

**WOLFENSBERGER
SUBDIVISION IMPROVEMENTS AGREEMENT**

DATE: August 23, 2016.

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

WOLFENSBERGER, LLLP, a Colorado limited liability limited
partnership, 8605 Explorer Drive #250, Colorado Springs, Colorado
80920 ("Subdivider").

MORTGAGEE: **SUNFLOWER BANK, N.A.**

RECITALS:

A. Subdivider desires to plat and subdivide certain property as the Wolfensberger subdivision ("Subdivision"), more particularly described in the attached *Exhibit 1* ("Property").

B. The subdivision regulations of the Castle Rock Municipal Code require that the Subdivider construct the public improvements necessary to provide municipal utilities and services to the Subdivision in accordance with Town regulations. By this Agreement the parties address the conditions for construction of such improvements and certain other issues concerning development of the Subdivision.

C. 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 Town makes no representation to any owner of a lot or tract within the Subdivision that all necessary Subdivision infrastructure will be completed by the Town in the event of a default by Subdivider.

D. Mortgagee is a party to this Agreement for the purpose of subordinating its lien and interest in the Property to the terms and conditions of this Agreement.

COVENANTS:

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

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

Agreement: this Wolfensberger Subdivision Improvements Agreement, as may be further amended from time to time.

Code: the Castle Rock Municipal Code, as amended.

Development Agreement: the Wolfensberger Development Agreement an Amendment and Restatement of the Graham Development Agreement dated January 15, 2015, recorded in the Records on May 15, 2015 at Reception No. 2015031662.

Director: the Director of Development Services, or designee.

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

Phase: a contiguous geographical area of the Subdivision so designated a specific Phasing Plan submitted to and approved by the Town (or, if applicable, a sub-phase).

Phasing Plan: the depiction or description in the Plans of the Phases and the Improvements to be constructed with each Phase, as approved by the Director or designee.

Plans: the description of the Improvements on the construction drawings approved concurrently with the Plat and related documents.

Plat: the final subdivision plat for the Subdivision as approved by the Town.

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

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

Site Development Plan: a site development plan for any portion of the Subdivision as approved by the Town.

Subdivision: the Wolfensberger subdivision.

Town Regulations: the Code, inclusive of the Town technical design criteria manuals, as the same may be amended from time to time.

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 Regulations. The Improvements may be constructed by Phase, in accordance with the applicable Phasing Plan, if any. If so approved by the Director, a sub-Phasing Plan may be implemented such that Phase Improvements are developed only as necessary to service specific sub-Phases.

In the event 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 authorization under this Agreement shall lapse. As a condition to commencement of construction of any of the 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 the Improvements for the Subdivision; provided that Subdivider shall not be required to resubmit a land use application for the Subdivision.

Improvements must be completed not later than one year after the date of issuance of the first construction permit for such Improvements, provided that the completion date may be extended by the Director for up to 6 months if justified due to adverse weather, material unavailability, or other unanticipated and unavoidable circumstances beyond the control of Subdivider, as determined by the Director.

Section 3. Restrictions Pending Completion of Improvements. The Property shall not qualify for building permits until the Improvements are substantially completed, except when authorized by the Director, as further provided in this section. Substantial completion occurs when the Improvement is functional and operable in all material respects, although not completed to the standard required for formal acceptance by the Town for operation and maintenance. The Property shall not qualify for the issuance of certificates of occupancy unless the Improvements have been initially accepted by the Town as provided in section 4.

The Director, in his/her absolute discretion, may authorize issuance of one or more designated building permits prior to substantial completion, if unusual and unanticipated circumstances warrant granting a relaxation of the substantial completion requirement. In such event, the Director may impose the condition that all work must cease under such building permit if the Improvements are not substantially completed by the date specified in the permit. In no event shall the Director authorize the issuance of a building permit unless there is adequate emergency access to the site and the water system is completed sufficiently to provide adequate fire flows for fire protection.

Section 4. Acceptance of Improvements. Upon substantial completion of the Improvements, Subdivider may request inspection. Town shall make inspection within 5 working days of the date Subdivider requests final inspection, and Town shall notify Subdivider of non-conforming work within 5 working days after the inspection is made.

Subdivider shall have 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 record drawings 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 and receipt of the warranty surety, the applicable warranty period commences.

Section 5. Improvements Security.

A. In accordance with Town Regulations, Subdivider shall provide Town with a letter of credit, cash escrow deposit or performance bond ("Security") as surety for the Improvements, except as otherwise provided in 5.B, below. The amount of the Security shall be dependent on the form of Security provided, calculated in accordance with the Town Regulations. The form of the Security is subject to approval by the Town Attorney. The Security shall be irrevocable for a period or term extending 60 days beyond the Completion Date. "Completion Date" shall mean the date the Town gives initial acceptance for the Improvements. Security which has a term expiring on or before 60 days after the Completion Date shall contain a provision that unless renewed or substitute Security is provided, prior to its expiration date, it may be called by the Town for lack of adequate Security. The Security shall be delivered to Town prior to and as a condition of the issuance of the first public works permit. The warranty portion of the Security shall be released as authorized in the Town Regulations.

B. Subdivider shall provide Town with a cash deposit in the amount of \$532,354 as surety for the Omni Channel Stabilization Improvements as described in section 9.B ("Drainage Security"). The Drainage Security shall be delivered to Town prior to and as a condition of the issuance of the first construction permit for the Channel Stabilization Improvements. The warranty portion of the Drainage Security shall be released as authorized in the Town Regulations.

C. The purpose of the Security and the Drainage Security is to provide Town with the financial resources to mitigate any public health and safety hazards and/or re-grade and re-vegetate the Subdivision and/or complete construction or installation of any of the Improvements (inclusive of the Channel Stabilization Improvements), should Subdivider default in its obligation to complete the Improvements and/or the Channel Stabilization 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. Any portion of the Security not utilized in the Remedial Work shall be returned to the obligor on the Security or to Subdivider in the event a cash deposit furnished by Subdivider.

With Town's initial acceptance of the Improvements, the Security shall be reduced to 15% of the actual construction cost of the Improvements in accordance with Town

Regulations. The warranty portion of the Security shall be released as authorized in the Town Regulations.

D. The Drainage Security shall be released as follows:

1. Upon completion of 50% of the Channel Stabilization Improvements, as determined by the Town based on evidence of payment by Subdivider to the contractor constructing the Channel Stabilization Improvements, Subdivider may request that the Drainage Security be reduced by \$62,000 (to \$470,354).

2. Upon completion of 75% of the Channel Stabilization Improvements, as determined by the Town based on evidence of payment by Subdivider to the contractor constructing the Channel Stabilization Improvements, Subdivider may request that the Drainage Security be reduced by an additional \$235,000 (to \$235,354).

In no event shall the reduction to the Drainage Security prior to initial acceptance of the Channel Stabilization Improvements exceed \$297,000. Upon Town's initial acceptance of the Channel Stabilization Improvements, the Drainage Security shall be reduced to 15% of the actual construction cost of the Channel Stabilization Improvements for warranty purposes, at which time Subdivider may choose to replace the Drainage Security with a warranty bond, in accordance with the Town Regulations. The warranty portion of the Drainage Security shall be released as authorized in the Town Regulations.

Section 6. Landscaping.

A. Landscaping is required in connection with the Improvements and in connection with the private improvements on the Property as follows: (i) Subdivider shall make commercially reasonable efforts to complete all Landscaping pertaining to the Improvements prior to initial acceptance of the Improvements as prescribed in the Plans; and (ii) Subdivider shall make commercially reasonable efforts to complete all applicable Landscaping pertaining to private improvements on the Property prior to the issuance of a certificate of occupancy for related private improvements.

B. In the event Subdivider is unable to complete installation of the Landscaping in accordance with Subparagraph A, above, the following provisions shall apply:

1. Subdivider shall make a cash deposit to the Town in the amount of 100% of the estimated cost to complete the applicable Landscaping, to be held by the Town as security for completion of the Landscaping ("Landscape Deposit").

2. The amount of the Landscape Deposit shall be determined by the Town after review of the cost estimate of completion furnished by the Subdivider's landscape architect or contractor;

3. The Landscape Deposit must be made prior to and as a condition to:

- a. Initial acceptance of the Improvements under A(i); above; or
 - b. Prior to the issuance of a certificate of occupancy for the private improvements under A(ii), above.
4. The Landscape Deposit shall not accrue interest;
 5. Subdivider shall have 180 days from the date the Landscape Deposit is deposited with Town to complete the applicable Landscaping;
 6. Within 10 days of completion of the Landscaping and acceptance by the Town, Town shall return the Landscape Deposit to Subdivider;
 7. If at the end of the 180 day period the applicable Landscaping has not been completed and accepted by Town, Town may use the Landscape Deposit to the extent necessary to complete the Landscaping, provided Town will not be obligated to spend any Town funds to complete the applicable Landscaping in the event the Landscape Deposit is insufficient to fund completion; and
 8. Town shall return to Subdivider any portion of the Landscape Deposit which remains after the Town has completed the Landscaping within 10 days after completion of such Landscaping.

Section 7. Water Supply. 10.35 SFE of the "Water Credit" provided in Article IV of the Development Agreement have been applied to meet the water supply requirements for the Subdivision (Subdivision Water Credit). Town shall not require additional water rights or water resources as a condition to issuance of land use approvals within the Subdivision, so long as the aggregate water demand from development does not exceed the Subdivision Water Credit as computed in accordance with the Town Regulations.

To the extent that the water demand created by development on the Property (computed in accordance with Town Regulations), exceeds the Subdivision Water Credit, the appropriate number of additional SFE of the "Water Credit" provided in Article IV of the Development Agreement shall be applied to account for such additional water demand, or to the extent all of the "Water Credit" provided in Article V of the Development Agreement has been allocated, Subdivider must provide additional water resources computed in accordance with Town Regulations sufficient to meet the demand in excess of the initial Subdivision Water Credit. Should the Subdivision Water Credit not be fully utilized after full development of the Subdivision, the remaining SFE shall revert to the Graham Water Bank, as provided in the Development Agreement.

Section 8. Water Efficiency Plan. In order to maximize the utilization of the Water Credit and reduce the demand for long-term renewable water, Subdivider is encouraged to establish a water efficiency plan in accordance with the Town Regulations in place at the time such water efficiency plan is submitted for review and approval by Town.

Section 9. Drainage Improvements. Pursuant to 5.08 of the Development Agreement, certain drainageway improvements are required for the Omni Tributary between Wolfensberger Road and Red Hawk Drive.

A. A portion of the Property is within the 100-year floodplain and development of the Property will require conveyance of the 100-year flows through a secondary diversion channel to meet floodplain requirements. In lieu of Subdivider constructing a secondary diversion channel, Town has agreed to accept cash-in-lieu of construction, which shall be applied to Town's cost of increasing the capacity of the existing drainage facilities, estimated to be approximately \$570,000 for design and construction ("Omni Culvert Improvements"). Accordingly, prior to and as a condition to recordation of this Agreement, Subdivider shall pay to Town \$130,000, which amount represents the Property's pro rata share of the cost to design and construct the Omni Culvert Improvements. Town shall complete the Omni Culvert Improvements no later than 12 months from the date the Town receives the Subdivider's cash in lieu payment for the Omni Culvert Improvements. Town shall not restrict issuance of building permits or certificates of occupancy prior to the completion of the Omni Culvert Improvement project. However, in the event of a storm occurrence which exceeds the capacity of the existing culverts prior to completion of the Omni Culvert Improvements, Subdivider releases Town and shall indemnify and hold 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 such storm event, as such claim may relate to the construction of any improvements within the current floodplain.

B. The Property will not qualify for the issuance of a building permit until the Plans for the Omni Tributary Channel Stabilization project ("Channel Stabilization Improvements") have been reviewed and approved by the Town. Subdivider, at its sole expense, shall construct the Channel Stabilization Improvements concurrently with construction of the Improvements. No certificates of occupancy will be issued on the Property until the Channel Stabilization Improvements have been constructed by Subdivider and initially accepted by Town.

C. Not later than six months from the date of completion of the Omni Culvert Improvements and the Channel Stabilization Improvements, whichever occurs later, Subdivider shall submit a Letter of Map Revision (LOMR) to FEMA that includes flood map revisions resulting from both the Channel Stabilization Improvements constructed by Subdivider and the Omni Culvert Improvements constructed by the Town.

Section 10. Exit 182/Wolfensberger Road Interchange Participation. Pursuant to 6.01 of the Development Agreement, prior to and as a condition to recordation of this Agreement, Subdivider shall pay to Town \$5,070, which amount represents the Property's pro rata share in the funding of existing and planned improvements to the Exit 182/Wolfensberger Road Interchange.

Section 11. Wolfensberger Road Improvements. Subdivider shall construct, at its sole expense, all curb, gutter, sidewalk, median, street lighting, pavement and storm sewer

improvements for that portion of Wolfensberger Road that fronts the Property (“Wolfensberger Road Improvements”). The Wolfensberger Road Improvements shall be constructed as part of the Improvements.

Section 12. Traffic Control Improvement Participation. Concurrently with and as a condition to recordation of this Agreement, Subdivider shall pay to Town \$7,790, which amount represents the Property’s pro rata share of the cost of construction of the traffic control improvements at the intersection of Wolfensberger Road and Red Hawk Drive. Town shall undertake the construction of the traffic control improvements when warranted.

Section 13. Cash-in-lieu of Public Land Dedication. Pursuant to 7.01 of the Development Agreement, as a condition to recordation of this Agreement, Subdivider shall pay to Town \$55,037 as cash-in-lieu of public land dedication required under the Town Regulations for the Property.

Section 14. Water Conservation Regulations. The landscaping of the Property shall conform to the Town’s adopted water conservation requirements in effect at the time of the building permit application.

Section 15. Application of Development Agreement. The Development Agreement may contain certain other conditions and requirements which apply to the development of the Property. The enumeration in this Agreement of certain obligations triggered under the phasing plan of the Development Agreement is not inclusive of all such obligations. In the event of a conflict between the Development Agreement and this Agreement, the Development Agreement shall govern and control.

Section 16. Subdivider Default. The following occurrences constitute a default by the 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 Improvements within the applicable cure period;
- C. 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 thirty (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 17. 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 Subdivision 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 for which the Improvements have not been completed or accepted;
- C. record a notice of non-compliance with this Agreement in the 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 18. Town Default. In the event Town should fail to timely perform its obligations under this Agreement, Subdivider shall give written notice to Town of such default and Town shall have 10 calendar days from the receipt of such notice to cure the default. If the default is not timely cured, Subdivider shall have the right to seek legal and/or equitable relief against the Town.

Section 19. Indemnification. Subdivider indemnifies and holds 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 construction or repair of the Improvements by Subdivider.

Section 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 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 approval of any wrongful act by the Subdivider or the acceptance of any Improvement.

Section 21. 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 22. 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 with the U.S. Postal Service, postage prepaid, certified, and return receipt requested and addressed as follows:

Unofficial Copy

If to Town: Town of Castle Rock
 Attn: Town Attorney
 100 Wilcox Street
 Castle Rock, CO 80104

If to Subdivider: Wolfensberger, LLLP
 8605 Explorer Drive #250,
 Colorado Springs, Colorado 80920

Section 23. 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 to this Agreement.

Section 24. Immunity. Nothing contained in this Agreement constitutes a waiver of the Town's sovereign immunity under any applicable state law.

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Official Copy

EXHIBIT 1

Property Description:

Lot 1, Anderson Subdivision, Douglas County, Colorado.

Unofficial Copy

EXHIBIT 2
PUBLIC IMPROVEMENTS CONVEYANCE AND INITIAL ACCEPTANCE

TRANSFEROR:

TRANSFeree: Town of Castle Rock, a municipal corporation ("Town")
100 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 the Wolfensberger subdivision. 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 in Title 15 of the Town's Municipal Code commencing with the date of acceptance made below.
4. Transferor represents that the approximate amount of direct costs of construction of the Improvements (excluding engineering, financing, insurance, etc.), as determined in accordance with usual and customary construction accounting practices is as follows:

Water _____

Wastewater _____

Stormwater _____

Streets _____

Parks and recreation _____

TOTAL _____

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

TRANSFEROR:

By: _____

Its: _____

ACCORDINGLY, Town accepts for ownership and maintenance of the Improvements effective _____, 20__.

TOWN OF CASTLE ROCK

Engineering Division

Unofficial Copy