

## RE: Copperleaf Ph. 6 Warranty Agreement

### Background:

For city council's consideration is an agreement to provide an extended warranty for a portion of roadway in the sixth addition of Copperleaf subdivision. The agreement is being offered by the developer. He is proposing a five-year warranty for a 500-foot section of road constructed in violation of adopted city standards. During construction of Ph. 6 the subcontractor for the developer paved 500 linear feet of roadway after failing sub-grade inspections and in defiance of city inspection staff's instructions not to pave the area of roadway until a passed sub-grade inspection was conducted. Not wanting to tear out the pavement to verify that the sub-grade is in conformance with city standards, the developer is offering to deposit a letter of credit with the city for a five-year period. The escrowed monies will be retained by the city during the warranty period for the city to draw upon in the event that roadway failure occurs. Use of the escrowed security in the event of roadway failure will be in conformance with the attached Agreement To Warrant Completion Of Public Improvements.

### Analysis:

The agreement is being offered by the Developer of the project to provide an extended warranty for the 500 linear foot portion of roadway constructed in violation of adopted city standards. Monetary security in the amount of \$110,147.21 is being deposited by the developer in the form of a letter of credit to be retained by the City of Nixa for a period of 5 years. To determine the amount of security the engineer of record for the project provided an Engineers Probable Opinion of Cost for removal, remediation of subgrade, and replacement of asphalt for the identified 500-foot area. The cost for remediation was reviewed and approved by city staff with a five-year assumed inflation rate of 4% added.

When presented to council at the March 27<sup>th</sup> meeting there was discussion regarding the proposed agreement and how best to proceed with the request. Based on staff's understanding, this discussion seemed to be concentrated around two main themes. The first was whether this agreement provided enough of a punishment for not complying with adopted regulations and the second was whether this would set a precedent for future developments to openly defy adopted requirements knowing that they would be afforded the opportunity to simply request an extended warranty. Based on this discussion staff is offering the following possible options to use as a starting point for further deliberations on how to proceed with the request.

1. The request to provide an extended warranty could be denied. This would require the developer to rebuild the roadway in conformance with adopted city regulations prior to city acceptance of the improvements.
2. The request could be modified to require a cash escrow in lieu of a letter of credit. This would provide additional assurance that the funds would be available if needed while providing a form of punishment that could potentially deter others from viewing this as a viable option.
3. A modification of the agreement could be made to extend the warranty period from 5 years to 10 years. This option could also be coupled with the use of a cash escrow.

The above is not intended to be the only options, but rather a starting point to help aid council in formulating a decision on how best to proceed with the request.

### **Recommendation:**

The attached agreement (previously discussed on March 27<sup>th</sup>) was developed by the Developers attorney, reviewed and modified by city staff to present a version for your consideration that provides reasonable protections and security for the city.

Staff is ready to receive further direction including either: 1) if adopted, complete the necessary action to carry out the original agreement or, 2) carry out any combination of numbers 1 through 3 above as directed.

MEMO SUBMITTED BY:

**Travis Cossey** | Asst. Director Nixa Utilities & Public Works

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### Recommendation:

The attached agreement was developed by the Developers attorney, reviewed and modified by city staff to present a version for your consideration that provides reasonable protections and security for the city.

### MEMO SUBMITTED BY:

**Travis Cossey** | Asst. Director Nixa Utilities & Public Works



1 **AN ORDINANCE OF THE COUNCIL OF THE CITY OF NIXA AUTHORIZING THE CITY**  
2 **ADMINISTRATOR TO EXECUTE AN AGREEMENT WITH ENTERPRISE**  
3 **DEVELOPMENTS, LLC, TO WARRANT THE COMPLETION OF CERTAIN PUBLIC**  
4 **IMPROVEMENTS.**

5 \_\_\_\_\_  
6  
7 **WHEREAS** Enterprise Developments, LLC, is engaged in finalizing Phase 6 of the  
8 subdivision know as Copper Leaf; and  
9

10 **WHEREAS** certain public improvements are required to be constructed and  
11 approved prior to the completion of the subdivision; and  
12

13 **WHEREAS** during the construction of the improvements a certain portion of street  
14 was found to have been constructed in violation of adopted City standards; and  
15

16 **WHEREAS** to obviate a dispute between the City and Developer, the Developer  
17 has proposed providing a warranty agreement to warrant the construction of the street.  
18

19 **NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF**  
20 **NIXA, AS FOLLOWS, THAT:**  
21

22 **SECTION 1:** The City Administrator, or designee, is hereby authorized and  
23 directed to execute an “Agreement to Warrant Completion of Public Improvements” with  
24 Enterprise Developments, LLC. Said Agreement shall be in substantially similar form as  
25 the document attached hereto, and incorporated herein by this reference as “Council Bill  
26 Exhibit A.”  
27

28 **SECTION 2:** The City Administrator and the officers of the City are hereby  
29 authorized and empowered to do all things necessary or convenient to carry out the terms  
30 and intent of this Ordinance.  
31

32 **SECTION 3:** This Ordinance shall be in full force and effect from and after its final  
33 passage by the City Council and after its approval by the Mayor, subject to the provisions  
34 of section 3.11(g) of the City Charter.  
35

36  
37 **[Remainder of page intentionally left blank. Signatures follow on next page.]**  
38  
39  
40  
41  
42  
43  
44  
45  
46

47 **ADOPTED BY THE COUNCIL THIS \_\_\_\_\_ DAY OF \_\_\_\_\_ 2023.**

48

49

ATTEST:

50

51

\_\_\_\_\_  
PRESIDING OFFICER

\_\_\_\_\_  
CITY CLERK

53

54

55 **APPROVED BY THE MAYOR THIS \_\_\_\_\_ DAY OF \_\_\_\_\_ 2023.**

56

57

ATTEST:

58

59

\_\_\_\_\_  
MAYOR

\_\_\_\_\_  
CITY CLERK

61

62

63 APPROVED AS TO FORM:

64

65

\_\_\_\_\_  
CITY ATTORNEY

66

**AGREEMENT TO WARRANT COMPLETION OF  
PUBLIC IMPROVEMENTS**

THIS AGREEMENT, made and entered into upon its execution by the parties, by and between Enterprise Developments, LLC, hereinafter called "Developer" and the City of Nixa, Missouri, hereinafter called "City." All parties hereto may be collectively referred to herein as the "Parties".

WITNESSETH:

WHEREAS, Developer is engaged in finalizing Phase 6 of the subdivision known as Copper Leaf (hereinafter "development" or "subdivision" or "plat" or "Copper Leaf") within the City; and

WHEREAS, Developer is required to make certain public improvements in said development prior to final platting, receiving a building permit, or receiving a certificate of occupancy; and

WHEREAS, during the construction of the improvements of the development a certain portion of a street consisting of exclusively 500 lineal feet of Street 2 from STA 5+00 to STA 10+00, 23 feet in total width (hereinafter the "Roadway") which is referenced in the attached engineering drawing provided by Shaffer and Hines, Inc. (attached hereto and incorporated herein by this reference as "Exhibit A") was found to have been constructed in violation of adopted City standards; and

WHEREAS, the applicable City standards at issue being Technical Specification Section 54.C and Section 55.B.; and

WHEREAS, in an effort to obviate the need for dispute between the parties, the City and Developer have agreed to the terms set forth herein to permit Developer to obtain the Final Plat and assure the City of the quality of construction the City desires.

WHEREAS, Developer agrees to warrant and secure any repairs which may be required to the section of Roadway at issue by placement of security to adequately insure that in the event a failure as defined herein were to occur, repairs will be covered by adequate security (the "Extended Warranty Period").

NOW, THEREFORE, in consideration of the mutual covenants contained herein and the mutual benefits to be derived here from, it is hereby agreed and understood by and between the parties hereto as follows:

1. Developer has deposited with the City of Nixa a letter of credit (Security) in the amount of One Hundred Ten Thousand One Hundred Forty-Seven Dollars and 21/100 (\$110,147.21) to secure the Developer's promise and commitment contained herein to warrant the 500' lineal feet of Roadway exclusively (attached hereto and incorporated herein as "Exhibit B").
2. Developer agrees to warrant that portion of the Roadway in question against failure for a period of Five (5) years from the date of this Agreement. All other public improvements dedicated in the Plat of Copper Leaf shall not be subject to or a part of this Extended Warranty Period.
3. For purposes of this Agreement, failure of the Roadway shall be defined as premature deterioration or wear of the Roadway.

4. In the event the City believes a Failure has occurred within the 5-year Extended Warranty Period, City shall notify the Developer of City's findings. Developer shall have a period of Ten (10) days from receipt of written notice from the City to meet with City officials and provide Contractor's proposed repair plan and timetable (the "Plan").

5. If Contractor fails to propose a Plan within the Ten (10) day window, the City shall have the right to proceed to repair as set forth below.

6. If Developer timely submits its Plan, then Contractor shall have the right, but not the obligation, to repair any Failure and reconstruct the improvements to the now current building codes and requirements. Contractor shall have a period of Sixty (60) days to perform the repairs and rectify the Failure. However, the Sixty (60) day period shall only consider days upon which asphalt is readily available in the area of Copper Leaf. In the event asphalt availability will delay the necessary repairs, then Developer shall make all reasonably necessary temporary repairs until such time as asphalt is readily available in the area.

7. If Developer elects not to perform the repairs or fails to complete the repairs within Sixty (60) days without justifiable delay, then Developer shall notify the City in writing of its intention not to repair and the City shall draw upon the Security. Said Security shall not expire or terminate during this Sixty (60) day period.

8. Upon the expiration of the Extended Warranty Period, the City shall take all steps necessary, if any, to release the Security within Thirty (30) days to the Contractor or Developer. However, the City shall not be required to release, and the Security shall not be required to be released by its terms, if Developer is within the Ten (10) day window to propose a Plan or if the Developer is within the Sixty (60) day window to complete repairs.

9. In the event Developer fails to complete any portion of the required repairs within the time allowed hereunder, the City may, after notice to Developer, enforce the Security to reimburse the City for the true and actual costs of the repairs completed by the City or its contractors up to the full extent of the Security.

10. If any provision herein permits the City to draw upon the Security, then the City shall reimburse Developer all funds not used in the actual cost of repair of the Roadway within thirty (30) days of the repairs being made to the Roadway.

11. The Developer is an independent contractor, and nothing contained herein shall constitute or designate the Developer, nor any of the Developer's contractors, agents or employees, as agents or employees of the City of Nixa, Missouri.

12. If any party shall violate any of the terms of this Agreement which are binding upon it, the other party shall not thereby be deemed to either have waived or relinquished any term of this Agreement or to have acquiesced in any such violation thereof, unless such party has expressed such waiver or relinquishment in writing.

13. This agreement may not be assigned by any party hereto without the express written agreement of all Parties.



14. This Agreement contains the entire agreement of the parties. No modification, amendment, or waiver of any of the provisions of this Agreement shall be effective unless in writing specifically referring hereto, and signed by all parties affected by such modification, amendment, or waiver.

15. By execution of this Agreement and for valuable consideration, all parties hereto agree to meet the obligations imposed upon each hereby.

16. The parties hereto agree that should any litigation arise out of this Agreement, the venue for such litigation shall be in the Circuit Court of Christian County, Missouri, and the parties hereto expressly waive all rights to venue inconsistent therewith.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed on the date first above mentioned.

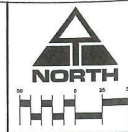
**CITY OF NIXA, MISSOURI**

By: \_\_\_\_\_  
City Administrator or his/her  
designee

**DEVELOPER:**  
**Enterprise Developments, LLC**

By:   
4E46D6C05B86485...  
Mike Cronkhite, Member

# EXHIBIT A



**COPPERLEAF SUBDIVISION**  
**PHASE 6**  
 A SUBDIVISION IN THE CITY OF  
 HOWARD COUNTY, MISSOURI  
 OWNERS/DEVELOPERS:  
 NCLC, LLC



**SHAFFER & HINES**  
 CONSULTING ENGINEERS - REGISTERED LAND SURVEYORS  
 P.O. Box 493, New Missouri, 65277  
 Tel: (314) 725-2250  
 Email: shah@shafferhines.com

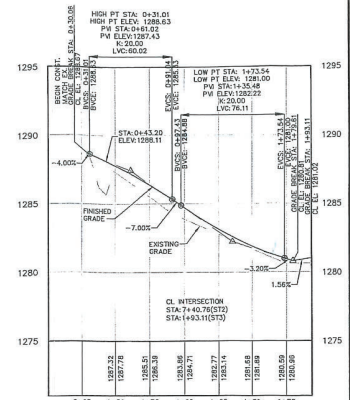


**STREET 2 & 3  
 PLAN / PROFILE**

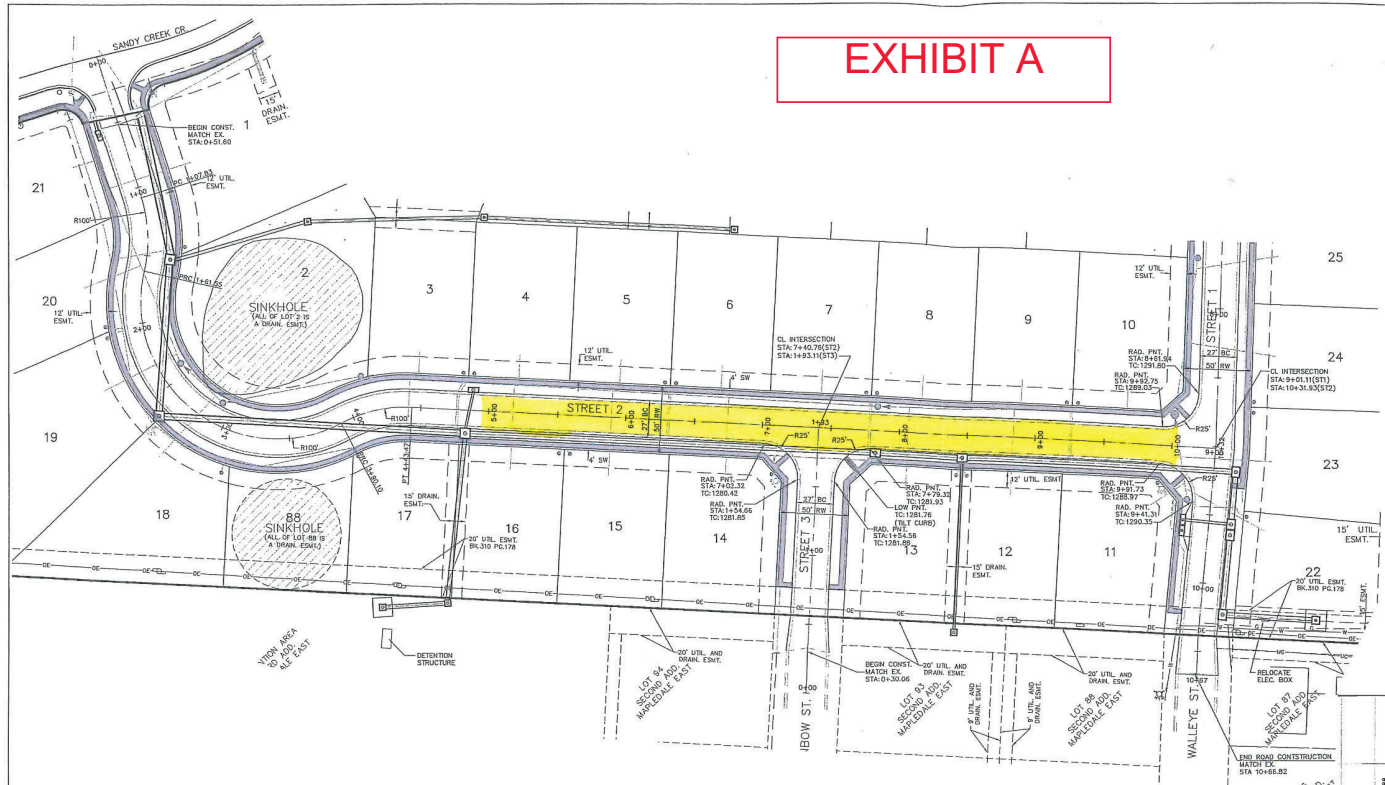
DESIGN BY	COH
DRAWN BY	GM
CHECK BY	COH
DATE	APR 2021
SCALE	AS SHOWN

REVISIONS  
 1. 12/21/21  
 2. 12/21/21  
 3. 12/21/21  
 4. 12/21/21  
 5. 12/21/21

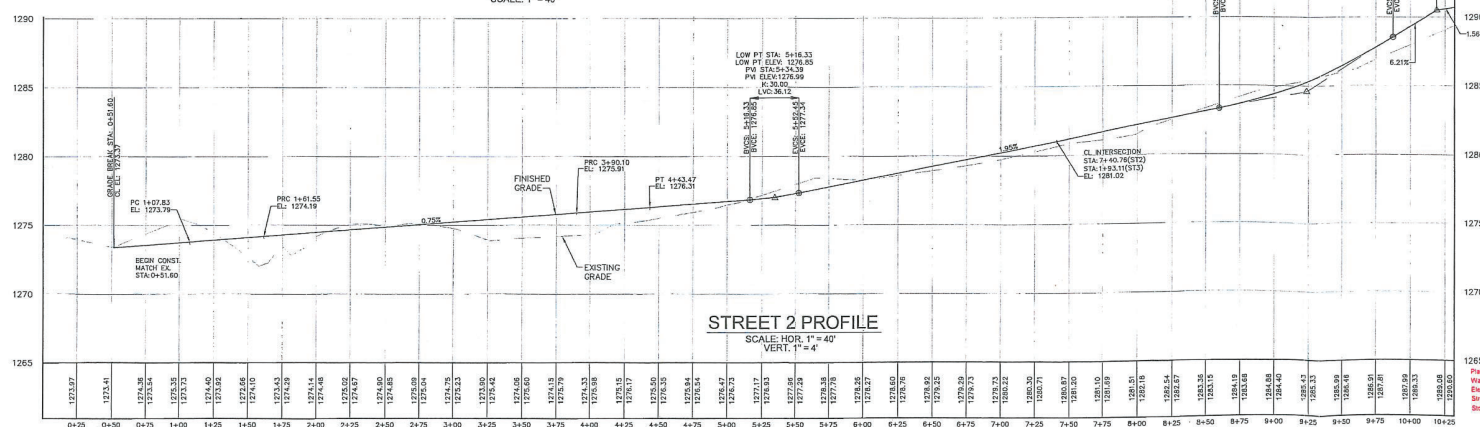
JOB NO. **200014**  
 SHEET **3 OF 10**



**STREET 3 PROFILE**  
 SCALE: HOR. 1" = 40'  
 VERT. 1" = 4'



**STREET 1 & 3 PLAN**  
 SCALE: 1" = 40'



**STREET 2 PROFILE**  
 SCALE: HOR. 1" = 40'  
 VERT. 1" = 4'

**CITY OF NIXA  
 OFFICIAL  
 1265 PLAN APPROVAL**

Water Engineer  
 Electric Engineer  
 Surveyor

**IRREVOCABLE LETTER OF CREDIT**

United Bank of Union  
15 E Main St Union, MO. 63084  
Aaron Hall  
636-583-9011

United Bank of Union, hereinafter referred to as "the Bank", does hereby authorize the City of Nixa, 715 W. Mt. Vernon, P.O. Box 395, Nixa MO, 65714 to draw upon the Bank for the account of Enterprise Developments, LLC, hereinafter referred to as "the Contractor", up to the aggregate amount of USD One Hundred Ten Thousand One Hundred Forty-Seven Dollars and 21/100 (\$110,147.21) (United States Dollars) upon the City of Nixa's written certification, to the Bank, of the Contractor's failure to complete construction as set forth in the "Agreement to Warrant Completion of Public Improvements," entered into by and between the City of Nixa, Missouri and Enterprise Developments, LLC. In addition to the terms of this Letter, said Agreement shall also govern the terms of this Letter.

The amount available to be drawn under this letter of credit shall be reduced, from time to time, upon receipt by the Bank of a certificate from the City of Nixa, Missouri, which specifically sets forth the particular improvement(s) which has been completed and accepted by the City of Nixa and the amount by which the Letter of Credit is to be reduced, in relation thereto; the amount available under this letter of credit shall be reduced by an amount equal to the amount stated in said certificate.

This instrument must be presented with the draft(s) and notification(s) as referenced above.

The improvements required to be made which are secured by this Letter of Credit must be completed on or before five years from the execution of that certain "Agreement to Warrant Completion of Public Improvements" between City and Contractor and the City shall have ninety (90) days thereafter to draw upon this Letter of Credit. Thereafter, this Letter of Credit shall expire, unless the expiration date is extended in writing by the Bank. In the event the Letter of Credit is returned by the City to the Bank for cancellation before the expiration date, it will expire on the date it is so returned and marked canceled.

We hereby engage with the Drawers of all drafts drawn under and in compliance with the terms of this credit, that such drafts will be duly honored upon presentation to the Bank.

Except as otherwise expressly stated herein, this Credit is subject to the Uniform Customs and Practice for Commercial Documentary Credits, 1983 revision, International Chamber of Commerce Publication No. 500.

United Bank of Union

Aaron R. Hall  
Authorized Signature

Name: Aaron Hall

Title: Sr. VP

Address: 15 E main st.

Phone Number: 636-583-9011

Enterprise Developments, LLC

Michael A. Crankhite  
Authorized Signature

Name: Michael A Crankhite

Title: Owner

Address: 1526 S. Enterprise Ave.

Phone: 417-766-3431



April 11, 2023

City of Nixa

RE: Irrevocable Standby Letter of Credit #302

Dear Sir/Madam:

At the request of The City of Nixa (beneficiary) for the account of Enterprise Developments, LLC (account party), we hereby issue in your favor this irrevocable and non-transferable Standby Letter of Credit No. 302 for drawings up to a maximum amount of \$110,147.21. This Letter of Credit is to guarantee the account party's obligation to the beneficiary. This Standby Letter of Credit is effective April 11, 2023 and expires at the close of business on July 11, 2028.

The term "Beneficiary" includes any successor, whether by operation of law or otherwise, of the named beneficiary, including without limitation, any liquidator, rehabilitator, receiver or conservator.

We hereby undertake to promptly honor your demand letter, indicating our Letter of Credit No. 302, for all or any part of this Letter of Credit, if presented at United Bank of Union, located at 15 E. Main, Union, MO. 63084 on or before the expiration date, along with attached invoices pertaining to the claim.

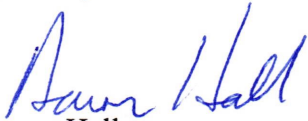
Except as stated herein, this undertaking is not subject to any condition or qualification. Our obligation under this Letter of Credit shall be our individual obligation, in no way be contingent upon reimbursement with respect hereto.

P.O. Box 500  
Union, Missouri 63084  
636-583-2555  
Fax 636-583-4405  
[www.ubu.bank](http://www.ubu.bank)

Page 2

This Standby Letter of Credit is subject to the Uniform Customs and Practices for Documentary Credit (1993 revision), International Chamber of Commerce Publication 500, or any subsequent revisions thereto. The account party will pay all costs associated with this Standby Letter of Credit.

Sincerely,



Aaron Hall  
Senior Vice President  
UNITED BANK OF UNION

AH/mkw