

**ORDINANCE NO. 560**

**AN ORDINANCE TO STANDARDIZE SUBDIVISION IMPROVEMENT AGREEMENTS BETWEEN THE CITY OF POLSON AND SUBDIVISION DEVELOPERS:**

**BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF POLSON, MONTANA:**

WHEREAS, the City of Polson oversees and administers all subdivision requests within the City of Polson; and,

WHEREAS, Montana law provides that the City may give subdivision approvals prior to completion of improvements therein so long as the City is adequately assured that the completion of necessary infrastructure and improvement will occur; and,

WHEREAS, the City of Polson finds that the public health and safety require subdivision developers to complete improvements, including but not limited to roads, curbs, sidewalks, and provision for water, sewer, and power within subdivisions; and,

WHEREAS, the City of Polson desires to standardize to the extent possible the assurances to be provided to the City of Polson by subdivision developers to ensure that the improvements within the approved subdivision occur; and,

WHEREAS, the City of Polson has developed standardized Subdivision Improvement Agreement as Exhibits A & B, respectively, together with a standardized Irrevocable Letter of Credit, both of which are attached hereto and by this reference made a part hereof as if fully set forth in this place, for the purpose of ensuring adequate protection to the City of Polson and its inhabitants during development of subdivisions; and,

WHEREAS, the City of Polson does not intend by adoption hereby of the Subdivision Improvement Agreement to benefit contractors, suppliers, laborers or others providing work, services, or materials to any developer or subdivision or for the benefit of any lot or home buyers within any subdivision, but intends only hereby to protect the interests of the City of Polson and its inhabitants; and,

WHEREAS, the City of Polson recognizes that each Agreement entered into between the City and subdivision developers will be unique, and wishes to empower designated City employees to negotiate the final terms of any agreement on behalf of the City subject to the final consent and approval of the City Council.

**THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF POLSON:**

- Section 1. That the foregoing are not Recitals but are part and parcel of this Ordinance.
- Section 2. That the Subdivision Improvements Agreement attached hereto are hereby adopted as a standard form to be used by the City in developing agreements with subdivision developers.
- Section 3. That the Irrevocable Letter of Credit form attached hereto are hereby adopted as a standard form to be used by the City in developing agreements with subdivision developers.
- Section 4. That City staff personnel are authorized and required to present the Subdivision Improvements Agreement and Irrevocable Letter of Credit forms to any interested subdivision developers and to use the same as the basis for negotiations on the subjects therein covered.
- Section 5. The City recognizes that each development is unique and will entail negotiations directed at achieving a mutual agreement acceptable in particular development circumstances. Therefore, the City does not require that each agreement entered into between itself and any subdivision developers adhere strictly to the form agreements or letter of credit attached hereto. In addition, other forms of financial security such as escrows or bonds are not barred by this Ordinance.

Section 6. No employee, administrator, or agent of the City has any power to finally bind the City to any negotiation position or tentative agreement. Any draft agreement reached between any employee or agent of the City and a developer is not effective to bind the City to any obligation therein stated until such time as, with the advice and consent of the Council, the same has been executed on behalf of the City by the Mayor thereof.

Section 7. No final Subdivision Improvement Agreement executed by the Mayor of the City of Polson with the advice and consent of the Council is effective to bind the City thereto unless the same is complete as to form including any and all attachments or exhibits referenced therein.

Section 8. Any ordinances or parts of ordinances in conflict herewith are, to that extent, repealed.

**REPEALING CLAUSE:** All ordinances or parts of ordinances in conflict herewith are hereby repealed.

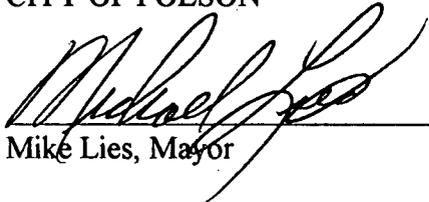
**FIRST READING:** March 15, 1999

**SECOND READING:** April 5, 1999

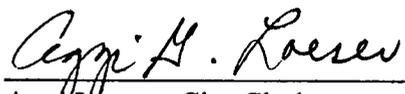
**NOW THEREFORE,** it is resolved that the subject Ordinance shall become effective on the 5th day of May, 1999.

**PASSED AND ADOPTED THIS** 5th day of April 1999.

CITY OF POLSON

  
\_\_\_\_\_  
Mike Lies, Mayor

ATTEST:

  
\_\_\_\_\_  
Aggy Loeser, City Clerk

**SUBDIVISION IMPROVEMENTS AGREEMENT**

The parties to this Subdivision Improvements Agreement (“this agreement”) are \_\_\_\_\_ (“the Developer”) and the City of Polson.

WHEREAS, the Developer also desires to defer construction of improvements described in Attachment B;

WHEREAS, the purpose of this Agreement is to protect the City of Polson and is not intended for the benefit of contractors, suppliers, laborers or others providing work, services, or materials to the Subdivision, or for the benefit of lot or home buyers in the Subdivision; and

WHEREAS, the mutual promises, covenants and obligations contained in this Agreement are authorized by state law and City of Polson subdivision regulations.

NOW THEREFORE BE IT RESOLVED, The Parties hereby agree as follows:

Effective Date: The effective date of this Agreement shall be the date that final subdivision plat approval is granted by the City of Polson.

Attachments: The Attachments cited herein are hereby made a part of this Agreement.

**DEVELOPER’S OBLIGATIONS**

Improvements: The Developer shall construct and install, at his own expense, those subdivision improvements listed in attachment B of this Agreement. The Developer’s obligation to complete the improvements shall arise upon approval of the final subdivision plat. Building Permits and Certificates of Occupancy will be conditioned on completion of all improvements and conformance with all relevant laws, ordinances, regulations and requirements in effect at the time of subdivision plat approval within the City of Polson Jurisdictional Area, and shall be independent of any obligations of the City of Polson contained in this Agreement.

Security: To secure the performance of his obligations under this Agreement, the Developer shall deposit with the City of Polson on or before the effective date, an Irrevocable Letter Of Credit (or other financial security acceptable to the local officials) in the amount of \$ (150% of accepted bid). The letter of credit shall be issued by (lending institution), be payable at sight to the City of Polson and bear an expiration date not sooner than 455 days after the improvement completion deadline (maximum of 2 years). This time frame covers an additional 1-year warranty period and an additional 90 days to give local officials time to submit any drafts and documentation to draw funds, if necessary. The letter of credit shall be

so drawn by the Developer's lending institution so as to be payable to the City of Polson at any time upon presentation of (1) a sight draft drawn on the issuing lending institution in the amount up to \$ (150% of the accepted bid price), (2) a signed statement or affidavit executed by an authorized City official stating that the Developer is in default under this Agreement; and (3) the original copy of the letter of credit, and upon no other conditions.

**Standards:**

The Developer shall construct the required improvements according to the standards and specifications required by the City of Polson as specified in Attachment D of this Agreement.

The Developer shall be required to provide a resident on-site construction inspector at all times that work on the required on and off-site improvements is proceeding. The inspector shall be approved by the City Council prior to initiation of any work on said improvements. The inspector shall provide to the City Clerk copies of daily inspection reports no later than noon the first City work day of the week following any week in which work proceeded. The City shall not inspect, certify or consider accepting any improvements without documentation of these inspections.

**6. Damage & Repair of Public & Private Property:** The Developer will be responsible to repair, at Developer's sole expense, any damage to any public & private property that may occur during construction. This includes repairing any disturbed area to the condition it was in before construction or better. Developer specifically agrees to indemnify and hold the City harmless for any claims for damage or injury arising from Developer's execution of this Agreement.

**Warranty:** The Developer warrants that each and every improvement, including both materials and workmanship, shall be free from defects for a period of 1 year from the date that the City of Polson accepts the dedication of the last improvement completed by the Developer.

**Commencement and Completion Periods:** The Developer shall complete all of the required improvements within (2 max.) years from the effective date of this Agreement.

**Compliance with Law:** The Developer shall comply with all relevant laws, ordinances, regulations and requirements in effect at the time of subdivision plat approval when meeting his obligations under this Agreement, including but not limited to compliance with material and construction specifications contained in all relevant authorities as to which Developer specifically agrees and understands Developer has the obligation to inform itself.

**CITY OF POLSON OBLIGATIONS**

**Inspection and Certification:**

The City of Polson shall provide for inspection of the improvements as they are completed and, where found acceptable, shall certify those improvements as complying with the standards and specifications set forth in Attachment D of this Agreement. The inspection and certification shall occur within 14 days of notice by the Developer that the improvements are complete and he desires City inspection and certification. Before requesting City certification of any improvements the Developer shall present to the City valid lien waivers from all persons providing materials or performing work on the improvements. Actual costs for time spent on initial and subsequent inspection of required improvements by the City must be paid before certificates of compliance are issued and any portion of the letter of credit funds are released. The fees and costs for City inspections and certifications hereunder required shall be defined by the City at the time this Agreement is entered into.

Reproducible as-built drawings of all subdivision improvements to be dedicated to the City shall be provided, at the developer's expense, before a certificate of compliance is issued.

Certification by the City of Polson does not constitute a waiver by the City of the right to draw funds under the letter of credit in the event defects in or failure of any improvement are found following the certification.

**Notice of Defect:** The City of Polson shall provide timely notice to the Developer whenever inspection reveals that an improvement does not conform to the standards and specifications set forth in Attachment D, or is otherwise defective. The Developer shall have 30 days from the date the notice is issued to remedy the defect. The City of Polson may not declare default under this Agreement during the 30-day remedy period unless the Developer clearly indicates he/she does not intend to correct the defect. The Developer shall have no right to correct the defect in, or failure of, any improvement found after the City accepts dedication of the improvements.

**Reduction of Security:** After the acceptance of any improvement, the amount that the City of Polson is entitled to draw on the letter of credit shall be reduced by an amount equal to 75 percent of the estimated cost of the improvement as shown in Attachment B. At the request of the Developer, the City shall execute a certificate verifying the acceptance of the improvement and waiving its right to draw on the letter of credit to the extent of the amount. Upon the certification of all of the improvements the balance that may be drawn under the credit shall be available to the City for the one-year warranty period plus an additional 90 days.

**Use of Proceeds:** The City of Polson shall use funds drawn under the letter of credit only for the purposes of completing the improvements or correcting defects in or failure of the improvements.

**OTHER PROVISIONS**

Events of Default: The following conditions, occurrences or actions shall constitute a default by the Developer during the completion period:  
failure to complete construction of the improvements within (2 maximum) years of final subdivision plat approval;  
failure to remedy the defective construction of any improvement within the remedy period;  
insolvency of the Developer or the filing of a petition for bankruptcy;  
foreclosure of the property or assignment or conveyance of the property in lieu of foreclosure.

Measure of Damages: The measure of damages for breach of this Agreement shall be the reasonable cost of completing the improvements. For purposes of this Agreement the estimated cost of the improvements as specified in Attachment B shall be prima facie evidence of the minimum cost of completion. However, neither that amount nor the amount of the letter of credit establishes the maximum amount of the Developer's liability. The City shall be entitled to complete all unfinished improvements at the time of default regardless of the extent to which development has taken place in the Subdivision or whether development ever was commenced.

16. Local Government Right Upon Default:

**Upon the occurrence of any event of default, the City may draw on the letter of credit to the extent of the face amount of the credit less the estimated cost (as shown in Attachment B) of all improvements previously certified by the City. The City shall have the right to complete improvements itself or contract with a third party for completion and use the funds deriving from the letter of credit for those purposes.**

In addition, the City may suspend final plat approval during which time the Developer shall have no right to sell, transfer or otherwise convey lots or homes within the Subdivision without the express approval of the City or until the improvements are completed and certified by the City.

Indemnification: The Developer agrees to indemnify and hold the City harmless for and against all claims, costs and liability of every kind and nature, for injury or damage received or sustained by any person or entity in connection with, or on account of, or due to, the performance of work under this agreement.

Independent Contractor The Developer acknowledges its obligations to comply with all applicable law regarding appropriate employee insurance. The Developer shall supply its own tools and equipment and be guided in execution hereof only as to the result and not as to the process. The parties hereto agree that Developer or its agents, employees, heirs, successors, or assigns, are not employees, officers, agents, or assigns of the City for any purposes arising from the existence or execution of this Agreement. In those cases where Developer is at the

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time of execution or subsequently becomes an employee or public official of the City of Polson, the said employee or public official acknowledges that he or she is not an employee of the City for any claims that may arise out of the employee's execution of the terms of this Agreement as Developer. Developer specifically acknowledges that no execution of the terms hereof by the Developer shall operate to establish an employer/employee relationship between the City and the Developer or any agent of either.

**Amendment or Modification:** The Parties to this Agreement may amend or modify this Agreement only by written instrument executed on behalf of the City and by the Developer.

**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, shall be entitled to costs, including reasonable attorney's fees and expert witness fees, from the opposing party. If the court, arbitrator or mediator awards relief to both parties, each shall bear its own costs in their entirety.

**Third Party Rights:** No person or entity who is not party to this Agreement shall have any right under this Agreement, except that if the City does not exercise its rights within 60 days following an event of default, a purchaser of a lot or home in the Subdivision may bring an action in mandamus to compel the City to exercise its rights.

**Scope:** The Agreement constitutes the entire agreement between the parties and no statement, promise or inducement that is not contained in this Agreement shall be binding on the parties.

**Time:** For the purpose of computing the Commencement and completion periods, and time periods for City action, times in which war, civil disasters, acts of God or extreme weather conditions occur shall not be included if the events prevent the Developer or the City from performing the obligations under this Agreement.

**Assigns:** The benefits of this Agreement to the Developer may not be assigned without the express written approval of the City. Such approval may not be withheld unreasonable, but any unapproved assignment is void. There is no prohibition on the right of the City to assign its rights under this Agreement.

The City shall release the original Developer's letter of credit if it accepts new security from any developer or lender who obtains the property. However, no action by the City shall constitute a release of the original developer from his liability under this Agreement.

**Severability:** If any part, term or provision of this Agreement is held by the courts to be illegal the illegality shall not affect the validity of any other part, term or provision, and the rights of the parties shall be construed as if the part, term or

provision were never part of the Agreement.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_.

\_\_\_\_\_  
MAYOR OF THE CITY OF POLSON

\_\_\_\_\_  
Developer

**ATTACHMENT D  
IMPROVEMENTS STANDARDS & SPECIFICATIONS**

The provisions of this attachment ensure that required improvements will be installed and maintained in accordance with the standards enforceable and applicable within the City of Polson. A required improvement is any on or off-site improvement required for compliance with all relevant laws, ordinances, regulations and requirements in effect at the time of subdivision plat approval when meeting the obligations under this Agreement. Required improvements include, but are not limited to: storm water retention; utilities; fire protection; streets, curb, gutter, sidewalks; off-street parking and loading areas; improvements required by a community impact report; landscaping and buffers; lighting; and any other requirements required for compliance by the City of Polson.

The letter of credit (or other financial security acceptable to the local officials) shall be in the amount to cover all costs listed below with the exception of private utilities.

**STANDARDS:**

**Utilities**

- a. Water & Sewer                      Montana Public Works Standards, DEQ, & City

**Private Utilities**

- a. Gas, Power, Phone, cable                      Provide letter from Utilities Company stating services are available and will be provided
- 3. Fire Protection                                      Current U.F.C. codes, State, City
- 4. Streets, curb & Gutter, Sidewalks                      Current City Standards - as approved by City Staff

- 5. Access Driveways & Off-Street Parking                      Current City Standards – as approved by City Staff
- 6. Landscaping & Lighting                                      Current City Standards – as approved by City Staff

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**TERMS TO BE INCLUDED IN ANY SUBDIVISION IMPROVEMENT AGREEMENT WHEN DEVELOPMENT TO BE COMPLETED IN PHASES.**

The Developer may elect to record final plats of the Development in phases or to offer phases of the Development for lease, sale, or occupancy before all required improvements are installed. Phasing shall be permitted pursuant to a development agreement that:

1. incorporates the preliminary plat or site plan used as a basis for permit approval and a detailed site plan and construction drawings of the initial phase;
2. identifies all required improvements in the initial phase/s and establishes their estimated cost;
3. sets a schedule for the completion of the required improvements in the initial phase and an anticipated schedule for future phases;
4. guarantees completion and 455 days warranty of all required improvements in the initial phase/s using one of the methods acceptable to the City, and provides a process for submission of detailed plans and cost estimates, and the guarantee of improvements in future phases;
5. provides a process by which the city may, if necessary, complete required improvements using the guarantee provided;
6. provides a process by which either party may request re-negotiation of the development agreement;
7. provides a process by which the development agreement may be transferred, with city approval, to the developer's successors; and
8. provides that the development agreement and any vested rights it confers shall be void if the City is required to "call" a guarantee to complete required improvements, or if the anticipated schedule is not met or re-negotiated. The developer may re-negotiate the anticipated schedule without losing vested rights, provided that such negotiations are initiated within 90 days after failure to initiate or complete a phase as scheduled.

**TERMS TO BE INCLUDED IN SUBDIVISION IMPROVEMENT AGREEMENT WHEN REQUIRED IMPROVEMENTS WILL BE COMPLETED BEFORE FINAL PLAT IS APPROVED AND THE DEVELOPMENT IS OFFERED FOR LEASE, SALE OR OCCUPANCY.**

Enforcement of the warranty shall be assured by a letter of credit (or other financial security acceptable to the City) in the amount of 25% of the cost of the required improvements.

The warranty funds shall be released upon expiration of the warranty period or, if necessary, used to remedy defects that have not been remedied by the developer on the terms and conditions as appear elsewhere in this Agreement.

**IRREVOCABLE LETTER OF CREDIT**

Letter of Credit # \_\_\_\_\_

Date

**City of Polson  
106 1<sup>st</sup> St. East  
P.O. Box 238  
Polson, MT. 59860**

**City of Polson,**

**We hereby establish in your favor our Irrevocable Letter of Credit # \_\_\_\_\_ for the account of (Developer) , available by your drafts at sight up to an aggregate amount of \$ \_\_\_\_\_. Should (Developer) default or fail to complete the improvements under the terms specified in the attached subdivision improvements agreement for (Name of Subdivision) . We shall pay on demand your sight draft or drafts for such funds, to the limit of credit set forth herein, as are required to complete said improvements.**

**All drafts must be presented prior to (expiration date) and this Letter of Credit must accompany the final draft for payment. Drafts drawn hereunder must be by sight draft marked:**

**“Drawn under (lending institution) , Letter of Credit # \_\_\_\_\_ dated (date of Letter of Credit ),” and the amount drawn endorsed on the reverse hereof by the lending institution.**

**Unless otherwise stated, this Letter of Credit is subject to the Uniform Customs and Practices for Commercial Documentary Credits (1983 Revision) International Chamber of Commerce. We hereby agree with the drawers, endorsers and bona fide holders of the drafts drawn under and in compliance with the terms of this Credit that these drafts shall be duly honored upon presentation to the drawee.**

**This Letter of Credit may not be withdrawn or reduced in any amount prior to its expiration date except by your draft or written release.**

**(Lending Institution)**

**(Signature and Title of Official)**