

RESOLUTION NO. 2392

A RESOLUTION OF THE MAYOR AND COMMON COUNCIL OF THE TOWN OF PAYSON, ARIZONA, APPROVING AND AUTHORIZING THE TOWN MANAGER TO EXECUTE AN AGREEMENT FOR SUBDIVISION GRADING IMPROVEMENTS WITH HALLIE OVERMAN (CHILSON RANCH SUBDIVISION).

WHEREAS, the developer of the Chilson Ranch Subdivision desires to proceed with construction of the Chilson Ranch grading improvements; and

WHEREAS, the Town has negotiated an Agreement for Subdivision Grading Improvements with the developer requiring the posting of assurances that such improvements will be constructed,

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

Section 1. That the Agreement for Subdivision Grading Improvements, attached hereto as Exhibit "A" and incorporated herein as though set forth in full at this point, be and is hereby approved in substantially the form as set forth in said Exhibit "A".

Section 2. That Debra A. Galbraith, Town Manager of the Town of Payson, be and is hereby authorized to execute such Agreement in substantially the form attached.

Section 3. That the Town of Payson be and hereby is authorized to take such other and further actions as are necessary or appropriate to carrying out the purposes of such Agreement.

PASSED AND ADOPTED BY THE MAYOR AND COMMON COUNCIL OF THE TOWN OF PAYSON, ARIZONA, this \_\_\_\_ day of June, 2008, by the following vote:

AYES \_\_\_\_\_ NOES \_\_\_\_\_ ABSTENTIONS \_\_\_\_\_ ABSENT \_\_\_\_\_

\_\_\_\_\_  
Kenny J. Evans, Mayor

ATTEST:

APPROVED AS TO FORM:

\_\_\_\_\_  
Silvia Smith, Town Clerk

\_\_\_\_\_  
Samuel I. Streichman, Town Attorney

**Prepared by Town of Payson Legal Department**

*SIS:dbs June 17, 2008 (5:49PM)*

*C:\MyFiles\Resolutions\2392 Grading Agreement-Chilson Ranch.wpd*

JUN 19 2008 G.9

# EXHIBIT "A"

to Resolution No. 2392

When recorded, return to:  
Samuel I. Streichman  
Town of Payson Legal Department  
303L North Beeline Highway  
Payson, Arizona 85541  
Phone: 928-474-5242, Ext. 208

## AGREEMENT FOR SUBDIVISION GRADING IMPROVEMENTS Chilson Ranch, Payson, Arizona

This Agreement is made and entered into as of the \_\_\_\_ day of \_\_\_\_\_, 2008, by and between the Town of Payson, a municipal corporation of the State of Arizona (the "Town") and Hallie Overman, a married woman, dealing with her sole and separate property (the "Subdivider") (collectively, the "Parties"). The Parties hereby confirm and agree as follows:

### RECITALS

- A. The Subdivider intends to subdivide and develop that certain property located in Payson, Arizona, identified as the Chilson Ranch Subdivision (the "Subdivision"); and
- B. The Town and Hurlburt Development, Inc., an Arizona Corporation (of which Hallie Overman is President) have entered into a Development Agreement for the development of the Subdivision that has been amended from time to time; and
- C. The Subdivider wishes to place fill dirt on the Creech Property portion of the Subdivision, as such portions identified in the First Amendment to the Development Agreement, recorded in the official records of Gila County on April 4, 2007 at recording number 2007-005746 ("the Property"); and
- D. The Town seeks to protect the health, safety and general welfare of the community by placing restrictions on the placement of fill dirt prior to the approval of final improvement plans for the Subdivision.

### AGREEMENT

NOW, THEREFORE, in consideration of the foregoing premises and the mutual promises and agreements set forth herein, the Parties hereto state, confirm and agree as follows:

1. The Subdivider shall be permitted to place fill dirt on the Property subject to the restrictions contained in Section 2 below.

2. The Subdivider shall:
- a. Take all steps deemed necessary by the Town Engineer to mitigate all dust emanations from the fill dirt placed on the Property; and
  - b. Assure that none of the fill dirt erodes or washes away onto neighboring properties, into the American Gulch, or into the Green Valley Park lakes; and
  - c. Not allow any of the fill dirt to be piled higher than five (5) feet above grade; and
  - d. Not disrupt any vegetation that is protected by any provision of the Town Code, including, but not limited to the Unified Development Code; and
  - e. Comply with the provisions of Section 130.38 (Roadway Protection) of the Town Code; and
  - f. Not allow any Construction Traffic (as defined in Section 130.38) to operate before 7:00 am or after 5:00 pm; and
  - g. Not place more than five thousand (5,000) cubic yards of fill dirt on the Property.

3. Security. To secure performance of its obligations under this Agreement, Subdivider shall submit assurances through security acceptable to the Town. Said security shall be in the amount of Ten Thousand Dollars (\$10,000.00). Subdivider and Town agree that the sum referenced above will be used only for the purpose of remediating any default or curing any nonperformance under this Agreement. Said security shall be provided to the Town within ten (10) days of the effective date of this Agreement.

4. Town's Option Upon Default. If Subdivider defaults on its obligations or fails to perform any obligation required on its part to perform under this Agreement, the Parties agree that, in addition to any other remedies the Town may have against the Subdivider for failure to perform as required under this Agreement, the Town shall have and is hereby granted the right, at its sole discretion, without election, obtain the Security funds and may use such funds to remediate any default or failure to perform by the Subdivider. In this connection, the Town shall have sole discretion in determining a default or failure to perform under this Agreement, which discretion shall be exercised in a fair and reasonable manner.

5. Termination. This Agreement shall remain in full force and effect until the Town has approved the Subdivider's final improvements.

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

7. 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 and to this end the provisions of this Agreement are severable.

8. 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 both the Town and the Subdivider; nor will the waiver of any default under this Agreement be deemed a waiver of any subsequent default of the same type. The Town's failure to exercise any right under this Agreement will not constitute the approval of any wrongful act by the Subdivider.

9. Complete Agreement. This Agreement and additional written agreements described herein, if any, contain and set forth the entire and exclusive Agreement and understanding between the Parties hereto pertaining to the subject matter or rather reflect the reasonable expectations of the Parties hereto. This Agreement may not be rescinded, canceled, terminated, supplemented, amended or modified in any way whatsoever without the prior written consent of all Parties to this Agreement.

10. Notice. The Subdivider 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 Subdivider or the Escrow Agent; 2) intent to transfer, or a transfer of title to the Property by deed, or a transfer of title to the Property by deed, contract or operation of law; 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 Subdivider; 5) any other event that may affect performance of the Parties under this Agreement.

11. Address of the Parties:

Subdivider: Hallie Overman

Payson, Arizona 85541

Town: Town of Payson

303 N. Beeline Highway

Payson, Arizona 85541

Attention: Town Engineer Engineer

12. Date of Agreement. The date of this Agreement shall be the date first above written.

13. Cancellation. This Agreement is subject to the provisions of A.R.S. § 38-511, the terms of which are incorporated herein, and which provides for cancellation of contracts by the municipality for certain conflicts of interest.

14. Authority. The Parties acknowledge and warrant that each of them is fully authorized and empowered to execute this Agreement by and through the individual(s) executing hereinafter.

15. 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.

16. Representations. Each of the Parties acknowledge and warrant that it has been, or has had an opportunity to be represented by independent 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 the party who drafted this Agreement or any provision or portion thereof.

17. Counterparts. This Agreement may be executed in one or more counterparts. Each executed counterpart shall for all purposes be deemed an original, but all of which together shall constitute in the aggregate but one in the same instrument. The signature pages from one or more counterparts may be removed therefrom and attached to one or more duplicate agreements containing all original signatures.

18. 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.

19. Dispute Resolution. This Agreement shall be governed and construed in accordance with the internal laws of the State of Arizona. With the written consent of both Parties, any dispute, controversy, claim, or cause of action arising out of or related to this Agreement may, but in no event need, 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.; and judgment upon any award rendered by the arbitrator(s), if filed in Arizona Superior Court, shall be filed in the Superior Court of Gila County, Arizona; or any such dispute, controversy, claim, or cause of action may be litigated in the Superior Court of Gila County, Arizona. The venue for any such dispute shall be Gila County, Arizona, and both Parties consent in advance to such venue and jurisdiction and waive any right to object that Gila County is an inconvenient or improper forum based upon lack of venue. 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, but each party shall bear its own attorneys' fees without contribution from the other party, whether the same is resolved through arbitration, litigation in a court, or otherwise.

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

TOWN OF PAYSON

Hallie Overman

By \_\_\_\_\_  
Debra Galbraith  
Town Manager

By \_\_\_\_\_  
Hallie Overman, a married woman  
dealing with her sole and separate property

ATTEST:

APPROVED AS TO FORM:

By \_\_\_\_\_  
Silvia Smith, Town Clerk

By \_\_\_\_\_  
Samuel I. Streichman, Town Attorney

State of Arizona        )  
                                  ) ss.  
County of Gila         )

The foregoing Agreement for Subdivision Grading Improvements was signed before me this \_\_\_\_\_ day of \_\_\_\_\_, 2008, by Debra Galbraith, Town Manager of the Town of Payson, on behalf of the Town of Payson.

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

My commission expires:  
\_\_\_\_\_

State of Arizona        )  
                                  ) ss.  
County of Gila         )

The foregoing Agreement for Subdivision Grading Improvements was signed before me this \_\_\_\_\_ day of \_\_\_\_\_, 2008, by Hallie Overman, a married woman dealing with her sole and separate property.

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

My commission expires:  
\_\_\_\_\_