

Construction Agreement (Cost Plus a Fee Basis for Construction on Owner's Land)



THIS CONSTRUCTION AGREEMENT ("Agreement") is made and entered into as of this _____ day of _____, 20____ between _____ ("Owner") and _____ ("Builder").

1. **PROPERTY.** The Owner's land ("Property") on which the construction will take place is the following: Street Address: _____, City: _____ State: _____, County: _____, Zip Code: _____, and being more particularly described as Lot: _____, Block: _____, Unit: _____, Phase/Section: _____, of _____ Subdivision, as recorded in Plat Book _____, Page _____ of such county's records. The full legal description of the Property is as recorded with the Clerk of the Superior Court in such county and is incorporated by reference.

2. **WORK.** Builder shall construct a single-family residence and any other improvements, grading and landscaping (collectively "House") on the Property in substantial compliance with the Plans and Specifications described below. Unless otherwise specified, Builder shall provide and pay for all labor, materials, equipment, tools, construction equipment and machinery, transportation and other services necessary for the execution and completion of the House.

3. **PLANS AND SPECIFICATIONS.** The Plans are attached hereto as Exhibit "A," entitled _____, dated _____, and consist of _____ pages. The Specifications are attached hereto as Exhibit "B", entitled _____, dated _____, and consist of _____ pages. If there are conflicts between the terms of the rest of this Agreement and the Plans or Specifications, the terms of the rest of this Agreement shall govern. If there are conflicts between the Plans and the Specifications, the Specifications shall govern. Owner warrants and represents that, to the extent that the Plans and Specifications have been provided by or on behalf of Owner and are required to be approved by any homeowners' association or related entity, such as an architectural control committee, they have been so approved. Upon request by Builder, Owner shall obtain written evidence of such approval prior to Builder's obligation to commence construction.

4. **CONTRACT PRICE.** Owner shall pay to Builder the total Costs incurred in connection with construction of the House, including but not limited to the Costs incurred in connection with selections and changes under this Agreement, plus _____ (dollars or percent of total Costs) for Builder's overhead and _____ (dollars or percent of total Costs) for Builder's profit. Such Costs plus the amounts for overhead and profit will sometimes collectively be referred to in this Agreement as the "Contract Price." Payments shall be made in accordance with paragraph 8 unless otherwise provided herein.

5. **GUARANTEED MAXIMUM CONTRACT PRICE.** (Select A or B below; the other is not part of this Agreement.)

A. The Contract Price shall not exceed \$_____ ("Guaranteed Maximum Contract Price"), subject to additions per Change Orders or as otherwise provided by this Agreement. Costs which cause the Guaranteed Maximum Contract Price to be exceeded shall, subject to such additions, be paid by Builder without reimbursement by Owner. The Guaranteed Maximum Contract Price is based on the Plans and Specifications identified above.

B. There is no Guaranteed Maximum Contract Price.

6. COSTS. The term "Cost" or "Costs" shall mean costs or expenses actually and reasonably incurred by Builder or for which Builder actually and reasonably becomes obligated to pay in connection with the construction or design of the House, including but not limited to the following:

- A. Costs of all materials and supplies incorporated into the House, including transportation and storage expenses (discounts for cash or prompt payments shall not reduce such Costs);
- B. Wages for labor in the direct employ of Builder in the performance of work on or relating to the House;
- C. Salaries of Builder's employees for the time that they spend in connection with the House, whether on or off site;
- D. Payments to subcontractors for work performed or to be performed on the House;
- E. Fees and expenses incurred for architectural, engineering and consulting services relating to the construction or design of the House;
- F. Costs of all employee benefits and taxes for such items as unemployment compensation, social security and other benefits for the labor and employees mentioned in paragraph 6.B. and C.;
- G. Costs, including transportation and maintenance, of equipment, and hand tools not owned by workmen employed by Builder, which are employed or consumed in the construction of the House;
- H. Payments for rental charges for machinery, equipment, facilities and tools used in connection with construction of the House and payments for installations, repairs, replacements, dismantling, removal, lubrication, transportation and delivery of such rental items;
- I. Other transportation costs incurred in connection with the construction of the House;
- J. That portion attributable to this Agreement of premiums for insurance that is required by this Agreement to be obtained or maintained by Builder;
- K. Sales, use, gross receipts or other taxes related to the House, imposed by any governmental authority, to the extent that Builder is responsible for such taxes;
- L. Permit fees, licenses or tests that Builder is required to obtain or reasonably obtains in order to design or construct the House;
- M. Costs of corrective work on the House to the extent not caused by Builder or those for whom Builder is responsible;
- N. Costs of long-distance telephone calls, telephone service at the site and postage relating to work on the House;
- O. Costs of removal of debris from the House or Property;
- P. Costs associated with any Change Order or change as to which Builder is entitled to payment hereunder;

Q. Costs of data processing services used in connection with the performance of the work required by this Agreement;

R. Legal Costs reasonably incurred in connection with the prosecution of the work required by this Agreement;

S. Costs or expenses incurred in connection with selections permitted under this Agreement; and,

T. Losses and expenses, not compensated by insurance, sustained by Builder in connection with the work under this Agreement, provided they resulted from causes other than the fault or neglect of Builder.

7. FINANCING. (Select A or B below; the other is not part of this Agreement)

A. Owner Financing: Owner shall pay the Contract Price entirely from its personal funds and does not intend to obtain a construction loan to finance the construction. Owner warrants and represents that it has sufficient funds to pay the Contract Price without obtaining a construction loan. Prior to the commencement of work by Builder, Owner shall provide to Builder evidence of its ability to pay the Contract Price. In addition, upon request by Builder, at any time prior to final payment, it shall be entitled to reasonable evidence of Owner's continuing financial ability to fulfill its obligations under this Agreement.

B. Loan Options:

1. Contingency: This Agreement is contingent upon Owner's "ability to obtain" the following loan (Select A or B below; the other is not part of this Agreement)

(a.) Construction Loan: A construction loan in the amount of \$_____dollars, at an interest rate of not more than _____% per annum on the amount of the loan funds disbursed, and with loan and closing costs not exceeding \$_____dollars, to be secured by a first priority security deed on the Property and House, on which construction loan interest is repayable monthly or _____, and principal is repayable upon completion or Substantial Completion of the House, and subject to any escrow account as required by the lender for ad valorem taxes on the Property and House and hazard insurance premiums on the House.

(b.) Construction and Permanent Loan: a construction and permanent loan in the amount of \$_____dollars, at an interest rate of not more than _____% per annum on the amount of the loan funds disbursed during the construction phase and at an interest rate of not more than ____% per annum on the unpaid principal balance of the permanent loan, with loan and closing costs not exceeding \$_____dollars, to be secured by a first priority security deed on the Property and House, on which construction loan interest is repayable monthly or _____, and principal is repayable in consecutive monthly installments of principal and interest over a term of not less than _____ years, and subject to any escrow account as required by the lender for ad valorem taxes on the Property and House and hazard insurance premiums on the House.

2. Ability to Obtain: Ability to obtain means that Owner is qualified to receive such loan based upon the customary and standard underwriting standards and criteria of any lender to whom Owner submits an application for such loan.

3. Loan Application: Within two (2) days from the date that this Agreement is executed by the last of the executing parties, Owner agrees to make application for such financing and to notify Builder of the

identity of any lender to whom application has been made. Owner further agrees to pursue each such application diligently and in good faith, to execute all documents, to provide all documents, to perform all other actions necessary to obtain a loan, and to accept any such loan if approved by any lender to whom an application is submitted. Owner agrees to provide updates to Builder, upon request, regarding the progress in obtaining such loan. If Owner has not provided notice to Builder within thirty (30) days of the execution of this Agreement by the last party that a loan has been obtained along with evidence of such approval by the lender, Builder has the right to terminate this Agreement upon written notification to Owner.

4. Loan and Closing Costs: All fees and expenses of obtaining and of maintaining the loan, including but not limited to closing costs, attorney's fees, discount points, loan origination fees, survey costs, title insurance costs, recording costs, intangible tax, loan discount, private mortgage insurance, credit reports, and inspection costs, shall be paid by Owner.

5. Loan Options: (a) Owner acknowledges the possibility that many different loan programs, available from many different lenders, may fit the description of the contemplated loan. No attempt has been made to precisely describe all terms and conditions of the loan. The economics of this transaction, as bargained by the parties, are such that Owner agrees that a loan with terms consistent with those described herein shall be acceptable to Owner and shall satisfy the loan contingency. (b) At its option and without voiding this Agreement, Owner may also apply for a loan with different terms and conditions provided: (1) all other terms and conditions of this Agreement are fulfilled; and (2) the new loan does not increase costs to Builder. Notwithstanding the foregoing option, Owner shall be obligated to consummate this Agreement if it has the ability to obtain a loan with terms as described herein.

6. Escrow Account: In addition to the payment of principal and interest and fees and costs relating to the loan, Owner shall pay such escrow amounts as are required by the lender for ad valorem taxes on the Property and House and hazard insurance premiums on the House.

7. Inspection Fees: Owner shall pay the cost of all inspection fees charged by or on behalf of lender, if any, for the inspection of construction by Builder.

8. Loan Responsibility: Owner acknowledges and represents that it has not relied upon the advice or Representations of Builder regarding the type of loan or the terms of any loan to be obtained by Owner. Owner agrees to indemnify and hold Builder harmless to the fullest extent permitted by Georgia law from any claim or loss arising out of Owner's application and commitment for any loan or the terms of the instruments evidencing or securing the loan.

9. Interest Rate Fluctuation: Owner acknowledges that interest rates on loans may fluctuate between the date of this Agreement and the date of loan closing. Accordingly, Owner agrees that, notwithstanding anything contained in paragraph 7.B. (1), a loan with an interest rate(s) no more than two percent (2%) higher than the interest rate(s) set forth in paragraph 7.B. (1) and a monthly payment not greater than that amount resulting from such two percent (2%) increase in interest rate(s), shall be acceptable to Owner and the financing contingency shall be subject to such adjusted rate.

10. Owner authorizes Builder to request and any lender to provide to Builder information regarding the status of any loan application, the amount of loan funds before or during construction, the existence and nature of any default or breach by Owner under loan documents, the reason(s) for any delay in payment contemplated hereunder and any other matter reasonably related to Builder's interests under the Agreement.

8. PAYMENTS. The Contract Price shall be paid as follows:

A. Earnest Money and/or Non-Refundable Construction Deposit: (Select 1 and/or 2; if not selected, the subsection is not part of this Agreement)

1. Non-Refundable Construction Deposit (see attached Non-Refundable Construction Deposit Exhibit).

2. Earnest Money:

a. Owner has paid \$ _____ as earnest money to Builder in the form of cash or check.

b. Within five (5) banking days, the earnest money shall be deposited in Builder's escrow/trust account or in Builder's general account and, in the case of an escrow/trust account, shall thereafter be held in such account until applied or used as permitted by this Agreement. The earnest money may be deposited in an interest bearing account and Builder shall retain any interest earned thereon.

c. If any check given as earnest money is not honored, Builder may terminate this Agreement by notice to Owner.

d. If the earnest money is to be deposited in Builder's general account, such funds shall not be Segregated and Builder may use such funds for whatever purpose Builder deems fit.

e. The earnest money shall be applied to the Contract Price in the manner shown on the applicable construction draw schedule unless any of the following subparagraphs (1), (2), (3) or (4) applies:

(1) Owner does not have the "ability to obtain" any loan on which this Agreement is Contingent despite having complied with its obligations to pursue a loan, in which case the earnest money will promptly be refunded to Owner.

(2) Owner obtains a loan on which this Agreement is contingent and otherwise complies with the preconditions to commencement of work by Builder, but Builder fails to commence work and Owner is entitled to and does terminate the Agreement, in which case the earnest money will promptly be refunded to Owner.

(3) Owner fails to comply with its obligations to attempt to obtain any loan on which this Agreement is contingent or otherwise fails to comply with any preconditions to the Commencement of work by Builder, in which case Builder shall be entitled to retain the earnest money as liquidated damages for damages other than those damages covered by any Non-Refundable Construction Deposit. The parties agree that it would be extremely difficult to ascertain the actual damages that would be incurred by Builder in such event, that the earnest money is a reasonable estimate of such actual damages to Builder and that the retention of the earnest money is not intended as a penalty but rather as full liquidated damages to Builder other than for damages covered by any Non-Refundable Construction Deposit. As an alternative to the earnest money, Builder may seek specific performance of the Agreement. If specific Performance is granted; the earnest money shall be applied to the Contract Price.

(4) This Agreement is terminated after commencement of work, in which case any unapplied portion of the earnest money or so much as is necessary may be applied by Builder to the amounts to which Builder is entitled in the event of termination. Any remaining amount, if any, shall be returned to Owner.

B. Balance of Contract Price: (Select 1 or 2 below; the other is not part of this Agreement)

o (1) Owner Financing: If Owner is not obtaining a loan, Owner will make payments to Builder in accordance with the Construction Draw Schedule* attached hereto as Exhibit "C."

o (2) Lender Financing: If Owner is obtaining a loan, Owner will make payments by authorizing Builder to make draws on the Construction Draw Schedule* approved by the lender in the manner required by the lender. Owner shall authorize lender to process the construction draw requests and to disburse funds directly to Builder based on applications submitted by Builder directly to lender. Owner's signature shall not be required in order for lender to process such draw requests and Owner shall not interfere with Builder obtaining payment pursuant to such draw requests. Any loan is for the convenience of Owner and shall not reduce or eliminate Owner's direct liability to Builder for any portion of the Contract Price not funded by the lender.

* Note to parties: The Construction Draw Schedule should reflect the application of the earnest money and any Non-Refundable Construction Deposit.

(3) Applications or Draw Requests: Unless otherwise provided in the applicable Construction Draw Schedule, Builder shall submit written applications or draw requests for interim or progress payments as well as for final payment.

(4) Time for Payments: Unless otherwise provided on the applicable construction draw schedule, draw payments shall be made within five (5) days after submission of a draw request or application for payment, except for the final payment which shall be due upon Substantial Completion, as hereafter defined, and submission of the final application or draw request.

(5) Discrepancies: It is intended that Builder be paid the entire Contract Price as adjusted herein. In the event of discrepancies between the Contract Price, as it may be adjusted herein, and the payments called for by the applicable construction draw schedule, Builder shall be entitled to receive the Owner shall pay Contract Price, as adjusted, and any discrepancy shall be paid to the Builder no later than the time final payment is due.

(6) Interest: Payments due and unpaid by Owner for more than thirty (30) days shall bear interest at the rate of eighteen percent (18%) per annum. This provision does not create a grace period for Payments, but rather the date on which interest payments will commence.

(7) Architects: Payments hereunder shall not be withheld or delayed based on determinations by any architect of Owner, unless expressly permitted by this Agreement.

9. SELECTIONS. Owner shall be entitled to hereafter make selections relating to the items listed on the Selections and Allowance Exhibit, attached hereto as Exhibit "D," for which an allowance has been specified. Owner will make every reasonable effort to make selections from Builder's stock on hand or other stock immediately available. Owner will make selections by the deadlines specified on the Selections and Allowance Exhibit in the absence of which, Owner hereby authorizes Builder to make such selections. Any other decisions, if any, required of Owner in order to complete the House shall be promptly made.

10. COMMENCEMENT. Builder shall not be required to commence construction of the House or to obtain the building permit until any financing and all other contingencies for which Owner is responsible hereunder have been met by Owner and the insurance certificates, title policy and survey and any other items required by this Agreement to be provided by Owner to Builder prior to commencement have been provided by Owner to

Builder. Promptly after any such contingencies have been met and items provided by Owner, Builder shall obtain the building permit for construction of the House and shall commence work.

11. **COMPLETION.** For purposes of final payment and any completion deadline, the House shall be deemed to have reached "Substantial Completion" upon the earliest of: (1) the issuance of the certificate of occupancy; (2) the lender's determination that the House is substantially complete; or (3) Owner's occupation of any portion of the House. Builder will use its best efforts to reach Substantial Completion of the House within months from the date on which Builder obtains the building permit. Whether or not a Change Order is signed, the date for Substantial Completion shall be extended by such time as Builder is prevented by causes beyond its control from constructing the House, which the parties agree include, but are not limited to, the unavailability of materials, fire, inclement weather, strikes, lockouts or other labor disputes, differing site conditions, unavoidable casualties, changes in government regulations, unavailability of materials at reasonable cost, acts of governmental agencies or their employees, government moratoria, acts of God, declarations of war or national emergencies, civil unrest, force majeure, failure or unavailability of adequate sewer, water, electricity, gas or any utility services, interference by Owner, or the failure of Owner to perform responsibilities under this Agreement, including but not limited to the failure to make timely selections and other acts or omissions of Owner causing delay. The date for Substantial Completion shall also be extended by the number of days agreed upon by the parties in any Change Order and, whether a Change Order is signed, by the number of days required for Builder to perform other work for which Builder is entitled to additional compensation hereunder. The date for Substantial Completion shall also be extended by the period of any delay in payment of any interim payment due to Builder. Owner shall provide Builder, its employees, subcontractors, suppliers and material men continual and uninterrupted access to the Property and House in order to perform the work contemplated by this Agreement.

12. **OWNERSHIP AND ABSENCE OF ENCUMBRANCES.** Owner warrants and represents that: (1) it is currently the sole holder of legal and equitable title to the Property; (2) there are currently no leases, restrictions, easements, covenants, rules or regulations or other encumbrances on the Property that would prevent or inhibit construction of the House on the Property as contemplated in the Plans and Specifications; (3) the Property complies with all zoning, planning, environmental, homeowners' association and other building requirements; and (4) all utilities necessary for the completion of the House are available at the Property and no easements are required in order to bring them to the Property. Prior to Builder's obligation to commence construction of the House, Owner shall provide to Builder a copy of an owner's title insurance policy demonstrating the accuracy of items (1) and (2) of this paragraph and, upon request by Builder, shall provide to Builder an updated survey showing all boundary lines, building lines, utility locations, easements, other encumbrances and improvements, if any, on the Property. Except to execute a security deed in order to obtain a loan per paragraph 7, Owner shall not transfer any interest in the Property or House or otherwise encumber the Property or House until such time as Builder has been fully paid pursuant to this Agreement.

13. **SUBCONTRACTORS, EMPLOYEES AND SUPPLIERS.** Builder is entitled to select the subcontractors, employees and suppliers who will work on or provide materials to the House. Owner agrees not to have any work performed on the House by its own subcontractors, employees or suppliers until after Builder has completed all of its work on the House or this Agreement has been terminated. Owner shall not direct, supervise or control the subcontractors, employees or suppliers of Builder and shall not interfere with their work.

14. **CHANGE ORDERS.**

A. **Owner Changes:** Owner acknowledges that Builder will be organizing labor, subcontractors and materials based on the Plans and Specifications and the designated items on Exhibit "D" that are part of the Agreement at the time of its execution. Changes requested by Owner may involve additional time, effort, overhead and Costs for Builder. Consequently, Builder shall not be required to make any

changes requested by Owner in the Plans and Specifications or the Agreement. If Owner wants to request a change, it is important that Owner do so in a timely manner so as to permit Builder an opportunity to schedule the change in the normal building process if Builder agrees to such change.

B. Required Changes: Changes in the Plans and Specifications might be required by governmental entities or agencies (because of changes in laws or codes or otherwise), by job conditions or by homeowners associations or related entities, such as architectural control committees. Owner acknowledges that Builder is entitled to make these changes and that these changes may also involve additional time, effort, overhead and Costs for Builder.

C. Differing Site Conditions: Builder may encounter rock formations, springs, latent or subsurface Conditions, or other conditions materially differing from those ordinarily encountered and generally Recognized as inherent in the work of the type covered by this Agreement that substantially inhibit work or increase the Costs or time involved in performing the work.

D. Emergencies: If during construction, the safety or condition of persons, the House or the Property are threatened by an emergency, not caused by the negligence of Builder, or its agents, employees, subcontractors or suppliers, Builder, without seeking instructions from Owner, may act at Builder's discretion to prevent threatened damage, injury or loss.

E. Written Change Order: In the event of Owner's request for such a change to which Builder is willing to agree, other changes to which the parties agree, required changes in the Plans and Specifications, differing site conditions or emergencies as described in subparagraph 14.D., the parties agree to sign a written Change Order addressing such change utilizing the form attached hereto as Exhibit "E." Owner shall pay to Builder all additional Costs incurred in connection with the Change Order and, in the absence of a specific agreement for a different amount as set forth in the Change Order, shall also pay to Builder _____ percent of such additional Costs for overhead and profit combined. For any change that requires Builder to order a custom or specialized item, Builder may require prior payment by Owner of the Costs of such item.

F. Lender Approval: If a Change Order must be approved by a lender, it shall be Owner's responsibility to immediately obtain written approval and Builder shall not be required to perform such Change Order until written approval of the lender has been obtained.

G. Right to Terminate: If Owner or lender refuse to sign a Change Order as provided for in paragraph 14.E. relating to changes covered by subparagraphs 14. A., B., C. Or D., Builder may terminate this Agreement and recover the amounts provided for under paragraph 24.C. For a breach by Owner or may demand arbitration.

H. Subcontractors and Suppliers: No subcontractor or supplier is authorized to agree to a change on behalf of Builder.

I. Work Without Change Order: Notwithstanding the requirement that Change Orders be in writing, signed by the parties and approved by any lender, if necessary, if Builder in fact performs or partially performs a change requested by Owner or Owner's architect or other agent or a required change, or if Builder incurs additional Costs related to differing site conditions or an emergency, Builder shall be entitled to recover from Owner prior to Owner's occupancy of the House, unless earlier payment is provided for by the applicable Construction Draw Schedule, the additional Cost of such change, plus a reasonable overhead and profit (which overhead and profit shall be no less than fifteen percent (15%) of such Cost) and any deadline for Substantial Completion of the House shall be extended a reasonable amount of time.

15. CONSTRUCTION STANDARDS AND INSPECTIONS.

A. Standards for Construction and Inspections: Builder shall construct the House in accordance with Applicable building codes, standards in any express limited warranty provided for in paragraph 16 and in substantial compliance with the Plans and Specifications, as they may be modified in accordance with this Agreement. Such standards shall collectively be referred to in this Agreement as the "Construction Standards." The only criteria and standards that will be used in connection with inspections under this Agreement and in compiling any New Home Orientation Walk Through List are the Construction Standards.

Builder shall not be required to perform any work that would exceed the Construction Standards. Under no circumstance is Builder responsible for addressing or correcting conditions or circumstances located outside the Property even if affecting the Property or House. Builder shall have no obligation to repair and no liability for errors or omissions attributable to its compliance with Plans and Specifications prepared by an architect or other agent of Owner or for following instructions, directions or rules of such architect or agent or of any homeowners' association or related entity.

B. Inspection Rights: Owner, at its expense, shall have the right and responsibility to inspect, examine and test the House at reasonable times during normal business hours. While engaging in such activities, Owner shall not interfere with the progress of the work. Builder or its representative may be present during any such activities. Owner assumes all responsibility for its own acts and those of its representatives in exercising such rights and agrees to indemnify and hold Builder harmless from any damages, liabilities or injuries (including any attorney's fees and litigation or arbitration costs and fees) resulting there from to the fullest extent permitted by Georgia law. If Owner becomes aware of any problem during any such inspection, it shall provide prompt notification of such problem to Builder.

C. Owner Inspection Waiver: Owner acknowledges that it has read subparagraph 14.B. By initialing below, Owner waives the inspections described in that subparagraph. Owner agrees that in waiving its right to inspect, Owner: (1) accepts the House, **AS IS**, despite any provision in this Agreement to the contrary, except as provided in subparagraph 15.D. and except to the extent of any express limited warranty provided by Builder as set forth in paragraph 16; and, (2) waives and releases Builder, its agents, employees and subcontractors and brokers, if any, from any claim, right of action, suit or arbitration, seeking legal or equitable relief, including damages, relating to the House or Property, to the fullest extent permitted by Georgia law, except as provided in subparagraph 15.D. and except to the extent of any express limited warranty provided by Builder as set forth in paragraph 16.

Owner(s) Initials _____ Builder Representative Initials _____.

D. New Home Orientation Walk Through Inspection: Whether or not Owner has earlier inspected the House, upon Builder's request at or near the time of Substantial Completion of the House, Owner and Builder shall inspect the House and prepare, sign and date a New Home Orientation Walk Through List, specifying all items, including any noted in previous inspections, that fail to comply with the Construction Standards. The inclusion of an item on the New Home Orientation Walk Through List that does not fail to meet the Construction Standards shall not obligate Builder to address that item. The existence of items on the New Home Orientation Walk Through List shall not be grounds for the failure to make final payment to Builder as long as the House has reached Substantial Completion. Builder will make its best efforts to complete all of the items on the New Home Orientation Walk Through List that fail to comply with the Construction Standards as soon as reasonably possible after its compilation.

E. Private Inspectors: If Owner chooses to use a private home inspector in connection with any of the

Inspections permitted herein, that inspector must at the time of the inspection: (1) maintain all business licenses required by law; (2) be a full-time professional inspector or professional engineer; (3) if not a Professional engineer, be a member of either the American Society of Home Inspectors, Inc. Or the Georgia Association of Home Inspectors, Inc.; (4) have general liability insurance in an amount of at least \$500,000; and, (5) have professional liability errors and omissions insurance in an amount of at least \$500,000. Prior to any inspection by a home inspector, Owner shall provide to Builder proof that the inspector meets these requirements. Owner shall make arrangements with Builder at least one week in advance of the inspection for the home inspector to conduct any inspection. In conducting any inspection permitted by this Agreement, the private inspector shall evaluate the House solely in accordance with the Construction Standards and not in accordance with other standards. If the home inspector concludes that there are violations of any applicable codes, then, for each alleged violation, the inspector must specify in written form the applicable code(s) and provide as precise a reference as possible to the applicable portions of such code(s). It is Owner's responsibility to see that the inspector conducts inspections as required by this subparagraph.

F. Owner Acceptance: By signing the New Home Orientation Walk Through List, Owner expressly Acknowledges acceptance of the House and the Property and waives and releases Builder, its agents, Employees and subcontractors and any brokers from any claim, right of action, suits or arbitrations, seeking legal or equitable relief based upon or relating to any condition or circumstances in the House or on the Property, except for items on the New Home Orientation Walk Through List that fail to meet the Construction Standards and except as may be covered by any express limited warranty mentioned in paragraph 16. Upon satisfactory disposition of the items set forth in the New Home Orientation Walk Through List, this acceptance, waiver and release shall apply to such items as well, except as may be covered by any express limited warranty mentioned in paragraph 16.

16. HOME WARRANTY DISCLOSURE. (Initial as applicable; the others are not part of this Agreement)

_____ Builder Limited Warranty with Homeowner Handbook: Attached hereto as Exhibit "F" is Builder's Limited Warranty. It incorporates the current version of the Homeowner Handbook published by the Greater Atlanta Home Builders Association, Inc. The Homeowner Handbook is not a warranty by the Greater Atlanta Home Builders Association, Inc.

_____ An Insured Limited Warranty: Attached hereto as Exhibit "F" is the limited warranty, which is insured by a third party authorized to insure warranties under a state or federal insurance or risk retention statute.

_____ Builder Limited Warranty (Without Homeowner Handbook): Attached hereto as Exhibit "F" is Builder's Limited Warranty, without the Homeowner Handbook.

_____ No Warranty is offered with the House.

THE WARRANTY, IF ANY, CHECKED ABOVE CONSTITUTES THE ONLY WARRANTY, EXPRESS OR IMPLIED, PROVIDED BY BUILDER TO OWNER, AND BUILDER DISCLAIMS ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO ANY WARRANTIES OF MERCHANTABILITY, HABITABILITY AND FITNESS FOR A PARTICULAR PURPOSE. Unless Otherwise provided in the warranty selected above, the effective date of the warranty shall be the date of Substantial Completion.

17. TRANSFER OF MANUFACTURERS' WARRANTIES. Builder agrees to transfer to Owner, within five (5) days after final payment by Owner, all of Builder's interests, if any, in all manufacturers' warranties that by their terms are transferable by Builder to Owner.

18. PERMITS AND FEES. Builder shall be responsible for obtaining and paying the cost of all building permits. Owner authorizes and appoints Builder to obtain such permits from governmental agencies and authorizes Builder to execute applications in Owner's name. Owner agrees upon request by Builder to assist Builder in obtaining such permits by completing all related applications and forms.

19. TAXES. The Owner shall be responsible for paying all taxes and assessments on the House and Property, including but not limited to ad valorem taxes and shall be liable to Builder for any damages or adverse effect on lien rights resulting to Builder as a consequence of its failure to do so.

20. OCCUPANCY BY OWNER. Without Builder's express written consent, Owner agrees not to occupy the House or move household items into the House until a certificate of occupancy has been issued and until all amounts to be paid to Builder under this Agreement have been paid. If Owner breaches this provision, Builder shall be entitled to recover from Owner, in addition to any other damages permitted, damages equal to the fair market rental value of the House and Property during the period of such violation by Owner.

21. INSULATION. Insulation will be installed in the House, which, according to the manufacturer, will yield the following R-values:

A. Exterior walls in living areas will be insulated with _____ insulation to a thickness of ____ inches with an R-value of _____.

B. Ceilings below attic areas will be insulated with _____ insulation to a thickness of _____ inches with an R-value of _____.

C. Vaulted ceilings are insulated with _____ insulation to a thickness of _____ inches with an R-value of _____.

D. Floor overhangs are insulated with _____ insulation to a thickness of _____ inches with an R-value of _____.

22. HAZARDOUS MATERIALS. Owner represents that it is not aware of any hazardous materials or substances on the Property, including but not limited to asbestos and polychlorinated biphenyl (PCB). In the event Builder encounters or in good faith believes that it has encountered hazardous materials or substances, Builder has the right to stop work in the area(s) affected and remove its employees from the Property until the nature of the materials or substances has been determined, and, if necessary, removed or rendered harmless. Builder has no obligation to investigate or discover hazardous materials and shall not be responsible for hazardous materials unless brought onto the Property by Builder. Owner shall indemnify and hold harmless Builder, its agents, employees, subcontractors and suppliers to the fullest extent permitted by Georgia law from any and all claims, damages, losses and expenses, including but not limited to attorney's fees and litigation or arbitration expenses, arising from or involving such hazardous materials and substances.

23. INSURANCE.

A. Builder's Insurance: During construction, Builder shall purchase and maintain at Builder's expense any necessary workers compensation insurance. Builder shall also purchase and maintain during construction comprehensive general liability insurance. Such insurance coverages shall be obtained from one or more companies authorized to do business in Georgia.

B. Owner's Insurance: During construction and until such time as Builder has been fully paid hereunder, Owner shall purchase and maintain its own liability insurance on the House. Owner shall also purchase and maintain property insurance during that period covering loss to the House due to vandalism, theft, fire or other casualty to the full insurable value of the House (including the additional

value attributed to any Change Order) and shall name Builder as an additional insured. This insurance shall be on an all-risk policy form and shall include the interests of Owner, Builder and all subcontractors, sub-subcontractors, material men and suppliers performing work on the House or providing supplies or materials to the House. Owner waives all rights against Builder for damages caused by fire, theft, vandalism or other perils to the extent covered by the property insurance to be obtained by Owner, except such rights as it may have to the proceeds of such insurance. Such insurance to be provided by Owner shall be from one or more companies authorized to do business in Georgia.

C. Certificates of Insurance: Each party shall obtain current certificates of insurance and provide them to the other party before commencement of construction.

24. DEFAULT.

A. Owner's Rights: If Builder materially breaches its obligations under this Agreement, Owner shall be entitled, after giving Builder written notice of such breach and a ten (10) day period in which to substantially cure the breach, to demand arbitration or to terminate this Agreement in writing.

B. Builder's Rights: If Owner fails to timely make any payment required under this Agreement, Builder shall be entitled to immediately terminate this Agreement by providing written notice to Owner of such termination or to demand arbitration. If Owner otherwise materially breaches its obligations under this Agreement, Builder, after giving Owner written notice of such breach and a ten (10) day period in which to substantially cure such other breach, shall be entitled to demand arbitration or to terminate this Agreement in writing. As an interim step, Builder shall also be entitled to suspend its obligations under this Agreement pending the curing of any breach by Owner. If Builder decides to suspend its obligations, it shall provide notice to Owner of such decision.

C. Payments Upon Termination: In the event of termination by Owner as a result of breach by Builder after commencement of work, Owner shall pay Builder any: (1) amounts due at that time pursuant to paragraph 8; (2) amounts agreed upon in a Change Order or to which Builder is otherwise entitled under paragraph 14, in proportion to which the related work has been performed, unless such amounts are already covered by payments due at the time pursuant to paragraph 8; and (3) all Costs incurred by Builder in connection with the House that are not covered by other payments provided for by this subparagraph. In the event of termination by Builder as a result of breach by Owner, Owner shall pay to Builder all of the amounts to be paid upon termination by Owner, plus any portion of the overhead and profit provided for under paragraph 4 that has not already been paid or is not otherwise covered by other payments required by this subparagraph. As an alternative to termination, Builder may seek specific performance of the Agreement.

D. Timing of Payments: Notwithstanding any later date for payment specified in this Agreement, any Construction Draw Schedule, any Change Order or otherwise, the payments required upon termination shall be paid within seven (7) days from the date of termination.

E. Interest: Payments due under this paragraph and unpaid for more than thirty (30) days shall bear interest at the rate of eighteen percent (18%) per annum.

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25. STATUTORY ALTERNATIVE DISPUTE RESOLUTION:

A. "Act:" For purposes of this paragraph, the term "Act" shall refer to O.C.G.A. §§ 8-2-35 through 8-2-43.

- B. Notice: GEORGIA LAW CONTAINS IMPORTANT REQUIREMENTS YOU MUST FOLLOW BEFORE YOU MAY FILE A LAWSUIT OR OTHER ACTION FOR DEFECTIVE CONSTRUCTION AGAINST THE CONTRACTOR WHO CONSTRUCTED, IMPROVED, OR REPAIRED YOUR HOME. NINETY DAYS BEFORE YOU FILE YOUR LAWSUIT OR OTHER ACTION, YOU MUST SERVE ON THE CONTRACTOR A WRITTEN NOTICE OF ANY CONSTRUCTION CONDITIONS YOU ALLEGE ARE DEFECTIVE. UNDER THE LAW, A CONTRACTOR HAS THE OPPORTUNITY TO MAKE AN OFFER TO REPAIR OR PAY FOR THE DEFECTS OR BOTH. YOU ARE NOT OBLIGATED TO ACCEPT ANY OFFER MADE BY A CONTRACTOR. THERE ARE STRICT DEADLINES AND PROCEDURES UNDER STATE LAW, AND FAILURE TO FOLLOW THEM MAY AFFECT YOUR ABILITY TO FILE A LAWSUIT OR OTHER ACTION.
- C. "Construction Defect:" For purpose of the Act, the term "construction defect" shall mean: any matter concerning the design, construction, or repair of a dwelling, as that term is defined in O.C.G.A. § 8-2-36 (6), or an alteration of or repair or addition to an existing dwelling, or of an appurtenance to a dwelling on which a person has a complaint against Seller or other "contractor," as that term is defined in O.C.G.A. § 8-2-36 (5); and any physical damage to the dwelling or real property on which it is located that is caused by a construction defect. This definition does not change or expand: the definition of "Construction Standards" in this Agreement; or Seller's obligations relating to design, construction, repair or replacement under this Agreement, any limited warranty, the law or otherwise. The term "construction defect" is incorporated into this Agreement to make it clear that any "action," as that term is defined in O.C.G.A. § 8-2-36 (1), whether based on breach of contract, breach of warranty, negligence, fraud or other statutory or common-law grounds, that alleges a "construction defect" is subject to the Act.
- D. Interaction of Act and Agreement: Buyer acknowledges and agrees that his obligations under this Agreement are in addition to those under the Act.
- E. Except as permitted by O.C.G.A. § 8-2-38 (o), if Buyer files an "action," as that term is defined in O.C.G.A. § 8-2-36 (1), without first complying with the requirements of the Act, Buyer shall be liable for the reasonable attorney's fees and expenses incurred by Seller in obtaining a stay of that action

26. MANDATORY BINDING ARBITRATION. Builder and Owner will cooperate with one another in avoiding and informally resolving disputes between them. Builder and Owner acknowledge that in the event of disputes that are not informally resolved, resolution will best be achieved through arbitration rather than civil litigation because of the substantial savings of time and expense for all parties and because of the privacy and flexibility associated with arbitration procedures. If Builder provides a warranty to Owner, then the terms and procedures of that warranty shall first apply to any claim or dispute that is within the coverage of that warranty involving Owner, Builder or the insurer, if any, of the warranty. Any unresolved claim or dispute between Builder and Owner arising out of or relating to such warranty, if any, and any other claim or dispute of any kind or nature between Builder and Owner arising out of or relating in any manner to this Agreement or this transaction, whether characterized as a contract claim or otherwise, shall be decided by binding arbitration in accordance with Official Code of Georgia Annotated section 9-9-1, *et seq.* And with the rules and procedures of the arbitrator and such decision shall be final. If Builder and Owner do not otherwise voluntarily agree on the arbitrator, the arbitrator shall be Construction Arbitration Associates, Ltd. The provisions of this paragraph shall survive the termination, rescission and/or completion of this Agreement. Any questions regarding the interpretation of this arbitration provision or the arbitrability of a dispute under this provision shall be decided by the arbitrator, unless specifically required by law to be decided by a court, and shall be binding on the parties. Their initials below evidence the agreement of the parties to the provisions of this paragraph:

Owner(s) Initials: _____ Builder Representative Initials: _____

In order for this paragraph to be deemed a part of this Agreement, both Builder and Owner must initial it. In the event this Agreement is executed by Owner and Builder, but one or the other does not initial this paragraph, then either party shall have two (2) days from its receipt of the original or a copy of such executed Agreement in which to void this Agreement by written notice to the other party.

27. **BROKERS.** Unless otherwise indicated in the Agreement, Owner and Builder each warrant and represent that it has not utilized or contracted with a real estate broker or licensee in connection with the construction contemplated by this Agreement. In the event of the breach of such warranty and representation, the breaching party shall indemnify and hold harmless the other party to the fullest extent permitted by Georgia law from claims by such broker or licensee for commissions or compensation and shall pay all costs of defending against any such claims, including but not limited to attorney's fees and litigation or arbitration expenses and fees.

28. **OTHER PROVISIONS.**

A. **Time is of the essence:** Time is of the essence of this Agreement. Builder's acceptance of one or more late payments shall not constitute a waiver of Builder's right to insist upon strict compliance with the remainder of payments due under this Agreement.

B. **Transfer or Assignment:** This agreement shall not be transferred or assigned without the consent of all parties and any permitted assignee shall fulfill all of the terms and conditions of this Agreement.

C. **Governing Law:** This Agreement shall be governed by and construed and interpreted in accordance With Georgia law.

D. **Cooperation:** All parties agree that such documentation as is reasonably necessary to carry out the Obligations of this Agreement shall be produced, executed and/or delivered by such parties at such time Required to fulfill the terms and conditions of this Agreement. This subparagraph shall not require Builder and Builder is not required to assume obligations to any lender or anyone else that are in excess of those assumed by Builder in this Agreement.

E. **IRS Compliance:** Owner and Builder agree to comply with, execute and deliver such certifications, Affidavits and statements, if any, as are required in order to meet the requirements of Internal Revenue Code.

F. **Entire Agreement:** This Agreement constitutes the sole and entire agreement between the parties. No representation, promise or inducement not included in this Agreement shall be binding upon any party.

G. **Definition of Agreement:** The term "Agreement" as used herein, as well as the terms "herein," "Hereunder," and the like mean this Agreement in its entirety. All exhibits, amendments and addenda attached hereto or stated to be attached hereto are part of this Agreement.

H. **Modifications:** This Agreement may not be modified, altered or amended except by written instrument executed by the parties hereto, but this subparagraph shall not affect Builder's rights under paragraph 14.I.

I. **Terminology and Captions:** All pronouns, singular or plural, masculine, feminine or neuter, shall mean and include the person, entity, firm or corporation to which they refer as the context may require. Whenever the context may require, the singular shall mean and include the plural and the plural shall mean and include the singular.

J. Successors and Assigns: This Agreement shall inure to the benefit of, and be binding upon, the parties hereto, their heirs, successors, administrators, executors and assigns.

K. Severability: Each provision of this Agreement is severable from every other provision of the Agreement. If any provision is determined to be unenforceable, the rest of the Agreement shall remain valid and enforceable. If any provision of the Agreement is determined to be unenforceable in a particular context or as to a particular right, the Agreement shall remain enforceable in all other contexts and as to all other rights.

L. Notices: Except as otherwise provided for in this Agreement, all notices or demands required or permitted hereunder shall be in writing to the address herein provided on the signature page and shall be delivered either: (1) in person; (2) by overnight delivery service prepaid; (3) by facsimile (Fax) transmission; or (4) by the United States Postal Service, postage prepaid, registered or certified, return receipt requested. Such notice shall be deemed to have been given as of the date and time the same are actually received by the party to whom the notice is directed. Refusal to accept or inability to deliver because of changed address of which no notice was given shall be deemed to be receipt of such notice. Any party, by written notice to the other, in the manner herein provided, may designate an address different from that set forth on the signature page.

M. Construction of Agreement: The parties acknowledge that each party and, if they choose, counsel for each party, has reviewed this Agreement and that any rule of construction or interpretation calling for the construction against the drafting party shall not be employed in the interpretation or construction of this Agreement.

N. Multiple Owners: In the event that there is more than one Owner, each Owner hereby authorizes and empowers any other Owner to act on his or her behalf in connection with matters relating to this Agreement, including but not limited to changes in the work and Change Orders, and each Owner authorizes Builder to rely on such action. This authorization shall not preclude Builder from requiring that each Owner agree to matters relating to the Agreement.

29. SPECIAL STIPULATIONS. The following special stipulations are made a part of this Agreement and, if Conflicting with any preceding paragraph, shall control:

30. EXHIBITS AND ADDENDA. The following Exhibits and/or Addenda are attached hereto and by reference made a part hereof:

- o Plans, Exhibit "A"
- o Specifications, Exhibit "B"
- o Construction Draw Schedule, * Exhibit "C"
- o Selections Exhibit, Exhibit "D"
- o Change Order Form, Exhibit "E"

- o Limited Warranty, if any (as described herein), Exhibit "F"
- o Non-Refundable Construction Deposit, Exhibit " _____ "
- o Other, _____ Exhibit " _____ "
- o Other, _____ Exhibit " _____ "

* If the parties incorporate by reference a lender's Construction Draw Schedule without attaching that Document, there will not be an Exhibit "C."

31. TIME LIMIT OF OFFER. This instrument shall be regarded as an offer by Contractor or Owner, whichever first signs, to the other and is open for acceptance by the other until _____ o'clock _____ M, on the ____ day of _____, 20____.

32. ACCEPTANCE. The offer is hereby accepted, at _____ o'clock _____M, on the _____day of _____, 20 _____. This instrument shall become a binding Agreement when written acceptance or a facsimile (FAX) transmission of acceptance is actually received by offeror.

SIGNATURE PAGE

Owner's Signature

Owner's Signature

Print or Type Name: _____

Print or Type Name: _____

Social Security No.: _____

Social Security No.: _____

Home Phone: _____

Home Phone: _____

Business Phone: _____

Business Phone: _____

FAX: _____

FAX: _____

Address: _____ Address: _____

Builder Signature
(Use full legal name)

Print or Type Name: _____

By: _____

Title: _____

Business Phone: _____

FAX: _____

Address: _____