

71- 14
\$7

**CASTLE PINES COMMERCIAL FILING 8
SUBDIVISION IMPROVEMENTS AGREEMENT**

DC9888739

DATE: October 8, 1998.

PARTIES: **TOWN OF CASTLE ROCK**, a Colorado municipal corporation, 680 N. Wilcox Street, Castle Rock, Colorado 80104 ("Town").

CASTLE PARTNERS THREE, LTD., a Colorado limited partnership, 600 17th Street, Suite 750 South, Denver, Colorado 80202 ("Subdivider").

MORTGAGEE: SunAmerica Housing Fund 515

RECITALS:

A. Subdivider desires to plat and subdivide certain property within the Town as Castle Pines Commercial, Filing 8 (the "Subdivision"), more particularly described in the attached *Exhibit 1* (the "Property").

B. The Property is subject to the Development Agreement (Castle Pines Commercial) dated December 2, 1994, recorded on July 14, 1995 at Reception No. 9531414; First Amendment to Development Agreement dated December 19, 1995, recorded on December 20, 1995 at Reception No. 9560844; Second Amendment to Development Agreement dated March 14, 1996, recorded on November 20, 1996 at Reception No. 9664762; and Third Amendment to Development Agreement dated October 24, 1996, recorded on November 15, 1996 at Reception No. 9663946 of the public records of Douglas County, Colorado (as so amended, the "Development Agreement").

C. The subdivision regulations within the Castle Rock Municipal Code and the Development Agreement require that the Subdivider enter into this Agreement for the purpose of securing the timely construction of public improvements necessary to provide public utilities and services to the Subdivision. In addition, the parties have identified the need to address certain other issues concerning development of the Subdivision.

D. This Agreement is intended to protect the Town from any liability or cost which may result from the failure of the Subdivider to

complete construction of such public improvements to Town standards. This Agreement is not made for the benefit of any other party and no representation is made by Town to any owner of a lot or tract within the Subdivision that all necessary infrastructure will be completed by the Town in the event of a default by Subdivider.

E. Mortgagee is a party to this Agreement solely for the purpose of subordinating its lien and interest in the Property to this Agreement.

COVENANTS:

NOW, THEREFORE, in consideration of these mutual promises, the parties agree and covenant as follows:

Section 1. Definitions. The following terms, when capitalized in the text shall have the meanings indicated:

Agreement: the Castle Pines Commercial Filing 8 Subdivision Improvements Agreement.

Improvements: the water, wastewater, stormwater drainage, transportation and landscaping, or other systems or infrastructure required to be constructed under applicable Town regulations to serve the Subdivision (whether on-site or off-site), which upon their completion are to be dedicated to the Town for operation and maintenance by the Town. The Improvements are identified and described in the Plans.

Plans: the description of the Improvements on the Subdivision preliminary plat and related documents as modified and supplemented by approved construction plans and drawings.

Plat: the final Subdivision plat recorded on 11-5-98 at Reception No. 9888738 of the Records.

Property: the real property described in the attached *Exhibit 1*.

Records: the public records of Douglas County, Colorado maintained by the Clerk and Recorder.

Subdivision: Castle Pines Commercial Filing 8.

Certain other terms are defined elsewhere in this Agreement. Section references are to the numbered sections of this Agreement.

Section 2. Construction of Improvements. The Improvements shall be constructed in strict accordance with the Plans, or to the extent not otherwise provided in the Plans, in accordance with applicable Town ordinances, rules and regulations. In the event the Subdivider has not obtained all necessary Town permits and approvals and commenced construction of the Improvements within one year of the date of recordation of this Agreement, the Town's approval of the Subdivision shall lapse. As a condition to commencement of construction of Improvements thereafter, Subdivider shall demonstrate to the Town Council good cause for the delay and its good faith intention and financial ability to proceed and complete development of the Subdivision. Subject to the further restrictions on building permit issuance set forth in section 5, no building permit shall be issued by Town until Improvements are completed and conveyed to the Town in accordance with section 3, provided that the Castlegate Drive West and Atrium Drive Improvements (the "Street Improvements") need not be "functionally completed" until June 1, 1999. If the Street Improvements are not functionally completed by June 1, 1999, thereafter the Town may withhold issuance of building permits and exercise its contractual remedies in accordance with sections 7 and 8. Functionally completed means that the Street Improvements have been opened for public travel by the Town, irrespective of whether the Street Improvements have been provisionally accepted by the Town. Town will not unreasonably delay opening of the Street Improvements for public use. Irrespective of whether building permits are requested, Improvements for which construction is undertaken by the Subdivider must be completed not later than one year after the date of issuance of the first public works permit, except when timely completion is delayed due to adverse weather, material unavailability, or other circumstances beyond the control of the Subdivider.

Section 3. Acceptance. Upon substantial completion of the Improvements, Subdivider may request inspection. Town shall make inspection within five (5) working days of the date Subdivider requests final inspection, and Town shall notify Subdivider of non-conforming work within five (5) working days after the inspection is made. Subdivider shall have thirty (30) days from the date of receipt of Town's inspection report to remedy the non-conforming work unless the remedial work is delayed due to weather conditions, in which event the work shall be completed as soon as reasonably feasible thereafter. With cure of non-conforming work, receipt of as-built plans and initial acceptance of the Improvements by Town,

Subdivider shall promptly convey its interest in the Improvements by document in the form attached as *Exhibit 2*. With conveyance of the Improvements, the warranty period on the Improvements commences.

Section 4. Improvements Security. In accordance with Town regulations, Subdivider shall provide Town with a letter of credit or cash escrow deposit approved the Town Attorney in the amount of 115% of the estimated construction cost of the Improvements (the "Security"). All construction cost estimates shall be submitted by Subdivider's registered civil engineer and review and approved by the Town's engineering division, which cost estimates shall be used to estimate the Security requirement. The purpose of the security is to provide Town with the financial resources to mitigate any public health and safety hazards and/or regrade and revegetate the Property and/or complete construction of any of the Improvements, should Subdivider fail in its obligation to complete the Improvements (the "Remedial Work"). The Town retains the absolute discretion to determine what Remedial Work, if any, is undertaken by Town on the Improvements in the event of such default. With Town's initial acceptance of the Improvements, the Security shall be reduced to 15% of the actual construction cost of the Improvements to secure Subdivider's warranty on the Improvements during the warranty period, commencing with initial acceptance of the Improvements. Upon expiration of the applicable warranty period, or in the event warranty matters have not been rectified within such one year period, as soon thereafter as the Town has finally accepted the Improvements, the balance of the Security for the Improvements shall be refunded or released to Subdivider.

Section 5. Floodplain Map Amendment. A portion of the Property is within the regulatory floodplain, as currently mapped. However, drainage channel improvements will be made as part of the Improvements which the parties believe will support the redefinition of the floodplain by the Federal Emergency Management Agency (FEMA) to exclude the Property, in its entirety, from the floodplain. Town will sponsor and Subdivider shall prepare the necessary engineering and other documentation supporting a request for a conditional letter and map revision ("CLOMR") to FEMA reflecting the drainage Improvements. However, prior to issuance of the CLOMR, no building permits shall be issued for Buildings D and F, nor Garages F and H.

Section 6. Water Supply. The Property is subject to the Castle Pines Commercial Water Rights Dedication Agreement dated December 2, 1994, recorded on July 14, 1995 at Reception No. 9531415 in the Records (the "Water Agreement"). The water demand for the Subdivision has been

calculated by Subdivider's engineer and reviewed and approved by the Town's engineering division based upon the taps to the potable water systems set forth in *Exhibit 3*. According 104 SFE of the "Water Credit" under the Water Agreement have been applied to meet the water supply requirements for the Subdivision, as requested by the Subdivider (the "Subdivision Water Credit"). Town shall not require additional water rights or resources as a condition to issuance of land use approvals within the Subdivision, so long as neither the specified tap sizes increase nor additional taps are added. If additional taps are made or the tap sizes increase from that indicated in *Exhibit 3*, additional entitlements under the Water Agreement must be allocated to the Property and/or Subdivider must provide additional water resources in accordance with chapter 4.04 of the Castle Rock Municipal Code, sufficient to meet the demand in excess of the initial Subdivision Water Credit. Absent compliance with this section, Town may withhold development approvals on the Property for any proposed use, which, after taking into account all previous development on the Property, will create an aggregate water demand in excess of the Subdivision Water Credit (as the same may be subsequently augmented in accordance with this section). Should the Subdivision Water Credit not be fully utilized after full development of the Subdivision, the remaining SFE shall revert to the Castle Pines Commercial Water Bank (as that term is defined in the Water Agreement).

Section 7. Default. The following occurrences constitute a default by Subdivider:

- (a) failure to commence or complete construction of the Improvements within the time periods prescribed in section 3, above;
- (b) failure to cure the defective construction of any Improvement within the applicable cure period;
- (c) failure to perform work on the Improvements required by this Agreement within the Subdivision for a period of more than 90 consecutive days except when such delay is due to adverse weather, material unavailability, or other circumstances beyond the control of Subdivider;
- (d) Subdivider's insolvency, the appointment of a receiver for the Subdivider or the filing of a voluntary or involuntary petition in bankruptcy respecting the Subdivider; and/or

- (e) Subdivider has breached, or caused a breach of any other provision of this Agreement.

As a condition to Town's right to exercise its remedies for default, Town shall give written notice to Subdivider of the occurrence of an event of default. Subdivider shall have 30 calendar days from the receipt of such notice to cure the default. If timely cure of the noticed default(s) is not accomplished, Town shall thereafter be entitled to pursue its remedies against Subdivider.

Section 8. Town's Rights Upon Default. When any event of default occurs and has not been timely cured, the Town may:

- (a) if the applicable Improvements have not been timely completed, call the Security in accordance with its terms, and apply the Security for the Remedial Work. Subdivider grants to Town and, if applicable, the surety, and their employees, agents and contractors, a non-exclusive right and easement to enter onto the Property after an uncured default for the purpose of undertaking the Remedial Work.

- (b) if improvements have not been timely completed, withhold issuance of building permits, certificates of occupancy and tap connections.

- (c) record a notice of non-compliance with this Agreement in the public records to provide record notice of Subdivider's default, which notice shall promptly be released by Town upon cure of the default; and

- (d) bring suit against Subdivider for money damages and/or equitable relief for breach of this Agreement.

Section 9. Substituted Performance. Subdivider may cause third parties to construct all or a portion of the Improvements, and Town shall accept performance by a third party in conformance with the terms and conditions of this Agreement.

Section 10. Indemnification. Subdivider indemnifies and holds the Town 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 construction or repair of the Improvements by Subdivider.

Section 11. 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 Town and Subdivider, 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 Town's failure to exercise any right under this Agreement will not constitute the approval of any wrongful act by Subdivider or the acceptance of any Improvement.

Section 12. Attorney's Fees. Should either party be required to resort to litigation 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 awards relief to both parties, each will bear its own costs in their entirety.

Section 13. Notice. Any notice required or permitted by this Agreement will be deemed effective when personally delivered in writing or by facsimile, or three (3) days after notice is deposited in the U.S. Postal Service, postage prepaid, certified, return receipt requested, and addressed as follows:

if to Subdivider: Castle Partners Three, Ltd.
600 17th Street, Suite 750 South
Denver, CO 80202

if to Town: Town of Castle Rock
Attn: Town Attorney
680 N. Wilcox Street
Castle Rock, CO 80104

Section 13. Recordation. This Agreement shall be recorded with the Clerk and Recorder's office of Douglas County, Colorado and shall be binding upon the assigns, successors, and grantees of Subdivider in the same manner as if such third parties were signatories of this Agreement.

Section 14. Immunity. Nothing contained in this Agreement constitutes a waiver of the Town's sovereign immunity under any applicable state law.

EXHIBIT 1

9888739 - 11/05/98 14:57 - RETA A. CRAIN DOUGLAS CO. COLO. CLERK & RECORDER
B1621 - P0650 - \$70.00 - 11/ 14

LEGAL DESCRIPTION - Castle Pines Commercial Filing 8

A tract of land located in the Southwest quarter of Section 22, and the Northwest quarter of Section 27, Township 7 South, Range 67 West of the 6th Principal Meridian, Douglas County, Colorado, being described as follows:

Commencing at the Southwest corner of said Section 22 and considering the South line of said Southwest quarter to bear South 89°10'01" East with all bearings contained herein, relative thereto; thence South 40°44'34" East, 776.73 feet to the most Southerly corner of Tract A of Castle Pines Commercial Filing 6, according to the recorded plat thereof, and the POINT OF BEGINNING of this description; thence along the Southeast line of said Tract A, North 44°32'19" East, 967.85 feet to the West right-of-way line of Castlegate Drive West; thence along said right-of-way line the following courses: along a non-tangent curve to the left having a delta of 01°44'25", a radius of 965.00 feet, an arc of 29.31 feet and a chord which bears South 39°14'40" East, 29.31 feet; thence South 40°06'53" East, 435.28 feet; thence along a curve to the right having a delta of 33°33'26", a radius of 565.00 feet and an arc of 330.91 feet; thence South 06°33'27" East, 46.15 feet; thence departing said right-of-way line, South 67°49'25" West, 864.10 feet; thence along a non-tangent curve to the left having a delta of 10°37'55", a radius of 2480.00 feet, an arc of 450.19 feet and a chord which bears North 42°47'12" West, 459.53 feet to the POINT OF BEGINNING of this description, containing 13.89 acres, more or less.

(EXEMPLAR – NOT FOR EXECUTION)

9888739 - 11/05/98 14:57 - RETA A. CRAIN DOUGLAS CO. COLO. CLERK & RECORDER
E1621 - P0651 - \$70.00 - 12/ 14

EXHIBIT 2
PUBLIC IMPROVEMENTS CONVEYANCE AND INITIAL ACCEPTANCE

TRANSFEROR: _____

TRANSFOREE: Town of Castle Rock, a municipal corporation, ("Town")
680 North Wilcox Street
Castle Rock, Colorado 80104

Transferor has caused to be constructed certain public improvements and facilities described in the attached *Exhibit A* (the "Improvements"), as required by Town to serve Castle Pines Commercial Filing 8. Town will assume the obligation for maintenance and operation of the Improvements, located in rights-of-way, easements or other real property owned by Town, upon the conveyance of the Improvements to Town.

THEREFORE, Transferor grants, conveys and transfers to Town all its interest (real or personal) and title to the Improvements subject to the following:

1. Transferor warrants to Town that Transferor has a good title to the Improvements, free and clear of any lien, claim or right of any third party in or to the Improvements, and Transferor will defend Town's title to the Improvements against the claim of any third party.
2. Transferor warrants that the Improvements are located within the easement, right-of-way or other real property interest designated by the Town for siting of the Improvements. Town acknowledges receipt of as-built drawings of the Improvements dated _____.
3. Transferor warrants that, as constructed, all Improvements are in conformance with the current Town of Castle Rock standards and the approved construction plans, and are free from defects in design, material or workmanship. This warranty is for the period prescribed by the Town's Public Works Regulations acceptance made below.
4. Transferor represents that the approximate amount of direct costs of construction of the Improvements (excluding

(EXEMPLAR - NOT FOR EXECUTION)

9888739 - 11/05/98 14:57 - RETA A. CRAIN DOUGLAS CO. COLO. CLERK & RECORDER
B1621 - P0652 - \$70.00 - 13/ 14

engineering, financing, insurance, etc.), as determined in accordance with usual and customary construction accounting practices is as follows:

Water	_____
Wastewater	_____
Stormwater	_____
Streets	_____
Parks & Recreation	_____
TOTAL	_____

5. Transferor concurrently submits to Town the surety attached as *Exhibit B* in the amount of 15% of the above total and secure Transferor's warranty obligation on the Improvements.

TRANSFEROR:

By: _____

Its: _____

ACCORDINGLY, Town accepts for ownership and maintenance the Improvements effective _____, 19____.

TOWN OF CASTLE ROCK

Engineering Division

EXHIBIT 3
WATER DEMAND CALCULATION

Occupance	No. of Taps	Size (in.)	SFE/ Tap	Total SFE
PARCEL 1				
Apartment Buildings	11	2	8	88
Clubhouse	1	1½	4	4
Laundry	1	1½	4	4
Irrigation Taps	2	1½	4	8
Totals	15			104