

Erosion Control Agreement

INTRODUCTION AND SCOPE OF THE AGREEMENT

THIS Erosion Control Agreement (the "Agreement") is made and entered into effective this the _____ day of _____, 20____, by and between _____ the address of which is _____, ("Developer"), and DeSoto County, Mississippi, a political subdivision of the State of Mississippi, acting through its duly elected Board of Supervisors ("County").

WITNESSETH

WHEREAS, the Developer is the owner, or agent of the owner¹, of the Site, and desires to undertake Construction Activities within the Site which activities are subject to the mandates and requirements of the County's Stormwater Ordinance; and

WHEREAS the Developer and County each desire and agree to execute this Agreement as a condition to said parties approval and execution of the Residential Subdivision Development Contract; and

WHEREAS, it is understood by the parties hereto that the intended manager of this Agreement is the office of the Desoto County Engineer; and

WHEREAS, the parties agree and understand this Agreement will, subsequently, be made an exhibit to the Residential Subdivision Development Contract and incorporated therein by reference; and

NOW, THEREFORE, in consideration of the premises and the mutual covenants of the parties herein contained, it is understood and agreed as follows:

I. DEFINITIONS

Construction Activities: any clearing, grading, excavating, or equipment usage that will result in the disturbance of the land surface and is subject to the National Pollutant Discharge Elimination System (NPDES) construction permits. This includes construction projects resulting in land disturbances of 1 acre or more or projects less than 1 acre but are part of a larger common plan of development, as required by 40 CFR 122. The term shall not include:

- (1). Such minor construction activities as home gardens and individual home landscaping, home repairs, home maintenance work and other related activities that result in minor soil erosion;
- (2). Individual service and sewer connections for single or two family residences;
- (3). Agricultural practices involving the establishment, cultivation or harvesting of products of the field or orchard, preparing and planting of pasture land, forestry land management practices including harvesting, farm ponds, dairy operations, and livestock and poultry management practices and the construction of farm buildings;
- (4). Any project carried out under the technical supervision of the Natural Resources Conservation Service of the United States Department of Agriculture; and

¹ If the Developer is not the owner of the Subdivision site, but has permission from the owner to develop same, the owner will be required to join herein and all obligations imposed upon the Developer hereunder shall be the joint and several obligations of the Developer and the owner.

(5). Installation, maintenance, and repair of any underground public utility line when such activity occurs in an existing hard surface road, street or sidewalk, provided the activity is confined to the area of the road, street or sidewalk that is hard surfaced and a street, curb, gutter or sidewalk permit has been obtained.

Erosion and Sediment Control Plan: a plan that is designed to minimize the accelerated erosion and sediment runoff at a Construction Activities or Land Disturbance site.

Final Subdivision Acceptance: shall occur after all required improvements have been completed by the Developer to the satisfaction of the Director of the DeSoto County Planning Commission and County Engineer; all applicable maintenance periods have expired, the terms and conditions of the Residential Subdivision Contract fully completed, and the Board of Supervisor's has approved the release of the Security.

Land Disturbance: any activity which changes the volume or peak flow discharge rate of rainfall runoff from the land surface. This may include the grading, digging, cutting, scraping, or excavating of soil, placement of fill materials, paving, construction, substantial removal of vegetation, or any activity which bares soil or rock or involves the diversion or piping of any natural or man-made Watercourse.

NPDES Permit: a permit issued pursuant to 33 U.S.C. Chapter 26 (Water Pollution Prevention and Control), Subchapter IV (Permits and Licenses), Section 1342 that authorizes the discharge of Pollutants to waters of the United States, whether the permit is applicable on an individual, group, or general area-wide basis.

Residential Subdivision Development Contract: That agreement prepared by the County, for execution by the County and the Developer, setting forth certain conditions, obligations and requirements for the development of real property as a subdivision and styled "DeSoto County, Mississippi Residential Subdivision Development Contract."

Security: a Letter of Credit issued by a bank qualified to do business in the State of Mississippi, to the Developer, naming the County as beneficiary, and securing the completion of all requirements set forth herein and set forth in the Stormwater Ordinance. Said letter of credit shall have an expiration date of not less than one (1) year and is callable upon a branch of the issuing bank located in DeSoto, Tate, Marshall and Tunica Counties, or cash, or other adequate security acceptable to the County. In the sole discretion of the County, cash or alternative forms of security may be accepted upon approval of the Board of Supervisors. This Security shall be posted separate and apart from any other security posted by Developer for development of the Site.

Site: those parcels or tracts of land upon which the Developer intends to develop the Subdivision. The Site shall include all portions of the parcels or tracts of land shown on the plat which receives Preliminary Subdivision Approval, whether any construction activities will take place upon the same or not.

Stormwater Ordinance: The "ORDINANCE ESTABLISHING STORMWATER CONTROLS AND MANAGEMENT PRACTICES FOR DESOTO COUNTY, MISSISSIPPI", adopted by the County on December 19, 2005.

Subdivision: as defined in the County ordinances, is the division of a tract or parcel of land into two or more parcels or lots, any of which has an area of ten (10) acres or less. Also tracts or parcels of any size where one or more of the parcels not bordering a public road is a subdivision and must have approval from the Board of Supervisors. However, not included in this definition for the purposes and scope of application of this Agreement is the division of land into lots or parcels of more than ten (10) acres each and that border a public road. The project contemplated hereunder may be developed under the ordinances and

regulations of the County relative to Planned Developments. In such event, the term Subdivision shall be read so as to refer to such Planned Developments.

Subdivision Plans: are those documents and plans submitted to the DeSoto County Planning Commission in conjunction with an application for subdivision approval, including, but not limited to the application for Preliminary Subdivision Approval, plans for construction, plans for drainage, plans for storm water and erosion control, plats, drawings, road plans, and application for Final Subdivision Approval.

II. DRAINAGE

1. The Developer agrees that all drainage and related facilities, including, without limitation, ditch paving, bank protection and fencing adjacent to open ditches, detention ponds, culvert installation and the like, as are made necessary by the development of the Site are to be constructed by the Developer according to plans and specifications approved by the County Engineer.

2. The Developer, unless responsibility is transferred to another person or entity by the appropriate issuing of a "Transfer of Responsibility" by the Mississippi Department of Environmental Quality, transferring the NPDES permit, agrees that it will provide necessary stormwater and erosion control measures, including, but not limited to silt fencing/hay bales, rip-rap, seeding for gentle slopes (4 to 1 or less), grass sod for steeper slopes, with special grading and terracing, in accordance with the specifications of the County Engineer and the Stormwater Ordinance. Compliance with the Stormwater Ordinance requires, but is not limited to requiring, that all freshly excavated and embankment areas not covered with satisfactory vegetation be fertilized, mulched and seeded and/or sodded as required by the County Engineer to prevent erosion. In the event that the County Engineer determines that necessary erosion control is not being provided by the Developer, the County shall officially notify the Developer in writing of the problem and identify options for the acceptable cure of the problem and proceed in accordance with the Stormwater Ordinance. Prior to releasing any Security hereunder, all expenses incurred by the governing authority relative to the foregoing shall be paid in full by the Developer plus interest thereon at the rate of ten percent (10%) per annum.

3. Any and all open watercourses lying partially or wholly within the boundary of the Site shall be constructed to an adequate cross section to provide design flow without threat of erosion or flooding of any property within the Site or any adjoining property. This provision does not in any way supersede the authority of the Corp of Engineers for management of the streams and watercourses of the United States.

4. All drainage structures referenced or incorporated in the approved Subdivision Plans, affecting any watercourse lying partially or wholly within the Site, are to be provided, installed and/or constructed by the Developer prior to the recording of the final Subdivision plat.

5. The Developer agrees to provide and deliver the formal written opinion of a certified and licensed professional engineer in the State of Mississippi, certifying as a professional engineer that he or she has reviewed the entire drainage system within the Site and that upon full development at the greatest allowable use density under existing zoning of all land within that watershed, the proposed development of the Subdivision, as designed and certifying to the County Standard, will not increase the rate of flow of surface water leaving the Site, nor damage or flood any neighboring property so long as the construction comports to the design and the Developer maintains proper erosion control measures.

III. SECURITY

1. Time Frames.

(a) The Developer will furnish to the County, prior to commencement of any Construction Activities on the Site, an Erosion and Sediment Control Plan in accordance with the requirements of the Stormwater Ordinance.

(b) In the context of the Residential Subdivision Development Contract, this Agreement shall be in place and proper Security posted at the earlier of the Effective Date of the Residential Subdivision Development Contract or the issuance of the NPDES Permit. In the context of the transfer of an NPDES Permit, the transferee must execute an acknowledgement and joinder of this Agreement, or a separate but substantially identical agreement, at the earlier of the issuance to transferee or the required NPDES Permit or the issuance of the permit for the construction of improvements on the Site.

(c) In the context of the Subdivision Approval Process, the Security required herein shall remain in force through the date of Final Subdivision Acceptance, although same may be reduced from time to time as provided herein.

(d) The Security shall be attached as a supplement to this Agreement, and guarantee, to the extent of the Security, the faithful performance of this Agreement by the Developer.

2. Determination of Amount of Security.

(a) Although the amount of the Security may be less than the total cost of Developer's obligations hereunder, it is understood and agreed that the Security, subject to its limit, is to furnish protection for, and assurance of, the performance of all of the Developer's obligations hereunder and that such obligations are not limited by the amount of such Security.

(b) The amount of the Security shall be determined by the County Engineer and be in an amount equivalent to the cost of completing the Erosion and Sediment Control Plan, plus a reasonable amount necessary to cover Developer's maintenance obligations set forth in this Agreement.

(c) All collection expenses, court costs and attorney's fees (as applicable and as provided for herein), necessarily incurred by the County in connection with collection under the Security, as a result of the Developer's default of this Agreement shall be paid by the Developer.

3. Release of Security.

(a) The Developer shall be entitled to make application for partial releases of Security when (i) the costs of compliance with the Erosion and Sediment Control Plan are reduced to by amount not less than fifty (50%) percent of the value of the Security or, (ii) the occurrence of the renewal date of the letter of credit supporting such Security. In such instances, the amount of the Security may be reduced to the cost, as estimated by the County, of any anticipated further costs of compliance with the Erosion and Sediment Control Plan.

(b) Any Security not released in accordance with (a) will otherwise be released within ten (10) days of fulfillment of all responsibilities detailed in this Agreement and the Residential Subdivision Development Contract.

4. Calling on Security.

(a) Prior to making a call on the Security, the County shall issue a notice to the Developer specifying the nature of Developer's failure to perform any of the obligations of this Agreement, or the Stormwater Ordinance, as well as an estimate of the amount that may be called upon the Security if the Developer fails to correct the alleged default within the specified cure period, which cure period shall be not

less than 30 days, or such time period to cure as is proscribed by the Stormwater Ordinance, from the date of mailing of such notice.

(b) Nothing contained herein shall be construed as waiving or limiting either party's rights to appeal the decision of the County Engineer to the Board of Supervisors, as applicable.

(c) If Developer has not (i) cured the default within the cure period set forth in the default notice, or such amount of time as is reasonably necessary to cure or remedy such default, taking into account unavoidable delays to perform the work required, and (ii) the County Engineer has determined the Developer remains in default of the terms of this Agreement, and (iii) Developer has not appealed such determination, the County shall be entitled to call on the Security posted to secure the performance of those actions addressed in the notice of default.

(d) The Security, if a Letter of Credit, shall provide that the physical presence of a representative of the County shall not be required for demand upon the same and that the venue relative to any litigation regarding same shall be DeSoto County, Mississippi.

IV. MISCELLANEOUS CONDITIONS

1. NPDES Transfers: Developer acknowledges and understands that the NPDES Permit is transferable to third parties who may undertake Construction Activities within the Site, such as home builders. Developer specifically agrees that any transfer of the NPDES Permit, or rights under said permit, which is a transfer of less than the permit for all Construction Activities within the Site, will relieve Developer of his obligations set forth in this Agreement or the Stormwater Ordinance only as to that portion of Site covered by the transferring permit.

2. Costs of Default. The parties agree, should either default in performing any of its obligations under this Agreement, and litigation ensues between them with respect to this Agreement, the party who prevails therein shall be entitled to recover from the other its reasonable attorney's fees and the costs and expenses of such litigation, including same related to any appeal. The court(s) before which such litigation is pending shall determine which party prevailed and the amount of such fees, costs, and expenses to be recovered by the prevailing party; and, if either party prevails in part, but not in whole, an equitable award of its attorney's fees and expenses shall be made by the court(s).

3. Interpretation and Severability. If any provision of this Agreement is held to be unlawful, invalid or unenforceable under present or future laws effective during the terms hereof, such provisions shall be fully severable and this Agreement shall be construed and enforced as if such unlawful, invalid or unenforceable provision was not a part of this Agreement. Furthermore, if any provision of this Agreement is capable of two constructions, one of which would render the provision void and the other of which would render the provision valid, then the provision shall have the meaning which renders it valid.

4. Construction of Agreement. Each party has received and had the opportunity to review this Agreement, and each party has had the opportunity, whether exercised or not, to have each respective party's attorney review this Agreement, and, accordingly, the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of this Agreement.

5. No Waiver. The failure of either party to insist upon prompt and strict performance of any of the terms, conditions or undertakings of this Agreement, or to exercise any right herein conferred, in any one or more instances, shall not be construed as a waiver of the same or any other term, condition, undertaking or right.

6. Amendments and Modification. This Agreement shall not be modified in any manner, except by an instrument in writing executed by or on behalf of all parties.

7. Authority to Execute. County and Developer each warrant and represent that the party signing this Agreement on behalf of each has authority to enter into this Agreement and to bind the County and Developer, respectively, to the terms, covenants and conditions contained herein. Each party shall deliver to the other, upon request, all documents reasonably requested by the other evidencing such authority, including a copy of all resolutions, consents or minutes reflecting the authority of persons or parties to enter into agreements on behalf of such party.

8. Notices. All notices, demands and requests required or permitted by this Agreement shall be in writing (including telecopy communications) and shall be sent by facsimile transmission, air or other courier, or hand delivery, as follows:

(i) To: COUNTY
DeSoto County Planning Department
Attn: Director of the Planning Commission Office
365 Loshier Street
Suite 200
Hernando, MS 38632

Telephone: 662-429-1303
Telecopier: 662-429-1307

With Required Copy To:
DeSoto County Engineering Department
Attn: County Engineer
P.O. Box 389
Nesbit, MS 38651

Telephone: 662-429-1347
Telecopier: 662-429-1521

(ii) To: DEVELOPER

Telephone: _____
Telecopier: _____

Any notice, demand or request sent by facsimile transmission shall be deemed given for all purposes under this Agreement when properly transmitted by telecommunication device. Any notice, demand or request which is hand delivered or sent by air or other courier shall be deemed given for all purposes under this Agreement when delivered to the intended address.

Any party to this Agreement may change such party's address for the purpose of notices, demands and requests required or permitted under this Agreement by providing written notice of such change of address to the other party, which change of address shall only be effective when notice of the change is actually received by the party who thereafter sends any notice, demand or request.

9. Choice of Law. This Agreement is being executed and delivered and is intended to be performed in the State of Mississippi, County of DeSoto, and the laws (without regard to principles of conflicts of law) of the State of Mississippi shall govern the rights and duties of the parties hereto in the validity, construction, enforcement and interpretation hereof.

10. Incorporation in Other Contracts: This Agreement will be made an exhibit to the Residential Subdivision Development Contract, upon the execution of the same, and immediately deemed to be incorporated therein by reference without the need for the execution of any modifications or addendums hereto.

WITNESS the due execution hereof.

DEVELOPER

By: _____

Title: _____

Date : _____

OWNER (if applicable):

By: _____

Title: _____

Date: _____

COUNTY OF DESOTO, MISSISSIPPI

By: _____
President, DeSoto County Board of Supervisors

Date: _____

ATTEST: _____
DeSoto County Chancery Clerk - Clerk of the
DeSoto County Board of Supervisors