

CITY OF WEST HAVEN



W2857745

SUBDIVISION IMPROVEMENT 2857745 PG 1 OF 13
LEANN H KILTS, WEBER COUNTY RECORDER
16-MAY-17 306 PM FEE \$1.00 DEP TN
REC FOR: WEST HAVEN CITY

AGREEMENT

15-629-0001-0080 ✓ BK
(15-094-0113, 0115, 0117)

1. PARTIES: The parties to this Subdivision Improvement Agreement ("the Agreement") are ("the Developer") and City of West Haven ("the City").
2. EFFECTIVE DATE: The Effective Date of this Agreement will be the date that final subdivision plat approval is granted by the West Haven City Council ("the City Council").

RECITALS

WHEREAS, the Developer seeks permission to subdivide property within the City of West Haven, to be known as TOSCAN MEADOWS SUBDIVISION Phase I (the "Subdivision"), which property is more particularly described on Exhibit A attached hereto and incorporated herein by this reference (the "Property"); and

WHEREAS, the City 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 subdivision which leaves property undeveloped and unproductive; and

WHEREAS, the purpose of this Agreement is to protect the City 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 City's Subdivision Ordinance 3-92:

THEREFORE, the Parties hereby agree as follows:

DEVELOPER'S OBLIGATIONS

3. IMPROVEMENTS: The developer will construct and install, at his own expense, those on-site and off-site subdivision improvements listed on Exhibit B attached hereto and incorporated herein by this reference ("the improvements"). The Developer's obligation to complete the Improvements will arise upon final plat approval by the City, will be independent of any obligations of the City 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.

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4. SECURITY: To secure the performance of his obligations hereunder, the Developer will, prior to the effective date, deposit Escrow in the amount of \$ _____. The Escrow hereinafter referred to as ("Escrow") will be issued by _____ Bank (or other financial institution approved by the City) to be known as ("Bank"), will be payable at sight to the City and will bear an expiration date not earlier than two years after the Effective Date of this Agreement. The Escrow will be payable to the City at any time upon presentation of (i) a sight draft drawn on the issuing Bank in the amount to which the City is entitled to draw pursuant to the terms of this Agreement; or (ii) an affidavit executed by an authorized City official stating that the Developer is in default under this Agreement; and (iii) the original of the Escrow Certificate. An Escrow Certificate will be substantially similar to Exhibit C attached hereto and incorporated herein by this reference.
5. STANDARDS: The Developer will construct the Improvements according to the Public Works Standards and Technical Specifications adopted by the City of West Haven, as incorporated herein by this reference.
6. WARRANTY: The Developer warrants that the Improvements, each and every one of them, will be free from defects for a period of one year from the date that the City accepts the improvement when completed by the Developer.
7. COMPLETION PERIODS: The Developer will commence work on the Improvements within one year from the Effective Date of the 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").
8. 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.
9. DEDICATION: The Developer will dedicate to the City or other applicable Agency as designated by the City the Improvements listed on Exhibit B attached hereto and incorporated herein by this reference pursuant to the procedure described in Paragraph 13 below.

CITY'S OBLIGATIONS

10. PLAT APPROVAL: The City 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.

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11. **INSPECTION AND CERTIFICATION:** The City will inspect the Improvements As they are being constructed and, if acceptable to the City Engineer, Certify such improvement as being in compliance with the standards and specifications of the City. Such inspection and certification, if appropriate, will occur within 7 days of notice by the Developer that he desires to have the City inspect and improvement. Before obtaining certification of any such improvement, the Developer will present to the City valid lien waivers from all persons providing materials or performing work on the improvement for which certification is sought. Certification by the City Engineer does not constitute a waiver by the City of the right to draw funds under the Escrow on account of defects in or failure of any improvement that is detected or which occurs following such certification.
12. **NOTICE OF DEFECT:** The City 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 West Haven City Engineering office or is otherwise defective. The Developer will have 30 days from the issuance of such notice to cure or substantially cure the defect. The City may not declare a default under the Agreement during the 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 City accepts dedication of the improvement(s).
13. **ACCEPTANCE OF DEDICATION:** The City or other applicable agency will accept the dedication of any validly certified improvement within 30 days of the Developer's offer to dedicate the improvement. The City 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 City 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 City in it's reasonable judgment. Acceptance of the dedication of any improvement does not constitute a waiver by the City 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 City in no more than one dedication per month.
14. **REDUCTION OF SECURITY:** After the acceptance of any improvement, the amount which the City is entitled to draw on the Escrow may be reduced by an amount equal to 90 percent of the estimated cost of the improvement as shown on Exhibit B. At the request of the Developer, the City will execute a certificate of release verifying the acceptance of the improvement and waiving it's 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. Upon the acceptance of all of the Improvements, the balance that may be drawn under the Escrow will be available to the City for 90 days after expiration of the Warranty Period.
15. **USE OF PROCEEDS:** The City will use funds drawn under the Escrow only for the purpose of completing the Improvements or correcting defects in or failures of the Improvements.

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OTHER PROVISION

16. 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 City may not declare a default until written notice has been given to the Developer.

17. 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 or the amount of the Escrow establishes the maximum amount of the Developer's liability. The City 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.

18. CITY'S RIGHT UPON DEFAULT: When any event of default occurs, the City may draw on the Escrow 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 City. The City will have the right to complete improvements itself or contract with a third party for completion, and the Developer hereby grants to the City, 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 City 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 City if and only if the subsequent developer (or lender) agrees in writing to complete the unfinished improvements. In addition, the City 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 City or until the Improvements are completed and approved by the City. These remedies are cumulative in nature except that during the Warranty Period, the City's only remedy will be to draw funds under the Escrow.

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19. **INDEMNIFICATION:** The developer hereby expressly agrees to indemnify and hold the City 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 City in the event that the City 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 City.
20. **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 City 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 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.
21. **AMENDMENT OR MODIFICATION:** The parties to this Agreement may amend or modify this Agreement only by written instrument executed by the City and by the Developer or his authorized officer. Such amendment or modification will be properly notarized before it may be effective.
22. **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 it's own costs in their entirety.
23. **VESTED RIGHTS:** The City does not warrant by this Agreement that the Developer is entitled to any other approval(s) required by the City, if any, before the Developer is entitled to commence development of the Subdivision or to transfer ownership of property in the Subdivision.
24. **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 City 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 City to exercise it's rights.
25. **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.
26. **TIME:** For the purpose of computing the Commencement, Abandonment, and Completion Periods, and time periods for City 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 City from performing his/it's obligations under the Agreement.

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27. **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.
28. **BENEFITS:** The benefits of this Agreement to the Developer are personal and may not be assigned without the express written approval of the City. 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 City to assign its rights under this agreement. The City will release the original developer's Escrow if it accepts new security from any developer or lender who obtains the Property. However, no act of the City will constitute a release of the original developer from this liability under this Agreement.
29. **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) CASTLE CREEK HOMES LLC
(Address) 1798 W. 5150 S. SUITE 103
RAY, UT 84401
- if to City: Attn: City Engineer
4150 S. 3900 W.
West Haven, Ut 84401
30. **RECORDATION:** Either Developer or City may record a copy of this Agreement in the Clerk and Recorder's Office of Weber County, Utah
31. **IMMUNITY:** Nothing contained in this Agreement constitutes a waiver of the City's sovereign immunity under any applicable state law.

City Attorney

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CORPORATE ACKNOWLEDGEMENT

State of Utah)
 ss
County of Weber)

On the _____ day of _____ A.D. 20____

Personally appeared before me _____

duly sworn, did say that he/she is the _____

of _____ of _____

the corporation which executed the foregoing instrument, and that said instrument was signed in behalf of said corporation by authority of a Resolution of its Board of Directors that the said corporation executed the same.

Notary Public

Residing at: _____

Sharon Feltz
Mayor, City of West Haven

15 May 2017
Date

ATTEST:

Maulyn Cook
City Recorder/Clerk

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EXHIBIT A: PROPERTY DESCRIPTION TO BE SUBDIVIDED

Tuscan Meadows Sub Ph 1

EXHIBIT B: REQUIRED ON & OFF SITE SUBDIVISION IMPROVEMENTS



Roads
Water
CG & SW
sewer
2nd Water
Street Lights
Sturry Seal
Signs

EXHIBIT C: FINANCIAL GUARANTEE



ESCROW CERTIFICATE

TO THE CITY OF WEST HAVEN, UTAH:

The undersigned Escrow Agent does hereby certify that it has in its possession and custody, cash in the sum of \$ 609,650.00 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 City of West Haven, 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, subdivider/developer agrees to forthwith pay to the City of West Haven 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 City of West Haven, 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 City of West Haven, Utah for the sole purpose of making and/or completing all of said improvements, with said City to return to the said Escrow Agent any and all funds which may prove to be in excess of the actual cost to the City to make and/or complete said improvements.

**Escrow funds will be held as undisbursed loan funds. Loan advances will be funded with cash.



Bank of American Fork

FR 2857765 PG 11 OF 13

May 9, 2017
IRREVOCABLE LETTER OF CREDIT NO. 995-1

BENEFICIARY:

EXPIRATION: November 9, 2018

CITY OF WEST HAVEN
1798 WEST 5150 SOUTH, SUITE 103
ROY, UTAH 84067

AMOUNT: USD \$609,650.00

Dear Sir/Madam:

At the request of Mike Schultz, Inc., 1798 West 5150 South, Suite 103, Roy, Utah 84067, Bank of American Fork, a Division of People's Intermountain Bank hereby establishes our Irrevocable Letter of Credit in your favor up to an aggregate amount of Six Hundred Nine Thousand Six Hundred Fifty and no/100 Dollars (USD \$609,650.00) to expire at our counters on November 9, 2018. This credit is available for payment against presentation of your draft(s) at sight drawn on Bank of American Fork, 95 East 500 South, Bountiful, Utah 84010 accompanied by this original Irrevocable Letter of Credit and the following documents:

A statement signed by an authorized representative of the City of West Haven certifying that Mike Schultz, Inc. has not completed the public improvements as required on property known as Tuscan Meadows Subdivision, located at approximately 2275 West 3300 South, West Haven, Utah in a timely and/or workmanlike manner.

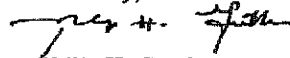
All drawings must indicate this letter of credit number.

Partial drawings are permitted.

We hereby agree with drawers, endorsers and bona fide holders that all draft(s) drawn under and in compliance with the terms of this letter of credit will be honored upon presentation and delivery of documents to us as specified herein.

This letter of credit is governed by Utah Code Annotated 70A-5-101 ET Seq. 1953 as amended Uniform Customs and Practice Documentary Credits (2007 Revision), International Chamber of Commerce Publication No. 600 and jurisdiction for resolution of disputes arising under this letter of credit lies in the courts of State of Utah.

Sincerely,


Philip H. Gunther
Senior Vice President

CONSENT AND AGREEMENT FOR LETTER OF CREDIT

Mike Schultz, Inc., hereby consents and agrees to the terms and conditions of the foregoing Letter of Credit, and hereby requests and authorizes Bank of American Fork to establish and issue such Letter of Credit to the City of West Haven. In consideration of Bank of American Fork's so doing, Mike Schultz, Inc. shall execute and deliver to Bank of American Fork an "Application Agreement and Note for Commercial Letter of Credit" in form and content acceptable to Bank of American Fork.

Dated: May 9, 2017

Mike Schultz, Inc.

By:


Mike Schultz, President



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It is understood that the City 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 City 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 City of West Haven, Utah.

DATED this _____ day of _____, 20____

Escrow Agent

Signature _____

Please Print Name and Title _____

Escrow Company Name and Mailing Address:

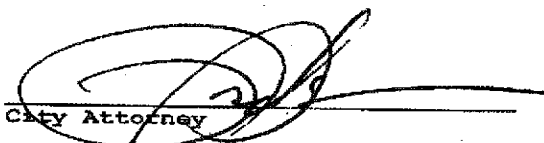
Bank of American Fork

State of Utah)
 Ss
County of Weber)

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:


City Attorney

15 May 17
Date

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APPROVED:

Sharon Felt
Mayor, City of West Haven

15 May 2017
Date

State of Utah)
 Ss
County of Weber)

On the 15th day of May, 2017

Appeared before me the signer(s) of the within instrument, who duly acknowledged to me that he/she executed the same.

Notary Public: Marilyn Cook
Residing at: Weber County

