

IMPROVEMENT AGREEMENT

DATE OF AGREEMENT: _____, 20 ____ .

NAME OF DEVELOPER: _____

(referred to as “DEVELOPER”)

NAME OF DEVELOPMENT: _____

(referred to as “DEVELOPMENT”)

DEVELOPMENT RESOLUTION

OF APPROVAL NO.: Resolution _____

(referred to as “Resolution of Approval”)

IMPROVEMENT PLANS NO.: _____

(referred to as “Improvement Plans”)

ESTIMATED TOTAL COST OF IMPROVEMENTS:\$ _____

SURETY: _____

LETTER OF CREDIT/BOND NOS.: _____

This Agreement is made and entered into by and between the City of Palm Desert, a municipal corporation of the State of California, hereinafter referred to as “CITY”, and the DEVELOPER.

RECITALS

A. DEVELOPER has presented to CITY for approval a Conditional Use Permit/Precise Plan of Development pursuant to provisions of the CITY's ordinances and regulations relating to development approval.

B. A Conditional Use Permit/Precise Plan of Development has been approved, subject to the requirements and conditions contained in the Resolution of Approval. The Resolution of Approval is on file in the Office of the Director of Community Development and incorporated into this Agreement by reference.

C. In consideration of the approval of a Conditional Use Permit/Precise Plan of Development for the DEVELOPMENT by the Planning Commission, DEVELOPER desires to enter into this Agreement, whereby DEVELOPER promises to install and complete, at DEVELOPER's own expense, all the public improvement work required by CITY in connection with the proposed DEVELOPMENT. DEVELOPER has secured this Agreement by improvement security required by the City and approved by the City Attorney.

D. Complete Improvement Plans for the construction, installation, and completion of the improvements have been prepared by DEVELOPER and approved by the City Engineer. The Improvement Plans numbered as referenced previously in this Agreement are on file in the Office of the City Engineer and are incorporated into this Agreement by this reference. All references in this Agreement to the Improvement Plans shall include reference to any specifications for the improvements as approved by the City Engineer.

E. An estimate of the cost for construction of the public improvements and performing land development work in connection with the improvements according to the Improvement Plans has been made and has been approved by the City Engineer. The estimated amount is stated on

Page 1 of this Agreement. The basis for the estimate is on file in the Office of the City Engineer and is incorporated into this agreement by reference.

F. CITY has adopted standards for the construction and installation of improvements within the CITY. The Improvement Plans have been prepared in conformance with CITY standards in effect on the date of the Resolution of Approval.

NOW, THEREFORE, in consideration of the approval of the DEVELOPMENT, DEVELOPER and CITY agree as follows:

(1) DEVELOPER's Obligation to Construct Improvements.

DEVELOPER shall:

- (a) Comply with all the requirements of the Resolution of Approval, and any amendments thereto.
- (b) Complete at DEVELOPER's own expense, all the public improvement work required by the Resolution of Approval in conformance with approved Improvement Plans within one year from date of execution of this Agreement.
- (c) Furnish the necessary materials for completion of the public improvements in conformity with the Improvement Plans.
- (d) Acquire, or pay the cost of acquisition by CITY, and dedicate all rights-of-way, easements and other interests in real property for construction and installation of the public improvements, free and clear of all liens and encumbrances. The DEVELOPER's obligations with regard to acquisition by CITY of off-site rights-of-way, easements and other interests in real property shall be subject to a separate agreement between DEVELOPER and CITY.

DEVELOPER shall also be responsible for obtaining any public or private sanitary sewer, domestic water, drainage, and/or utility easements or authorization to accommodate the DEVELOPMENT.

- (e) Commence construction of the improvements by the time established in Section (21) of this Agreement and complete the improvements by the deadline stated in Section (1)(b) above, unless a time extension is granted by the CITY as authorized in Section (21).

(2) Acquisition and Dedication of Easements or Rights-of-Way. If any of the public improvement and land use development work contemplated by this Agreement is to be constructed or installed on land not owned by CITY or DEVELOPER, no construction or installation shall be commenced before:

- (a) The offer of dedication to CITY of appropriate rights-of-way, easements or other interests in real property, and appropriate authorization from the property owner to allow construction or installation of the improvements or work, or
- (b) The dedication to, and acceptance by, CITY of appropriate rights-of-way, easements or other interests in real property, as determined by the City Engineer, or
- (c) The issuance by a court of competent jurisdiction pursuant to the State Eminent Domain Law of an order of possession. DEVELOPER shall comply in all respects with the order of possession.

Nothing in this Section (2) shall be construed as authorizing or granting an extension of time to DEVELOPER.

(3) Security. DEVELOPER shall at all times guarantee DEVELOPER's performance by furnishing to CITY, and maintaining, good and sufficient security as required on forms approved by CITY for the purposes and in the amounts as follows:

- (a) to assure faithful performance of this Agreement in regard to said improvements in an amount of 100% of the estimated cost of the improvements; and
- (b) to secure payment to any contractor, subcontractor, persons renting equipment, or furnishing labor and materials for the improvements required to be constructed and installed pursuant to this Agreement in the additional amount of 50% of the estimated cost of the improvements; and

The securities required by this Agreement shall be kept on file with the City Clerk. The terms of the security documents referenced on page 1 of this Agreement are incorporated into this Agreement by this reference. If any security is replaced by another approved security, the replacement shall: 1) comply with all the requirements for security in this Agreement; 2) be provided to the City Engineer to be filed with the City Clerk and, upon filing, 3) shall be deemed to have been made a part of and incorporated into this Agreement. Upon provision of a replacement security with the City Engineer and filing of a replacement security with the City Clerk, the former security may be released.

(4) Alterations to Improvement Plans.

- (a) Any changes, alterations or additions to the Improvement Plans not exceeding ten percent (10%) of the original estimated cost of the improvements, which are mutually agreed upon by CITY and DEVELOPER, shall not relieve the improvement security given for faithful performance of this Agreement. In the

event such changes, alterations, or additions exceed 10% of the original estimated cost of the improvement, DEVELOPER shall provide improvement security for faithful performance as required by Section (3) of this Agreement for one hundred percent (100%) of the total estimated cost of the improvements as changed, altered, or amended, minus any completed partial releases allowed by Section (6) of this Agreement.

- (b) The DEVELOPER shall construct the improvements in accordance with CITY standards in effect at the time of adoption of the Resolution of Approval. CITY reserves the right to modify the standards applicable to the DEVELOPMENT and this Agreement, when necessary to protect the public safety or welfare or comply with applicable state or federal law or CITY zoning ordinances. If DEVELOPER requests and is granted an extension of time for completion of the improvements, CITY may apply the standards in effect at the time of the extension.

(5) Inspection. DEVELOPER shall at all times maintain proper facilities and safe access for inspection of the public improvements by CITY inspectors and to the shops wherein any work is in preparation. Upon completion of the work, DEVELOPER may request a final inspection by the City Engineer, or the City Engineer's authorized representative. If the City Engineer, or the designated representative, determines that the work has been completed in accordance with this Agreement, then the City Engineer shall certify the completion of the public improvements to the City Council. No improvements shall be finally accepted unless all aspects of the work have been inspected and completed in accordance with the Improvement Plans. When applicable law requires an inspection to be made by City at a particular stage of the work of constructing and installing such improvements, CITY shall be given timely notice of DEVELOPER's readiness for such inspection and

DEVELOPER shall not proceed with additional work until the inspection has been made and the work approved. DEVELOPER shall bear all costs of inspection and certification. No improvements shall be deemed completed until accepted pursuant to Section (16) herein.

(6) Release of Securities. The securities required by this Agreement shall be released as following:

- (a) Security given for faithful performance of any act, obligation, work or agreement shall be released upon the final completion and acceptance of the act or work, subject to the provisions of subsection (b) hereof.
- (b) The City Engineer may release a portion of the security given for faithful performance of improvement work as the improvement progresses upon application thereof by the DEVELOPER; provided, however, that no such release shall be for an amount less than twenty-five percent (25%) of the total improvement security given for faithful performance of the improvement work and that the security shall not be reduced to an amount less than fifty percent (50%) of the total improvement security given for faithful performance until final completion and acceptance of the improvement work. In no event shall the City Engineer authorize a release of the improvement security which would reduce such security to an amount below that required to guarantee the completion of the improvement work and any other obligation imposed by this Agreement.
- (c) Security given to secure payment to the contractor, his or her subcontractors and to persons furnishing labor, materials or equipment shall, at six (6) months after completion and acceptance of the work, be reduced to an amount equal to no less than 125% of the total claimed by all claimants for whom liens have been filed and of which notice has been given to the CITY, plus an amount reasonably determined

by the City Engineer to be required to assure the performance of any other obligations secured by the Security. The balance of the security shall be released upon the settlement of all claims and obligations for which the security was given.

- (d) CITY may retain from any security released, an amount sufficient to cover costs and reasonable expenses and fees, including reasonable attorneys' fees.

(7) Injury to Public Improvements, Public Property or Public Utilities Facilities.

DEVELOPER shall replace or repair or have replaced or repaired, as the case may be, all public improvements, public utilities facilities and surveying or subdivision monuments which are destroyed or damaged as a result of any work under this Agreement. DEVELOPER shall bear the entire cost of replacement or repairs of any and all public or public utility property damaged or destroyed by reason of any work done under this Agreement, whether such property is owned by the United States or any agency thereof, or the State of California, or any agency or political subdivision thereof, or by CITY or any public or private utility corporation or by any combination of such owners. Any repair or replacement shall be to the satisfaction, and subject to the approval, of the City Engineer.

(8) Permits. DEVELOPER shall, at DEVELOPER's expense, obtain all necessary permits and licenses for the construction and installation of the improvements, give all necessary notices and pay all fees and taxes required by law.

(9) Default of DEVELOPER.

- (a) Default of DEVELOPER shall include, but not be limited to,

- (1) DEVELOPER's failure to timely commence construction of this Agreement;

- (2) DEVELOPER's failure to timely complete construction of the improvements;

- (3) DEVELOPER's failure to timely cure any defect in the improvements;
- (4) DEVELOPER's failure to perform substantial construction work for a period of twenty (20) calendar days after commencement of the work;
- (5) DEVELOPER's insolvency, appointment of a receiver, or the filing of any petition in bankruptcy either voluntary or involuntary which DEVELOPER fails to discharge within thirty (30) days;
- (6) the commencement of a foreclosure action against the DEVELOPMENT or a portion thereof, or any conveyance in lieu or in avoidance of foreclosure;
or
- (7) DEVELOPER's failure to perform any other obligation under this Agreement.

(b) CITY reserves to itself all remedies available to it at law or in equity for breach of DEVELOPER's obligations under this Agreement. CITY shall have the right, subject to this Section, to draw upon or utilize the appropriate security to mitigate CITY's damages in event of default by DEVELOPER. The right of CITY to draw upon or utilize the security is additional to and not in lieu of any other remedy available to CITY. It is specifically recognized that the estimated costs and security amounts may not reflect the actual cost of construction or installation of the improvements and, therefore, CITY's damages for DEVELOPER's default shall be measured by the cost of completing the required improvements. The sums provided by the improvement security may be used by CITY for the completion of the public improvements in accordance with the improvement plans and specifications contained herein.

- (c) In the event of DEVELOPER's default under this Agreement, DEVELOPER authorizes CITY to perform such obligation twenty (20) days after mailing written notice of default to DEVELOPER and to DEVELOPER's surety, and agrees to pay the entire cost of such performance by CITY. CITY may take over the work and prosecute the same to completion, by contract or by any other method CITY may deem advisable, for the account and at the expense of DEVELOPER, and DEVELOPER's surety shall be liable to CITY for any excess cost or damages occasioned CITY thereby. In such event, CITY, without liability for so doing, may take possession of, and utilize in completing the work, such materials, appliances, plants and other property belonging to DEVELOPER as may be on the site of the work and necessary for performance of the work.
- (d) Failure of DEVELOPER to comply with the terms of this Agreement shall constitute consent to the filing by CITY of notice of violation against all proposed improvements in the DEVELOPMENT, or to rescind the approval or otherwise revert the DEVELOPMENT to acreage. The remedy provided by this subsection (c) is in addition to and not in lieu of other remedies available to CITY. DEVELOPER agrees that the choice of remedy or remedies for DEVELOPER's breach shall be in the discretion of CITY.
- (e) In the event that DEVELOPER fails to perform any obligation hereunder, DEVELOPER agrees to pay all costs and expenses incurred by CITY in securing performance of such obligations, including but not limited to fees and charges of architects, engineers, attorneys, other professionals, and court costs.

(f) The failure of CITY to take an enforcement action with respect to a default, or to declare a breach, shall not be construed as a waiver of that default or breach or any subsequent default or breach of DEVELOPER.

(10) DEVELOPER Not Agent of CITY. Neither DEVELOPER nor any of DEVELOPER's agents, contractors or subcontractors are or shall be considered to be agents of CITY in connection with the performance of DEVELOPER'S obligations under this Agreement.

(11) Injury to Work. Until such time as the improvements are accepted by CITY, DEVELOPER shall be responsible for and bear the risk of loss to any of the improvements constructed or installed. Until such time as all improvements required by this Agreement are fully completed and accepted by CITY, DEVELOPER will be responsible for the care, maintenance of, and any damage to such improvements. CITY shall not, nor shall any officer or employee thereof, be liable or responsible for any accident, loss or damage, regardless of cause, happening or occurring to the work or improvements specified in this Agreement prior to the completion and acceptance of the work or improvements. All such risks shall be the responsibility of and are hereby assumed by DEVELOPER.

(12) Warranty. DEVELOPER shall guarantee or warranty the work done pursuant to this Agreement for a period of one year after final formal acceptance of the improvements by the City Council against any defective work or labor done or defective materials furnished. If within the warranty period any work or improvement or part of any work or improvement done, furnished, installed, or constructed by DEVELOPER fails to fulfill any of the requirements of this Agreement or the improvement plans and specifications referred to herein, DEVELOPER shall without delay and without any cost to CITY, repair or replace or reconstruct any defective or otherwise unsatisfactory part or parts of the work or

structure. Should DEVELOPER fail to act promptly or in accordance with this requirement, DEVELOPER hereby authorizes CITY, at CITY's option, to perform the work twenty (20) days after mailing written notice of default to DEVELOPER and to DEVELOPER's surety, and agrees to pay the cost of such work by CITY. Should CITY determine that an urgency requires repairs or replacements to be made before DEVELOPER can be notified, CITY may, in its sole discretion, make the necessary repairs or replacement or perform the necessary work and DEVELOPER shall pay to CITY the cost of such repairs.

(13) Environmental Warranty. Prior to the acceptance of any dedications or improvements by CITY, DEVELOPER shall certify and warrant that neither the property to be dedicated nor DEVELOPER is in violation of any environmental law and neither the property to be dedicated nor the DEVELOPER is subject to any existing, pending or threatened investigation by any federal, state or local governmental authority under or in connection with environmental law. Neither DEVELOPER nor any third party will use, generate, manufacture, produce, or release, on, under, or about the property to be dedicated, any hazardous substance except in compliance with all applicable environmental laws. DEVELOPER has not caused or permitted the release of, and has no knowledge of the release or presence of, any hazardous substance on the property to be dedicated or the migration of any hazardous substance from or to any other property adjacent to, or in the vicinity of, the property to be dedicated. DEVELOPER's prior and present use of the property to be dedicated has not resulted in the release of any hazardous substance on the property to be dedicated. DEVELOPER shall give prompt written notice to CITY at the address set forth herein of:

- (a) Any proceeding or investigation by any federal, state or local governmental authority with respect to the presence of any hazardous substance on the property to

be dedicated or the migration thereof from or to any other property adjacent to, or in the vicinity of, the property to be dedicated;

(b) Any claims made or threatened by any third party against CITY or the property to be dedicated relating to any loss or injury resulting from any hazardous substance; and,

(c) DEVELOPER's discovery of any occurrence or condition on any property adjoining in the vicinity of the property to be dedicated that could cause the property to be dedicated or any part thereof to be subject to any restrictions on its ownership, occupancy, use for the purpose for which is it is intended, transferability or suit under any environmental law.

(14) Other Agreements. Nothing contained in this Agreement shall preclude CITY from expending monies pursuant to agreements concurrently or previously executed between the parties, or from entering into agreements with other developers for the apportionment of costs of water and sewer mains, or other improvements, pursuant to the provisions of the CITY ordinances providing therefore, nor shall anything in this Agreement commit CITY to any such apportionment.

(15) DEVELOPER'S Obligation to Warn Public During Construction. Until formal final acceptance of the improvements, DEVELOPER shall give good and adequate warning to the public of each and every dangerous condition existent in said improvements, and will take all reasonable actions to protect the public from such dangerous condition.

(16) Vesting of Ownership. Upon formal final acceptance of the work by CITY and recordation of the Resolution of Acceptance of Public Improvements, ownership of the improvements constructed pursuant to this Agreement shall vest in CITY.

(17) Final Acceptance of Work. Acceptance of the work on behalf of CITY shall be made by the City Council upon recommendation of the City Engineer after final completion and inspection of all improvements. The City Council shall act upon the Engineer's recommendation within sixty (60) days from the date the City Engineer certifies that the work has been finally completed, as provided in Section (6). Such acceptance shall not constitute a waiver of defects by CITY.

(18) Indemnity/Hold Harmless. CITY or any officer or employee thereof shall not be liable for any injury to persons or property occasioned by reason of the acts or omissions of DEVELOPER, its agents, or employees, contractors and subcontractors in the performance of this Agreement. DEVELOPER further agrees to protect, defend, indemnify and hold harmless CITY, its officials, boards and commissions, and members thereof, agents and employees from any and all claims, demands, causes of action, liability or loss of any sort, because of, or arising out of, acts or omissions of DEVELOPER, its agents, employees, contractors and subcontractors in the performance of this Agreement, except for such claims, demands, causes of action, liability, or loss arising out of the sole active negligence of the CITY, its officials, boards, commissions, the members thereof, agents, and employees, including all claims, demands, causes of action, liability, or loss because of, or arising out of, in whole or in part, the design or construction of the improvements. This indemnification and agreement to hold harmless shall extend to injuries to persons and damages or taking of property resulting from the design or construction of said DEVELOPMENT, and the public improvements as provided herein, and in addition, to adjacent property owners as a consequence of the diversion of waters from the design and construction of public drainage systems, streets and other public improvements. Acceptance by CITY of the improvements shall not constitute an assumption by CITY of any responsibility for any damage or taking covered by

this Section. CITY shall not be responsible for the design or construction of the property to be dedicated or the improvements pursuant to the approved improvement plans or map, regardless of any negligent action or inaction taken by CITY in approving the plans or map, unless the particular improvement design was specifically required by CITY over written objection by DEVELOPER submitted to the City Engineer before approval of the particular improvement design, which objection indicated that the particular improvement design was dangerous or defective and suggested an alternative safe and feasible design.

After acceptance of the improvements, the DEVELOPER shall remain obligated to eliminate any defect in design or dangerous condition caused by the design or construction defect; however, DEVELOPER shall not be responsible for routine maintenance. Provisions of this Section shall remain in full force and effect for ten (10) years following the acceptance by CITY of the improvements. It is the intent of this Section that DEVELOPER shall be responsible for all liability for design and construction of the improvements installed or work done pursuant to this Agreement and that CITY shall not be liable for any negligence, nonfeasance, misfeasance or malfeasance in approving, reviewing, checking, or inspecting any work or construction. The improvement security shall not be required to cover the provisions of this Section.

DEVELOPER shall reimburse CITY for all costs and expenses (including but not limited to fees and charges of architects, engineers, attorneys, and other professionals, and court costs) incurred by CITY in enforcing the provisions of this Section.

(19) Personal Nature of DEVELOPER'S Obligations. All of DEVELOPER's obligations under this agreement are and shall remain the personal obligations of DEVELOPER notwithstanding a transfer of all or any part of the property within the DEVELOPMENT subject to this Agreement, and DEVELOPER shall not be entitled to assign

its obligations under this Agreement to any transferee of all or any part of the property within the DEVELOPMENT or to any other third party without the express written consent of CITY.

(20) Sale or Disposition of DEVELOPMENT. Seller or other DEVELOPER may request a novation of this Agreement and a substitution of security. Upon approval of the novation and substitution of securities, the DEVELOPER may request a release or reduction of the securities required by this Agreement. Nothing in the novation shall relieve the DEVELOPER of the obligations under Section (17) for the work or improvement done by DEVELOPER.

(21) Time of the Essence. Time is of the essence in the performance of this Agreement.

(22) Time for Commencement of Work; Time Extensions. DEVELOPER shall commence substantial construction of the improvements required by this Agreement not later than six (6) months after the date of this Agreement. In the event good cause exists as determined by the City Engineer, the time for commencement of construction or completion of the improvements hereunder may be extended for a period or periods not exceeding a total of two (2) additional years. The extension shall be executed in writing by the City Engineer. Any such extension may be granted without notice to DEVELOPER's surety and shall not affect the validity of this Agreement or release the surety or sureties on any security given for this Agreement. The City Engineer shall be the sole and final judge as to whether or not good cause has been shown to entitle DEVELOPER to an extension. Delay, other than delay in the commencement of work, resulting from an act of CITY, act of God, or by storm or inclement weather, strikes, boycotts or similar political actions which prevents the conducting of work, which DEVELOPER could not have reasonably foreseen and, furthermore, were not caused by or contributed to by DEVELOPER, shall constitute good cause for and extension of the time for

completion. As a condition of such extension, the City Engineer may require DEVELOPER to furnish new security guaranteeing performance of this Agreement as extended in an increased amount as necessary to compensate for any increase in construction costs as determined by the City Engineer.

(23) No Vesting of Rights. Performance by DEVELOPER of this Agreement shall not be construed to vest DEVELOPER’s rights with respect to any change in any zoning or building law or ordinance.

(24) Notices. All notices required or provided for under this Agreement shall be in writing and delivered in person or sent by mail, postage prepaid and addressed as provided in this Section. Notice shall be effective on the date it is delivered in person, or, if mailed, on the date of deposit in the United States mail. Notices shall be addressed as follows unless a written change of address is filed with the City:

Notice to CITY: City of Palm Desert
73-510 Fred Waring Drive Palm
Desert, California 92260
Attn: Public Works Director

Notice to DEVELOPER: _____

Notice to SURETY: _____

(25) Compliance With Laws. DEVELOPER, its agents, employees, contractors and subcontractors shall comply with all federal, state and local laws in the performance of the improvements and land development work required by this Agreement.

(26) Severability. The provisions of this Agreement are severable. If any portion of this Agreement is held invalid by a court of competent jurisdiction, the remainder of the agreement shall remain in full force and effect unless amended or modified by the mutual consent of the parties.

(27) Captions. The captions of this Agreement are for convenience and reference only and shall not define, explain, modify, limit, exemplify, or aid in the interpretation, construction or meaning of any provisions of this Agreement.

(28) Litigation or Arbitration. In the event that suit or arbitration is brought to enforce the terms of this Agreement, the prevailing party shall be entitled to litigation costs and reasonable attorneys' fees.

(29) Incorporation of Recitals. The recitals to this Agreement are hereby incorporated into in the terms of this Agreement.

(30) Entire Agreement. This Agreement constitutes the entire agreement of the parties with respect to the subject matter. All modifications, amendments, or waivers of the terms of this Agreement must be in writing and signed by the appropriate representatives of the parties.

(31) Interpretation. This Agreement shall be interpreted in accordance with the laws of the State of California.

(32) Jurisdiction. Jurisdiction of all disputes over the terms of this Agreement shall be in the County of Riverside, State of California.

IN WITNESS WHEREOF, this Agreement is executed by the parties as of the date hereinabove first written; by CITY, by and through its Mayor.

CITY OF PALM DESERT

DEVELOPERS

By:

LAURI AYLAIAN, CITY MANAGER

DEVELOPER

(Proper Notarization of
DEVELOPER'S signature is
required and shall be attached)

ATTEST

RACHELLE D. KLASSEN, CITY CLERK

APPROVED AS TO FORM:

ROBERT W. HARGREAVES, CITY ATTORNEY

