

SON03COL

TYPE OF RECORD: PERMANENT

CATEGORY OF RECORD: **DEVELOPMENT IMPROVEMENTS AGREEMENT**

NAME OF APPLICANT OR DEVELOPER: SONSHINE II CONST & DEV.

PROJECT / SUBDIVISION: COLONIAL HEIGHTS FILING III

LOCATION: SE CORNER OF 25 AND G ROAD

PARCEL NO: 2945-032-00-114

FILE NO: FP-2003-105

CITY DEPARTMENT: COMMUNITY DEVELOPMENT

YEAR: 2003

EXPIRATION DATE: NONE

DESTRUCTION DATE: NONE

DEVELOPMENT IMPROVEMENTS AGREEMENT

1. **Parties:** The parties to this Development Improvements Agreement ("Agreement") are Sunshine II Const + Dev. ("Developer") and the **City of Grand Junction**, Colorado ("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 shall be the date that it is signed by the Community Development Director, 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, described on Exhibit A attached and incorporated by this reference ("the Property" or "Property"). The Property, known as Colonial Heights^{PL III} has been reviewed and approved under Community Development file # _____ ("Development" or "the Development").

The City seeks to protect the health, safety and general welfare of the community by requiring the completion of various improvements to the Property and limiting the harmful effects of substandard development.

A further purpose of this Agreement is to protect the City from the cost of completing necessary improvements itself; this 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 owner(s), purchaser(s) or user(s) of the Property.

The mutual promises, covenants and obligations contained in this Agreement are authorized by state law, the Colorado Constitution and City's land development ordinances and regulations.

DEVELOPER'S OBLIGATION

3. **Improvements:** The Developer shall 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 ("Improvements" or "the Improvements").

3a. On and after the Effective Date of this Agreement the Developer agrees to pay the City for its Administration and Inspection of the Development. The hourly rate for those services is \$45.00/hour. Administration and Inspection includes but is not limited to the time expended by the City's planner, engineer, construction inspector and attorney in directing, advising, correcting and enforcing by means other than litigation, this agreement and/or the approved development plan. Making

disbursements and calling/collecting Guarantees are Administration and Inspection services and shall be charged at \$45.00/hour. See, paragraph 19 concerning attorneys' / litigation fees.

3b. The scope of this project is such that the City may have to engage independent consultants(s) to adequately provide inspection services; Developer agrees to pay such costs, in addition to all others for which Developer is responsible hereunder.

3c. The Developer's obligation to complete the Improvements is and shall 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. The Developer is required to post security in an amount of ~~\$410,153~~⁸⁰ (120% of the amount for the Improvements) in a form and with terms acceptable to the City ("Guarantee"). The Guarantee shall be in the form of a cash deposit made to the City, a letter of credit or a disbursement agreement in a form and with content approved by the City Attorney. The Guarantee specific to this Agreement is attached as Exhibit C and is incorporated by this reference as if fully set forth.

5. **Standards:** The Developer shall construct the Improvements according to the City's standards and specifications.

6. **Warranty:** The Developer shall warrant the Improvements for one year following Final Acceptance by the City. "Warrant" or "Warranty" as used herein means the Developer shall take such steps and incur such costs as may be needed so that the Improvements or any portion or phase thereof as repaired and/or replaced, shall comply with the Development's construction plans and/or site plan, City standards and specifications at the end of the warranty period. The Developer shall warrant each repaired and/or replaced Improvement or any portion or phase thereof for one year following Final Acceptance of such repair and/or replacement.

6a. Upon Final Acceptance the Developer shall provide a Maintenance Guarantee in an amount of ~~\$81,712.30~~ (20% of the DIA amount for the Improvements that the Developer has completed and for which the City has given its Final Acceptance.)

6b. The Maintenance Guarantee shall be secured by a letter of credit, cash escrow or other form acceptable to the City.

7. **Commencement, Completion and Abandonment Periods:** The Developer shall commence work on the Improvements within 30 days from the Effective Date of this Agreement; that date is known as the "Commencement Date."

7a. The Developer shall complete the Improvements by the end of the twelfth month from the Effective Date of this Agreement; that date is known as the "Completion Date."

7b. The Developer shall not cease construction for any period of more than 60 consecutive days. If construction is ceased for 60 or more consecutive days the Director may deem the Development abandoned ("the Abandonment Period").

7c. The Commencement date and the Completion Date are shown on Exhibit D.

8. **Compliance with Law:** The Developer shall comply with all applicable federal, state and local laws, ordinances and regulations when fulfilling its obligations under their 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 the Effective Date.

9. **Notice of Defect:** The Developer by and through his/her/its engineer shall provide timely written notice to the issuer of the Guarantee and the Director when the Developer and/or his/her/its engineer has knowledge, that an Improvement or any part or portion of any Improvement either does not conform to City standards or is otherwise defective.

9a. The Developer shall correct all non-conforming construction and/or defects within thirty (30) days from the issuance of the notice by his/her/its engineer of a/the defect.

10. **Acceptance of Improvements:** The City shall not accept and/or approve any or all of the Improvements 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 on the Improvements other than those that have been accepted by the City Attorney.

10a. Approval and/or acceptance of any Improvement(s) does not constitute a waiver by the City of any right(s) that 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.

10b. Acceptance by the City shall only occur when the City Engineer, sends a writing to such effect ("Final Acceptance").

11. **Reduction of Security:** Upon Final Acceptance of any Improvement(s) the amount which the City is entitled to draw on the Guarantee shall be reduced by an amount of ~~\$37,161.24~~ 80% of the DIA amount for the Improvements that the Developer has completed and for which the City has given its Final Acceptance).

11a. At the written request of the Developer, the City shall execute a certificate verifying Final Acceptance of the Improvement and thereafter waiving its right to draw on the Guarantee to the extent of such amount. A Developer in default under this Agreement has no right to such certification.

12. **Use of Proceeds:** The City shall use funds deposited with ..., drawn or guaranteed pursuant to this Agreement only for the purpose of completing the Improvements or correcting defects in or failure of the Improvements or paying Administration and Inspection fees.

13. **Events of Default:** The following conditions, occurrences or actions shall constitute a default by the Developer:

13a. Developer's failure to complete each portion of the Improvements on or before the Completion Date;

13b. Developer's failure to demonstrate reasonable intent to correct defective construction of any Improvements within the applicable warranty period;

13c. 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;

13d. Notification to the City, by any lender with a lien on the Property, of a default by Developer on any obligation to such lender. In such event, the City may immediately declare a default without prior notification to the Developer.

13e. With regard to the Property or any portion thereof: initiation of any foreclosure action regarding any lien or encumbrance; or initiation of mechanics lien(s) procedure(s); or assignment or conveyance of the Property in lieu of foreclosure. In such event the City may immediately declare a default without prior notification to the Developer.

13f. Notification to the City from the bank issuing the Guarantee that it will not renew the Guarantee at a time when security is still required hereunder and no substitute collateral acceptable to the City has been provided by the Developer.

13g. Except as provided, the City may not declare a default until written notice has been sent to the Developer at the address shown in the development file. 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 shall be the reasonable cost of satisfactorily completing the Improvements, plus reasonable expenses. 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 shall be *prima facie* evidence of the minimum cost of completion; however, the maximum amount of the Developer's liability shall not be established by that amount or the amount of the Guarantee.

15. City's Rights Upon Default: When any event of default occurs, the City may draw on the Guarantee or proceed to collect any other security to the extent of the face amount of the Guarantee less eighty percent (80%) of the estimated cost (as shown on Exhibit B) of all Improvements for which the City has given its Final Acceptance and no warranty work is reasonably required. The City may also exercise its rights to disbursement of loan proceeds or other funds under the City improvements disbursement agreement.

15a. The City shall have the right to complete Improvements itself or it may contract with a third party for completion.

15b. 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, inspecting and repairing the Improvements.

15c. The City may assign the proceeds of the Guarantee or other funds or assets that it may receive in accordance with this Agreement to a subsequent developer or lender that has acquired the Property by purchase, foreclosure or otherwise.

15d. That developer or lender shall then have the same rights of completion as the City if and only if the subsequent developer or lender agrees in writing to complete or correct the Improvements and provides to the City reasonable security for that obligation.

15e. 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 ("City") 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 and/or the Improvements and/or the Development that is being done pursuant to this Agreement.

16a. The Developer further agrees to aid and defend the City in the event that the City and/or the Improvements is named as a defendant in an action concerning the performance of work pursuant to this Agreement except for a suit wherein the Developer states claim(s) against the City.

16b. The Developer is not an agent, partner, joint venturer or employee of the City.

17. No Waiver: No waiver of any provision of this Agreement by the City shall be deemed or constitute a waiver of any other provision nor shall 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 shall 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 shall not constitute the approval of any wrongful or other act by the Developer or the acceptance of any Improvement.

18. 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/her/its 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, shall be entitled to costs, including reasonable attorney's fees and expert witness fees, from the opposing party. The City shall be entitled to claim the value of its in-house attorneys at the rate of \$125.00 per hour. 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: This Agreement does not guarantee, represent or certify that the Developer is entitled to any other approval(s) required by the City, before the Developer is entitled to commence development beyond the scope of this Agreement 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. No statement(s), promise(s) or inducements(s) that is/are not contained in this Agreement shall be binding on the parties.

22. Third Party Rights: No person or entity who or which is not a party to this Agreement shall have any right of action under or be a beneficiary of this Agreement.

23. Time: For the purpose of computing the Abandonment Period and Commencement and Dates, such times in which war, civil disasters or acts of God occurs or exist shall not be included if such prevents the Developer or City from performing its obligations under the Agreement. The Developer must notify the City in writing if/when it asserts impossibility of performance under this paragraph. The City may reject the Developer's assertion, if it finds, in writing that the condition(s) that the Developer asserts do not exist.

24. Severability: If any part, term or provision of this Agreement is held by a court of competent jurisdiction to be illegal or otherwise unenforceable, such illegality or unenforceability shall not affect the validity of any other part, term or provision. The rights of the parties shall 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.

25a. Notwithstanding the foregoing, the burdens of this Agreement are personal obligations of the Developer and also shall be binding on the heirs, successors and assigns of the Developer and shall be a covenant(s) running with the Property.

25b. There is no prohibition on the right of the City to assign its rights under this Agreement.

25c. Upon written request from the Developer the City shall expressly release the original Developer's Guarantee and/or contract obligations if it accepts new security from any developer or lender who obtains the Property, however, no other act of the City shall constitute a release of the original Developer from his liability under this Agreement.

25d. When the City has issued its Final Acceptance regarding the Improvements, the City agrees to state the same in writing, with appropriate acknowledgments.

25e. The City shall 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 shall 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: Sunshine II Const. & Dev. LLC Name - Developer/Company
2350 G Road Address - Street and Mailing if different
Grand Junction, CO 81505 City, State & Zip Code
Ph: 255-8853 Telephone and Fax Numbers
Fax: 245-1452
_____ E-mail

Cc:

If to City: Office of the City Attorney
250 North 5th Street
Grand Junction, CO 81501

Cc: Community Development Department
250 North 5th Street
Grand Junction, CO 81501

27. **Recordation:** Developer shall pay the costs to record a memorandum of this Agreement (Exhibit E) in the records of the Mesa County Clerk and Recorder's Office. The Developer may, at his/her/its option record the entire agreement.

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, the Guarantee, the Maintenance Guarantee or any action based arising out of or under this Agreement shall be deemed to be proper only if such action is commenced in Mesa County, Colorado.

29a. The Developer expressly waives his/her/its right to bring such action in or to remove such action to any other court whether state or federal.

30. **Liability before Final 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 Improvement shall have received Final Acceptance by the City.

30a. 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 the side of the street nearest the property to enable an initial two-way traffic operation without on-street parking.

30b. Developer shall also construct and pay for end-transitions, intersection paving, drainage facilities and adjustments to existing utilities necessary to open the street to traffic.

30c. The City shall not issue its written Final Acceptance with regard to any Improvement(s) including any street, storm drainage facility, sewer, water facility or other required Improvement(s), until the Developer:

- (i) furnishes 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) provides 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 Improvement(s) have been constructed or which are necessary for the Improvements are free from toxic, hazardous and other regulated substances or materials;
- (iii) provides 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; and
- (iv) provides written evidence, certified by the Developer's engineer, that the work was systematically inspected and tested and that the materials and the compaction

of the materials that are required to be compacted, were in conformance with City-approved plans and specifications.

Developer *[Signature]* manager 5-19-03
Date

Lloyd J Davis, JR

Attest:

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

Director of Community Development Date

EXHIBIT A

A parcel of land situated in the NW 1/4 NW 1/4 and SW 1/4 NW 1/4 of Section 3, Township 1 South, Range 1 West, of the Ute Meridian, Mesa County, Colorado, being more particularly described as follows:

Commencing at the W 1/4 corner of said Section 3, being a found Mesa County survey marker, the basis of bearing being N00°03'01"E to the N 1/16 corner of said Section 3, being another found Mesa County Survey marker;
thence N00°03'01"E a distance of 811.28 feet along the west line of said SW 1/4 NW 1/4 to the Point of Beginning;
thence N00°03'01"E a distance of 509.55 feet to said N 1/16 corner;
thence N00°02'33"E a distance of 1139.91 feet along the west line of said NW 1/4 NW 1/4;
thence N89°58'59"E a distance of 220.00 feet;
thence N00°02'33"E a distance of 180.00 feet to the north line of said NW 1/4 NW 1/4;
thence N89°58'59"E a distance of 859.26 feet along said north line;
thence S13°57'02"E a distance of 989.68 feet to the east line of said NW 1/4 NW 1/4, also being the west line of Moonridge Falls Subdivision;
thence S00°00'18"W a distance of 371.96 feet to the NW 1/16 corner of said Section 3, being another found Mesa County survey marker;
thence S00°01'47"W a distance of 147.18 feet along the east line of said SW 1/4 NW 1/4 to the northeast corner of Diamond Ridge Subdivision;
thence S74°29'16"W a distance of 684.14 feet to the northwest corner of said Subdivision, also being the northeast corner of Garrett Estates Subdivision;
thence S74°30'51"W a distance of 400.36 feet along the north line of said Subdivision;
thence S64°54'52"W a distance of 141.92 feet along said north line;
thence S89°57'14"W a distance of 145.60 feet along said north line to the Point of Beginning;
Said parcel contains 46.83 acres more or less.

This description was prepared by:
Michael W. Drissel PLS 20677
118 Ouray Avenue,
Grand Junction, CO. 81501

EXHIBIT B

IMPROVEMENTS LIST/DETAIL

DATE: May 26, 2003

NAME OF DEVELOPMENT: Colonial Heights Filing III

LOCATION: South East of the G Road and 25 Road Intersection

PRINTED NAME OF PERSON PREPARING: Jessica Loveland

	UNITS	TOTAL QTY.	UNIT PRICE	TOTAL AMOUNT
I. SANITARY SEWER				
1. Clearing and grubbing	ac	0	\$190.00	\$0.00
2. Cut and remove asphalt	sq ft	370	\$2.00	\$740.00
3. PVC sanitary sewer main (incl. trenching, bedding & backfill)	lf	3385	\$18.00	\$60,930.00
4. Sewer Services (incl. trenching, bedding, & backfill)	each	58	\$500.00	\$29,000.00
5. Sanitary sewer manhole(s)	each	14	\$1,700.00	\$23,800.00
6. Connection to existing manhole(s)	each	2	\$200.00	\$400.00
7. Aggregate Base Course	ton	0	\$15.00	\$0.00
8. Pavement replacement	ton	0	\$31.00	\$0.00
9. Driveway restoration	each	0		\$0.00
10. Utility adjustments	each	0		\$0.00
II. DOMESTIC WATER				
1. Clearing and grubbing	ac	0	\$190.00	\$0.00
2. Cut and remove asphalt	sq ft	0	\$2.00	\$0.00
3. Water Main (incl. excavation, bedding, backfill, valves, and appurtenances)	lf	2474	\$14.00	\$34,636.00
4. Water services (incl. excavation, bedding, backfill, valves, and appurtenances)	each	58	\$500.00	\$29,000.00
5. Connect to existing water line	each	3	\$250.00	\$750.00
6. Aggregate Base Course	ton	0	\$15.00	\$0.00
7. Pavement Replacement	ton	0		\$0.00
8. Utility adjustments	each	0		\$0.00
III. 3. STREETS				
1. Clearing and grubbing	ac	2	\$190.00	\$380.00
2. Earthwork, including excavation and embankment construction	cu yd	4120	\$1.70	\$7,004.00
3. Utility relocations	each	0		\$0.00
4. Aggregate sub-base course	ton	0		\$0.00
5. Aggregate base course	ton	4325	\$15.00	\$64,875.00
6. Sub-grade stabilization	ton	0		\$0.00
7. Asphalt or concrete pavement	ton	1638	\$31.00	\$50,778.00
8. Curb, gutter & sidewalk	lf	5972	\$12.50	\$74,650.00
9. Driveway sections	lf	0	\$9.20	\$0.00

10. Crosspans & fillets	sq ft	680	\$4.00	\$2,720.00
11. Retaining walls/structures	lf	0		\$0.00
12. Storm drainage system	ls	1	\$13,000.00	\$13,000.00
13. Signs and other traffic control devices	each	0	\$200.00	\$0.00
14. Construction staking	ls	1	\$300.00	\$300.00
15. Dust control	ls	1	\$1,000.00	\$1,000.00
16. Street lights (each)	each	7	\$1,500.00	\$10,500.00

IV. LANDSCAPING

1. Design/Architecture		0		\$0.00
2. Earthwork (includes top soil, fine grading, & berming)		0		\$0.00
3. Hardscape features (includes walls, fencing, and paving)	lf	0	\$10.00	\$0.00
4. Plant material and planting	ls	0	\$9,776.00	\$0.00
5. Irrigation system	sq ft	2997	\$0.50	\$1,498.50
6. Other features (incl. statues, water displays, park equipment, and outdoor furniture)		0		\$0.00
7. Curbing	lf	0	\$3.50	\$0.00
8. Retaining walls and structures		0		\$0.00
9. One year maintenance agreement		0		\$0.00

V. MISCELLANEOUS

1. Design/Engineering				\$0.00
2. Surveying				\$0.00
3. Developer's inspection costs				\$0.00
4. Quality control testing	ls	1	\$1,000.00	\$1,000.00
5. Construction traffic control	ls	1	\$1,500.00	\$1,500.00
6. Rights-of-way/Easements				\$0.00
7. City Inspection fees @ \$45./hr	ls	1	\$500.00	\$500.00
8. Permit fees				\$0.00
9. Recording costs				\$0.00
10. Bonds				\$0.00
11. Newsletters				\$0.00
12. General Construction Supervision				\$0.00
13. Other				\$0.00
14. Other				\$0.00

TOTAL ESTIMATION COST OF IMPROVEMENTS: \$ \$408,961.50

20% \$81,792.30

120% TOTAL AMOUNT OF IMPROVEMENTS \$ \$490,753.80

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.

J. L. ...

5-19-03

SIGNATURE OF DEVELOPER

Date

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

Reviewed and approved.

CITY ENGINEER

Date

COMMUNITY DEVELOPMENT

Date

RECORDING MEMORANDUM
Exhibit D

City of Grand Junction
Community Development Department Community Development
File: # FP-2003-105

This memorandum relates to and confirms that certain Development Improvements Agreement and/or Maintenance Guarantee concerning land in Mesa County, Colorado. The Agreement is by and between Sonsheve II Const. & Dev., LLC (Developer) and the City of Grand Junction (City) pertaining to Colonial Heights, filings #2 & 3 & 25 RD (Project), located at SE CORNER OF 25 RD. & G RD. Emp.

(Subject subdivision is more particularly depicted and described in the recording found at Plat Book 3573, Pages 302, 303.) Filing 2
and Plat Book 3573, Pages 304, 305, 306. Filing 3

The Developer of the Project was required by law to install and construct certain public and private improvements, the completion of which was guaranteed by a Development Improvements Agreement and/or Maintenance Guarantee. The Project is required to be constructed in accordance with the approval by the City pursuant to and in accordance with the Zoning and Development Code all as more fully detailed and described in City of Grand Junction development file # FP-2003-105.

The Developer and the City of Grand Junction by and through the signatures of the undersigned have determined and agreed to the type, quality and amount of improvements required and/or necessitated by the approval of the Project and that the improvements are guaranteed by and through the Development Improvements Agreement and /or Maintenance Guarantee. Furthermore, the Developer and the City agree that the Development Improvements Agreement and/or Maintenance Guarantee are contractual in nature and that the obligations under the Development Improvements Agreement and/or Maintenance Guarantee shall not be assigned except as provided in the agreement(s).

By virtue of this notice being recorded in the land records of the Mesa County Clerk and Recorder, subsequent owners and/or those that claim by, through or under the Developer are on notice of the Developer's obligations under the agreement(s).

NOW THEREFORE, the Developer and an official of the City of Grand Junction, both possessing and representing by their signatures that they possess sufficient authority, do hereby memorialize the relative, rights and obligations contained in the Development Improvement Agreement and/or Maintenance Guarantee herein characterized.

DEVELOPER: Sonsheve II Construction & Development, LLC

By: [Signature] Recy. 11-7-03
Date

(Print Name) Lloyd J Davis Jr.

CITY OF GRAND JUNCTION:

In accordance with the above, I hereby certify that the Development Improvement Agreement and/or Maintenance Guarantee are made of record by this memorandum and that the same may be inspected and/or copied at the City of Grand Junction, Community Development Department, 250 N. 5th Street, Grand Junction Colorado.

[Signature] 11/26/03
Community Development Department Date

COPY

MAINTENANCE GUARANTEE

1. **Parties:** The parties to this Maintenance Guarantee ("the Guarantee" or "Guarantee") are ^{SUNSHINE II CONSTRUCTION}~~+~~ DEVELOPMENT, LLC ("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 Guarantee will be the date that it is signed and accepted by the City.

RECITALS

The Developer has constructed, installed and is required to warrant and maintain certain improvements ("Improvements" or "the Improvements") which were made necessary by virtue of development on property within the City. The Property, known as COLONIAL HEIGHTS FILINES 2 + 3 has been reviewed and approved under Community Development file # FP-2003-105 and as necessary or required to construe this guarantee, that file(s) is 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 guarantee 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 guarantee 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 and guarantee the Improvements, at his/her/its own expense, against defects in workmanship and materials for a period of one year from the date of City acceptance of the Improvements. The Developer's obligation is and will be independent of any obligations of the City.

4. **Security:** To secure the performance of its obligations the Developer is required to post security in an amount of \$ 194,895.02 (Line G2, Exhibit B, City Security).

4a. The Developer has posted security to guarantee the Improvements in an amount, form and with terms acceptable to the City.

4b. In addition to that security all warranties and/or guarantees (those incident to construction or as provided by the contractor and/or manufacturer of installed equipment) are hereby assigned to the City.

4c. The Developer shall to the extent necessary or required by the City take whatever action is necessary or required to assign all warranties and/or guarantees (those incident to construction or as provided by the contractor and/or manufacturer of installed equipment) to the City. A copy of those warranties or a memorandum of the same is attached as Exhibit A.

4d. The Developer for itself, its successors and assigns agrees that if the Improvements are not maintained to City standards that the City shall notify the Developer in writing of the defect(s) in accordance with paragraph 8 hereof.

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

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 for the period of this guarantee.

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 guarantee. When necessary to protect the public health, safety or welfare, the Developer shall be subject to laws, ordinances and regulations that become effective after acceptance of the Improvements.

8. **Notice of Defect/Default:** 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 or required in or by the development or that an Improvement(s) is otherwise defective.

8a. As provided herein the City shall provide written notice to the Developer at the address stated in paragraph 22. Notice is and shall be deemed effective

two calendar days after mailing thereof by first class United States mail, postage prepaid.

8b. The Developer will have twelve (12) calendar days from the date of the notice to correct the defect.

8c. The City may grant reasonable extensions in writing to the time for correction of defect(s), however, it is not obligated to do so nor is it obligated to provide any notice of a defect(s) if it becomes aware of the defect(s) in or during an emergency. Furthermore, the City is not obligated to inspect the Improvements but may do so as it would any other improvement.

9. Acceptance: Prior to 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. All warranties and/or guarantees shall be for a period of no less than 12 months from the date of acceptance of the Improvements.

10. Funds: Funds drawn, guaranteed or collected by the City under this agreement shall be used for the purpose of correcting defects in and/or repairing or replacing failure(s) of the Improvement(s).

11. Defect/Default Events: The following conditions, occurrences or actions will constitute a defect and/or default:

11a. Developer's failure to maintain each and every one of the Improvements in conformance with this guarantee and/or as required by code, law, rule, ordinance or regulation;

11b. Developer's failure to correct defective construction of any Improvement within the applicable guarantee period;

11c. Developer's failure to maintain security in a form and amount required/provided by this guarantee.

11d. 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 guarantee will be the reasonable cost of satisfactorily repairing and/or replacing the Improvements plus reasonable City administrative expenses (in the amount of 20% of the repair, replacement and/or warranty work) all of which may exceed the amount of the security provided for in paragraph 4. The amount of the security provided for in paragraph 4 does not set, limit, establish or provide the Developer's maximum financial obligation.

12a. City administrative expenses for which the Developer is obligated to pay 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 the repair and/or replacement of the Improvements and/or enforcement of this guarantee and all initial warranty(ies) or guarantee(s) assigned to the City by the Developer.

13. City's Rights: When any defect or default occurs, the City may after notice and the Developer's failure and/or refusal to repair or replace the Improvements, proceed to collect the amount of the cost or expense incidental or necessary to affect the repair or replacement 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 guarantee. 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 guarantee 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 to or constitute a waiver of any other provision, nor will it be deemed to 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 defect or default under this guarantee be deemed a waiver of any subsequent defect(s) or default(s) 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 defect(s), defaults(s) or Improvement(s).

16. **Amendment or Modification:** The Parties may amend or modify the Agreement only by written instrument executed on behalf of the City by the Public Works and Utilities Director 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 guarantee, 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. The value of the City's in-house legal counsel is agreed to be \$125.00 per hour.

18. **Integration:** This guarantee, 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 guarantee 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:

PAUL JOHNSON
If to Developer: SUNSHINE II CONSTRUCTION & DEVELOPMENT, LLC Name - Developer/Company
2350 G ROAD Address (Street and Mailing)
GRAND JUNCTION, CO 81505 City, State & Zip Code
(970) 255-8853 Telephone and Fax Numbers
(970) 245-1452
pjohnson@bluestarindustries.com E-mail

If to City: Office of the City Attorney
250 North 5th Street
Grand Junction, CO 81501

Cc: Public Works and Utilities Department
250 North 5th Street
Grand Junction, CO 81501

23. Recordation: Developer will pay for all costs to record a memorandum of this guarantee 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.

By: 

SONSHINE II CONSTRUCTION & DEVELOPMENT, LLC AUGUST 3, 2005
Developer Date

Name (printed): LLOYD J. DAVIS, JR.

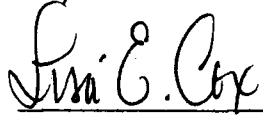
Title (position): PRESIDENT OF SUNDANCE PROPERTY LEASING, INC.
MANAGER OF SONSHINE II CONSTRUCTION AND DEVELOPMENT, LLC

Attest:

Secretary

Date

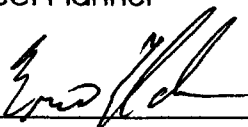
City of Grand Junction



Project Planner

8/04/05

Date



Dept. of Public Works and Utilities

8/4/05

Date

GUARANTEE2003
6/13/2003



FIRST UNITED BANK®

"...a Colorado-owned community bank"

A subsidiary of *United Banks of Colorado*

RECEIVED
AUG 01 2005
COMMUNITY DEVELOPMENT
DEPT.

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

Irrevocable Letter of Credit No.9051-01

Dated: July 6, 2005

Expiration: July 6, 2006

Dear Sirs:

We hereby establish our Irrevocable Letter of Credit No. 9051-01 in favor of the City of Grand Junction at the request of and for the account of Sonshine II Construction and Development, LLC., in the amount of One Hundred Ninety-Four Thousand Eight Hundred Ninety-Five Dollars and 02/100—(\$194,895.02) 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 July 6, 2006, subject to the automatic extensions discussed below:
- 3) This Letter of Credit is available by sight draft (s) drawn and marked "Drawn under First United Bank Letter of Credit No. 9051-01 dated July 6, 2005."
- 4) This Letter of Credit is established for the use and benefit of the City of Grand Junction by reason of the Sonshine II Development, LLC., 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) **"Sonshine II Development, LLC, 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 \$ _____."**

AURORA-CITY CENTER
14501 E. Alameda Ave.
Aurora, CO 80012

AURORA-MISSION VIEJO
15490 E. Hampden Avenue
Aurora, CO 80013

COLORADO SPRINGS
1310 United Heights
Colorado Springs, CO 80921

DENVER-DOWNTOWN
740 17th St.
Denver, CO 80202

DENVER-PARK HILL
5901 E. Colfax Avenue
Denver, CO 80220

DENVER TECH CENTER
8095 E. Belleview Avenue
Englewood, CO 80111

LAKEWOOD-WADSWORTH
201 Wadsworth Boulevard
Lakewood, CO 80226

LITTLETON-KIPLING
10024 W. San Juan Wy.
Littleton, CO 80127

PARKER-COTTONWOOD PLAZA
17821 Cottonwood Drive
Parker, CO 80134

PARKER-MAINSTREET
19201 E. Mainstreet
Parker, CO 80134

WESTMINSTER
6500 W. 104th Ave.
Westminster, CO 80020

UNITED BANKS OF COLORADO
8095 E. Belleview Avenue
Englewood, CO 80111





FIRST UNITED BANK®

"...a Colorado-owned community bank"

A subsidiary of *United Banks of Colorado*

City of Grand Junction
Letter of Credit
Sonshine II Construction and Development, LLC
July 6, 2005
Page Two

- 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) First United Bank notifies the City of Grand Junction at 250 N. 5th Street Grand Junction, Colorado 81501, by certified 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.

First United Bank National Association

Arnold Parks
Sr. Vice President

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