

A RESOLUTION AUTHORIZING THE MAYOR AND THE FINANCE DIRECTOR TO ENTER INTO A PERFORMANCE ESCROW AND CONSTRUCTION AGREEMENT FOR KENSINGTON RESERVE SUBDIVISION WITH HOME SAVINGS AND LOAN AND DECLARING AN EMERGENCY

BE IT RESOLVED by the Council of the Village of Richfield, Summit County, State of Ohio:

SECTION 1. That the Mayor and the Finance Director be, and they hereby are, authorized and directed to enter into a Performance (Escrow) and Construction Agreement for Kensington Reserve Subdivision with Home Savings and Loan, a copy of which Agreement is attached hereto as Exhibit "A" and incorporated herein fully as if by reference.

SECTION 2. This Resolution is hereby declared to be an emergency measure necessary for the immediate preservation of public health, safety and welfare and for the further reason that it is immediately necessary in order to allow construction to commence at the earliest possible time; wherefore, provided this Resolution receives the affirmative vote of two-thirds of the members of Council elected or appointed, it shall take effect immediately upon its passage and execution by the Mayor; otherwise it shall take effect and be in force from and after the earliest period allowed by law.

PASSED: August 7, 2001

Shelly Peter Egan
Vice President of Council

ATTEST:
Carole Gibson
Clerk of Council

Ronald W. Larsen
Mayor

Dated: 8/7/01

PERFORMANCE (ESCROW) AND CONSTRUCTION AGREEMENT

KNOW ALL MEN BY THESE PRESENTS:

That Kensington Reserve Development Company, Ltd., as Principal (hereinafter referred to as "Kensington Reserve") is held and firmly bound unto the Village of Richfield (hereinafter referred to as "Village") in the amount of \$176,000.00 and to payment of which said sum of money well and truly to be made and done, the undersigned binds itself, its successors and assigns, firmly well to these presents.

WHEREAS, Kensington Reserve has requested approval of a subdivision plat to be constructed at Kensington Reserve Subdivision (hereinafter referred to "Development") prior to completion of construction of certain "Improvements" serving said subdivision; and

WHEREAS, the Subdivision Regulations of the Village require that a Performance Guarantee equal to one hundred percent (100%) of the cost of said Improvements be posted with the Village to secure the proper installation of said Improvements; and

WHEREAS, said Improvements are listed in the Agreement for Installation of Public Improvements, and Exhibit "A" attached hereto, also sets forth the Engineer of the Village's estimate of the cost of completing said Improvements; and

WHEREAS, as a condition of issuing subdivision approval prior to the completion by Kensington Reserve and the acceptance by the Village of said Improvements, the Village has required that Performance Guarantees be posted by Kensington Reserve that secure for the Village, the prompt installation of said Improvements serving said Development; and that

A. Said Improvements serving the Development will be constructed and installed in accordance with the plans, specifications, profiles and estimates for Kensington Reserve prepared by Ken Jensen and Associates dated _____, 20____, as submitted by Kensington Reserve and approved by the Engineer of the Village.

B. The construction of the Improvements shall be under the supervision of and to the satisfaction of the Engineer of the Village and any expense incurred by the Village related to the supervision of said construction shall be borne by Kensington Reserve.

NOW, THEREFORE, in order to secure to the Village the prompt performance of the installation of said Improvements for the Development as filed with the Engineer of the Village in accordance with the terms, conditions and obligations hereinafter set forth. Kensington Reserve shall cause Home Savings & Loan ("Bank") to set aside and reserve \$176,000.00 ("Reserve Fund") of the proceeds of its development loan to Kensington Reserve which amount represents one hundred percent (100%) of the Engineer of the Village's estimate of the cost of completing said Improvements, to be held and disbursed by Bank as hereinafter provided, and Kensington Reserve agrees and undertakes as follows:

1. Kensington Reserve agrees that all monies held in the Reserve Fund are irrevocably conveyed to Bank by Kensington Reserve and thus without any reservation of right or interest in such monies by Kensington Reserve.

However, said Bank is bound to disburse such monies in accordance with the terms of this Agreement, and only upon satisfactory completion of the Improvements referred to herein shall Kensington Reserve be entitled to payment from the Reserve Fund, all in accordance with terms hereinafter recited.

2. Each month, Kensington Reserve may file with the Engineer of the Village an application for payment for approved work performed. Kensington Reserve shall attach thereto sufficient documentation (affidavits or invoices) for all labor and/or materials paid or to be paid directly to the suppliers or subcontractors by the Bank. The Engineer of the Village will not certify any progress payments until these conditions are met, and the amount approved shall be equal to one hundred percent (100%) of the value of the approved work. The Engineer will not approve payments for any materials until such are physically incorporated into the work of the Improvements.

3. Upon approval for payment and certification by the Engineer of the Village, and upon compliance with the terms and provisions of the Bank's loan documents, the Bank shall disburse to Kensington Reserve or suppliers and/or subcontractors one hundred percent (100%) of the amount so certified for payment by said Engineer. Prior to payments under this provision said Engineer shall furnish a copy of such certification to the Bank. No payments of any kind shall be made from the Reserve Fund by the Bank without certification and direction for payment by the Engineer of the Village. Said Reserve Fund shall be held by the Bank for such purpose only and none other.

4. Until final completion of said Improvements, and acceptance in writing for the work thereof by the Village Engineer, no certification or authorization for payment by the Engineer shall operate or be construed as an acceptance of the whole or any part of the Improvements by or on behalf of the Village.

5. In the event that Kensington Reserve fails to complete the Improvements guaranteed by this Agreement in accordance with the terms and conditions of this Agreement, suspends work for a cumulative period of 180 days (exclusive of delays or suspension as a result of force majeure), or fails to pay in full its contractors for work performed upon the subject Improvements, Kensington Reserve shall be in default of this Agreement and its loan with the Bank. In such event, the Engineer of the Village shall have final authority to direct the use of unused funds held by the Bank in the Reserve Fund for the completion of the Improvements guaranteed by this Agreement and to pay all contractors in full for the work performed but remaining unpaid and shall notify the Bank in writing that Kensington Reserve is in default of this Agreement. Upon receipt of such notification that Bank is hereby authorized and directed to disburse the balance of the funds held in the Reserve Fund as authorized or instructed by the Engineer of the Village for the completion of said Improvements or other obligations under this Agreement, which shall include the payment of contractors performing work upon the subject Improvements. Prior to notifying the Bank or proceeding to operate under the authority of this Paragraph, the Engineer of the Village shall notify Kensington Reserve in

writing of his intention to declare this Agreement in default unless work is commenced and diligently pursued, or outstanding obligations are paid to contractors, within fourteen days.

6. Maintenance Bond. Kensington Reserve shall provide to the Village a Maintenance Bond with respect to the Improvements in accordance with the Village's Subdivision Regulations.

7. All costs and expenses in connection with this Agreement shall be paid by Kensington Reserve.

8. The provisions of this Agreement and any act thereunder by any of its officers or employees shall not constitute or be construed as constituting the Village as the agent of Kensington Reserve, the Bank, or any contractor, subcontractor or persons furnishing labor or material on or for the Improvements referred to herein, and said Village and its officers and employees are hereby relieved and discharged from any liability or responsibility therefor, except for fraud or willful misconduct in the performance of such acts.

9. The undersigned, Kensington Reserve, shall comply with all applicable laws, ordinances, rules and regulations of the Village, or any governmental agency or instrumentality having jurisdiction over the matters referred to herein, or any acts or work to be done or performed pursuant hereto, including any applicable Federal regulations.

10. Any funds remaining in the Reserve Fund shall not be paid out until Kensington Reserve posts maintenance guarantees upon the Improvements acceptable to the Village Law Director, and as required by the Subdivision Regulations of the Village, and only when all Improvements have been accepted by the Engineer of the Village.

11. No Third Party Beneficiary. The rights and obligations of the parties set forth herein are established and agreed upon by the parties hereto for their own benefit with respect to the Improvements and this Agreement shall not be construed as creating any rights for the benefits of any third party, including, but not limited to, Contractor.

12. Expiration. In the event that Kensington Reserve, prior to commencement of the Improvements, elects not to proceed with the Improvements, the Village shall relinquish all control over the Reserve Fund and this Agreement shall be null and void.

13. Indemnification. Kensington Reserve hereby agrees to indemnify and hold the Village, its Mayor and Finance Director, harmless from and against all liabilities, claims, costs and expenses imposed upon or asserted against them on account of their performance of any of its or their obligations under this Agreement unless such liability, claim, cost or expense was incurred by reason of the gross negligence of the Village or its Mayor or Finance Director or by reason of any action taken or inaction on their part which is in bad faith.

14. Binding Effect. This Agreement will be binding upon, and inure to the benefit of, the parties hereto and their respective successors and assigns.

Kensington Reserve of the problem; the Engineer of the Village shall within the context of his contract with the Village, observe that the construction work shall be completed in accordance with the Village's requirements.

Dated: 8-28-01

By: Jon P. Mizziante
Village Engineer

ACCEPTANCE BY THE BANK:

The undersigned hereby agrees to hold and disburse funds held in the Reserve Fund in accordance with the terms and provisions of the foregoing Agreement. Further, the undersigned certifies that funds in the amount of \$ 176,000.00 has been allocated and reserved from the proceeds of its development loan to Kensington Reserve solely to implement and effectuate the terms, conditions and purposes of the foregoing Agreement, and from the date of this Agreement the undersigned will fulfill its duties hereunder, ensuring that the above funds are and shall remain available in the amount specified until disbursements are directed by the Engineer of the Village of Richfield in accordance herewith.

HOME SAVINGS & LOAN

Dated: 7/31/01

By: Walter C. Holdrege
Vice President, Commercial Real Estate