# ESCROW AGREEMENT

This ESCROW AGREEMENT (the "Agreement") is made and entered into this ____ day of _____, _____, by and between the City of O'Fallon, Missouri, a Missouri municipal corporation (hereinafter the "City"), _____ (hereinafter the "Developer") a _____ corporation, and _____ (hereinafter the "Escrow Holder") a _____.

## RECITALS

WHEREAS, the Developer has submitted plans, information and specifications to the City for the formation and development of a subdivision / development to be known as _____ (the "Development") on certain real property described in Exhibit A (the "Property"), attached hereto and incorporated herein by reference; and

WHEREAS, the Developer is required to construct certain improvements (the "Improvements") in connection with the Development; and

WHEREAS, pursuant to Section 405.110 of the Code of the City of O'Fallon, Missouri, prior to proceeding with the Development, the Developer must deposit with the City Clerk, or an escrow agent agreed upon by the City Administrator and the Developer, a cash amount, certified check, performance bond or irrevocable bank letter of credit with the City of O'Fallon as beneficiary, endorsed to the escrow agent (the "Escrow Agent"); and

WHEREAS, pursuant to Section 405.110 of the Code of the City of O'Fallon, Missouri, the escrow amount shall be an amount, estimated by the City Engineer, equal to the estimated cost for completing construction of the Improvements over the anticipated construction period and contingencies, based on an estimating guide acceptable to the City Engineer; and

WHEREAS, the City and the Developer have mutually agreed upon a person or entity to act as the Escrow Agent in connection with this Development.

NOW, THEREFORE, in consideration of the foregoing Recitals and the mutual covenants and promises herein contained, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the City, the Developer and the Escrow Agent do hereby covenant and agree as follows:

## TERMS AND CONDITIONS

1. **Improvements.** The Developer shall design, construct and install, at the Developer's sole cost and expense, the Improvements listed on Exhibit B, attached hereto and incorporated herein by reference. The Improvements shall be installed, constructed

and completed in accordance with the plans approved by the City and pursuant to all applicable state and federal laws, and City ordinances.

2. **Escrow Sum.** To secure the satisfactory installation, construction and completion of the Improvements and the other obligations under this Agreement, the Developer shall deposit with the Escrow Agent cash, a certified check, performance bond or an irrevocable bank letter of credit endorsed to the Escrow Agent, in the amount of _____ dollars ($_____) (the "Escrow Sum"). For the purposes of this Agreement, the Improvements and the Escrow Sum shall be divided into separate categories (the "Improvements Categories") as shown on the attached Exhibit B.

3. **Escrow Account.** The Escrow Sum will be held in escrow by the Escrow Agent in a special escrow account. The City or the Developer may, from time to time, request written verification of the amount in this account from the Escrow Agent. The Escrow Agent will provide said verification within ten (10) days of said request. The escrow account may also be audited during the term of this Agreement at the discretion of the City.

4. **Additional Sums.** If the Escrow Sum herein provided is determined by the City Engineer to be insufficient to complete the Improvements, the Developer will deposit with the Escrow Agent an additional sum in cash, certified check, performance bond or an irrevocable bank letter of credit in an amount determined by the City Engineer to be sufficient to complete the Improvements. The additional sum shall be subject to the terms of this Agreement and this Agreement shall be deemed amended to include said additional sum.

5. **Time to Complete Improvements**. Unless otherwise specified herein, the Developer shall complete all of the Improvements within two (2) years of the date of execution of this Agreement. The City may, in its sole discretion, extend the time to complete all or any portion of the Improvements.

6. **Completion of Improvements**. Upon completion of the Improvements, the City shall certify that the Improvements were completed in accordance with the terms of this Agreement and with the applicable ordinances of the City. The City and the Developer agree that the certification of the Improvements shall follow the process detailed in Section 405.120 of the Code of the City of O'Fallon, Missouri.

7. **As-Built Engineering Drawings**. Upon completion of the Improvements, the Developer shall submit to the City Engineer a reproducible copy of "as-built" engineering drawings and three (3) sets of prints of each of the required Improvements that have been completed. Each set of drawings shall be certified by the Developer's engineer.

8. **Events of Default**. The following conditions, occurrences or actions will constitute a default by the Developer:

(a) The Developer's failure to complete all of the Improvements within the time provided herein;

(b) The Developer's failure or refusal to correct the defective construction of any Improvement within any period of time designated or specified for correction;

(c) The 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 written 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 the prior notification to the Developer; or

(e) Initiation of any foreclosure action of any lien or initiation of a mechanics lien procedure against the Property in lieu of foreclosure, the City may immediately declare a default without prior notification to the Developer.

Unless specifically provided for herein, the City may not declare a default until written notice has been sent to the Developer.

9. **Failure to Complete Improvements**. In the event the Developer shall be in default pursuant to Paragraph 8 above or in the event the Developer shall, in any case, fail to complete the Improvements within the period of time required herein, the City shall ensure the satisfactory completion of the Improvements and shall be reimbursed for the costs and expenses incurred by appropriating funds from the Escrow Sum. To ensure the satisfactory completion of the Improvements, the City may complete the Improvements itself or it may contract with a third party for completion. The Developer grants to the City, its successors, assigns, agents, contractors, subcontractors and employees, a nonexclusive right and easement to enter the Property for the purposes of constructing, reconstructing, maintaining and/or repairing such Improvements.

10. **Reduction of Escrow Sum**. The portion of the Escrow Sum held to secure the actual construction, installation and completion of each of the Improvements under each Improvement Category shall be released by the City within thirty (30) days of the completion of said Improvement Category, minus a maximum retention of five percent (5%) which shall be released in accordance with Section 405.120 of the Code of the City of O'Fallon, Missouri and as set forth herein. Any such Improvement Category shall be deemed to be completed upon certification by the City that the Improvements described therein are complete in accordance with the terms of this Agreement and any applicable ordinances of the City, including the filing of all documentation and certifications required by the City in complete and acceptable form. Once the City has determined that an Improvement Category has been completed in a timely and satisfactory manner, as described herein, the City Engineer will provide written

authorization to the Escrow Agent to release or disburse the portion of the Escrow Sum relating to the particular Improvement Category.

11. **Release of Escrow Sum**. The Escrow Agent shall only release or disburse the Escrow Sum or any portion thereof upon receipt of and in the amount set forth in a written authorization from the City Engineer addressed to the Escrow Agent, which said authorization may be for the payment of labor and materials of the City in connection with the construction, installation and completion of said Improvements. The release shall be deemed effective when the Escrow Sum or any portion thereof are duly posted with the United States Postal Service or other agreed upon delivery service or upon hand delivery to an authorized person or place as specified by the Developer.

12. **Acceptance of Improvements**. The City's final acceptance, certification and/or approval of any 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 other than those that have been accepted by the City Attorney on the Improvements. Approval, certification 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, certification and/or acceptance. Approval, certification and/or acceptance shall not constitute acceptance of the Improvements by the City for dedication purposes.

13. **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, either directly or indirectly, by any person or entity in connection with, or on account of the performance or non-performance of work on the Property or otherwise relating to the Development. 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, except where such suit is brought by the Developer against the City.

14. **No Waiver**. No waiver of any provision of this Agreement by the City will be deemed to 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 the City, the Developer and the Escrow Agent; 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.

15. **Attorney's Fees**. The City shall be entitled to payment by the Developer of costs, including reasonable attorney's fees and expert witness fees, incurred in the enforcement of this Agreement whether that enforcement is in the form of a legal action or otherwise.

16. **Third Party Rights**. This Agreement is not executed for the benefit of materialmen, laborers, or others providing work, services or materials to the Developer and/or the Property or for the benefit of the owners, purchasers or users of the Property. No person or entity who or which is not a party to this Agreement will have any right of action under this Agreement.

17. **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.

18. **Principal and Agent**. Nothing contained in this Agreement shall be deemed or construed by the parties hereto or by any third party to create the relationship of principal and agent or of partnership or of joint venture or of any association between the City and the Developer.

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

20. **Governing Law**. This Agreement and the performance thereof shall be governed, interpreted, construed, and regulated by the laws of the State of Missouri. Any litigation concerning this Agreement shall be conducted in the courts located in St. Charles County, Missouri, and the parties hereto agree to the venue and personal jurisdiction of these courts.

21. **Assignment**. This Agreement shall inure to the benefit of and be binding upon the successors in interest and/or the legal representatives of the respective parties hereto. This Agreement shall not be assigned or transferred by the Developer without the written consent of the City being first had and obtained.

22. **Notice**. Any notice or demand made pursuant to this Agreement shall be given by certified mail, return receipt requested, and addressed as shown below:

**Developer**: _____
_____
_____
_____
Attention: _____

**Escrow Agent:** _____
_____
_____
_____
Attention: _____

**City of O'Fallon, Missouri:** The City of O'Fallon
100 N. Main Street
O'Fallon, MO 63366
Attention: City Administrator

Any such notice or demand shall be deemed to have been given or made at the time it is received in the United States Mail by the addressee. The City, the Developer or the Escrow Agent may by written notice to the other parties designate any other address for this purpose.

23. **Ambiguities**. The parties have each had the opportunity to review and negotiate the terms of this Agreement, and any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply in the interpretation of this Agreement.

24. **Headings**. The section headings contained herein are intended for convenience and reference only, and are not a part of this Agreement.

25. **Recording**. In the event the City elects to record this Agreement or a memorandum thereof among the land records of St. Charles County, Missouri, the parties hereto agree to execute a memorandum of Agreement, and all costs of recording this Agreement or memorandum thereof shall be paid by the City.

26. **Counterparts**. This Agreement may be executed in any number of counterparts, each of which will be deemed to be an original, but all of which together will constitute one instrument.

27. **Finality**. The parties have read and understand each and every term, condition, and covenant contained in this Agreement and in any document incorporated by reference. This Agreement and any appendices attached hereto constitutes the entire Agreement between the parties and supersedes all prior or contemporaneous negotiations, commitments, representations, writings and/or oral understandings or agreements, except those otherwise referenced in this Agreement. The parties signed this Agreement for the consideration herein expressed. Any addition to, variation or modification of this Agreement shall be void and ineffective unless in writing signed by all the parties.

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**IN WITNESS WHEREOF**, the parties have hereunto set their respective hands and seals as of the day and year first above written.

**CITY:** **"CITY OF O'FALLON, MISSOURI"**

By: _____

Title: _____

**DEVELOPER:** "_____"

By: _____

Title: _____

**ESCROW AGENT:** "_____"

By: _____

Title: _____

**NOTARY STATEMENT FOR DEVELOPER**

State of Missouri

of

On this ____ day of ____ in the year ____, before me, the undersigned notary public, personally appeared _____, known to me to the person whose name is subscribed to the within instrument and acknowledged that she executed the same for the purposes therein contained.

In witness whereof, I hereunto set my hand and official seal.

Notary _____

Print Name_____

My Commission Expires_____

**NOTARY STATEMENT FOR ESCROW HOLDER**

State of Missouri

of

On this ____ day of ____ in the year ____, before me, the undersigned notary public, personally appeared _____, known to me to the person whose name is subscribed to the within instrument and acknowledged that she executed the same for the purposes therein contained.

In witness whereof, I hereunto set my hand and official seal.

Notary_____

Print Name_____

My Commission Expires_____

**EXHIBIT A**

(Legal description of the Property or 11 X 17 of proposed plat)

**EXHIBIT B**

(Designate Separate Improvement Categories and itemize improvements under each Improvement Category)

IMPROVEMENT CATEGORIES

| | | |
|---|---|---|
| 1. | Streets: | $_____ |
| 2. | Storm Sewers: | $_____ |
| 3. | Sanitary Sewers: | $_____ |
| 4. | Water: | $_____ |
| 5. | Rough Grading: | $_____ |
| 6. | Vegetation: | $_____ |
| 7. | Sidewalks: | $_____ |
| 8. | Street Lights and Name Signs: | $_____ |
| 9. | Common Ground Improvements: | $_____ |
| 10. | Other Miscellaneous Items: | $_____ |
| | **TOTAL:** | **$_____** |