

ESCROW AGREEMENT

(To Assure Completion of Improvements)

THIS AGREEMENT (herein "Agreement") is entered into this _____ day of _____, 20____.

****** PARTIES ******

APPLICANT: _____ ,
[insert legal name of person entering into the agreement]

a(n) _____ ,
[insert legal description of applicant; ie ,individual, a Utah corporation, partnership, limited liability company, etc.], of

street address: _____

city, state, zip Code: _____ ,
[current valid address of Applicant]

telephone: (____) _____, facsimile (____) _____;

email: _____

DEPOSITORY: _____ ,
[insert legal name of person entering into the agreement]

a(n) _____ ,
[insert legal description of applicant; ie ,individual, a Utah corporation, partnership, limited liability company, etc.], of

street address: _____

city, state, zip Code: _____ ,
[current valid address of Depository]

telephone: (____) _____, facsimile (____) _____;

email: _____

CITY: Ogden City, a Utah Municipal Corporation
2549 Washington Boulevard, Suite
Ogden, Utah 84401
telephone: (801)629—8150, facsimile: (801)629—8154

***** RECITALS *****

WHEREAS, APPLICANT desires:

- _____ a conditional use permit (permit # _____)
- _____ subdivision recordation
- _____ a building permit (permit # _____)
- _____ a temporary occupancy permit
- _____ a business license
- _____ an excavation permit
- _____ OTHER (explain)

from City for _____;
[description or name of project as used in development approvals]

located at _____ ; and
[insert street and number address of project]

WHEREAS, approval by the City is conditioned upon completion by the APPLICANT of improvements (herein the “Improvements”) as described in approved plans, and as specified in Exhibit A attached hereto and incorporated herein by reference; and

WHEREAS, CITY will not grant said approval until adequate provision has been made to guarantee completion of the Improvements and warrant the Improvements from any defects, which Improvements are estimated to cost \$ _____ *[insert estimated cost as approved by City]* and which Improvements shall be installed in accordance with the applicable ordinances and specifications of CITY; and

WHEREAS, provision has been made whereby APPLICANT may, in lieu of final completion of the Improvements prior to development approval, file a guarantee acceptable to CITY to secure the actual construction of the Improvements in a manner satisfactory to CITY.

NOW, THEREFORE, in consideration of the premises and other valuable consideration, the parties agree as follows:

1. ADDITIONAL DEFINITIONS.

- 1.1 APPLICANT, DEPOSITORY and CITY, as used in this Agreement, shall also refer to all heirs, executors, administrators, successors, and/or assigns of APPLICANT, DEPOSITORY and CITY, respectively.
 - 1.2 “Estimated Improvement Costs,” as used in this Agreement, means the estimated costs as approved by the City to construct or install the Improvements as outlined in this Agreement and as further calculated in **Exhibit A** .
 - 1.3 “Failure to Perform” or “Fail to Perform,” as used in this Agreement, means, in addition to failing to satisfactorily complete the Improvements within the time allowed in paragraph 5, the non-performance in a timely manner by a party to this Agreement of any obligation, in whole or in part, required of such party by the terms of this Agreement or required by Ogden City ordinance or other applicable law. The occurrence of such shall give the other party or parties the right to pursue any and all remedies available at law, in equity, and/or otherwise available pursuant to the terms of this Agreement.
 - 1.4 “Incidental Costs,” as used in this Agreement, means direct or indirect costs, such as engineering and architect fees, administrative expenses, court costs, attorneys’ fees (whether incurred by in-house or independent counsel), insurance premiums, performance bonds, payment bonds, mechanic’s or materialmen’s liens, and/or any other cost and interest thereon incurred by CITY, occasioned by APPLICANT’S Failure to Perform any and/or all obligations under this Agreement.
 - 1.5 “Retainage,” as used in this agreement, means 10% of the Estimated Improvement Costs or 10% of the actual cost of constructing and installing the Improvements if Applicant provides CITY with evidence, deemed satisfactory by CITY, of the actual costs of the Improvements.
2. PURPOSE FOR AGREEMENT. The parties hereto expressly acknowledge that the purpose of this Agreement is not only to guarantee the proper completion of the Improvements named herein, but also, among other things, to eliminate and avoid the harmful effects of unauthorized subdivisions or land developments which may leave property and/or improvements improperly completed, undeveloped and/or unproductive.
 3. UNRELATED OBLIGATIONS OF APPLICANT. The benefits and protection provided by this Agreement shall inure solely to CITY and not to third parties, including, but not limited to, purchasers, contractors, subcontractors, laborers, suppliers, or others. DEPOSITORY and CITY shall not be liable to claimants or others for obligations of APPLICANT under this Agreement. CITY shall further have no liability for payment of any costs or expenses of any party who attempts to make a claim under this Agreement, and shall have under this Agreement no obligation to make payments to, give notices on

behalf of, or otherwise have obligations to any alleged claimants under this Agreement.

4. AGREEMENT DOCUMENTS. All data which is used by CITY to compute the cost of the Improvements or otherwise govern the design and installation of the Improvements is hereby made a part of this Agreement, and is incorporated herein by this reference. If this Agreement covers improvements required in a subdivision, site plan, or permit, this Agreement then incorporates herein by reference the approved plat, site plan, or permit, and any improvement plans which otherwise govern the design and installation of the Improvements, and all ordinances and standards governing the completion of such Improvements.

5. COMPLETION DATE. APPLICANT shall complete the Improvements: *[check & complete]*

_____ within a period of two years from the date this Agreement was entered into. *[For subdivisions, unless it is a private subdivision with onsite landscaping requirements under the Ogden City Zoning Ordinances.]*

—or—

_____ Before occupancy or use of any building, structure or improvement associated with the project or before issuance of an occupancy permit by the City. In the case of inclement weather that prevents the installation of the required improvements, the time for completion of the Improvements may be extended, in writing, upon approval of the CITY in conjunction with issuance of a temporary occupancy permit; however, in no case shall the time for completion be extended beyond the date of issuance of a temporary certificate of occupancy beyond the first day of June immediately following the date of issuance of such temporary certificate of occupancy. *[For installation of landscaping or other improvements required under the Ogden City Zoning Ordinances.]*

_____ within a period of _____ years/months/days (circle one) from the date this Agreement was entered into. *[Use only if specifically approved or required by City.]*

—or—

_____ As specified in Exhibit B, attached hereto and incorporated herein by this reference. *[Use only if specifically approved or required by City.]*

6. SPECIFIC ENFORCEMENT. APPLICANT and DEPOSITORY have entered into this Agreement with CITY for the purpose of guaranteeing construction of the Improvements. CITY shall be entitled to specifically enforce APPLICANT'S obligation under this Agreement to construct and install the Improvements in a manner satisfactory to CITY. CITY shall also be entitled to specifically enforce DEPOSITORY'S own performance

required by this Agreement.

7. **APPLICANT'S INDEPENDENT OBLIGATION.** APPLICANT expressly acknowledges, understands, and agrees: (a) that its obligation to complete and warrant the Improvements and/or fulfill any other obligation under this Agreement or Ogden City ordinances and standards is independent of any obligation to CITY, either express or implied; (b) that its' obligation to complete and warrant the Improvements is and shall not be conditioned upon the commencement of actual construction work in the subdivision or development or upon the sale of actual construction work in the subdivision or development; (c) that its obligation to complete and warrant the Improvements is independent of any other remedy available to CITY to secure proper completion of the Improvements; (d) that APPLICANT may not assert as a defense that CITY has remedies against other entities or has other remedies in equity or at law that would otherwise relieve APPLICANT of its duty to perform as outlined in this Agreement, or preclude CITY from requiring APPLICANT'S performance under this Agreement.
8. **APPLICANT'S OBLIGATION FOR COSTS.** It is expressly understood and agreed upon among the parties that this Agreement shall not relieve APPLICANT from the obligation to complete and pay for the Improvements in full. Should APPLICANT Fail to Perform in any degree its responsibilities under this Agreement, APPLICANT agrees to compensate CITY for all costs, including Incidental Costs, related to the APPLICANT'S Failure to Perform its obligation to complete and warrant the Improvements to the extent that such costs are not adequately covered by the Proceeds.
9. **ESCROW ACCOUNT.** As an independent guarantee to CITY for the purpose of ensuring construction and installation of the Improvements APPLICANT hereby assigns and sets over to CITY all its right, title and interest in and to that certain Escrow Account with DEPOSITORY, entitled: _____ (herein the "Account") (*insert name and account number of Escrow Account*) in the amount of: \$ _____ (herein the "Proceeds"). The City makes no claim regarding interest which may be earned on such account. DEPOSITORY hereby affirms and covenants that the Proceeds in the Account are currently available; that the Account is not a line-of-credit, mortgage or other type of extended credit account; and that it is not aware of any other person or entity who may have a claim to the Proceeds.
10. **EXTENT OF DEPOSITORY LIABILITY: INDEPENDENT OBLIGATION.** DEPOSITORY hereby acknowledges and agrees that (a) it has on deposit to the credit of APPLICANT in the account referenced above, the sum mentioned as the Proceeds, that it is aware of, understands and agrees to, each provision of this Agreement, that it agrees to make disbursement of the Proceeds of the Account only within the terms as outlined in this Agreement, and that it will hold the Proceeds in the Account indefinitely until such time as CITY, in writing, either demands the Proceeds be remitted to CITY, or otherwise releases DEPOSITORY from its obligation to hold the Proceeds; (b) should DEPOSITORY fail to timely perform its obligations as outlined herein, DEPOSITORY shall be liable to CITY for all costs incurred by CITY in completing and/or repairing the

Improvements to the maximum extent of the Proceeds, along with any and all Incidental Costs incurred by CITY in attempting to enforce DEPOSITORY'S obligations under this Agreement or in completing and/or repairing the Improvements as a result of DEPOSITORY'S Failure to Perform its obligations under this Agreement; (c) this paragraph shall not limit the right of CITY to pursue any and all remedies it may have in equity or at law as a result of DEPOSITORY'S Failure to Perform under this Agreement; (d) its obligation under this Agreement is independent of any obligation of CITY, either express or implied; (e) its performance is not and shall not be conditioned upon the commencement of actual construction work in the subdivision or development, or upon the sale of any lots or any part of the subdivision or development; and (f) its obligations under this Agreement are independent of any other remedy available to CITY to secure proper completion of the Improvements and therefore, acknowledges that DEPOSITORY may not assert as a defense that CITY has remedies against other persons or entities or has other remedies in equity or at law that would otherwise relieve DEPOSITORY of its duty to perform as outlined in this Agreement, or preclude CITY from requiring DEPOSITORY'S performance under this Agreement.

11. **PARTIAL RELEASE OF PROCEEDS.** As the Improvements are accepted by City, a portion of the Proceeds may be released to Applicant upon Applicant's written request. Such requests may be made only once every 30 days. The amount of any requested release shall be determined in the sole discretion of City. No release shall be authorized until such time as City has inspected the Improvements and found them to be in compliance with City standards. Completion of Improvements, even if verified by City, shall not entitle Applicant to an automatic release of any part of the Proceeds. The release of any Proceeds shall be evidenced by the written authorization of City.
12. **FINAL ACCEPTANCE.** Notwithstanding the fact that certain of the Proceeds may be released upon partial completion of the Improvements, neither shall any partial release nor full release of the Proceeds constitute final acceptance of the Improvements by CITY. Final acceptance of the Improvements shall be official only upon written notice to APPLICANT from CITY expressly acknowledging such.
13. **WARRANTY OF IMPROVEMENTS.** Applicant hereby warrants that the Improvements shall remain free from defects or damage following final inspection, and acceptance or approval, as applicable, of the Improvements, such that the Improvements continue to meet City standards, as determined by City, for one year following said final inspection and acceptance or approval, as applicable (the 'Warranty Period'). The term of this Agreement shall extend to the end of the Warranty Period unless terminated earlier as allowed by paragraph 16.
14. **RETAINAGE DURING WARRANTY PERIOD.** APPLICANT and DEPOSITORY expressly agree that notwithstanding any partial release of any of the Proceeds requested by APPLICANT and/or granted by CITY, the Proceeds shall not be released below the amount of the Retainage for one year following final inspection and/or acceptance of the

Improvements. The Retainage shall be held to ensure that if Improvements have any latent defects or damage as determined by City, the Improvements will be repaired or replaced to meet City standards for one year after said final acceptance. Notwithstanding retention of said Retainage, Applicant shall be responsible for any substandard, defective, or damaged Improvements if the Retainage is inadequate to cover the full cost of repairing or replacing any such Improvements.

15. **APPLICANT INDEMNIFICATION.** APPLICANT agrees to indemnify, save harmless and defend CITY, its officers, agents and employees, from and against any and all liability which may arise as a result of the installation of the Improvements prior to CITY'S final acceptance of the Improvements as defined herein and any and all liability which may arise as a result of any Improvements which are found to be defective during the one (1) year warranty period covered by this Agreement. With respect to Applicant's agreement to defend City, as set forth above, City shall have the option to either provide its own defense, with all costs for such being borne by Applicant, or require that Applicant undertake the defense of City.
16. **FINAL RELEASE OF PROCEEDS.** Upon final acceptance and/or approval of all Improvements, the Proceeds, not including the Retainage, will be released to the Applicant. The Retainage will be held for the Warranty Period to ensure that the Improvements do not have any latent defects or damage as determined by City. If at the end of the Warranty Period the Improvements have remained free of defect or damage, the Retainage will be released to the Applicant. At Applicant's request, all of the Proceeds may be released and this Agreement terminated upon final acceptance and/or approval of the Improvements if a separate and independent financial guarantee is first provided in the amount of the Retainage to warranty the Improvements as described in this Agreement.
17. **DEMAND FOR PROCEEDS.** In the event the Improvements are not installed to the satisfaction of CITY pursuant to this Agreement and Ogden City Ordinances, within the above stated time period, and/or APPLICANT fails to perform any obligation under this Agreement or Ogden City Ordinances, DEPOSITORY shall remit to CITY, upon CITY'S written demand, the Proceeds. CITY may use and expend all the Proceeds, or such lesser amount as may be estimated by CITY to be necessary to complete the Improvements as required herein.
18. **INCIDENTAL COSTS.** If, upon CITY'S written notice to DEPOSITORY of APPLICANT'S Failure to Perform, the Proceeds are not remitted to CITY within thirty (30) days of demand, the CITY'S costs of obtaining the Proceeds and/or completing the Improvements and all Incidental Costs shall be added to the amount due CITY from DEPOSITORY, and shall be paid to CITY in addition to and with the Proceeds.
19. **INADEQUATE PROCEEDS.** If the Proceeds are inadequate to pay the cost of the completion of the Improvements according to CITY standards for whatever reason, including previous reductions, APPLICANT shall be responsible for the deficiency independent of DEPOSITORY. Additionally, no further permits shall be issued, no

certificates of occupancy issued, no business license shall be issued, and further, any existing permits or business licenses applicable to the completion of the Improvements may be immediately suspended or revoked by the Mayor, or other City official authorized by the Mayor to revoke such permits or licenses, until the Improvements are completed, or, until sufficient funds have been deposited in the Account to ensure completion of the remaining Improvements. Furthermore, the cost of completion of the Improvements shall include reimbursement to CITY for all costs including but not limited to construction costs and any Incidental Costs incurred by CITY in completing the Improvements and/or collecting the Proceeds.

20. **ACCESS TO PROPERTY.** Should CITY elect to use the Proceeds to complete the Improvements, APPLICANT herein expressly grants to CITY and any contractor or other agent hired by CITY the right of access to the project property to complete the Improvements.
21. **SUBSTANDARD IMPROVEMENTS.** Should any Improvements prove to be substandard or defective within the one year warranty period discussed above, CITY shall notify APPLICANT in writing of such substandard or defective Improvements. APPLICANT shall then have 15 days from notice from the CITY to commence repair of the Improvements, and a reasonable amount of time as determined by CITY which shall be specified in the notice, to complete repair of the Improvements. Should APPLICANT fail to either commence repair of the Improvements or complete repair of the Improvements within the required time periods, CITY may exercise its option to remedy the defects and demand payment for such from DEPOSITORY and APPLICANT, should the Proceeds be insufficient to cover the costs incurred by CITY.
22. **INSURANCE & INDEMNIFICATION.** Should CITY elect to install, complete or remedy any defect or damage in the Improvements, APPLICANT shall be responsible for the payment of the premium for an insurance policy covering any liability, damage, loss, judgment or injury to any person or property, including but not limited to damage to APPLICANT or its property as a result of the work of any contractor or agent hired by CITY to complete or remedy the Improvements. The minimum dollar amount and the scope of coverage of the insurance policy shall be determined and set by CITY. APPLICANT shall indemnify, defend and hold harmless CITY, its officers and employees from any liability which exceeds the insurance policy limit. APPLICANT further agrees that CITY, at its option, may collect and expend the Proceeds to make the premium payments should APPLICANT fail to pay said premium. No permit, approval or business license shall be issued by CITY and any existing permit, approval or business license shall be suspended until said premium is initially paid and a bond is in place to cover subsequent payments. APPLICANT further agrees to indemnify, defend and hold harmless CITY, its officers and employees for or from any damage or loss suffered or any judgment resulting from the work of any contractor or agent hired under the terms of this paragraph by CITY on behalf of APPLICANT.
23. **NOTICE.** Notice to APPLICANT, CITY or DEPOSITORY shall be mailed or delivered to the address shown in this Agreement. The date notice is mailed or delivered to the

address shown in this Agreement shall be the date of actual notice, however accomplished.

24. **MECHANIC/MATERIAL LIENS.** Should CITY elect to complete or remedy the Improvements, APPLICANT shall indemnify, defend and hold harmless CITY from and against any liability which exceeds the Proceeds for the payment of any mechanic's or materialmen's liens as a result of any work of any contractor (including subcontractors and materialmen of any such contractor or agent) hired by CITY or which may arise due to either a defect in or failure of this Agreement or insufficient Proceeds to cover such costs.
25. **FAILURE TO PERFORM.** In addition to those events previously or subsequently described herein, the following shall be considered Failure to Perform on the part of APPLICANT, the occurrence of which shall entitle CITY to invoke any and all remedies outlined in this Agreement or any and all remedies it may have in equity or at law: APPLICANT'S abandonment of the project as determined by CITY; APPLICANT'S insolvency, appointment of a receiver or filing a voluntary or involuntary petition in bankruptcy; the commencement of a foreclosure proceeding against the project property; or the project property being conveyed in lieu of foreclosure.
26. **WAIVER.** The failure by any party to insist upon the strict performance of any covenant, duty, agreement or condition of this Agreement, or to exercise any right or remedy consequent to a Failure to Perform, shall not constitute a waiver of any such Failure to Perform or of any other covenant, agreement, term or condition. No waiver shall effect or alter the remainder of this Agreement but each and every other covenant, agreement, term and condition hereof shall continue in full force and effect with respect to any other then existing or subsequently occurring failure to perform.
27. **ATTORNEYS' FEES.** In the event there is a Failure to Perform under this Agreement and it becomes reasonably necessary for any party to employ the services of an attorney in connection therewith (whether such attorney be in house or outside counsel), either with or without litigation, on appeal or otherwise, the losing party to the controversy shall pay the successful party reasonable attorneys' fees incurred by such party, and, in addition, such costs and expenses as are incurred in enforcing this Agreement.
28. **TIME IS OF THE ESSENCE.** Time is of the essence of this Agreement. In case either party shall Fail to Perform the obligations on its part at the time fixed for the performance of such obligations by the terms of this Agreement, the other party may pursue any and all remedies available in equity, or law.
29. **GOVERNING LAW.** This Agreement shall be interpreted pursuant to, and the terms thereof governed by, the laws of the State of Utah. This Agreement shall be further governed by CITY ordinances and standards in effect at the time of the execution of this Agreement. However, the parties expressly acknowledge that any subdivision or other development regulations enacted after the execution of this Agreement reasonably necessary to protect the health, safety and welfare of the citizens of CITY, shall also

apply to the subdivision or development which is the subject of this Agreement.

30. INDUCEMENT, INTEGRATION, MODIFICATION, CAPTIONS, SEVERABILITY.

30.1 The making and execution of this Agreement has been induced by no representations, statements, warranties or agreements other than those herein expressed.

30.2 This Agreement embodies the entire understanding of the parties and there are no further or other agreements or understandings, written or oral, in effect between the parties, relating to the subject matter herein.

30.3 This instrument may be amended or modified only by an instrument of equal formality signed by the respective parties.

30.4 The titles or captions of this Agreement are for convenience only and shall not be deemed in any way to define, limit, extend, augment, or describe the scope, content or intent of any part or parts of this Agreement.

30.5 If any portion of this Agreement is declared invalid by a court of competent jurisdiction, the remaining portions shall not be affected thereby, but shall remain in full force and effect.

31. ASSIGNABILITY, NO THIRD PARTY BENEFICIARY. No right or rights shall ever be assigned or sublet in part or in whole without the written consent of the parties to this Agreement. This Agreement is made solely and specifically between and for the benefit of the parties to it and their respective successors and assigns subject to the provisions of it relating to successors and assigns, and no other person, individual, corporation or entity, shall have any rights, interest, or claims under this Agreement or be entitled to any benefits on account of this Agreement as a third party beneficiary or otherwise.

WHEREUPON, the parties hereto have set their hands the day and year first above written.

APPLICANT

DEPOSITORY

By: _____

By: _____

Title: _____

Title: _____

(Signature must be notarized on applicable page)

(Signature must be notarized on applicable page)

CITY

OGDEN CITY, a Utah Municipal Corporation

By: _____

Title: _____

(Public Works Director/City Engineer/
Community Development Director/Chief
Deputy/Current Planning Manager)

ATTEST:

CITY RECORDER

Approved as to form:

CITY ATTORNEY

STATE OF UTAH)
 : SS
COUNTY OF WEBER)

On this _____ day of _____, 20____, personally appeared before me
_____, the _____ of Ogden City, the signer of the
foregoing instrument who duly acknowledged to me that he/she executed the same on behalf of
Ogden City.

My Commission Expires: _____ NOTARY PUBLIC

APPLICANT NOTARY

(Complete only if APPLICANT is an Individual)

STATE OF _____)
:SS
COUNTY OF _____)

On this _____ day of _____, 20____, personally appeared before me, _____, the signer(s) of the foregoing instrument who duly acknowledged to me that he/she/they executed the same.

My Commission Expires: _____
NOTARY PUBLIC

(Complete only if APPLICANT is a Corporation)

STATE OF _____)
:SS
COUNTY OF _____)

On this _____ day of _____, 20____, personally appeared before me, _____ who being by me duly sworn did say that he/she is the _____ of _____ corporation, and that the foregoing instrument was signed in behalf of said corporation by authority of its Board of Directors, and who acknowledged to me that said corporation executed the same.

My Commission Expires: _____
NOTARY PUBLIC

(Complete only if APPLICANT is a Partnership)

STATE OF _____)
:SS
COUNTY OF _____)

On this _____ day of _____, 20____, personally appeared before me, _____, who being by me duly sworn did say that he/she/they is/are the _____ of _____ a partnership, and that the foregoing instrument was duly authorized by the partnership at a lawful meeting held or by authority of its by—laws and signed in behalf of said partnership.

My Commission Expires: _____
NOTARY PUBLIC

DEPOSITORY NOTARY

(Complete only if DEPOSITORY is an Individual)

STATE OF _____)
: SS
COUNTY OF _____)

On this ____ day of _____, 20____, personally appeared before me, _____, the signer(s) of the foregoing instrument who duly acknowledged to me that he/she/they executed the same.

My Commission Expires: _____
NOTARY PUBLIC

(Complete only if DEPOSITORY is a Corporation)

STATE OF _____)
:SS
COUNTY OF _____)

On this ____ day of _____, 20____, personally appeared before me, _____ who being by me duly sworn did say that he/she is the _____ of _____ corporation, and that the foregoing instrument was signed in behalf of said corporation by authority of its Board of Directors, and he acknowledged to me that said corporation executed the same.

My Commission Expires: _____
NOTARY PUBLIC

(Complete only if DEPOSITORY is a Partnership)

STATE OF _____)
:SS
COUNTY OF _____)

On this ____ day of _____, 20____, personally appeared before me, _____, who being by me duly sworn did say that he/she/they is/are the _____ of _____ a _____ partnership, and that the foregoing instrument was duly authorized by the partnership at a lawful meeting held or by authority of its by-laws and signed in behalf of said partnership.

My Commission Expires: _____
NOTARY PUBLIC