

FORM D4

PERFORMANCE SECURED BY FUNDS RETAINED BY LENDER  
MORTGAGE PROCEEDS

*This is a sample form. The form submitted to the Planning Board shall be prepared as an original document. The Developer should not attempt to "fill in the blanks" on this copy.*

\_\_\_\_\_, 20\_\_  
, Massachusetts

AGREEMENT made this date between the Planning Board of the Town of Lexington, hereinafter referred to as "the Board"; \_\_\_\_\_ hereinafter referred to as "the applicant" of (name of applicant)

\_\_\_\_\_ and \_\_\_\_\_  
(address of applicant)

\_\_\_\_\_, hereinafter referred to as "the lender" of \_\_\_\_\_ (name of bank that has first mortgage)

\_\_\_\_\_, to secure construction of ways and \_\_\_\_\_ (address of lender) installation of municipal services in the subdivision of land shown on a plan entitled

by: \_\_\_\_\_ dated: \_\_\_\_\_, 20\_\_  
and showing \_\_\_ proposed lots, hereinafter referred to as the "definitive plan."

WHEREAS, the applicant and the Board have executed a covenant, dated \_\_\_\_\_, 20\_\_, recorded in the Middlesex County Registry of Deeds, Book \_\_\_\_\_, Page \_\_\_\_\_; and

WHEREAS, the applicant has recorded a first mortgage with the lender dated \_\_\_\_\_, 20\_\_, recorded in the Middlesex County Registry Deeds, Book \_\_\_\_\_, Page \_\_\_\_\_, covering as shown on the above-referenced plan as security for the payment of a certain note in the principal sum of \_\_\_\_\_ dollars; and

WHEREAS, there is now due and available to the applicant on account of said loan a sum not less than dollars; and

WHEREAS, the Board is in receipt of a recommendation of the Town Engineer, dated \_\_\_\_\_ 20\_\_, and has determined the amount of surety needed for the construction of ways and installation of utilities;

NOW, THEREFORE, in consideration of the mutual covenants herein contained, the parties hereto agree as follows:

1. The applicant and the lender warrant and represent that they are the only parties having any interest in lots numbered \_\_\_ through \_\_\_ inclusive shown on the definitive plan and that they are duly authorized and empowered to enter into this agreement upon the terms and conditions herein set forth.
2. The lender hereby acknowledges that it has retained and set aside from said loan the sum of dollars (\$\_\_\_\_\_) to secure performance of the work, which sum shall not be released except in accordance with the provisions of this agreement.

3. The applicant and lender hereby bind and obligate themselves, their executors, administrators, devisees, heirs, successors and assigns, jointly and severally to the Board, in the sum of

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 RETAINED BY LENDER, MORTGAGE PROCEEDS  
 AS OF (date)

dollars, and have secured this obligation by the lender retaining said sum of money of said principal sum otherwise due the applicant to insure the performance by the applicant of all covenants, conditions, agreements, terms and provisions contained in the following:

- a. Conditions included in the Certificate of Action issued by the Planning Board and dated \_\_\_\_\_  
 (date of vote to approve);
  - b. The definitive plan as qualified by the Certificate of Action; and
  - c. The subdivision control law and the Planning Board's Rules and Regulations governing this subdivision and dated \_\_\_\_\_;  
 (date of Rules and Regulations which govern plan)
  - d. A covenant, dated \_\_\_\_\_, 20\_\_, recorded in the Middlesex Registry of Deeds, Book \_\_\_\_\_, Page \_\_\_\_\_; and
  - e. Other document(s) specifying construction or installation to be completed, namely: specify other documents, if any, and list lots secured if only a part of the subdivision is secured by a lender's agreement \_\_\_\_\_.
4. The applicant that it shall expeditiously undertake to perform the work and that in all events the work shall be performed no later than \_\_\_\_\_, unless such date is extended by written agreement of the parties hereto. The Board shall be under no obligation to extend such date and may condition any such extension upon reasonable further conditions, including a condition that additional sums be held pursuant to this agreement on account of increased costs.
5. The parties agree that the work is of such a nature that provision may be made for a release in stages of the sum held pursuant to this agreement. Accordingly, such sum be released from time to time by the lender to the applicant upon receipt by the lender of a certificate from the Board that a

specified amount of the work has been performed to the satisfaction of the Board and that the Board has voted to release a specified sum, and in accordance with the following schedule:

SUM TO BE RETAINED BY LENDER	STAGE OF CONSTRUCTION AND OR INSTALLATION TO BE COMPLETED	DATE WHEN CONSTRUCTION INSTALLATION IS TO BE COMPLETED
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- 1. \$                      Installation of all utilities
- 2. \$                      Installation of "binder" course of street
- 3. \$                      Installation of surface course of street, final grading, loaming and seeding

If the Board shall not provide a final certificate prior to the Completion Date because of the failure of the applicant to perform its obligations hereunder, then, upon notice from the Board to the lender of such fact, such (or such portion thereof as the Board may determine to be appropriate in the circumstances) shall be made available to the Town of Lexington (without, however, intending hereby to require Town Meeting action on account thereof) to enable it to cause the applicant's obligations hereunder to be performed. The

lender shall have no obligation to inquire into the validity of any such notice and shall be fully protected in relying upon the terms set forth therein.

The applicant hereby expressly assents to release of sums hereunder in accordance with the foregoing procedures and agrees that any such release shall be considered as properly made in accordance with the terms hereof except for actions taken by the lender or the Board in bad faith. Any unused portion of such funds will be released by the Planning Board and may be disbursed by the lender to the applicant upon completion of the work by said Town.

6. In consideration of the foregoing, the Board hereby releases lots numbered \_\_\_ through inclusive as shown on the definitive plan from the provisions of the covenant and the conditions therein imposed. Except to the extent herein expressly set forth, the Board does not waive any rights it may have on account of the definitive plan or the covenant or under the Massachusetts Subdivision Control Law and the Board's Rules and Regulations adopted there under. The lender hereby assents to any and all changes and modifications which may be made by the Board and the applicant with respect to the definitive plan, said certificate of action, this agreement and other relevant documents.

7. This agreement shall be binding upon the parties hereto and their respective successors and assigns.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals as of the day and year first above written.

\_\_\_\_\_  
Signature of Applicant

Applicant's Name Typed \_\_\_\_\_

Address \_\_\_\_\_

\_\_\_\_\_  
Signature of Authorized Representative of the Lender

Name of Authorized Representative Typed \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Signatures of a Majority of the Lexington Planning Board