

# **SUBDIVISION CONSTRUCTION AGREEMENT**

**with**  
**[DEVELOPER]**  
**For**  
**[SUBDIVISION NAME]**

1. **Parties.** This Subdivision Construction Agreement (the “Agreement”) is by and between the County and the Owner/Developer. The “County” is El Paso County, Texas acting by and through its Commissioners Court, or authorized representative as designated by the Commissioners Court. The Owner/Developer is **[NAME OF DEVELOPER]** who is the owner, or the authorized agent of owner, of a tract of land, located within the geographic area and jurisdiction of the County.

2. **Effective Date.** This Agreement is effective on **[DAY OF THE WEEK, MONTH DAY, YEAR]** (“Effective Date”) prior to commencement of construction of the proposed improvements to be dedicated to the County (“Improvements”) within **[SUBDIVISION NAME]**.

## **RECITALS**

3. Owner/Developer is the owner of the land included in the proposed final plat for **[SUBDIVISION NAME]** and more particularly described by the metes and bounds description attached and incorporated into this Agreement as **Exhibit C**;

4. Owner/Developer seeks authorization from the County to subdivide the Property in accordance with the requirements imposed by Texas statute and the County's regulations, and other requirements governing development of a subdivision;

5. County requires the completion of various improvements in connection with the development of the subdivision to protect the health, safety, and general welfare of the community and to limit the harmful effects of substandard subdivisions;

6. This Agreement is to protect the County from the expense of completing subdivision improvements required to be installed by the Owner/Developer; and

7. This agreement is authorized by and consistent with Texas state law and the County's regulations, and other requirements governing development of a subdivision.

IN CONSIDERATION of the foregoing recitals and the mutual covenants, promises, and obligations by the parties set forth in this Agreement, the parties agree as follows:

## **OWNER/DEVELOPER'S OBLIGATIONS**

8. **Prior to Construction of Proposed Dedicated Improvement to County.** The Owner/Developer is required to sign this Subdivision Construction Agreement, obtain a Subdivision Bond, and attend a Pre-Construction meeting with the County prior to commencing construction of improvements that are proposed to be dedicated to the County.

9. **Dedicated Improvements to the County.** The Owner/Developer agrees to construct and install, at Owner/Developer's expense, all subdivision improvements required to comply with County orders, regulations, and

policies governing subdivision approval, specifically including those improvements listed on **Exhibit A** (“Improvements”) that is attached and incorporated by reference into this Agreement. The Improvements shall be constructed and inspected in accordance with the County of El Paso – Pre-Construction Conference Minutes, County of El Paso – Subdivision Regulations, County of El Paso – Subdivision Design Standards, Construction Plans that have been reviewed and concurred with by the County of El Paso, and also with good engineering practices and workmanship, whichever is the most stringent; (“Constructions Guidelines”).

**10. Construction of Proposed Dedicated Improvements to County.** Construction of all the Improvements shall be completed in [NUMBER OF DAYS] calendar days, or by [MONTH DAY, YEAR]. Upon approval by the County, the Owner/Developer may deliver to the County within forty-five (45) calendar days prior to the Completion Date, a substitute Subdivision Bond satisfying the criteria established by Paragraph 12 and which has an expiration date no earlier than one year from the Completion Date. In that event, the completion Date shall be extended to the expiration date of the substitute Subdivision Bond or any subsequent substitute Subdivision Bond provided in accordance with this Paragraph. Upon completion of each of the improvements, the Owner/Developer agrees to provide to the County two (2) complete sets of “As-Built” drawings certified by the engineer responsible for preparing the approved construction plans and specifications.

**11. Warranty.** The Owner/Developer warrants the Improvements constructed by Owner/Developer or Owner/Developer agents, contractors, employees, tenants, or licensees will be free from defects for a period of one (1) year (“Warranty Period”) from the date the County accepts all the completed Improvements. The Owner/Developer agrees to repair any damage to the Improvements before and during the Warranty Period. As a condition of the County's acceptance of dedication of any of the Improvements, the County will require the Owner/Developer to post a Maintenance Bond or Letter of Credit similar to that shown on **Exhibit D** or other financial security acceptable to the County.

**12. Security.** To secure the performance of Owner/Developer’s obligations under this Agreement, Owner/Developer agrees to provide adequate financial guarantees of performance in the form of a surety bond (Subdivision Bond) acceptable to the County, a cash deposit to be held by the County, or an irrevocable letter of credit in the amount of [**X Thousand, X Hundred X Dollars and X Cents (\$XXX,XXX.XX)**], the amount and/or cost of all outstanding improvements as shown on **Exhibit A** and must be acceptable to the County, shall have an expiration date no earlier than one year from the date of its issuance, and shall be issued by a financial institution having a rating established under the County's financial institution rating system in effect at the time the initial letter of credit is issued pursuant to this Agreement. During the term of this Agreement and subject to the terms of Paragraph 22 of this Agreement, the County may revise the standard form letter of credit it reasonably considers acceptable and necessary to secure the performance of Owner/Developer’s obligation under this Agreement. Owner/Developer shall not be required to replace existing letter of credits; however, any new letter of credits that are to be submitted by the Owner/Developer will incorporated the county’s new form.

## COUNTY’S OBLIGATIONS

**13. Inspection and Substantially Complete and Complete Acceptance Report.** The County agrees to inspect Improvements during and at the completion of construction. Upon completion of the Improvement(s) and submitting two (2) sets of final As-Built drawings, the Owner/Developer shall provide a written request for a Substantial Complete Acceptance Inspection of Improvements that is expected to be dedicated to the County. The County will perform a Substantially Complete Inspection along with the Owner/Developer and will either provide a Substantially Complete Acceptance Report that will include a “Punch List” indicating all areas requiring correction or repair by the Owner/Developer, or a Complete Acceptance Report identifying the improvement that is acceptable for

dedication to the County. If a Substantially Complete Acceptance Report and “Punch List” are provided to the Owner/Developer, the Owner/Developer will be required, within seven (7) calendar days, to provide a written plan and schedule indicating how and when correction and repairs will be performed. The County will review, within fourteen (14) calendar days of receipt of the proposed plan and schedule, the proposed methods for repairs and/or corrections of the deficiencies and the schedule, and shall either provide a Notice to Proceed that concurs with the proposed plan and schedule, or shall request additional information and/or provide the repair methods to be used. Once the areas identified are corrected and repaired, the Owner/Developer may request, in writing a Complete Acceptance Inspection. The County will schedule and perform the Complete Acceptance Inspection along with the Owner/Developer. Only after all Improvements are found to be acceptable by the County and a Complete Acceptance Report has been provided to the Owner/Developer for all Improvements to be dedicated to the County will the one-year Warranty Period begin as identified in Paragraph 11. The Owner/Developer hereby grants the County, its agents, employees, officers, and contractors an easement and license to enter the property to perform such inspections as it deems appropriate.

**14. Notice of Defect.** The County will provide timely notice to the Owner/Developer whenever inspection reveals that an Improvement does not meet the workmanship required by the County or has not been constructed or completed in accordance with the Construction Guidelines.

On a monthly basis, as needed, the Owner/Developer will be provided a Notice of Defects letter that will include a Log of Deficiencies Report identifying work that is unacceptable to the County. The Owner/Developer will be given seven (7) calendar days to respond in writing to the notice identifying how and when the deficiencies will be corrected. If the Notice of Defects includes a statement stating that the defect creates an immediate and substantial harm, the cure period may be shortened to a reasonable time in accordance with the perceived harm. The County will review and, within fourteen (14) calendar days, either concurs with a response to the Notice of Defect and issue a Notice to Proceed, or will not agree with the corrective procedure and will request additional information and/or provide the repair methods to be used. The Owner/Developer will have seven (7) calendar days to provide another corrective action. The Owner/Developer shall not proceed with any corrective action until a Notice to Proceed from the County has been received.

If after seven (7) calendar days after the Notice of Defects, the Owner/Developer does not provide a written response, the County may declare default under this Agreement and proceed to communicate with the Surety Company or Issuer in attempt to have the work corrected and completed to meet the workmanship required by the County.

**15. Use of Proceeds.** The County will disburse funds drawn under the Letter of Credit only for purposes of completing the Improvements in conformance with the Construction Guidelines. The Owner/Developer has no claim or rights under this Agreement to funds drawn under the Letter of Credit. The County shall maintain all funds obtained by the County pursuant to one or more draws under the Letter of Credit until the County disburses such funds. The County may disperse all or portions of the funds as Improvements are completed and accepted by the County, or in accordance with the terms of a written construction contract between the County and a third party for the construction of Improvements. The County will keep detailed records of the disbursement of funds and shall provide the Owner with a copy of records, upon request of the Owner.

**16. Return of Excess Funds.** Funds not used or held by the County for the purpose of completing the improvements or any portion thereof or correcting effects in or failures of an Improvement, shall be paid by the County to the Issuer of the Letter of Credit not later than sixty (60) calendar days following the County’s complete acceptance of the Improvement or its decision not to complete the Improvement using these funds, whichever date is earlier.

The County shall endeavor to return excess funds to the Issuer not later than sixty (60) calendar days after its receipt of a written request from the Owner/Developer or the Issuer. For purposes of this Paragraph, "excess funds" means the amount of funds exceeding one hundred ten percent (110%) of the estimated cost of the Improvements that the County intends to construct. Notwithstanding the first sentence in this Paragraph, the County shall not be required to disburse excess funds more frequently than every ninety (90) calendar days.

**17. Cost Participation by County.** If the County and Owner/Developer agree the County will participate in the expense of installing any of the Improvements, the respective benefits and obligations of the parties shall be governed by the terms of a Community Facilities Construction Agreement executed by the parties thereto, and the terms of that agreement shall control to the extent of any inconsistency with this Agreement.

**18. Conditions of Draw on Security.** The County may draw upon any financial guarantee posted in accordance with this agreement upon the occurrence of one or more of the following events and upon Owners/Developer's failure to cure as provided herein:

- a. Owner/Developer's failure to, construct the Improvements in accordance with paragraph 9 of this Agreement;
- b. Owner/Developer's failure to renew or replace the Letter of Credit within forty-five (45) calendar days prior to the expiration date of the Letter of Credit;
- c. Owner/Developer's failure to replace or confirm the Letter of Credit if the Issuer fails to maintain the minimum rating acceptable to the County, in accordance with Paragraph 12 of this Agreement; or
- d. Issuer's acquisition of the Property or a portion of the Property, through foreclosure or an assignment or conveyance in lieu of foreclosure.
- e. The preceding events shall collectively hereafter be referred to as "Event of Default".

The County shall provide written notice of the occurrence of one or more of the above events to the Owner/Developer, with a copy provided to the Issuer.

Where a Letter of Credit has been provided as the financial guarantee, with respect to an event described by subparagraph (a), the County shall provide notice to the Owner/Developer of the specific default. The notice shall include a statement that the County intends to perform some or all of Owner/Developer's obligations under Paragraph 9 for specified Improvements if the failure is not corrected within 20 days from the date of the default notice as required by the County. The notice with respect to a default under subparagraph (a) above shall be given no less than twenty (20) days before presentation of a draft on the Letter of Credit, unless, in the reasonable opinion of the County, the failure creates an immediate and substantial harm to the public health or safety, in which case the notice shall state why the failure creates an immediate and substantial harm to the public health or safety, and shall be given no less than five (5) days before presentation of a draft on the Letter of Credit. In the event of a draw based on subparagraph (a) above, the County shall be entitled to draw in the amount it considers necessary to perform Owner/Developer's obligations under Paragraph 9, up to the amount allocated according to **Exhibit A** for any improvement it states its intent to construct or complete in accordance with the Construction Guidelines.

The Owner/Developer hereby grants to the County, its successors, assigns, agents, contractors, and employees, a

nonexclusive right and easement to enter the Property for the purposes of constructing, maintaining, and repairing such Improvements. Where a Letter of Credit has been provided as the financial guarantee, with respect to an event described by subparagraphs (b), (c), or (d) above, the notice shall be given no less than twenty (20) days before presentation of a draft on the Letter of Credit. In lieu of honoring a draft based on an event described in subparagraphs (b) or (c) above, the Issuer or the Owner/Developer may deliver to the County a substitute Letter of Credit if the event is described by subparagraph (b) or a substitute or confirming Letter of Credit if the event is described by subparagraph (c). If the Issuer has acquired all or a portion of the property through foreclosure or an assignment or conveyance in lieu of foreclosure, in lieu of honoring a draft based on an event described in subparagraph (d), the Issuer may deliver to the County a substitute or confirming Letter of Credit.

**19. Procedures for Drawing on the Letter of Credit.** The County may draw upon the Letter of Credit in accordance with Paragraph 18 by submitting a draft to the Issuer in compliance with the terms of the Letter of Credit governing such draft. The County may not draft under a Letter of Credit unless it has substantially complied with all its obligations to the Issuer under this Agreement and has properly completed and executed the draft in strict accordance with the terms of the Letter of Credit.

**20. Measure of Damages.** The measure of damages for breach of this Agreement by the Owner/Developer is the reasonable cost of completing the Improvements in conformance with the Construction Guideline. For Improvements upon which construction has not begun, the estimated cost of the Improvements shown on **Exhibit A** will be prima facie evidence of the minimum cost of completion.

**21. Remedies.** The remedies available to the County, the Owner/Developer, and Issuer under this Agreement and the laws of Texas are cumulative in nature.

**22. Provisions for the Benefit of Issuer.** The provisions of Paragraphs 10, 11, 12, 15, 16, 17, 18, 19, 21, 22, 23, 25, 26, 27, 28, 29, 30, 32, and 36 of this Agreement for the benefit of the Issuer may not be modified, released, diminished, or impaired by the parties without the prior written consent of the Issuer.

**23. Third Party Rights.** No person or entity who or which is not a party to this Agreement shall have any right of action under this Agreement, nor shall any such person or entity other than the County (including without limitation a trustee in bankruptcy) have any interest in or claim to funds drawn on the Subdivision Bond and held in escrow by the County in accordance with this Agreement. Notwithstanding the preceding sentence, the Issuer shall have a right of action to enforce any provision of this Agreement where the Issuer is specifically named as a beneficiary of such provision pursuant to Paragraph 22.

**24. Indemnification.** THE OWNER/DEVELOPER HEREBY EXPRESSLY AGREES TO INDEMNIFY AND HOLD THE COUNTY HARMLESS FROM AND AGAINST ALL CLAIMS, DEMANDS, COSTS, AND LIABILITY OF EVERY KIND AND NATURE, INCLUDING REASONABLE ATTORNEY'S FEES FOR THE DEFENSE OF SUCH CLAIMS AND DEMANDS, ARISING FROM ANY BREACH ON THE PART OF OWNER/DEVELOPER OF ANY PROVISION IN THIS AGREEMENT, OR FROM ANY ACT OR NEGLIGENCE OF OWNER/DEVELOPER OR OWNER/DEVELOPER'S AGENTS, CONTRACTORS, EMPLOYEES, IN THE CONSTRUCTION OF THE IMPROVEMENTS. THE OWNER/DEVELOPER FURTHER AGREES TO AID AND DEFEND THE COUNTY IF THE COUNTY IS NAMED AS A DEFENDANT IN AN ACTION ARISING FROM ANY BREACH ON THE PART OF OWNER/DEVELOPER OF ANY PROVISION IN THIS AGREEMENT, OR FROM ANY ACT OF NEGLIGENCE OF OWNER/DEVELOPER OR OWNER/DEVELOPER'S AGENTS, CONTRACTORS, EMPLOYEES, TENANTS, OR LICENSEES IN THE CONSTRUCTION OF THE IMPROVEMENTS, EXCEPT WHERE SUCH SUIT IS BROUGHT BY THE OWNER/DEVELOPER. THE

**OWNER/DEVELOPER IS NOT AN EMPLOYEE OR AGENT OF THE COUNTY. NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED IN THIS AGREEMENT, THE OWNER/DEVELOPER DOES NOT AGREE TO INDEMNIFY AND HOLD THE COUNTY HARMLESS FROM ANY CLAIMS, DEMANDS, COSTS, OR LIABILITIES ARISING FROM ANY ACT OR NEGLIGENCE OF THE COUNTY, ITS AGENTS, CONTRACTORS, EMPLOYEES, TENANTS, OR LICENSEES.**

**25. 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 continuing waiver unless expressly provided for by a written amendment to this Agreement; nor will the waiver of any default under this agreement be deemed a waiver of any subsequent defaults of the same type. The failure at any time to enforce this Agreement or covenant by the County, the Owner/Developer, or the Issuer, their heirs, successors or assigns, whether any violations thereof are known or not, shall not constitute a waiver or estoppels of the right to do so.

**26. Assignability.** The benefits and burdens of this Agreement are the obligations of the Owner/Developer and also are binding on the heirs, successors, and assigns of the Owner/Developer. The Owner/Developer's obligations under this Agreement may not be assigned without the express written approval of the County. The County's written approval may not be withheld if the Owner/Developer's assignee explicitly assumes all obligations of the Owner/Developer under this Agreement and has posted the required security. The County agrees to release or reduce, as appropriate, the Letter of Credit provided by the Owner/Developer if it accepts substitute security for all or any portion of the Improvements. The County, in its sole discretion, may assign some or all of its rights under this Agreement, and any such assignment shall be effective upon notice to the Owner/Developer and the Issuer.

**27. Expiration.** This Agreement shall terminate upon the completion of all Improvements and the approval, agreement, and signature of the Maintenance Bond or Letter of Credit for Maintenance.

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

**If to Owner/Developer:**

Owner/Developer Name:	[NAME OF DEVELOPER]
Owner/Developer Representative's Name:	[NAME OF REPRESENTATIVE]
Owner/Developer Representative's Title:	[REPRESENTATIVE TITLE]
Address:	[ADDRESS]

**If to County:**

Name:	<b>County of El Paso</b>
County Judge's Name:	<b>Ricardo A. Samaniego or his Successor-in-Office</b>
Office Name:	<b>Office of County Judge</b>
Address:	<b>County Courthouse, 500 E. San Antonio Street El Paso, Texas 79901</b>
Attention:	<b>Gilbert Saldana Jr., P.E. Planning and Development Department</b>

**If to the Issuer:**

Issuer's address as shown on the Letter of Credit or Bond.

The parties may, from time to time, change their respective addresses listed above to any other location in the United States for the purpose of notice under this Agreement. A party's change of address shall be effective when notice of the change is provided to the other party in accordance with the provisions of this Paragraph.

**30. Severability.** If any part, term, or provision of this Agreement is held by the courts to be illegal, invalid, or otherwise unenforceable, such illegality, invalidity, or enforceability shall not affect the validity of any other part, term, or provision, and the rights of the parties will be construed as if the part, term, or provision was never part of this Agreement.

**31. Personal Jurisdiction and Venue.** Personal jurisdiction and venue for any civil action commenced by either party to this Agreement or the Issuer, whether arising out of or relating to the Agreement or the Letter of Credit, will be deemed to be proper only if such action is commenced in District Court for El Paso County, Texas, or the United States District Court for the Western District of Texas, El Paso Division. The Owner/Developer expressly waives any right to bring such an action in or to remove such an action to any other court, whether state or federal. The Issuer, by providing a Letter of Credit pursuant to the terms of this Agreement, expressly waives any right to bring such an action in or to remove such an action to any other court, whether state or federal.

**32. Release Upon Completion.** Upon acceptance of all Improvements, and approval, agreement, and signature of the Maintenance Bond, the County agrees:

a. To issue to the Owner/Developer the Complete Acceptance Reports prepared by the County;

b. To complete, execute and deliver to the Owner/Developer a complete acceptance in recordable form accepting the Improvements as identified in this Agreement with the exception of the conditions stated in Paragraph 11, and to return to the Owner/Developer the Subdivision Bond or Letter of Credit and any funds not expended or obligated by the County and paid to the County by the Owner/Developer, Owner/Developer's heirs, successors and assigns, for the completion of the improvements

**33. Captions Immaterial.** The numbering, order, and captions or headings of the paragraphs of this agreement are for convenience only and shall not be considered in construing this agreement.

**34. Entire Agreement.** This Agreement contains the entire agreement between the parties and correctly sets forth the rights, duties, and obligations of each to the other as of the Effective Date. Any oral representations or modifications concerning this Agreement shall be of no force or effect excepting a subsequent written modification executed by both parties.

**35. Authorization to Complete Blanks.** By signing and delivering this agreement to the appropriate official of the County, the Owner/Developer authorizes the completion of this Agreement by filling in the Effective Date below. The Effective Date shall be the date of the preconstruction meeting with County.

**36. Binding Agreement.** The execution and delivery of this agreement and the performance of the transactions contemplated thereby have been duly authorized by all necessary corporate and governmental action of the County. This Agreement has been duly executed and delivered by each party, and constitutes a legal, valid, and binding

obligation of each party enforceable in accordance with the terms as of the effective Date. These representations and agreements are for the benefit of the Issuer, and have been relied on by the Issuer in issuing the Letter of Credit. The Parties hereto execute this instrument to be effective when signed by both parties.

EXECUTED by the parties to be effective as of the \_\_\_\_ day of \_\_\_\_\_ 2020.

FOR COUNTY OF EL PASO

Date: \_\_\_\_\_

\_\_\_\_\_  
(Signature of County of El Paso Signatory)

\_\_\_\_\_  
(Type Name and Title of County of El Paso Signatory)

FOR THE OWNER/DEVELOPER

**[NAME OF DEVELOPER]**

Date: \_\_\_\_\_

\_\_\_\_\_  
(Signature of Owner/Developer Signatory)

\_\_\_\_\_  
(Name & Title of Owner/Developer Signatory)

EXHIBIT A: COST OF OUTSTANDING SUBDIVISION IMPROVEMENTS

EXHIBIT B: SUBDIVISION PERFORMANCE BOND

EXHIBIT C: METES AND BOUNDS DESCRIPTION OF PROPERTY

EXHIBIT D: SAMPLE COPY OF MAINTENANCE BOND