

APPENDIX G

SUBDIVISION IMPROVEMENTS AGREEMENT; GUARANTY  
MODEL SUBDIVISION IMPROVEMENT AGREEMENT

The parties to this Subdivision Improvements Agreement ("this agreement") are \_\_\_\_\_ ("the Developer") and \_\_\_\_\_ ("the County").

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

WHEREAS, the purpose of this Agreement is to protect the County 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 Big Horn County 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 County.
2. Attachments: The Attachments cited herein are hereby made a part of this Agreement.

Developer's Obligations

3. Improvements: The Developer will construct and install, at his own expense, those subdivision improvements listed in Attachment A of this Agreement. The Developer'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 County contained in this Agreement.
4. Security: To secure the performance of his obligations under this Agreement, the Developer will deposit with the County on or before the effective date, an Irrevocable Letter of Credit (or other financial security acceptable to the local officials) in the amount of \$\_\_\_\_\_. The letter of credit will be issued by \_\_\_\_\_ (lending institution), be payable at sight to the County 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 County official stating that the Developer is in default under this Agreement; and (3) the original copy of the letter of credit.

5. Standards: The Developer will construct the required improvements according to the standards and specifications required by the County as specified in Attachment ( ) of this Agreement.
6. Warranty: The Developer warrants that each and every improvement will be free from defects for a period of 1 year from the date that the County accepts the dedication of the last improvement completed by the Developer.
7. Commencement and Completion Periods: The Developer will complete all of the required improvements by \_\_\_\_\_(deadline date for completion, not to exceed 2 years from the effective date of this Agreement).
8. Compliance with Law: The Developer will comply with all relevant laws, ordinances, regulations and requirements in effect at the time of preliminary plat approval when meeting his obligations under this Agreement.

#### County's Obligations

9. Inspection and Certification:
  - a. Upon completion of required improvements, the subdivider shall file with the County Commissioners a statement certifying that:
    - 1) All required improvements are complete;
    - 2) The improvements are in compliance with the minimum standards specified by the County Commissioners;
    - 3) The subdivider knows of no defects in the improvements
    - 4) The improvements are free and clear of any encumbrance or liens;
    - 5) A schedule of actual construction costs has been filed with the County Commissioners; and
    - 6) All applicable fees and surcharges have been paid.

The Developer shall file with the County Commissioners copies of final construction plans, road profiles, proposed grades and specifications for improvements as well as copies of final as-built plans, profiles, grades, and specifications for improvements.

The Developer shall provide for inspection of all required public improvements by a registered professional engineer, agreed upon in advance to be acceptable to both parties (County and the Developer). Upon completion of the inspection, the inspecting engineer shall file with the County Commissioners a statement either certifying that the improvements

have been completed in the required manner or listing the defect in those improvements.

Should the Developer fail to meet the requirements of this section, the County Commissioners may provide for such inspection and the cost shall be borne by the Developer.

- b. Certification by the County does not constitute a waiver by the County 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 County will provide timely notice to the Developer whenever inspection reveals that an improvement does not conform to the standards and specifications set forth in Attachment (\_\_\_), or is otherwise defective. The Developer will have 30 days from the date the notice is issued to remedy the defect. The County may not declare a default under this Agreement during the 30 day remedy period unless the Developer clearly indicates he does not intend to correct the defect. The Developer will have no right to correct the defect in, or failure of, any improvement found after the County accepts dedication of the improvements.
  11. Reduction of Security: After the acceptance of any improvement, the amount that the County is entitled to draw on the letter of credit will 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 Developer, the County will 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 of the improvements the balance that may be drawn under the credit will be available to the County for the one year warranty period plus an additional 90 days.
  12. Use of Proceeds: The County will 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.

#### Other Provisions

13. Events of Default: The following conditions, occurrences or actions constitute a default by the Developer during the completion period:
  - a. failure to complete construction of the improvements within the specified time frame not to exceed two years from final subdivision plat approval;
  - b. failure to remedy the defective construction of any improvement within the remedy period;

- c. insolvency of the Developer 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 Developer's liability. The County 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 event of default, the County 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 County. The County may complete improvements itself or contract with a third party for completion, or the County may assign the proceeds of the letter of credit to a subsequent developer who has acquired the Subdivision and who has the same rights of completion as the County if and only if the subsequent developer agrees in writing to complete the unfinished improvements.
  - b. In addition, the County may suspend final plat approval. During this suspension the Developer may not sell, transfer or otherwise convey lots or homes within the Subdivision without the express approval of the County until the improvements are completed and certified by the County.
16. Indemnification: The Developer agrees to indemnify and hold the County 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 Developer is not an employee or agent of the County.
17. Amendment or Modification: The Parties to this Agreement may amend or modify this Agreement only by written instrument executed on behalf of the County and by the Developer.
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 will 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 County 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 County 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 County action, times in which war, civil disasters, acts of God or extreme weather conditions occur will not be included if the events prevent the Developer or the County from performing the obligations under this Agreement.
22. Assigns: The benefits of this Agreement to the Developer may not be assigned without the express written approval of the City (or County). Such approval may not be withheld unreasonably, but any unapproved assignment is void. There is no prohibition on the right of the City (or County) to assign its rights under this Agreement.

The City (or County) will release the original Developer's letter of credit if it accepts a new security from any developer or lender who obtains the property. However, no action by the City (or County) constitutes a release of the original developer from his 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 will be construed as if the part, term or provision were never part of the Agreement.

Dated this \_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
City (or County) Official

\_\_\_\_\_  
Developer

## ATTACHMENT A

### Improvements to Be Completed

Improvements to be completed under this agreement must be completed per the standards specified by the county commissioners. Improvements may include streets, roads, bridges, culverts, curbs, gutters, stormwater drainage systems, water supply systems, wastewater treatment systems, sidewalks, street lights, street signs, right-of-way clearings, solid waste facilities, park and recreational facilities, extension of utilities, and other improvements as required by the county commissioners.

For each improvement listed below, the following must also be submitted:

- 1) Details for cost of completion – to be prepared by a registered professional engineer or from the bids of at least two licensed contractors qualified to complete the work
- 2) Detailed plans and specifications

The County Commissioners, at their discretion, may require the submitted plans, specifications and projects costs to be reviewed by another registered professional engineer acceptable to both parties. The costs of such review shall be borne by the subdivider.

Provide a summary of improvements and estimated costs below:

Improvement Description	Estimated cost of completion	Amount of Improvement Guarantee (Estimated Costs x 150%)
TOTAL		

## ACCEPTABLE FORMS OF IMPROVEMENTS GUARANTEES

The subdivider shall provide one or more of the following financial security guarantees in the amount of 150 percent of the estimated total cost of installing all required improvements.

### 1. Letter of Credit

Subject to Commission approval, the subdivider shall provide the Commission with a letter of credit from a bank or other reputable institution or individual certifying the following:

- a. That the creditor guarantees funds in an amount equal to the cost, as approved by the Commission, of completing all required improvements.
- b. That if the subdivider fails to complete the specified improvements within the required period, the creditor will immediately pay to the Commission upon presentation of a sight draft without further action, an amount of cash necessary to finance the completion of those improvements, up to the limit of credit stated in the letter.
- c. That this letter of credit may not be withdrawn, or reduced in amount, until released by the Commission.

### 2. Escrow Account

The subdivider shall deposit cash either with the Commission or in escrow with a bank. The selection of the bank where funds are to be deposited must be approved by the Commission.

Where an escrow account is to be used, the subdivider shall give the governing body an agreement with the bank guaranteeing the following:

- a. That the funds in the escrow account are to be held in trust until released by the governing body and may not be used or pledged by the subdivider as security for any obligation during that period.
- b. That, should the subdivider fail to complete the required improvements, the bank shall immediately make the funds in escrow available to the Commission for completing these improvements.

### 3. Special Improvements District

The Commission may enter into an agreement with the subdivider, and the owners of the property proposed for subdivision if other than the subdivider, that the installation of required improvements will be financed through a special or rural improvement district created pursuant to Title 7, Chapter 12, MCA. This agreement must provide that no lots within the subdivision will be sold, rented, or leased, and no contract for the sale of lots executed, before the improvement district has been created.

If the proposed subdivision lies in an unincorporated area, the subdivider, or other owners of the property involved must also petition the Commission to create a rural improvement district pursuant to Section 7-12-2102, MCA.

An agreement to finance improvements through the creation of a special improvement district, or a petition to create a rural improvement district, constitutes a waiver by the subdivider or the other owners of the property of the right to protest, or petition against, the creation of the district under either Section 7-12-2109 or Section 7-12-4110, MCA. This waiver must be filed with the Clerk and Recorder and will be deemed to run with the land.

### 7. Auto-Renewable, Joint-Ownership Certificate Of Deposit Assigned To Big Horn County

The Commission may accept (1) an automatically-renewable, joint-ownership Certificate of Deposit in the amount of the cost, as approved by the Commission, of completing all required improvements, issued and held by a Montana bank or any national bank in the United States that is federally insured, in the names of the Subdivider and Big Horn County, Montana, and (2) an Assignment Agreement whereby the Subdivider assigns to Big Horn County all right, title and interest in said Certificate of Deposit which shall entitle the Commission to negotiate the CD or any part thereof, in the event the CD is delivered to the Commission by the Bank pursuant to a written demand for delivery from the Commission when the Commission requires the proceeds of the CD under the Subdivider's performance bond, which assignment shall remain in effect until revoked in writing by the Commission. The assignment shall also direct that all accrued interest earned by the CD shall accrue to Subdivider.



MODEL  
IRREVOCABLE LETTER OF CREDIT

Letter of Credit No. \_\_\_\_

Date

Big Horn County Commission  
Box  
Red Lodge, MT 59068

Gentlemen:

We hereby establish in your favor our Irrevocable Letter of Credit # \_\_\_\_ for the account of \_\_\_\_ (Developer) \_\_\_\_, available by your drafts at sight up to an aggregate amount of \$ \_\_\_\_\_. Should \_\_\_\_ (Developer) \_\_\_\_, default or fail to complete the improvements under the terms specified in the attached subdivision improvements agreement for \_\_\_\_ (name of subdivision) \_\_\_\_, we shall pay on demand your sight draft or drafts for such funds, to the limit of credit set forth herein, as are required to complete said improvements.

All drafts must be presented prior to expiration date and this Letter of Credit must accompany the final draft for payment. Drafts drawn hereunder must be by sight draft marked:

"Drawn under (lending institution) \_\_\_\_, Letter of Credit # \_\_\_\_ dated (date of Letter of Credit) \_\_\_\_, " and the amount drawn endorsed on the reverse hereof by the lending institution.

Unless otherwise stated, this Letter of Credit is subject to the Uniform Customs and Practices for Commercial Documentary Credits (1993 Revision) International Chamber of Commerce. We hereby agree with the drawers, endorsers and bona fide holders of the drafts drawn under and in compliance with the terms of this Credit that these drafts will be duly honored upon presentation to the drawee.

This letter of credit may not be withdrawn or reduced in any amount prior to its expiration date except by your draft or written release.

(Lending Institution)

(Signature and Title of Official)

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