

# REQUEST FOR BOARD ACTION

## HENDERSON COUNTY BOARD OF COMMISSIONERS

**MEETING DATE:** May 2, 2005

**SUBJECT:** Request for Extension of Improvement Guarantee for Mountain Vista Subdivision

**ATTACHMENTS:**

1. Letter from Gary Benjamin of Pavilion Development Corporation
2. Original Performance Guarantee Agreement
3. Draft of Performance Guarantee Agreement for Extension

### **SUMMARY OF REQUEST:**

On April 21, 2004, the Board of Commissioners approved an application, submitted by Pavilion Development Corporation, for an improvement guarantee for a subdivision known as Mountain Vista. As required by the Performance Guarantee Agreement for the improvement guarantee, the developer posted with Henderson County irrevocable letters of credit that, together, amounted to \$706,151.00, to cover the cost of completing road, water system, erosion control and related improvements in Mountain Vista. The Agreement also required that the required improvements be completed by May 1, 2005. The expiration dates on the letters of credit are July 1 and July 7, 2005.

The Planning Department has received a letter from Gary Benjamin of Pavilion Development Corporation requesting that the County extend the deadline for completing the improvements. Mr. Benjamin estimated the developer would need another 60 days to do so. Section 170-39 of the Subdivision Ordinance allows the Board of Commissioners to grant extensions to completion dates for improvement guarantees for a maximum of one additional year, provided the time between initiation and completion of the improvements does not exceed two years.

If the Board of Commissioners agrees to extend the completion date for the improvement guarantee for Mountain Vista, staff has attached for the Board's consideration a draft Performance Guarantee Agreement which reflects a new improvements completion date of July 31, 2005, and requires submittal of amendments to the previously filed letters of credit showing an expiration date not earlier than 60 days after such new improvements completion date. The new Performance Guarantee Agreement must be executed by the relevant parties if the Board approves the extension request.

### **COUNTY MANAGER'S RECOMMENDATION/BOARD ACTION REQUESTED:**

The extension, 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 extend the completion date for the improvement guarantee for Mountain Vista subdivision to July 31, 2005, provided that amendments to the letters of credit are submitted in accordance with the new Performance Guarantee Agreement.

received  
4-28-05

**PDC**  
**Pavilion Development Corporation**  
*Real Estate Development*

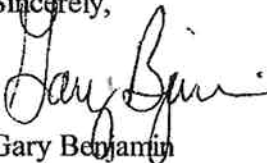
April 28, 2005

Matt Carr  
Henderson County Planning  
Fax 828-697-4533

Dear Mr. Carr,

We would like to request an extension on the Mountain Vista Project in Saluda. Per your numbers, the amount of \$130,000.00 plus 25% contingency to equal \$169,112.50 is left on the bond. We hope to complete this project within the next 60 days. If you need any further information, please contact me at (864) 420-2224.

Sincerely,

  
Gary Benjamin

**STATE OF NORTH CAROLINA**

**PERFORMANCE GUARANTEE AGREEMENT**

**COUNTY OF HENDERSON**

**THIS AGREEMENT** made and entered into this 21 day of April, 2004, by and between Pavilion Development Corporation, 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 a Final Plat for the proposed subdivision known as Mountain Vista located in Henderson County, North Carolina; and

**WHEREAS**, the Henderson County Planning Board conditionally approved a combined Master Plan and Development Plan 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 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 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 1<sup>st</sup> of May, 2005, complete as required the following improvements in Mountain Vista subdivision: grading, installation of gravel, asphalt paving and shoulder stabilization for roads serving the entire project; water system improvements; and maintenance of erosion control measures, as shown on the combined Master Plan and Development Plan conditionally approved by the Henderson County Planning Board on April 16, 2002, as required by the Henderson County Subdivision Ordinance, and as shown on the attached proposal and cost estimate certified by Jon H. Laughter, P.E., received April 12, 2004.
2. The Developer will post with Henderson County an irrevocable letter of credit, from a banking corporation licensed to do business in North Carolina, in the amount of not less than \$706,151.00 (the "Improvement Guarantee") payable to Henderson County, securing and guaranteeing completion of said improvements by the required date stated in Paragraph 1, above. Said irrevocable letter of credit must have an expiration date not earlier than 60 days after the stated completion date.

3. In the event that required improvements are completed as required, the irrevocable 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 Henderson County shall call the irrevocable letter of credit and use the funds to complete the required improvements. The Developer shall be required to reimburse to the County any amounts expended to complete the required improvements that exceed the Improvement Guarantee.
4. At such time as the (Assistant) County Attorney has reviewed and approved the above referenced irrevocable letter of credit and this Agreement is fully executed, then the Board will allow the Final Plat of Mountain Vista 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.
5. The County Manager shall have the authority under Section 170-38 of the Henderson County Code 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 (Assistant) 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 21<sup>st</sup> day of April, 2004.

**APPROVED AS TO FORM:**

  
\_\_\_\_\_  
County Attorney

**HENDERSON COUNTY BOARD OF COMMISSIONERS**

BY:   
\_\_\_\_\_  
Grady Hawkins, Chairman

ATTESTED BY:

[OFFICIAL SEAL]

Elizabeth W. Corn  
Elizabeth W. Corn, Clerk to the Board

DEVELOPER:  
Pavilion Development Corporation

BY: [Signature]  
President/Vice President

ATTESTED BY:

[CORPORATE SEAL]

[Signature]  
Secretary/Assistant Secretary

[Signature]

STATE OF NORTH CAROLINA  
COUNTY OF HENDERSON

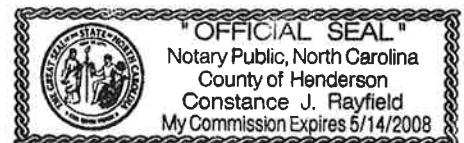
I, Constance J. Rayfield, Notary Public for said County and State, certify that Elizabeth W. corn personally came before me this day and acknowledged that she is the Clerk to the Board of Commissioners of Henderson County, a municipal corporation and that by authority duly given and as the act of the corporation, the foregoing instruction 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 1<sup>st</sup> day of May, 2004.

Constance J. Rayfield  
Notary Public

My Commission Expires: \_\_\_\_\_

[NOTARIAL SEAL]



STATE OF SC  
COUNTY OF Anderson

I, Connie Carr, Notary Public for said County and State, certify that Gary Benjamin came before me this day and acknowledged that he/she is the Secretary/Assistant Secretary of Pavilion Development Corporation, a S.C. corporation, and that by authority duly given and as the act of the corporation, the foregoing instrument was signed in its name by its President/Vice President, sealed with its corporate seal, and attested by him/her as its Secretary/Assistant Secretary.

THIS the 5 day of May, 2004.

Connie Carr  
Notary Public

My Commission Expires: 11-18-04

[NOTARIAL SEAL]

Laughter, Austin and Associates, P.A.  
 Mountain Vista Estimate For Improvements  
 April 12, 2004

<b>MOUNTAIN VISTA</b>					
LAA Job No. 04-060			12-Apr-04		
<b>Project: MOUNTAIN VISTA</b>					
Mr. Lowell Frazier					
<b>PAVILION DEVELOPMENT CORPORATION</b>					
125 LEADER DRIVE, P.O. Box 51307					
PIEDMONT, S.C. 29673					
Prepared by Laughter, Austin and Associates, PA 828 692-9089					
<b>ITEM</b>	<b>DESCRIPTION</b>	<b>UNIT</b>	<b>QUANTITY</b>	<b>UNIT PRICE</b>	<b>TOTAL</b>
<b>Grading, Drainage, Paving, Water Main Extension, and Restoration</b>					
1	Grading	LF	5,535	\$ 21.00	\$ 116,235.00
2	6" Aggregate Base Course	SY	11,070	\$ 7.43	\$ 82,250.10
3	2" Bitum. Surface Course (I-2)	SY	11,070	\$ 5.55	\$ 61,438.50
4	Seed & Mulch	SY	28,420	\$ 1.16	\$ 32,967.20
5	Precast Concrete Drop Inlet Box & Grate	EA	2	\$ 350.00	\$ 700.00
6	18" Cross Pipe	LF	540	\$ 22.00	\$ 11,880.00
7	24" Cross Pipe	LF	120	\$ 30.00	\$ 3,600.00
8	Water Main				
9	6" Diameter C900 PVC	LF	5,550	\$ 18.00	\$ 99,900.00
10	Valves	EA	17	\$ 550.00	\$ 9,350.00
11	2" PVC DR21	LF	1100	\$ 11.00	\$ 12,100.00
12	2" GV & BOX	EA	2	\$ 250.00	\$ 500.00
13	Fire Hydrant Assembly	EA	5	\$ 1,300.00	\$ 6,500.00
14	Pump Building w/Tank and Controls	LS	1	127500	\$ 127,500.00
CONTENGENCIES 25%					\$ 141,230.20
<b>TOTAL ESTIMATE</b>					<b>\$ 706,151.00</b>

**RECEIVED**  
 APR 12 2004  
 By \_\_\_\_\_



**STATE OF NORTH CAROLINA**

**PERFORMANCE GUARANTEE AGREEMENT**

**COUNTY OF HENDERSON**

**DRAFT**

**THIS AGREEMENT** made and entered into this \_\_\_\_\_ day of \_\_\_\_\_, 200\_, by and between Pavilion Development Corporation, hereinafter referred to as "Developer," and the Henderson County Board of Commissioners, hereinafter referred to as "Board."

**WITNESSETH:**

**WHEREAS**, the Board and the Developer entered into an Agreement (the "original Agreement") on or about April 21, 2004, concerning improvement guarantees for a proposed subdivision known as Mountain Vista, located in Henderson County, North Carolina; and

**WHEREAS**, the Developer filed with Henderson County irrevocable letters of credit from banks licensed to do business in North Carolina which, together, amounted to \$706,151.00 (the "original Improvement Guarantee") in accordance with the original Agreement; and

**WHEREAS**, the original Agreement provided that all required improvements were to be completed on or before May 1, 2005, and

**WHEREAS**, the Developer obtained approval of Final Plats for Mountain Vista from Henderson County Planning Department staff on or about September 21, 2004 and subsequently recorded such Final Plats; and

**WHEREAS**, on or about September 24, 2004, the County Manager authorized a partial release of the amount of the original Improvement Guarantee, reducing it to \$544,863.49, as allowed by the original Agreement;

**WHEREAS**, the Developer has asked the Board for an extension of time in which the Developer must complete the required improvements and the Board has agreed to such extension upon the condition that the irrevocable letters of credit previously posted by the Developer be amended to reflect a new expiration date;

**IT IS THEREFORE AGREED** as follows:

1. The Developer will, on or before July 31, 2005, complete as required the following improvements in Mountain Vista subdivision: grading, installation of gravel, asphalt paving and shoulder stabilization for roads serving the entire project; water system improvements; and maintenance of erosion control measures, as shown on the combined Master Plan and Development Plan conditionally approved by the Henderson County Planning Board on April 16, 2002, as required by the Henderson County Subdivision Ordinance, and as shown on the proposal and cost estimate certified by Jon H. Laughter, P.E., received April 12, 2004, and attached to the original Agreement;



2. The Developer shall file with Henderson County amendments to the previously filed irrevocable letters of credit (as they may have been amended to reflect the partial release referenced above) comprising the original Improvement Guarantee reflecting that the letters of credit will expire no earlier than 60 days after such new improvements completion date stated in Paragraph 1, above.
3. At such time as the Developer has filed amendments to the letters of credit as provided in Paragraph 2, above, and this Agreement is fully executed, this Agreement will supercede the original Agreement between the Board and the Developer.
4. In the event that the required improvements are completed as required, the amended letters 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 Henderson County shall call the amended letters of credit and use the funds to complete the required improvements. The Developer shall be required to reimburse to the County any amounts expended to complete the required improvements that exceed the Improvement Guarantee.
5. The County Manager shall have the authority under Section 170-38 of the Henderson County Code 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 (Acting) 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:**

**DRAFT**  
\_\_\_\_\_  
(Acting) County Attorney

**HENDERSON COUNTY BOARD OF COMMISSIONERS**

**DRAFT**

**BY:** \_\_\_\_\_  
**William L. Moyer, Chairman**

**ATTESTED BY:**

**[OFFICIAL SEAL]**

DRAFT

**Elizabeth W. Corn, Clerk to the Board**

**DEVELOPER:  
Pavilion Development Corporation**

**BY: \_\_\_\_\_**  
**President/Vice President**

**ATTESTED BY:**

DRAFT

**[CORPORATE SEAL]**

**Secretary/Assistant Secretary**

**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\_.

DRAFT

**Notary Public**

**My Commission Expires: \_\_\_\_\_**

**[NOTARIAL SEAL]**

STATE OF \_\_\_\_\_  
COUNTY OF \_\_\_\_\_

I, \_\_\_\_\_, Notary Public for said County and State, certify that \_\_\_\_\_ came before me this day and acknowledged that he/she is the Secretary/Assistant Secretary of Pavilion Development Corporation, a \_\_\_\_\_ corporation, and that by authority duly given and as the act of the corporation, the foregoing instrument was signed in its name by its President/Vice President, sealed with its corporate seal, and attested by him/her as its Secretary/Assistant Secretary.

THIS the \_\_\_\_\_ day of \_\_\_\_\_, 200\_\_.

DRAFT

\_\_\_\_\_  
Notary Public

My Commission Expires: \_\_\_\_\_

[NOTARIAL SEAL]