

RESOLUTION NO. 2902

A RESOLUTION OF THE MAYOR AND COUNCIL OF THE TOWN OF PAYSON, ARIZONA, APPROVING THE FINAL PLAT FOR HEATHER ESTATES SUBDIVISION, AND APPROVING AND AUTHORIZING THE MAYOR TO EXECUTE THE AGREEMENT TO CONSTRUCT SUBDIVISION IMPROVEMENTS FOR HEATHER ESTATES SUBDIVISION.

WHEREAS, on March 2, 2015, the Town of Payson Planning and Zoning Commission ("P&Z") approved a preliminary plat for Heather Estates Subdivision ("the Subdivision"), thereafter on December 7, 2015, the P&Z approved a six month extension to the preliminary plat for the Subdivision; and

WHEREAS, following approval of the preliminary plat, the developer of the Subdivision prepared a final plat and engineered improvement plans for the Subdivision; and

WHEREAS, the developer of the Subdivision now desires to proceed with construction of the improvements in the Subdivision; and

WHEREAS, the Town has negotiated an Agreement to Construct Subdivision Improvements with the developer of the Subdivision requiring placement of the necessary funds in an escrow account to assure that such improvements will be constructed and completed,

NOW, THEREFORE, THE MAYOR AND TOWN COUNCIL OF THE TOWN OF PAYSON, ARIZONA, DO HEREBY RESOLVE AS FOLLOWS:

Section 1. The Council finds that the Final Plat for Heather Estates Subdivision, attached as Exhibit 1, complies with all of the requirements in the Payson Unified Development Code and approves such Final Plat.

Section 2. The Agreement to Construct Subdivision Improvements, attached as Exhibit 2, is approved in substantially the form set forth in Exhibit 2.

Section 3. Upon the funding of the escrow account contemplated in the Agreement to Construct Subdivisions Improvements: (a) Kenny J. Evans, Mayor of the Town of Payson, is authorized to execute such Agreement in substantially the form attached hereto as Exhibit 2; and (b) Town Staff is directed to record the Final Plat.

Section 4. The Town of Payson is authorized to take such other actions as are necessary to carrying out the purposes of the Agreement to Construct Subdivision Improvements.

PASSED AND ADOPTED BY THE MAYOR AND COUNCIL OF THE TOWN OF PAYSON this _____ day of _____, 2016, by the following vote:

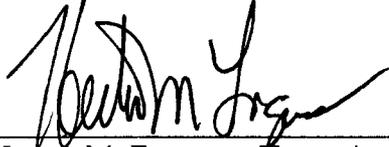
AYES _____ NOES _____ ABSTENTIONS _____ ABSENT _____

Kenny J. Evans, Mayor

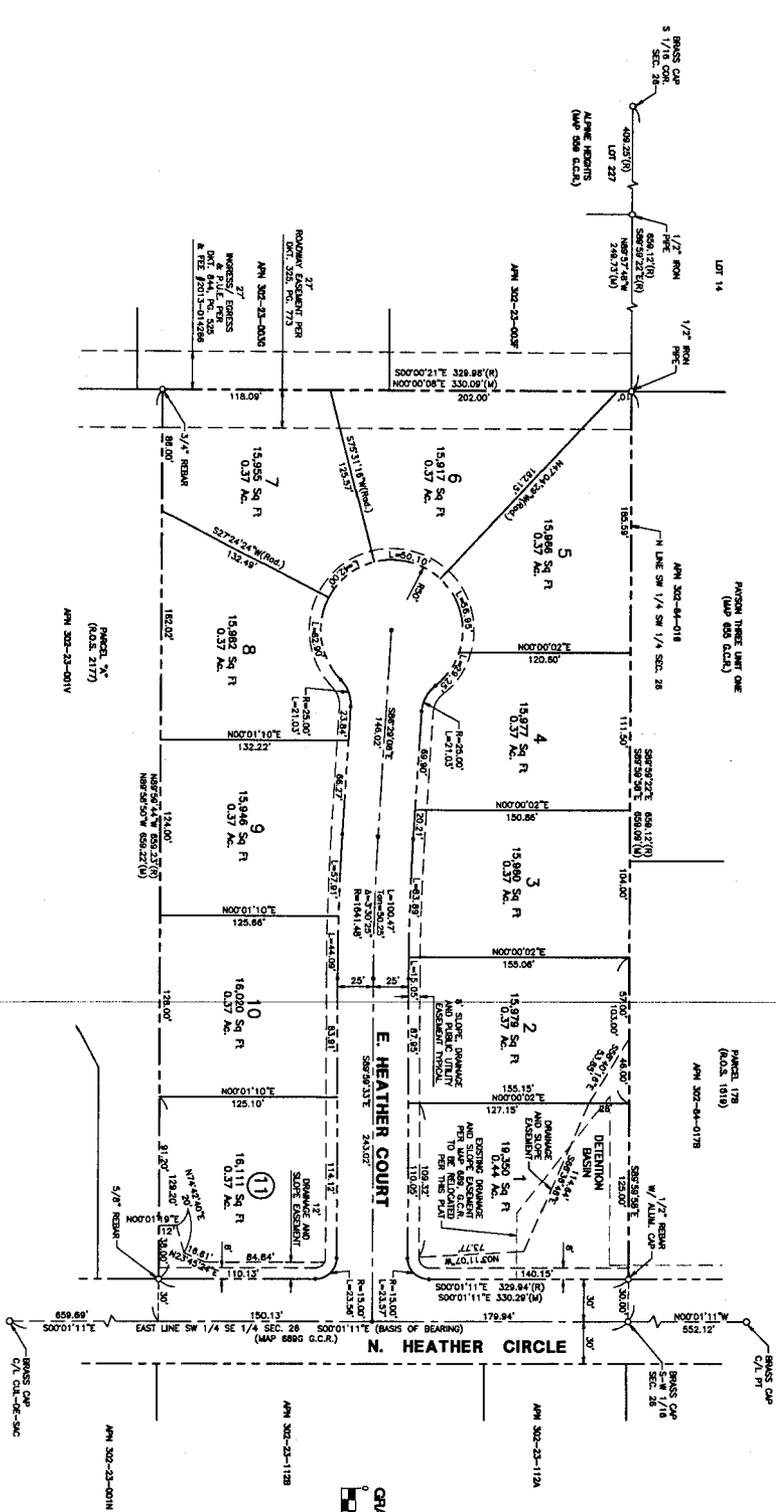
ATTEST:

APPROVED AS TO FORM:

Silvia Smith, Town Clerk



Hector M. Figueroa, Town Attorney



NO.	REVISIONS	DATE	BY	CHK

Verde Engineering Group PLLC
 1128 North McDowell Road
 Payson, Arizona 85541
 Doug R. Verde, P.E.
 License No. 10000
 (908) 555-2818

HEATHER ESTATES

PAYSON, ARIZONA

DATE	NO.	DESCRIPTION
07/03/15 <td>1 <td>PRELIMINARY</td> </td>	1 <td>PRELIMINARY</td>	PRELIMINARY
	2 <td>FINAL</td>	FINAL

FINAL PLAT

SCALE	1" = 40'
DATE	07/03/15
BY	D.R. VERDE
CHK	D.R. VERDE
NO.	2



EXHIBIT 2

To resolution 2902

WHEN RECORDED, RETURN TO

**Silvia Smith, Town Clerk
303 North Beeline Highway
Payson, Arizona 85541
Phone: 928-472-5001**

AGREEMENT TO CONSTRUCT SUBDIVISION IMPROVEMENTS

Heather Estates Subdivision, Payson, Arizona

This Agreement is made and entered into as of the _____ day of _____, 2016, by and between Jeff Vaughn Homes LLC, an Arizona Limited Liability Company ("Developer"), and the TOWN OF PAYSON, ARIZONA, an Arizona Municipal Corporation ("Town"), (collectively, the "Parties").

BACKGROUND

- A. Developer intends to subdivide and develop the property located in Payson, Arizona, as described in Exhibit A (the "Property"), identified as Heather Estates Subdivision (the "Subdivision").
- B. The improvements to be constructed in the Subdivision are described in Exhibit B ("the Improvements"). Construction of the Improvements is to be assured to the Town as provided in Paragraph 8 of this Agreement.
- C. The Parties wish to establish specific terms, conditions, and guidelines to provide for assurances for the completion of the required improvements in the Subdivision in compliance with the provisions of A.R.S. § 9-463.01(C)(8) and Payson's Unified Development Code ("the UDC").
- D. The Town seeks to protect the health, safety, and general welfare of the community by requiring the completion of various improvements in the Subdivision and thereby to limit the harmful effects of substandard subdivision.

AGREEMENT

NOW, THEREFORE, based on the foregoing and in consideration of the Town approving a Final Plat (the "Subdivision Plat") for the Property, the Parties agree as follows:

1. Construction of Subdivision Improvements. Developer hereby agrees to construct and install, at its own expense, all subdivision improvements for the Property, as described in Exhibit B. Developer's obligation to complete the Improvements will arise as of the date of this Agreement (the "Start Date"). The Developer's obligation to complete the Improvements is independent of any obligations of the Town contained herein and is not conditioned on the sale of any lots or improvement within the development.

2. Existing Utilities. Any relocation or modification of existing utilities or public improvements to construct the Improvements shall be done at no expense to the public.

3. Assurance of Construction. This Agreement is submitted as an assurance that Developer will construct the Improvements as required by A.R.S. § 9-463.01(C)(8) and the UDC.

4. Start of Construction. Developer shall begin construction of the Improvements within six (6) months of the Start Date, and will diligently pursue completion of the Improvements. Developer's failure to do substantial work on the Improvements for a period of sixty (60) consecutive calendar days shall be presumptive evidence that Developer is failing to diligently pursue construction of the Improvements, and shall constitute a default under this Agreement.

5. Completion of Improvements. The Improvements shall be completed by the Developer not more than two (2) years after the Start Date. The Improvements shall not be considered completed unless and until the Improvements have been completed in accordance with all Town regulations and all applicable plans which have been approved by the Town, and after the Town has inspected the Improvements for compliance with the plans and regulations and has accepted the Improvements in accordance with Paragraph 6. The period for completion of the Improvements may be extended for good cause shown at the discretion of the Town's Public Works Director.

6. Acceptance of Improvements. The Town shall not accept the Improvements or maintenance responsibility for the Improvements, nor shall the Improvements be deemed accepted until all of the following have occurred:

- (a) The Improvements have been completed in accordance with Paragraph 5.
- (b) The Improvements and the right-of-way in which the Improvements are located have been dedicated or conveyed to the Town in accordance with the Subdivision Plat or separate instrument.
- (c) The dedication or conveyance has been accepted by the Town as evidenced by the approval of the Subdivision Plat or by some other formal action.
- (d) The Town Council has acted to accept the Improvements as built. The Parties anticipate that each portion of the Improvements will be given a preliminary acceptance by the Town or its inspector; however, the Parties understand and acknowledge that no such preliminary acceptance shall be effective as a final acceptance until approval by the

Town Council has occurred. The Parties further understand that it shall be the sole responsibility of Developer to repair any Improvements which are damaged, fall into disrepair, or are defective prior to acceptance of such Improvements by the Town Council and/or the termination of the warranty period provided for in Paragraph 7 "Warranty".

(e) The Town shall not give final acceptance for the Improvements nor shall such Improvements be deemed accepted until Developer provides a title report demonstrating that there are no construction liens on the Property.

7. Warranty. The Developer warrants that the Improvements will be free from defects for a period of two (2) years from the date that the Town Council accepts the maintenance of the last Improvement completed by the Developer.

8. Security.

(a) To secure performance of its obligations to construct the Improvements under this Agreement, Developer shall establish an escrow account (the "Escrow Account") with Pioneer Title Agency in Payson, Arizona (the "Escrow Agent"), pursuant to an agency or other agreement in form and content as generally set forth on attached Exhibit "C" (the "Agency Agreement"). Developer shall deposit the sum of Two Hundred Thousand, Five Hundred Seventy Nine Dollars and Sixty Three cents (\$200,579.63) in cash with the Escrow Agent, which is the amount equal to the engineer's estimate, accepted by the Town's Public Works Director, of total costs to perform Developer's obligations for Improvements as set forth in Exhibit B to be constructed under this Agreement, an additional ten percent (10%) of such sum for contingency, and an additional three percent (3%) for inspection fees. This amount shall be increased from time to time on request of the Town based upon change orders issued for additional compensated work to construct and install the Improvements or other increases in the costs to perform Developer's obligations under this Agreement. Monies from the Escrow Account shall be disbursed by the Escrow Agent to cover the costs of constructing and installing the Improvements in the Subdivision in conformity with this Agreement. Such funds shall be disbursed in accordance with the Agency Agreement upon direction of the Developer, but only upon prior approval of the Town, which approval shall not be unreasonably withheld. The Town shall agree to disbursement of such funds as are reasonable and necessary to construct and install the Improvements as provided in this Agreement. Developer agrees that if this Agreement is terminated for any reason before the completion of all Improvements required under this Agreement, Developer shall tender to the Town (1) monetary assurances in an amount equal to the Town's estimate of the total cost to complete the Improvements, or (2) other assurances acceptable to the Town. The Parties agree that the sum referenced above and the Escrow Account in which such funds are to be placed will be used only for the purpose of installing the Improvements.

(b) In order to further secure performance of its obligations under this Agreement, and to provide for the acceptability of the Improvements constructed

hereunder, Developer shall pay to the Town the greater of an amount equal to three percent (3%) of the amount of the engineer's estimate, accepted by the Town's Public Works Director, excluding the amount estimated by the engineer for sewer collection installations, or 3% of the final construction cost excluding the cost of the sewer collection system, whichever is greater.

(c) In the event such Escrow Account is not established in the amount required pursuant to this Paragraph, Developer shall provide additional security in cash or other form acceptable to the Town equal to such amount and any increase thereto of the total costs to perform Developer's obligations to construct the Improvements prior to commencing or continuing construction of the Improvements.

(d) The additional ten percent (10%) of funds provided for in this Paragraph shall be released from commitment upon the final release of assurances by the Town. Such amount represents retention in the event of a default by Developer to provide additional funds for completion of the Improvements by the Town.

9. Retention. At the request of the Developer, the Town may cause to be retained 10% of the construction invoices to assure compliance by a contractor with that contractor's responsibilities.

10. Town's Option Upon Default. If Developer materially defaults on its obligations under this Agreement, in addition to any other remedies, the Town may initiate a process to revert the Property to acreage of approximately the same boundary configurations of record existing before the Subdivision Plat for the Property was recorded. Developer hereby authorizes the Town to execute on behalf of Developer all documents necessary to revert the Property to acreage, and appoints the Town as its agent and attorney-in-fact to do so. The reversion to acreage may exclude any dedications to the public which were made on the Subdivision Plat or by separate instrument which are deemed necessary to serve the portions of the Property which are not reverted to acreage or to necessarily serve the public. Developer shall pay the reasonable costs incurred in reverting to acreage. Prior to initiating any action to revert the Property to acreage or any portion of Property, Town shall give forty-five (45) days' first-class mailed notice to Developer at its last known address on file with the Town and, if different, also to the known place of business for Developer on file with the Arizona Corporation Commission at the time of the notice. Developer shall have an opportunity to cure any such defaults within such period. In addition, if Developer materially defaults on its obligations under this Agreement and, after notice and opportunity to cure defaults as provided in this paragraph, the Town may make claim against the security under Paragraph 8 and use said funds to complete construction of the Improvements. The Town shall have the sole discretion in determining a default under this Agreement, which discretion the Town may exercise in any manner that is fair and reasonable under the circumstances.

11. Termination. This Agreement shall remain in full force and effect until one of the following has occurred:

- a) All of the Improvements have been completed and accepted for maintenance by action of the Town Council and Contractor has provided the title report as required by Paragraph 6(e).
- b) The Developer has tendered substitute assurances acceptable to the Town for the completion of the Improvements.
- c) A new and superseding Subdivision Plat has been recorded for the Property in compliance with any and all applicable laws and regulations.

12. Binding Effect. This Agreement shall be binding upon the Parties and their respective successors and assigns.

13. Severability. If any portion of this Agreement is found to be invalid, such finding will not affect the validity of the remainder of this Agreement.

14. No Waiver. No waiver of any provision of this Agreement shall be deemed or constitute a waiver of any other provision, nor shall it be deemed to be a continuing waiver unless expressly provided for by a written amendment to this Agreement signed by the Parties.

15. Notice. The Developer agrees to provide written notice to the Town, within ten (10) days of the occurrence of (1) a change of name, corporate identity, or address of the Developer; (2) intent to transfer, or transfer of title to the Property by deed, or transfer of title to the Property by deed, contract, or operation of law, except in the case of the sale of Units to third party home buyers in the ordinary course of business; (3) the foreclosure of a lien against the Property or a portion of the Property; (4) the filing of a voluntary or involuntary petition of bankruptcy respecting the Developer; (5) any other event that may materially affect performance of the Parties under this Agreement.

16. Address of the Parties:

Developer:
Jeff Vaughn Homes LLC
Attention: Jeff Vaughn, Manager
134 West Midway Street
Payson, Arizona 85541

Town:
Payson Town Public Works Director
Attention: LaRon Garrett
303 North Beeline Highway
Payson, Arizona 85541

17. Date of Agreement. The date of this Agreement shall be the date of the signature of the last Party to sign this Agreement.

18. Controlling Law. This Agreement shall be governed in accordance with the laws of the State of Arizona.

19. Authority. The Parties acknowledge that each is fully authorized and empowered to execute this Agreement by and through the individual(s) executing hereinafter.
20. Further Documents. The Parties shall execute and deliver any and all such documents and perform any and all such acts as reasonably necessary or required to carry out the matters contemplated by this Agreement.
21. Representations. The Parties acknowledge that each has been, or has had an opportunity to be, represented by counsel. This Agreement is the result of negotiation between the Parties and their respective attorneys, and the terms, conditions, and provisions of this Agreement shall be construed in a fair and even manner regardless of which Party drafted this Agreement.
22. Counterparts. This Agreement may be executed in one or more counterparts.
23. Date of Performance. If this Agreement provides that any time period expires or date for performance specified in this Agreement falls on a non-business day (a Saturday, Sunday, or legal holiday recognized by the Town), such time period or performance deadline shall be extended to the Town's next business day. Except as may otherwise be set forth herein, any performance shall be timely made and completed no later than 5:00 p.m. (Payson time) on the date the performance is due.
24. Complete Agreement. This Agreement and additional written agreements described herein, if any, contain and set forth the entire Agreement and understanding between the Parties hereto pertaining to the subject matter of this Agreement.
25. Modification. This Agreement may not be modified without the prior written consent of the Parties.
26. Dispute Resolution.
- (a) This Contract shall be governed and construed in accordance with the laws of the State of Arizona.
 - (b) With the written consent of the Parties, any dispute, controversy, claim, or cause of action arising out of or related to this Contract may be settled by submission to binding arbitration in accordance with the rules of the American Arbitration Association and the Arizona Uniform Arbitration Act, A.R.S. § 12-1501, et seq.
 - (c) The venue for any such dispute shall be Gila County, Arizona.
 - (d) Neither Party shall be entitled to recover from the other Party any of its attorneys' fees, costs, or expert witness fees incurred in any such dispute, controversy, claim, or cause of action. Each party shall bear its own attorneys' fees without contribution from the other party.

27. Cancellation. This Agreement is subject to the provisions of A.R.S. § 38-511, which provide for cancelation of contracts by the municipality for certain conflicts of interest.
28. Town Business License. The Developer shall provide the Town with a copy of its Town business license. If the Developer is exempt from the Town’s business licensing requirements, it shall still provide the Town with the items required under Section 110.03(C)-(D) of the Payson Town Code.
29. Authorized Presence Requirements/Government Procurement (A.R.S. §41-4401).
- (a) Contractor and any Subcontractor employed by Contractor warrants their compliance with all Federal immigration laws and regulations that relate to their employees and with Arizona Revised Statutes § 23-214(A).
 - (b) A breach of the warranty under Subsection (a) above shall be deemed a material breach of this Contract and shall be subject to penalties up to and including termination of the Contract.
 - (c) The Town retains the legal right to inspect the papers of the Contractor or Subcontractor who works on this Contract to ensure that the Contractor and any Subcontractor are complying with Subsection (a) above.
30. No Third Party Beneficiaries. No term or provision of this Agreement is intended to be for the benefit of any person or entity not a party to this Agreement.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the date first above mentioned.

TOWN OF PAYSON,
an Arizona Municipal Corporation

JEFF VAUGHN HOMES LLC,
an Arizona Limited Liability Company

By: Vaughn Family Trust, Member

By _____
Kenny J. Evans, Mayor

By: _____
Jeffrey L. Vaughn, Trustee

By: _____
Debra L. Vaughn, Trustee

APPROVAL AS TO FORM

The Town of Payson Legal Department has reviewed this contract and approved it as to form. When reviewing this contract for form, the Legal Department considers whether the following situations have been addressed:

Identification of parties;

- 1. Offer and acceptance;
- 2. Existence of contract consideration (Legal Department does not review to determine if consideration is adequate);
- 3. That certain provisions specifically required by statute are included (i.e., provisions concerning non-availability of funds and conflict of interest, A.R.S. § 38-511).

Legal Department has not reviewed the contract for other issues. Therefore, approval as to form should not be considered as approval of the appropriateness of the terms or conditions of the contract or the underlying transaction. In addition, approval as to the form should not be considered approval of the underlying policy considerations addressed by the contract.

Dated: ____ day of _____, 2016.

By _____
Hector M. Figueroa, Town Attorney

Dated

STATE OF ARIZONA)
) ss.
County of Gila)

The foregoing Agreement to Construct Subdivision Improvements for Heather Estates Subdivision was signed before me this ____ day of _____, 2016, by Jeff Vaughn Homes LLC, by Vaughn Family Trust, Member, by Jeffrey L. Vaughn, Trustee, on behalf of the Trust.

Notary Public

My commission expires:

STATE OF ARIZONA)
) ss.
County of Gila)

The foregoing Agreement to Construct Subdivision Improvements for Heather Estates Subdivision was signed before me this _____ day of _____, 2016, by Jeff Vaughn Homes LLC, by Vaughn Family Trust, Member, by Debra L. Vaughn, Trustee, on behalf of the Trust.

Notary Public

My commission expires:

STATE OF ARIZONA)
) ss.
County of Gila)

The foregoing Agreement to Construct Subdivision Improvements for Heather Estates Subdivision was signed before me this _____ day of _____, 2016, by Kenny J. Evans, Mayor of the Town of Payson, on behalf of the Town.

Notary Public

My commission expires:

EXHIBIT A
LEGAL DESCRIPTION

Those lots and tracts as shown on the Heather Estates Subdivision Plat recorded on _____, 2016, as Map Number _____, in the Office of the Gila County Recorder, Gila County, Arizona.

EXHIBIT B IMPROVEMENTS

Those improvements as shown on the "Civil Improvement Plans for Heather Estates Subdivision," consisting of ten (10) sheets sealed 2-17-16, and approved by the Town of Payson on 2-19-16.

EXHIBIT C
FUNDING AGREEMENT

WHEN RECORDED, RETURN TO:

**Silvia Smith, Town Clerk
Town of Payson
303 North Beeline Highway
Payson, Arizona 85541
Phone: 928-472-5001**

FUNDING AGREEMENT

Heather Estates Subdivision, Payson, Arizona

TO: Town of Payson, Arizona Date: _____, 2016

For the purpose of providing the assurance of construction through funds placed in an escrow account, Jeff Vaughn Homes LLC, an Arizona limited liability company ("Developer"), and Pioneer Title Agency, Inc. (Escrow Agent) agree as follows:

1. Funds in the amount of Two Hundred Thousand, Five Hundred Seventy-nine Dollars and Sixty-three Cents (\$200,579.63) ("the Funds"), determined by the Developer to be sufficient to cover the cost of completing the Improvements required for Heather Estates Subdivision ("the Subdivision") pursuant to the Agreement to Construct Subdivision Improvements entered into between the Developer and the Town of Payson on _____, 2016 (Agreement to Construct Subdivision Improvements), have been committed by the Escrow Agent and will be made available by Escrow Agent as agent for the Developer.
2. Developer agrees that the Funds will be used only for the purpose of installing off-site and on-site subdivision improvements ("Subdivision Improvements") in the Subdivision.
3. All disbursements from the Funds by Escrow Agent to pay for the Subdivision Improvements shall be made in accordance with this Funding Agreement to Developer or to a contractor or materialman upon direction of Developer, only upon receipt from the Town Public Works Director/Town Manager of notice which must state the amount of the disbursement approved and that the construction of said Subdivision Improvements for the period covered by the disbursement has been accepted or preliminarily accepted in accordance with the Agreement to Construct Subdivision Improvements.

4. If Developer defaults on its obligations under the Agreement to Construct Subdivision Improvements; if Developer abandons construction of the Subdivision Improvements; or if Developer fails to complete construction of the Subdivision Improvements covered by the Funds within two (2) years of the date of the Agreement to Construct Subdivision Improvements, the Town of Payson, by giving written notice to Escrow Agent of its intent to complete the Subdivision Improvements, may draw on the remaining balance of the Funds in order to complete construction of the Subdivision Improvements in the above-referenced subdivision.

5. It is understood that the Town of Payson is not a borrower of funds from Escrow Agent and shall not be required to repay any funds disbursed to or on behalf of Developer. The Town may obtain from Escrow Agent part or all of the funds committed under this Funding Agreement in accordance with the Agreement to Construct Subdivision Improvements and this Funding Agreement and, to the extent practicable, Escrow Agent may disburse such funds in accordance with this Funding Agreement to the Town; provided, however, the Parties understand and acknowledge that, in the event the Town of Payson makes claim to or utilizes such funds, or otherwise exercises its rights under said Agreement to Construct Subdivision Improvements, the Town of Payson will utilize such funds only for completion of the construction of Improvements according to said Agreement to Construct Subdivision Improvements and according to the approved plans for the construction of such Improvements. Escrow Agent agrees to disburse all its committed funds or such part as is then remaining under this Funding Agreement.

Acknowledged and agreed to:

PIONEER TITLE AGENCY, INC.
 An Arizona corporation

By _____

Title _____

DEVELOPER:
 JEFF VAUGHN HOMES LLC,
 An Arizona limited liability company
 By: VAUGHN FAMILY TRUST,
 MEMBER

DEVELOPER:
 JEFF VAUGHN HOMES LLC,
 An Arizona limited liability company
 By: VAUGHN FAMILY TRUST,
 MEMBER

By _____
 Jeffrey L. Vaughn, Trustee

By _____
 Debra L. Vaughn, Trustee

STATE OF ARIZONA)
) ss.
County of Gila)

The foregoing Agreement to Construct Subdivision Improvements for Heather Estates Subdivision was signed before me this _____ day of _____, 2016, by _____, _____ for Pioneer Title Agency, on behalf of the Agency.

Notary Public

My commission expires:

STATE OF ARIZONA)
) ss.
County of Gila)

The foregoing Agreement to Construct Subdivision Improvements for Heather Estates Subdivision was signed before me this _____ day of _____, 2016, by Jeff Vaughn Homes LLC, by Vaughn Family Trust, Member, by Jeffrey L. Vaughn, Trustee, on behalf of the Trust.

Notary Public

My commission expires:

STATE OF ARIZONA)
) ss.
County of Gila)

The foregoing Agreement to Construct Subdivision Improvements for Heather Estates Subdivision was signed before me this _____ day of _____, 2016, by Jeff Vaughn Homes LLC, by Vaughn Family Trust, Member, by Debra L. Vaughn, Trustee, on behalf of the Trust.

Notary Public

My commission expires:
