

KOE0224R

TYPE OF RECORD: PERMANENT

CATEGORY OF RECORD: **DEVELOPMENT IMPROVEMENTS AGREEMENT**

NAME OF APPLICANT OR DEVELOPER: JAMES P. KOEHLER, OWNER

PROJECT/SUBDIVISION: HOLIDAY INN AND SUITES

LOCATION: 629 24 ROAD

PARCEL NO. 2945-054-00-101

FILE NO. : SS-2001-197 – SIMPLE SUBDIVISION

CITY DEPARTMENT: COMMUNITY DEVELOPMENT

YEAR: 2002

EXPIRATION DATE: NONE

DESTRUCTION DATE: NONE

2057071 05/20/02 1059AM
MONIKA TODD CLK&REC MESA COUNTY CO
REC FEE \$60.00

SS-2001-197
2445-054-00-101

DEVELOPMENT IMPROVEMENTS AGREEMENT

1. **Parties:** The parties to this Development Improvements Agreement ("the Agreement" or "Agreement") are JAMES P. KOEHLER ("the Developer") and **THE CITY OF GRAND JUNCTION, Colorado** ("the City" or "City").

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

2. **Effective Date:** The Effective Date of the Agreement will be the date that this agreement is signed which shall be no sooner than recordation of the final plat or final plan approval whichever first occurs.

RECITALS

The Developer seeks permission to develop property within the City to be known as HOLIDAY INN AND SUITES, which property is more particularly described on Exhibit A attached and incorporated by this reference ("the Property" or "Property"). The City seeks to protect the health, safety and general welfare of the community by requiring the completion of various improvements in the Property and limiting the harmful effects of substandard developments. 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 Developer and/or the Property or for the benefit of the owners, purchasers or users of the Property. 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.

DEVELOPER'S OBLIGATION

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" or "Improvements"). The Developer agrees to pay the City for inspection services performed by the City, in addition to amounts shown on Exhibit B. The hourly rate of "in-house" City inspection services is \$45.00 per hour. The scope of this project is such that the City may have to engage independent consultant(s) to adequately provide inspection services; Developer agrees to pay such costs, in addition to all others for which Developer is responsible hereunder. The Developer's obligation to complete the improvements is and will be independent of any obligations of the City contained herein.

4. **Security:** To secure the performance of its obligations under this Agreement the Developer shall supply a guarantee in a form and with terms acceptable to the City. A copy of which or a memorandum thereof is attached as Exhibit C.

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

05/04/01

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 or approves the last Improvement completed by the Developer.

7. **Commencement, Completion and Abandonment Periods:** The Developer will commence work on the Improvements within 14 days from the Effective Date of this Agreement 12-12-01 (set date) ("the Commencement Period") and the Improvements, each and every one of them, shall be completed by the end of the 24TH month from the Effective Date of this Agreement 12-12-01 (set date) (the "Completion Period"). The Developer shall not cease construction activities for any period of more than 60 consecutive days ("the Abandonment Period").

8. **Compliance with Law:** The Developer shall comply with all applicable federal, state and local laws, ordinances and regulations in effect at the time of final approval when fulfilling its obligations under this Agreement. When necessary to protect the public health, safety or welfare, the Developer shall be subject to laws, ordinances and regulations that become effective after final development approval.

9. **Notice of Defect:** The Developer's Engineer shall 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 the defect. The City may grant reasonable extensions.

10. **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 or as accepted by the City Attorney and that there are no liens, encumbrances or other restrictions other than those that have been accepted by the City Attorney on the Improvements. Approval and/or acceptance of any Improvements 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 approval and/or acceptance.

11. **Reduction of Security:** After the acceptance of any Improvement, the amount which the City is entitled to draw on the guarantee will be reduced by an amount equal to 90 percent of the estimated cost of such Improvement as shown in Exhibit B. At the written request of the Developer, the City will execute a certificate verifying the acceptance of the Improvement and waiving its right to draw on the guarantee to the extent of such amount. A Developer in default under this Agreement will have no right to such certification. Upon the acceptance of all of the Improvements the remaining balance that may be drawn under the guarantee shall be available to the City for 90 days after the expiration of the warranty period.

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

13. **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 time schedule provided in paragraph number seven (7.), above;
- b. Developer's failure to demonstrate reasonable intent to correct defective construction of any Improvement within the applicable correction period;
- 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.

Unless specifically provided herein the City may not declare a default until written notice has been sent to the Developer at the address on file with the development application. Notice is and shall be deemed effective two calendar days after mailing thereof by first class United States mail, postage prepaid.

14. **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. Administrative expenses may include but are not limited to contracting costs, collection costs and the value of planning, engineering, legal and administrative staff time devoted to the collection/completion of the Improvements. 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 or other guarantee establish the maximum amount of the Developer's liability.

15. **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 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 lender) who has acquired the Property 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 to the City 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 or accepted. These remedies are cumulative in nature and are in addition to any other remedies the City has at law or in equity.

16. **Indemnification:** The Developer expressly agrees to indemnify and hold the City, its officers, employees, agents 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 or non-performance of work at the Property or the Property being developed 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 or non-performance of work 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.

17. **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 the City and the 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.

18. **Amendment or Modification:** The parties to this Agreement may amend or modify the 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 shall be properly notarized before it may be deemed effective.

19. **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 relief is awarded to both parties, the attorney's fees may be equitably divided between the parties by the decision maker.

20. **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 the Property being developed.

21. **Integration:** This Agreement, together with the exhibits and attachments thereto 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.

22. **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.

23. **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.

24. **Severability:** If any part, term, or provision of this Agreement is held by a court or courts of competent jurisdiction 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.

25. **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 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. When the Improvements are completed and approved by the City, the City agrees to state same in writing, with appropriate acknowledgments. The City will sign a release only after all warranty periods, as extended by litigation, repair or alteration work, have expired.

26. **Notice:** Any notice required or permitted by this Agreement will be deemed effective two calendar days after deposit with the United States Postal Service, first class, postage prepaid and addressed as follows:

If to Developer:

JAMES P. KOEHLER
P.O. Box 15
ABERDEEN, SD 57402

If to City:

City of Grand Junction
Community Development Director
250 N. 5th Street
Grand Junction, Colorado 81501

27. **Recordation:** Developer will pay for all costs to record this Agreement or a Memorandum thereof in the Clerk and Recorder's Office of Mesa County, Colorado.

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

29. **Personal Jurisdiction and Venue:** Personal jurisdiction and venue for any 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, Colorado. The Developer expressly waives his right to bring such action in or to remove such action to any other court whether state or federal.

30. a. **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 finally accepted by the City.

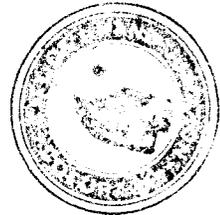
b. **Phased Development:** If the City allows a street to be constructed in stages, the Developer of the first one-half street opened for traffic shall construct the adjacent curb, gutter and sidewalk in the standard location and shall construct the required width of pavement from the edge of gutter 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.

c. Prior to requesting final acceptance of any street, storm drainage facility, or other required improvement(s), the Developer shall: (i) furnish to the City engineer as-built drawings in reproducible form, blue-line stamped and sealed by a professional engineer and in computer disk form and copies of results of all construction control tests required by City specification; (ii) provide written evidence to the City Engineer under signature of a qualified expert that the earth, soils, lands and surfaces upon, in and under which the improvements have been constructed, or which are necessary for the improvements, are free from toxic, hazardous or other

regulated substances or materials: (iii) provide written evidence to the City Attorney that the title to lands underlying the improvements are free and clear from all liens and encumbrances, except those items and encumbrances which may be approved in writing by the City Attorney.

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

Pat Cowl 5/14/02
~~Director of~~ Community Development date



Attest:

Stephanee Turn 5/14/02
City Clerk date

By: James P Koehler 4-30-02
Developer date

Name (printed): James P Koehler

Its (position): Owner

Attest: Witness

Kanema 4/30/02
Secretary date

TYPE LEGAL DESCRIPTION BELOW, USING ADDITIONAL SHEETS AS NECESSARY.
USE SINGLE SPACING WITH A ONE INCH MARGIN ON EACH SIDE.

EXHIBIT A

**THE S ½ SE ¼ NE ¼ SE ¼ OF SECTION 5, TOWNSHIP 1 SOUTH, RANGE 1 WEST OF
THE UTE MERIDIAN, MESA COUNTY, COLORADO. EXCEPT FOR ROAD
RIGHT-OF-WAY AS RECORDED IN BOOK 1015 AT PAGE 111 AND BOOK 2585 AT
PAGES 841 AND 842 OF THE MESA COUNTY RECORDS.
SAID PARCEL CONTAINS 4.52 ACRES MORE OR LESS.**

EXHIBIT B
IMPROVEMENTS LIST/DETAIL
(Page 1 of 4)

DATE: 12-07-01
NAME OF DEVELOPMENT: Holiday Inn & Suites
LOCATION: 629 24 Road, Grand Junction
PRINTED NAME OF PERSON PREPARING: Jim Bell

	UNITS	TOTAL QTY.	UNIT PRICE	TOTAL AMOUNT
I. SANITARY SEWER	<u>1</u>	<u>LS</u>		<u>58,529.00</u>
1. Clearing and grubbing	_____	_____	_____	_____
2. Cut and remove asphalt	_____	_____	_____	_____
3. PVC sanitary sewer main (incl. trenching, bedding & backfill)	_____	_____	_____	_____
4. Sewer Services (incl. Trenching, bedding, & backfill)	_____	_____	_____	_____
5. Sanitary sewer manhole(s)	_____	_____	_____	_____
6. Connection to existing manhole(s)	_____	_____	_____	_____
7. Aggregate Base Course	_____	_____	_____	_____
8. Pavement replacement	_____	_____	_____	_____
9. Driveway restoration	_____	_____	_____	_____
10. Utility adjustments	_____	_____	_____	_____
II. DOMESTIC WATER	<u>1</u>	<u>LS</u>		<u>21,837.00</u>
1. Clearing and grubbing	_____	_____	_____	_____
2. Cut and remove asphalt	_____	_____	_____	_____
3. Water Main (incl. Excavation, bedding, backfill, valves and appurtenances)	_____	_____	_____	_____
4. Water services (incl. Excavation, bedding, backfill, valves, and appurtenances)	_____	_____	_____	_____
5. Connect to existing water line	_____	_____	_____	_____
6. Aggregate Base Course	_____	_____	_____	_____
7. Pavement Replacement	_____	_____	_____	_____
8. Utility adjustments	_____	_____	_____	_____
III. STREETS (ON-SITE)	<u>1</u>	<u>LS</u>		<u>198,255.00</u>
1. Clearing and grubbing	_____	_____	_____	_____
2. Earthwork, including excavation and embankment construction	_____	_____	_____	_____
3. Utility relocations	_____	_____	_____	_____

	TOTAL UNITS	UNIT QTY.	TOTAL PRICE	AMOUNT
4. Aggregate sub-base course (square yard)				
5. Aggregate base course (square yard)				
6. Sub-grade stabilization				
7. Asphalt or concrete pavement (square yard)				
8. Curb, gutter & sidewalk (linear feet)				
9. Driveway sections (square yard)				
10. Crosspans & fillets				
11. Retaining walls/structures				
12. Storm drainage system	<u>1</u>	<u>LS</u>		<u>14,288.00</u>
13. Signs and other traffic control devices				
14. Construction staking				
15. Dust control				
16. Street lights (each)	<u>19</u>	<u>2,500.00</u>		<u>47,500.00</u>
III. STREETS (24 ROAD)	<u>1</u>	<u>LS</u>		<u>52,445.00</u>
1. Clearing and grubbing				
2. Earthwork, including excavation and embankment constructio				
3. Utility relocations				
4. Aggregate sub-base course (square yard)				
5. Aggregate base course (square yard)				
6. Sub-grade stabilization				
7. Asphalt or concrete pavement (square yard)				
8. Curb, gutter & sidewalk (linear feet)				
9. Driveway sections (square yard)				
10. Crosspans & fillets				
11. Retaining walls/structures				
12. Storm drainage system				
13. Signs and other traffic devices				
14. Construction staking				
15. Dust control				
16. Street lights (each)	<u>6</u>	<u>3,000.00</u>		<u>18,000.00</u>

	TOTAL UNITS	UNIT QTY.	TOTAL PRICE	AMOUNT
IV. LANDSCAPING	<u>1</u>	<u>LS</u>		<u>112,008.00</u>
1. Design/Architecture				
2. Earthwork (includes top soil, fine grading, & berming)				
3. Hardscape features (includes walls, fencing, and paving)				
4. Plant material and planting				
5. Irrigation system				
6. Other features (incl. Statues, water displays, park equipment, and outdoor furniture)				
7. Curbing				
8. Retaining walls and structures				
9. One year maintenance agreement				<u>2,500.00</u>
V. MISCELLANEOUS				
1. Design/Engineering	<u>1</u>	<u>LS</u>		<u>2,500.00</u>
2. Surveying	<u>1</u>	<u>LS</u>		<u>1,500.00</u>
3. Developer's inspection costs				
4. Quality control testing	<u>1</u>	<u>LS</u>		<u>500.00</u>
5. Construction traffic control				
6. Rights-of-way/Easements				
7. City inspection fees @\$45./hr				
8. Permit fees				
9. Recording costs				
10. Bonds				
11. Newsletters				
12. General Construction Supervision				
13. Other				
14. Other				

TOTAL ESTIMATED COST OF IMPROVEMENTS: \$ 529,862.00

SCHEDULE OF IMPROVEMENTS:

I. SANITARY SEWER _____

II. DOMESTIC WATER _____

III. STREETS _____

IV. LANDSCAPING _____

V. MISCELLANEOUS _____

I have reviewed the estimated costs and time schedule shown above and based on the plans and the current costs of construction agree to construct and install the Improvements as required above.

Don Koehn

4-30-02

SIGNATURE OF DEVELOPER

date

(If corporation, to be signed by president and attested to by secretary together with the corporate seals.)

Reviewed and approved.

Rich Davis

5-14-02

CITY ENGINEER

date

Pat Carl

5/14/02

COMMUNITY DEVELOPMENT

date

DISBURSEMENT AGREEMENT

(Improvements Guarantee)

2057072 05/20/02 1059AM

MONIKA TODD CLERK Reg Mesa County Co
REG FEE \$20.00

DEVELOPER: JAMES P. Koehler

BANK: Bank of Colorado

PROPERTY: HOLIDAY Inn and Suites
629 24 Road, Grand Jct, CODISBURSEMENT AMOUNT: For the construction of improvements to the Property in an amount not to exceed
\$ 529,862This Agreement is entered into by and between JAMES P. Koehler ("Developer"), Bank of Colorado ("Bank") and the City of Grand Junction, Colorado ("City").RECITALSDeveloper has been required by the City to construct certain improvements to HOLIDAY Inn, Suites ("Improvements") in accordance with the Zoning and Development Code, Improvements Agreement and subdivision approval.

The Bank has agreed to loan funds to the Developer for construction of the Improvements.

The City Engineer has approved an estimate of the costs of the Improvements and that amount or an amount not to exceed \$ 529,862, whichever is greater, shall be referred to as the "Funds."

The parties desire to secure the full and complete performance of the Developer's obligations and to secure that the Funds are disbursed only to pay for the Improvements.

NOW, THEREFORE, THE PARTIES AGREE:

1. **BANK PROMISES.** Bank shall dedicate or set aside the Funds on behalf of Developer and for the City's benefit within twenty-four hours of execution of this Disbursement Agreement.

Bank warrants: that the Funds are to be held in trust solely to secure Developer's obligations under the Improvements Agreement; that the Bank shall act as agent of the City in holding the Funds; that the Funds will not be paid out or disbursed to, or on behalf of, the Developer except as set forth in this document and/or as set forth in the Improvements Agreement; and that the Bank may not modify or revoke its obligation to disburse funds to or on behalf of the Developer or the City. The Bank warrants that the Funds are and will be available exclusively for payment of the costs of satisfactory completion of the Improvements.

2. **DISBURSEMENT PROCEDURES.** The Funds shall be advanced for payment of costs incurred for the construction of Improvements on the Property in accordance with the Improvements List/Detail attached to the Improvements Agreement, the terms of which are incorporated by this reference. All disbursements must comply with the following procedures:(a) **Request for Advance.** Developer shall deliver to the Bank a written request for the disbursement of funds on forms acceptable to the Bank. Such requests shall be signed by Developer, Developer's General Contractor, Project Engineer and Architect, if applicable, and the City Engineer. By signing the request for disbursement the Developer is certifying: that all costs for which the advance is being requested have been incurred in connection with the construction of the Improvements on the Property; that all work performed and materials supplied are in accordance with the plans and specifications submitted to and approved by the City; that the work has been performed in a workmanlike manner; that no funds are being requested for work not completed, nor for material not installed; the Project Engineer has inspected the Improvements for which payment is requested; and that such improvements have been completed in accordance with all terms, specifications and conditions of the approved plans. Attached hereto is the list of those individuals, and their respective signatures, required to sign the above described request(s) for disbursement of funds.

(b) **Documentation, Waivers and Checks.** Each request for disbursement of funds shall be accompanied by: (i) one original and one copy of each invoice to be paid; (ii) checks drawn on Developer's construction loan account with the Bank, made payable to the payee(s) and for the amount of each invoice presented for payment; (iii) lien waivers in a form approved by the Bank prepared for signature by each payee; and (iv) postage paid envelopes addressed to each payee for the mailing of checks presented to the Bank.

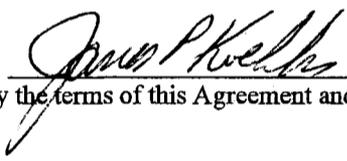
The Bank shall verify its receipt of all lien waivers relating to any prior disbursements, which lien waivers shall be properly executed and contain no alterations or modifications from those lien waivers that have been previously presented to the Bank.

Upon approval by Developer, the Project Engineer and the Bank of the invoices being presented to the Bank, the Bank shall advance funds into the checking account designated for the payment of the invoices and mail the checks to the payee(s) in the envelopes presented to the Bank, together with lien waivers and copies of supporting invoices.

Under no circumstances shall the Bank make a disbursement for the payment of an invoice if it in good faith believes that: (i) the work has not been completed; (ii) the work has not been completed in a workmanlike manner; (iii) written approval has not been received from the Project Engineer; or (iv) any lien waiver has been altered or modified or has not been returned to the Bank.

(c) **Default.** Upon default of the Developer on any obligation to the Bank or under the Improvements Agreement, the Bank shall disburse no funds to, or at the direction of, the Developer except to the City under the terms of the Improvements Agreement. The Bank shall immediately notify the City, in writing, of any event of default or event of default as provided for in the Improvements Agreement and/or as provided herein.

(d) **Disbursement to City.** In the event the Improvements are not satisfactorily and timely constructed, or upon any default or event of default, the City Engineer shall notify the Bank to immediately cease disbursement of funds to the Developer and disburse the full amount of the remaining undisbursed funds to the City. Upon such notice, the Bank shall promptly honor the demand of the City Engineer to disburse the Funds to the City or a third party or parties designated in writing by the City. Upon final completion and acceptance of the performance required under the Improvements Agreement, the City shall refund to the Bank any funds disbursed, if any, which are not actually expended to pay all costs, expenses and liabilities, including attorney fees, incurred in completing the Improvements.

3. **DEVELOPER CONSENT:** The Developer, by the signature of  (name & title), consents to disbursements and other actions authorized and provided for by the terms of this Agreement and/or the Improvements Agreement.

4. **LIABILITY FOR LOSS:** If the Bank fails to disburse funds in accordance with the procedures set forth, and the City suffers loss or damage, the Bank shall be liable to the City for the City's direct and consequential damages and all fees, costs and expenses, including attorneys fees.

5. **BINDING EFFECT:** This Agreement shall be binding on the heirs, successors, receivers and assigns of all parties and shall terminate when the City has accepted the Improvements and has recorded a release of the Improvements Agreement.

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

DISBURSEMENT AGREEMENT
(page 3 of 4)

Book 3081 Page 704

Dated this 14 day of May, ²⁰⁰² 1992.

(BANK) Bank of Colorado
By: [Signature]
Title Senior Vice President
PO Box 968, G5, W-81506
Address

(DEVELOPER)
By: [Signature]
Title
P.O. Box 15
Address Aberdeen, SD 57402-0015

CITY OF GRAND JUNCTION
By: [Signature]
Director of Community Development

Pursuant to the terms of the foregoing Disbursement Agreement (Improvements Guarantee) by and between James P. Koehler Developer, Bank of Colorado as Bank, and the City of Grand Junction, the following are the individuals authorized to sign written requests for the disbursement of the Funds:

DEVELOPER:

<u>[Signature]</u> (name)	<u>[Signature]</u> (signature)
<u>James P Koehler</u> (name)	 (signature)
 (name)	 (signature)

DEVELOPER'S GENERAL CONTRACTOR:

Ray Davis Ray Davis
(name) (signature)

DEVELOPER'S PROJECT ENGINEER: MANAGER

JAMES E. BELL J.E. Bell 12-21-01
(name) (signature)

DEVELOPER'S ARCHITECT:

(name) (signature)

CITY ENGINEER:

Rick Dorris RICK DORRIS
(name) (signature)

2057073 05/20/02 1059AM
MONIKA TODD CLK&REC MESA COUNTY CO
REC FEE \$35.00

MAINTENANCE AGREEMENT

1. **Parties:** The parties to this Maintenance Agreement ("the Agreement" or "Agreement") are JAMES P. KOEHLER ("the Developer") and **THE CITY OF GRAND JUNCTION**, Colorado ("the City" or "City"). Collectively the Developer and the City may be referred to as the Parties.

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

2. **Effective Date:** The Effective Date of the Agreement will be the date that this Agreement is signed.

RECITALS

The Developer shall construct, install and maintain certain improvements ("Improvements" or "the Improvements") which are made necessary by virtue of development on property within the City known as (name and tax schedule #) ²⁰⁵⁻⁰⁵⁴⁻⁰⁰⁻¹⁰¹ ~~2945-054-00-102~~ "the Property" or "Property". The Improvement(s) is/are more particularly described on Exhibit A attached and incorporated by this reference.

The City seeks to protect the health, safety and general welfare of the community by requiring that the Improvements once constructed be maintained. The purpose of this Agreement is to protect the City from having to repair the Improvements at its cost. The Agreement is not executed for the benefit of materialmen, laborers or others providing work, services or material to the Developer and/or the Property or for the benefit of the owners, purchasers or users of the Property. The mutual promises, covenants and obligations contained in this Agreement are authorized by law, the Colorado Constitution, the Charter and the City's ordinances.

DEVELOPER'S OBLIGATION

3. **Improvements:** The Developer or its successor(s) or assign(s) shall maintain, at its (their) own expense, those on-site and off-site Improvements listed on Exhibit A attached to this Agreement and incorporated by this reference ("the Improvements" or "Improvements") as if fully set forth. The Developer's obligation to maintain the Improvements is and will be independent of any obligations of the City.
4. **Security:** To secure the performance of its obligations under this Agreement the Developer has agreed to perpetually guarantee the Improvements in a form and with terms acceptable to the City. A copy of all-initial warranties or guarantees (those incident to construction or as provided by the contractor and/or manufacturer of installed equipment) which, are hereby assigned to the City. A copy of those warranties or a memorandum of the same is attached as Exhibit B. The Developer for itself, its successors and assigns agrees that if the Improvements are not maintained to City standards that the City may perform the maintenance and bill the Developer, its successors or assigns. If a City billing is unpaid after a period of 21 days the City shall

certify the amount to the Mesa County Treasurer to be placed on the tax list for the current year and to be collected with a 25 percent administrative surcharge thereon to defray the costs and to provide an economic disincentive for failing to maintain or pay for the maintenance expenses. The unpaid amount shall constitute a lien against the property, which may be collected as and in accordance with the law pertaining to the collection of taxes including the law allowing for the sale of the lien property.

5. **Standards:** The Developer shall maintain the Improvements according to the standards and specifications required by the City Engineer or as otherwise established by the City.
6. **Warranty:** The Developer hereby warrants that the Improvements, each and every one of them, will be maintained in accordance with the Standards in paragraph 5 in perpetuity.
7. **Compliance with Law:** The Developer shall comply with all applicable federal, state and local laws, ordinances and regulations in effect at the time of final approval when fulfilling its obligations under this Agreement. When necessary to protect the public health, safety or welfare, the Developer shall be subject to laws, ordinances and regulations that become effective after final development approval.
8. **Notice of Defect:** The City shall provide timely notice to the Developer whenever routine inspection reveals that an Improvement and/or maintenance of the same does not conform to City standards and any specifications approved in the development application or is otherwise defective. The Developer will have ten (10) days from the issuance of such notice to correct the defect. The City may grant reasonable extensions, however, it is not obligated to do so nor is it obligated to provide any notice of a defect if it becomes aware of the defect in or during an emergency. Furthermore, the City is not obligated to inspect the Improvements but may do so at it would any other improvement.
9. **Initial Acceptance:** Prior to initial acceptance of any Improvement(s), the Developer shall demonstrate in writing to the satisfaction of the City Attorney that it owns the Improvements in fee simple or that there are no liens, encumbrances or other restrictions other than those that have been accepted by the City Attorney on the Improvements. Approval and/or acceptance of any Improvements 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 or maintenance of the same that is detected or which occurs after approval and/or acceptance. Initial warranties or guarantees shall be for a period of no less than 12 months from the date of acceptance of the Improvements. The Developer shall to the extent necessary or required by the City assign to the City any and all rights that is has under the initial warranty (ies) or guarantee(s).
10. **Funds:** Funds drawn, guaranteed or collected by the City under this agreement shall be used only for the purpose of correcting defects in or failure of the Improvements.
11. **Events of Default:** The following conditions, occurrences or actions will constitute a default:

- a. Developer's failure to maintain each and every one of the Improvements in conformance with this Agreement and/or as required by code, law, rule, ordinance or regulation;
- b. Developer's failure to correct defective construction of any Improvement within the applicable Warranty Period;

As provided herein the City shall provide written notice to the Developer at the address on file with the development application. Notice is and shall be deemed effective two calendar days after mailing thereof by first class United States mail, postage prepaid.

- 12. **Measure of Cost/Expenses:** The measure of costs and or expenses chargeable by the City under this Agreement will be the reasonable cost of satisfactorily completing the Improvements plus reasonable City administrative expenses not to exceed the amount provided for in paragraph 4. Eligible expenses may include but are not limited to personnel costs, including benefits, overtime, callback, standby and other extraordinary compensation, materials, equipment, third-party contracting costs, collection costs and the value of engineering, legal and administrative staff time devoted to repair of the Improvements and/or collection.
- 13. **City's Rights upon Default:** When any event of default occurs, the City may proceed to collect the amount of the cost or expense incidental or necessary to affect the repair of the Improvements. The City will have the right to reconstruct, rebuild or otherwise maintain Improvements itself or it may contract with 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. This remedy is cumulative in nature and is in addition to any other remedy the City has at law or in equity.
- 14. **Indemnification:** The Developer expressly agrees to indemnify and hold the City, its officers, employees, agents 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 or non-performance of work at 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 or non-performance of work 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, however, not an agent or employee of the City.
- 15. **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 the City and the 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.

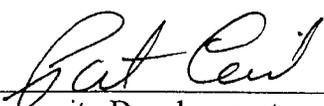
16. **Amendment or Modification:** The Parties may amend or modify the Agreement only by written instrument executed on behalf of the City by the City Manager or his designee and by the Developer or his authorized officer. Such amendment or modification shall be properly notarized before it may be deemed effective.
17. **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 relief is awarded to both parties, the attorney's fees may be equitably divided between the parties by the decision-maker.
18. **Integration:** This Agreement, together with the exhibits and attachments thereto 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.
19. **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.
20. **Severability:** If any part, term, or provision of this Agreement is held by a court or courts of competent jurisdiction to be illegal or otherwise unenforceable, such illegality or unenforceability will not affect the validity of any other part, term, or provision and the right of the parties will be construed as if the part, term, or provision was never part of the Agreement.
21. **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 City to assign its rights under this Agreement. The City will expressly release the original Developer's guarantee or obligations 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.
22. **Notice:** Any notice required or permitted by this Agreement will be deemed effective two calendar days after deposit with the United States Postal Service, first class, postage prepaid and addressed as follows:

If to Developer:

If to City: City of Grand Junction
Community Development Director
250 North 5th Street
Grand Junction, CO 81501

- 23. **Recordation:** Developer will pay for all costs to record this Agreement or a Memorandum thereof in the Clerk and Recorder's Office of Mesa County, Colorado.
- 24. **Immunity:** Nothing contained in this Agreement constitutes a waiver of the City's sovereign or other immunity under any applicable law.
- 25. **Personal Jurisdiction and Venue:** Personal jurisdiction and venue for any action commenced by either party to this Agreement whether arising out of or relating to the Agreement, will be deemed to be proper only if such action is commenced in Mesa County, Colorado. 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 5th Street
Grand Junction, CO 81501



Director of Community Development

5/14/02

Date

Attest:

Stephanie Turner _____ 5/14/02 _____
City Clerk Date

By: James P Koehler _____ 4-11-02 _____
Developer Date

Name (printed): James P Koehler _____

Its (position): Owner _____

Attest:

N/A _____
Secretary Date

EXHIBIT A

STORM SEWER FACILITY DESCRIPTION

1. Storm sewer pump and manhole.
2. Pressurized storm sewer pipe to the inlet in 24 Road.
3. Detention facilities.
4. All storm sewer items outside the public right of way.

May 30, 2012

Mr. James Koehler
415 N. 4th Street
Aberdeen, South Dakota 57401

RE: Notice of Final Acceptance -

Project Name: 24 Road Holiday Inn Subdivision
Project Number: SS-2001-197

This letter is written after the fact to document closure of this project created in 2001.

The Developer's warranty obligation, for all materials and workmanship, has concluded and all warranty obligations are hereby released except as provided in the separate Maintenance Agreement between the City and James P. Koehler.

The following improvements within the public right-of-way are accepted for future maintenance by the City:

Public streets:

- All public streets as shown on the Project plans.

Storm drainage system:

- Storm drain pipes, inlets and manholes within the public right of way.
- Maintenance of the detention pond on the Holiday Inn Express property, outlet works, pumping system, and forced main, is the responsibility of James Koehler subject to a separate Maintenance Agreement.

Water distribution system:

- N/A – Served by Ute Water

Sanitary sewer:

- Sewer mains, manholes

The Development Improvements Agreement has already been released.

Sincerely,

**Rick
Dorris**

Digitally signed by Rick Dorris
DN: cn=Rick Dorris, o=City of
Grand Junction, ou=Engineering,
email=rickdo@gjcity.org, c=US
Date: 2012.05.30 10:40:39 -0600

Rick Dorris, PE, CFM
Development Engineer

Electronic copy:

Scott Peterson, Senior Planner
Peggy Sharpe, Administrative Assistant

Mark Barslund, Development Inspector
Leslie Ankrum, Administrative Assistant

June 18, 2012

Bank of Colorado
200 Grand Avenue
PO Box 968
Grand Junction, CO 81502

Re: Cancellation of Letter of Credit Number 2689001301
James P. Koehler
Internal Reference: Holiday Inn and Suites SPR-2001-197

To Whom It May Concern:

Enclosed please find the original Letter of Credit Number **2689001301** for **James P. Koehler**. As beneficiary, the City of Grand Junction informs you that the Letter of Credit is being returned to you for cancellation. The letter is being provided at the direction of the Director of Public Works and Planning Department for the City.

If you have any questions, or need additional information, please inform me.

Sincerely,



Lisa E. Cox, Planning Manager

Encl. Letter of Credit **2689001301**

EC: Mark Barslund, Development Inspector
Scott Peterson, Senior Planner
Leslie Ankrum, Senior Administrative Assistant
Rick Dorris, Development Engineer

Developer:
Mr. James P. Koehler
PO Box 15
Aberdeen, SD 57402



RECEIVED

MAY 28 2004

COMMUNITY DEVELOPMENT
DEPT.

City of Grand Junction
c/o Director of Community Development
250 N. 5th Street
Grand Junction, CO 81501

Irrevocable Letter of Credit No. 2689001301
Dated: March 11, 2004
Expiration: August 21, 2004 subject to the automatic extensions stated below

Dear Sirs:

We hereby establish our Irrevocable Letter of Credit No. 2689001301 in favor of the City of Grand Junction at the request of and for the account of James P. Koehler (Developer) in the amount of eighty thousand (\$80,000.00) U.S. dollars.

This Letter of Credit is subject to the following terms and conditions:

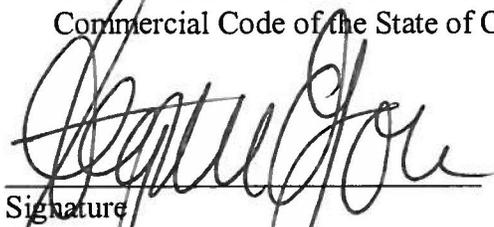
- 1) it is effective upon signature
- 2) it expires on August 21, 2004 subject to the automatic extensions discussed below;
- 3) this Letter of Credit is available by sight draft(s) drawn and marked "Drawn under Bank of Colorado (Bank) Letter of Credit No. 2689001301 dated March 8, 2004";
- 4) this Letter of Credit is established for the use and benefit of the City of Grand Junction by reason of James P. Koehler (Developer) being obligated to pay or perform in accordance with the provisions of the Grand Junction Zoning and Development Code;
- 5) the following statement signed by an authorized designee of the City of Grand Junction must accompany the sight draft;
- 6) **James P. Koehler (Developer) has failed to comply with the terms, conditions, provisions and requirements of the Grand Junction Zoning and Development Code and/or plans, specifications or agreements relating to the construction of improvements required by the City of Grand Junction. The monies received from this drawing are required to construct those improvements. The City of Grand Junction therefore requests the payment of \$ (Blank).**
- 7) It is a condition of this Letter of Credit that it will be automatically extended for a period of six (6) months from the present or any future expiration date unless; (a) the underlying obligation has been performed, released or satisfied, (b) this Letter of Credit has been called in full or (c) the Bank notifies the City of Grand Junction at 250 N. 5th Street Grand Junction, CO 81501, by certified

200 Grand Avenue
P.O. Box 968
Grand Junction
Colorado 81502
Tel (970) 245-1600
Fax (970) 245-9530

2903 F Road
Grand Junction
Colorado 81504
Tel (970) 245-1600
Fax (970) 263-2101

mail return receipt requested, at least ninety (90) days prior to such expiration date that we elect not to further extend this Letter of Credit.

- 8) except as stated above no modifications or revocations may be made by the undersigned to this Letter of Credit without the express written approval of the City's Director of Community Development or his designee;
- 9) this Letter of Credit is neither negotiable nor assignable;
- 10) partial drawings are permitted;
- 11) we hereby agree that drafts drawn under and in compliance with the terms of this Letter of Credit will be duly honored on due presentation and delivery of documents, which may be done by first class mail, facsimile, in person or by any other reasonable business practice on or prior to the expiration or any extension thereof of this Letter of Credit;
- 12) except as otherwise stated herein, this Letter of Credit is subject to the Uniform Customs and Practice for Documentary Credits (1993 Revision) and to the extent that it does not conflict with Article 5 of the Uniform Commercial Code of the State of Colorado



Signature

Stephen C. Love, Sr. Vice President

RELEASE OF RECORDING MEMORANDUM
City of Grand Junction
Public Works & Planning Department
SPR-2001-197
SS-2001-197

This Release relates to a Development Improvements Agreement dated May 14, 2002, by and between James P. Koehler (Developer) and the City of Grand Junction, pertaining to Holiday Inn and Suites (Project), located at 629 24 Road, Grand Junction, CO, recorded at Book 3081, Pages 690 - 712, Mesa County Clerk and Recorder's Office.

WHEREAS, the Developer has installed and constructed certain public and private improvements at and for the Project, which completion was guaranteed by the execution of a Development Improvements Agreement and/or Maintenance Guarantee and provision of a Guarantee, and;

WHEREAS, the City of Grand Junction and other agencies possessing authority over the Project, and/or the improvements, have inspected the improvements and have accepted the same.

NOW THEREFORE, officials of the City of Grand Junction, duly representing their agencies, possessing and representing by their signatures affixed hereto, that they possess sufficient authority to accept improvements and may release the Development Improvements Agreement and/or Maintenance Guarantee, pertaining to the improvements under their jurisdiction, do accept, sign and release said Development Improvements Agreement and/or Maintenance Guarantee.

City Engineer:

Keith Lewis

Date:

5-25-12

City Planner:

Sub J Petrus

Date:

5-25-12

In acknowledgement with the above signatures, I hereby certify that the improvements as specified in the Development Improvements Agreement and/or Maintenance Guarantee have been completed and accepted in accordance with the provisions of the Grand Junction Zoning and Development Code, and are hereby released, subject to the required warranty period.

[Signature]
Public Works & Planning Department

5.25.12
Date

The foregoing instrument was executed before me this 25th day of May, 2012, by Greg Moberg, of the Public Works & Planning Department for the City of Grand Junction, Colorado.

Witness my hand and official seal:

Leslie G. Ankrum
Leslie G. Ankrum, Notary Public



My Commission Expires 08/21/2013

My commission expires on 8/21/2013