

WES001ST

TYPE OF RECORD: PERMANENT

CATEGORY OF RECORD: DEVELOPMENT IMPROVEMENTS AGREEMENT

NAME OF AGENCY OR CONTRACTOR: WESTEC CONSTRUCTION

STREET ADDRESS/PARCEL NAME/SUBDIVISION/PROJECT: AGREEMENT DATED JANUARY  
24, 2000, FOR 233 NORTH 1<sup>ST</sup> STREET, BURGER KING

CITY DEPARTMENT: COMMUNITY DEVELOPMENT

YEAR: 2000

EXPIRATION DATE: NONE

DESTRUCTION DATE: NONE

## DEVELOPMENT IMPROVEMENTS AGREEMENT

1. **Parties:** The parties to this Development Improvements Agreement ("the Agreement" or "Agreement") are WESTEC CONSTRUCTION ("the Developer") and **THE CITY OF GRAND JUNCTION, Colorado** ("the City" or "City").

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 is {01/24/00} (mm/dd/yy).

### RECITALS

The Developer seeks permission to develop property within the City to be known as GRAND JUNCTION, CO (233 N. 1<sup>st</sup> ST.), which property is more particularly described on Exhibit A attached and incorporated by this reference ("the Property" or "Property"). The City seeks to protect the health, safety and general welfare of the community by requiring the completion of various improvements in the Property 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 Developer and/or the Property or for the benefit of the owners, purchasers or users of the Property. 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 Improvements" or "Improvements"). The Developer agrees to pay the City for inspection services performed by the City, in addition to amounts shown on Exhibit B. The hourly rate of "in-house" inspection services is \$45.00 per hour. The scope of this project is such that the City may have to engage independent consultant(s) to adequately provide inspection services; Developer agrees to pay such costs, in addition to all others. 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 shall supply a financial guarantee, in a form and with terms acceptable to the City as indicated below:

- (I) disbursement agreement between a bank doing business in Mesa County and the City,  
or
- (II) a good and sufficient letter of credit acceptable to the City, or
- (III) depositing with the City cash equivalent to the estimated cost of construction of the  
improvements, or
- (IV) other: \_\_\_\_\_

5. **Standards:** The Developer shall 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 last improvement completed by the Developer.

7. **Commencement, Completion and Abandonment Periods:** The Developer will commence work on the Improvements within 90 days from the Effective Date of this Agreement ("the Commencement Period") and the Improvements, each and every one of them, shall be completed by the end of the 3<sup>rd</sup> month from the Effective Date of this Agreement {04/24/00 (mm/dd/yy)} (the "Completion Period"). The Developer shall not cease construction activities for any period of more than 60 consecutive days ("the Abandonment Period").

8. **Compliance with Law:** The Developer shall comply with all applicable federal, state and local laws, ordinances and regulations in effect at the time of final approval when fulfilling its obligations under this Agreement. When necessary to protect the public health, safety or welfare, the Developer shall be subject to laws, ordinances and regulations that become effective after final development approval.

9. **Notice of Defect:** The Developer's Engineer shall 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 the defect. The City may grant reasonable extensions.

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 approval and/or acceptance.

**11. Reduction of Security:** After the acceptance of any Improvement, the amount which the City is entitled to draw on the guarantee will be reduced by an amount equal to 90 percent of the estimated cost of the Improvement as shown in Exhibit B. At the written request of the Developer, the City will execute a certificate verifying the acceptance of the Improvement and waiving its right to draw on the guarantee to the extent of such amount. A Developer in default under this Agreement will have no right to such certification. Upon the acceptance of all of the Improvements the remaining balance that may be drawn under the guarantee shall be available to the City for 90 days after the expiration of the warranty period.

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

**13. 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 time schedule provided in paragraph number seven (7.), above;
- b. Developer's failure to demonstrate reasonable intent to correct defective construction of any Improvement within the applicable correction period;
- 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.

Unless specifically provided herein the City may not declare a default until written notice has been sent to the Developer at the address on file with the development application. Notice is and shall be deemed effective two calendar days after mailing thereof by first class United States mail, postage prepaid.

14. **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. Administrative expenses may include but are not limited to contracting costs, collection costs and the value of planning, engineering, legal and administrative staff time devoted to the collection/completion of the Improvements. 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.

15. **City's Rights Upon Default:** When any event of default occurs, the City may draw on the letter of credit, escrowed collateral, or 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 lender) who has acquired the Property 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 to the City 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.

16. **Indemnification:** The Developer expressly agrees to indemnify and hold the City, its officers, employees, agents 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 or non-performance of work at the Property or the Property being developed 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 or non-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.

17. **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 the City and the 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.

18. **Amendment or Modification:** The parties to this Agreement may amend or modify the 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 shall be properly notarized before it may be deemed effective.

19. **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 relief is awarded to both parties, the attorney's fees may be equitably divided between the parties by the decision maker.

20. **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 the Property being developed.

21. **Integration:** This Agreement, together with the exhibits and attachments thereto constitutes the entire agreement between the parties and no statement(s), promise(s) or inducement(s) that is/are not contained in this Agreement will be binding on the parties.

22. **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.

23. **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.

24. **Severability:** If any part, term, or provision of this Agreement is held by a court or courts of competent jurisdiction 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.

25. **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 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. When the Improvements are completed and approved by the City, the City agrees to state same in writing, with appropriate acknowledgments. The City will sign a release only after all warranty periods, as extended by litigation, repair or alteration work, have expired.

26. **Notice:** Any notice required or permitted by this Agreement will be deemed effective two calendar days after deposit with the United States Postal Service, first class, postage prepaid and addressed as follows:

If to Developer: Westec Construction Management Co.  
10701 Melody Dr., Suite 401  
Northglenn, Co. 80234

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

27. **Recordation:** Developer will pay for all costs to record this Agreement or a Memorandum thereof in the Clerk and Recorder's Office of Mesa County, Colorado.

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

29. **Personal Jurisdiction and Venue:** Personal jurisdiction and venue for any 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, Colorado. The Developer expressly waives his right to bring such action in or to remove such action to any other court whether state or federal.

30. 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 finally accepted by the City.
- 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.

- c. Prior to requesting final acceptance of any street, storm drainage facility, or other required improvement(s), the Developer shall: (i) furnish to the City engineer as-built drawings in reproducible form, blue-lined and sealed by a professional engineer and in computer disk form and copies of results of all construction control tests required by City specification; (ii) provide written evidence to the City Engineer under signature of a qualified expert that the earth, soils, lands and surfaces upon, in and under which the improvements have been constructed, or which are necessary for the improvements, are free from toxic, hazardous or other regulated substances or materials; (iii) provide written evidence to the City Attorney that the title to lands underlying the improvements are free and clear from all liens and encumbrances, except those items and encumbrances which may be approved in writing by the City Attorney.

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

Pat Ceil 1/26/00  
Community Development - date  
Development Services Supervisor



Attest:  
Stephanie Nye 1/26/00  
City Clerk date

Developer: WESTEC CONSTRUCTION CO

By: [Signature] 01-24-00  
date

Print name: DEL LUKASIEWICZ - PRES

Attest: \_\_\_\_\_  
Secretary date



**EXHIBIT "B"**

**IMPROVEMENTS LIST/DETAIL**

(Page 1 of 3)

DATE: 01-24-00  
 NAME OF DEVELOPMENT: BURGER KING  
 LOCATION: 233 N 1<sup>ST</sup> ST.  
 PRINTED NAME OF PERSON PREPARING: DEL LUKASIEWICZ

	TOTAL	UNIT	TOTAL
	UNITS	QTY.	PRICE AMOUNT
<b>I. SANITARY SEWER</b>			
1. Clearing and grubbing	_____	_____	_____
2. Cut and remove asphalt	_____	_____	_____
3. PVC sanitary sewer main (incl. trenching, bedding & backfill)	_____	_____	_____
4. Sewer Services (incl. trenching, bedding, & backfill)	_____	_____	_____
5. Sanitary sewer manhole(s)	_____	_____	_____
6. Connection to existing manhole(s)	_____	_____	_____
7. Aggregate Base Course	_____	_____	_____
8. Pavement replacement	_____	_____	_____
9. Driveway restoration	_____	_____	_____
10. Utility adjustments	_____	_____	_____
<b>II. DOMESTIC WATER</b>			
1. Clearing and grubbing	_____	_____	_____
2. Cut and remove asphalt	_____	_____	_____
3. Water Main (incl. excavation, bedding, backfill, valves and appurtenances)	_____	_____	_____
4. Water services (incl. excavation, bedding, backfill, valves, and appurtenances)	_____	_____	_____
5. Connect to existing water line	_____	_____	_____
6. Aggregate Base Course	_____	_____	_____
7. Pavement Replacement	_____	_____	_____
8. Utility adjustments	_____	_____	_____
<b>III. STREETS</b>			
1. Clearing and grubbing	_____	_____	_____
2. Earthwork, including excavation and embankment construction	_____	_____	_____
3. Utility relocations	_____	_____	_____
4. Aggregate sub-base course (square yard)	_____	_____	_____

5. Aggregate base course (square yard)			
6. Sub-grade stabilization			
7. Asphalt or concrete pavement (square yard)			
8. Curb, gutter & sidewalk (linear feet)			
9. Driveway sections (square yard)			
10. Crosspans & fillets			
11. Retaining walls/structures			
12. Storm drainage system			
13. Signs and other traffic control devices			
14. Construction staking			
15. Dust control			
16. Street lights (each)			
IV. LANDSCAPING			
1. Design/Architecture			
2. Earthwork (includes top soil, fine grading, & berming)			
3. Hardscape features (includes walls, fencing, and paving)			
4. Plant material and planting <i>SOD</i>	<i>2400 S.F.</i>	<i>.63</i>	<i>1524</i>
5. Irrigation system			
6. Other features (incl. statues, water displays, park equipment, and outdoor furniture)			
7. Curbing			
8. Retaining walls and structures			
9. One year maintenance agreement			
V. MISCELLANEOUS			
1. Design/Engineering			
2. Surveying			
3. Developer's inspection costs			
4. Quality control testing			
5. Construction traffic control			
6. Rights-of-way/Easements			
7. City inspection fees			
8. Permit fees			
9. Recording costs			
10. Bonds			
11. Newsletters			


- 12. General Construction Supervision \_\_\_\_\_
- 13. Other \_\_\_\_\_
- 14. Other \_\_\_\_\_

TOTAL ESTIMATED COST OF IMPROVEMENTS: \$ \$ 1,524

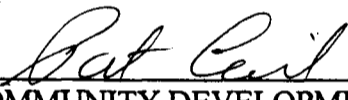
SCHEDULE OF IMPROVEMENTS:

- I. SANITARY SEWER \_\_\_\_\_
- II. DOMESTIC WATER \_\_\_\_\_
- III. STREETS \_\_\_\_\_
- IV. LANDSCAPING \$ 1,524
- V. MISCELLANEOUS \_\_\_\_\_

I have reviewed the estimated costs and time schedule shown above and based on the plans and the current costs of construction agree to construct and install the Improvements as required above

 01/24/00  
 SIGNATURE OF DEVELOPER date  
 (If corporation, to be signed by president and attested to by secretary together with the corporate seals.)

Reviewed and approved.

\_\_\_\_\_  
 CITY ENGINEER date  
 1/26/00  
 COMMUNITY DEVELOPMENT date  
 Development Services Supervisor

RELEASE OF IMPROVEMENTS AGREEMENT & GUARANTEE  
Grand Junction Community Development Department  
FILE #

This memorandum relates to a certain unrecorded Improvements Agreement and Guarantee dated Jan, 24 2000, and memorandum of recording at Book NA, Page NA of the land records of Mesa County, Colorado, by and between WESTEC CONSTRUCTION (Developer) and the City of Grand Junction (City) pertaining to BURGER KING (233 N. 1ST STREET) (Project).

Legal Description:

SEE ATTACHED

Whereas, Developer has installed and constructed certain public and private improvements at and for the Project, which completion was guaranteed by the execution of an Improvements Agreement and Guarantee, and

Whereas, the City of Grand Junction and all other agencies possessing regulatory authority over the Project and/or the improvements have inspected the improvements and have accepted the same,

NOW THEREFORE, officials of the City of Grand Junction and other officials duly representing their agencies, possessing and representing by their signatures, affixed thereto, that they possess sufficient authority to accept improvements and release the portion of the guarantee pertaining to the improvements under their jurisdiction, do accept, sign and release said improvements agreement and guarantee.

CITY OF GRAND JUNCTION:

By: NA  
City Engineer Date  
NA  
City Utilities Manager Date  
NA  
Fire Marshall Date

UTE WATER:

By: NA  
Date

GRAND JUNCTION DRAINAGE:

By: NA  
Date

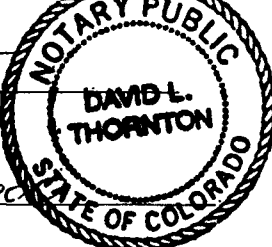
In accordance with the above signatures, I hereby certify that the Improvements Agreement & Guarantee ~~and the recording evidencing the agreement and guarantee, at Book NA, Page NA of the Mesa County land records,~~ <sup>Not Recorded.</sup> have been completed and accepted and in accordance with the provisions of the Grand Junction Zoning and Development Code are hereby released, subject to the required warranty period.

Pat Cecil 4/21/00  
Director of Community Development Date  
*Development Services Supervisor*

The foregoing instrument was executed before me this 21 day of April, 2000,  
by PAT Cecil, Director of Community Development for the City of Grand Junction,  
Colorado. *Development Services Supervisor*

Witness my hand & official seal.

David L. Thornton  
Notary Public  
My commission expires 08/07/2000



PARCEL NO. 1

Beginning at the Northeast corner of Lot 2 in Block 3 of RICHARD D. MOBLEY'S FIRST SUBDIVISION to the City of Grand Junction,  
thence West 100 feet,  
thence South 62.5 feet,  
thence East 100 feet,  
thence North 62.5 feet to the point of beginning.

PARCEL NO. 2

The South 62.5 feet of the East 100 feet of Lot 2 in Block 3 of RICHARD D. MOBLEY'S FIRST SUBDIVISION to the City of Grand Junction.

PARCEL NO. 3

The West 45 feet of the East 145 feet of Lot 2 in Block 3 of RICHARD D. MOBLEY'S FIRST SUBDIVISION to the City of Grand Junction.

PARCEL NO. 4

Commencing at a point 245 feet West of the Northwest corner of Block 99 of the CITY OF GRAND JUNCTION;  
thence West 43 feet;  
thence South 125 feet;  
thence East 43 feet;  
thence North 125 feet to the place of beginning;  
being part of Lot 2 in Block 3 of RICHARD D. MOBLEY'S FIRST SUBDIVISION to the City of Grand Junction.

PARCEL NO. 5

Beginning at a point 329 feet West of the Northwest corner of Block 99 in the CITY OF GRAND JUNCTION;  
thence East 41 feet;  
thence South 125 feet;  
thence West 41 feet;  
thence North 125 feet to the point of beginning;  
being a part of Lot 2 in Block 3, of RICHARD D. MOBLEY'S FIRST SUBDIVISION to the City of Grand Junction.

PARCEL NO. 6

The West 41 feet of Lot 2 in Block 3 of RICHARD D. MOBLEY'S FIRST SUBDIVISION to the City of Grand Junction,  
Beginning at a point 329 feet West of the Northwest corner of Block 99 of the CITY OF GRAND JUNCTION;  
thence West 41 feet,  
thence South 125 feet;  
thence East 41 feet;  
thence North 125 feet to the point of beginning;  
being a part of Lot 2 in Block 3 of RICHARD D. MOBLEY'S FIRST SUBDIVISION to the City of Grand Junction.