

SECTION 10. PERFORMANCE SECURITY.

A. General Requirements. As security to the Village for the performance by Developer of Developer's obligations (1) to construct and complete the Work and the Improvements pursuant to and in accordance with this Agreement, (2) to pay all Village fees, costs, and expenses due from Developer pursuant to this Agreement, (3) to maintain and repair streets, sidewalks and other public property pursuant to this Agreement, and (4) to otherwise faithfully perform its undertakings pursuant to this Agreement, Developer shall provide to the Village a letter of credit or such other security approved by the Village prior to adoption of the Final PD Ordinance, in an amount equal to 125% of the estimated cost of completing the Improvements and site restoration required pursuant to this Agreement, as determined by the Village Engineer and the Village Director of Community Development (for matters within their respective permitting authorities) ("**Performance Security**"). If the Performance Security is a letter of credit it shall be in a form provided by, and acceptable to, the Village, and substantially the same as attached to this Agreement as **Exhibit K**. The Village shall release the

Performance Security in a timely fashion upon the Village's approval, and as appropriate, acceptance of the Improvements; provided, however, that the Village shall only be required to release that percentage of the Performance Security that equals the portion of the Improvements that have been approved and, as appropriate, accepted, and provided further that any such release shall be subject to posting of all Maintenance Guarantees required by Subsection B of this Section.

B. Maintenance Guarantee. Following the Village's release of any percentage of the Performance Security for any Public Improvement, Developer shall substitute for the released percentage of the Performance Security a maintenance guarantee in the form of a letter of credit or other form of security approved by the Village prior to adoption of the Final PD Ordinance ("**Guaranty Security**"), which is equal to 15 percent of the actual costs of the completed Public Improvements for which the Performance Security has been released, and which is acceptable to the Village Attorney and, if a letter of credit, shall be in a form substantially the same as attached to this Agreement as **Exhibit L**. Developer shall deposit or otherwise provide the Guaranty Security with the Village. The Guaranty Security shall be effective for a period of two years from the date of acceptance by the Village of the Public Improvements and may be utilized by the Village in accordance with Section 7.D.4 of this Agreement ("**Maintenance Guarantee Term**"). The Village shall return or otherwise release to Developer the Guaranty Security upon the end of the Maintenance Guarantee Term if no defects develop in the Public Improvements.

C. Interest and Costs. Developer shall bear the full cost of securing and maintaining the Performance Security and the Guaranty Security.

D. Form of Letters of Credit. The Performance Security and the Guaranty Security shall each be in a form satisfactory to the Village Attorney and, if letters of credit, shall be substantially the same as the forms set forth in Exhibits K and L of this Agreement, and shall each be from a bank acceptable to the Village and having capital resources of at least \$50,000,000, with an office in the Chicago Metropolitan Area and insured by the Federal Deposit Insurance Corporation. Any such letter of credit shall, at a minimum, provide that it shall expire no earlier than one year following the date of its issuance or 45 days after delivery to the Village of written notice, in the manner provided in this Agreement, that such letter of credit will expire and in no event, until 60 days after written notice of such expiration has been given by the issuing bank to the Village. The Performance and Guaranty Securities shall generally provide that (1) they may be drawn on based upon the Village Manager's certification that Developer has failed to fulfill any of the obligations for which the respective Security is security; (2) they shall not require the consent of Developer prior to any draw by the Village; (3) they shall not be cancelled without the prior written consent of the Village; and (4) if at any time they will expire within 45 or any lesser number of days, and if they have not been renewed, and if any obligation of Developer for which it is security remains uncompleted or unsatisfactory, then the Village may, without notice and without being required to take any further action of any nature whatsoever, call and draw down the applicable Security and thereafter either hold all proceeds (1) as security for the satisfactory completion of all such obligations, (2) to complete all such obligations, and (3) to reimburse the Village for any and all costs and expenses, including legal fees and administrative costs, incurred by the Village, as the Village shall determine.

E. Reductions. The Performance Security may provide that the aggregate amount of the Security may be reduced, but only upon joint written direction by Developer and the Village, to reflect a reduction in the total amount of the deposit required pursuant to Subsection

10.A of this Agreement as a result of (1) payments made by Developer in full or partial satisfaction of Developer's obligations pursuant to Section 10 of this Agreement, or (2) to reimburse Developer for payment of Improvement Work satisfactorily completed. No such reduction to reimburse Developer for payment of Improvement Work satisfactorily completed shall be allowed except upon presentation by Developer of proper contractors' sworn statements, partial or final waivers of lien, as may be appropriate, and all such additional documentation as the Village may reasonably request to demonstrate satisfactory completion of the Improvement in question and full payment of all contractors, subcontractors and material suppliers. No reduction other than the final reduction shall be allowed for an amount less than 25 percent of the original amount of the letter of credit.

F. Replenishment of Letters of Credit. If at any time the Village determines that the funds remaining in the Performance Security are not, or may not be, sufficient to pay in full the remaining unpaid cost of all Improvements and all unpaid or reasonably anticipated Village fees, costs, and expenses, or that the funds remaining in the Guaranty Security are not, or may not be, sufficient to pay all unpaid costs of correcting any and all defects and deficiencies in the Improvements and all unpaid or reasonably anticipated Village fees, costs, and expenses, then, within 10 days following a demand by the Village, Developer shall increase the amount of the appropriate Security to an amount determined by the Village to be sufficient to pay such unpaid fees, costs and expenses; provided, however, that Developer shall not be required to increase the amount of the Performance Security or Guaranty Security to an amount greater than the initial amount of such Security. Failure to so increase the amount of the security shall be grounds for the Village to draw down the entire remaining balance of the Performance and Guaranty Securities.

G. Replacement of Letters of Credit. If at any time the Village determines that the bank issuing either the Performance Security or the Guaranty Security is without capital resources of at least \$50,000,000, is unable to meet any federal or state requirement for reserves, is insolvent, is in danger of becoming any of the foregoing, or is otherwise in danger of being unable or unwilling to honor the security or letter of credit at any time during its term, or if the Village otherwise reasonably deems itself to be insecure, then the Village shall have the right to demand that Developer provide a replacement letter of credit from a bank satisfactory to the Village. Such replacement letter of credit shall be deposited with the Village not later than 20 days following such demand. Upon such deposit, the Village shall immediately surrender the original letter of credit to Developer. Failure to provide such a replacement letter of credit shall be grounds for the Village to draw down the entire remaining balance of the Performance Security and the Guaranty Security.

H. Use of Funds in the Event of Breach of Agreement. If Developer fails or refuses to complete the Improvements in accordance with this Agreement, or fails or refuses to correct any defect or deficiency in the Improvements as required by Section 7 of this Agreement, or fails or refuses to restore property in accordance with a demand made pursuant to Subsection 8.1 of this Agreement, or in any other manner fails or refuses to meet fully any of its obligations under this Agreement, then the Village may, in its discretion, draw on and retain all or any of the funds remaining in the Performance Security and the Guaranty Security. The Village thereafter shall have the right to exercise its rights under Subsections 10.H and 10.I of this Agreement, to take any other action it deems reasonable and appropriate to mitigate the effects of such failure or refusal, and to reimburse itself from the proceeds of the Performance Security and the Guaranty Security for all of its costs and expenses, including legal fees and administrative expenses, resulting from or incurred as a result of Developer's failure or refusal to fully meet its obligations under this Agreement. If the funds remaining in the Performance

12/27/16 version

Security and the Guaranty Security are insufficient to repay fully the Village for all such costs and expenses, and to maintain a cash reserve equal to the required Guaranty Security during the entire time such Guaranty Security should have been maintained by Developer, then Developer shall, upon demand of the Village therefor, deposit with the Village within 10 days such additional funds as the Village determines are necessary to fully repay such costs and expenses and to establish such cash reserve.