

TOWN OF COLCHESTER
PUBLIC IMPROVEMENT AGREEMENT

1. **Parties:** The parties to the Public Improvement Agreement ("the Agreement") are _____ ("the Developer") and Town of Colchester ("the Town").
2. **Effective Date:** The Effective Date of this Agreement will be the date that findings of fact and order of approval is granted by the Town's Development Review Board ("the D.R.B.").

RECITALS

WHEREAS, the Developer seeks approval to improve a property within the Town to be known as _____, which property (the "Property") is more particularly described on Exhibit A attached hereto and incorporated herein by reference (the "Property Plan"); and

WHEREAS, the Town's regulations are established to protect the public health, safety and general welfare by requiring the completion of various public improvements in order to limit harmful effects caused by substandard public improvements; and

WHEREAS, the purpose of this Agreement is to protect the Town from the cost of completing public improvements and not to benefit the Developer of the Property or materialmen, laborers, or others providing work, services or material to the Property ; and

WHEREAS, the mutual promises, covenants, and obligations contained in this Agreement are authorized by Chapter 117 of Title 24 Vermont Statutes Annotated and the Town's regulations;

THEREFORE, the Parties hereby agree as follows:

DEVELOPER'S OBLIGATIONS

3. **Improvements:** The Developer shall construct and install, at the Developer's own expense, those on-site and off-site public improvements listed on Exhibit B (construction plans with a schedule of costs) attached hereto and incorporated herein by this reference ("the Improvements"). By signing below the Developer acknowledges and agrees that the Improvements are necessary to mitigate adverse impacts created by the development or redevelopment of the Property. The obligations of the Developer contained herein will arise upon the issuance of findings of fact and order of approval by the Town Development Review Board (the "Effective Date"). Said obligations of the Developer shall be independent of any obligations of the Town contained herein, and shall not be conditioned on the commencement of construction on the Property or Improvements to the Property.

4. **Surety: Construction Surety.** To secure the performance of Developer's obligations hereunder, the Developer, on or prior to the Effective Date, shall deposit with the Town a surety instrument (in the form of an escrow deposit, irrevocable letter of credit, or other form of surety acceptable to the Town and approved by the Town Attorney) in the amount of _____ and 00/100 Dollars (\$_____) (the "Construction Surety Instrument"). Said Construction Surety Instrument shall be issued by _____ ("Bank"), shall be payable on sight to the Town, and shall bear an expiration date not earlier than two (2) years after the Effective Date. Said Construction Surety Instrument is intended to ensure and secure the completion of all improvements as required under this Agreement and the Development Review Board Order of Approval until the Town has accepted the Improvements. It may be extended at the election of the Town in the event that the Town has not accepted the Improvements prior to the expiration of said two year period. If the Construction Surety Instrument is a letter of credit, it shall conform substantially to Exhibit C attached hereto and incorporated herein by reference.

Warranty Surety. It is the intent of the parties that from the Effective Date to the end of the Warranty Period, there shall be a Surety Instrument in place. To secure the Developer's obligations during the Warranty Period, the Developer shall deposit with the Town at the time Developer offers the Improvements for acceptance by the Town, a Surety Instrument to cover the warranty period referenced in paragraph 6 below

("Warranty Surety Instrument"). If the Warranty Surety Instrument is a letter of credit, it shall conform substantially to Exhibit C-1 attached hereto and incorporated herein by reference.

Any Surety Instrument referenced herein shall be payable to the Town of Colchester at any time upon presentation of (i) a sight draft drawn on the issuing Bank in the amount to which the Town is entitled to draw pursuant to the terms of this Agreement; (ii) an affidavit executed by an authorized Town official stating that the Developer is in default under this Agreement; and (iii) an executed original or a copy of the applicable Surety Instrument.

5. **Standards:** The Developer shall construct the Improvements according to the standards and specifications approved by the Town's Engineer as set forth on Exhibit D (site construction permit with specific standards and conditions) attached hereto and incorporated herein by reference.

6. **Warranty:** The Developer warrants that each of the Improvements shall be free from defects for a period of two (2) years following the date that the Town accepts the dedication of the last Improvement completed by the Developer (the "Warranty Period").

7. **Commencement and Completion Periods:** The Developer shall commence work on the Improvements within 30 days from the Effective Date of this Agreement (the "Commencement Period"), and shall complete each and every Improvement within two years from the Effective Date of this Agreement (the "Completion Period"). Developer shall not cease construction activities for any period of more than 60 consecutive days (the "Abandonment Period"). For good cause shown, Developer may request and the Development Review Board may grant a reasonable modification of this provision.

8. **Compliance with Law:** The Developer shall comply with all applicable laws, ordinances, and regulations in effect at the time of findings of fact and order of approval. Developer acknowledges that the Property may be subject to laws, ordinances and regulations that become effective after findings of fact and order of approval.

9. **Dedication:** The Developer shall offer and dedicate to the Town the Improvements listed on Exhibit (B) attached hereto and incorporated herein by reference, pursuant to the procedure described in Paragraph 13 below.

TOWN'S OBLIGATIONS

10. **Plan Approval:** The Town Development Review Board shall issue findings of fact and order of approval for the development of the Property consistent with the terms and conditions agreed to herein by the Parties, so long as those terms and conditions are consistent with applicable state laws and local ordinances in effect at the time of issuance of said findings of fact and order.

11. **Inspections and Certification:** Developer shall notify the Town of the completion of the various phases of the Property. Provided the Town is given timely and adequate notice of completion, the Town shall inspect the Improvements as they are completed. If the Improvements are acceptable to the Town Engineer, the Engineer, or her/his designate, shall certify that such Improvements are in compliance with the standards and specifications on Exhibit D. Such inspection and certification, if appropriate, will occur within 14 days of notice by the Developer that he/she/it desires to have the Town inspect an Improvement.

Lien Waivers. Before obtaining certification of any such Improvement, the Developer shall present to the Town valid lien waivers from all persons providing materials or performing work on the Improvements for which certification is sought. Certification by the Town Engineer does not constitute a waiver by the Town of the right to draw funds under the any Surety Instrument because of defects in or failure of any Improvement detected or occurring after such certification.

12. **Notice of Defect; Time to Cure:** The Town shall provide timely notice to the Developer whenever inspection reveals that an Improvement a) does not conform to the standards and specifications shown on Exhibit D, or b) is otherwise defective. The Developer shall have 30 days from the issuance of such notice to cure or substantially cure the defect. The Town may not declare a default under this Agreement during the 30 day cure period based on such defect unless it is clear that the Developer does not intend to cure the defect. The Developer shall have no right to cure defects in or failure of any Improvement found to exist or occurring after the Town accepts dedication of the Improvement(s).

13. **Acceptance of Dedication:** The Select Board of the Town of Colchester shall consider formal acceptance of the Developer's offer to dedicate an Improvement as long as the Developer meets all of the following conditions:

- 1) Said Improvement is certified by the Town Engineer as being constructed and complete in accordance with the approved plans,
- 2) Developer has provided the Town with a Surety Instrument (either for the construction period or the warranty period as appropriate) which meets the requirements of paragraph 4 herein,
- 3) The Developer has formally offered such improvement to the Town in writing.
- 4) The Developer has presented to the Select Board all applicable studies, including warrant analysis and speed analysis, and any other information required by the town's regulations, state law, of the applicable town and/or state approvals, in conjunction with the installation of traffic control measures/devices, including but not limited to speed limit signs, no-parking signs, stop signs, yield signs.
- 5) The Select Board has enacted all ordinances and taken all other action necessary for or incidental to the establishment of said traffic control measures/devices to be effective no later than the date upon which the Town formally opens the Improvement for public use.
- 6) The Developer has installed all such traffic control measures/devices and obtained the Town Engineers written certification that said measures/devices and their installation are in compliance with all applicable requirements and standards.
- 7) If acceptance is offered during the winter, the developer shall have suitably maintained the improvement free and clear from snow and ice so as to permit the Town to effectively begin maintenance of the improvement without undue efforts.
- 8) Acceptance of the improvement generally shall not occur until the first structure served by the improvement is ready for occupancy.

If the Developer has met the aforementioned conditions, the Select Board shall consider the Developer's offer to dedicate within 60 days of such request. Improvements shall be considered privately owned until such time as the Improvements have been formally

accepted by ordinance or resolution of the Select Board of the Town of Colchester. The Town's acceptance of dedication is expressly conditioned on the presentation by the Developer of a title opinion, where appropriate, for the benefit of the Town showing that the Developer owns in fee simple the Improvement and any property being dedicated and accepted and that there are no liens, encumbrances, or other restrictions unacceptable to the Town.

Acceptance of the dedication of any Improvement does not constitute a waiver by the Town of the right to draw funds under any Surety Instrument on account of any defect in or failure of the Improvements detected or occurring after the acceptance of the dedication.

14. **Reduction of Surety:** After the acceptance of any Improvement, the amount which the Town is entitled to draw on the applicable Surety Instrument will 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 Town shall execute a certificate verifying the satisfactory completion of the Improvement and waiving its right to draw on the Surety Instrument 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 Surety Instrument will be available to the Town for the Warranty Period.

15. **Use of Proceeds:** The Town shall use funds drawn under the Surety Instrument for the purposes of completing and/or maintaining the Improvements or correcting defects in or failures of the Improvements and any associated legal costs incurred by the Town in obtaining said funds and implementing said improvements.

16. **Events of Default:** The following conditions, events, or actions will constitute a default by the Developer during the Completion Period:

- a. Developer's failure to commence construction of the Improvements within 30 days of final project approval;
- b. Developer's failure to complete construction of the Improvements within two years of said approval;
- c. Developer's failure to cure any defect in any Improvement within the cure period;

- d. Developer's failure to perform work within the Subdivision for a period of more the 60 consecutive days;
- e. 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;
- f. Foreclosure of any lien against the Property or a portion of the Property or assignment or conveyance of the Property in lieu of foreclosure.
- g. Failure of Developer or Bank to extend or renew the surety as provided herein.

The Town shall provide the developer with written notice of default.

17. **Measure of Damages:** The measure of damages for breach of this Agreement will be the reasonable cost of completing the Improvement(s). 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 nor the amount of the Surety Instrument establishes the maximum amount of the Developer's liability. The Town shall 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. **Town's Rights Upon Default:** When any event of default occurs, the Town may draw on the Surety Instrument. The Town shall have the right to complete Improvements itself or contract with a third party for completion, and the Developer hereby grants to the Town, its successors, assigns, agents, contractors, and employees, a nonexclusive right and easement to enter the Property to construct, maintain, and repair such Improvements. Alternatively, the Town may assign the proceeds of the Surety Instrument 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 Town, provided such assignment shall occur if and only if the subsequent developer (or lender) agrees in writing to complete the unfinished Improvements. In addition, until the Improvements are completed and accepted by the Town, the Town 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 Property without the express written approval of the Town. These

remedies are cumulative in nature; except that during the Warranty Period, the Town's first remedy will be to draw funds under the Surety Instrument.

19. **Indemnification:** The Developer hereby expressly agrees to indemnify and hold the Town harmless from and against all claims, costs and liabilities 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 on the property and elsewhere pursuant to this Agreement. The Developer further agrees to aid and defend the Town in the event that the Town is named as a defendant in an action concerning the performance of work pursuant to the Agreement except where such suit is brought by the Developer. The Developer is not an agent or employee of the Town.

20. **No Waiver:** No waiver of any provision of this Agreement, or any rights arising hereunder, shall be effective against a party to this agreement unless expressly provided for by a written amendment to this Agreement signed by said property; nor will the waiver of any default under this Agreement be deemed a waiver of any subsequent default or defaults. The Town's failure to exercise any right under this Agreement shall 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 on behalf of the Town by the Town Manager or his properly authorized designee and on behalf of the Developer by the Developer or his properly authorized designee.

22. **Attorney's Fees:** Should the Developed be declared in default, the Town may utilize funds drawn under the Surety Instrument for the purposes legal fees incurred by the Town in declaring the default and in implementing said improvements or correcting said deficiencies. Additionally, should either party be required to resort to litigation, arbitration, or mediation to enforce the terms of this Agreement, the substantially prevailing party, plaintiff or defendant, will be entitled to all costs, including reasonable attorney's fees and expert witness fees, from the opposing party. If the court, arbitrator, or mediator awards substantial relief to both parties, each shall bear its own costs in their entirety.

23. **No Vested Rights:** This Agreement does not entitle the Developer to any other approval(s) or permits required by the Town, nor does it entitle the Developer to commence

development of the Property or to transfer ownership of Property, unless all required permits have first been obtained.

24. **Third Party Rights:** No person or entity that is not a party to this Agreement shall have any right of action under this Agreement.

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 shall be binding on the parties.

26. **Time:** For the purpose of computing the Commencement, Abandonment, and Completion Periods, and time periods for Town action, such times in which war, terrorism, civil disasters, natural disaster, or extreme weather conditions occur or exist will not be included if such times prevent the Developer or Town from performing their obligations under the Agreement.

27. **Severability:** If any part, term, or provision of this Agreement is held by a court 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 of this Agreement and the rights of the parties shall be construed as if the part, term, or provision was never part of the Agreement.

28. **Binding Effect; Successors and Assigns:** The benefits of this Agreement to the Developer are personal and may not be assigned without the express written approval of the Town. Such approval may not be unreasonably withheld, but any unapproved assignment is void. Notwithstanding the foregoing, the obligations of Developer set forth in this Agreement are the personal obligations of the Developer, but shall also, at the Town's election, be binding on the heirs, successors, and assigns of the Developer. There is no prohibition on the right of the Town to assign its rights under this Agreement. The Town shall release the original developer's obligations under the Surety Instrument if it accepts a new Surety Instrument from any developer or lender who obtains the Property. However, no act of the Town will constitute a release of the original developer from his liability under this Agreement.

29. **Notice:** Any notice required or permitted by this Agreement shall be in writing and will be deemed effective either 1) upon delivery to the party or 2) three (3) days after deposited with the U. S. Postal Service, postage prepaid, certified, return receipt requested, and

addressed as follows:

If to Developer: _____

If to Town: Town of Colchester Department of Planning & Zoning
P. O. Box 55
Colchester, Vermont 05446

Any party may notify the other party of a change of address, provided such notice complies with the provisions of this section.

30. **Recordation:** Either Developer or Town may record a copy of this Agreement in the Town Clerk's Office of the Town of Colchester.

31. **Immunity:** Nothing contained in this Agreement constitutes a waiver of the Town's sovereign immunity.

32. **Jurisdiction and Venue:** Jurisdiction and venue for any civil action commenced by either party to this Agreement whether arising out of or relating to the Agreement or Surety Instrument will be deemed to be proper only if such action is commenced in the Superior Court for Chittenden County. The Developer expressly waives his right to bring such action in or to remove such action to any other court whether state or federal.

Dated at Colchester, Vermont this ____ day of _____, 20__.

IN THE PRESENCE OF:

_____ TOWN OF COLCHESTER

_____ By: _____
Duly Authorized Agent

_____ _____
Developer

_____ By: _____
Duly Authorized Agent

Exhibit A - Property Description.

Exhibit B – On-site and Off-Site Improvements with Estimated Costs (include construction plans).

Exhibit C – Sample Letter of Credit for Construction Period

Exhibit C1 – Sample Letter of Credit for Warranty Period

Exhibit D – Site Construction Permit with Specific Standards and Conditions.

"EXHIBIT C"
(Construction Period)

**PUBLIC IMPROVEMENT AGREEMENT
TOWN OF COLCHESTER
IRREVOCABLE LETTER OF CREDIT**

THE TOWN OF COLCHESTER DATE: _____
COLCHESTER, VERMONT

Dear Sirs:

We hereby open our irrevocable credit in your favor available by your drafts at sight on us for a sum not exceeding \$ _____ for the account of _____ ("Developer"), to be accepted by your signed statement that drawing is due to default or failure to perform by Developer with respect to Developer's obligation to comply with the requirements of a certain Public Improvement Agreement between Developer and the Town of Colchester, including the construction of all Improvements, in connection with the Town's approval of a project known as _____ (the "Project"). This irrevocable letter of credit shall remain open from the date hereof and thereafter for a period of two (2) years, or until the Town accepts all of the improvements required to be completed and offered to the Town by the Developer as a condition of the approval of the Project, whichever occurs sooner; provided, however, in the event the Town has not accepted said improvements by the end of said two year period, the Town may extend this letter of credit for a reasonable period of time to allow the completion of said improvements and acceptance thereof.

Acting through the Town Attorney, you will notify us when either:

- 1). The Town has discovered a defect or failure in an Improvement, which notice must be by affidavit signed by the Town Attorney;
- 2). An event of default has occurred; or
- 3) The Town has accepted all improvements as required and this credit may be released.

All drafts drawn hereunder must be by sight draft marked: "Drawn under _____ ("Bank") Credit No., _____ dated _____, 20 __". The original of the credit must be presented along with any such draft.

The amount of any draft drawn under this credit must, concurrently with negotiation, be endorsed on the reverse side hereof, and the presentment of any such draft will be a warranty by the negotiating bank that such endorsement has been made and that documents have been forwarded as herein required.

Except so far as otherwise expressly stated herein, this credit is subject to the Uniform Customs and Practices for Commercial Documentary Credits fixed by the 13th Congress of the International Chamber of Commerce.

We hereby agree with the drawers, endorses, and bonafide holders of drafts under and in compliance with the terms of this credit that the same will be duly honored and payment made no later than three days after due presentation of the credit and delivery of documents as specified if negotiated on or before _____ (as referenced in paragraph 1 above).

BANK NAME

(Corporate Seal) By: _____
(Authorized signature)

"EXHIBIT C-1"
(Warranty Period)

**PUBLIC IMPROVEMENT AGREEMENT
TOWN OF COLCHESTER
IRREVOCABLE LETTER OF CREDIT**

THE TOWN OF COLCHESTER DATE: _____
COLCHESTER, VERMONT

Dear Sirs:

We hereby open our irrevocable credit in your favor available by your drafts at sight on us for a sum not exceeding \$ _____ for the account of _____ ("Developer"), to be accepted by your signed statement that drawing is due to a defect or failure in any Improvement, as a term defined in the Public Improvement Agreement between Developer and the Town of Colchester, during the two year warranty period following acceptance of said Improvements. This credit shall commence on the date upon which the Town of Colchester formally accepts the said Improvements and shall extend for a period ending on a date two years thereafter.

Acting through the Town Attorney, you will notify us when either:

- 1). The Town has discovered a defect or failure in an Improvement, which notice must be by affidavit signed by the Town Attorney, or
- 2). The warranty period has terminated and the credit may be released.

All drafts drawn hereunder must be by sight draft marked: "Drawn under _____ ("Bank") Credit No., _____ dated _____, 20 __". The original of the credit must be presented along with any such draft.

The amount of any draft drawn under this credit must, concurrently with negotiation, be endorsed on the reverse side hereof, and the presentment of any such draft will be a warranty by the negotiating bank that such endorsement has been made and that documents have been forwarded as herein required.

Except so far as otherwise expressly stated herein, this credit is subject to the Uniform Customs and Practices for Commercial Documentary Credits fixed by the 13th Congress of the International Chamber of Commerce.

We hereby agree with the drawers, endorses, and bonafide holders of drafts under and in compliance with the terms of this credit that the same will be duly honored and payment made no later than three days after due presentation of the credit and delivery of documents as specified if negotiated on or before _____ (as referenced in paragraph 1 above).

BANK NAME

(Corporate Seal) By: _____
(Authorized signature)