

ESCROW AGREEMENT – PER LOT

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 “Responsible Party”) a _____ corporation, and _____ (hereinafter the “Escrow Holder”) a _____.

RECITALS

WHEREAS, the Responsible Party is a home builder that wants to undertake certain activity on certain lots within an area subject to a plat previously approved by the City that is known as _____ (the “Development”) and is located on certain real property described in Exhibit A (the “Property”), attached hereto and incorporated herein by reference; and

WHEREAS, the Responsible Party is required to protect and maintain certain existing infrastructure in conjunction with its activity within and adjacent to the Development and also perform repairs for deficiencies, defects or conditions caused or exacerbated by the activities and work being performed in the Development; and

WHEREAS, to ensure the completion of such repairs and maintenance and pursuant to Sections 405.126 and 405.127 of the Code of the City of O’Fallon, Missouri, prior to proceeding with the Responsible Party’s work, the Responsible Party must deposit with the City Clerk, or an escrow agent agreed upon by the City Administrator and the Responsible Party, an adequate escrow to guarantee the continued condition of the existing infrastructure; and

WHEREAS, the City and the Responsible Party 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 Responsible Party and the Escrow Agent do hereby covenant and agree as follows:

TERMS AND CONDITIONS

1. **Lots Subject to this Agreement.** The Responsible Party will be conducting activity on one or more lots shown on Exhibit A, attached hereto and incorporated herein.

2. **Maintenance and Repair.** The Responsible Party shall protect, at the Responsible Party’s sole cost and expense, the existing infrastructure shown or listed on Exhibits A, attached hereto and incorporated herein by reference (“Infrastructure”). In

addition, the Responsible Party shall maintain and/or repair the Infrastructure in the event that its activities on one or more of the Lots shown on Exhibit A cause deficiencies in the Infrastructure which are directly attributable to the activity on such Lot or Lots. The Infrastructure shall be maintained and repaired during Responsible Party's work and, upon conclusion of the Responsible Party's work on the Lot or Lots shown on Exhibit A, shall be in good working order and in compliance with the plans previously approved by the City and all applicable state and federal laws, and City ordinances.

However, the parties hereby acknowledge that the Infrastructure is subject to certain existing damage and defects which occurred prior to Responsible Party's activities and work. It is agreed that Responsible Party shall not be obligated to repair the damage and defects described on Exhibit B; however, in the event that Responsible Party's activities cause the existing damage or defects to worsen, Responsible Party shall repair such worsened condition.

3. **Initial Escrow Sum.** To secure the satisfactory maintenance and/or repair of the existing infrastructure and the other obligations under this Agreement, the Responsible Party has deposited with the Escrow Agent cash, a certified check, or an irrevocable bank letter of credit, which qualifies as an insurable deposit by the FDIC, endorsed to the Escrow Agent, in the amount of Five Thousand Dollars (\$5,000.00) (the "Initial Escrow Sum"). The Escrow Agent hereby acknowledges receipt and deposit of such cash, certified check, or irrevocable bank letter of credit. Should the escrow account have insufficient funds to complete the necessary repairs and maintenance as part of this agreement, the Responsible Party shall deposit additional escrow funds into the escrow account to cover the costs of repairs and maintenance. If the escrow account has insufficient funds, no further permits for Responsible Party's activities shall be issued until the City receives written acknowledgement from the Escrow Holder that such sum was received and deposited as required by this section.

4. **Escrow Account.** The Initial Escrow Sum will be held in escrow by the Escrow Agent in a special escrow account. The City or the Responsible Party 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. The City can accept either cash or a certified check as the Escrow Sum and act as the Escrow Agent.

5. **Additional Per Lot Escrow Sums.** In addition to the Initial Escrow Sum, the Responsible Party shall deposit with City cash or a certified check in the amount of Seven Hundred Fifty Dollars (\$750.00) for each Lot shown on Exhibit A ("Additional Per Lot Escrow Sum"). The Additional Per Lot Escrow Sum shall be deposited upon the issuance of a building permit for the particular Lot.

6. **Completion of Maintenance and Repairs.** Unless otherwise specified herein, the Responsible Party shall cause the Infrastructure to be inspected upon completion of activities on one or more Lots and upon Responsible Party's request for

release of the Additional Per Lot Escrow Sum(s). If such inspections reveal that repair or maintenance is required, Responsible Party shall complete such repairs and maintenance within a reasonable time following inspection.

7. **Certification by City.** Following the repairs and maintenance by Responsible Party as required under this Agreement, the City shall inspect the existing Infrastructure and any repairs and maintenance performed by Responsible Party. If such inspection shows such Infrastructure, together with repairs and maintenance, to be in good and satisfactory condition following Responsible Party's activities and work, the City shall certify that the existing infrastructure has been repaired and maintained in accordance with the terms of this Agreement and with the applicable ordinances of the City. The City and the Responsible Party agree that the inspection of the Infrastructure shall follow the process detailed in Section 405.120 of the Code of the City of O'Fallon, Missouri.

8. **Emergency Conditions.** Responsible Party shall conduct periodic inspections of the Infrastructure during its activities and work. In the event that defects or conditions which warrant immediate repair arise, the Responsible Party shall repair such defect or condition immediately. If Responsible Party fails to make such immediate repair, the parties agree that the City shall utilize either the Initial Escrow Sum or the applicable Additional Per Lot Escrow Sums in order to perform such emergency repairs; Escrow Holder shall release such amount as necessary to make the emergency repairs merely upon written notice from the City that such defect or condition exists and emergency repairs are necessary. Within five (5) days of such emergency repair, the Responsible Party shall replace the escrow sums utilized in order to restore the Initial Escrow Sum and the Additional Per Lot Escrow Sums to the amount set forth in this Agreement. No further permits for Responsible Party's activities and work shall be issued until the City receives written acknowledgement from the Escrow Holder that such sum was received and deposited as required by the section.

9. **As-Built Engineering Drawings.** Upon completion of the repair and maintenance responsibilities, the Responsible Party shall submit to the City Engineer a revised original reproducible "as-built" engineering drawing of any revisions to the Infrastructure that had been previously completed and approved, including detention basin cross sections. Each set of drawings shall be certified by the Responsible Party's engineer.

10. **Events of Default.** The following conditions, occurrences or actions will constitute a default by the Responsible Party:

- (a) The Responsible Party's failure to complete all repairs and maintenance within the time required by this Agreement;
- (b) The Responsible Party's failure or refusal to correct the deficiencies within any period of time designated or specified for correction;

- (c) The Responsible Party's insolvency, the appointment of a receiver for the Responsible Party or the filing of a voluntary or involuntary petition in bankruptcy respecting the Responsible Party; in such event the City may immediately declare a default without prior written notification to the Responsible Party;
- (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 Responsible Party; 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 Responsible Party.

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

11. **Failure to Complete Repairs and Maintenance.** In the event the Responsible Party shall be in default pursuant to Paragraph 10 above or in the event the Responsible Party shall, in any case, fail to perform required repairs and maintenance in order to resolve deficiencies, defects or conditions within the period of time required herein, the City shall ensure the satisfactory completion of the repairs and maintenance and shall be reimbursed for the costs and expenses incurred by appropriating funds from the Initial Escrow Sum and any applicable Additional Per Lot Escrow Sums. To ensure the satisfactory completion of such work, the City may perform such work itself or it may contract with a third party for completion. Such work shall be in the sole and exclusive discretion of the City. In no event shall the City be required to perform certain work or make specific repairs or maintenance. The Responsible Party grants to the City, its successors, assigns, agents, contractors, subcontractors and employees, a nonexclusive right and easement to enter any property over which Responsible Party has ownership or control for the purposes of maintaining and/or repairing any Infrastructure as described in this Agreement.

12. **Release of Escrow Sums.** The Additional Per Lot Escrow Sum for a particular lot shall be released upon the repair of any deficiencies caused by the home construction and the issuance of the Certificate of Occupancy for the home. The Initial Escrow Sum shall be released upon the conclusion of Responsibility Party's activities within the platted area and certification by the City that all deficiencies have been satisfactorily repaired.

13. **Responsibilities of Escrow Holder.** The Escrow Agent shall not release or disburse the Escrow Sums or any portion thereof to the Responsible Party unless Escrow Agent has received written authorization from the City Engineer setting forth the amount of the Escrow Sums to be released and addressed to the Escrow Agent. The Escrow Agent shall release and disburse the Escrow Sums or portions thereof to the City upon the receipt of written notice that the City is required to perform maintenance and/or repair of the Infrastructure. The release shall be deemed effective when the Escrow Sums

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 City or the Responsible Party.

14. **Limitation of Certification.** Certification by the City following inspection of the repairs and maintenance does not constitute a waiver by the City of any rights it may have on account of any defect in or failure of the existing Infrastructure that is detected or which occurs after certification.

15. **Indemnification.** The Responsible Party 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 Responsible Party's activities. The Responsible Party 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 Responsible Party against the City.

16. **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 Responsible Party 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 Responsible Party relating to its activities, work or failure to perform under this Agreement.

17. **Attorney's Fees.** The City shall be entitled to payment by the Responsible Party 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.

18. **Third Party Rights.** This Agreement is not executed for the benefit of materialmen, laborers, or others providing work, services or materials to the Responsible Party 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.

19. **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.

20. **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 Responsible Party.

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

22. **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.

23. **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 Responsible Party without the written consent of the City being first had and obtained.

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

Responsible Party:

Attention: _____

Escrow Agent:

(this signature is not required
if escrow is deposited with City)

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 Responsible Party or the Escrow Agent may by written notice to the other parties designate any other address for this purpose.

25. **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.

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

27. **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.

28. **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.

29. **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: _____

RESPONSIBLE PARTY:

“ _____ ”

By: _____

Title: _____

ESCROW AGENT:

“ _____ ”

By: _____

Title: _____

NOTARY STATEMENT FOR RESPONSIBLE PARTY

STATE OF MISSOURI)
) SS
COUNTY OF _____)

On this ___ day of _____, _____, 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 he/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)
) SS
COUNTY OF _____)

On this ___ day of _____, _____, 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 he/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

<Record Plat of Development>

EXHIBIT B

<Existing Inspection>