

First Reading: November 18, 2010
Second Reading: Dispensed

RESOLUTION NO. 2010 - 85

**A RESOLUTION DETERMINING TO PROCEED AND AUTHORIZING A
CONTRACT FOR KENWOOD ROAD IMPROVEMENTS, DISPENSING WITH THE
SECOND READING AND DECLARING AN EMERGENCY**

WHEREAS, the Township Trustees have previously agreed and determined to construct certain improvements in the right of way of Kenwood Road between Orchard Lane and Galbraith Road with the approval of the Hamilton County Engineer in cooperation with FNC Kenwood Group, LLC (the "Kenwood Road Improvements"); and

WHEREAS, the Township, in cooperation with the Hamilton County Engineer and FNC Kenwood Group, LLC, has caused plans and specifications for the Kenwood Road Improvements to be prepared; and

WHEREAS, the Board of Township Trustees desires to enter into a contract whereby the Township will provide partial funding for the Kenwood Road Improvements with the balance of the payments being made by FNC Kenwood Group, LLC; and

NOW THEREFORE, BE IT RESOLVED, by the Board of Township Trustees of Sycamore Township, State of Ohio:

SECTION 1. The Board hereby approves a contract with FNC Kenwood Group, LLC in substantially the same form as that attached as Exhibit A. The President of the Board and Fiscal Officer are hereby authorized and directed to execute such contract on behalf of the Township

SECTION 2. The Board orders that construction of the improvement proceed. The Board adopts the surveys, plans, profiles, cross-sections, estimates, and specifications, therefore.

SECTION 5. The contract price to the Township shall not exceed \$250,000.00.

SECTION 6. The Board of Township Trustees, by a unanimous vote of all of its members, dispenses with any requirement that this Ordinance be read on two separate days and authorizes its passage upon one reading.

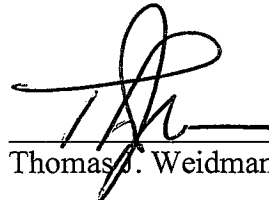
SECTION 7. This Resolution is hereby declared to be an emergency measure necessary for the preservation of the public peace, health, welfare, and safety of the Township. The reason for the emergency is to provide for the immediate

commencement of construction of the Kenwood Road Improvements in order provide safe streets and roads in the Township.


VOTE RECORD:

Mr. Bishop AYE Mr. Kent AYE Mr. Weidman AYE

Passed at a meeting of the Board of Township Trustees of Sycamore Township this 18th day of November, 2010.



Thomas J. Weidman, President



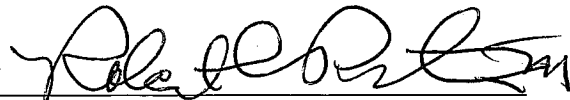
Cliff W. Bishop, Vice President



Richard C. Kent, Trustee


AUTHENTICATION

This is to certify that this resolution was duly passed and filed with the Township Fiscal Officer of Sycamore Township this 18th day of November, 2010.



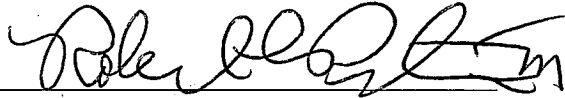
Robert C. Porter III, Fiscal Officer
Sycamore Township, Ohio

APPROVED AS TO FORM:


R. Douglas Miller, Law Director

PROOF OF PUBLICATION

I hereby certify that I have published this Resolution on _____ by posting in the five most public places as established by the Board of Township Trustees such places being the Sycamore Township Government Complex, Bob Meyer Park, Bechtold Park, the Robert L. Schuler Sports Complex, and the Clete McDaniel Sports Complex.



Robert C. Porter III, Fiscal Officer

EXHIBIT A

KENWOOD ROAD IMPROVEMENTS

CONSTRUCTION AGREEMENT

This Construction Agreement (the "Agreement") is entered into as of November, 2010, by and between the Board of Township Trustees of SYCAMORE TOWNSHIP, OHIO (hereinafter referred to as the "Township"), a township organized and existing under the Constitution and the laws of the State of Ohio (the "State") and FNC KENWOOD GROUP LLC a limited liability company, organized and existing under the laws of the State of Ohio ("Developer").

Section 1. Definitions and Accounting Terms.

1.1 Defined Terms. As used in this Agreement, the following terms shall have the meaning set forth respectively after each such term:

"Agreement" means this Construction Agreement, either as originally executed or as it may from time to time be supplemented or amended.

"Business Day" means any day other than (i) a Saturday or Sunday, or (ii) a day on which the Federal Reserve System or banking institutions in the City of Cincinnati, Ohio are authorized or obligated by law or executive order to be closed.

"Event of Default" means each of those events so designated in Section 8 of this Agreement.

"Improvements" means the improvements to be constructed on the Property as set forth in Exhibit A to this Agreement.

"Person" means and includes an individual, corporation, limited liability company, partnership, trust, unincorporated organization or association and a government or any department or agency thereof.

"Project Budget" means the itemized budget for the costs of completing the Improvements, a copy of which is attached hereto as Exhibit B.

"Property" means the real property interests described in this Agreement.

"Township" means Township of Sycamore, County of Hamilton, Ohio.

1.2 Rules of Construction. Unless the context indicates otherwise, the singular number shall include the plural number and vice versa, and words importing persons shall include corporations and associations, including public bodies, as well as natural persons.

The terms "hereby", "hereof", "hereto", "herein", "hereunder" and any similar terms, as used in this Agreement, refer to this Agreement.

Any defined term used in the plural shall refer to all members of the relevant class, and any defined term used in the singular shall refer to any number of the members of the relevant class.

1.3 Exhibits. All Exhibits to this Agreement, either as now existing or as the same may from time to time be supplemented or amended, are incorporated herein by this reference.

Section 2. Completion of Improvements. In consideration of the agreements by the Township contained in this Agreement, Developer has agreed and elected to construct the Improvements. Developer agrees to complete the Improvements in conformance with the Plans and Specifications as approved by the Township and by the Hamilton County, Ohio Engineer. Except for the portion to be paid by the Township as provided in Sections 3 and 4, below, the Developer shall pay for all of the costs of the Improvements in accordance with the Project Budget.

Section 3. Construction Price. The Township shall pay the Developer the sum of \$250,000.00 for construction of the Improvements. In the event the cost of the Improvements exceeds \$250,000.00, the Developer shall be responsible for any excess.

Section 4. Payment. Subject to the overall cap of \$250,000.00 set forth in Paragraph 3 above, the Township shall pay the Developer for the actual costs of completing the Improvements, provided the work has been completed and provided such costs are in conformance with the Project Budget, and provided Developer satisfies the conditions described in Section 5 and Section 6 of this Agreement. Such payment shall be made within thirty (30) days after invoice(s) are submitted, unless the Township is entitled to suspend payments in accordance with Section 8.2, below. Developer may submit invoice(s) on a monthly basis during the project based upon percent complete. The Township may hold retainage from each invoice in an amount not to exceed 10 percent (10%) of the invoice. All retainage shall be paid to Developer upon satisfaction completion of Section 5 and Section 6 of this Agreement.

Section 5. Conditions to Reimbursement.

5.1 Conditions to Reimbursement. The obligation of the Township to reimburse the Developer is expressly subject to the following conditions precedent, unless specifically waived in writing by the Township:

(a) The Developer shall have completed the Improvements in conformance with the Plans and Specifications as approved by the Township and by the Hamilton County, Ohio Engineer, per the percentage complete at the time of invoice.

(b) With each monthly draw submitted in accordance with Section 4 above, the Developer shall have provided conditional lien waivers (covering all work through the period covered by the current draw) or final lien waivers (covering all work up through the period covered by the prior draw), together with affidavits and other documents as may be reasonably necessary to evidence that the work on the Improvements through the effective date of the lien waivers has been completed without the possibility of any liens being filed by

contractors, subcontractors or materialmen providing work, services or materials for the Improvements.

(c) With the final draw submitted in accordance with Section 4 above, the Developer shall have provided such lien waivers and affidavits and other documents as may be reasonably necessary to evidence that Improvements have been completed without the possibility of any liens being filed by contractors, subcontractors or materialmen providing work, services or materials for the Improvements.

(d) The Developer, in designing, constructing, completing, repairing, maintaining and conveying the Improvements shall have complied with all requirements with which the Township would have to comply regarding the construction of public improvements, under any applicable federal or state law, rule or resolution, including, but not limited to the public bidding of contracts, bonding provisions, and payment of prevailing wages, and including any private work that may be required. The Township shall consult with and advise Developer as to such requirements from time to time upon Developer's requests.

Section 6. Approval by Township. In any matter where it would be necessary for a public body to render a decision or take some action pursuant to any Ohio Statute regarding construction of public improvements if the contract for the Improvements was let by the Township (i.e. awarding the contract following submission of all bids), the Developer shall first obtain approval from the Township before proceeding.

Section 7. Obligations Absolute. The obligations of the Developer and the Township under this Agreement shall be paid and performed strictly in accordance with the terms of this Agreement.

Section 8. Events of Default and Remedies Upon Default.

8.1 If the Township fails to reimburse Developer as and when required by this Agreement, then the Developer may, at its option, exercise any and all of its rights as provided by law, all in such order and in such manner as the Developer in its sole discretion may determine.

8.2 If the Developer fails to follow all requirements for the construction of public improvements as provided in Sections 5(a), 5(d) and 6 above, and such failure continues for a period of ten (10) business days after written notice from the Township specifying the requirement(s) which Developer has failed to follow and the required cure (a "Default Notice"), such failure shall constitute an event of default on the part of Developer and shall allow the Township to suspend any further payments to Developer under this Agreement until the default is cured. Notwithstanding the foregoing, if the default is not cured within forty-five (45) days after the Default Notice, then the Township shall be relieved of any and all obligations to pay any additional amounts to Developer.

8.3 In any circumstances other than those set forth in Sections 8.1 or 8.2 above, in the event of any believed default or breach of this Agreement by either party hereto, or any successor to such party, such party (or successor) shall, upon written notice from the non-

defaulting party, proceed immediately to cure or remedy such default or breach. In case such action is not taken or not diligently pursued, or the default or breach shall not be cured or remedied within a reasonable time, the aggrieved party may institute such proceedings as may be necessary or desirable in its opinion to cure and remedy such default or breach, including, but not limited to, proceedings to compel specific performance by the party in default or breach of its obligations.

Section 9. Retention of Records and Audit Responsibility. All records relating to the services and construction provided under this contract and supporting documentation for invoices submitted to the Township by the Developer shall be retained and made available by the Developer for audit by the Township or its designee for a minimum of three (3) years after final payment under this Agreement or a duly authorized and fully executed written amendment. If an audit is initiated during this time period, the Developer shall retain such records until the audit is concluded and all issues resolved. The Developer agrees to accept responsibility for receiving, replying to and/or complying with any audit exception by any appropriate federal, state, or local audit related to the provisions of services under this Agreement.

Section 10. Disclosure. The Developer hereby covenants that it has disclosed any information that it possesses about any business relationship or financial interest that Developer has with the Township or any Township employee, employee's business, or any business relationship or financial interests that the Township or an employee or officer has with the Developer or the Developer's business. The Developer further warrants that it is aware of no improper personal, financial or other beneficial interest on the part of any member, employee, or officer of the Township involved in the development of the specifications, negotiation or performance of this Agreement. The Developer has no knowledge of any situation that would constitute a conflict of interest. It is understood that a conflict of interest occurs when an employee or officer will gain financially or receive personal benefit or favored as a result of procuring, signing, negotiation or implementation of this Agreement. The Developer will report the discovery of any potential conflict of interest to the Township.

Section 11. Assignment. The parties expressly agree that neither this Agreement, nor any portion thereof, may be assigned/sublet/subcontracted by the Developer without the prior written approval of the Township. All assignments/sublets/subcontracts shall be subject to the same terms, conditions and covenants contained within this Agreement. The Developer shall at all times remain primarily responsible for the work and shall cause all work performed by the approved subcontractor to be performed in accordance with this Agreement. The Developer shall be responsible for making direct payments to all subcontractors for any and all services provided by such subcontractor. Nothing contained in this paragraph shall preclude the Developer from contracting the actual work to be performed under this Agreement with third parties. However, the Developer shall remain primarily liable to the Township for the services to be performed under this Agreement.

Section 12. Compliance. The Developer certifies that the Developer and all subcontractors who will provide direct or indirect services under this Agreement will comply with all requirements of federal laws and regulations, applicable OMB circulars, state statutes in Ohio Administrative Code Rules and the conduct of this Agreement. The Developer accepts full responsibility for payment of any and all unemployment compensation premiums, all income tax

deductions, pension deductions, and any and all other taxes or payroll deductions required for the performances of this Agreement by the Developer's employees, if any.

Section 13. Non-Discrimination. The Developer certifies that it is an equal opportunity employer and shall remain in compliance with state and federal civil rights and non-discrimination laws and regulations including, but not limited to, Title VI and Title VII of the Civil Rights Act of 1964 as amended, the Rehabilitation Act of 1973, the Americans with Disabilities Act, the Age Discrimination Act of 1975, the Age Discrimination and Employment Act, and the Ohio Civil Rights Law.

During the performance of this Agreement, the Developer will not discriminate against any employee, contract worker or applicant for employment because of race, color, religion, sex, national origin, ancestry, disability, Vietnam-era veteran status, age, political belief, or place of birth. The Developer will take affirmative action to insure that during employment all employees are treated without regard to race, color, religion, sex, national origin, ancestry, disability, Vietnam-era veteran status, age, political belief, or place of birth. These provisions apply also to any contract workers. Such action shall include, but is not limited to, the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff, or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship. The Developer agrees to posting conspicuous places, available to employees and applicants for employment, notices stating that the Developer complies with all applicable federal and state non-discrimination laws. The Developer and any person claiming through the Developer agrees not to establish or knowingly permit any such practice or practices or discrimination or segregation.

Section 14. Relationship. Nothing in this Agreement is intended to, nor shall it be deemed to constitute a partnership, association, or joint venture with the Developer in the conduct of the provisions of this Agreement. The Developer and its employees are expected to perform the services under this contract without the benefit of direct day-to-day control from the Township. The Developer will exercise its own discretion and professional judgment in providing the services hereunder, and the Developer's employees and subcontractors will perform work and labor under supervision of the Developer and not the Township. The Developer shall at all times have the status of an independent contractor in performing its obligations under this Agreement.

Section 15. Indemnification. The Developer shall save, protect, defend, indemnify and hold harmless, the Board of Township Trustees of Sycamore Township, Ohio, the Hamilton County Engineer, the Township, its officers, employees, and agents from and against any and all liabilities, penalties, damages, settlements, or costs of every other kind and character, including legal fees, arising in any way out of or in connection with (a) the negligent acts, errors, or omissions, or intentional misconduct of the Developer, its employees, officers, agents, independent contractors, or subcontractors, which are related directly to the performance of services and work under this Agreement or (b) Developer's breach of any term of this Agreement which continues beyond any applicable grace or cure period. The Developer agrees to pay all damages, costs and expenses, including legal fees, of the Board of Township Trustees of Sycamore Township, Ohio, the Hamilton County Engineer, the Township, and its officers, employees, and agents in defending any action arising out of the aforementioned negligent acts,

errors, or omissions or intentional misconduct. The parties expressly agree that this provision shall survive the termination or expiration of this Agreement.

Section 16. Insurance. It shall be the responsibility of the Developer to insure the protection of all life and property under this Agreement. During the term of this Agreement, the Developer will provide, pay for and maintain in full force and effect the following insurance coverage as required and described herein:

(a) A commercial general liability insurance in a minimum amount of \$1,000,000.00 for each occurrence; \$2,000,000.00 general aggregate;

(b) Automobile liability minimum limit \$1,000,000.00 combined single limit each accident;

(c) Workers Compensation. The consultant will maintain Workers Compensation Insurance.

The Developer shall name the Township, its officers, employees, and agents as additional insureds on the above policies. The Developer will submit one certified complete copy of those portions of the insurance policy in which Sycamore Township, its officers, employees, and agents are named as additional insureds.

In the event the Developer, the Township, its officers, employees, or agents is named in litigation related to this Agreement, the Developer also agrees to provide to the Township, within ten (10) business days of the Developer receiving a lawsuit, one certified copy of the entire insurance policy or policies and associated endorsements.

Section 17. Drug Free Workplace. The Developer certifies and affirms that Developer will comply with all applicable state and federal laws regarding a drug free workplace. The Developer will make a good faith effort to insure that all employees and subcontractors performing duties or responsibilities under this Agreement, while working on Township or private property, will not purchase, transfer, use or possess illegal drugs or alcohol, or abuse prescription drugs in any way.

Section 18. Illegal Immigration. In the event the Developer is found to be using any illegal immigrant as defined in Sycamore Township Resolution 2007-40 on any portion of this Agreement, or in the event any subcontractor employed by Developer is found to be using any illegal immigrant for any portion of this Agreement, the Developer shall pay a penalty to Sycamore Township in the amount of ten percent (10%) of the contract price.

Section 19. Public Information. Although some or all information about or generated under this Agreement may fall within the public domain, the Developer will not release information about or related to this Agreement to the general public or media verbally, in writing or by any electronic means without the prior approval of the Township, unless the Developer is otherwise required to release requested information by law. If contacted by the media about this Agreement, the Developer agrees to notify the Township in lieu of responding directly. Nothing in this Section is meant to restrict the Developer from using project information and results to

market to specific clients or prospects or to preclude or interfere with the Developer's compliance with the laws of the State of Ohio.

Section 20. Changes and Additional Work. Changes to the work detailed on the plans and specifications attached hereto, shall be made only in writing executed by representatives of the Township and the Developer duly authorized and empowered to so act. The Developer shall have no obligation to commence work in connection with any change in the plans and specifications until the parties agree to the change in writing. In the event of a change in the scope of the project, or the plans and specifications, the price to the Township shall continue to not exceed \$250,000.00.

Section 21. Miscellaneous.

21.1 Binding Effect. This Agreement shall be binding upon and inure to the benefit of the Developer and the Township and their respective successors and assigns.

21.2 Execution in Counterparts. This Agreement may be executed in any number of counterparts and any party hereto or thereto may execute any counterpart, each of which when executed and delivered will be deemed to be an original and all of which counterparts of this Agreement, as the case may be, taken together will be deemed to be but one and the same instrument. The execution of this Agreement by any party hereto or thereto will not become effective until counterparts hereof or thereof, as the case may be, have been executed by all the parties hereto or thereto.

21.3 Prior Agreements; Amendments; Consents. This Agreement contains the entire agreement between the Developer and Township with respect to the subject matter hereof, and all prior negotiations, understandings and agreements with respect thereto are superseded by this Agreement. No amendment, modification, supplement, termination or waiver of any provision of this Agreement, and no consent to any departure by the Township therefrom, may in any event be effective unless in writing signed by the Developer, and then only in the specific instance and for the specific purpose given.

21.4 Notices. Any notice required, permitted or contemplated hereunder shall be in writing and addressed to the party to be notified at the address set forth below or at such other address as each party may designate for itself from time to time by notice hereunder, and shall be deemed validly given (i) three (3) days following deposit in the U.S. mails, with proper postage prepaid, or (ii) the next business day after such notice was delivered to a regularly scheduled overnight delivery carrier with delivery fees either prepaid or an arrangement, satisfactory with such carrier, made for the payment thereof, or (iii) upon receipt of notice given by telecopy, mailgram, telegram, telex or personal delivery:

The Developer: FNC Kenwood Group LLC
c/o Midland Atlantic
8044 Kenwood Road, suite 710
Cincinnati, Ohio 45236

Attn: John I. Silverman

The Township: Bruce Raabe, Township Administrator
Sycamore Township
8540 Kenwood Road
Cincinnati, Ohio 45236

21.5 Governing Law. This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of Ohio.

21.6 Severability of Provisions. Any provision in this Agreement that is held to be inoperative, unenforceable or invalid shall be inoperative, unenforceable or invalid without affecting the remaining provisions, and to this end the provisions of this Agreement are declared to be severable.

21.7 Headings. Article and section headings in this Agreement are included for convenience of reference only and are not part of this Agreement for any other purpose.

IN WITNESS WHEREOF, the Developer and the Township have executed this Agreement by their duly authorized officers as of the date first above written.

FNC KENWOOD GROUP LLC
an Ohio Limited Liability company

By: _____

Name: _____

Title: _____

SYCAMORE TOWNSHIP,
HAMILTON COUNTY, OHIO

By: _____
Thomas J. Weidman, President

By: _____
Robert C. Porter, III, Fiscal Officer

EXHIBITS

EXHIBIT A – Description and Plans of Improvements to be Completed

EXHIBIT B – Project Budget