

## CONSTRUCTION LOAN DISBURSEMENT AGREEMENT

Order No. \_\_\_\_\_

THIS AGREEMENT, made and entered into as of the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, by and between \_\_\_\_\_ (“Lender”), Fidelity National Title Insurance Company \_\_\_\_\_, (the “Escrowee”), \_\_\_\_\_ (“Owner”), and \_\_\_\_\_ (“Contractor”);

**WITNESSETH:**

WHEREAS, the Lender has entered into an agreement to make a construction loan with owner in the principal sum of \$ \_\_\_\_\_ to be secured by a mortgage upon the premises described in Exhibit A attached hereto; and

WHEREAS, Lender contemplates that there will be approximately \_\_\_\_ disbursements pursuant to said loan; and

WHEREAS, Lender will make or has made application to Escrowee for issuance of Escrowee’s ALTA mortgage policy insuring the mortgage. When the mortgage, in recordable form, is in Escrowee’s hands, same will be recorded promptly or per instructions. Thereafter, Escrowee will disburse the loan proceeds in accordance with the terms of this Agreement.

WHEREAS, Lender desires that Escrowee serve as disbursing agent, and Escrowee desires so to serve, but only upon the terms and conditions hereinafter set forth;

NOW, THEREFORE, in consideration of the covenants and commitments herein contained, the parties agree as follows:

1. From time to time, Lender will deposit funds with Escrowee, and Escrowee shall disburse the funds so deposited in accordance with the terms of this agreement (i) to pay the costs of construction of the improvement to be erected on the above-described premises, and, where authorized, to pay nonconstruction items approved by the owner and lender, and (ii) to obtain partial and/or final lien waivers and releases and satisfactions of liens and other encumbrances, if any, pursuant to the sworn statements of amounts due approved by the owner and lender. The inspector/architect is \_\_\_\_\_ and the general contractor is \_\_\_\_\_.

2. Prior to the first disbursement of funds hereunder it is a requirement of this escrow that the Escrowee be furnished:

- A. An approval by the lender of the conditions of title to the premises described above. If funds are furnished without formal approval by lender, it may be conclusively presumed that the conditions of title are satisfactory to the Lender.
- B. A sworn owner's statement disclosing the various contracts entered into by the owner and setting forth the names of the contractors, their addresses, work or materials to be furnished, amounts of the contracts, amounts paid to date, and balance due.
- C. A sworn general contractor's statement setting forth in detail all contractors and material suppliers with whom he has contracted, their addresses, work or material to be furnished, amounts of the contracts, amounts paid to date, and balance due.
- D. An approval by the Lender for loan disbursement purposes of the general contractor's statements and the owner's statement, which are provided at B and C above.

3. Prior to each disbursement of funds hereunder, it is a requirement of this escrow that the Escrowee be furnished:

- A. A sworn general contractor's statement setting forth all contractors and materialmen with whom they have contracted, amounts of contracts, amounts paid to date, amounts being requested and balance due.
- B. An approval by the owner of the requested disbursement.
- C. A report of the inspector or certification by the architect certifying that work has been completed and materials are in place as indicated by the request for payment of the general contractor.
- D. Sufficient funds to cover the requested disbursements, and to pay for extras or change orders for which waivers have not been deposited and for which funds have not previously been deposited.
- E. Sufficient funds to cover unpaid title and escrow charges.
- F. Statements, waivers, affidavits, supporting waivers and releases of liens (if necessary) satisfactory to Escrowee.

4. All disbursements for construction purposes will be made directly to the owner, general contractor, or sub-contractors and materialmen at the Escrowee's option. Where Escrowee makes disbursement to a general contractor for work or materials furnished by a subcontractor, escrowee does so at its own risk, unless the lender directs that payment be so made. Escrowee is not responsible for loss due to false affidavits of contractors and subcontractors unless the lender has furnished escrowee the same with knowledge of the facts. With respect to the condition of the title, the liability of the escrowee in making any disbursement in reliance upon its title report is limited to insuring that condition of the title is correctly set forth in said title report and shall not extend to the determination of whether it is acceptable to the lender furnishing the funds for disbursement being considered and acceptance of title as so reported.

5. After Escrowee has made a partial disbursement of mortgage proceeds it will furnish the Lender, if so requested, a Date Down Endorsement to the Policy or Commitment in the following form:

I. Schedule A of the above commitment/policy is hereby amended in the following particulars:

A. Effective date is extended to \_\_\_\_\_

II. Schedule B of the above commitment/policy is hereby amended in the following particulars:

A. The following item(s) are hereby deleted:

B. The following items are hereby added:

1. Any lien, or right to a lien, for services, labor or material furnished after

\_\_\_\_\_.

2. Rights of mechanics or materialmen who are named on the contractor's statement dated \_\_\_\_\_ and of mechanics or materialmen claiming by, through or under them, to the extent, if any, that the amounts shown in said statement as being unpaid related to work, labor and material actually in place on said land on the date covered by said statement.

III. Anything in this policy and any endorsement thereto notwithstanding, the liability of the Company under said policy shall not exceed the sum of

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(being the amount actually disbursed of the proceeds of the loan secured by the mortgage described in Schedule A at the date of said policy) and costs which the Company is obligated under the Conditions and Stipulations to pay, but such liability shall be increased by the sum of each subsequent disbursement made under said mortgage up to the face amount of the policy; subject, however, with respect to each such increase, to any defects, liens, encumbrances, adverse claims or other matters which may be disclosed upon an examination of the title to the estate or interest in said land subsequent to the preceding examination and down to and including the date of each disbursement.

IV. The Company hereby insures the Insured against loss or damage which the Insured shall sustain by reason of any inaccuracy in the following assurance:

The lien of the mortgage described in Schedule A is first, prior and superior to any other liens (including mechanics' and materialmen's liens) not shown in Schedule B of the policy to the extent of \$ \_\_\_\_\_, advanced out of the proceeds of the mortgage.

6. Prior to the final disbursement of the funds hereunder, it is a requirement of this escrow that Escrowee be prepared to furnish its ALTA Mortgagee's Policy of Title Insurance subject to the usual terms, conditions and exceptions contained in that form of policy and also subject to exceptions appearing in its title report or commitment aforesaid.

7. No changes or modifications shall be made in the plans and specifications without the advance written consent by each of the parties hereto. Failure to secure such written approval shall render the Contractor liable for any costs and damages resulting therefrom, and Contractor hereby waives his right to make any additional charge for same;

8. That Lender, through its agents and inspectors, may enter upon the premises at any time to inspect the progress of construction;

9. That Escrowee, through its agents, employees and any independent contractor employed by it, shall have the privilege, at any time, and from time to time, of going upon the property and the improvements, for the purpose of exercising any of the rights and duties conferred upon the Escrowee under the provisions of this Agreement.

10. That Escrowee does not guarantee sufficiency of funds for completion to owner, contractor or lender;

11. That owner, contractor and lender will notify Escrowee in writing of any mechanics' or materialmen's liens, or notice thereof which is served on them within three (3) days after receipt of such lien or notice;

12. That owner and/or contractor will not install or cause to be installed any fixture or equipment included in the plans and specifications, the payment for which shall be evidenced by a purchase money security interest, as provided for and defined under the provisions of the Uniform Commercial Code. This paragraph will not prohibit or limit the lender from taking a security interest as an additional lien;

13. That this Agreement shall not be assignable by any party without the consent of the other parties, but shall be enforceable against the heirs, trustees, executors and administrators of any individual party hereto, and the successors or trustees of any corporate party;

14. If at any time during the course of construction, the total of the unpaid disclosed cost of construction as indicated by the column totals on the general contractor's sworn statement exceeds the amount of the undisbursed mortgage proceeds, as calculated by subtracting the total amount of liability taken on the endorsements from the face amount of the mortgage, the Escrowee need not make further disbursements under the terms of this escrow until the owner has deposited in this escrow the sum necessary to make the available funds equal to the unpaid disclosed cost of construction, or unless specifically directed to do so by the lender. Also if Escrowee discovers a mis-statement in an affidavit furnished by general contractor or owner/borrower, it may stop disbursement until the mis-statement has been corrected. No liability is assumed by Escrowee to the owner as regards protection against mechanic's lien claims;

15. The functions and duties assumed by Escrowee include only those described in this Agreement, and the Escrowee is not obligated to act except in accordance with the terms and conditions of this escrow. Fidelity National Title Insurance Company does not insure that the building will be completed, nor does it insure that the building when completed will be in accordance with plans and specifications, nor that sufficient funds will be available for completion, nor does it make the certifications of the inspector/architect its own, nor does it assume any liability for same other than procurement as one of the conditions precedent to each disbursement.

16. Escrowee is to deliver the mortgage policy and all mortgage papers when available to the Lender and bill all title and escrow charges to: \_\_\_\_\_.

17. Escrowee is to pay all title and escrow charges as they are determined. These items are not to be considered as a cost of construction for purposes of paragraph 1 (i) above;

18. General Conditions: At any time prior to its commencement of disbursement of funds hereunder Escrowee reserves the right to decline any risk offered for insurance hereunder, whereupon it shall return to the Lender any documents in its possession relating to such loan and the funds received by it. Commencement of disbursements makes this agreement effective as to all funds received and disbursed on the construction in question;

19. Where, after the first disbursement, a further title search reveals a subsequently arising exception over which Escrowee is unwilling to insure, it will notify the Lender and may discontinue disbursement, until the exception has been disposed of to Escrowee's satisfaction;

20. Escrowee has no liability for loss caused by an error in the certification furnished it hereunder as to work in place;

21. Escrowee shall not be liable for loss or impairment of funds in the course of collection or on deposit of disbursement, due to bank failure, insolvency or suspension, except such as shall result from failure of the Escrowee to comply with written instructions to deposit the funds in a bank specified by the lender. Documents or funds deposited in the U. S. Mail shall not be construed as being in the custody of the Escrowee;

22. Contractor's Indemnification: In consideration of, among other things, Fidelity National Title Insurance Company's entering into this Escrow Agreement, contractor, for himself and for his heirs, successors, assigns and administrators, indemnifies and saves Fidelity National Title Insurance Company harmless from any and all losses, costs, damages, expenses and liabilities including attorney's fees which Fidelity National Title Insurance Company may incur under the aforementioned commitment or policy and the endorsements thereto or under this Escrow Agreement, arising from any mechanic's and materialmen's liens for services, labor or material pursuant to contractor's construction contract with owner or from any erroneous information which contractor, or any person claiming by, through or under him, may have provided Fidelity National Title Insurance Company, or from the breach of any warranty or covenant made by contractor to Fidelity National Title Insurance Company;

23. Owner's Indemnification: Because contractor is an agent of the owner for purposes of the construction project, owner shall be responsible to Fidelity National Title Insurance Company for the performance of contractor's obligations in connection with said indemnification. In addition, and in consideration of, among other things, Fidelity National Title Insurance Company's entering into the Escrow Agreement, owner, for himself and for his heirs, successors, assigns and administrators, indemnifies and saves Fidelity National Title Insurance Company harmless from any and all losses, cost, damages, expenses and liabilities, including attorney's fees, which Fidelity National Title Insurance Company may incur because of mechanic's and materialmen's liens under said commitment or policy and the endorsements thereto or under this Escrow Agreement, or from the breach of any warranty or covenant made to Fidelity National Title Insurance Company by owner, or any person claiming by, through or under him.

IN WITNESS WHEREOF, this Agreement has been executed as of the day and year first above written.

By: \_\_\_\_\_

By: \_\_\_\_\_

Its \_\_\_\_\_

Its \_\_\_\_\_

(Owner)

(Owner)

By: \_\_\_\_\_

By: \_\_\_\_\_

Its \_\_\_\_\_

Its \_\_\_\_\_

(Lender)

(Contractor)

Fidelity National Title Insurance Company

By: \_\_\_\_\_

Its \_\_\_\_\_

Order No

**EXHIBIT A**