

JHS94DRN

TYPE OF RECORD:	PERMANENT
CATEGORY OF RECORD:	DEVELOPMENT IMPROVEMENTS AGREEMENT
NAME OF CONTRACTOR:	J.H.S. LIMITED LIABILITY COMPANY BY FREDRICK A. SCHUMANN, PARTNER
PROJECT/SUBDIVISION:	LARCHWOOD INN DRAINAGE IMPROVEMENTS
ADDRESS:	2845 NORTH 15 TH STREET
TAX PARCEL NO:	2945-013-11-003
FILE #:	1993-0093
CITY DEPARTMENT:	PUBLIC WORKS AND PLANNING
YEAR:	1994
EXPIRATION DATE:	NONE
DESTRUCTION DATE:	NONE

DEVELOPMENT IMPROVEMENTS AGREEMENT

*file original
improvements completed
as of 8/12/94. Guarantee
retained for landscaping
improvements. KJ*

1. **Parties:** The parties to this Development Improvements Agreement ("the Agreement") are J.H.S. Limited Liability Company by Fredrick A. Schumann, Partner ("the Developer") and **THE CITY OF GRAND JUNCTION, Colorado** ("the City").

2. **Effective Date:** The Effective Date of the Agreement will be the date that this agreement is recorded which is not sooner than recordation of the site plan for Larchwood Inns - 80 bed nursing home.

RECITALS

The Developer seeks permission to develop property within the City to be known as Lot #2 Hilltop Subdivision No. 2, which property is more particularly described on Exhibit "A" attached and incorporated by this reference (the "Property"). The City seeks to protect the health, safety and general welfare of the community by requiring the completion of various improvements in the development and limiting the harmful effects of substandard developments, including premature subdivision which leaves property undeveloped and unproductive. The purpose of this Agreement is to protect the City from the cost of completing necessary improvements itself and is not executed for the benefit of materialmen, laborers, or others providing work, services or material to the development or for the benefit of the purchasers or users of the development. The mutual promises, covenants, and obligations contained in this Agreement are authorized by state law, the Colorado Constitution and the City's land development ordinances.

THEREFORE, for valuable consideration, the receipt and adequacy of which is acknowledged, the Parties agree as follows:

DEVELOPER'S OBLIGATIONS

3. **Improvements:** The Developer will design, construct and install, at its own expense, those on-site and off-site improvements listed on Exhibit "B" attached and incorporated by this reference ("the Improvements"). The Developer agrees to pay the City for inspection services performed by the City, in addition to amounts shown on Exhibit B. The City estimates that \$ 200.00 will be required for City inspection of the required Improvements. The Developer's obligation to complete the Improvements is and will be independent of any obligations of the City contained herein and is not conditioned on the commencement of improvements within the development nor on the sale of any lots.

4. **Security:** To secure the performance of its obligations

under this Agreement (except its obligations for warranty under paragraph 6), the Developer will enter into an agreement to provide security to City as described in paragraph 17, or other written agreement between the City and the Developer.

5. Standards: The Developer will construct the Improvements according to the standards and specifications required by the City Engineer or as adopted by the City.

6. Warranty: The Developer warrants that the Improvements, each and every one of them, will be free from defects for a period of twelve (12) months from the date that the City Engineer accepts, in writing, the Improvements and the dedication of the last improvement completed by the Developer.

7. Commencement and Completion Periods: The Developer will commence work on the Improvements with 180 days of the effective date of this Agreement, and each and every one of the Improvements will be completed within one year of the date this agreement is signed (the "Completion Period").

8. Compliance with Law: The Developer will comply with all relevant federal, state and local laws, ordinances, and regulations in effect at the time of final City approval associated with the development when fulfilling its obligations under this Agreement.

~~**9. Dedication:** The Developer will dedicate to the City those Improvements and rights-of-way required by the City Engineer. The Developer shall present a policy of title insurance, where appropriate, and conveyancing documents for the benefit of the City showing that the Developer owns the improvement in fee simple and that there are no liens, encumbrances, or other restrictions on the improvement unacceptable to the City in its reasonable judgment. Acceptance of the dedication of any improvement does not constitute a waiver by the City of the right to proceed against any security or the Developer on account of any defect in or failure of the improvement that is detected or which occurs after the acceptance of the dedication.~~

10. Inspection and Certification: The City will inspect the Improvements as they are completed and, if acceptable to the City Engineer, certify such improvement as being in compliance with the standards and specifications. Such inspection and certification, if appropriate, will occur within 14 days of notice by the Developer that he desires to have the City inspect an improvement. Before obtaining certification of any such improvement, the Developer will present to the City valid lien waivers from all persons providing materials or performing work on the improvement for which certification is sought. Certification by the City Engineer does not constitute a waiver

by the City of the right to proceed against a bank to draw funds or on account of defects in or failure of any improvement that is detected or which occurs following such certification.

11. **Notice of Defect:** The Developer's Engineer will provide timely notice to the Developer, contractor, issuer of security and the City Engineer whenever inspection reveals, or the Developer's Engineer otherwise has knowledge, that an Improvement does not conform to City standards and any specifications approved in the development application or is otherwise defective. The Developer will have thirty (30) days from the issuance of such notice to correct or substantially correct the defect.

12. **Acceptance of Improvements:** The City's final acceptance and/or approval of improvements will not be given or obtained until the Developer presents a document or documents, for the benefit of the City, showing that the Developer owns the improvements in fee simple and that there are no liens, encumbrances, or other restrictions on the Improvements. ~~and until Developer tenders executed conveyancing documents.~~ Approval ~~and/or Acceptance~~ of any Improvement does not constitute a waiver by the City of any rights it may have on account of any defect in or failure of the Improvement that is detected or which occurs after the approval and/or acceptance.

13. **Use of Proceeds:** The City will use funds deposited with it or obtained pursuant to any written disbursement agreement entered into between the parties only for the purpose of completing the Improvements or correcting defects in or failure of the Improvements.

14. **Events of Default:** The following conditions, occurrences or actions will constitute a default by the Developer during the Completion Period:

- a. Developer's failure to complete each portion of the Improvements in conformance with the agreed upon timeschedule or if no such schedule has been agreed upon, within 12 months of final plat approval; the City may not declare a default until a fourteen (14) calendar day notice has been given to the Developer;
- b. Developer's failure to correct defective construction of any Improvement within the applicable correction period; in such event the City may immediately declare a default without further notice to the Developer.
- c. 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; in such event the City may immediately declare a default without prior notification to the Developer;

- d. Notification to the City, by any lender with a lien on the property, of a default on an obligation; the City may immediately declare a default without prior notification to the Developer;
- e. Initiation of any foreclosure action of any lien or initiation of mechanics lien(s) procedure(s) against the Property or a portion of the Property or assignment or conveyance of the Property in lieu of foreclosure; the City may immediately declare a default without prior notification to the Developer.

15. **Measure of Damages:** The measure of damages for breach of this Agreement by the Developer will be the reasonable cost of satisfactorily completing the Improvements plus reasonable City administrative expenses. For Improvements upon which construction has not begun, the estimated costs of the Improvements as shown on Exhibit "B" will be prima facie evidence of the minimum cost of completion; however, neither that amount or the amount of a letter of credit, the subdivision improvements disbursement agreement or cash escrow establish the maximum amount of the Developer's liability.

16. **City's Rights Upon Default:** When any event of default occurs, the City may draw on the ~~letter of credit~~, escrowed collateral, ~~or proceed to collect any other security to the extent of the face amount of the credit or full amount~~ of escrowed collateral, cash, or security less ninety percent (90%) of the estimated cost (as shown on Exhibit "B") of all Improvements previously accepted by the City or may exercise its rights to disbursement of loan proceeds or other funds under the improvements disbursement agreement. The City will have the right to complete Improvements itself or it may contract with or assign to a third party for completion, and the Developer grants to the City, its successors, assigns, agents, contractors, and employees, a nonexclusive right and easement to enter the Property for the purposes of constructing, reconstructing, maintaining, and repairing such Improvements. Alternatively, the City may assign the proceeds of the letter of credit, the improvements disbursement agreement, the escrowed collateral, cash, or other funds or assets to a subsequent developer (or a lender) who has acquired the development by purchase, foreclosure or otherwise who will then have the same rights of completion as the City if and only if the subsequent developer (or lender) agrees in writing to complete the unfinished Improvements and provides reasonable security for the obligation. In addition, the City may also enjoin the sale,

transfer, or conveyance of lots within the development, until the Improvements are completed and accepted. These remedies are cumulative in nature and are in addition to any other remedies the City has at law or in equity.

17. The **improvements guarantee** required by the City Code to ensure that the Improvements described in the improvements agreement are constructed (to City standards) may be in the form of an agreement: ~~(a) between a bank doing business in Mesa County,~~ the Developer, and the City or as described in (b), below. The agreement between a bank and the City shall provide, among other things, for the bank to guarantee and warrant to the City that it shall:

- A. have available money equal to the estimated costs of the required Improvements, in an amount equal to the amount agreed upon in the Improvements Agreement;
- B. only pay such amounts to contractors who have constructed required Improvements;
- C. only pay such amounts after the bank has received the written approval of the City Engineer, or his designee; the City Engineer shall inspect within three (3) working days of request;
- D. in the event the bank disburses without the City Engineer having approved such disbursement, the Bank shall pay, in addition to all other sums it would otherwise be obligated to pay, to the City the amount of the wrongful disbursement if the City Engineer determines that the work is not acceptable, based on the approved plans and specifications. The City shall use such money to cause the work to be constructed in accordance with ~~the approved plans and specifications;~~

An alternative agreement may be executed for a development which is expected to require not more than 10 transactions shall contain the following provisions:

- a) The Finance Department of the City will act as disbursing agent and will account for disbursements to Developer contractors as required Improvements are completed and accepted.
- b) The City will accept a cash deposit from the Developer equal to the City approved estimate of the required Improvements, for purposes of securing and guaranteeing the construction of the required drainage improvements, and other on-site

Improvements in the development plan. Such deposit(s), currently estimated at approximately \$18,355.00 shall be given to the City's Finance Department, commingled with other funds of the City and specifically invested in the short term market. Interest income shall be allocated to the Developer's escrow account monthly, in the same manner as other short-term investments of the city.

- c) Such interest income shall be used to reimburse the General Fund of the City for accounting and transaction costs incurred in making payments to the appropriate contractors. For purposes of this agreement, the City's costs shall be one hundred dollars (\$100.00) for each check, disbursement or other transaction which is made. In any event the amount retained by the City for its transaction costs shall not be less than two percent (2%) of the amount deposited. After all required Improvements have been made and accepted by the City, any surplus funds remaining in the account (in excess of the two percent minimum or the calculated transaction costs) shall be returned to the developer within thirty (30) days of request. Any transaction costs which are not covered by the amount of the deposit plus accrued interest shall be paid to the City by the Developer in like manner within thirty (30) days of completion of the Improvements. No guarantee as to the level of interest income or rate of return on the funds so deposited is either implied or made in this agreement; the City agrees only to keep the funds invested as with other City funds.
- d) in any event, the Developer promises to construct the required Improvements to the satisfaction of the City Engineer, in accordance with the approved plans and specifications.

18. Conditions of Acceptance: The City shall have no responsibility or liability with respect to any street, or other Improvement(s), notwithstanding the use of the same by the public, unless the street or other Improvements shall have been accepted by the City, and then only after the expiration of the last applicable warranty period.

Prior to requesting final acceptance of streets, storm drainage facilities, or other required Improvements, the Developer shall furnish to the City Engineer as-built drawings in reproducible form and copies of results of all construction control tests required by City specifications.

~~If the City allows a street to be constructed in stages, the Developer of the first one-half street opened for traffic shall construct the adjacent curb, gutter and sidewalk in the standard location and shall construct the required width of pavement from the edge of gutter on his side of the street to enable an initial two-way traffic operation without on-street parking. That Developer is also responsible for end-transitions, intersection paving, drainage facilities, and adjustments to existing utilities necessary to open the street to traffic.~~

19. **Indemnification:** The Developer expressly agrees to indemnify and hold the City, its officers, employees and assigns harmless from and against all claims, costs and liabilities of every kind and nature, for injury or damage received or sustained by any person or entity in connection with, or on account of the performance of work at the development or the Property pursuant to this Agreement. The Developer further agrees to aid and defend the City in the event that the City is named as a defendant in an action concerning the performance of work pursuant to this Agreement except where such suit is brought by the Developer against the City. The Developer is not an agent or employee of the City.

20. **No Waiver:** No waiver of any provision of this Agreement by the City will be deemed or constitute a waiver of any other provision, nor will it be deemed or constitute a continuing waiver unless expressly provided for by a written amendment to this Agreement signed by both City and Developer; nor will the waiver of any default under this Agreement be deemed a waiver of any subsequent default or defaults of the same type. The City's failure to exercise any right under this Agreement will not constitute the approval of any wrongful act by the Developer or the acceptance of any Improvement.

21. **Amendment or Modification:** The parties to this Agreement may amend or modify this Agreement only by written instrument executed on behalf of the City by the City Manager or his designee and by the Developer or his authorized officer. Such amendment or modification will be properly notarized before it is effective.

22. **Attorney's Fees:** Should either party be required to resort to litigation to enforce the terms of this Agreement, the prevailing party, plaintiff or defendant, will be entitled to costs, including reasonable attorney's fees and expert witness fees, from the opposing party. If the court awards relief to both parties, the attorney's fees may be equitably divided between the parties by the decision maker.

23. **Vested Rights:** The City does not warrant by this Agreement that the Developer is entitled to any other approval(s) required by the City, if any, before the Developer is entitled to commence development or to transfer ownership of property in the

development.

24. **Third Party Rights:** No person or entity who or which is not a party to this Agreement will have any right of action under this Agreement.

25. **Time:** For the purpose of computing the Abandonment and Completion Periods, and time periods for City action, such times in which war, civil disasters, or acts of God occur or exist will not be included if such times prevent the Developer or City from performing its obligations under the Agreement.

26. **Severability:** If any part, term, or provision of this Agreement is held by the courts to be illegal or otherwise unenforceable, such illegality or unenforceability will 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 the Agreement.

27. **Benefits:** The benefits of this Agreement to the Developer are personal and may not be assigned without the express written approval of the City. Such approval may not be unreasonably withheld, but any unapproved assignment is void. Notwithstanding the foregoing, the burdens of this Agreement are personal obligations of the Developer and also will be binding on the heirs, successors, and assigns of the Developer, and shall be a covenant(s) running with the Property. There is no prohibition on the right of the City to assign its rights under this Agreement. The City will expressly release the original Developer's guarantee or obligations under the improvements disbursement agreement if it accepts new security from any developer or lender who obtains the Property. However, no other act of the City will constitute a release of the original Developer from his liability under this Agreement.

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

29. **Scope:** This agreement constitutes the entire agreement between the parties and no statement(s), promise(s) or inducement(s) that is/are not contained in this Agreement will be binding on the parties.

If to Developer: J.H.S. Limited Liability Company
P.O. Box 2931
Grand Junction, Colorado 81502

If to City: City of Grand Junction
Community Development Director
250 N. 5th Street

Grand Junction, Colorado 81501

30. **Recordation:** Developer will pay for any costs to record a copy of this Agreement in the Clerk and Recorder's Office of Mesa County, Colorado.

31. **Immunity:** Nothing contained in this Agreement constitutes a waiver of the City's sovereign immunity under any applicable state law.

32. **Personal Jurisdiction and Venue:** Personal jurisdiction and venue for any civil action commenced by either party to this Agreement whether arising out of or relating to the Agreement, letter of credit, improvements disbursements agreement, or cash escrow agreement or any action to collect security will be deemed to be proper only if such action is commenced in Mesa County. The Developer expressly waives his right to bring such action in or to remove such action to any other court whether state or federal.



City of Grand Junction
250 North Fifth Street
Grand Junction CO 81501

Stephanie Nye
Stephanie Nye
City Clerk

By: David A. Vukobratovic
Mark K. Achen
Asst. City Manager

Developer: J.H.S. Limited Liability Co.

Fredrick A. Schumann 1/6/84
BY: Fredrick A. Schumann, Partner Dufe

dw:cl:ImpAgree rev.12/10/93

Addendum to Development Improvements Agreement
between J.H.S. Limited Liability Company (Fredrick A. Schumann, Partner) and
the City of Grand Junction dated January , 1994, regarding
Larchwood Inns Drainage Improvements:

Developer at his option shall have the choice of either leaving the cash deposit
with the City of Grand Junction, ^{or} requesting disbursements from said cash
deposit per Paragraphs 17(a), (b), (c) and (d).

In the event Developer elects to leave said cash deposit with the City and pay
for the subject improvements with other funds, the accrued interest on said
deposit shall be refunded to the Developer by the City upon acceptance of the
subject improvements, *less one disbursement charge. DW FAS.*

City of Grand Junction

J.H.S. Limited Liability Company

Daniel A. Vagan

Fredrick A. Schumann

BY: ~~Mark K. Achen~~, City Manager
ASST.

BY: Fredrick A. Schumann, Partner *Date*

1/6/94