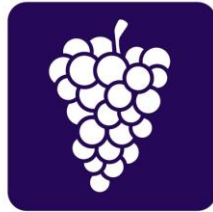


# New Kent

C O U N T Y • V I R G I N I A



A GREAT PLACE TO GROW

## EROSION AND SEDIMENT CONTROL PERFORMANCE AGREEMENT

BETWEEN

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(Property Owner and/or Property Owner and Contractor Jointly)

AND

THE COUNTY OF NEW KENT, VIRGINIA

<b>DATE:</b>	
<b>TAX MAP NO. OR SUBDIVISION NAME:</b>	
<b>AMOUNT OF SECURITY:</b>	
<b>SECURITY NUMBER</b>	

**NEW KENT COUNTY  
EROSION AND SEDIMENT CONTROL  
PERFORMANCE AGREEMENT  
SUMMARY OF IMPROVEMENTS**

1. \_\_\_\_\_
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## **EROSION AND SEDIMENT CONTROL**

### **PERFORMANCE AGREEMENT**

**THIS EROSION AND SEDIMENT CONTROL PERFORMANCE AGREEMENT** (the “E&S Agreement”) is entered into \_\_\_\_\_, 20\_\_\_\_, by (each property owner, or an individual or a corporation with authority to legally act for them) \_\_\_\_\_, (the “Property Owner”), and NEW KENT COUNTY, VIRGINIA, (the “County”), in order to assure performance by the Developer.

**IN CONSIDERATION OF** the approval by the County, through its Agent, of an erosion and sediment control plan titled “\_\_\_\_\_”, and dated \_\_\_\_\_ (the “Approved Plan”) on real property identified as Tax Map Parcel No. \_\_\_\_\_ (the “Development”), Property Owner for itself and its personal representatives, agents, assigns, and other successors in interest, agrees to construct, install and complete all of the erosion and sediment control measures set forth in the Approved Plan (the “Improvements”) necessary to comply with all statutory requirements, including the provisions of the Virginia Code, the Virginia Erosion and Sediment Control Handbook, Third Edition, the New Kent County Code, as each may be amended, and all rules and regulations adopted pursuant to these statutes (the “Requirements”). Any reference in this E&S Agreement to completion or construction of Improvements shall be deemed to include all functions, goods, and services and design and engineering work necessary to conform the Improvements to the Requirements.

### **SECTION I GENERAL**

1. The Property Owner shall complete the Improvements in conformance with the Requirements and in conformance with the Approved Plan. The Approved Plan is incorporated in this E&S Agreement only to the extent that it meets the Requirements. All necessary Improvements shall be installed in full compliance with the Requirements and all stabilization measures. Extensions of time for completion may be granted by the Environmental Director or his designee (the “Director”) in accordance with the New Kent County Code, regulations, and procedures of the County.
2. If after work has commenced on the Improvement it is in the opinion of the Director that the Approved Plan is inadequate to ensure that the construction and installation of the Improvements will conform to the Requirements, the Property Owner, upon the written demand of the Director, shall submit revised plans conforming to the Requirements and shall construct the Improvements in accordance with the required revisions.

### **SECTION II PROPERTY OWNER COVENANTS**

The Property Owner covenants and agrees as follows:

1. Comply with Requirements

To comply with all Requirements in the construction and maintenance of all Improvements and to assure that all land disturbance and stabilization activities on the Development is complete and remains stabilized for a period of one (1) year following certification of plan completion.

2. Acceptance of Improvements

To promptly request inspections, file applications, and take any other actions required of the Property Owner for the purpose of effecting acceptance or approval of the Improvements by the appropriate governmental entity.

3. Assignment of Property Rights to County

In the event of default by the Property Owner, to assign or grant to the County all property rights necessary for completion of the Improvements. If such rights can not be assigned or conveyed, the Property Owner shall post bond for the acquisition of such property rights by the County.

4. Security

(a) To provide and maintain security satisfactory to the County to secure performance under this E&S Agreement:

(1) The amount of security shall be the estimated costs of construction for the Improvements in the approved Erosion and Sediment Control Plan.

(2) The estimated construction costs shall be increased by ten percent (10%) (the "Default Administration Fee") to cover any expenses that the County may incur if default occurs. The Default Administration Fee shall not exceed \$2,000,000 in additional security.

(b) The security shall be provided and maintained in the form of a cash escrow, an irrevocable letter of credit, or performance bond in the amount of \$\_\_\_\_\_ and shall be in a form approved by the County Attorney.

(c) If the security provided is not permitted to be for an indefinite period of time, the duration of the surety shall be until \_\_\_\_\_, 20\_\_.

(d) With the execution of this E&S Agreement, the security shall be delivered to the County.

(e) In the event all Improvements are not completed ninety (90) days prior to the expiration date of the security, the Property Owner shall provide a new security instrument within sixty (60) days prior to the expiration date. Should the Property

Owner fail to replace the security within this time period, the Property Owner shall be in default.

(f) The security shall be released as follows:

(1) Partial Release: Once the County issues an approved certification of plan completion, the Property Owner may request in writing a partial security release, up to ninety percent (90%) of the security, provided that the remaining ten percent (10%) is not less than \$500.00. If the remaining ten percent (10%) is less than \$500.00, the County will retain the minimum of \$500.00.

(2) Final Release: A full release of the security will occur when the land has been stabilized for one year following issuance of a certification of plan completion (the "Stabilization Period"). If, in the opinion of the Director, the land is not stabilized during the Stabilization Period, the County will issue a written notice of such to the Property Owner. The Property Owner shall have ten (10) days to stabilize the land in accordance with the Requirements and this E&S Agreement (or upon written request, such additional time as may be expressly authorized in writing by the Director). If the land is not stabilized within the allotted number of days, the Property Owner will be in default.

(g) No partial or complete release will occur if the Development is causing off-site erosion or sediment deposits or storm water drainage problems in violation of the Requirements. If such off-site erosion or sedimentation occurs, stop work orders shall be issued for the Development and no building permits or certificates of occupancy will be issued for the Development until such off-site erosion or sedimentation is abated in full compliance with the Requirements.

#### 5. Hold Harmless

To indemnify, defend and hold harmless the County and its officers, agents, and employees from any claims, damages and actions of any kind or nature, whether at law or in equity, however caused in connection with any work undertaken by the County to complete the Improvements, including those arising directly or indirectly from the Developer's constructions, failure to maintain, or use of such Improvements prior to final acceptance.

#### 6. Payment for Professional Services

To be responsible for, and agree to pay any and all costs including professional services incurred by the County in executing its responsibilities and oversight under this E&S Agreement.

#### 7. Invitation

To give the County all rights to enter upon the property as an invitee for any and all activities related to the enforcement of this E&S Agreement and for the purposes of the public health, safety, and welfare.

8. Assumption of Liability

To be jointly and severally liable for all obligations of this E&S Agreement, including performance and payment.

**SECTION III  
DEFAULT**

1. A default shall be deemed to have occurred on the part of the Property Owner if the Property Owner
  - (a) Fails to perform or adhere to any provision or condition in this E&S Agreement, including the time periods or any extensions that may have been granted by the Director in writing; or
  - (b) If in the judgment of the Director, the Property Owner has at any time:
    - (1) Abandoned the performance of its obligations under the E&S Agreement; or
    - (2) Renounced or repudiated its obligations under the E&S Agreement; or
    - (3) Demonstrated through insolvency, inaction, or otherwise, including the voluntary filing of a bankruptcy that its obligations under the E&S Agreement cannot be completed or maintained as required in this E&S Agreement.
  - (c) Fails to renew or have reissued a security instrument for the Improvements yet to be completed.
2. In the event of default, the Property Owner shall be mailed a written Notice of Default and given ten (10) days after receipt (or upon written request, such additional time as may be expressly authorized in writing by the Director) to:
  - (a) Provide satisfactory evidence that no default exists; or
  - (b) Cure the default; or
  - (c) In the event curing the default reasonably requires more than ten (10) days to complete, commence the cure no later than such ten (10) day period and diligently proceed to cure the default, but in no event shall such cure extend longer than sixty (60) days from the receipt of the Notice of Default unless extended by the Director. Notice of default shall not be required where default occurs for Property Owner's failure to give any notice in a timely manner. Failure of the Director to

give notice of default shall not constitute waiver of such default unless otherwise expressly stated in writing.

3. If the Property Owner has received Notice of Default:
  - (a) If the default is not cured within ten (10) days from the receipt of the Notice of Default the Property Owner's right to complete the E&S Agreement terminates and the County will draw upon the security and use such funds to complete the obligations under this E&S Agreement.
  - (b) The Property Owner acknowledges and agrees that the County is under no obligation to give any notice to the Property Owner of its intent to draw on posted security when default occurs.
  - (c) The County shall not be liable to the Property Owner or to any third party for the manner that the Improvements are completed or for any delay in fulfilling the Property Owner's obligations under this E&S Agreement.
  - (d) The Property Owner shall be liable to the County for payment of the cost of completion of the Improvements, in addition to all administrative costs, regardless of whether the ultimate cost exceeds that of the security posted. The cost of completion shall include all functions, goods and services, and design and engineering work necessary to bring the Improvements into conformance with the Requirements. Administrative costs shall include the time expended by the County's staff, County Attorney, consultants, and all legal fees and costs associated with the Development and enforcement of this E&S Agreement.
  - (e) The County shall not be bound by the Property Owner's plans if unforeseen conditions within the Development require the County to deviate from the approved plan. Such deviations shall be reasonable with regard to costs, time, and exigency and shall be at the sole discretion of the Director.
4. The Property Owner recognizes that the County will suffer financial loss if the Improvements are not completed by the Completion Date. Accordingly, the Property Owner agrees to pay \$100.00 per day from the date of Property Owner's default through to the completion of the Improvements by the County. Both parties also recognize the difficulty, delays, expense, and damages involved in proving in a legal proceeding the actual loss suffered by the County if the Improvements are not completed on time. The Property Owner further agrees should there be a default, to waive any and all rights to assert a defense to, or challenge the validity of, this provision or the assessment of liquidated damages on the grounds that such liquidated damages are void as penalties or not reasonably related to the County's actual damages.

#### **SECTION IV MISCELLANEOUS**

1. In any action at law or in equity to enforce any provision of this E&S Agreement, including any appeals that may be taken, the County shall be entitled to recover reasonable attorneys' fees, costs and expenses.
2. If any clause or portion of this E&S Agreement is found not to be valid and binding, the remainder shall continue in full force and effect.
3. The failure or refusal of the County to take any action, proceedings, or step to enforce any remedy or exercise any right under this E&S Agreement or the taking of any action, proceeding, or step by the County, acting in good faith upon the belief that same is permitted shall not in any way release the Property Owner from the obligations of this E&S Agreement.
4. This E&S Agreement shall be administered and interpreted in accordance with the laws of the Commonwealth of Virginia. Any actions arising out of this E&S Agreement or other obligations securing the obligations of this E&S Agreement shall be filed and maintained in the District Court or Circuit Court of New Kent County, Virginia.
5. The purpose and effect of this E&S Agreement is to secure the completion of all Improvements required by the Virginia Code, the Virginia Erosion and Sediment Control Handbook, Third Edition, as amended, the New Kent County Code, the New Kent County Zoning and Subdivision Ordinances, and all other applicable statutes, ordinances, rules and regulations. The County does not waive or modify any provision or requirement of those statutes, ordinances, rules or regulations by this E&S Agreement. Any approved plan or revision referred to anywhere in this E&S Agreement is incorporated for reference purposes only to the extent that it meets, at a minimum, the unmodified requirements of those statutes, ordinances, regulations and rules.
6. Whenever notice is required, it shall be deemed given if mailed registered, return receipt requested, in the names and to the addresses given below; provided, however, that notice of change of address shall be effective if given in accordance with this paragraph.

**DEVELOPER**

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

**COUNTY**

Environmental Director  
 P.O. Box 150  
 12007 Courthouse Circle  
 New Kent, Virginia 23124

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*The parties have acknowledged this E&S Agreement by their signatures and seals set out below.*

**PROPERTY OWNER:**

Type of Organization (Individual/  
Sole Proprietorship/Partnership/  
Corporation):

\_\_\_\_\_

Legal Name(s) & Mailing Address(es):  
(Print or type)

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Signature:

Name (Print or type):

Address (if different from above):

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

COMMONWEALTH OF VIRGINIA,  
CITY/COUNTY OF \_\_\_\_\_, to-wit:

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by \_\_\_\_\_.

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

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

**NEW KENT COUNTY, VIRGINIA**

Environmental Director  
P. O. Box 150  
New Kent, Virginia 23124-0150

Signature: \_\_\_\_\_ (SEAL)  
Environmental Director or Designee

COMMONWEALTH OF VIRGINIA,  
CITY/COUNTY OF \_\_\_\_\_, to-wit:

The foregoing instrument was acknowledged before me this \_\_\_\_ day of  
\_\_\_\_\_, 20\_\_\_\_, by \_\_\_\_\_.

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

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