

BYZ02HRZ

TYPE OF RECORD: ACTIVE NON-PERMANENT

CATEGORY OF RECORD: **CONTRACT (VEHICULAR ACCESS AGREEMENT)**

NAME OF CONTRACTOR: BYZANTIUM HOLDINGS, LLC
CHRISTOPHER M BLACKBURN

SUBJECT/PROJECT: PANTUSO'S RESTAURANT ACCESS TO THE
PROPERTY WILL BE FROM THE ADJACENT PUBLIC STREET, HORIZON
DRIVE

LOCATION: 707 HORIZON DRIVE

PARCEL #: 2701-363-27-007

CITY DEPARTMENT: COMMUNITY DEVELOPMENT

YEAR: 2002

EXPIRATION DATE: 6/1/22

DESTRUCTION DATE: 1/29

AGREEMENT REGARDING VEHICULAR ACCESS

This Agreement is made this 6th day of June, 2002, by and between THE CITY OF GRAND JUNCTION, ("City") and Byzantium Holdings, LLC, by CHRISTOPHER M. BLACKBURN as its manager ("Owner").

BOOK 3134 PAGE 918

Recital.

- A. Owner represents that it owns property at 707 Horizon Drive, legally described as Lot 3, Applebee's Subdivision, Assessor's tax parcel number 2701-363-27-007, (hereinafter "Property") on which it anticipates constructing a restaurant facility.
- B. Access to the Property will be from the adjacent public street, Horizon Drive.
- C. Owner desires to preserve a left-turn access to the Property from Horizon Drive, however, the City intends to eliminate any left-turning vehicular access to the Property. The City's purpose in this regard is to protect vehicular flows, eliminate dangerous or risky vehicular turning movements. The parties acknowledge that while traffic engineering has scientific databases, ultimately the City will exercise its judgment to decide when, where and how access is allowed, changed and restricted.
- D. The City is willing to temporarily allow a northbound left turn access to the Property from Horizon Drive, but only if the Owner pays for certain street improvements to be constructed as provided herein and if Owner pays to make any future changes as described herein.

NOW, THEREFORE, in consideration of the recitals and the mutual covenants contained herein, it is agreed by and between the City and Owner as follows:

- 1. Subject to the following terms and conditions, the City shall allow Owner to construct a left turn access to the Property:
 - (a) All City standards, specifications and requirements apply;
 - (b) Owner has submitted a P.E.'s construction plans for City review;
 - (c) If the City approves such plans, Owner may engage a contractor that is on the City's pre-qualification list to do the following (generally described) work: reduce the existing median north of G road on Horizon Drive;

- (d) The Owner agrees to pay for all expenses and costs required to: engineer, design and construct changes to the existing median; and construct and paint to accomplish a left turn lane. Owner agrees that all such work will be accomplished in compliance with applicable City rules and regulations.
 - (e) Owner agrees to pay the City's standard inspection and oversight costs, as though the Owner were performing work pursuant to a development improvements agreement signed by Owner and the City, a copy of which is attached.
2. (a) Owner agrees that it shall, when the City gives it or the then Owner written notice, extend the then existing median(s) and Owner shall pay for and replace signs, striping and other related improvements to the conditions existing as of the date of execution hereof; the foregoing shall be at Owner's expense without cost or expense to the City, and in compliance with the City's then adopted requirements and specifications, including those established as described in section 1, above;
- (b) Owner agrees to submit a P.E.'s design consistent with the City's Notice (and directions contained within said notice) within 60 days of mailing of said notice by the City to the Owner.
- (c) Owner shall pay to construct such City approved changes to the medians, surface signage and related infrastructure within 180 days of the City's notice.
- (d) Owner agrees to pay the City's reasonable attorneys fees incurred in enforcing this section 2.
3. Before any work is performed under section 2, above, Owner shall provide proof to the City that the terms hereof have been accepted by all lien holders.
4. The City's decision to eliminate Owner's desired left turn access will be made reasonably, but will involve the exercise of discretion. Owner agrees to accept such reasonable exercise of judgment, even if Owner disagrees and even if Owner can obtain the opinion of an engineer to the contrary. The City agrees not to eliminate Owner's left turn access authorized by this agreement except on the basis of need to address traffic and/or safety concerns;
- (b) In the event the City improves the portion of Horizon Drive that includes the area adjacent to the Property, or if an improvement

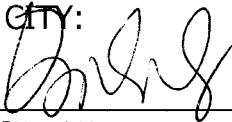
district or similar project is constructed such that the median described herein is replaced or extended as a part of such project, Owner's obligations hereunder shall terminate and be of no further force or effect.

5. This agreement shall not obligate the Owner to pay, or give the City the right to require that the Owner pay for, improvements other than as described herein.
6. There are no oral agreements between the parties hereto affecting this Agreement. This Agreement supersedes and cancels any and all previous negotiations, arrangements, agreements and understanding, if any, between the parties hereto with respect to the subject matter hereof. There are no other representations or warranties between the parties. All reliance with respect to representations is solely upon the terms contained in this document.
7. The parties shall attempt to resolve any dispute as to the interpretation or enforcement of any part of this Agreement first, if reasonably possible, by mediation. The parties shall make all reasonable efforts to select a mutually agreeable mediator. No litigation may be commenced until after the mediator determines that the parties have reached an impasse and that further mediation would not likely result in success. Each party shall each pay its attorney fees and costs for the mediation and one-half of the mediator's fees and costs.
8. If any term or other provision of this Agreement is invalid, illegal or incapable of being enforced by any rule of law, or public policy, all other conditions and provisions of this Agreement shall nevertheless remain in full force and effect so long as the economic or legal substance of the transaction contemplated hereby is not affected in any manner adverse to any Party. Upon such determination that any term or other provision is invalid, illegal or incapable of being enforced, the Parties hereto shall negotiate in good faith to modify this Agreement so as to effect the original intent of the Parties as closely as possible in a mutually acceptable manner in order that the transaction contemplated hereby be consummated as originally contemplated to the fullest extent possible.
9. The terms of this Agreement are intended to run with the title to the Property. Owner may not assign, sell or transfer Owner's rights hereunder independently from title to the Property. The terms and obligations herein are binding on each subsequent owner, transferee and assignee.

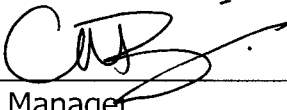
- 10. Owner shall provide the City's Real Estate Manager with a copy of this agreement that has been recorded with the Clerk and Recorder of Mesa County before occupying the Property.
- 11. Notwithstanding any provision to the contrary herein, Owner's obligation to make changes to the median as described herein shall terminate on June 1, 2022.

IN WITNESS WHEREOF, the parties have executed this Agreement on the date set forth below:

THE CITY:

By:  6/6/02
 Its: City Attorney

OWNER:

By:  6/6/02
 Its: Manager

DEVELOPMENT IMPROVEMENTS AGREEMENT

1. **Parties:** The parties to this Development Improvements Agreement ("the Agreement" or "Agreement") are Byzantium Plus ("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 will be the date that ~~this agreement is signed, which shall be no sooner than recordation of the final plat or final plan approval whichever first occurs.~~

Notices given under Vehicular Access Agreement dated: 1/14/02
CWJ

RECITALS

The Developer seeks permission to develop property within the City to be known as PANTUSO'S RESTAURANT (LOT 3 OF APPLEBEE'S SUBDIVISION), 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" City 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 for which Developer is responsible hereunder. 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 the Developer shall supply a guarantee in a form and with terms acceptable to the City. A copy of which or a memorandum thereof is attached as Exhibit C.

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 14 days from the Effective Date of this Agreement~~ ^{as provided in Vehicular Access Agreement dated: 6/6/02} ~~(set date)~~ ("the Commencement Period") and the Improvements, each and every one of them, shall be completed by the end of the ___ month from the Effective Date of this Agreement ___ ~~(set date)~~ (the "Completion Period"). The Developer shall not cease construction activities for any period of more than 60 consecutive days ("the Abandonment Period").

BM
CB

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 or as accepted by the City Attorney and that there are no liens, encumbrances or other restrictions other than those that have been accepted by the City Attorney 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 such 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 or other guarantee 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 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 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:

Byzantium Holdings LLC
642 Main St.
Mesa, CO 81501

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-line stamped 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

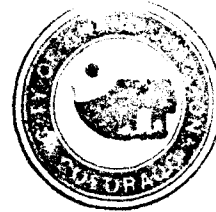
regulated substances or materials: (iii) provide written evidence to the City Attorney that the title to lands underlying the improvements are free and clear from all liens and encumbrances, except those items and encumbrances which may be approved in writing by the City Attorney.

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

Don E. Wilson June 6 2002
Director of Community Development date
City Attorney

Attest:

Stephanie Sun
City Clerk date



By: Chris 6/5/02
Developer date

Name (printed): Christopher M. Blackburn for Byzantium Holdings, LLC

Its (position): Manager

Attest:

Secretary date

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

EXHIBIT A

LOT 3 OF APPLEBEE'S SUBDIVISION
Mesa County, Colorado

EXHIBIT B

IMPROVEMENTS LIST/DETAIL

(Page 1 of 3)

DATE: 5-2-02

NAME OF DEVELOPMENT: PANTUSOS RESTAURANT

LOCATION: 707 HORIZON DRIVE

PRINTED NAME OF PERSON PREPARING: MARK AUSTIN

UNITS	TOTAL QTY.	UNIT PRICE	TOTAL AMOUNT
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I. SANITARY SEWER

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

0			

II. DOMESTIC WATER

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

III. STREETS

1. Clearing and grubbing
2. Earthwork, including excavation and embankment construction
3. Utility relocations
4. Aggregate sub-base course (square yard)

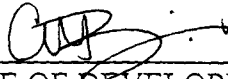
5. Aggregate base course (square yard)	50	SY	\$15 ⁰⁰	\$750 ⁰⁰
6. Sub-grade stabilization				
7. Asphalt or concrete pavement (square yard)	50	SY	\$25 ⁰⁰	\$1250
8. Curb, gutter & sidewalk (linear feet)	50	LF	17 ⁰⁰	\$850 ⁰⁰
9. Driveway sections (square yard)				
10. Crosspans & fillets				
11. Retaining walls/structures				
12. Storm drainage system				
13. Signs and other traffic control devices	1	EA	\$150	\$150
14. Construction staking	1	LS	300	\$300 ⁰⁰
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				
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	1	LS	100	100
4. Quality control testing	1	LS	100	100
5. Construction traffic control	1	LS	500	500
6. Rights-of-way/Easements				
7. City inspection fees @\$45./hr	2	HRS	45	90 ⁰⁰
8. Permit fees				
9. Recording costs				
10. Bonds				
11. Newsletters				
12. General Construction Supervision	1	LS	200	200

13. Other REMOVAL OF EXIST CURBS 1 LS 500⁰⁰ 500⁰⁰
14. Other _____

TOTAL ESTIMATED COST OF IMPROVEMENTS: \$ 4,940
15. W/ 20% CONTINGENCY \$5,928
SCHEDULE OF IMPROVEMENTS:

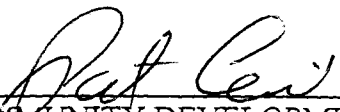
- I. SANITARY SEWER _____
- II. DOMESTIC WATER _____
- III. STREETS SEPTEMBER 2002
- IV. LANDSCAPING _____
- V. MISCELLANEOUS _____

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.

 6/5/02
SIGNATURE OF DEVELOPER date
(If corporation, to be signed by president and attested to by secretary together with the corporate seals.)

Reviewed and approved.

 6/7/02
CITY ENGINEER date

 6/7/02
COMMUNITY DEVELOPMENT date