

**CAPITAL IMPROVEMENTS PROJECT
GUARANTEED MAXIMUM PRICE AGREEMENT
FOR
LANCASTER AVENUE, EAST BROAD STREET, AND
NEW COLLECTOR ROAD IMPROVEMENTS**

This Contract, pursuant to Ordinance No. _____ - ____, passed the ___ day of _____, 2004 (the "Special Assessment Ordinance"), is made and entered into this ___ day of _____, 2004, by and between the City of Columbus, State of Ohio, acting by and through its Director of Public Service (the "CITY"), and Dominion Homes, Inc., an Ohio corporation, County of Franklin, State of Ohio (the "DEVELOPER"); and

WHEREAS, the DEVELOPER is the owner of or has the right to control 110.490 +/- acres located on the southeast corner of the intersection of East Broad Street and Lancaster Avenue, more commonly referred to as Reynolds Crossing, and

WHEREAS, the Departments of Public Service and Development have determined that it is in the CITY's best interest to enter into the subject agreement with the DEVELOPER for purposes of constructing improvements to the rights of way along Lancaster Avenue and East Broad Street, constructing improvements to the intersection of Lancaster Avenue and East Broad Street and the intersection of East Broad Street and Brannockburn Boulevard, constructing a collector road between Lancaster Avenue and East Broad Street and certain other new roads, and certain other infrastructure improvements.

WHEREAS, in order to facilitate construction of the aforementioned improvements, it is necessary for the CITY and the DEVELOPER to enter into this guaranteed maximum sum agreement for purposes of setting forth the terms and conditions therein; and

NOW THEREFORE, the parties agree to as follows:

1. DEFINITIONS:

- A. "Contract Documents" shall mean collectively: a) this Agreement; b) all detailed engineering plans; and c) the technical specifications set forth in the most recent edition of the "City of Columbus, Ohio Construction and Materials Specifications Manual" applicable to roadways and other infrastructure improvements.
- B. "Cost of Work" is defined as the total consideration paid for the construction of the Improvement to a subcontractor selected pursuant to Section 3 hereof.
- C. "Guaranteed Maximum Sum" means the Improvement cost total is not to exceed \$2,022,060.80.
- D. "Improvement" means those collective improvements described in the Contract Documents, and specifically identified within Exhibit A.
- E. "Work" means the construction of the Improvement.

- 2. GENERAL CONSIDERATIONS:** In consideration of the promises of the CITY set forth herein, the DEVELOPER, its administrators, successors and assigns, jointly and severally agree to construct the capital improvements identified in Exhibit A. In making the improvements, the DEVELOPER shall fully cooperate with the CITY and shall follow and comply with all reasonable requests and instructions of the CITY particularly dealing with the time, timing, and manner of doing the work and shall complete said

improvements in accordance with approved plans. The CITY retains the right to review, comment on, and approve drawings and plans prior to construction. All plans and specifications shall conform to those sections of the most recent edition of the "City of Columbus, Ohio Construction and Material Specifications" manual (the "CMSC") that are applicable to said improvements and to all current applicable City of Columbus Standard Drawings. The Developer shall be responsible for complying with all other Federal, State and Local laws, including but not limited to the Americans with Disabilities Act. The DEVELOPER shall process all payments to its contractors in accordance with the provisions of Section 109 of the CMSC.

In communications with the DEVELOPER, the CITY shall respond in a timely manner, and City approvals will not be unreasonably conditioned, withheld, or delayed.

3. **DEVELOPER TO ACT AS GENERAL CONTRACTOR:** The DEVELOPER agrees to act as general contractor for the construction of the Improvement and to contract for the construction of the Improvement in the DEVELOPER's name with a subcontractor selected as hereinafter set forth. The competitive bidding process has been expressly waived in writing by the City's Director of Public Service pursuant to Resolution No. _____, passed _____ by the Columbus City Council.
4. **PROJECT GUARANTY:** The DEVELOPER warrants that it will exercise in its performance of the work the standard of care normally exercised by qualified engineering, architectural and construction organizations engaged in performing comparable services. The DEVELOPER further warrants that the Work shall be free from defects in materials and workmanship (without regard to the standard of care exercised in its performance) for a period of one (1) year after final written acceptance of the Work. The DEVELOPER shall at its own expense:
 - A. Correct or re-execute any of the Work that fails to conform with the requirements of the Contract Documents and appears during the prosecution of the Work.
 - B. Correct any defects in materials and workmanship of the Work (without regard to the standard of care exercised in its performance) which appear within a period of one (1) year after final written acceptance of the Work or within such longer period of time as may be set forth in the Contract Documents, and replace, repair, or restore any parts of the Work or any of the fixtures, equipment, or other items placed therein that are injured or damaged as a consequence of any such failure or defect, or as a consequence of corrective action taken pursuant hereto. Should the DEVELOPER fail to make corrections required by this Section, then the CITY may do so at the reasonable and customary expense and for the account of the DEVELOPER.
5. **ACCEPTANCE OF THE WORK:** Acceptance of the Improvement by the CITY shall not relieve the DEVELOPER of its responsibility for defects in material or workmanship as set forth in Section 4.
6. **LIABILITY:** The DEVELOPER shall indemnify, defend and hold harmless the CITY, its agents, and employees from and against any and all suits or claims for damages or losses arising or allegedly arising out of, or resulting from its performance of the Work,

by the DEVELOPER, its contractors, subcontractors, agents, employees or representatives. The DEVELOPER shall require all contractor and subcontractor agreements to include indemnification language as found above. The DEVELOPER shall promptly reimburse the CITY and its successors and assigns, for any cost, expense or attorney's fees incurred on account of any such suit or claim incurred in enforcing the terms of this contract. The DEVELOPER expressly waives any immunity it may enjoy as a complying employer under Section 35, Article II of the Ohio Constitution and Worker's Compensation laws of the Ohio Revised Code from indemnifying and holding the CITY harmless from claims by employees, agents or contractors of the Developer. This indemnity does not cover (a) any injuries or damages occurring after the completion of construction of the Improvement by the DEVELOPER, or (b) any injuries or damages arising out of the actions or inactions of the CITY or its agents or employees.

7. **INSURANCE REQUIREMENTS:** The DEVELOPER shall take out or cause to be taken out and maintain during the life of the contract, such Public Liability (Bodily Injury and Property Damage) Insurance as shall protect them and any subcontractor performing work covered by the contract from claims for damages for personal injury, including accidental death, as well as from claims for property damage which may arise from operations under the contract, whether such operations are performed by the DEVELOPER, or by a subcontractor or by anyone directly or indirectly employed by them. SUCH INSURANCE POLICY SHALL INCLUDE THE CITY AS AN ADDITIONAL INSURED. The DEVELOPER shall maintain coverage of the types and in the amounts as specified below. Prior to execution of this Agreement, the DEVELOPER shall have provided an original certificate of insurance or a copy of the insurance policy as proof of such insurance coverage. An "umbrella" type policy with limits specified below may be submitted for this requirement, with the CITY as named insured.

The amounts of such insurance shall be as follows:

BODILY INJURY LIABILITY	
EACH PERSON	\$500,000.00
EACH ACCIDENT	\$1,000,000.00
 PROPERTY DAMAGE LIABILITY	
EACH ACCIDENT	\$500,000.00
ALL ACCIDENTS	\$1,000,000.00

Such insurance shall remain in full force and effect during the life of the contract. Insurance may not be changed or canceled unless the insured, including the CITY, are notified in writing not less than thirty days prior to such change or cancellation. If any part of the contract is subcontracted, the DEVELOPER is responsible for the subcontracted part being adequately covered by insurance hereinabove described. Cancellation or lapse of insurance coverage during the life of this contract shall be considered a default by the DEVELOPER sufficient to relieve the CITY of its obligations under this contract. The CITY shall receive an original certificate of insurance prior to the commencement of the improvement.

8. **TRAFFIC CONTROL REQUIREMENTS:** The DEVELOPER shall be responsible for ensuring the provision of all traffic control devices, flaggers and police officers

required to properly and safely maintain traffic. All traffic control devices shall be furnished, erected, maintained and removed in accordance with the "Ohio Manual of Traffic Control Devices for Construction and Maintenance Operation."

9. **PREVAILING WAGE:** For the Work set forth in this Agreement, the DEVELOPER agrees to abide by the prevailing wage requirements of Chapter 4115 of the Ohio Revised Code. This provision shall apply for all subcontracts for services procured by the DEVELOPER under the terms of this Agreement.
10. **PERFORMANCE AND PAYMENT BOND:** The DEVELOPER agrees to execute a contract performance and payment bond that names the CITY as obligee in the form provided by Section 153.57 of the Ohio Revised Code, in conformance with Section 103.05 of the CMSC, and shall cover all improvements set forth in Section 1 of this Agreement, including a one year guarantee period of one (1) year set forth in Section 5 hereof.
11. **PUBLIC USE:** The DEVELOPER and the CITY agree that the Work paid for under this contract shall be dedicated for public use. Upon expiration of the one (1) year guarantee period as set forth in Section 5 herein, the CITY shall accept all maintenance responsibility for the Work constructed under this agreement.
12. **COST OF WORK IN EXCESS OF GUARANTEED MAXIMUM COST:** The DEVELOPER agrees to assume and pay all Cost of Work in excess of the Guaranteed Maximum Sum and to indemnify the CITY against any Cost of Work in excess of the Guaranteed Maximum Sum as authorized by the Columbus City Ordinance referenced in paragraph 1 hereof.
13. **SPECIAL ASSESSMENT PAYMENTS:** The Developer, for itself and any successors in interest to the Property or any part thereof or interest therein (collectively, the "Owners") hereby agrees there shall be made by the then Owners of the Property semiannual special assessment payments with respect to the Improvement, pursuant to and in accordance with the requirements of the Act, and pursuant to the Special Assessment Ordinance and any subsequent amendments or supplements thereto. Any late payments shall be subject to penalty and bear interest at the then current rate established under Ohio Revised Code Sections 323.121(B)(1) and 5703.47, as the same may be amended from time to time, or any successor provisions thereto as the same may be amended from time to time (the payment of penalties and interest are collectively referred to herein with the special assessment payments as the "Special Assessment Payments"). Such Special Assessment Payments shall be made semiannually to the County Treasurer (or to the Treasurer's designated agent for collection of the Special Assessment Payments) on or before the date on which real property taxes are due and payable for the Improvement. Each semiannual payment shall be in the amount set forth in the Special Assessment Ordinance and otherwise shall be in accordance with the requirements of the Act.

All Special Assessment Payments when received by the City shall be deposited into the Reynolds Crossing Special Assessment Fund (the "Special Assessment Fund").

14. **PAYMENT:** The CITY agrees to purchase the Improvement described herein, by paying the Developer an amount equal to the cost of the Improvement but not to exceed

\$2,022,060.80, the currently estimated cost (the "Purchase Price"), as authorized by the Ordinance referenced in Section 1 of this agreement.

The DEVELOPER agrees that the Project Costs will be those items specifically delineated within Exhibit "A", plus all additional costs of the Improvement. The CITY reserves the exclusive right to consider authorizing reasonable increases and/or decreases in said items, or approving new items that are deemed reasonable to the successful completion of the project, so long as the cost therein does not exceed the Guaranteed Maximum Sum. The DEVELOPER further agrees and understands that the consideration for these increases, decreases or establishment of new items as shown in Exhibit "A" shall be at the sole determination of the Director of Public Service or their designee.

For purposes of determining the amount to be paid by the CITY, the DEVELOPER shall be required to keep complete and accurate books of account showing the Cost of Work and shall provide the following items as documentation of project related expenditures, in the form acceptable to the Public Service Department and the City Auditor:

- A. Invoices – Three (3) copies of all construction contract invoices, including City of Columbus inspection costs, that are applicable to the construction of the project, as defined in Section 1 hereof. Invoices are required to be itemized, so as to provide a clear definition of the work performed.

- B. Construction Inspection Approval – When the DEVELOPER's subcontractor completes all portions of the work set forth in Section 1, the DEVELOPER shall request a final inspection by the CITY's Transportation Division. If items remain which must be completed or remedied by the DEVELOPER as determined by the CITY, the DEVELOPER shall perform the work immediately upon being notified. All work must pass final inspection, and include a final accounting of the construction items utilized and have the approval of the Administrator of the Transportation Division (the "Administrator"), before it will be accepted by the CITY.

- C. Payment by the City – Subject to this Section 14, the City hereby agrees to purchase the Improvement from the Developer in accordance with the terms of this Agreement by paying the Developer the Purchase Price. Subject to this Section 14, that Purchase Price shall be paid in installments with interest as follows: On each June 1 and December 1, commencing June 1, 2005, the City shall pay all moneys then on deposit in the Special Assessment Fund to the Developer until the Purchase Price and any interest thereon have been paid in full. Such moneys shall be applied first to the payment of interest on the then unpaid Purchase Price to such date from the last date to which interest has been paid or if no interest has been paid, from the date of City approval of the accounting of costs of Improvement under this Section 16; and second, to the payment of the Purchase Price. Interest on the unpaid portion of the Purchase Price from time to time shall be at the rate of five percent (5%) per annum, calculated on the basis of a 360 day year comprised of twelve 30-day months. The City may prepay the unpaid Purchase Price in whole or in part in inverse order of maturity at any time without penalty.

All payments to the Developer hereunder shall be made by wire transfer of immediately available funds to the Developer's Wire Transfer Address. Time is of the essence under this

Agreement. The City hereby waives presentment, demand, notice, protest and all other demands and notices in connection with the delivery, acceptance, performance, default or enforcement of this Agreement.

Any expenditure pursuant to this Section of Special Assessment Payments deposited in the Special Assessment Fund is subject to the expenditure restrictions and appropriation requirements of Sections 27 through 31 of the Charter of the City.

Notwithstanding any other provision of this Agreement, the City's payment obligations hereunder shall be limited to the moneys in the Special Assessment Fund and do not constitute an indebtedness of the City within the provisions and limitations of the laws and the Constitution of the State of Ohio, and the Developer does not have the right to have taxes or excises levied by the City for the payment of the Purchase Price and interest thereon. Nothing herein shall be deemed to prohibit the City from using, of its own volition, any other lawfully available resources for the fulfillment of any of the City's obligations hereunder.

The parties hereto intend that the interest payable by the City hereunder be exempt from federal income taxation and taxation by the State of Ohio, and the City covenants that it will, to the extent possible, comply with all applicable provisions of the Code to obtain and maintain the Federal and State of Ohio tax exemptions for such interest, including any expenditure requirements, investment limitations, rebate requirements or use restrictions. Without limiting the generality of the foregoing, the City covenants that it will restrict the use of any "proceeds" of this Agreement (as defined in the Code) in such manner and to such extent, if any, as may be necessary after taking into account reasonable expectations at the time the City's obligation is incurred, so that this Agreement will not constitute an "arbitrage bond" under Sections 103(b)(2) and 148 of the Code and will timely file an IRS Form 8038G with respect to this Agreement.

- 17. **LEGAL JURISDICTION:** All claims, counterclaims, disputes and other matters in question between the CITY, its agents and employees, and the DEVELOPER, his contractors, subcontractors and agents arising out of or relating to this agreement or its breach will be decided in a court of competent jurisdiction within the County of Franklin, State of Ohio.

- 18. **CITY INCOME TAX WITHHOLDING:** The DEVELOPER hereby further agrees to withhold all City Income Taxes due or payable under the provisions of Chapter 361, Columbus City Codes, 1959, for wages, salaries and commissions paid to its employees and further agrees that any of its subcontractors shall be required to agree to withhold any such City Income Taxes due under said Chapter for services performed under this Contract.

- 19. **EQUAL OPPORTUNITY CLAUSE:** The DEVELOPER, contractor, subcontractors and agents will not discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin. The DEVELOPER, contractor, subcontractors and agents will take affirmative action to ensure that applicants are employed and that employees are treated during employment without regard to their race, color, religion, sex or national origin. Such action shall include, but not be limited to, the following: employment, upgrading,

demotion, or termination; rates of pay or other forms of compensation; and selection for training. The DEVELOPER, contractor, subcontractors and agents agree to post in conspicuous places, available to employees and applicants for employment, notices summarizing the provisions of this Equal Opportunity Clause.

- A. The DEVELOPER will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that the contractor is an equal opportunity employer.
- B. It is the policy of the City of Columbus that business concerns owned and operated by minority and female persons shall have the maximum practicable opportunity to participate in the performance of contracts awarded by the City. The DEVELOPER shall permit access to any relevant and pertinent reports and documents by the Administrator for the sole purpose of verifying compliance with this paragraph, and with the regulations of the Contract Compliance Office. All such materials provided to the Administrator by the contractor shall be considered confidential.
- C. The DEVELOPER and each subcontractor will include a summary of this equal opportunity clause in every subcontract. The subcontractor will take such action with respect to any subcontract as is necessary as a means of enforcing the provisions of the equal opportunity clause.
- D. The DEVELOPER will not obstruct or hinder the Administrator or his deputies and assistants in the fulfillment of the duties and responsibilities imposed by Article I, Title 39 of Columbus City Codes.
- E. The DEVELOPER agrees to refrain from subcontracting any part of this contract or contract modification thereto to a contractor not holding a valid certification number as provided for in Article 1, Title 39, Columbus City Codes.
- F. Failure or refusal of the DEVELOPER or subcontractor to comply with the provisions of Article I, Title 39, may result in cancellation of this contract.

20. **ADDITIONAL DOCUMENTATION:** At the time of award of the bid as set forth within Section 3, the DEVELOPER shall provide the following document exhibits to be hereby incorporated into and made part of the Contract as though specifically rewritten herein:

- A. Description of Work and Cost Estimate
- B. Contract Signature Authorization Affidavit
- C. Delinquent Personal Property Tax Form
- D. Insurance Forms: Public Liability, Automobile, Property Damage Insurance
- E. Ohio Worker's Compensation Certificate of Insurance from DEVELOPER'S sub-contractor

21. **ENTIRE AGREEMENT:** This agreement shall constitute the entire agreement between the parties and shall supersede all prior agreements, proposals, representations, negotiations and letters of intent, whether written or oral, pertaining to the Work.

22. **CITY COUNCIL AUTHORIZATION:** The City's obligation to pay for the Work, or incur any financial obligation under this Agreement is subject to the future authorization of the appropriation and expenditure of funds by the Columbus City Council to meet the financial obligations of the City herein and certification by the City Auditor under Section 159 of the Columbus City Charter, provided that the Developer shall not be obligated to proceed with any part of the Work until such authorization of funds by the Columbus City Council and certification by the City Auditor.

23. **SIGNATURES:**

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorized officers on the dates appearing below.

DOMINION HOMES, INC.,
an Ohio corporation

THE CITY OF COLUMBUS

By: _____

By: _____

Name: _____

Name: _____

Title: _____

Director of Public Service

Date: _____

Date: _____

Fed. I.D. No.: _____

APPROVED AS TO FORM AND CORRECTNESS:

Richard C. Pfeifer, Jr., City Attorney

AUDITOR'S CERTIFICATION:

EXHIBIT "A"

Reynolds Crossing, Lancaster Avenue and East Broad Street

JOB DESCRIPTION

EXHIBIT "B"

CONTRACT SIGNATURE AUTHORIZATION AFFIDAVIT

(To be filled in and executed by the Developer)

STATE OF _____

COUNTY OF _____

_____, being duly sworn, deposes and says that he or she is (Officer) _____ of Dominion Homes, Inc., an Ohio corporation, organized and existing under and by virtue of the laws of the STATE OF OHIO and having its principal office at

Number and Street

City

County

State

Affiant further says that he is familiar with the records, minute books and by-laws of Dominion Homes, Inc.

Affiant further says that _____ is _____
Name of Officer Title

Of Dominion Homes, Inc. and is duly authorized to sign the Contract for:

REYNOLDS CROSSING

For Dominion Homes, Inc. by virtue of _____ (State whether a provision of by-laws or a resolution of the Board of Directors. If by resolution, give date of adoption.)

Affiant

Sworn to before me and subscribed in my presence this ____ day if _____ 200__.

Notary Public

My Commission expires: _____, 20__

EXHIBIT "C"

DELINQUENT PERSONAL PROPERTY TAX

AFFIDAVIT

STATE OF _____)
)SS:
COUNTY OF _____)

_____, being first duly sworn, deposes and says that ___he is _____ (Sole owner, a partner, president, secretary, etc.) of Dominion Homes, Inc., an Ohio corporation, the developer on the attached contract with the City of Columbus for

REYNOLDS CROSSING

And for the purpose of complying with Section 5719.042 of the Ohio Revised Code states at the time the subject contract was executed, Dominion Homes, Inc. (was/was not) charged with delinquent personal property taxes on the General Tax list of personal property of a county in which the City of Columbus has territory (presently Franklin, Delaware, Fairfield and Madison Counties). The amount of such due and unpaid delinquent taxes, penalties and interest thereon is as follows:

<u>TAXES</u>	<u>PENALTIES & INTEREST</u>	<u>COUNTY</u>
\$ _____	\$ _____	_____
\$ _____	\$ _____	_____
\$ _____	\$ _____	_____
\$ _____	\$ _____	_____

Affiant

Sworn to before me and subscribed in my presence this ____ day of _____ 200__.

Notary Public

My Commission Expires: _____, 20__

EXHIBIT “D”

Insurance Forms: Public Liability, Automobile, Property Damage Insurance

EXHIBIT "E"

Ohio Worker's Compensation Certificate of Insurance