

## 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") and \_\_\_\_\_ (hereinafter the "Developer") a \_\_\_\_\_ corporation.

### RECITALS

WHEREAS, the Developer has submitted plans, information and specifications to the City for the development of commercial to be known as \_\_\_\_\_ located at \_\_\_\_\_ in O'Fallon, MO (the "Development") on certain real property described in Exhibit A (the "Property"), attached hereto and incorporated herein by reference; and

WHEREAS, per governmental approvals, including approval of the site plan for the Property, the Developer is required to construct or install certain improvements (the "Improvements") in connection with the Development; and

WHEREAS, to guarantee the proper construction and installation of the Improvements, Developer must deposit with the City Clerk, a cash amount, check, or wire transfer to the City of O'Fallon, endorsed to the City (the "City"); and

WHEREAS, the escrow amount was determined by the City Engineer considering the estimated cost for completing construction of the Public Improvements over the anticipated construction period and contingencies (*See*, Exhibit B, attached hereto); and

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 and the Developer 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 as depicted on the approved site construction plans and 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 City of O'Fallon cash, check or wire transfer, in the

amount of \_\_\_\_\_ dollars (\$ \_\_\_\_\_) (the “Escrow Sum”).

3. **(Intentionally Omitted)**

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 City of O’Fallon an additional sum in cash, check, or wire transfer 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 the time frame required by ordinance or the governmental approvals of the site plan and construction plans. All improvements shall be completed prior to occupancy. In no event shall the Improvements be completed more than six (6) months after approval of the construction plans.

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 an electronic pdf format (signed and sealed by a registered professional engineer or land surveyor) and an AutoCad dwg format copy of "as-built" engineering drawings that have been completed.

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. Escrow Sum funds or any portion thereof shall be disbursed upon receipt of and in the amount set forth in a written authorization from the City Engineer, 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. 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. **Release of Escrow Sum.** The Escrow Sum shall be released by the City within thirty (30) days of the City's certification that all Improvements have been completed 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. 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.

11. **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.

12. **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.

13. **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 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.

14. **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.

15. **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.

16. **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.

17. **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.

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

19. **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.

20. **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.

21. **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: \_\_\_\_\_

**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 may by written notice to the other parties designate any other address for this purpose.

22. **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.

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

24. **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.

25. **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.

26. **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.

**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: \_\_\_\_\_

**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 be 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**

**ESCROW CALCULATIONS**

1.	Commercial:	\$ _____
2.	Public Improvements:	\$ _____
	<b>TOTAL:</b>	<b>\$ _____</b>