SUBSTITUTE ASSURANCE AGREEMENT TO CONSTRUCT SUBDIVISION IMPROVEMENTS

THIRD PARTY TRUST

**TOWN OF MARANA, ARIZONA**

(Option; Portion of Subdivision)

This Agreement is made and entered into by and between Optionee's Name, an Arizona limited liability company (the “Optionee”), Optionee Trustee's Name, an Arizona corporation, as Trustee under trust number XXX, and not in its corporate capacity (the “Optionee Trustee”), and the Town of Marana, Arizona, a municipal corporation (the “Town”). The Optionee, the Optionee Trustee and the Town are sometimes collectively referred to in this Agreement as the “Parties,” any one of which is sometimes referred to as a “Party.”

# RECITALS

1. The Optionee has entered into an option agreement with Optionor's Name (the “Optionor”) for the purchase of Lots Subject Lots (the “Subject Lots”) of the subdivision created pursuant to the subdivision plat identified as Full Subdivision Name, recorded in the office of the Pima County Recorder at Sequence Number or Book and Page. The land area depicted on the plat and the manner in which the plat proposes to divide and develop the land are collectively referred to in this Agreement as the “Subdivision.”
2. The Town approved the final plat of the Subdivision on Subdivision Approval Date.
3. The Subdivision is subject to an existing agreement or agreements (collectively “the Existing Agreement”) to assure construction of subdivision improvements for the Subdivision. Under the Existing Agreement, Optionor has placed legal title to certain property, including the Subject Lots, in Optionor Trustee's Name, an Arizona corporation, as Trustee under trust number XXX, and not in its corporate capacity (the “Optionor Trustee”).
4. When ownership of one or more of the Subject Lots transfers from the Optionor and the Optionor Trustee to the Optionee and the Optionee Trustee, this Agreement is intended to take the place of and supercede the Existing Agreement to the extent of subdivision improvements that only benefit, serve, or are required for the Subject Lots that are transferred.
5. This Agreement is intended to leave the Existing Agreement in full force and effect to the extent subdivision improvements are required for, benefit, or serve portions of the Subdivision other than the Subject Lots that are transferred from the Optionor and the Optionor Trustee to the Optionee and the Optionee Trustee.
6. The Parties wish to establish specific terms, conditions and guidelines to assure completion of the required subdivision improvements in compliance with the provisions of A.R.S. § 9‑463.01(C)(8) and Marana Town Code section 17‑5‑5, as they may be amended from time to time.
7. The Town seeks to protect the health, safety and general welfare of the community by requiring the completion of various improvements in the Subdivision and thereby to limit the harmful effects of substandard subdivisions, including premature subdivision which leaves property undeveloped and unproductive.
8. This Agreement inures to the benefit of the Parties and is not executed for the benefit of third parties, such as, but not limited to, materialmen, laborers, or others providing work, services or materials for the Subdivision, or lot or home purchasers in the Subdivision.

# AGREEMENT

Now, therefore, based on the foregoing recitals, which are incorporated here as the intention of the Parties in entering into this Agreement, the Parties agree as follows:

1. **Construction of Subdivision improvements.** The Optionee shall construct and install, at no expense to the Town, all subdivision improvements shown on the approved preliminary plat (if applicable), final plat and improvement plans for the Subdivision that the Town reasonably determines are required to serve any portion of the Subdivision, including by way of illustration but not by limitation those improvements listed on Exhibit A attached to and incorporated in this Agreement, that serve those of the Subject Lots for which the Optionee exercises its option to purchase (the “Improvements”). The Optionee’s obligation to complete the Improvements arises as of the date of this Agreement, is independent of any obligations of the Town, and is not conditioned upon any further sale of any lots or improvements within the Subdivision. Nothing in this Agreement shall be construed as an undertaking by the Optionee Trustee to install, to guarantee the installation of, or to indemnify any other person for the installation of the Improvements.
2. **Existing utilities.** Any relocation or modification of existing utilities or public improvements necessary to construct the Improvements shall be done at no expense to the public. The Optionee’s performance of this requirement shall be considered in determining whether to release assurances under paragraphs 12 and 13.
3. **Assurance of construction.** This Agreement is submitted as an assurance that the Optionee will construct the Improvements as required by A.R.S. § 9‑463.01(C)(8) and Marana Town Code section 17‑5‑5.
4. **Start of construction.** If not already begun, construction of the Improvements shall promptly begin and shall be completed in a timely manner as required by Marana Town Code section 17‑5‑5, as it may be amended.
5. **Diligence.** Once construction of the Improvements has begun, the Optionee shall diligently pursue completion of the Improvements. The Optionee’s failure to do substantial work on the Improvements for a period of 30 consecutive calendar days shall be presumptive evidence that the Optionee is failing to diligently pursue construction of the Improvements.
6. **Completion of the** **Improvements.** The Optionee shall complete construction of the Improvements within the time period required by Marana Town Code section 17‑5‑5, as it may be amended. The Improvements shall not be considered completed unless and until they have been constructed in accordance with all applicable plans and regulations and inspected by the Town for compliance with the plans and regulations.
7. **Acceptance of the Improvements.** With respect to any of the Improvements to be dedicated to the Town, the Town shall not accept the Improvements or maintenance responsibility for the Improvements unless and until all of the following have occurred:
   1. The Improvements have been completed in accordance with paragraph 6 of this Agreement.
   2. The Improvements and the right-of-way in which the Improvements are located have been dedicated or conveyed to the Town.
   3. The Town by formal action has accepted dedication or conveyance of the Improvements and the right-of-way in which they are located.
8. **Warranty.** The Optionee warrants that the Improvements will be free from defects for a period of one year from the date the Town determines upon inspection (see paragraph 6 above) that the Improvements have been constructed in accordance with all applicable plans and regulations.
9. **Security.** To secure performance of its obligations under this Agreement, the Optionee shall immediately place legal title to each of the Subject Lots for which the Optionee exercises its option to purchase into a third party trust (the “Trust”) that is subject to the terms of this Agreement. The Optionee agrees that if the trust agreement entered into between the Optionee and the Optionee Trustee is terminated for any reason before the completion of all of the Improvements, the Optionee shall tender to the Town 1) monetary assurances in an amount equal to the Town’s estimate of the total cost to complete the Improvements, or 2) other assurances acceptable to Town.
10. **Limitation on transfer of title.** The Optionee Trustee shall not convey title to one or more of the Subject Lots without obtaining prior written approval from the Town in the form of a release of assurances signed by the Town Engineer.
11. **Conveyances between the Optionor and the Optionee.** Notwithstanding paragraph 10 and any similar requirement of the Existing Agreement, this Agreement constitutes prior approval by the Town for the Optionor Trustee to convey one or more of the Subject Lots to the Optionee Trustee.
12. **Release of assurances.** The obligations of the Optionee and the Optionee Trustee under this Agreement shall be released, and a release of assurances issued by the Town Engineer, only upon the Optionee’s satisfactory completion and the Town’s acceptance of the Improvements in accordance with paragraph 6, or the Optionee’s tender and the Town’s acceptance of substitute assurances for completion of the Improvements.
13. **Partial release of assurances.** The Town may issue a partial release of assurances, releasing one or more of the Subject Lots from this Agreement, if both of the following have occurred:
    1. All of the Improvements that are required for, benefit, or serve the released lots have been completed in accordance with paragraph 6 of this Agreement; and
    2. The Town determines that the released lots and the Improvements that are required for, benefit, or serve the released lots can be used and maintained separately from the Improvements that are not yet completed.
14. **Substitution of assurances.** The Optionee may submit substitute assurances in a form and amount acceptable to the Town at any time the Optionee is not in default of this Agreement.
15. **Contracts for sale.** Notwithstanding paragraph 10, the Optionee Trustee may enter into a contract or a deposit receipt agreement for the sale of one or more of the Subject Lots if the contract or agreement clearly states that none of the Subject Lots shall be conveyed until the Optionee’s obligations under this Agreement are fully performed.
16. **Bulk sales.** Notwithstanding paragraph 10, the Optionee Trustee may sell and convey all of the Subject Lots in one transaction to a single purchaser who has tendered to the Town satisfactory assurances for the completion of the Improvements.
17. **Conveyance out of trust for encumbrance.** Notwithstanding paragraph 10, the Optionee Trustee may convey one or more of the Subject Lots to the Optionee or to a beneficiary of the Trust solely for the purpose of encumbering the Subject Lots, provided that the Subject Lots are thereafter immediately reconveyed into the Trust. Any person or entity who records an encumbrance or security agreement against one or more of the Subject Lots shall be subject to the obligations of this Agreement.
18. **Town’s option upon default.** In addition to any other remedies, if the Optionee defaults on its obligations under this Agreement, the Town may at its sole discretion prepare and record a re-plat of the Subject Lots, eliminating the Improvements that have not been constructed and the lots or parcels served by those Improvements. The Optionee hereby authorizes the Town to execute on behalf of the Optionee all documents necessary to re-plat the Subject Lots. The re-plat may exclude any dedications already in use by the public or for utilities needed to serve the portions of the Subdivision which are not re-platted. The Optionee shall pay the reasonable costs incurred to re-plat the Subject Lots. The Town shall give 30 calendar days’ notice to the Optionee and the Optionee Trustee before initiating any action to re-plat one or more of the Subject Lots.
19. **Issuance of permits.** The Town shall not issue any permit for development of the Subject Lots, except permits for the completion of the Improvements, unless the Improvements that serve the lot or lots for which the permit is sought have been completed or are secured by acceptable assurances on file with the Town.
20. **Termination.** This Agreement shall remain in full force and effect until one of the following has occurred:
    1. All the Improvements have been completed and accepted by the Town Engineer as evidenced by a written full release of assurances from the Town Engineer.
    2. The Optionee has tendered substitute assurances acceptable to the Town for the completion of the Improvements.
    3. A new subdivision plat has been recorded for the Subject Lots in compliance with any and all applicable laws and regulations.
21. **Binding effect.** If for any reason the legal or beneficial title to the Subject Lots changes without the Town’s prior approval of substitute assurances or issuance of a release of assurance, this Agreement shall remaining binding upon the Parties and their respective successors and assigns. This paragraph shall not be construed as a waiver of the limitation on the transfer of title contained in paragraph 10 or the requirements for release of assurance or substitute assurance contained in paragraphs 12, 13, and 14.
22. **Severability.** The provisions of this Agreement are severable. A court’s determination that any portion of this Agreement is invalid shall not affect the validity of the remainder of this Agreement.
23. **No waiver.** No waiver of any provision of this Agreement shall be deemed or constitute a waiver of any other provision, nor shall it be deemed to be a continuing waiver unless expressly provided for by a written amendment to this Agreement signed by both the Town and the Optionee; nor will the waiver of any default under this Agreement be deemed a waiver of any subsequent default of the same type. The Town’s failure to exercise any right under this Agreement shall not constitute the approval of any wrongful act by the Optionee.
24. **Optionee’s notice of changes.** TheOptionee agrees to provide written notice to the Town at least ten calendar days before the occurrence of 1) a change of name, corporate identity or address of the Optionee or the Optionee Trustee; 2) intent to transfer, or a transfer of title to the Subject Lots by deed, contract or operation of law; 3) the foreclosure of a lien against one or more of the Subject Lots, 4) the filing of a volun­tary or involuntary petition of bankruptcy respecting the Optionee or affecting the Subdivision; 5) any other event that may affect performance of the Parties.
25. **Notices, addresses, and change of address.** Any notice required under this Agreement shall be complete when sent via First Class Mail or hand delivered to the following addresses. Any Party may change its address for purposes of notice under this Agreement by mailing a notice of change of address to the other Parties.

Optionee: Optionee's Name

1234 Main Street (use as many lines as necessary)

Marana, Arizona 85653

Optionee Trustee: Optionee Trustee's Name, an Arizona corporation, as Trustee under trust number XXX, and not in its corporate capacity

1234 Main Street (use as many lines as necessary)

Marana, Arizona 85653

Town: Town of Marana Development Services Center

11555 W. Civic Center Drive, A2

Marana, Arizona 85653

1. **Effect of failure to transfer ownership of the land.** This Agreement shall have no effect if none of the Subject Lots is transferred from the Optionor and the Optionor Trustee to the Optionee and the Optionee Trustee.
2. **Date of Agreement.** The date of this Agreement shall for all purposes be the date of the signature of the last of the Parties to sign this Agreement.

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| The “Optionee”:  Optionee's Name, an Arizona limited liability company  By:  Name of Optionee's Signer  Title of Optionee's Signer  The “Optionee Trustee”:  Optionee Trustee's Name, an Arizona corporation, as Trustee under trust number XXX, and not in its corporate capacity  By:  Name of Optionee Trustee's Signer  Title of Optionee Trustee's Signer | The “Town”:  Town of Marana, Arizona  By:  Town Manager  Attest:  By:  Town Clerk  Approved as to Form:  By:  Town Attorney  Approved as to Substance:  By:  Town Engineer |

State of Arizona )

ss.

County of Pima )

The foregoing instrument was acknowledged before me this day of                               , 20    , by Name of Optionee's Signer, Title of Optionee's Signer of Optionee's Name (the “Optionee”), an Arizona limited liability company, on its behalf.

|  |  |
| --- | --- |
| (Seal) | Notary Public |

State of Arizona )

ss.

County of Pima )

The foregoing instrument was acknowledged before me this day of                               , 20    , by Name of Optionee Trustee's Signer, Title of Optionee Trustee's Signer of Optionee Trustee's Name, an Arizona corporation, as Trustee under trust number XXX, and not in its corporate capacity (the “Optionee Trustee”).

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| (Seal) | Notary Public |

**Exhibit A**

Subdivision Name: Full Subdivision Name

Trustee: Optionee Trustee's Name, an Arizona corporation, as Trustee under trust number XXX, and not in its corporate capacity

The following improvements and conditions are made a part of this assurance agreement:

1. Obtaining all necessary Governmental permits
2. Preservation of native plants, as identified on approved salvage plans
3. Grading:
   1. Rough grading in improvement plans
   2. Structures in improvement plans
   3. Utility trenching in improvement plans
   4. Any other items included in improvement plans
4. Septic systems
5. Water distribution system
6. Other utility installations
7. Any off-site installations required
8. Any drainage included in improvement plans
9. Paving required by improvement plans, including, if appropriate:
   1. Subgrade
   2. Base
   3. Paving
   4. Curb and gutter
   5. Storm drainage not covered elsewhere
10. Installation of all signs and paving markings
11. Landscaping in any public right-of-way
12. Other construction items included in improvement plans, such as guardrails
13. Placement of all lot corners, standard monuments, and bench marks and records thereof
14. Field engineering: Staking, surveillance, inspections, testing, reports, as-built mylars
15. Park improvements and equipment for all pocket parks, if any, shown on the plat or improvement plans