

## FAIRWAY DRIVE DRAINAGE IMPROVEMENT COOPERATION AGREEMENT

This agreement ("Agreement") made and entered into by Grizzly Golf Center, Inc. (hereinafter referred to as "GRIZZLY"), and the City of Mason, (hereinafter referred to as "MASON").

**WHEREAS**, to reduce flooding in the area of Van Buren Drive, MASON desires to remove the existing storm sewer system and to build a new bridge and culvert located within the City of Mason's corporation limits, and which new bridge and culvert will be owned and maintained by GRIZZLY, all in accordance with the specifications of MASON and Warren County Engineer (hereinafter referred to as the "PROJECT"); and

**WHEREAS**, GRIZZLY and MASON desire to enter into a joint agreement to construct the PROJECT; and

**NOW, THEREFORE**, in consideration of the mutual covenants hereinafter contained and the benefit to be derived by the parties from the execution hereof, GRIZZLY consents to the construction of the PROJECT by MASON on the following terms:

1. MASON will build the bridge and culvert, and restore the drainage channel across property owned by GRIZZLY, in accordance with the MASON and Warren County specifications, as noted on attachment "A".
2. MASON will pay the total cost of the bridge and road improvements including design and obtaining FEMA permits. MASON will promptly and diligently take all steps necessary, including initiating and prosecuting legal action, to remove any mechanics' liens on GRIZZLY's property that may arise from construction of the PROJECT.
3. Per MASON contract requirements, the Contractor (as defined below) will be provided twelve-weeks to complete the PROJECT and will comply with a date for substantial completion of **March 1, 2006**. If paving is not completed by the above date, the final scheduled paving of the cart paths will require two weeks notice and approval by GRIZZLY and MASON. In the event that the Contractor fails to perform the work according to the terms and conditions of the contract, the City has incorporated liquidated damages at Three Thousand Dollars (\$3000.00) for each calendar day beyond March 1, 2006 that the PROJECT remains incomplete and hereby agrees that it will pay GRIZZLY the full amount of any delay damages it recovers to offset revenues lost by GRIZZLY as a result of diminished or lost greens fees and cart rentals due to any actions by MASON or the Contractor associated with the completion of the PROJECT.
4. MASON will advertise and open bids, will contract with the successful bidder (the "Contractor"), and will administer the contract including paying the Contractor for accepted work.
5. Per MASON bidding requirements, the Contractor will provide a contract bid bond with the submission of its bid and MASON will hold a performance bond equal to the contract amount. The performance bond will not be released until the Contractor's work has been completed and accepted both by MASON and by GRIZZLY. In the event that the Contractor fails to perform the work according to the terms and conditions of the contract and to the

satisfaction of MASON and GRIZZLY, MASON hereby agrees that it will use any proceeds it recovers from the Performance Bond to complete the PROJECT according to the approved specifications for the PROJECT.

6. MASON will supervise, monitor and inspect construction of the PROJECT. MASON further agrees to ensure that the Contractor complies with all of the terms and conditions of the contract, including, but not limited to, any prevailing wage requirements, and any similar legal requirements. MASON will further require the Contractor to submit affidavits averring that any subcontractors or material suppliers on the Project have been paid in full.

7. Upon completion of the PROJECT, GRIZZLY shall assume ownership and all maintenance responsibilities related to the new bridge and culvert in a manner consistent with the requirements of the City of Mason Codified Ordinances and the laws of the State of Ohio.

8. It is contemplated that at some point in the future GRIZZLY may desire to grant a maintenance easement and access easement to MASON for purposes of MASON assuming all maintenance responsibilities to ensure proper operation of the floodplain and all improvements. This Agreement shall not be construed as any acceptance of such grant of easements. The Parties understand that the legislative authority of MASON must act under separate ordinance to accept any future grant of easements to MASON.

9. All personnel or agents of GRIZZLY and MASON shall, for the purposes of allocation of liability to third parties only, be deemed to be acting under the direction and control of their respective employers or principals and not under the direction and control of the other party to this Agreement, and their own employers or principals shall assume the risk of any liability to third parties arising from the conduct, acts or omissions of such personnel or agents. In the event of any claim or action arising from any circumstances to which this Agreement applies, and whether or not a reservation of rights is made, as a term of this Agreement, shall give their full cooperation to any party defending such a claim or action.

The parties further recognize that (a) the parties are autonomous organizations (b) the parties have independent and separate boards of elected officials and officers responsible to manage their operations and affairs (c) the parties have their own separate assets, (d) the parties are not affiliated, and do not have any interest in the other party, (e) the parties have the right and power to hire, supervise and fire their own employees and contractors, (f) the parties have the function of carrying out and supervising their services under this Agreement, and (g) the parties do not control the day-to-day operations and affairs of the other party.

10. This Agreement may only be terminated by either party in the event of a material breach of this Agreement, if the material breach remains uncured sixty (60) days after written notice is given to the breaching party specifying the breach. A "material breach" is any failure of either party to fully comply with and perform any and all terms and conditions of the Agreement.

11. All notices required to be given hereunder shall be in writing and shall be sent to the following addresses:

If to GRIZZLY:

Peter K. Ryan  
The Golf Center at Kings Island  
6042 Fairway Drive  
Mason, Ohio 45040

If to MASON:

Richard Fair, P.E.  
City Engineer  
City of Mason  
6000 Mason-Montgomery Road  
Mason, Ohio 45040

12. Whenever the terms "GRIZZLY" and "MASON" are used herein, these terms shall include, without exception, the employees, agents, elected officials, successors, assigns and/or authorized representatives of GRIZZLY and MASON.
13. Neither party shall assign any of its rights or delegate any of its duties under this Agreement without prior written consent of the other. Subject to the above provision, this Agreement shall be binding on the successors and permitted assigns of the parties.
14. This Agreement contains the entire agreement between GRIZZLY and MASON with respect to the subject matter hereof and supersedes all prior written or oral contracts between the parties. No representations, promises, understandings, contracts or otherwise, not herein contained shall be of any force or effect.
15. No modification or amendment of any provisions of this Agreement shall be effective unless made by a written instrument duly executed by the party to be bound thereby, which refers specifically to this Agreement and the amendment of modification being made.
16. Should any judicial officer or tribunal of competent jurisdiction deem any portion of this Agreement unenforceable, the balance of this Agreement shall remain in full force and effect unless revised or terminated pursuant to any other section of this Agreement.
17. No waiver by either party by any breach of any provision of this Agreement shall be deemed to be a further or continuing waiver of any breach of any other provision of this Agreement. The failure of either party at any time or times to require performance of any provision of this Agreement shall in no manner affect such party's right to enforce the same at a later time.
18. This Agreement shall be construed in accordance with, and the legal relations between the parties shall be governed by, the laws of the State of Ohio as applicable to contracts executed and fully performed in the State of Ohio.

19. The signatures of the parties to this Agreement is certification that the funds required for this Agreement will be available as required herein, for each appropriation period through the end of the term of this Agreement.

*(Remainder of page intentionally blank; signature page follows.)*

IN WITNESS WHEREOF, Grizzly Golf Center, Inc., pursuant to Resolution No. \_\_\_\_\_ and the Mason City Council, pursuant to Ordinance No. \_\_\_\_\_ have caused this instrument to be executed this \_\_\_\_ day of \_\_\_\_\_, 2005.

**Recommended by:**

\_\_\_\_\_  
Richard Fair, City of Mason Engineer

**GRIZZLY GOLF CENTER, INC.**

**CITY OF MASON**

By: \_\_\_\_\_  
James C. Ashworth, President

By: \_\_\_\_\_  
Scot Lahrmer, City Manager

APPROVED AS TO FORM:

\_\_\_\_\_  
Kenneth Schneider, Law Director