

Escrow and Disbursement Agreement (Performance Security)

This Escrow and Disbursement Agreement (this “**Agreement**”) is made and entered into this 18th day of July, 2016, by and between the City of Harrisburg, a municipal corporation (hereinafter referred to as “**City**”), DL Holdings, LLC (hereinafter referred to as “**Developer**”), and Getty Abstract and Tilte (hereinafter referred to as “**Disbursing Agent**”).

WHEREAS, Developer is subject to the terms of certain ordinances of the City of Harrisburg and a Subdivision Construction Agreement attached hereto as Exhibit A and hereby incorporated by reference (hereinafter referred to as “**SCA**”) as from time to time adopted and amended by the City of Harrisburg, for the purpose of the design, development, and construction of certain Public Improvements to be dedicated to the City; and

WHEREAS, Pursuant to the terms of the SCA, it is anticipated that prior to acceptance of any Final Plat by the City the Developer will deposit specified sums of money (hereinafter referred to as the “**Escrow Funds**”) with Disbursing Agent for the payment of the costs associated with the construction of the Public Improvements as the same become necessary; and

WHEREAS, Developer has requested that Disbursing Agent maintain and disburse the Escrow Funds under the SCA and in accordance with the terms thereof and of this Agreement.

NOW, THEREFORE, in consideration of the understandings and agreements set forth herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Developer, City, and Disbursing Agent agree as follows:

1. **Definitions.** All capitalized terms not otherwise defined in this Agreement shall have the meanings given to them in the SCA.
2. **Amount of Escrow Funds.** Prior to approval of any Final Plat, Developer shall deposit Escrow Funds in the amount of the Performance Security per the SCA into an escrow account (“**Escrow**”). Escrow amount \$120,000.00.
3. **Amount of Disbursements.** Disbursements to the Developer may be made only to the extent allowed under the SCA as evidenced by the written approval by the City Engineer and delivered to the Disbursing Agent upon request by the Developer.
4. **Deposit of Escrow Funds and Advances through Disbursing Agent.** The City and Developer agree that prior to acceptance of any Final Plat all Escrow Funds for the Public Improvements shall be deposited into the Escrow. All disbursements shall be made by and through the Disbursing Agent in accordance with the terms of the SCA and of this Agreement. If at any time the Disbursing Agent determines that the amount of the Escrow Funds is insufficient to make approved

disbursements, the Disbursing Agent shall notify the City and Developer of such deficiency in writing. At such time, the Developer shall pay in additional Escrow Funds in the same proportion as Developer is liable for the payment of the costs of the Public Improvements as calculated pursuant to the SCA. If upon completion of the Public Improvements and the SCA, including the Warranty Period thereunder or upon a separate security being taken to cover the Warranty Period after the completion of the Public Improvements, there remain undisbursed Escrow Funds, the Disbursing Agent shall return said undisbursed Escrow Funds to the Developer. The parties agree that the Disbursing Agent shall be a bank that is an official depository of the City or title company licensed and registered under the laws of the State of South Dakota and verification of the same, and pre-approval by the City, shall be required hereunder.

5. Conditions of Each Advance to Developer. Prior to any disbursement to Developer, the Disbursing Agent shall be furnished with written authorization by the City Engineer specifying the amount of such disbursement and to whom it should be made. Such authorization shall be granted in accordance with the SCA upon the request of the Developer, but the Disbursing Agent shall not release any such advance without the written consent of the City Engineer.

6. Conditions for Advance to the City. The City Engineer may request a disbursement of all or any portion of the Escrow Funds to pay any costs for the construction of the Public Improvements pursuant to the SCA. Notice of said request shall be provided to the Developer and Disbursing Agent shall honor the same.

7. Conditions for Final Advance. At the time of submission of a final disbursement request, which shall not be submitted until completion of the construction of the Public Improvements and running of the Warranty Period as set forth in the SCA (unless the Warranty Security is otherwise provided for), the Disbursing Agent shall be provided final written approval of disbursement by the City Engineer indicating the amount and to whom such disbursement should be made. Disbursing Agent shall not release any such final advance without such approval by the City Engineer.

8. Disbursing Agent's Records. The Disbursing Agent shall keep records showing the names of all payees to whom disbursements are made by the Disbursing Agent, the date of each disbursement, and the amount of each disbursement, which records may be inspected by the Developer and the City Engineer.

9. Inspections of Project. City shall be responsible for making inspections during the course of the construction of the Public Improvements and shall determine to its own satisfaction that the work done or material supplied by the Developer to whom disbursements are to be made has been properly done or supplied in accordance with the City's requirements. Disbursing Agent shall not be required to conduct any inspections.

10. Disbursing Agent's Liability. It is expressly understood and agreed that the Disbursing Agent assumes no liability or responsibility for the satisfactory completion of the construction of the Public Improvements, for the adequacy of funds

advanced or disbursed pursuant to this Agreement and the SCA, for inspections during construction, or for any acts on the part of the Developer or the City to be performed in the construction of the Public Improvements. Disbursing Agent shall not be liable to any party for payment of interest in the event any Escrow Funds are held, but not disbursed, pending the resolution of any dispute.

11. Notices. Any notice required or permitted to be given by any party hereto to any other party hereto under the terms of this Agreement shall be deemed to have been given on the date the same is deposited in the United States mail, registered or certified, return receipt requested, postage prepaid, addressed to the party to which the notice is to be given at the address set forth opposite its name below, or at any other address specified in a notice given by such party to the other parties not less than ten (10) days prior to the effective date of the address change:

City: City of Harrisburg
Planning & Zoning Administrator
301 E. Willow St.
Harrisburg, SD 57032

Copy to: Harrisburg City Engineer
c/o Stockwell Engineers
600 N Main Ave, Suite 100
Sioux Falls, SD 57104

Developer: DL Holdings, LLC
27093 Fairway Circle
Harrisburg, SD 57032

Copy to: VanBuskirk Companies
5800 S. Remington Place, Suite 100
Sioux Falls, SD 57108

Disbursing Agent: Getty Abstract and Title
5800 S. Remington Place, Suite 120
Sioux Falls, SD 57108
605-336-0490

12. Approval of Documents. All documents required to be delivered pursuant to this Agreement shall be in a form and content acceptable to the City.

13. Fees. Developer agrees to be responsible for the payment of the fees of the Disbursing Agent.

14. General Provisions.

a. **Waivers.** No waiver of any breach of this Agreement shall constitute a waiver of any other breach of the same or other provisions of this Agreement, and no waiver shall be effective unless made in writing.

b. **Entire Agreement; Amendments.** This Agreement comprises the entire Agreement between the parties hereto with respect to the subject matter hereof. Any amendment to this Agreement or to the Exhibit attached hereto shall be in writing only and shall be signed by all parties.

c. **Severability.** In the event that any term, condition, or provision of this Agreement is held to be invalid by any court of competent jurisdiction, such holding or holdings shall not invalidate or make unenforceable any other term, condition, or provision of this Agreement. The remaining terms, conditions, and provisions shall be fully severable, and the remaining terms, conditions, and provisions shall be construed and enforced as if such term, condition, or provision held invalid had never been inserted in this Agreement.

d. **Governing Law.** The laws of the state of South Dakota (without giving effect to its conflicts of laws principles) govern all matters arising out of or relating to this Agreement and the transaction it contemplates, including without limitation, its interpretation, construction, performance and enforcement. Any suit arising hereunder shall be venued in the Circuit Court for the County of Lincoln, State of South Dakota.

e. **Successors and Assigns.** This Agreement shall be binding upon and inure to the benefit of the Developer and Disbursing Agent and their respective successors and assigns.

f. **Cooperation.** The parties hereto agree to cooperate with one another in the performance of their respective obligations and responsibilities set forth in this Agreement. The parties further agree to execute and deliver such other and additional documents and instruments as may be reasonably necessary to accomplish the purposes of this Agreement.

g. **No Joint Venture or Partnership.** The parties hereto agree that they will be independent contractors in performing their respective obligations under this Agreement. This Agreement is not intended to create, nor does it create, a relationship of partners or joint ventures between the parties hereto.

h. **Counterparts.** The parties hereto may execute this Agreement in multiple counterparts, each of which constitutes an original, and all of which constitute only one Agreement. The signatures of all the parties need not appear on the same counterpart, and delivery of an executed counterpart signature page by facsimile is as effective as executing and delivering the Agreement in the presence of the other parties to this Agreement. This Agreement is effective upon

delivery of one executed counterpart from one party to the other parties. In approving this Agreement, a party must produce or account only for the executed counterpart of the party to be charged.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

Developer 
~~_____~~
By: _____
Its: Manager

Disbursing Agent

By: _____
Its: Asst/Sec.

City of Harrisburg:

Mayor

ATTEST:

Finance Officer

Exhibit A
(Subdivision Construction Agreement)