

MEMORANDUM OF AGREEMENT

THIS MEMORANDUM OF AGREEMENT is made and entered into as of the ____ day of June, 2019 (the “Effective Date”) by and between **CITY CENTER COMPANIES, LLC**, having an address of 250 West Main Street, Lexington, KY 40507 (hereinafter referred to as “CITY CENTER”), the **LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT**, an urban-county government pursuant to KRS Chapter 67A, located at 200 East Main Street, Lexington, KY 40507 (hereinafter referred to as “LFUCG”), and **L-M ASPHALT PARTNERS, LTD, d/b/a ATS CONSTRUCTION**, having an address of 3009 Atkinson Avenue, Suite 400, Lexington, KY, 40509 (hereinafter referred to as “ATS Construction”), collectively referred to as the “Parties.”

RECITALS

WHEREAS, LFUCG owns and maintains that portion of the right-of-way identified as South Upper Street between West Vine Street and West Main Street as well as that portion of the right-of-way identified as South Limestone Street between West Vine Street and West Main Street, both located in Lexington, Kentucky; and

WHEREAS, CITY CENTER has constructed a development which consists of an underground parking garage and buildings housing retail businesses, hotels, offices, and residential condominiums, which is situated between West Vine Street and West Main Street and between South Upper Street and South Limestone Street in Lexington, Kentucky; and

WHEREAS, the construction activity by CITY CENTER requires the reconstruction of a paved right-of-way on South Upper Street between West Vine Street and West Main Street; and

WHEREAS, the construction activity by CITY CENTER requires the resurfacing of a portion of the right of way on South Limestone Street between West Vine Street and West Main Street; and

WHEREAS, LFUCG has an agreement with ATS Construction to perform general paving activities in Lexington, Kentucky, in those areas designated by LFUCG; and

WHEREAS, it would be mutually advantageous to the parties for ATS Construction to reconstruct South Upper Street between West Vine Street and West Main Street, in accordance with construction plans and specifications approved by LFUCG, and for LFUCG and CITY CENTER to share the cost of such reconstruction of South Upper Street; and

WHEREAS, in connection with CITY CENTER’s required resurfacing of South Limestone Street between West Vine Street and West Main Street, it would be mutually advantageous to the parties for ATS Construction to resurface the remainder of South Limestone between West Vine Street and West Main Street, in accordance with construction plans and specifications approved by LFUCG; and

WHEREAS, CITY CENTER and LFUCG have agreed to share the costs of the reconstruction of South Upper Street between West Vine Street and West Main Street by ATS Construction and have agreed to cooperate in the resurfacing of the remainder of South Limestone Street between West Vine Street and West Main Street by ATS Construction, and the parties now desire to reduce their agreement to writing.

NOW, THEREFORE, in consideration of the premises and the foregoing mutually agreed upon promises, conditions, and covenants hereinafter set forth, CITY CENTER, LFUCG, and ATS Construction hereby covenant and agree as follows:

(1) **INCORPORATION OF RECITALS.** The above recitals are incorporated herein as if fully set forth.

(2) **RECONSTRUCTION OF SOUTH UPPER STREET BETWEEN WEST VINE STREET AND WEST MAIN STREET.** ATS Construction shall dig out and replace all pavement and base on South Upper Street between West Vine Street and West Main Street to a depth of approximately twenty-four (24) inches. ATS Construction shall rebuild the street using DGA, base with fiber, and PG 76-22 surface. ATS Construction shall replace all pavement curb to curb. ATS Construction shall furnish all construction labor, equipment, and shall use contractor supplied materials to reconstruct South Upper Street in accordance with construction plans and specifications approved by LFUCG.

Outside of this project and in advance of this work, LFUCG shall reinforce the existing sanitary sewer pipe. Outside of this project and in advance of this work, LFUCG shall also investigate the storm sewer and if corrective work is needed, LFUCG shall perform such work.

ATS Construction and CITY CENTER agree that this work shall be constructed, inspected, and surety shall be provided in accordance with the requirements of the LFUCG Division of Engineering manuals for a new development project. This work shall be constructed in a good, safe and workmanlike manner in compliance with all applicable codes, ordinances, laws and regulations. ATS Construction and CITY CENTER shall take necessary action to protect the life, health, safety, and property of all personnel on the job site, members of the public, and LFUCG personnel. The parties agree to cooperate each with the other to expedite the reconstruction of South Upper Street between West Vine Street and West Main Street.

(3) **RESURFACING OF SOUTH LIMESTONE STREET BETWEEN WEST VINE STREET AND WEST MAIN STREET.** CITY CENTER understands and agrees that it is responsible for resurfacing the turn lane and left through lane on South Limestone between West Vine Street and West Main Street. ATS Construction shall perform this portion of the resurfacing work for CITY CENTER. In connection with this work, LFUCG desires for ATS Construction to resurface the remainder of South Limestone between West Vine Street and West Main Street. ATS Construction shall complete the resurfacing of the remaining portion of South Limestone between West Vine Street and West Main Street and shall coordinate the completion of this work with CITY CENTER and LFUCG. The parties agree to cooperate each with the other to expedite the resurfacing of South Limestone Street between West Vine Street and West Main Street.

(4) **COST ESTIMATES AND COST ALLOCATION.** Recognizing that the reconstruction of South Upper Street between West Vine Street and West Main Street and the resurfacing of South Limestone Street between West Vine Street and West Main Street are mutually beneficial to both CITY CENTER and LFUCG, these parties have agreed to share the construction cost associated with this reconstruction and resurfacing as follows:

(a) **Reconstruction of South Upper Street between West Vine Street and West Main Street:** The estimated cost of this project is **NINETY THOUSAND DOLLARS (\$90,000.00)**, as shown by the estimate attached hereto and incorporated herein as **Exhibit A**. CITY CENTER shall pay 50% of all costs associated with this project, up to a maximum amount of **FORTY FIVE THOUSAND DOLLARS (\$45,000.00)**. LFUCG shall pay the remaining 50% of this project cost, up to a maximum amount of **FORTY FIVE THOUSAND DOLLARS (\$45,000.00)**. If the estimated construction cost changes, ATS Construction shall provide immediate notice of any change orders affecting the estimated project cost to CITY CENTER and LFUCG for approval. In no event shall LFUCG be required to pay an amount in excess 50% of the actual cost for this work, capped at an amount not to exceed **FORTY FIVE THOUSAND DOLLARS (\$45,000.00)**, except by written modification to this Agreement approved by both parties and approval of an appropriate change order by the Urban County Council. CITY CENTER and LFUCG shall each separately pay their respective portion of the total cost of reconstruction of South Upper Street between West Vine Street and West Main Street to ATS Construction and shall notify the other party of such payment in writing when payment has been made.

(b) **Resurfacing of South Limestone Street between West Vine Street and West Main Street:** The estimated total cost of this project is **THIRTY TWO THOUSAND DOLLARS (\$32,000.00)**, as shown by the estimate attached hereto and incorporated herein as **Exhibit A**. CITY CENTER shall pay for that portion of the costs of resurfacing the turn lane and left through lane on South Limestone between West Vine Street and West Main Street, at a cost estimated not to exceed **FIFTEEN THOUSAND DOLLARS (\$15,000.00)**. LFUCG shall pay for resurfacing of the remainder of South Limestone Street between West Vine Street and West Main Street, at a cost estimated not to exceed **SEVENTEEN THOUSAND DOLLARS (\$17,000.00)**. If the estimated construction cost changes, ATS Construction shall provide immediate notice of any change orders affecting the project cost to CITY CENTER and LFUCG for approval. CITY CENTER and LFUCG shall each separately pay their respective portions of the total resurfacing cost to ATS Construction, and shall notify the other party of such payment in writing when payment has been made.

(5) **CONSTRUCTION APPROVALS; CHANGES IN THE WORK; CHANGE ORDERS.** Any and all work performed pursuant to this Agreement shall be approved by LFUCG's Department of Environmental Quality and Public Works. CITY CENTER and ATS Construction hereby agree to submit any changes or modifications to the plans to LFUCG's Department of Environmental Quality and Public Works for consideration and approval before the commencement of any work pursuant to those changes, modifications, or change orders.

LFUCG reserves the right in its sole discretion to demand that CITY CENTER and/or ATS Construction and all other construction contractors or subcontractors immediately cease any portion of, or all further work undertaken within the right of way or in the scope of work described

in this agreement. Any authorized services performed, materials used or installed to the satisfaction of LFUCG before the demand to cease any and all further work shall be paid in accordance with the terms of this Agreement. LFUCG shall thereafter authorize ATS Construction in writing to undertake only minimal, reasonable, and necessary additional work or services and acquire, expend, use, or install only minimal, reasonable, and necessary additional materials to re-establish the original use and function of the right of way. ATS Construction shall notify CITY CENTER and LFUCG in writing, and obtain their approval, prior to any change orders to the construction plans for the site or service area that will affect the shared project costs.

(6) **COMMENCEMENT; COMPLETION DATE; DELAY.** This Agreement will commence on the Effective Date. Time is of the essence in the performance of this Agreement. The work is expected to be completed on or about **September 30, 2019**. The performance period may be extended by agreement of the parties via change order executed by the parties and approved by the Urban County Council. Notwithstanding the foregoing, if delays result solely by reason of the acts of CITY CENTER, CITY CENTER shall be solely liable for any increased costs or penalties associated with such delays. If delays result solely by reason of the acts of ATS Construction, ATS Construction shall be solely liable for any increased costs or penalties associated with such delays. CITY CENTER and/or ATS Construction shall immediately notify LFUCG of any delay, regardless of cause, within five (5) business days and provide a written action plan regarding how it will attempt to resolve the delay, whenever CITY CENTER and/or ATS Construction observe or otherwise become aware of any development that affects the scope or timing of the work.

(7) **INSURANCE.** CITY CENTER and ATS Construction shall procure and maintain, and shall require its subcontractors to procure and maintain, insurance coverage at levels approved by LFUCG at all times during the period of this Agreement. CITY CENTER and ATS Construction shall provide at least thirty (30) days advance written notice via certified mail, return receipt requested, in the event that any required insurance coverages are canceled or not renewed.

(8) **TERMINATION.** CITY CENTER or ATS CONSTRUCTION may only terminate this Agreement due to LFUCG's material breach of the terms hereof which causes CITY CENTER or ATS Construction to be unable to perform its duties or responsibilities under this Agreement, and only upon thirty (30) days written advance notice to LFUCG by registered or certified mail. LFUCG shall have the right to terminate and cancel this Agreement at any time upon thirty (30) days written notice served on CITY CENTER or ATS Construction by registered or certified mail.

(9) **DEFAULT.** No party shall be in default under this Agreement unless and until the non-defaulting party shall have given the defaulting party written notice of such default and the defaulting party shall have failed to cure the default within thirty (30) days after written receipt of such notice. Upon the failure by the defaulting party to timely cure any default after notice thereof from the non-defaulting party, the non-defaulting party shall have the right to terminate the Agreement and pursue an appropriate remedy.

(10) **INDEMNIFICATION AND HOLD HARMLESS.** It is understood and agreed by the parties that, to the extent permitted by law, CITY CENTER and ATS Construction hereby

assume the entire responsibility and liability for any and all damages to persons or property caused by or resulting from or arising out of any act or omission on the part of CITY CENTER, ATS Construction, its subcontractors, agents, servants, owners, principals, licensees, or assigns, under or in connection with this Agreement and/or the provision of services and the performance or failure to perform any work required thereby.

CITY CENTER and ATS Construction shall indemnify, save, hold harmless, and defend LFUCG and its elected and appointed officials, employees, agents, volunteers, and successors in interest from and against any and all liability, damages, and losses, including but not limited to, demands, claims, causes of action, judgments, penalties, fines, liens, costs, expenses, interest, defense costs, and reasonable attorney's fees that are in any way incidental to or connect with, or that arise or are alleged to have arisen, directly or indirectly, from or by the performance or breach of this Agreement and/or the provision of goods or services by CITY CENTER, ATS Construction, its contractors, or subcontractors pursuant to this Agreement, provided that (a) it is attributable to personal injury, bodily injury, sickness, or death, or to injury to or destruction of property (including the loss of use resulting therefrom), or to or from the negligent acts, errors or omissions or willful misconduct of CITY CENTER, ATS Construction, or its subcontractors; and (b) not caused solely by the active negligence or willful misconduct of LFUCG. These provisions shall in no way be limited by any financial responsibility or insurance requirements, and shall survive any termination of this Agreement.

(11) **BINDING EFFECT.** This Agreement shall be binding upon, and shall inure to the benefit of, the executors, heirs, successors, and assigns of the parties hereto, and no party shall assign, sublet, or transfer its interests in this Agreement without the written consent of the other parties.

(12) **NON-WAIVER.** The failure or delay on the part of CITY CENTER, ATS Construction, or LFUCG to exercise any right, power or privilege hereunder shall not operate as a waiver thereof.

(13) **ENTIRE AGREEMENT.** This Agreement constitutes the entire agreement and understanding between the parties with respect to the subject matter contained herein and supersedes all prior offers, negotiations, and other agreements concerning the subject matter contained herein. No part of this Agreement may be altered, modified, or changed in any way except in writing signed by the parties hereto or signed by the duly authorized representatives of said parties. Unless specifically waived herein, all LFUCG ordinances, manuals, rules, regulations, or similar requirements of LFUCG applicable to the subject matter of this Agreement shall control.

(14) **AMENDMENTS.** This Agreement may only be amended by a written agreement of all the parties hereto. No revision of this Agreement shall be valid unless made in writing and signed by an officer of CITY CENTER, an officer of ATS Construction, and an authorized signatory on behalf of LFUCG.

(15) **GOVERNING LAW; CHOICE OF FORUM.** The laws of the Commonwealth of Kentucky shall govern this Agreement. This Agreement shall be interpreted, applied and enforced according to the fair meaning of its terms and not be construed strictly in favor of or

against either party, regardless of which party may have drafted any of its provisions. Any action brought against LFUCG, CITY CENTER, or ATS Construction on this Agreement, including but not limited to actions either for breach of the agreement or for enforcement of the agreement, shall be brought in a court of appropriate jurisdiction in Fayette County, Kentucky.

(16) **SEVERABILITY.** In the event that any one or more of the provisions contained herein shall, for any reason, be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provisions of this Agreement.

(17) **NO THIRD PARTY RIGHTS.** Nothing in this Agreement, expressed or implied, is intended or shall be construed to confer upon or give to any person other than the parties hereto any right, remedy, or claim under or by reason of such agreement or covenant, condition, or stipulation herein contained. Nothing expressed or mentioned in or to be implied from this Agreement is intended or shall be construed to give to any person other than the parties hereto any legal or equitable right, remedy, or claim under or in respect to this Agreement.

(18) **NOTICES.** All notices, consents, demands, or other communications required or permitted to be given or made hereunder shall be sufficiently given or made if given in writing, mailed by reliable overnight courier or by Certified Mail, return receipt, in a sealed envelope, postage prepaid, addressed to the following addresses:

LFUCG: Commissioner, Dept. of Environmental Quality and Public Works
Lexington-Fayette Urban County Government
200 East Main Street
Lexington, KY 40507

With
copies to: Commissioner of Law
Lexington-Fayette Urban County Government
200 East Main Street
Lexington, KY 40507

CITY CENTER: Mr. Ralph Coldiron
The Webb Companies, Suite 3000
250 West Main Street
Lexington, KY 40507

ATS Construction: Brian Billings
ATS Construction
3009 Atkinson Ave., #400
Lexington, KY 40509

CITY CENTER, LFUCG, or ATS Construction may from time to time designate any other address for this purpose by written notice to the other Party.

(19) This Agreement may be executed in duplicate counterparts, each of which shall be deemed an original. In the event that any signature is delivered by facsimile or by email of a “.pdf”

format data file, such signature shall create a valid and binding obligation of such party with the same force and effect as if such facsimile or “.pdf” signature page were an original thereof.

(20) The execution, delivery and performance of this Agreement and any documents relating hereto have been duly authorized by all necessary parties, and this Agreement is enforceable in accordance with its terms. CITY CENTER, LFUCG, and ATS Construction have full power and authority to enter into this Agreement, to execute and deliver all instruments and documents referred to herein and to consummate the transactions contemplated hereby.

IN WITNESS WHEREOF, the parties by their authorized representative have executed this Agreement as of the Effective Date.

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT

BY: _____
Linda Gorton, Mayor

ATTEST:

Clerk of the Urban County Council

CITY CENTER COMPANIES, LLC

BY: _____

Name: _____

Title: _____

ACKNOWLEDGMENT

STATE OF)
)
COUNTY OF FAYETTE)

On the ____ day of _____, 2019, before me personally appeared _____, and acknowledged under oath that he/she is the authorized representative of City Center Companies, LLC, and was authorized to execute this Agreement.

My Commission Expires: _____

NOTARY PUBLIC

L-M ASPHALT PARTNERS, LTD, d/b/a
ATS CONSTRUCTION

BY: _____

Name: _____

Title: _____

ACKNOWLEDGMENT

STATE OF)
)
COUNTY OF FAYETTE)

On the _____ day of _____, 2019, before me personally appeared _____, and acknowledged under oath that he/she is the authorized representative of L-M Asphalt Partners, Ltd., d/b/a ATS Construction, and as such was authorized to execute this Agreement.

My Commission Expires: _____

NOTARY PUBLIC



LFUGG STREETS & ROADS Project Cost Estimate

DATE: 6/4/2019
LOCATION: CD #3
PROJECT: S. Upper Street - Main Street to Vine Street
BIDDER: Mike Thomas, William Osborne, Bryan Beasley
CHECKED BY:

SCOPE OF WORK						
ROAD / STREET NAME	THICK INCH.	ITEM DESCRIPTION	APPROX. QUANTITY	Unit	UNIT PRICE	TOTAL AMOUNT
N. Upper Street - Main Street to Vine Street 6	18.0	AREA OF WORK	9,120.00	SF	1013	SY
		Remove Portland Cement Concrete Pavement	1013	SY	\$25.00	\$25,325.00
	5.0	Dense Graded Aggregate Base	367	TN	\$26.00	\$9,542.00
	5.0	No. 2 Stone	274	TN	\$28.00	\$7,672.00
	5.0	Bituminous Base	284	TN	\$77.00	\$21,868.00
	1.0	Class I, Bituminous Surface greater than 50 tons	61	TN	\$84.00	\$5,124.00
		Bituminous Material for Tack	0.5	TN	\$750.00	\$375.00
		4" HDPE Perforated Pipe	300	LF	\$15.75	\$4,725.00
		Geotextile Construction Type IV	1013	SY	\$2.25	\$2,279.25
		Saw cutting	640	LF	\$5.25	\$3,360.00
		MAINTAIN & CONTROL TRAFFIC	1	LS	\$3,155.55	\$3,155.55
		STAKING	1	LS	\$735.20	\$735.20
		MOBILIZATION	1	LS	\$2,715.00	\$2,715.00
		PAVEMENT MARKINGS - WHITE 4 IN. PAINT	465	LF	\$0.35	\$162.75
		PAVEMENT MARKINGS - Combination Arrow	1	EA	\$80.00	\$80.00
		PAVEMENT MARKINGS - Straight Arrow	1	EA	\$70.00	\$70.00
		PAVEMENT MARKINGS - Thermo 12" Width (Crosswalk)	185	LF	\$5.25	\$971.25
		PAVEMENT MARKINGS - Thermo 24" (Stop Bar)	40	LF	\$6.00	\$240.00
	Manhole Rapiir (in House with Mr. Manhole)	4	EA	\$400.00	\$1,600.00	
						\$0.00
					TOTAL:	\$80,000.00

ROAD / STREET NAME	MEASUREMENTS		
	L	W	SF
N. Upper - Main to Vine	240	28	6,720
	50	40	2,400
			0
TOTAL			9120

NOTES:
 This cost estimate is based on excavating out 18 inches of existing pavement / subgrade and reconstructing the street subgrade and pavement section with the above layer thicknesses.
 The pavement markings are based off the information from the concept traffic flow plans dated 8/21/2018 for the Centrepointe Development.
 ** The above pricing does not allow for any additional excavation for material deeper than 18 inches if the need is encountered. If additional depth is needed, this would require additional / special pricing at that time of discovery.

Exhibit A

**S. Upper Street- Main Street to Vine Street.
Repair /Paving Area**



PROJECT COST ESTIMATE

PROJECT NAME	South Limestone Street from East Vine Street to East Main Street
PROJECT NUMBER	
PROJECT LIMITS	Limestone Street / Vine Street to Main Street
TYPE OF PROJECT	Resurfacing
ESTIMATE DONE BY	Bill Osborne Project Manager Senior
DATE (Estimate)	4-Jun-19
COST ESTIMATE PHASE	CONCEPTUAL

NO.	ITEM	UNIT	QUANTITY	UNIT PRICE	EXTENSION
1	Milling	TN	170	\$22.00	\$3,740.00
2	Asphalt Surface	TN	170	\$93.47	\$15,889.90
	Pavement Markings				
3	Stop Bars	LF	39 LF	\$6.00	\$234.00
4	Cross Walk	LF	130	\$5.25	\$130.00
5	Cross Walk	LF	130	\$5.25	\$130.00
6	White Lines	LF	585	\$ 0.40	\$234.00
7	Skip Lines	LF	51	\$0.40	\$20.40
8	Turn Arrows	EA	3	\$80.00	\$240.00
9	Straight Arrows	EA	6	\$70.00	\$420.00
10	Manholes Raising	EA	4	\$225.00	\$900.00
11	Mobilization / Set Up	LS	1	\$2,715.00	\$2,715.00
12	Maintain & Control Traffic	LS	1	\$3,155.55	\$3,155.55
			Total		\$27,808.85
	Road/ Name	Measurments			
			L	W	SF/SY
	South Limestone Street - Vine Street to Main Street		340	39	13260/1,473.33
					\$ -
					\$ -
					\$ -
	CONTINGENCIES (For Conceptual Estimates is SUB TOTAL @ 15%)				\$4,171.32
	TOTAL				\$ 31,980.17

ADDITIONAL COMMENTS	
For Estimating and Budgeting Purposes The Total Project Cost	\$ 32,000.00
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Done



13488.8 Square Feet

Add Point