

IMPROVEMENT AGREEMENT
(sidewalk and storm drainage improvements)

This Improvement Agreement (this "Agreement") is made and entered into as of the date set forth on the signature page by and between the City of Newport, an Oregon municipal corporation (the "City"), and 5th Street Lofts, LLC, an Oregon limited liability company, hereinafter referred to as "Developer."

RECITALS:

WHEREAS, Developer owns the real property at 843, 847, 853, and 857 SE 5th Street, more specifically described in Exhibit A ("Property"), upon which they are constructing four (4) townhouse units; and

WHEREAS, Developer intends to file a final subdivision plat ("Final Plat") to place each townhouse unit on its own lot, said subdivision having been tentatively approved by the Newport Planning Commission on November 26, 2018 (File No. 2-SUB-18/4-GP-18); and

WHEREAS, the Newport Planning Commission's tentative subdivision approval included conditions requiring Developer install curb, gutter, sidewalk and related storm drainage improvements ("Required Improvements") along the Property's SE 5th Street frontage in a manner acceptable to the Newport Public Works Department before the final subdivision plat is recorded; and

WHEREAS, Developer, having experienced construction delays, has not yet completed Required Improvements; and

WHEREAS, the Newport Municipal Code provides that Developer may, in lieu of completing Required Improvements prior to recordation of a Final Plat, enter into an Agreement with the City for the completion of the Required Improvements; and

WHEREAS, Required Improvements under this Agreement do not constitute a Public Improvement as the term is defined in ORS 279C; and

WHEREAS, this Agreement is required by Newport Municipal Code (NMC) 13.05.090(C) in order to allow the City of Newport to move ahead with approval of the Final Plat.

IT IS HEREBY AGREED BY AND BETWEEN THE PARTIES above mentioned, for and in consideration of the mutual promises hereinafter stated, as follows:

1. Recitals. The Recitals to this Agreement set forth above are hereby incorporated herein as if fully set out, shall constitute contractual provisions and are not mere recitals.
2. Exhibits. The exhibits set forth below and attached to this Agreement are hereby incorporated herein by this reference.
 - a. Exhibit A – Legal description of the real property subject to this Agreement.
 - b. Exhibit B – Developer's cost estimate of the Required Improvements.
3. Identification of Required Improvements. Developer shall install and complete, or cause to be installed and completed, the Required Improvements. As used herein, the term "Required Improvements" shall mean and refer to the following:
 - a. Construction of 215 +/- lineal feet of concrete curb, gutter and 5-foot wide sidewalk, pedestrian ramp, and a new curbside storm drain inlet on an existing structure as

depicted on Sheets C-1 and C-2 of the plan set for the 5th Street Lofts prepared by Civil West Engineering Services Inc., dated October 2020.

4. Construction of Required Improvements. The Required Improvements shall be installed and completed and the plans and construction specifications related thereto shall be inspected and receive approval from the City Engineer prior to issuance of certificates of occupancy for the townhouse units on the Property. The City will accept the Required Improvements only if they have been inspected and accepted by the City Engineer. The City Engineer shall accept the Required Improvements if the work and materials are in accordance with the agreed upon plans and construction specifications.

5. License to Enter and Remain on Property. Developer hereby grants City and City's employees, engineers, consultants, agents, contractors, subcontractors and suppliers license to come onto and remain on the Property as necessary to make inspections of the Required Improvements.

6. Ownership of Required Improvements. The Required Improvements shall be owned and maintained by City upon its acceptance of the same. Developer shall warrant all Required Improvements and repairs for a period of one year after acceptance by City, as provided under NMC 13.05.090(G).

7. License to Use Permits, Specifications and Plans. If Required Improvements are not completed and accepted by the City within 24 months of this Agreement, Developer shall, upon request of the City, license to and provide City with all of Developer's applicable permits, plans and specifications and other documents necessary or useful in the completion of or related in any manner to the applicable Required Improvements.

8. No Third-Party Beneficiaries. City and Developer are the only parties to this Agreement and are the only parties entitled to enforce its terms. Nothing in this Agreement gives or provides any benefit or right, whether directly, indirectly, or otherwise, to third persons unless such third persons are individually identified by name in this Agreement and expressly described as intended beneficiaries of this Agreement.

9. Security for Required Improvements. The Developer's security shall consist of a cash deposit, surety bond executed by a surety company authorized to transact business in the State of Oregon, or an irrevocable letter of credit in the amount of \$75,000 ("Deposit"). The amount of the Deposit represents 150% of the estimated cost of the Required Improvements, as set forth in Exhibit B.

10. Developer's Obligation for Costs. Developer expressly acknowledges, understands, and agrees that this Agreement shall not relieve Developer from the obligation to complete and fully pay for the Required Improvements. Should Developer fail to perform its responsibilities under this Agreement in any manner, Developer agrees to compensate City for all costs related to Developer's failure to perform its obligations to complete the Required Improvements.

11. Release of Security or Obligation. After the Required Improvements have been inspected and approved by the City Engineer, the City shall release Developer's security required pursuant to Section 9. City may make partial releases of any security when appropriate.

12. Shortfall in Security. If the amount available to be drawn from Developer's security is less than the costs and expenses anticipated to be incurred, or actually incurred, by City, City may apply the proceeds of the security to the anticipated or actual costs and expenses of completion of the Required Improvements and then hold Developer responsible and liable for the difference between anticipated and actual costs and expenses of completion and the amount of the remaining security.

13. Expiration. This Agreement shall expire at such time as Developer obtains certificates of occupancy for the four townhouse units or twenty-four (24) months from the date of this Agreement, whichever is sooner.

14. No Agency. It is agreed by and between the parties that Developer is not carrying out a function on behalf of City, and City does not have the right of direction or control of the manner in which Developer completes performance under this Agreement nor does City have a right to exercise any control over the activities of the Developer.

15. Liens. Developer shall pay as due all claims for work done on and for services rendered or material furnished to the Property and shall keep the Property free from liens.

16. Waivers. No covenant, term or condition of this Agreement shall be deemed to have been waived by any Party, unless such waiver is in writing signed by the Party charged with such waiver. Any waiver of any provision of this Agreement, or any right or remedy, given on any one or more occasions shall not be deemed a waiver with respect to any other occasion.

17. Entire Agreement/Modifications. This Agreement constitutes the entire agreement between and among the Parties with respect to the subject matter herein contained and all prior negotiations, discussions, writings and agreements between the Parties with respect to the subject matter herein contained are superseded and of no further force and effect. This Agreement cannot be amended or modified without a writing signed by all of the Parties hereto.

18. Severability. The unenforceability or invalidity of any provisions hereof shall not render any other provision herein contained unenforceable or invalid.

19. Oregon Law; Attorneys' Fees. This Agreement shall be interpreted, construed and enforced in accordance with the law of the State of Oregon, without regard to conflict of law principles. If any suit, action or proceeding (including under the U.S. Bankruptcy Code) is brought to declare, interpret, or enforce any rights under this Agreement, or for the breach of any warranty, representation, covenant, term or condition hereof, the prevailing party in such suit, action or proceeding, including at arbitration, at trial, on appeal to an appellate court arising therefrom, or on any petition for review, shall be entitled to recover reasonable attorneys' fees in addition to costs and disbursements.

20. Covenants Running with the Land. It is the intention of the parties that the obligations set forth in this Agreement are also covenants necessary for the development of Property and as such shall run with the Property and shall be binding upon the heirs, executors, assigns, administrators, and successors of the parties hereto, and shall be construed to be a benefit and burden upon the Property.

21. Further Assurances. Each party shall execute and deliver any and all additional papers, documents and other assurances, and shall do any and all acts and things reasonably necessary in connection with the performance of its obligations hereunder in good faith, to carry out the intent of the parties hereto.

22. Indemnification. Developer shall be responsible for any and all injury to any and all persons or property caused directly or indirectly by reason of any and all activities of Developer under this Agreement and the failure of Developer to comply with this Agreement; and further agrees to defend, indemnify and save harmless City, its officers, agents and employees from and against all claims, suits, actions, damages, costs, losses and expenses in any manner resulting from, arising out of, or connected with any such injury or noncompliance. Notwithstanding the foregoing, Developer shall have no liability for, and no obligation to indemnify the City for, any liability, loss, injury or damage to the extent the same arises out of the actions or inactions of the City.

23. Counterparts. This Agreement may be executed in several counterparts, all of which when taken together shall constitute one Agreement binding on all parties, notwithstanding that all parties are not signatories to the same counterpart. Each copy of this Agreement so executed shall constitute an original.

24. Notice. Except as otherwise expressly provided in this Agreement, any communications between the parties hereto or notices to be given hereunder shall be given in writing to Developer or City at the addresses set forth below or to such other addresses or numbers as either party may hereafter indicate in writing. Delivery may be by personal delivery, e-mail, facsimile, or mailing the same, postage prepaid. Communication or notice by personal delivery shall be deemed delivered when actually given to the designated person or representative. Any communication or notice sent by facsimile shall be deemed delivered when the transmitting machine generates receipt of the transmission. To be effective against City, such facsimile transmission shall be confirmed by telephone notice to City Recorder. Any communication or notice mailed shall be deemed delivered three (3) days after mailing. Any notice under this Agreement shall be mailed by first class postage or delivered as follows:

To Developer:
5th Street Lofts, LLC
Attn: Dylan McEntee, Agent
449 SE Scenic Loop
Newport, Oregon 97365

To City:
City of Newport
Attn: City Engineer
169 SW Coast Highway
Newport, Oregon 97365

25. Captions. The captions contained in this Agreement were inserted for the convenience of reference only. Captions do not, in any manner, define, limit, or describe the provisions of this Agreement or the intentions of the parties.

Executed as of this 9 day of March 2022.

City:

CITY OF NEWPORT

By:

Spencer R. Nabel
Name: Spencer R. Nabel
Title: City Manager

Developer:

5th Street Lofts, LLC

By:

Celste M. Allen
Name: Celste M. Allen
Title: Manager

Approved as to Form:

David P. Allen
City Attorney

EXHIBIT A

(Legal Description of Real Property Subject to this Agreement)

PARCEL I:

Commencing at the meander corner between Section 8 and 9, Township 11 South, Range 11 West, Willamette Meridian, in Lincoln County, Oregon, which point is at the Southeast corner of Block 4, OLSSON'S SECOND ADDITION TO NEWPORT; thence North along the East line of the City of Newport, 166.33 feet to the Northerly right of way line of the Newport-Yaquina County Road No. 515; thence South 64° 54' East, along said right of way 129.09 feet; thence North 25° 06' East, 99.61 feet; thence North 72° 10' East, 161.60 feet to a 5/8 inch rod with angle iron, which point is the true point of beginning of the tract herein to be described; thence South 59° 13' East, 132.0 feet to a 5/8 inch rod; thence North 13° 35' East, 137.6 feet to a 1/2 inch rod; thence North 57° 52' West, 112.17 feet to a 1/2 inch rod; thence continuing North 57° 52' West 25 feet to the Northwest corner of the Charles E. Scott, et ux tract conveyed by instrument recorded February 24, 1959, in Book 197, page 595, Film Records; thence South 21° 57' West 135.7 feet to the North line of S.E. 5th Street; thence South 59° 13' East along the Northerly line of said street to the true point of beginning.

EXCEPTING that portion, if any, lying within S.E. 5th Street.

PARCEL II:

Commencing at the meander corner between Sections 8 and 9, Township 11 South, Range 11 West, of the Willamette Meridian, in Lincoln County, Oregon, which point is at the Southeast corner of Block 4, OLSSON'S SECOND ADDITION TO NEWPORT; thence North along the East line of the City of Newport, 166.33 feet to the Northerly right of way line of the Newport-Yaquina County Road No. 515; thence South 64° 54' East, along said right of way, 129.09 feet; thence North 25° 06' East 99.61 feet; thence North 72° 10' East, 161.60 feet to a 5/8 inch rod with angle iron; thence South 59° 13' East 132.00 feet to a 5/8 inch rod; which point is the true point of beginning of the tract herein to be described; thence South 59° 13' East 66.20 feet; thence North 12° 02' West, 120.40 feet to a 1/2 inch iron rod; thence North 0° 40 East, 50.00 feet, more or less, to the Northeast corner of the tract conveyed to Charles E. Scott recorded in Microfilm Volume 61, page 603, Deed Records for Lincoln County, Oregon; thence South 13° 35' West, 137.60 feet to the true point of beginning.

EXCEPTING THEREFROM those portions, if any, lying within S.E. 5th Street or S.E. Moore Drive.

ALSO EXCEPTING THEREFROM that portion conveyed to City of Newport, a municipal corporation by Quitclaim Deed recorded July 19, 1993 in Book 264, page 2413, Film Records.

EXHIBIT B

(Developer's Cost Estimate of Required Improvements)



"Creating the Greatest Value" CCB212759

Attention Dereck Tokos

The public utility estimate of \$50,000 at the time the plans were submitted for permits.
5th Street Lofts, LLC-located at 847 SE 5th Street-Newport, Oregon 97365

The four townhomes were permitted with preliminary approval conditions on addresses below:

843 SE 5th Street unit 4
847 SE 5th Street unit 3
847 SE 5th Street p
Newport, Oregon 97365

The final plat was notarized and signed by the owners of 5th Street Lofts, LLC and submitted by Gary Nyhus on October 22, 2021.

We are working with the city of Newport Public Works-Engineering departments, Clare and Melissa. Clare sent the information to me so we can submit for the right of way permit.

Larry Staton
Digitally signed by Larry Staton
DN: c=US,
E=lstaton@mustangridgeconstruction.com,
OU=Mustang Ridge Construction Inc.,
OU=Construction Manager, CN=Larry Staton
Date: 2021.12.09 11:29:35-0800

Larry Staton Construction Manager

Cell : (503) 931-5088

Office: (503) 385-1465

lstaton@mustangridgeconstruction.com



AUTHORIZATION FOR AGREEMENTS, MOUs, OR OTHER DOCUMENTS OBLIGATING THE CITY

All contracts, agreements, grant agreements, memoranda of understanding, or any document obligating the city (with the exception of purchase orders), requires the completion of this form. The City Manager will sign these documents after all other required information and signatures are obtained.

Document: Improvement Agreement Date: February 22, 2022

Statement of Purpose: Subdivision financial gaurantee required in order for the final plat to be recorded before required public improvements are completed (NMC 13.05.090(C)).

Department Head Signature: *[Handwritten Signature]*

Remarks, if any: _____

City Attorney Review and Signature: *[Handwritten Signature]* Date: 3/09/2022

Other Signatures as Requested by the City Attorney: _____

| | Signature | | | Name/Position |
|------------------------------------|--------------------------|--------------------------|-------------------------------------|---------------|
| | Yes | No | N/A | Date: _____ |
| Budget Confirmed: | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | |
| Certificate of Insurance Attached: | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | |
| City Council Approval Needed: | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | Date: _____ |

After all the above requested information is complete and signatures obtained, return this form, along with the original document to the City Manager for signature. No documents should be executed prior to the City Manager's approval as evidenced by signature of this document.

City Manager Signature: *[Handwritten Signature]* Date: 03/11/22

Once all signatures and certificates of insurance have been obtained, return this document, along with the original, fully-executed agreement, MOU, or other document to the City Recorder. A copy of grant agreement and all project funding documents, must be forwarded to the Finance Department for tracking and audit purposes.

City Recorder Signature: _____ Date: _____

Date posted on website: _____

