

SUBDIVISION IMPROVEMENTS PERFORMANCE GUARANTEE AGREEMENT

1. **Purpose:** This Subdivision Improvements Performance Guarantee Agreement ("Agreement") is intended to help ensure that developers properly install all required subdivision improvements in a timely manner, in accordance with approved plats and construction plans. This agreement is not executed for the benefit of persons providing services or material to the subdivision, or for the benefit of persons buying lots or homes in the subdivision, or other possible third party beneficiaries.
2. **Parties:** This Agreement is between the County of Wake, North Carolina (the "County") and _____.
(_____ *[Name of "Developer"]* _____
_____ Phone number _____ Email)
3. **Term:** The term of this Agreement is _____ *[insert duration; may not exceed 2 years]* from the date of execution signified below.
4. **Subdivision:** This Agreement applies to property the Developer is developing as _____ *[Subdivision Name]*, Phase(s) _____, recorded in Book(s) of Maps and Page(s) _____.
5. **Improvements:** The Developer is responsible for the construction and installation, at the Developer's sole expense, of the following improvements:
 - a. all roads within the subdivision and improvements to existing roads required for safe and adequate access to the subdivision as may be required by this County's regulations;
 - b. drainage facilities, easements and temporary stormwater management devices associated with roadways;
 - c. erosion and sedimentation control devices; and
 - d. any other on- or off-site improvements required by the Wake County Unified Development Ordinance or subdivision plat approval.
6. **Standards:** The Developer will construct and install improvements required in Section 5 in accordance with NCDOT standards and all applicable County subdivision regulations and any other applicable federal, state, county or municipal standards in effect at the time of subdivision plat approval.
7. **Estimate of Probable Costs:** The Developer hereby agrees and states that the attached estimate of the probable costs of subdivision improvements include the cost of design, engineering and construction and project management and supervision. Please see Attachment A for estimate criteria.

Pursuant to Wake County subdivision regulation standards, estimated probable costs must be itemized by improvement type and certified by the applicant's engineer or other licensed professional as authorized by General Statute. Cost

estimates must be based on industry norms within Wake County. An itemized cost estimate must be attached to this Agreement.

The Developer hereby agrees that the construction of the improvements will be completed on or prior to _____ [insert "Construction Completion Date"], which date shall not exceed two years from the date of execution of this Agreement.

The Developer estimates, based on the certified formal cost estimate(s) attached hereto, that the total cost of the construction of the improvements will be as follows: _____.

8. **Administrative Fee:** The Developer will pay the County, at the time of execution signified below, an administrative fee in the amount of \$400 to cover the County's cost in administering the provisions of this Agreement.
9. **Security:** To secure the performance of the Developer's obligations under this Agreement, the Developer will provide the County either an irrevocable letter of credit, performance bond or a cash deposit in the amount of \$ _____ [125% of cost estimate as provided in #7 above].
 - a. **Letter of Credit:** If the Developer provides a letter of credit, it must be valid for at least one year and be payable to the County at any time upon presentation of (a) a sight draft drawn on the issuing Bank, (b) an affidavit executed by an authorized County Official stating that the Developer is in default under this Agreement, and (c) the original letter of credit. The letter of credit will be issued by a financial institution approved by the County and located within Wake County, North Carolina, and must be irrevocable. An authorized county official for purpose of this subsection shall include the County Manager, the Planning Director, or their designees. The Developer shall renew the letter of credit for successive one-year terms until this Agreement is of no further effect.
 - b. **Performance Bond:** If the Developer provides a performance bond, it must be valid for at least one year and payable to the County upon default of this Agreement. The bonding company must be licensed to do business in NC. The bond must also detail the procedure for drawing funds once the Developer is determined to be in default under this Agreement. The Developer shall renew the performance bond for successive one-year terms until this Agreement is of no further effect. If a performance bond is deemed to be perpetual in form the bonding company will be required to provide annual notice of the performance bond's continuance.
 - c. **Cash Deposit:** Cash deposits will be placed in a separate Wake County account and designated for this purpose.
10. **Reduction in Security:** Once all of the required improvements are at least 50 percent complete, as certified by a North Carolina Registered Professional Engineer, the County may reduce the total financial security by the ratio that the completed improvements bear to the total estimated cost of improvements

required, provided that no more than one such reduction may be permitted prior to releasing the performance guarantee.

- 11. Release of Security:** The County will release the security when all required Subdivision Improvement Completion Certification Forms have been provided and any required maintenance guarantee and corresponding documents have been provided.
- 12. Events of Default:** The following conditions, occurrences, omissions or actions will constitute a default by the Developer:
 - a.** Developer's failure to provide either of the following to the County at least two weeks before the agreement and/or security expires, (1) a properly executed Subdivision Improvement Completion Certification Form certifying that all required subdivision improvements have been constructed or installed or (2) a renewed Agreement and/or security under Section 14, below;
 - b.** Developer's insolvency, the appointment of a receiver for the Developer, or the filing of a voluntary or involuntary petition in bankruptcy respecting the Developer; or
 - c.** Foreclosure of any lien against the Subdivision property or a portion of the property, or assignment or conveyance of the Subdivision property in lieu of foreclosure.
 - d.** Within 10 days after any appointment of a receiver for the Developer, filing of a bankruptcy petition respecting the Developer, foreclosure against the Subdivision property, or conveyance of the Subdivision property in lieu of foreclosure, the Developer will give the County written notice of such event.
- 13. Notice of Default:** At least 60 days before this Agreement expires, the County may give the Developer written notice of the Agreement's upcoming expiration and of the County's intent to declare a default under Section 12. The County need not provide any further notice before declaring a default under Section 11.
- 14. Renewal of Agreement:** If agreed to in writing by the County and Developer, this Agreement may be extended no more than twice and for no more than one year per extension.
- 15. County's Rights Upon Default:** When any event of default occurs, the County may draw on the financial security to the extent of its face value. The Developer grants the County, its successors, assigns, agents, contractors, and employees, a nonexclusive right to enter the Subdivision property for the purposes of constructing or installing subdivision improvements
- 16. Indemnification:** The Developer expressly agrees to indemnify and hold the County harmless from and against any claims, cost, and liability for injury or damage received or sustained by any person or entity in connection with work

performed under this Agreement. The Developer further agrees to aid and defend the County if the County is named as a defendant in an action concerning work performed under this Agreement except where the action is brought by the Developer. The Developer is not an agent or employee of the County.

- 17. No Waiver:** No waiver of any provision of this Agreement will constitute a waiver of any other provision, nor will it constitute a continuing waiver, unless expressly provided for by a written amendment to this Agreement. Nor will any waiver of any default under this Agreement constitute a waiver of any subsequent default of defaults of the same type. The County's failure to exercise any right under this Agreement will not constitute the approval of any wrongful act by the Developer. The County's exercise of any right under this Agreement will not relieve the Developer from any obligation to complete the Improvements under the County's Unified Development Ordinance and will not constitute a waiver of the County's right to exercise any enforcement action under those ordinances.
- 18. Amendment or Modification:** The parties to this Agreement may amend or modify this Agreement only by written instrument executed on behalf of the County by the County Attorney (or his designee) and by the Developer (or the Developer's authorized officer). An amendment or modification must be properly notarized before it is effective.
- 19. Attorney's Fees:** Should either party be required to resort to litigation, arbitration, or mediation to enforce the terms of this Agreement, the prevailing party, whether plaintiff or defendant, will be entitled to costs - including reasonable attorney's fees and expert witness fees - from the opposing party.
- 20. Third Party Rights:** No person or entity not a party to this Agreement will have any right of action under this Agreement.
- 21. Scope:** This Agreement constitutes the entire agreement between the parties, and no statement, promise, or inducement not contained in this Agreement will be binding on the parties.
- 22. Severability:** If the courts hold any part of this Agreement to be illegal or otherwise unenforceable, such illegality or unenforceability will not affect the validity of any other part, and the rights of the parties will be construed as if the part was never a part of the Agreement.
- 23. Notice:** Any notice required by this Agreement will be considered effective when personally delivered in writing, or three days after being deposited with the U.S. Postal Service, postage prepaid.

To the Developer: _____

To the County:

Wake County Planning
Suite 101, Wake County Office Building
P.O. Box 550
Raleigh, NC 27602

24. Immunity: Nothing contained in this Agreement constitutes a waiver of the County's sovereign, governmental or public official immunities under state law.

[For one or more individuals]

Dated this _____ day of _____, 20_____.

By:

Name(s) of Developer(s)

North Carolina
_____ County

I, _____, a Notary Public for said County and State, do hereby certify that _____ personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal, this the _____ day of _____, 20_____.

(Official Seal) _____
Notary Public

My commission expires _____, 20_____.

[For a Corporation]

Dated this _____ day of _____, 20_____.

By: _____
Signature

[Print name and title]

North Carolina

_____ County

I, _____, a Notary Public for said
County and State, do hereby certify that
_____, personally appeared before me this
day and stated that he is _____ of
_____ and acknowledged, on behalf of
_____, the due execution of the
foregoing instrument.

Witness my hand and official seal, this _____ day of
_____, 20_____.

(Official Seal)

Notary Public

My commission expires _____, 20_____.

Attachment A

Cost Estimate Worksheet

Use the following worksheet to show cost estimates for each of the required items.

Item	Cost Per Unit	Total Cost
Clearing and Grading		
Base Course ¹		
Surface Course ²		
Temporary Erosion Control Devices ³		
Drainage Structures ⁴		
Project Management Costs		
	Total Cost Estimate	
	X 125% = Amount of Required Security	

¹ Correct Base Course to meet DOT specs for the specific road section based on subgrade soil type.

² Correct Surface Course to correspond with proper base course.

³ Items such as silt fence, tree protection fence, check dams, seeding, matting, etc associated with road system.

⁴ Storm pipe and other costs associated with road system.