

Elwood Town, Utah
Title 11—Subdivisions

Appendix A - Sample Subdivision Improvement Agreement

ELWOOD TOWN
SUBDIVISION IMPROVEMENT AGREEMENT

PARTIES: The parties to this Subdivision Improvement Agreement (“the Agreement”) are _____ (“the Developer”),
_____ (“Bank”), and Elwood Town (“the Town”).

EFFECTIVE DATE: The Effective Date of this Agreement will be the date that final subdivision plat approval is granted by the Elwood Town Council (“the Town Council”).

RECITALS

WHEREAS, the Developer seeks permission to subdivide property within the Elwood Town, to be known as _____ (the “Subdivision”), which property is more particularly described on Exhibit A attached hereto and incorporated herein by this reference (the “Property”); and

WHEREAS, the Town seeks to protect the health, safety and general welfare of the residents by requiring the completion of various improvements in the Subdivision and thereby to limit the harmful effects of substandard subdivisions, including premature subdivisions which leave property undeveloped and unproductive; and

WHEREAS, the purpose of this Agreement is to protect the Town from the cost of completing subdivision improvements itself and is not executed for the benefit of material, men, laborers, or others providing work, services or material 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 Town’s Subdivision Ordinances:

THEREFORE, the Parties hereby agree as follows:

DEVELOPER’S AND BANK’S OBLIGATIONS

1.IMPROVEMENTS: The developer will construct and install, at his own expense,

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those on-site and off-site Subdivision improvements listed along with the cost of those improvements on Exhibit B attached hereto and incorporated herein by this reference (“Improvements” or “Improvement”). The Developer’s obligation to complete the Improvements will arise upon final plat approval by the Town, will be independent of any obligations of the Town contained herein, and will not be conditioned on the commencement of construction in the development or sale of any lots or Improvements within the development.

2.SECURITY: To secure the performance of the Developer’s obligations hereunder, the Developer shall, prior to the effective date, deposit Escrow or provide a Letter of Credit in the amount of \$_____. This amount is the estimated costs for construction and guaranty of said Improvements and facilities as specifically itemized in Exhibit B, plus an additional ten percent (10%) and which also includes the estimated cost for the Town’s inspections and administration. This amount is for the purpose of guaranteeing the completion of said Improvements. The Escrow or Letter of Credit hereinafter referred to as “Escrow” or “Letter”, depending on the form, will be issued by _____ Bank (or other financial institution approved by the Town) to be known as (“Bank”), will be payable at sight to the Town and will bear an expiration date not earlier than two (2) years after the Effective Date of this Agreement. The Escrow or Letter will be payable to the Town at any time upon presentation of (i) a sight draft drawn on the issuing Bank in the amount to which the Town is entitled to draw pursuant to the terms of this Agreement; or (ii) an affidavit executed by an authorized Town official stating that the Developer is in default under this Agreement; and (iii) the original of the Escrow Certificate. An Escrow Certificate will be presented to the Town, will be attached as Exhibit C to this Agreement, will be substantially similar to the Escrow Certificate attached hereto and titled “Example of Escrow Certificate”, and will be incorporated herein by this reference.

3.STANDARDS: The Developer will construct the Improvements according to the Public Works Standards and Technical Specifications adopted by Elwood Town, as incorporated herein by this reference.

4.WARRANTY: The Developer shall warrant and guarantee the Improvements provided for herein and every part thereof, will remain in good condition for a minimum period of one (1) year, after the Town Engineer has accepted the Improvements in writing, and the Developer agrees to make all repairs to and maintain the Improvements and every part thereof in good working condition during the guarantee period with no cost to the Town.

5.COMPLETION PERIODS: The Developer will commence work on the

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Improvements within one year from the Effective Date of this Agreement (the “Commencement Period”) and the Improvements, each and every one of them, will be Completed within two years from the Effective Date of this Agreement (the “Completion Period”).

6.COMPLIANCE WITH LAW: The Developer will comply with all relevant laws, ordinances, and regulations in effect at the time of final subdivision plat approval when fulfilling his obligations under this Agreement. When necessary to protect public health, the Developer will be subject to laws, ordinances and regulations that become effective after final plat approval.

7.DEDICATION: The Developer will dedicate to the Town or other applicable Agency as designated by the Town the Improvements listed on Exhibit B attached hereto and incorporated herein by this reference pursuant to the procedure described in Paragraph 13 below.

TOWN'S OBLIGATIONS

8.PLAT APPROVAL: The Town will grant final subdivision plat approval to the Subdivision under the terms and conditions previously agreed to by the Parties if those terms and conditions are consistent with all relevant state laws and local ordinances in effect at the time of final plat approval. Release of the final plat mylar shall not be released for recording until this Agreement is executed and the escrow agent or financial institution has issued a certificate that the funds have been secured with them in accordance with this Agreement.

9.INSPECTION AND CERTIFICATION: The Town Engineer will inspect the Improvements as they are being constructed and, if acceptable to the Town Engineer, certify such Improvements as being in compliance with the standards and specifications of the Town. Developer shall notify the Town Engineer of its intent to install or commence installation of each off-site and on-site Improvement within twenty-four (24) hours prior to commencement so that the Town Engineer, or an authorized representative, may inspect and verify and approve such installation. Such inspection and certification by the Town Engineer, if appropriate, will occur within seven (7) days of notice by the Developer that he desires to have the Town inspect the Improvements. Before obtaining certification of any such Improvements, the Developer will present to the Town valid lien waivers from all persons providing materials or performing work on the Improvements for which certification is sought. Certification by the Town Engineer does not constitute a waiver by the Town of the right to draw funds under the Escrow or Letter on account of defects in or

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failure of any Improvement that is detected or which occurs following such certification. All fees, including drive time to site, for inspections and reviews of the Improvements by the Town Engineer shall be paid by the Developer to the Town within thirty (30) days of receiving an invoice from the Town of those Town Engineer fees.

10. NOTICE OF DEFECT: The Town will provide timely notice to the Developer whenever inspection reveals that an Improvement does not conform to the standards and specifications shown on the approved subdivision improvement drawings on file in the Elwood Town Engineering office or is otherwise defective. The Developer will have thirty (30) days from the issuance of such notice to cure or substantially cure the defect. The Town may not declare a default under the Agreement during the thirty (30) day defect. The Developer will have no right to cure defects in or failure of any Improvement found to exist or occurring after the Town accepts dedication of the Improvement(s).

11. ACCEPTANCE OF DEDICATION: The Town or other applicable agency will accept the dedication of any validly certified Improvement within thirty (30) days of the Developer's offer to dedicate the Improvement. The Town or agency's acceptance of dedication is expressly conditioned on the presentation by the Developer of a policy of title insurance, where appropriate, for the benefit of the Town showing that the Developer owns the Improvement in fee simple and that there are no liens, encumbrances, or other restrictions on the Improvement unacceptable to the Town in its reasonable judgment. Acceptance of the dedication of any Improvement does not constitute a waiver by the Town of the right to draw funds under the Escrow on account of any defect in or failure of the Improvement that is detected or which occurs after the acceptance of the dedication. The Improvements must be offered to the Town in no more than one dedication per month.

12. REDUCTION OF SECURITY: After the acceptance of any Improvement, the amount which the Town is entitled to draw on the Escrow or Letter may be reduced by an amount equal to ninety (90) percent of the estimated cost of the Improvement as shown on Exhibit B. At the request of the Developer upon completion and acceptance of any Improvements, the Town Engineer will execute a certificate of release verifying the acceptance of the Improvement and waiving its right to draw on the Escrow to the extent of such amount. A Developer in default under this agreement will have no right to such a certificate. At the same time as the certificate of release, the Developer may file with the Town Engineer a written request for partial withdrawal from said Improvements construction account for payment of those certified and accepted Improvements. Approval by the Town Engineer shall be given within ten (10) working days. Town Engineer will authorize in writing to the Escrow or Letter Holder to disburse direct payments, up to the costs of construction and inspections listed in Exhibit B, to the Developer's Contractor, or persons furnishing such services as requested by Developer. The Improvements

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construction account shall not be reduced to an amount less than the 10% Subdivision Guaranty Surety listed in attached Exhibit C. Upon the acceptance of all of the Improvements, the balance that may be drawn under the Escrow or Letter will be available to the Town for ninety (90) days after expiration of the one (1) year Warranty Period. Nothing contained herein shall prevent Developer from paying any or all costs of improvements from separate financial sources or funds, should Developer determine to do so.

13. USE OF PROCEEDS: The Town will use funds drawn under the Escrow or Letter only for the purpose of completing the Improvements or correcting defects in or failures of the Improvements.

OTHER PROVISIONS

14. EVENTS OF DEFAULT: The following conditions, occurrences or actions will constitute a default by the Developer during the Construction Period:

- a. Developer's failure to commence construction of the Improvements within one year of final subdivision plat approval;
- b. Developer's failure to complete construction of the Improvements within two years of final subdivision plat approval;
- c. Developer's failure to cure the defective construction of any Improvement within the applicable cure period;
- d. 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;
- e. Foreclosure of any lien against the Property or a portion of the Property or assignment or conveyance of the Property in lieu of foreclosure.

The Town may not declare a default until written notice of Developer's default has been given to the Developer and Developer has been given ten (10) days from the date of the notice to respond.

15. MEASURE OF DAMAGES: The measure of damages for breach of this Agreement will be the reasonable cost of completing the Improvements. For Improvements upon which construction has not begun, the estimated cost of the Improvements as shown on Exhibit B will be prima facie evidence of the minimum cost of completion; however, neither that amount nor the amount of the Escrow establishes the maximum amount of the Developer's liability. The Town will be entitled to 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 commenced.

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16. TOWN'S RIGHT UPON DEFAULT: When any event of default occurs, the Town may draw on the Escrow Letter to the extent of the face amount of the Escrow less 90 percent of the estimated cost (as shown on Exhibit B) of all Improvements theretofore accepted by the Town. The Town will have the right to complete Improvements itself or contract with a third party for completion, and the Developer hereby grants to the Town, its successors, assigns, agents, contractors and employees, a nonexclusive right and easement to enter the Property for the purposes of constructing, maintaining, and repairing such Improvements. Alternatively, the Town may assign the proceeds of the Escrow to a subsequent developer (or a lender) who has acquired the Subdivision by purchase, foreclosure or otherwise who will then have the same rights of completion as the Town if and only if the subsequent developer (or lender) agrees in writing to complete the unfinished Improvements. In addition, the Town also may suspend final plat approval during which time the Developer will have no right to sell, transfer, or otherwise convey lots or homes within the Subdivision without the express written approval of the Town or until the Improvements are completed and approved by the Town. These remedies are cumulative in nature except that during the Warranty Period, the Town's only remedy will be to draw funds under the Escrow.

17. INDEMNIFICATION: The Developer hereby expressly agrees to indemnify and hold the Town harmless from 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 at the development site and elsewhere pursuant to this Agreement. The Developer further agrees to aid and defend the Town in the event that the Town 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. The Developer is not an agent or employee of the Town.

18. NO WAIVER: No waiver of any provision of this Agreement 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 Town 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 Town'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.

19. AMENDMENT OR MODIFICATION: The parties to this Agreement may amend or modify this agreement only by written instrument executed by the Town and by the Developer or his authorized officer. Such amendment or modification will be properly notarized before it may be effective.

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20. **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, plaintiff or defendant, will be 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.

21. **VESTED RIGHTS:** The Town does not warrant by this Agreement that the Developer is entitled to any other approval(s) required by the Town, if any, before the Developer is entitled to commence development of the Subdivision or to transfer ownership of property in the Subdivision.

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, except that if the Town does not exercise its rights within 60 days following knowledge of any event of default, a purchaser of a lot or home in the subdivision may bring an action in mandamus to compel the Town to exercise its rights.

23. **SCOPE:** This Agreement 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.

24. **TIME:** For the purpose of computing the Commencement, Abandonment, and Completion Periods, and time periods for Town action, such times in which civil disaster, acts of God, or extreme weather conditions occur or exist will not be included if such times prevent the Developer or Town from performing his/it's obligations under the Agreement.

25. **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.

26. **BENEFITS:** The benefits of this Agreement to the Developer are personal and may not be assigned without the express written approval of the Town. 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. There is no prohibition on the right of the Town to assign its rights under this agreement. The Town will release the original developer's Escrow or Letter if it accepts new security from any developer or lender who obtains the Property. However, no act of

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the Town will constitute a release of the original developer from this liability under this Agreement.

27. **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 (Attn)

(Address) _____

If to Town: Attn: Town Engineer
8800 North 5235 West
Elwood Town, UT 84337

28. **RECORDATION:** Either Developer or Town may record a copy of this Agreement in the Clerk and Recorder's Office of Box Elder County, Utah.

29. **IMMUNITY:** Nothing contained in this Agreement constitutes a waiver of the Town's sovereign immunity under any applicable state law.

30. **LEGAL COUNSEL** The Town has been represented by legal counsel and Developer acknowledges that they have had an opportunity to consult with legal counsel before signing this document. The parties acknowledge that they each voluntarily sign this Agreement believing it to be in their best interests. The parties acknowledge that the various rights and awards granted herein are contractual and based upon the consideration bestowed by each upon the other through the provisions of this Agreement.

31. **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 or Escrow or Letter will be deemed to be proper only if such action is commenced in the First District Court in Box Elder County. The Developer expressly waives their right to bring such action in or to remove such action to any other court whether state or federal.

Developer

Date

Bank

Date

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Mayor, Elwood Town **Date**

ATTEST:

Elwood Town Recorder **Date**

APPROVED AS TO FORM:

Town Attorney **Date**

- EXHIBIT A: PROPERTY DESCRIPTION TO BE SUBDIVIDED**
- EXHIBIT B: REQUIRED ON & OFF SITE SUBDIVISION IMPROVEMENTS**
- EXHIBIT C: FINANCIAL GUARANTEE**

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EXAMPLE OF
ESCROW CERTIFICATE

TO ELWOOD TOWN, UTAH:

The undersigned Escrow Agent does hereby certify that it has in its possession and custody, cash in the sum of \$ _____ which said sum Escrow Agent is holding in escrow to guarantee the installation and completion, according to ordinance, of all off-site Improvements, as specified in Exhibit "A" on the following described tracts of land in the Town of Elwood, Utah to wit:

In the event the funds so provided herein do not pay for and complete in full all of the specified Improvements set forth in Exhibit "A" and as contemplated herein, then and in that event, Developer agrees to forthwith pay to Elwood Town all additional amounts necessary to so complete such improvement.

Said Escrow Agent hereby covenants and agrees that it will not release said funds to any person, firm or corporation (other than as is hereinafter provided) without the express written consent and direction from said Elwood Town, Utah and that if said Improvements are not satisfactorily installed and completed according to Ordinance within one month short of two years from the date hereof, that the said Escrow Agent will upon demand deliver said funds to said Elwood Town, Utah for the sole purpose of making and/or completing all of said Improvements, with said Town to return to the said Escrow Agent any and all funds which may prove to be in excess of the actual cost to the Town to make and/or complete said Improvements.

It is understood that the Town may, at its sole option, extend said period of two years for such completion of such Improvements upon request of the Escrow Agent or the Subdivider, if the Town Council determines that such extension is proper.

It is further understood and agreed that all matters concerning this agreement shall be subject to appropriate ordinances and code provisions adopted by said Elwood Town, Utah.

DATED this ____ day of _____, 20 ____

Escrow Agent Signature

Please Print Name and Title

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STATE OF UTAH)
) ss.
County of _____)

On the _____ day of _____, 20__ appeared before me the
Signer(s) of the within instrument, who duly acknowledged to me that he/she
executed the same.

Notary Public:

Residing at:

DATED this _____ day of _____, 20__

Developer Signature

Please Print Name

STATE OF UTAH)
) ss.
County of _____)

On the _____ day of _____, 20__ appeared before me the
signer(s) of the within instrument, who duly acknowledged to me that he/she executed the
same.

Notary Public: _____

Residing at: _____

APPROVED AS TO FORM:

Elwood Mayor

Date

APPROVED AS TO FORM:

Town Attorney

Date