

WARRANTY BOND AGREEMENT FORM:
LETTER OF CREDIT

COMPLETION OF PUBLIC IMPROVEMENTS

All property owners on record with Tooele County MUST be listed as Applicants. They must each sign and have their signatures notarized. Only those listed on County records as owners of the property can enter into a Warranty Bond Agreement. For purposes of this Agreement, a lender with no other ownership interest is not an owner.

[BOND AGREEMENT FORM BEHIND THIS PAGE]

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WARRANTY BOND AGREEMENT: LETTER OF CREDIT

THIS WARRANTY BOND AGREEMENT, (herein the "Agreement"), is entered into by the Parties this ____ day of _____, 20____ (the "Effective Date").

PARTIES

Applicant _____

is the following type of business entity (check the applicable business entity):

- corporation
- partnership
- limited liability company
- individual
- other business entity: _____

Applicant business address: _____

Applicant business telephone: (____) _____

Applicant business facsimile/email: _____

City: Tooele City Corporation, a municipal corporation of the State of Utah,

City address: 90 North Main Street, Tooele, UT 84074

City telephone: (435) 843-2120

City facsimile: (435) 843-2129

RECITALS

WHEREAS, the Applicant has received approval of the following land use(s) (check all that apply)

- residential subdivision
- commercial subdivision
- condominium subdivision
- site plan
- building permit
- other: _____

from the City for the Project named and located as follows:

Project name: _____

Project street address: _____;

and,

WHEREAS, Tooele City requires the payment of a Bond Administration Fee in the amount of \$250, intended to cover the costs of preparing and administering this Agreement and the warranty bond matters associated with this Agreement; and,

WHEREAS, under the land use approval for the Project, the Applicant was required to construct the following public infrastructure improvements, (herein the "Improvements"):

1. those public improvements specified in a Bond and Fee Calculation Sheet prepared by the City, which Bond and Fee Calculation Sheet is attached as **Exhibit A**, and which includes an estimate of the cost of constructing the Improvements; and,
2. those public improvements specified in the land use approval documents, including Project construction drawings, on file with the City, incorporated herein by this reference as **Exhibit B**;

and,

WHEREAS, the Improvements have been completed, inspected, and Accepted by issuance of a Certificate of Completion and Acceptance, and the one-year Warranty Period for the Improvements began the same day; and,

WHEREAS, the Improvements are required to be free from defects for a period of one year after their acceptance, and the warranty bond is to provide an assurance that any defects existing during the Warranty Period are corrected:

NOW, THEREFORE, in consideration of the promises and other valuable consideration contained herein, the Parties agree as follows:

TERMS AND CONDITIONS

1. ADDITIONAL DEFINITIONS.

1.1. "Acceptance" means the process whereby Improvements are accepted for purposes of City ownership and maintenance by Certificate of Completion and Acceptance. Also "Accepted."

1.2. "Applicant" and "City" shall also refer to all heirs, executors, administrators, successors, and/or assigns of the Applicant and the City, respectively.

1.3. "Bond Amount" shall include the Applicant's estimated cost to construct the Improvements, together with a reasonable contingency of 20% of said cost, intended to cover the costs of inflation and unforeseen conditions or other circumstances.

1.4. "Failure to Perform" or "Fail to Perform" shall mean, in addition to those acts specified previously, the non-performance in a timely manner by a party to this Agreement of any obligation, in whole or in part, required of such party by the terms

of this Agreement or required by Tooele City ordinance or other applicable law. The occurrence of such shall give the other party or parties the right to pursue any and all remedies available at law, in equity, and/or otherwise available pursuant to the terms of this Agreement.

1.5 "Improvements" shall mean those public infrastructure items referred to in Tooele City Code Section 7-1-5, in this Agreement, and in Exhibit B to this Agreement.

1.6. "Incidental Costs" shall mean engineering and architect fees, administrative expenses, court costs, attorney's fees (whether incurred by in-house or independent counsel), insurance premiums, mechanic or materialmen liens, and any other costs, and interest thereon, incurred by the City, occasioned by the Applicant's failure to perform any or all obligations under this Agreement, to any degree.

1.7. "Warranty Amount" means 10% of the Bond Amount.

1.8. "Warranty Period" means a period of one year from the date of Acceptance of the Improvements.

2. **PURPOSE OF AGREEMENT.** The Parties expressly acknowledge that the purposes of this Agreement include a) to guarantee that all Accepted Improvements are free from deficiency for the Warranty Period, and b) to guarantee that land developments are free from construction debris and waste items at the end of the Warranty Period.

3. **WARRANTY OF IMPROVEMENTS.** The Applicant hereby warrants that the Improvements shall remain free from defect, damage, or other deficiency, as determined by the City, such that the Improvements continue to meet City standards throughout the Warranty Period. The Applicant also warrants that during the Warranty Period the rights-of-way, vacant areas, and other areas within the Project site or subdivision that are accessible to the Applicant or within the Applicant's control will be kept reasonably clean and free from any construction debris, waste items, and mounds of soil, rocks, concrete, asphalt, and other debris. To secure the warranty, Applicant shall provide an Irrevocable Letter of Credit for the Warranty Period and for the Warranty Amount, as provided and defined below

4. **WARRANTY AMOUNT.** The Applicant expressly agrees that, notwithstanding any partial release of any of the Bond Amount, the City shall Letter of Credit for the Warranty Amount, which for purposes of this Agreement shall be \$_____. A copy of the Letter of Credit shall be attached hereto as **Exhibit C**. The Letter of Credit shall comply with the most recent Uniform Customs and Practices for Documentary Credits published by the International Chamber of Commerce, and shall be for a term of at least one year. The original Letter of Credit shall be maintained in the files of the Tooele City Recorder. Notwithstanding the Warranty Amount, the Applicant shall be responsible for

any substandard, defective, or damaged Improvements if the Warranty Amount is inadequate to repair or replace any such Improvements.

5. **UNRELATED OBLIGATIONS OF APPLICANT.** The benefits and protections provided by this Agreement shall inure solely to the Parties and not to third parties, including, but not limited to, lot purchasers, contractors, subcontractors, laborers, suppliers, or others. The City shall not be liable to claimants or others for obligations of the Applicant under this Agreement. The City shall have no liability for payment of any costs or expenses of any party who attempts to make a claim under this Agreement, and shall have under this Agreement no obligation to make payments to, give notices on behalf of, or otherwise have obligations to any alleged claimants under this Agreement.

6. **AGREEMENT DOCUMENTS.** All data used by the City to compute the cost of, or otherwise govern the design and installation of, the Improvements is hereby made a part of this Agreement, and is incorporated herein by this reference as part of **Exhibit B**.

7. **SPECIFIC ENFORCEMENT.** The Applicant has entered into this Agreement with the City for the purposes set forth herein. The City shall be entitled to specifically enforce the Applicant's obligations under this Agreement, including to construct and to install the Improvements in a manner that is proper, timely, and satisfactory to the City.

8. **APPLICANT'S INDEPENDENT OBLIGATION.** The Applicant expressly acknowledges, understands, and agrees that its obligations under this Agreement are independent of any obligation or responsibility of the City, either express or implied. The Applicant further acknowledges the following: (a) that its contractual obligations under this Agreement are independent of any remedy available to the City to require Improvements free of defects; (b) that the Applicant may not assert as a defense that the City has remedies against other entities or has other remedies in equity or at law that would otherwise relieve the Applicant of all or a portion of its duty to perform as outlined in this Agreement or to preclude the City from requiring the Applicant's performance under this Agreement; and, (c) that the Applicant has a legal obligation pursuant to the Tooele City Code, independent of this Agreement, to provide Improvements free of defects (see particularly Tooele City Code §7-11-13, §7-19-12, and §7-19-32).

9. **APPLICANT'S OBLIGATION FOR COSTS.** Should the Applicant Fail to Perform any of its obligations under this Agreement in any degree, the Applicant agrees to compensate the City for all its costs, including Incidental Costs, related to the Applicant's Failure to Perform its obligations to the extent that such costs are not adequately covered by the Warranty Amount.

10. **ACCEPTANCE OF IMPROVEMENTS.** Acceptance of the Improvements shall be evidenced by a fully-signed Certificate of Completion and Acceptance, pursuant to Tooele City Code §7-19-32.

11. **APPLICANT INDEMNIFICATION.** Applicant agrees to indemnify, defend, and save harmless the City, its officers, employees, and agents from and against any and all liability which may arise as a result of any Improvements which are found at any point during the Warranty Period to be defective or damaged. With respect to the Applicant's agreement to defend the City, the City shall have the option to either provide its own defense, with all costs for such being borne by the Applicant, or require that the Applicant undertake the defense of the City.

12. **USE OF THE WARRANTY AMOUNT.** In the event the Applicant Fails to Perform any obligation under this Agreement or Tooele City ordinances, the City may use and expend all the Warranty Amount or such lesser amount as may be estimated or required by the City to be necessary to remedy Improvements deficiencies. The City is under no contractual obligation under this Agreement to remedy Improvements deficiencies.

13. **INADEQUATE PROCEEDS.** If the Warranty Amount is inadequate to pay the cost of correcting Improvements deficiencies, for whatever reason, or any other item for which the Warranty Amount may be utilized, the Applicant shall be responsible for the deficiency independent of the performance guarantees set forth in this Agreement. Additionally, no further land use applications or other permits or licenses shall be issued by the City until the Improvements deficiencies are corrected or the development site left clear of construction debris consistent with the purposes of this Agreement. Furthermore, the cost of remedying Improvements deficiencies shall include reimbursement to the City for all costs, including construction costs and any Incidental Costs incurred by the City, in doing so.

14. **INCIDENTAL COSTS.** (For Letters of Credit and Guaranteed Escrow Account Bonds.) If for any reason outside the control of the City the Warranty Amount is not remitted or otherwise made available to the City within 30 days of any Failure to Perform by the Applicant, then the City's costs of obtaining the Warranty Amount, including the City Attorney's Office costs or outside attorney's fees and court costs, shall be added to the amount due to the City from the Applicant and shall be added to the Warranty Amount sums remitted to the City.

15. **ACCESS TO PROPERTY.** Should the City elect to use the Warranty Amount to remedy Improvements deficiencies or clean a development site, the Applicant hereby expressly grants to the City, and any agent of City, the right of access to the Project property to do so.

16. **SUBSTANDARD IMPROVEMENTS.** Should any Improvements prove to be substandard, defective, or damaged, in the perspective of the City, within the Warranty Period, the City shall notify the Applicant in writing of such substandard, defective, or damaged Improvements prior to the end of the Warranty Period. The Applicant shall then have 15 days from the date of the City notice to commence repair of the Improvements, and a reasonable amount of time, as determined by the City, which shall be specified in the notice, to complete repair of the Improvements. Should the Applicant fail to either commence or complete repair of the Improvements within the required time

periods, the City may exercise its option to remedy the defects and repair the damage, and also to demand payment for such from the Applicant should the Warranty Amount be insufficient to cover the costs incurred by the City. The expiration of the Warranty Period shall not relieve the Applicant of any of its obligations under this Agreement where notice of Improvements deficiencies was provided to the Applicant during the Warranty Period.

17. **INSURANCE.** At all times during the construction of the Improvements, including through the end of the Warranty Period, the Applicant shall maintain an insurance policy covering any liability, damage, loss, judgment, or injury to any person or property, including, but not limited to, damage to the Applicant or its Project property as a result of the work of any contractor or agent hired by the City to construct the Improvements, including the repair of damage or defect. The City shall be named an additional insured on this policy. The minimum dollar amount and the scope of coverage of the insurance policy shall be determined and set by the City. The Applicant shall indemnify, defend, and hold harmless the City, its officers, employees, and agents for any liability which exceeds the insurance policy limit. The City, at its option, may collect and expend the Warranty Amount to make the premium payments should the Applicant fail to pay the premium. No further land use applications or other permits or licenses shall be issued by the City, and any existing approvals, permits, or licenses shall be suspended, until said premium is initially paid and a bond is in place to cover subsequent payments. The Applicant further expressly agrees to indemnify, defend, and hold harmless the City, its officers, agents, and employees for and from any damage or loss suffered or any judgment resulting from the work of any contractor or agent hired by the City to install, complete, or remedy any defect in or damage to the Improvements.

18. **NOTICE.** Notice to the Applicant or the City shall be mailed or delivered to the addresses shown in this Agreement. The date notice is received at the address shown in this Agreement shall be the date of actual notice, however accomplished. Notice sent by U.S. mail shall be considered received three days after mailing. The Applicant's address may be changed by written notification from the Applicant.

19. **MECHANIC/MATERIALMEN LIENS.** Should the City elect to complete or remedy the Improvements, the Applicant shall indemnify, defend, and hold harmless the City from and against any liability which exceeds the Bond Amount for the payment of any labor or material lien as a result of any work of any contractor (including subcontractors and materialmen of any such contractor or agent) hired by City or which may arise due to either a defect in or failure of this Agreement or insufficient Bond Amount to cover such costs.

20. **FAILURE TO PERFORM.** In addition to those events described herein, the following shall be considered a Failure to Perform on the part of the Applicant, the occurrence of which shall entitle the City to invoke any and all remedies outlined in this Agreement or any and all remedies it may have in equity or at law: the Applicant's abandonment of the project, as determined by City; the Applicant's insolvency, appointment of a receiver, or filing of a voluntary or involuntary petition in bankruptcy; the

commencement of a foreclosure proceeding against the Project property; the Project property being conveyed in lieu of foreclosure.

21. **WAIVER.** The failure by the City to insist upon the strict performance of any covenant, duty, agreement, or condition of this Agreement or to exercise any right or remedy consequent upon a failure to perform thereof shall not constitute a waiver of any such failure to perform or any other covenant, agreement, term, or condition. No waiver shall affect or alter the remainder of this Agreement, but each and every other covenant, agreement, term, and condition hereof shall continue in full force and effect with respect to any other then existing or subsequently occurring failure to perform.

22. **ATTORNEYS FEES.** In the event there is a failure to perform under this Agreement and it becomes reasonably necessary for any party to employ the services of an attorney in connection therewith (whether such attorney be in-house or outside counsel), either with or without litigation, the party prevailing in a controversy before a court of competent jurisdiction shall be entitled to recover reasonable attorneys fees and such reasonable costs and expenses as are incurred as a result of the failure to perform or in otherwise enforcing this Agreement.

23. **TIME IS OF THE ESSENCE.** Time is of the essence in this Agreement. In case either party fails to perform the obligations on its part at the time fixed for the performance of such obligations by the terms of this Agreement, the other party may pursue any and all remedies available in equity or law.

24. **GOVERNING LAW.** This Agreement shall be interpreted pursuant to, and the terms thereof governed by, the laws of the State of Utah. This Agreement shall be further governed by Tooele City ordinances in effect at the time of the execution of this Agreement. However, the Parties expressly acknowledge that any land use ordinances or regulations enacted after the execution of this Agreement, which are reasonably necessary to protect the health, safety, and welfare of the citizens of the City, shall also apply to the Project, the land use approval, and the Improvements that are the subject of this Agreement.

25. **WAIVER OF JURY TRIAL.** To the fullest extent permitted by law, each of the parties hereto waives any right it may have to a trial by jury in respect of litigation directly or indirectly arising out of, under or in connection with this agreement. Each party further waives any right to consolidate any action in which a jury trial has been waived with any other action in which a jury trial cannot be or has not been waived.

26. **INDUCEMENT; INTEGRATION; MODIFICATION; CAPTIONS; SEVERABILITY.**

26.1. The making and execution of this Agreement has been induced by no representations, statements, warranties, or agreements other than those herein expressed.

26.2. This Agreement embodies the entire understanding of the parties, and there are no further or other agreements or understandings, written or oral, in effect between the Parties relating to the subject matter herein.

26.3. This Agreement may be amended or modified only by an instrument of equal formality signed by the respective Parties.

26.4. The titles or captions of this Agreement are for convenience only and shall not be deemed in any way to define, limit, extend, augment, amend, or described the scope, content, or intent of any part or parts of this Agreement.

26.5. If any portion of this Agreement is declared invalid by a court of competent jurisdiction, the remaining portions shall not be affected thereby, but shall remain in full force and effect.

SIGNED as of the Effective Date:

Applicant

Printed Name and Title: _____

(Signature must be notarized on following page.)

(Attach additional signature and notary pages for multiple owners, as necessary.)

Tooele City Corporation

Mayor

ATTEST:

City Recorder

Approved as to Form:

City Attorney

SAMPLE

Exhibit A

Tooele City Fee Calculation Sheet with Improvements construction estimate

SAMPLE

Exhibit B

Project construction drawings
Project approval documents
Other Project-related documents and data

(attached only by reference)

Exhibit C

Irrevocable Letter of Credit

SAMPLE