

## LANDSCAPING IMPROVEMENT AGREEMENT

1. **Parties:** The parties to the Landscaping 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 the improvements are more particularly described on Exhibit A attached hereto and incorporated herein by reference (the "Landscaping Plan and Schedule"); and

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

**WHEREAS**, the purpose of this Agreement is to protect the Town from the cost of completing landscaping 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**

1. All work herein shall be completed within one (1) year from date of this agreement.
2. **Improvements:** The Developer shall install, at the Developer's own expense, all required

landscaping listed on Exhibit A (landscaping schedule with a schedule of costs) attached hereto and incorporated herein by this reference ("the Improvements").

**3. 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) ("Surety Instrument") in the amount of \_\_\_\_\_ and 00/100 Dollars (\$\_\_\_\_\_) (the "Surety Instrument"). Said 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 Surety Instrument is intended to ensure and secure the completion of all landscaping as required under this Agreement (see Exhibit A) and the Development Review Board Order of Approval (see Exhibit B) until the Town has accepted the landscaping. 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.

**4. 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").

**5. 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.

## TOWN'S OBLIGATIONS

6. **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.

7. **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 Building Inspector, or her/his designate, he/she shall certify that such Improvements are in compliance with the plans and schedule in Exhibit A. 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.** Certification by the Town Building Inspector does not constitute a waiver by the Town of the right to draw funds under the Surety Instrument because of defects in or failure of any Improvement detected or occurring after such certification.

8. **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 A, 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.

9. **Reduction of Surety:** After the acceptance of any Improvement, the amount which the Town is entitled to draw on the Surety Instrument will be reduced by an amount equal to 90 percent of the estimated cost of the Improvement as shown on Exhibit A. 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 completion 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.

10. **Use of Proceeds:** The Town shall use funds drawn under the Surety Instrument only for the purposes of completing and/or maintaining the Improvements or correcting defects in or failures of the Improvements.

11. **Events of Default:** The following conditions, occurrences 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 this agreement;
- b. Developer's failure to complete construction of the Improvements within one year of this agreement;
- c. Developer's failure to cure any defect in any Improvement within the 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.
- f. 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.

12. **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 A 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 on the property or whether development ever commenced.

13. **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 property 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, the Town may suspend DRB 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.

14. **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.

15. **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.

16. **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/her properly authorized designee and on behalf of the Developer by the Developer or his/her properly authorized designee.

17. **Attorney's Fees:** 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.

18. **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.

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

20. **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.

21. **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.

22. **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.

23. **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/her liability under this Agreement.

24. **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.

25. **Recordation:** Either Developer or Town may record a copy of this Agreement in the Town

Clerk's Office of the Town of Colchester.

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

27. **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/her 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 – Landscaping Plan and Schedule  
Exhibit B – DRB Findings of Fact and Order

**LANDSCAPING SCHEDULE OF COSTS**

*(Attach DRB Approved Landscaping Plan)*

_____	(species)	_____	(size)	_____	(cost per unit)	_____	(# of units)	_____	(total cost)
_____	(species)	_____	(size)	_____	(cost per unit)	_____	(# of units)	_____	(total cost)
_____	(species)	_____	(size)	_____	(cost per unit)	_____	(# of units)	_____	(total cost)
_____	(species)	_____	(size)	_____	(cost per unit)	_____	(# of units)	_____	(total cost)
_____	(species)	_____	(size)	_____	(cost per unit)	_____	(# of units)	_____	(total cost)
_____	(species)	_____	(size)	_____	(cost per unit)	_____	(# of units)	_____	(total cost)
_____	(species)	_____	(size)	_____	(cost per unit)	_____	(# of units)	_____	(total cost)
_____	(species)	_____	(size)	_____	(cost per unit)	_____	(# of units)	_____	(total cost)
_____	(species)	_____	(size)	_____	(cost per unit)	_____	(# of units)	_____	(total cost)
_____	(species)	_____	(size)	_____	(cost per unit)	_____	(# of units)	_____	(total cost)

10 percent to be retained.....\$ \_\_\_\_\_

TOTAL.....\$ \_\_\_\_\_