

*MS 06/07*

**PROFFER PERFORMANCE AGREEMENT**

This Agreement, made and entered into this \_\_\_ day of \_\_\_\_\_, 20 \_\_, by and between \_\_\_\_\_ (hereinafter called "**Developer**"); and **THE BOARD OF SUPERVISORS OF LOUDOUN COUNTY, VIRGINIA**, a body politic (hereinafter called "**Board**").

WHEREAS, Developer is obligated by the Proffers of \_\_\_\_\_ to construct the specific [public] improvements described in paragraph 1 below; and

WHEREAS, pursuant to [§540.12 of the 1972 Loudoun County Zoning Ordinance][§6-1209 of the 1993 Loudoun County Zoning Ordinance], the Zoning Administrator has required a guarantee, satisfactory to the Board, in an amount sufficient for and conditioned upon the construction of said improvements; and

WHEREAS, in consideration of the foregoing premises and in further consideration of the approval by the Board of the plat, plans or profiles of the subdivision/site plan known as " \_\_\_\_\_ ", designated as County application number CPAP/STPL \_\_\_\_\_, and any and all revisions thereof however such revisions may be redesignated (the "**Plans**"), and the Board not requiring the following work to be completed prior to the approval and/or recordation of the plat of said subdivision/site plan, the Developer, its successors and assigns agrees to do the following work within \_\_\_\_\_ months from the date hereof:

1. To construct all physical improvements in accordance with the Plans and all applicable laws and regulations, including, without limitation, applicable provisions of the Loudoun County Subdivision and Zoning Ordinances, including the concept development plan and proffers

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and all attachments, governing such Plans (with laws, regulations and ordinances to take precedence over Plans in the event of conflict), including, but not limited to, adequate storm drainage system both on the subject property and on adjacent properties as needed, [the construction of streets and roads in accordance with current standards of the Virginia Department of Transportation ("VDOT"),] and the submission of as-built plans for all such [public] improvements. The specific [public] improvements to be constructed pursuant to this Agreement are as follows:

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and

2. To provide adequate supervision on the project site during the installation of all required improvements and a responsible superintendent or foreman together with one (1) set of approved Plans on the project site at all times when work is being performed; and

[3. To comply with all requirements of VDOT in order that the streets will be accepted by VDOT for operation and maintenance, and the Developer agrees to make prompt application to VDOT for acceptance of such improvements into the state system and diligently to pursue and carry out all actions necessary to process such application until such acceptance has been achieved; and]

4. To maintain dust control on the project site at all times; and

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5. To provide for the adequate control of erosion and sedimentation by temporary and permanent control practices and measures which will be implemented during all phases of clearing, grading, and construction; and

[6. To provide and maintain convenient, safe, unobstructed, all-weather access to all those premises which are occupied by owners or occupants other than the Developer or its agents, until such premises are accessible via public streets that have been accepted for maintenance and operation by VDOT and promptly to repair any deterioration or damage to completed work for which partial but not complete reduction in the amount of the security has been approved; and]

7. To perform all overlot grading in accordance with approved Plans; and

[8. To install all traffic warning and regulatory signs and devices required by the approved Plans during construction and to maintain said signs and devices in an operable condition until streets are accepted for maintenance and operation by VDOT. All traffic signs shall be kept in proper position, clean, and legible at all times. Damaged signs shall be replaced immediately. Special care shall be taken to see that weeds, shrubbery, construction materials, and snow are not allowed to obscure the face of any sign; and]

9. To maintain control on the project site at all times so that mud is not tracked out of the project by vehicle tires and deposited on adjacent streets of the state system, or such other streets as may be adjacent to the project site.

10. It is agreed and understood that final approval of completed work can only be given by the Zoning Administrator of Loudoun County, Virginia.

11. It is agreed and understood that in the event the Developer shall default in its obligations under this Agreement and it becomes necessary for the Board to institute legal proceed-

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ings to enforce compliance with said obligations or to obtain reimbursement for costs incurred in fulfilling said obligations on behalf of the Developer, the Developer shall pay all reasonable attorney's fees and all other costs that may reasonably be incurred.

[12. Developer hereby agrees to provide security in the form of a **cash escrow** deposit in the amount of \$ \_\_\_\_\_, which funds are to be made available to the Board upon default or breach of any of the terms and conditions of this Agreement by the Developer . The said deposit is delivered herewith by certified check, receipt of which is hereby acknowledged by the Board. Such amount shall be placed in an escrow account with the Treasurer of Loudoun County until drawn upon by the Board or returned to Developer as provided herein and in the Bonding Policy of Loudoun County, Virginia. All interest accruing on this account shall be paid to the same party to whom the principal is paid, except that, in any event, five percent (5%) of any interest accrued may be retained by the Treasurer to cover the cost of administering the account. The Developer hereby ratifies and reaffirms its agreement that the said funds deposited as cash escrow are available to the Board on default of this Agreement. This paragraph shall not be construed in any manner as a waiver of any right of the Board to enforce the obligations of this Agreement against the Developer or its successors and assigns.]

**OR**

[12. Developer hereby agrees to provide security in the form of a [Letter of Credit] [Corporate Surety Bond] in the amount of \$ \_\_\_\_\_, which funds are to be made available to the Board upon default or breach of any of the terms and conditions of this Agreement by the Developer. Such [Bond] [Letter of Credit] Numbered \_\_\_\_\_ is attached hereto and made a part hereof, and the Developer hereby ratifies and reaffirms its agreement that the said

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funds represented by the [Bond] [Letter of Credit] are available to the Board on default of this Agreement. This paragraph shall not be construed in any manner as a waiver of any right of the Board to enforce the obligations of this Agreement against the Developer, its successors and assigns.]

13. If the [Bond] [Letter of Credit] provided to the Board pursuant to the preceding paragraph becomes not an acceptable form of surety or security, whether as a result of the failure of the issuing [Bank] [Surety Company] to achieve the rating required by the Board's duly adopted Bonding Policy or as a result of any other failure of such [Bond] [Letter of Credit] to satisfy any of the other criteria established by said Bonding Policy for acceptable forms of surety or security, then the Developer shall, upon request of the Zoning Administrator, promptly provide a substitute surety or security satisfactory to the Board. Failure of the Developer to furnish such substitute surety or security within sixty (60) days after the Zoning Administrator mails such request to the Developer by certified mail with return receipt requested shall constitute a default and a failure to perform in accordance with this Agreement and a failure to discharge its obligations under this Agreement, such that the Board may, thereafter, without further notice, call upon such [Bond] [Letter of Credit] for payment in accordance therewith.

The undersigned warrants that this Agreement is made and executed pursuant to authority properly granted by the [partnership agreement] [charter, bylaws and action of the Board of Directors] [articles of organization, operating agreement or majority vote of the members] of the Developer.

IN WITNESS WHEREOF, the Developer has caused its name and seal to be affixed hereto, by \_\_\_\_\_, its duly authorized representative.

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Developer: \_\_\_\_\_

By: \_\_\_\_\_(SEAL)

\_\_\_\_\_  
Title

COMMONWEALTH OF VIRGINIA,  
COUNTY OF \_\_\_\_\_, to wit:

I, \_\_\_\_\_, a Notary Public in and for the jurisdiction  
aforesaid, do hereby certify that on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_,  
\_\_\_\_\_ as \_\_\_\_\_ of \_\_\_\_\_,  
whose name is signed to the affixed Agreement, personally appeared before me in my jurisdiction,  
and acknowledged the same in my presence.

\_\_\_\_\_  
Notary Public

My Commission Expires: \_\_\_\_\_

**[SIGNATURES CONTINUE ON THE FOLLOWING PAGE]**

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IN WITNESS WHEREOF, the County has caused this Agreement to be executed, under seal, in its behalf, and its seal affixed.

APPROVED AS TO FORM:

THE BOARD OF SUPERVISORS OF  
LOUDOUN COUNTY

\_\_\_\_\_  
Assistant County Attorney

By: \_\_\_\_\_  
Its: Zoning Administrator

COMMONWEALTH OF VIRGINIA  
COUNTY OF \_\_\_\_\_, to wit:

I, \_\_\_\_\_, a Notary Public in and for the jurisdiction aforesaid, do hereby certify that on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, \_\_\_\_\_ as \_\_\_\_\_ on behalf of THE BOARD OF SUPERVISORS OF LOUDOUN COUNTY, VIRGINIA, whose name is signed to the affixed Agreement, personally appeared before me in my jurisdiction, and acknowledged the same in my presence.

\_\_\_\_\_  
Notary Public

My Commission Expires: \_\_\_\_\_

**Please complete the below contact information in reference to the attached agreement and submit this with your completed agreement and bond packet.**

Project Name: \_\_\_\_\_

Bond Number: \_\_\_\_\_

| <b>Please provide contact information for the PRINCIPAL/CO-PRINCIPAL of the bond:</b> | <b>Please provide contact information for the Developer/ Owner. This individual will keep the Performance Agreement/Bond current with Loudoun County:</b> |
|---|---|
| Name:   | Name(s):  |
|   |   |
| Title:  | Title(s):   |
|   |   |
| Address:  | Address(es):  |
|   |   |
|   |   |
|   |   |
| Phone No:   | Phone No(s):  |
|   |   |
|   |   |
| Email:  | Email(s):   |
|   |   |
|   |   |

Thank you for your help.  
*Bonds Management Team*

**For more Information:**

Email: bonds@loudoun.gov

www.loudoun.gov/bonds

## QUICK REFERENCE FOR PERFORMANCE BOND PROCESS WITH LOUDOUN COUNTY

Now that your agreement has been accepted by Loudoun County, its life has begun and may consist of Bond Maintenance prior to Bond Release.

***This is only the beginning. You are not done.***

Per [Facilities Standards Manual \(FSM\)](#) Section 8.302, “If construction of the subject project is not completed within the initial Performance Agreement term (12, 24, or 36 months), the performance bond amount may require *adjustment* (increase in bond amount) and subsequent *reconsideration* (new owner or surety substitution) and review by the Bond Committee”.

**Until the Bond Committee recommends approval or release of the bond, the performance agreement must be extended every year with a new set of completed extension documents and a \$300.00 extension fee per year(s) extended.** (See [FSM](#) Section 8.305.E for release requirements).

To keep your agreement *current* (not expired and out of default), you may need to take one or more of the following actions:

- 1) ***When would I need an Extension Agreement?*** This is the most common action that needs to be taken every year in order to keep your agreement current. Submit the required completed extension documents and a \$500.00 fee per year. Except for the 1<sup>st</sup> extension, all extensions are for one (1) year.

Please note, when extending a State Maintained Roads Agreement, a Preliminary Street Acceptance Package is also required. (See [Checklist for Preliminary Street Acceptance Package \(aka PSAP\)](#)).

Documents required:

- |                           |                         |                                     |
|---------------------------|-------------------------|-------------------------------------|
| 1) Extension Agreement    | 2) Consent to Extension | 3) Rider/Letter of Credit Amendment |
| 4) Extension Request Form | 5) Fee                  |                                     |

Please note, if your agreement is not extended by the expiration date, your agreement will be in DEFAULT (No reduction, release, permits, or inspections for project will be authorized) (See Loudoun County’s website for documents/information: [LC Perf Agree Extension](#)). Per [FSM](#) Section 8.305.B, submit an extension agreement approximately sixty (60) days prior to the agreement expiration. Upcoming expiration letters are generally emailed to owner/developer ninety (90) days from the expiration date of the agreement.

- 2) ***When would I need a New Owner Substitution?*** If the ownership of the property has changed, request a New Owner Substitution.

Please note, if the original agreement is expired, the agreement is in DEFAULT. When submitting a New Owner Substitution agreement on an expired performance agreement, a \$500.00 fee is required, per year(s) in default, to bring the expired agreement current. (See Loudoun County’s website for documents/information: [LC Substitutions](#)).

Documents required:

- |              |  |
|--------------|--|
| 1) Agreement | 2) Bond ( <a href="#">Preferred Collateral Discussion: Cash, Letters of Credit, Surety Bonds</a> ) |
|--------------|--|

- 3) ***When would I need a Surety Substitution?*** If the bank or surety company no longer meets the requirements of [FSM](#) Section 8.303, request a Surety Substitution. (See Loudoun County’s website for documents/information: [LC Substitutions](#))

Documents required:

- |              |  |
|--------------|--|
| 1) Agreement | 2) Bond ( <a href="#">Preferred Collateral Discussion: Cash, Letters of Credit, Surety Bonds</a> ) |
|--------------|--|

- 4) ***When would I need a Reduction?*** If you have completed 30% of the improvements, request a bond reduction and submit a \$1,215.00 fee. (See Loudoun County’s website for documents/information: [LC Reductions](#)).

Documents required:

- |                             |                         |         |                              |
|-----------------------------|-------------------------|---------|------------------------------|
| 1) Reduction request letter | 2) Bond Unit Price List | 3) Fees | 4) Geo-tech certified letter |
|-----------------------------|-------------------------|---------|------------------------------|

- 5) ***When would I need a Release?*** If improvements have been completed, request a bond release and submit a \$1,645.00 release fee and a \$185.00 fee for as-built plans. (See Loudoun County’s website for documents/information: [LC Street Acceptance / Bond Release](#)).

Documents required:

- |                           |   |
|---------------------------|---|
| 1) Release request letter | 2) Items Requested on Public Street Acceptance <b>OR</b>              |
| 3) Fees                   | Items requested on Private Street/Site Plan/Proffer Release Checklist |

*If after reviewing the website links above you have further questions or need clarifications, please contact:*

| <b>Contact Infrastructure Compliance Team for PSAP Questions</b>  |                 |
|---|-----------------|
| <b>Contact:</b>   | <b>Issue:</b>   |
| Rick Hoffman / 703-737 8625<br><a href="mailto:richard.hoffman@loudoun.gov">richard.hoffman@loudoun.gov</a> | PSAP Submission |

| <b>Contact Infrastructure Compliance Team for RELEASE and REDUCTION Questions</b>                           |                             |
|---|-----------------------------|
| <b>Contact:</b>   | <b>Issue:</b>               |
| Iona McGee / 571-258-3216<br><a href="mailto:iona.mcgee@loudoun.gov">iona.mcgee@loudoun.gov</a>             | Project Manager Assignments |
| Coleman Hutton / 703-737-8486<br><a href="mailto:coleman.hutton@loudoun.gov">coleman.hutton@loudoun.gov</a> | Street Acceptance Process   |

| <b>Contact Bonds Management Team for Extension, New Owner Substitution, or Surety Substitution Questions</b> |   |
|--|---|
| <b>Contact:</b>  |   |
| Michael Baggett – project names beginning with A-D   | 703-771-5043 / <a href="mailto:michael.baggett@loudoun.gov">michael.baggett@loudoun.gov</a> |
| Will Himel – project names beginning with E-O  | 703-737-8765 / <a href="mailto:will.himel@loudoun.gov">will.himel@loudoun.gov</a>           |
| Diana Larson – project names beginning with P – Z  | 703-771-5345 / <a href="mailto:diana.y.larson@loudoun.gov">diana.y.larson@loudoun.gov</a>   |
| Bonds Information Line   | 703-737-8942 / <a href="mailto:bonds@loudoun.gov">bonds@loudoun.gov</a>                     |

### **COMMONLY MADE ERRORS**

- The Agreement must be dated on or prior to the date of the Corporate Surety Bond or Letter of Credit.
- Application name and number must be correct and agree across all documents.
- Common Typos on the Rider/Continuation/Verification Certificate for application types (ex.: SPTL versus STPL, APAP versus CPAP).
- The Corporate Surety Bond or Letter of Credit Number must be filled in on Agreement.
- Owner of the property must be party to the Performance Agreement even if the Corporate Surety Bond is provided by a different entity or party.
- Incorrect or Missing Dates on the Consent to Extension.
- Notary Attestation cannot be before the date of the agreement.
- Signers' names must agree exactly across all documents (signature block and notary).
- Corporate Surety Bond Number must be on the upper left corner of the face of the bond and in the upper right corner of each subsequent page of the bond.
- Power of Attorney should be dated the same date as the Consent to Extension and/or the Bond Rider.
- Not using the EXACT template language if re-typed.