

REQUEST FOR BOARD ACTION

HENDERSON COUNTY BOARD OF COMMISSIONERS

MEETING DATE: October 19, 2005

SUBJECT: Request to Amend Improvement Guarantee for Cummings Cove

ATTACHMENTS: 1. September 21, 2005 (Original) Performance Guarantee Agreement
2. Draft October 19, 2005 Performance Guarantee Agreement

SUMMARY OF REQUEST:

On September 21, 2005, the Board of Commissioners approved an application submitted by Cummings Cove Company, LLC, owner of the project, for an improvement guarantee for two phases in the Cummings Cove major subdivision. Both Phases were conditionally approved by the Planning Board on July 19, 2005. The improvement guarantee covered the grading, construction of the road, the water distribution and sewer system improvements, erosion control and road shoulder stabilization for Phase I and Phase II of the Mountain Top Area in Cummings Cove.

Cummings Cove Company, LLC, is now requesting to amend the original Performance Agreement by changing the completion date from June 30, 2006 to September 30, 2007 to allow for the full two years allowed by Section 170-39 of the Henderson County Subdivision Ordinance. If the Board of Commissioners agrees to grant the requested amendment, staff has attached for the Board's consideration a draft Performance Guarantee Agreement which reflects a new improvements completion date of September 30, 2007, and requires submittal of an Irrevocable Letter of Credit showing an expiration date not earlier than 60 days after the new improvements completion date. The new Performance Guarantee Agreement must be executed by the relevant parties if the Board approves the amendment.

COUNTY MANAGER'S RECOMMENDATION/BOARD ACTION REQUESTED:

The amendment, if granted, would not cause the developer to exceed the two-year maximum time period for completion of the required improvements. Therefore, I recommend that the Board approve the request to change the completion date for the improvement guarantee for Cummings Cove to September 30, 2007, provided that an Irrevocable Letter of Credit is submitted in accordance with the Performance Guarantee Agreement.

STATE OF NORTH CAROLINA

PERFORMANCE GUARANTEE AGREEMENT

COUNTY OF HENDERSON

THIS AGREEMENT made and entered into this _____ day of _____, 200_, by and between Cummings Cove, LLC, hereinafter referred to as "Developer," and the Henderson County Board of Commissioners, hereinafter referred to as "Board;"

WITNESSETH:

WHEREAS, the Developer is attempting to secure approval of one or more Final Plats for Phase I and Phase II of the Mountain Top Area of a proposed subdivision known as Cummings Cove, hereinafter referred to as the "Project," located in Henderson County, North Carolina; and

WHEREAS, the Henderson County Planning Board conditionally approved the Phase I and Phase II Development Plan for the Mountain Top Area of Cummings Cove, under Chapter 170 of the Henderson County Code, which is entitled Subdivision of Land, and

WHEREAS, Chapter 170 requires the completion of certain improvements prior to Final Plat approval, however Sections 170-38 and 170-39 allow the Board of Commissioners to permit the Developer to post an irrevocable letter of credit with Henderson County to guarantee the completion of said required improvements; and

WHEREAS, the Developer has requested that the Board of Commissioners approve the posting of an irrevocable letter of credit to guarantee and secure the completion of said improvements in lieu of completion of all improvements prior to said approval;

IT IS THEREFORE AGREED as follows:

1. The Developer will, on or before September 30, 2007, complete as required the following improvements to serve lots in Phase I and Phase II of the Mountain Top Area in Cummings Cove: grading, construction of the road, the water distribution and sewer system improvements, erosion control and road shoulder stabilization, as required by the Henderson County Subdivision Ordinance, as shown on the Combined Master Plan and Phase I and Phase II Development Plan for the Mountain Top Area of Cummings Cove, as conditionally approved by the Henderson County Planning Board on July 19, 2005, and as shown on the attached cost estimates prepared by Don Hunley, P.E., (dated September 7, 2005).
2. The Developer will post with Henderson County an irrevocable letter of credit guaranteeing completion of said improvements by the required date. Said letter of credit must be issued by a bank licensed to do business in North Carolina, in the amount of at least \$2,311,562.50 (the "Improvement Guarantee"), payable to

Henderson County, and having an expiration date not earlier than 60 days after the completion date stated in Paragraph 1, above.

3. At such time as this Agreement is fully executed, this Agreement will supercede prior Agreements between the Board and the Developer regarding the improvement guarantee
4. In the event that the required improvements are completed as required, the letter of credit will be released. In the event that the improvements are not completed as required, then the Developer shall be in breach of this Agreement and the Improvement Guarantee and the County shall call the letter of credit and use the funds to complete the required improvements.
5. At such time as the County Attorney has reviewed and approved this Agreement and this Agreement is fully executed, and a letter credit in the proper form is posted, then the Board will allow the Final Plat(s) for Cummings Cove Mountain Top Area, Phase I and Phase II, to be approved by the Subdivision Administrator, provided that any other requirements of Chapter 170 of the Henderson County Code and/or conditions imposed by the Planning Board have been satisfied.
6. The County Manager shall have the authority to approve the release of portions of the Improvement Guarantee as work progresses, provided the amount remaining under the Improvement Guarantee meets or exceeds 125% of the cost of the remaining improvements. The County Manager has the discretion to require the Developer to provide, at the Developer's expense, an independent verification of the remaining work.

IN WITNESS WHEREOF, the Board has, by appropriate action, caused this Agreement to be reviewed for approval by the County Attorney and executed by its Chairman or other authorized member and attested by the Clerk, and the Developer has caused this Agreement to be properly executed, this the ____ day of _____, 200__.

APPROVED AS TO FORM:

County Attorney

HENDERSON COUNTY BOARD OF COMMISSIONERS

BY: _____
William L. Moyer, Chairman

ATTESTED BY:

[OFFICIAL SEAL]

Elizabeth W. Corn, Clerk to the Board

DEVELOPER:
Cummings Cove, LLC

BY: _____
Managing Member

STATE OF NORTH CAROLINA
COUNTY OF HENDERSON

I, _____, Notary Public for said County and State, certify that Elizabeth W. Corn personally came before me this day and acknowledged that she is the Clerk to the Board of Commissioners of Henderson County, a municipal corporation and that by authority duly given and as the act of the corporation, the foregoing instrument was signed in its name by the Chairman of the Board of Commissioners, sealed with its corporate seal, and attested by her as its Clerk.

THIS the ____ day of _____, 200__.

Notary Public

My Commission Expires: _____

[NOTARIAL SEAL]

STATE OF _____
COUNTY OF _____

I, _____, Notary Public for said State and County certify
that _____, Manager of Cummings Cove, LLC, personally came before me
this day and acknowledged the due execution of the foregoing instrument.

THIS the _____ day of _____, 200_.

Notary Public

My Commission Expires: _____

[NOTARIAL SEAL]

DRAFT