

ORDINANCE NO. 2020-04

**AN ORDINANCE AMENDING SECTION 17.21 OF THE FRUITA MUNICIPAL CODE
CONCERNING IMPROVEMENT GUARANTEES AND DEVELOPMENT
AGREEMENTS**

WHEREAS, pursuant to C.R.S. §31-15-103 and §31-15-104, and pursuant to the home rule powers of the City of Fruita (“City”), the City Council has the power to make and publish ordinances necessary and proper to provide for the safety, preserve the health, promote the prosperity, and improve the morals, order, comfort, and convenience of its inhabitants; and

WHEREAS, the City Council approved Resolution 2020-09 on February 4, 2020, thereby adopting the City of Fruita Comprehensive Plan Fruita In Motion: Plan Like a Local 2020 (the “Comprehensive Plan”); and

WHEREAS, the Comprehensive Plan summarized those actions intended to implement the goals and policies found throughout the Comprehensive Plan; and

WHEREAS, amendments to Chapter 17 (the “Land Use Code) of the Fruita Municipal Code (the “Municipal Code”) are necessary to implement certain action items identified within the Comprehensive Plan; and

WHEREAS, the Land Use Code has been established for the purpose of promoting the health, safety and welfare of the present and future inhabitants of the community;

WHEREAS, City staff has proposed additional amendments to the Land Use Code for consideration; and

WHEREAS, the Planning Commission reviewed the amendments contained here in on September 8, 2020 and formalized their recommendation regarding those amendments with a vote of 6-0 of those members present recommending approval of the proposed amendments; and

WHEREAS, the ordinance was introduced at first reading on September 15, 2020 pursuant to Section 2.13(B) of the City Charter; and

WHEREAS, pursuant Section 2.13(C) of the City Charter and Section 17.01.130 of the Municipal Code, a notice of public hearing was published in the Grand Junction Sentinel on August 22, 2020 and a notice was posted a Fruita City Hall on August 18, 2020 for the City Council meeting on October 6, 2020 to consider City staff and Planning Commission recommendations and receive public comments; and

WHEREAS, the City Council finds that passage of Ordinance 2020-04 will promote the health, safety and general welfare of the Fruita community; and,

WHEREAS, approval of this Ordinance on first reading is intended only to confirm that the City Council desires to comply with the requirement of Section 2.13(B) of the City Charter by setting

a public hearing in order to provide the public an opportunity to present testimony and evidence and that approval of this Ordinance on first reading does not constitute a representation that the City Council, or any member of the City Council, has determined to take final action on this Ordinance prior to concluding the public hearing on second reading.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF FRUITA, COLORADO the following:

Section 1. Recitals Incorporated. The above and foregoing recitals are incorporated herein by reference and adopted as findings and determinations of the City Council.

Section 2. Repealed and Re-enacted. Section 17.21 of the Fruita Municipal Code is hereby repealed and re-enacted to read as shown in Exhibit A.

Section 3. Severability. If any provision of this Ordinance, or the application of such provision to any person or circumstance, is for any reason held to be invalid, such invalidity shall not affect other provisions or applications of this Ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this Ordinance are declared to be severable. The City Council hereby declares that it would have passed this Ordinance and each provision thereof, even though any one of the provisions might be declared unconstitutional or invalid. As used in this Section, the term “provision” means and includes any part, division, subdivision, section, subsection, sentence, clause or phrase; the term “application” means and includes an application of an ordinance or any part thereof, whether considered or construed alone or together with another ordinance or ordinances, or part thereof, of the City.

Section 4. Effective Date. This Ordinance shall take effect thirty days after the date of final passage in accordance with Section 2.13(G) of the City Charter.

Section 5. Safety Clause. The City Council hereby finds, determines and declares that this Ordinance is promulgated under the general police power of the City, that it is promulgated for the health, safety and welfare of the public, and that this Ordinance is necessary for the preservation of health and safety and for the protection of public convenience and welfare. The City Council further determines that the Ordinance bears a rational relation to the proper legislative object sought to be obtained.

Section 6. No Existing Violation Affected. Nothing in this Ordinance shall be construed to release, extinguish, alter, modify, or change in whole or in part any penalty, liability or right or affect any audit, suit, or proceeding pending in any court, or any rights acquired, or liability incurred, or any cause or causes of action acquired or existing which may have been incurred or obtained under any ordinance or provision hereby repealed or amended by this Ordinance. Any such ordinance or provision thereof so amended, repealed, or superseded by this Ordinance shall be treated and held as remaining in force for the purpose of sustaining any and all proper actions, suits, proceedings and prosecutions, for the enforcement of such penalty, liability, or right, and for the purpose of sustaining any judgment, decree or order which can or may be rendered, entered, or made in such actions, suits or proceedings, or prosecutions imposing, inflicting, or declaring such penalty or liability or enforcing such right, and shall be treated and held as

remaining in force for the purpose of sustaining any and all proceedings, actions, hearings, and appeals pending before any court or administrative tribunal.

Section 7. Codification of Amendments. The codifier of the City's Municipal Code is hereby authorized to make such numerical and formatting changes as may be necessary to incorporate the provisions of this Ordinance within the Municipal Code. The City Clerk is authorized to correct, or approve the correction by the codifier, of any typographical error in the enacted regulations, provided that such correction shall not substantively change any provision of the regulations adopted in this Ordinance. Such corrections may include spelling, reference, citation, enumeration, and grammatical errors.

Section 8. Publication. The City Clerk is ordered to publish this Ordinance in accordance with Chapter 2.13(F)(1) of the Fruita Municipal Code.

**PASSED AND ADOPTED BY THE FRUITA CITY COUNCIL ON THIS
6TH DAY OF OCTOBER, 2020.**

CITY OF FRUITA

Joel Kincaid, Mayor

ATTEST:

Margaret Sell, City Clerk

EXHIBIT A TO ORDINANCE 2020-04

CHAPTER 17.21

IMPROVEMENT GUARANTEES AND DEVELOPMENT AGREEMENTS

Sections:

- 17.21.010 General Requirements**
- 17.21.020 Construction of Improvements**
- 17.21.030 Schedule of Improvements to Be Constructed**
- 17.21.040 City Inspections of Improvements**
- 17.21.050 Final Approval of Improvements by City Staff**
- 17.21.060 Conveyance of Public Improvements**
- 17.21.070 Warranty for Public and Other Required Improvements**
- 17.21.080 Performance Guarantee Required**
- 17.21.090 Indemnification and Insurance**
- 17.21.100 Default; Notice and Termination of Development Agreements**
- 17.21.110 Issuance of Certificate of Compliance**

17.21.010 GENERAL REQUIREMENTS.

An approval of a land development application which requires a development agreement does not become effective until a development agreement and related documents, setting forth financial arrangements to secure the actual construction of required public or semi-public (shared) improvements required by the City, has been executed between the property owner and the City Manager or Community Development Director. The development agreement shall include a guarantee to construct all required improvements together with collateral which shall be sufficient to ensure the completion of the required improvements. With the property owner's written consent, the City may enter into a development agreement with a developer or applicant who is not the property owner, provided that the agreement(s) are binding on the subject property and run with the land.

17.21.020 CONSTRUCTION OF IMPROVEMENTS.

Every development agreement shall provide that the applicant, at its sole cost and expense, shall design, purchase, construct and install all elements of all improvements, whether the improvements are located within the subdivision or development property (on-site) or outside of the subdivision or development (off-site). The improvements shall be designed and built in conformance with this Title and other applicable City ordinances and regulations in effect as of the effective date of the development agreement, unless otherwise provided in the approved plans and specifications. Those improvements shall be designed and approved by a registered professional engineer retained by the developer or applicant. All drawings and plans for those improvements shall be stamped by the engineer. Prior to the commencement of construction of the development improvements, the City shall review and approve all

drawings and plans.

17.21.030 SCHEDULE OF IMPROVEMENTS TO BE CONSTRUCTED.

A. All development agreements shall include a schedule of the required improvements showing in detail the required improvements, their costs, and reasonable provisions to complete the improvements in accordance with design and time specifications. No work shall be commenced on those improvements until the schedule of improvements is approved by the City and the required performance guarantee is delivered to the City.

B. Every improvement identified in the development agreement shall include a time schedule for the construction and completion of the required improvements. The schedule shall provide for a commencement date as well as a date when such improvements will be substantially completed. Under the schedule, all required development improvements shall be completed no later than one (1) year following the start of development.

C. Where a developer or property owner is prevented from commencing or completing any of the required improvements within the time periods set forth in the development agreement due to an unforeseeable cause or delay beyond the control and without the fault or negligence of the developer or applicant, the times for commencement and/or completion of such improvements may be extended by the Community Development Director in accordance with Section 17.05.040 in an amount equal to the time lost due to such delay if a request is made in writing to the City by the developer or applicant.

1. Delays beyond the control of the developer or applicant shall include acts of neglect by the City, fires, floods, epidemics, abnormal weather conditions, strikes, freight embargos or acts of God. Time extensions, however, will not be granted for rain, snow, wind or other natural phenomena at normal intensity within Mesa County.

2. Delays attributable to and within the control of the developer's or applicant's contractors, subcontractors or suppliers are deemed delays within the control of the developer or applicant.

17.21.040 CITY INSPECTIONS OF IMPROVEMENTS.

The City may inspect and require testing during construction of the required improvements in reasonable intervals as the responsible city officials may request. Inspection, acquiescence and approval of any inspector of the construction of physical facilities, at any particular time, does not constitute an approval by the City of any phase of the construction of such improvements. The approval is made by the City only after completion of construction of all improvements in the manner set forth in Section 17.21.060. The City also reserves the right to perform or contract for independent quality assurance tests to confirm compliance with City requirements.

17.21.050 FINAL APPROVAL OF IMPROVEMENTS BY CITY STAFF.

A. Upon completion of construction of all required improvements, the responsible city officials shall perform

final inspections of the improvements and certify with specificity whether they conform to the approved plans, specifications and design standards. The development agreement shall provide that the property owner or developer make all corrections necessary to bring the improvements into conformity with applicable city standards, approved for construction drawings, and the utility, drainage and street improvements plans and requirements of other agencies, as approved. The City is under no obligation to provide any wastewater collection service, street maintenance or issue any further planning clearances for building permits or certificates of occupancy, until all of those facilities conform to the applicable standards, plans and specifications and approved by the responsible city officials.

B. The applicant or developer shall provide all necessary engineering designs, surveys, field surveys, and "as-built" drawings for all public improvements and utility improvements, which shall be subject to review and approval by the City, and any incidental services related to the construction of the improvements, at its sole cost and expense. The legal description of all utility service lines shall be prepared by a registered land surveyor at the applicant's or developer's sole expense. In addition, all expenses incurred by the City in updating the City's base maps shall be paid by the applicant or developer, to the City.

C. All areas disturbed by construction shall be promptly revegetated with native vegetation following completion of such work unless a building permit application has been requested for a particular lot, in which case revegetation shall be provided prior to legal occupancy of such lot. The property owner or developer shall comply with all city regulations concerning dust suppression, drainage and the control of other nuisances. In addition, the applicant or developer shall control all noxious weeds and rodents within such areas to the reasonable satisfaction of the City until conveyed to individual lot owners.

17.21.060 CONVEYANCE OF PUBLIC IMPROVEMENTS.

All public improvements shall be conveyed to the City or other public entity, as applicable. Upon completion of construction in conformity with the applicable plans, standards, specifications and any properly approved changes, and final approval by the responsible city official, all public improvements shall be conveyed to the City or other public entity, as applicable. Acceptance of said conveyance to the City shall be made by the City Engineer. Following that conveyance, the City is solely responsible for the maintenance of those public improvements, unless otherwise provided for by the agreement, except for any correction work required during the warranty period.

17.21.070 WARRANTY FOR PUBLIC AND OTHER REQUIRED IMPROVEMENTS.

The property owner or developer shall warrant in the development agreement all public improvements constructed by the applicant or developer which are conveyed or dedicated to the City for a period of twenty-four (24) months from the date the City accepts the improvements. Specifically, but not by way of limitation, the property owner or developer shall warrant the following:

A. That the title conveyed shall be good and its transfer rightful; and

- B. Any and all facilities conveyed shall be free from any security interest or other lien or encumbrance; and
- C. Any and all facilities so conveyed shall be free of any and all defects in materials or workmanship.
- D. To secure the warranty:

1. The guarantee of performance provided for in this Section shall remain in effect until the end of the warranty period; or
2. The applicant or developer shall furnish the City with a cash deposit or letter of credit in an amount equal to a percent of the total construction costs as set forth in this Subsection. This security shall guarantee the payment of any reconstruction or repair costs that may be undertaken due to failures occurring during the warranty period. Responsibility for identifying the necessity of repairs or reconstruction of the improvements shall rest with the City.

Percent to Secure Warranty

Total Construction Costs	Percent to Secure Warranty
\$0.00-\$500,000.00	10%
\$500,000.01-\$1,000,000.00	7.5%
\$1,000,000.01 and over	5%

3. **Correction of Deficiencies Under Warranty.** Within thirty (30) days or a reasonable extension at the sole discretion of the City Engineer, of notification by the City of the need for repair or reconstruction, the applicant or developer shall correct the deficiencies, satisfactory to the City. Such notification shall be made by certified mail. If the applicant or developer fails to repair or reconstruct the deficiency within the time specified in this Section, the City will make the repair at the developer or property owner’s sole expense. The City may then bill the applicant or developer for the cost of the repair or declare the deposit forfeited. All repairs shall have a two (2) year warranty period and shall be guaranteed by the applicant or developer in a manner satisfactory to the City Engineer, including extension of the full warranty guarantee.
4. **Release of Warranty.** Inspection will be made by the City at the end of the warranty period and prior to the release of guarantees. All deficiencies shall be corrected prior to release of the warranty security. Upon satisfactory correction of all deficiencies and completion of the warranty period for the corrected improvements, the City will release the remaining security.
5. **Default.** If the applicant or developer defaults on any obligation to construct required public improvements or the obligation to warrant and repair such improvements, the City may demand immediate payment on the performance or warranty guarantee. In the case of deposits in escrow or letter of credit, the City may demand immediate payment of a portion of all sums obligated for the performance or warranty of any improvement. In

the case of a deed of trust guarantee method, the City may foreclose on the deed of trust and may also retain any sums deposited to obtain a partial release of the deed of trust. All funds received by the City shall be used for any construction, repair or reconstruction necessary to ensure that:

- a. All required public improvements are built to specifications necessary to receive final acceptance; and
 - b. The improvements remain in good condition for the completion of the warranty period. The City may use guarantee funds for the construction, repair or maintenance of required public improvements from the date of initial default until three (3) years after the funds have become available to the City for such use, except that no use shall be made of the funds later than two (2) years after satisfactory completion and final acceptance of the work. Following either: (1) the final acceptance of all public improvements and posting of the warranty security, or (2) successful completion of the warranty period, or (3) the three-year period provided for in this Subsection, the City shall pay to the property owner or developer all guarantee funds which were not used or obligated for the completion of the improvements.
6. Standards May not Be Altered. All provisions of this Section are mandatory and may not be altered by the subdivision agreement. The obligations contained in this Section shall be enforceable by methods of this Land Use Code, as well as by contract.

17.21.080 PERFORMANCE GUARANTEE REQUIRED.

- A. To secure the construction and installation of the public and other required improvements listed in the schedule of improvements for which the applicant or developer is responsible, whether on-site or off-site, including tasks not specifically itemized within the schedule of improvements but which can be reasonably considered necessary for the development and for which the property owner or developer is responsible, the property owner or developer shall furnish the city with a cash, letter of credit, cash bond, performance bond, or other security acceptable to the City Attorney to secure the performance and completion of such required improvements, in an amount equal to one hundred twenty-five percent (125%) of the estimated cost of those improvements.

The purpose of the cost estimate described above in Section 17.21.030 is solely to determine the amount of security required and may be revised from time to time to reflect the actual costs. No representations are made as to the accuracy of these estimates, and the applicant or developer shall agree to pay the actual cost of all such public and other required improvements. Neither the estimated costs nor the amount of the security establishes the

maximum amount of the applicant's or developer's liability.

- B. The developer or property owner shall deliver to the city the performance guarantee required by subsection (A) above prior to the recording of a subdivision final plat, or prior to recording of a PUD final development plan, or prior to the issuance of a conditional use permit or planning clearance, as applicable. Unless expressly authorized by the city, work shall not be commenced within the development until the approved security is furnished to the city. No lot within a subdivision shall be conveyed to any third party until the approved security is delivered to the city and the final plat is recorded in the records of the Mesa County Clerk and Recorder.
- C. Partial Release. Upon completion of improvements, a portion of the guarantee may be released as follows:
1. Upon completion of a certain class of improvements, such as wastewater facilities by way of example, evidenced by a detailed cost breakdown of the completed improvements, the amount of any security tendered may be reduced by up to one hundred (100) percent of the approved cost for the installation of such class of improvements, upon approval by the city.
 2. Upon completion of portions of the improvements by the applicant or developer, evidenced by a detailed cost breakdown of the completed improvements, and submittal of as-built drawings, a property owner or developer may apply to the City for a release of part or all of the collateral deposited with the City. Upon inspection and approval, the City may authorize the reduction of the amount of any performance guarantee security issued pursuant to the development agreement may be reduced by seventy-five percent (75%) of the approved estimated cost for the installation of such improvements, upon written request of the applicant or developer, and approval by the Community Development Director.
 3. Upon completion of all of the improvements required by the development agreement, and upon final inspection and approval by the city of all such improvements, the city shall further authorize a reduction of the amount of the security guaranteeing the required development improvements pursuant to Section 17.21.070(D)(2).
- D. Full Release. Pursuant to Section 17.21.110, any performance guarantee tendered to the city shall be fully released and discharged by certificate or resolution upon expiration of the twenty-four (24) month warranty period described in Section 17.21.080 and the correction of any defects discovered during such warranty period. If the correction of defects are not satisfactorily completed upon the expiration of the twenty-four (24) month warranty period, the city will retain the existing performance guarantee and may require a new performance guarantee and withhold further planning clearances for building permits and certificates of occupancy within the subdivision or development until the new performance guarantee is tendered to the city.
- E. Every development agreement shall provide that upon the developer's or property owner's failure to

perform its obligations under such agreement and all other applicable plans, drawings, specifications and documents, as approved, within the time periods set forth in the agreement, the city may give written notice to the developer or property owner of the nature of the default and an opportunity to be heard before the City Council concerning such default. If the default is not remedied within thirty (30) days of receipt of the notice or of the date of any hearing before the City Council, whichever is later (or any reasonable time period necessary to cure the default provided that the developer or the property owner has commenced in good faith to cure the default), the city may then give written notice to the developer or property owner and any surety on a performance bond, issuer of a letter of credit, or escrow agent that the city, as agent for the developer or property owner, is proceeding with the task of installing and completing the remaining required improvements in whole or in part.

- F. Every development agreement must contain a power of attorney whereby the developer or property owner designates and irrevocably appoints the City Attorney of the City of Fruita, Colorado as its attorney in fact and agent for the purpose of completing all necessary improvements required by the development agreement in the event of a default by the developer or property owner. The agreement shall be recorded in the office of the Clerk and Recorder of Mesa County, Colorado, and shall constitute constructive notice of the agreement and the power of attorney. The agreement and power of attorney may be enforced by the City pursuant to all legal and equitable remedies available, including an action for specific performance in a court of competent jurisdiction.
- G. If a substantial amount of time elapses between the time of delivery of the security and actual construction of the improvements, the city may require a reasonable increase in the amount of the applicable security, if necessary because of estimated increased costs of construction.
- H. In addition to all other security, when the City participates in the cost of an improvement, the applicant shall provide a performance bond from the contractor, with the City as a co-obligee.

17.21.090 INDEMNIFICATION AND INSURANCE.

Every development agreement shall require the developer, property owner and any contractor or subcontractor employed by the developer or property owner who performs work within public rights-of-way, easements dedicated to the City, or within other property owned by the city to indemnify and hold harmless the City of Fruita, its officers, employees, insurers, and self-insurance pool, from and against all liability, claims, and demands, on account of injury, loss, or damage, including without limitation claims arising from bodily injury, personal injury, sickness, disease, death, property loss or damage, or any other loss of any kind whatsoever, which arise out of or are in any manner connected with work performed by the developer or property owner, its contractors and subcontractors, within city rights-of-way, easements or other property, if such injury, loss, or damage is caused in whole or in part by, or is claimed to be caused in

whole or in part by, an act, omission, error, professional error, mistake, negligence, or other fault of the developer, property owner, or contractor, and any subcontractor. The City may also require in a development agreement that any contractor employed by the developer or property owner to perform work within public rights-of-way, easements dedicated to the city, or within any other property owned by the city to procure and maintain, at its own cost, a policy or policies of insurance sufficient to insure against all liability, claims, demands and other obligations assumed by contractors and subcontractors pursuant to this section.

17.21.100 DEFAULT; NOTICE; AND TERMINATION OF DEVELOPMENT AGREEMENTS.

In the event of any default or breach by a property owner or developer of a covenant, term, condition or obligation contained in a development agreement, and if the default or breach continues after notice and an opportunity of a hearing as set forth in this Chapter, the City may terminate the agreement. Any declaration of termination of an agreement is effective only after and upon a resolution to that effect adopted by the City Council. If a property owner or developer fails to construct any required improvements in accordance with the terms of a development agreement, the City may suspend approval of the development during which time the property owner or developer shall not sell, transfer or otherwise convey tracts or lots within the development or property without the express written approval of the city.

17.21.110 ISSUANCE OF CERTIFICATE OF COMPLIANCE. Upon satisfactory completion of all required improvements, expiration of the applicable warranty period, and compliance with all of the terms of the development agreement, the City shall, upon request, execute a resolution or certificate stating that all improvements have been constructed in compliance with the development agreement.