

ADMINISTRATIVE MATERIALS "D"
SUBDIVISION IMPROVEMENTS AGREEMENT; GUARANTY

The parties to this Subdivision Improvements agreement ("this agreement") are _____ ("the subdivider") and _____ ("the City").

WHEREAS, the subdivider desires to defer construction of improvements described in Attachment (___); and

WHEREAS, the purpose of this Agreement is to protect the City and is not intended for the benefit of contractors, suppliers, laborers or others providing work, services, or materials to the Subdivision, or for the benefit of lot or home buyers in the Subdivision; and

WHEREAS, the mutual promises, covenants and obligations contained in this Agreement are authorized by state law and the City subdivision regulations.

NOW THEREFORE THE PARTIES HEREBY AGREE AS FOLLOWS:

1. Effective Date: The effective date of this Agreement is the date that final subdivision plat approval is granted by the City.
2. Attachments: The Attachments cited herein are hereby made a part of this Agreement.

Subdivider's Obligations

3. Improvements: The Subdivider shall construct and install, at his own expense, those subdivision improvements listed in Attachment (___) of this Agreement. The Subdivider's obligation to complete the improvements arises upon approval of the final subdivision plat, is not conditioned on the commencement of construction in the development or sale of any lots or improvements within the subdivision, and is independent of any obligations of the City contained in this Agreement.
4. Security: To secure the performance of his obligations under this Agreement, the Subdivider shall deposit with the City on or before the effective date, an Irrevocable Letter of Credit in the amount of \$ _____. The letter of credit shall be issued by (lending institution), be payable at sight to the City at any time upon presentation of (1) a sight draft drawn on the issuing lending institution in the amount up to \$ _____, (2) a signed statement or affidavit executed by an authorized City official stating that the Subdivider is in default under this Agreement; and (3) the original copy of the letter of credit.
5. Standards: The Subdivider shall construct the required improvements according to the standards and specifications required by the City as specified in Attachment (___) of this Agreement.

6. Warranty: The Subdivider warrants that each and every improvement shall be free from defects for a period of 1 year from the date that the City accepts the dedication of the last improvement completed by the Subdivider.
7. Commencement and Completion Periods: The Subdivider shall complete all of the required improvements within two years from the effective date of this Agreement.
8. Compliance with Law: The Subdivider shall comply with all relevant laws, ordinances, regulations and requirements in effects at the time of subdivision plat approval when meeting his obligations under this Agreement.
9. Inspection and Certification:
 - a. The City shall provide for inspection of the improvements as they are completed and, where found acceptable, shall certify those improvements as complying with the standards and specifications set forth in Attachment () of this Agreement. The inspection and certification, shall occur within 14 days of notice by the Subdivider that the improvements are complete and that he desires City inspection and certification. Before requesting City certification of any improvement the Subdivider shall present to the City valid lien waivers from all persons for providing materials or performing work on the improvement. Inspection services shall be by the Subdivider at the rate the City pay for contracted engineering services at the time of inspections.
 - b. Certification by the City does not constitute a waiver by the City of the right to draw funds under the letter of credit in the event defects in or failure of any improvement are found following the certification.
10. Notice of Defect: The City shall provide timely notice to the Subdivider whenever inspection reveals that an improvement does not conform to the standards and specifications set forth in Attachment (), or is otherwise defective. The Subdivider shall have 30 days from the date the notice is issued to remedy the defect. The City may not declare a default under this Agreement during the 30 day remedy period unless the Subdivider clearly indicates he does not intend to correct the defect. The Subdivider shall have no right to correct the defect in, or failure of, any improvement found after the City accepts dedication of the improvements.
11. Reduction of Security: After the acceptance of any improvement, the amount that the City is entitled to draw on the letter of credit shall be reduced by an amount equal to 90 percent of the estimated cost of the improvement as shown in Attachment (). At the request of the Subdivider, the City shall execute a certificate verifying the acceptance of the improvement and waiving its right to draw on the letter of credit to the extent of the amount. Upon the certification of all the improvements the balance that may be drawn under the credit shall be available to the City for the one year warranty period plus an additional 90 days.
12. Use of Proceeds: The City shall use funds drawn under the letter of credit only for the purposes of completing the improvements or correcting defects in or failure of the improvements.

13. Events of Default: The conditions, occurrences or actions constitute a default by the Subdivider during the completion period:

- a. failure to complete construction of the improvements within two years of final subdivision plat approval;
- b. failure to remedy the defective construction of any improvement within the remedy period;
- c. insolvency of the Subdivider or the filing of a petition for bankruptcy;
- d. foreclosure of the property or assignment or conveyance of the property in lieu of foreclosure.

14. Measure of Damages: The measure of damages for breach of this Agreement is the reasonable cost of completing the improvements. For purposes of this Agreement the estimated cost of the improvements as specified in Attachment () is prima facie evidence of the minimum cost of completion. However, neither that amount nor the amount of the letter of credit establishes the maximum amount of the Subdivider's liability. The City may complete all unfinished improvements at the time of default regardless of the extent to which development has taken place in the Subdivision or whether development ever was commenced.

15. Local Government Rights Upon Default:

- a. Upon the occurrence of any even of default, the City may draw on the letter of credit to the extent of the face amount of the credit less the estimated cost [as shown in Attachment ()] of all improvements previously certified by the City. The City may complete improvements itself or contract with a third party for completion, or the City may assign the proceeds of the letter of credit to a subsequent subdivider who has acquired the Subdivision and who has the same rights of completion as the City if and only if the subsequent subdivider agrees in writing to complete the unfinished improvements.
- b. In addition, the City may suspend final plat approval. During this suspension the Subdivider may not sell, transfer or otherwise convey lots or homes within the Subdivision without the express approval of the City until the improvements are completed and certified by the City.

16. Indemnification: The Subdivider agrees to indemnify and hold the City harmless for and against all claims, costs and liability 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 under this Agreement. The Subdivider is not an employee or agent of the City.

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 and by the Subdivider.
18. Attorney's Fees: Should either party be required to resort to litigation, arbitration or mediation to enforce the terms of this Agreement, the prevailing party, whether plaintiff or defendant, is entitled to costs, including reasonable attorney's fees and expert witness fees, from the opposing party. If the court, arbitrator or mediator awards relief to both parties, each shall bear its own costs in their entirety.
19. Third Party Rights: No person or entity who is not party to this Agreement has any right of action under this Agreement, except that if the City does not exercise its rights within 60 days following an event of default, a purchaser of a lot or home in the Subdivision may bring an action in mandamus to compel the City to exercise its rights.
20. Scope: The Agreement constitutes the entire agreement between the parties and no statement, promise or inducement that is not contained in this Agreement is binding on the parties.
21. Time: For the purpose of computing the commencement and completion periods, and time periods for City action, times in which war, civil disasters, acts of God or extreme weather conditions occur will not be included if the events prevent the Subdivider or the City from performing the obligations under this Agreement.
22. Assigns: The benefits of this Agreement to the Subdivider may not be assigned without the express written approval of the City. Such approval may not be withheld unreasonably, but any unapproved assignment is void. There is no prohibition on the right of the City to assign its rights under this Agreement.

The City shall release the original Subdivider's letter of credit if it accepts a new security from any subdivider or lender who obtains the property. However, no action by the City constitutes a release of the original subdivider from is liability under this Agreement.

23. Severability: If any part, term or provision of this Agreement is held by the courts to be illegal the illegality shall not affect the validity of any other part, term or provision, and the rights of the parties shall be construed as if the part, term or provision were never part of the Agreement.

Dated this ____ day of _____, 20 ____.

City Official

Subdivider