

1. ACTION REQUESTED:

Board approval to enter into the attached Landscape Installation and Maintenance Agreement between Lee County and Portofino – Ft. Myers Limited Partnership. Authorize the Chairman to execute the agreement on behalf of the Board of County Commissioners.

WHY ACTION IS NECESSARY:

The Board must approve the agreement and authorize the Chairman to sign it in order for the document to become fully executed.

WHAT ACTION ACCOMPLISHES:

Provides an agreement that establishes the landscape installation, maintenance, and removal responsibilities for an existing landscaping project.

2. **DEPARTMENTAL CATEGORY:** 9
COMMISSION DISTRICT # 2

C9A

3. **MEETING DATE:**

11-09-2004

4. **AGENDA:**

6. **REQUESTOR OF INFORMATION:**

A. **COMMISSIONER**

B. **DEPARTMENT** Transportation

C. **DIVISION** Operations

BY: **Scott M. Gilbertson, P.E.,
 Director, DOT**

- CONSENT**
- ADMINISTRATIVE**
- APPEALS**
- PUBLIC**
- WALK ON**
- TIME REQUIRED:**

5. **REQUIREMENT/PURPOSE:**
 (Specify)

- STATUTE**
- ORDINANCE**
- ADMIN. CODE**
- OTHER**
 LeeScape Master Plan

7. BACKGROUND:

Portofino is a residential subdivision located north of Daniels Parkway on the west side of Ben C. Pratt/Six Mile Cypress Parkway. During development of the subdivision, the developer installed a roadway with landscaping improvements within a small portion of Ben C. Pratt/Six Mile Cypress Parkway right-of-way adjacent to their entrance road (Caserta Lane). This installation was done without a permit or agreement, as to the various responsibilities associated with the project. The subject agreement identifies those responsibilities, and provides a mechanism for the County to be compensated for the project's removal expenses, if the developer fails to honor their project removal responsibilities when this portion of Ben C. Pratt/Six Mile Cypress Parkway right-of-way is needed for future roadway widening or other items such as utilities.

8. MANAGEMENT RECOMMENDATIONS:

9. RECOMMENDED APPROVAL:

A Department Director	B Purchasing or Contracts	C Human Resources	D Other	E County Attorney	F Budget Services				G County Manager
					OA	OM	Risk	GC	

10. COMMISSION ACTION:

- APPROVED**
- DENIED**
- DEFERRED**
- OTHER**

Rec. by CoAtty
 Date: 10/21/04
 Time: 1:05
 Forwarded To:

RECEIVED BY
 COUNTY ADMIN: [Signature]
 10/22/04
 4:25 pm
 COUNTY ADMIN
 FORWARDED TO: [Signature]
 10/27/04
 9 am

LANDSCAPE INSTALLATION AND MAINTENANCE AGREEMENT

THIS AGREEMENT entered into this _____ day of _____, 2004, by and between LEE COUNTY, a political subdivision and charter county of the State of Florida, hereinafter referred to as "County", and Portofino - Ft. Myers Limited Partnership, a Florida limited partnership, hereinafter referred to as "Developer."

RECITALS

WHEREAS, the Developer and County desire to enter into an Agreement regarding their respective duties and responsibilities for the installation and maintenance of landscaping improvements installed within a portion of the right-of-way of Ben C. Pratt/Six Mile Cypress Parkway, hereinafter referred to as "Right-of-Way," in Section 17, Township 45S, Range 25E, which runs from the westerly edge of the roadway pavement on Ben C. Pratt/Six Mile Cypress Parkway west ward approximately 150' to the property line for Portofino subdivision and the beginning of the subdivision entrance road named Caserta Lane; and

WHEREAS, Developer will be responsible for the installation and maintenance of the installed roadway improvements including, but not limited to, trees, shrubs, ground covers, turfgrass, irrigation system, and any other plant material or hard scape items located within the Right-of-Way, hereinafter referred to as "Landscape Improvements," as described on Exhibit "A" attached hereto and by reference made a part hereof. Developer will be responsible for all costs associated with the installation and maintenance of the Right-of-Way Landscape Improvements; and deliver to the County a surety bond or equivalent security document in the amount of two thousand three hundred eighty six dollars and twenty five cents (\$2,386.25), for the estimated cost of the project's removal and restoration (\$2,075.00), plus 15% (\$311.25), subject to the reasonable satisfaction of the County Attorney's office; and

WHEREAS, it is in the public's interest for the County and Developer to enter into this Agreement; and

WHEREAS, the Developer has agreed to improve and landscape the Right-of-Way and maintain the Landscape Improvements and replace dead or damaged plant material and other items incidental to the landscaping as necessary at the Developer's expense.

NOW, THEREFORE, in consideration of the above premises and other good and valuable consideration, the sufficiency of which is hereby acknowledged by the parties, the Developer and the County hereby agree as follows:

1. The Recitals as set forth above are incorporated into the terms of this Agreement as if set out herein at length.
2. The County and Developer agree to enter into this Agreement concerning the installation and maintenance of the Landscape Improvements within the Right-of-Way.
3. Reference to the Developer includes all assigns and successors in interest.
4. The Developer agrees to landscape the Right-of-Way, including the installation of plant materials and irrigation system within the Right-of-Way in accordance with plans and specifications approved by Developer and Lee County Department of Transportation, hereinafter referred to as DOT (see attached plans marked Exhibit "A," and by reference, made a part hereof). All costs for construction, initial landscaping and maintenance of the Landscape Improvements, described on Exhibit "A," shall be at the Developer's expense.
5. The Developer will install and maintain the Landscape Improvements in cooperation with DOT, and in accordance with the Lee County Roadway Landscape Master Plan "LeeScope." The Developer will be responsible for providing the minimum maintenance frequencies as indicated on the Maintenance Matrix - Level Two, as described on Exhibit "B," and by reference, made a part hereof. DOT will enforce the LeeScope guidelines, and reserves the right to reject any plant material for substandard quality, improper planting/pruning or maintenance practices, and unsound tree structure. Trees shall be pruned in a manner that will provide a structurally sound tree, in order to minimize storm damage and tree/branch failure. Should the Developer fail to provide such care, the County will do so with its resources, and pursue reimbursement compensation from the Developer for all expenses incurred.
6. The Developer agrees to maintain the Landscape Improvements and all other items incidental to the landscaping, including all plant materials and hard scape items, during the installation and ongoing maintenance of the Landscape Improvements.
7. The Developer agrees to prevent obstructions or conditions which may be dangerous to the public through the exercise of its rights in the performance of its installation and maintenance duties contained herein. This includes providing clear visibility for motorists and pedestrians and the avoidance of wetting the adjacent roadway or bike paths/sidewalks with irrigation water.
8. The Developer agrees to indemnify, hold harmless and defend the County and all of its officers, agents, consultants and employees from and against all losses, claims, demands, payments, suits, actions, recoveries, and judgments of every nature and description brought or recoverable against it or them by reason of any act or omission of the Developer, its agents, consultants, employees, or

subcontractors, during the installation of Landscape Improvements or their maintenance contemplated by this Agreement. The Developer agrees to assume any related costs or fees. Developer further agrees to carry and maintain in full force and effect liability insurance that covers the foregoing indemnity. A copy of the certificate of insurance provided by the Developer to the County Risk Manager for review and approval is attached hereto as Exhibit "C." The foregoing insurance must remain in effect until such time as any assign or successor in interest provides similar proof of insurance to the satisfaction of the County Risk Manager's Office. The certificate of insurance on the general liability policy shall name Lee County, a political subdivision and Charter County of the State of Florida, its agents, employees, and public officials as an Additional Insured and shall provide County thirty (30) days notice prior to cancellation or modification of any stipulated insurance. Such notification shall be in writing by registered mail, return receipt requested and addressed to the Risk Manager, P.O. Box 398, Ft. Myers, FL 33902.

9. The Developer assumes all risk and bears any loss or injury to property or persons occasioned by neglect or accident arising from the exercise of its rights or the performance of its maintenance duties contained herein.
10. The Developer will give all required notices relating to the landscaping or maintenance contemplated by this Agreement to the proper authorities. In addition, Developer will obtain all official permits and licenses, and pay all proper fees related to the installation and maintenance of the Landscape Improvements.
11. The Developer agrees to repair, restore, or rebuild any damage caused to County property by installing or maintaining the Landscape Improvements in the Right-of-Way.
12. Developer will deliver to County a surety bond or other equivalent security document in the amount of two thousand three hundred eighty six dollars and twenty five cents (\$2,386.25), for the Estimated Cost of the project's removal and restoration (\$2,075.00), plus 15% (\$311.25), subject to the reasonable satisfaction of the County Attorney's office. A copy of the surety bond is attached hereto as Exhibit "D." The surety bond or equivalent security document must remain current during the term of this agreement.
13. If Developer shall fail to maintain the Landscape Improvements, as stated above, or keep the certificate of insurance, surety bond, or equivalent security document current, the Developer shall be in default of this agreement. Failure of the Developer to maintain the landscape improvements, or keep the certificate of insurance, surety bond, or equivalent security document current, will result in the County removing the Landscape Improvements and invoicing the Developer for the cost of said removal and restoration. Developer agrees to pay the County all of the County's costs for the removal of the Landscape Improvements and restoration of the areas to pre-construction conditions as they exist on the date hereof.

14. Failure of the Developer to pay the County the invoiced removal and restoration costs owed under this Agreement within thirty (30) days following receipt of the invoice shall constitute a material breach of this Agreement by the Developer. The County shall first give notice of the alleged breach and a thirty (30) day time period to cure the same and, if the Developer fails to cure the alleged breach within the thirty (30) day time period, the County's remedy shall be to exercise the surety bond or equivalent security document or sue for specific performance.
15. This Agreement will continue in full force and effect until such time as the road is widened, repaired, closed, abandoned, vacated, discontinued, reconstructed, or until the Developer receives written notice of the County's termination of this Agreement, or until such time as Developer notifies the County in writing of the intent to terminate this Agreement. At the County's option, the Developer may be required to remove or relocate all of the Landscape Improvements placed within the Right-of-Way by virtue of this Agreement, and restore those areas to pre-construction conditions within thirty (30) days of the Developer's receipt of written notice. The cost of relocation, or removal of the Landscape Improvements and restoration of those areas to pre-construction conditions will be paid entirely by the Developer.
16. The Developer understands that roadway improvements are programmed to occur on Ben C. Pratt/Six Mile Cypress Parkway in the near future. Those improvements are currently programmed for the County's fiscal year of 2006/2007. As a result of those improvements associated with the future road widening project of Ben C. Pratt/Six Mile Cypress Parkway, the Developer agrees to remove or relocate the Landscape Improvements within thirty (30) days of written notice by the County, as described in paragraph 15 above, at no cost to the County.
17. The Developer agrees that if the placement, repair, relocation or reconstruction of public utilities, including, but not limited to, water, sewage, gas, power, telephone located within the Right-of-Way, requires the relocation or removal of all or a portion the Landscape Improvements, then the Developer will relocate or remove the Landscape Improvements affected thereby and restore those areas to pre-construction conditions within thirty (30) days of the Developer's receipt of written notice, at no cost to the County or the relevant utility company.
18. This Agreement binds and inures to the benefit of the parties as well as their respective legal representatives, successors and/or assigns. In the event Developer assigns its obligations hereunder to a successor owner, developer, or homeowner's association, all of Developer's obligations and agreements made herein shall be fully and completely assigned to such assignees in full as if such assignees were mentioned by name instead of the Developer herein. In the event the Developer desires to transfer its rights and obligations hereunder to a third party such as a homeowner's association, the County agrees to cooperate with respect to modifying this Agreement, provided that prior to such assignment being binding on the

County, the Developer must demonstrate to the County that the third party or homeowner's association to become the assignee has the authority to undertake the obligations and responsibilities herein contemplated.

19. The Developer may assign the rights and obligations set forth herein to a successor owners, developer, or homeowner's association, except the Developer will remain responsible under the terms of this Agreement until such time as the Developer or successor in interest can provide written documentation to the satisfaction of the County Attorney's Office, which confirms that its successor in interest has assumed responsibility for the compliance with the terms and conditions of this Agreement with respect to the Landscape Improvements.
20. This Agreement shall be construed, and its performance enforced under Florida law.
21. This Agreement is the entire agreement between the parties and shall not be modified or replaced except by another signed written Agreement or amendment.
22. The parties recognize and agree that this Agreement is of a unique nature inuring principally to the benefit of the Developer and that money damages may not be an adequate or appropriate remedy for either party for breach of the terms contained herein. As a result, the parties specifically agree that a non-defaulting party may raise in any pleadings, without objections from the alleged defaulting party, the extraordinary remedy of specific performance, in order to protect the public's interest in this Agreement.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals the day and year first above written.

PORTOFINO - FT. MYERS LIMITED PARTNERSHIP, a Florida limited partnership

By: FL MSIII, GP L.C., a Florida limited liability company, as General Partner

By: HEARTHSTONE, INC. a California corporation d/b/a in Florida as Hearthstone Advisors, Inc., as Manager

By: [Signature]
TRACY T. CARVER, as Senior Vice President - General Counsel

[Signature]
Witness #1:

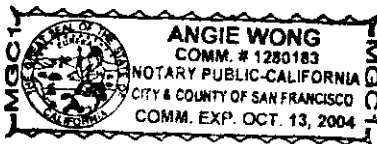
Kai Wu
Printed Name of Witness #1

[Signature]
Witness #2

Sia Richardson
Printed Name of Witness #2

STATE OF CALIFORNIA
COUNTY OF MARIN

The foregoing agreement was acknowledged before me this 22nd day of September, 2004, by TRACY T. CARVER as Senior Vice President of Hearthstone, Inc., Manager of General Partner of [development]. He is personally known to me or has produced [redacted] as [redacted] identification.



[Signature]
Notary Public, State of California at Large

ANGIE WONG
Name of Notary Printed, Stamped or Typed

ATTEST:
CHARLIE GREEN, CLERK

BOARD OF COUNTY COMMISSIONERS
OF LEE COUNTY, FLORIDA

By: _____
Deputy Clerk

By: _____
Chairman

APPROVED AS TO FORM BY:

Office of the County Attorney

EXHIBIT B - MAINTENANCE MATRIX LEVEL TWO

MAINTENANCE OPERATION	MAINTENANCE FREQUENCIES ARE MINIMUMS											
	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
MOWING 3-4" HEIGHT	XX	XX	XXXX	XXXX	XXXX	XXXX	XXXX	XXXX	XXXX	XXXX	XXXX	XX
	MOW ST. AUGUSTINE ON A WEEKLY BASIS FROM MARCH THROUGH NOVEMBER AND BI-MONTHLY FROM DECEMBER THROUGH FEBRUARY. MOW BAHIA GRASS AT THE LEVEL ONE FREQUENCIES.											
WATERING	PLANT MATERIAL		DAY		FREQUENCY			NUMBER OF APPLICATIONS				
	ALL		1-60		DAILY			60				
	ALL		61-150		3 TIMES/WEEK			36				
	ALL		151-365		WEEKLY			28				
WEEDING	LANDSCAPED BEDS AND MULCHED AREAS SHALL BE KEPT WEED FREE.											
PRUNING	PRUNE AS NECESSARY TO REMOVE ALL SUCKERS, DEAD, DISEASED, OR BROKEN BRANCHES, FRONDS AND SEED HEADS.											
FERTILIZATION		X		X		X		X		X		X
LITTER REMOVAL	WEEKLY IN ALL MULCHED AREAS AND JUST BEFORE EACH MOWING.											
GENERAL	RESTORE SAUCERS AND CONTROL ANTS, INSECTS AND DISEASE AS THEY APPEAR.											
IRRIGATION	MAINTAIN THE IRRIGATION SYSTEM IN AN OPERABLE CONDITION AT ALL TIMES. CHECK SYSTEM FOR LINE BREAKS AND CLOGGING OF HEADS AND BUBBLERS EACH WEEK.											
EDGING	XX	XX	XX	XXXX	XXXX	XXXX	XXXX	XXXX	XXXX	XXXX	XXXX	XX
MULCHING	MAINTAIN A CONTINUOUS 3" LAYER OF MULCH IN ALL PLANTED AND MULCHED AREAS. MULCH ENTIRE SITE IN MONTH TWELVE OF MAINTENANCE CONTRACT.											
	REFER TO SITE MAINTENANCE SPECIFICATIONS FOR DETAILS. LEE COUNTY RESERVES THE RIGHT TO ADJUST FREQUENCIES AS NECESSARY.											

ACORD. CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YY)
05/25/04

PRODUCER
 Aon Risk Services, Inc. of Southern California
 1901 Main Street
 Suite 300
 Irvine CA 92614 USA

PHONE: (949) 608-6300 FAX: (949) 608-6451

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.

INSURED
 hearthstone etal
 16133 ventura blvd., #1400
 Attention: Bernice Madella
 Encino CA 91436 USA

INSURERS AFFORDING COVERAGE	
INSURER A:	American International Specialty Lines
INSURER B:	
INSURER C:	
INSURER D:	
INSURER E:	

COVERAGES This Certificate is not intended to specify all endorsements, coverages, terms, conditions and exclusions of the policies shown. SIR May Apply

THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED, NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN. THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. AGGREGATE LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

INSR LTR	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YY)	POLICY EXPIRATION DATE (MM/DD/YY)	LIMITS	
A	GENERAL LIABILITY <input checked="" type="checkbox"/> COMMERCIAL GENERAL LIABILITY <input type="checkbox"/> CLAIMS MADE <input checked="" type="checkbox"/> OCCUR <input checked="" type="checkbox"/> BROAD FORM PG GEN'L AGGREGATE LIMIT APPLIES PER <input checked="" type="checkbox"/> POLICY <input type="checkbox"/> PRO. <input type="checkbox"/> RECT <input type="checkbox"/> LOC	GL267-00-34	06/30/99	06/30/04	EACH OCCURRENCE	\$1,000,000
					FIRE DAMAGE (Any one fire)	\$50,000
					MED EXP (Any one person)	
					PERSONAL & ADV INJURY	\$1,000,000
					GENERAL AGGREGATE	\$5,000,000
					PRODUCTS - COMP/OP AGG	\$5,000,000
	AUTOMOBILE LIABILITY <input type="checkbox"/> ANY AUTO <input type="checkbox"/> ALL OWNED AUTOS <input type="checkbox"/> SCHEDULED AUTOS <input type="checkbox"/> HIRED AUTOS <input type="checkbox"/> NON OWNED AUTOS	ISSUED IN LIEU OF CERTIFICATE DATED 5-20-04			COMBINED SINGLE LIMIT (Per accident)	
					BODILY INJURY (Per person)	
					BODILY INJURY (Per accident)	
					PROPERTY DAMAGE (Per accident)	
	GARAGE LIABILITY <input type="checkbox"/> ANY AUTO				AUTO ONLY - EA ACCIDENT	
					OTHER THAN AUTO ONLY	EA ACC AGG
A	EXCESS LIABILITY <input checked="" type="checkbox"/> OCCUR <input type="checkbox"/> CLAIMS MADE <input type="checkbox"/> DROUCTIBLE <input type="checkbox"/> RETENTION	267-79-55	06/30/99	06/30/04	EACH OCCURRENCE	\$20,000,000
					AGGREGATE	\$20,000,000
	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY				IWC STATUTORY LIMITS	OTHER
					E L EACH ACCIDENT	
					E L DISEASE-POLICY LIMIT	
					E L DISEASE-EA EMPLOYEE	
	OTHER					

DESCRIPTION OF OPERATIONS/LOCATIONS/VEHICLES/EXCLUSIONS ADDED BY ENDORSEMENT/SPECIAL PROVISIONS
 Re: Portofino project. Named Insureds include: Crosswinds Communities, Inc., Crosswinds Communities, LLC, Intelihomes Corp., Crosswinds at Portofino, LLC, Portofino-Ft. Myers, Limited Partnership, Crosswinds at Portofino, LLC See Attached Endorsements

CERTIFICATE HOLDER

Lee County
 Attention: wayne Fiyalke
 P.O. Box 398
 Fort Myers FL 33092 USA

CANCELLATION

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING COMPANY WILL ENDEAVOR TO MAIL 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT BUT FAILURE TO DO SO SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE COMPANY, ITS AGENTS OR REPRESENTATIVES

AUTHORIZED REPRESENTATIVE: *Hatricia Tapan Jouman*

EXHIBIT "C"
 PAGE 1 OF 3

Holder Identifier: 570009795794 Certificate No.

CERTIFICATE OF INSURANCE "CANCELLATION" CONTINUED

Should any of the described policies be cancelled before the expiration date thereof, the issuing company will mail 30 days written notice via Certified/Registered Mail, to the certificate holder named, except in the case of non-payment of premium where 10 days written notice will be mailed.

CANCELLATION CLAUSE

EXHIBIT "C"
PAGE 2 OF 3

POLICY NUMBER: GL267-00-34

COMMERCIAL GENERAL LIABILITY

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY

**ADDITIONAL INSURED — OWNERS, LESSEES OR
CONTRACTORS (FORM B)**

(Including "Primary" Wording)

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name of Person or Organization:

*Lee County, a political subdivision and Charter County of the State of Florida, its agents,
employees and public officials*

RE: Portofino project

(If no entry appears above, information required to complete this endorsement will be shown in the Declaration as applicable to this endorsement.)

WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of or related to "your work" or its supervision for that insured by or for you.

PRIMARY INSURANCE: It is agreed that such insurance as afforded by this policy for the benefit of the additional insured shall be primary insurance as respects any claim, loss or liability arising directly or indirectly from the insured's operations and any other insurance maintained by the additional insured shall be non-contributory with the insurance provided hereunder.

Bond No.: SU5008083
Premium: \$100.00

Surety Bond

KNOW ALL PERSONS BY THESE PRESENTS, That we Portofino - Ft. Myers Limited Partnership of Florida, hereinafter referred to as the Principal, and Arch Insurance Company as Surety, are held and firmly bound unto Lee County Board of County Commissioners (C/O Risk Manager) of P.O. Box 398, Ft. Myers, FL 33902 hereinafter referred to as the Oblige, in the sum of Two Thousand Three Hundred Eighty Six and 25/100 Dollars (\$2,386.25), for the payment of which we bind ourselves, our legal representatives, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, Principal has agreed to enter into a contract with Oblige, for Landscape Installation and Maintenance within the Oblige's right-of-way of Ben C. Pratt/Six Mile Cypress Parkway adjacent to Caserta Lane.

NOW, THEREFORE, if the Principal shall faithfully perform such contract or shall indemnify and save harmless the Oblige from all cost and damage by reason of Principal's failure so to do, then this obligation shall be null and void; otherwise it shall remain in full force and effect.

ANY PROCEEDING, legal or equitable, under this Bond may be instituted in any court of competent jurisdiction in the location in which the work or part of the work is located and shall be instituted within two years after Principal Default or within two years after the Surety refuses or fails to perform its obligations under this Bond, whichever occurs first. If the provisions of this Paragraph are void or prohibited by law, the minimum period of limitation available to sureties as a defense in the jurisdiction of the suit shall be applicable.

LEE COUNTY will be given thirty (30) days notice prior to cancellation or modification of any stipulated insurance. Such notification will be in writing by registered mail, return receipt requested and addressed to the Risk Manager (P.O. Box 398, Fort Myers, Florida 33902).

NO RIGHT OF ACTION shall accrue on this Bond to or for the use of any person or corporation other than the Oblige named herein or the heirs, executors, administrators or successors of the Oblige.

SIGNED, SEALED AND DATED this 25th day of June, 2004.

Portofino-Ft. Myers Limited Partnership
a Florida limited partnership

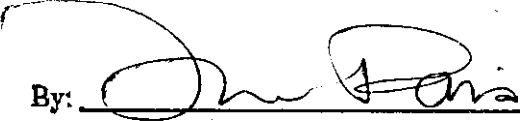
see attached SIGNATURE PAGE

By: _____

(SEAL)

Arch Insurance Company

(Surety)

By:  _____

Maria Pena, Attorney-in-Fact

(SEAL)

Attorney-in-fact

COUNTERSIGNED

By: Joseph M. Pietrangelo
Joseph M. Pietrangelo, Florida Resident Agent
Aon Risk Services, Inc. of Florida
1001 Brickell Bay Dr., Suite 1100
Miami, Florida 33131
License #A207358

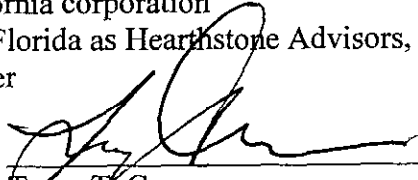
SIGNATURE PAGE

PRINCIPAL:

PORTOFINO-FT. MYERS LIMITED PARTNERSHIP,
a Florida limited partnership

By: FL MSIII GP, L.C.,
a Florida limited liability company
General Partner

By: Hearthstone, Inc.,
a California corporation
dba in Florida as Hearthstone Advisors, Inc.,
Manager

By: 

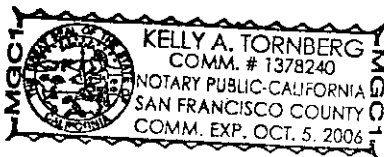
Tracy T. Carver
Senior Vice President-General Counsel

EXHIBIT "D"
PAGE 3 OF 8

State of California)
) ss.
County of San Francisco)

On June 28, 2004, before me, Kelly A. Tornberg, personally appeared Tracy T. Carver, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.



Kelly A. Tornberg
Notary Public

EXHIBIT "D"
PAGE 4 OF 9

POWER OF ATTORNEY

Know All Men By These Presents:

That the Arch Insurance Company, a corporation organized and existing under the laws of the State of Missouri, having its principal office in Kansas City, Missouri (hereinafter referred to as the "Company") does hereby appoint

KD Conrad, C.K. Nakamura, Joyce Herrin, Tom Branigan, Edward C. Spector, Marina Tapia, Clarice Lee, Richard E. Bigley, Lisa L. Thornton, Maria Pena, E. S. Albrecht Jr., Tracy Aston, Betty Walker and Brenda Wong of Los Angeles, CA (EACH)

its true and lawful Attorney(s)-in-Fact, to make, execute, seal, and deliver from the date of issuance of this power for and on its behalf as surety, and as its act and deed:

Any and all bonds and undertakings

EXCEPTION: NO AUTHORITY is granted to make, execute, seal and deliver bonds or undertakings that guarantee the payment or collection of any promissory note, check, draft or letter of credit.

This authority does not permit the same obligation to be split into two or more bonds in order to bring each such bond within the dollar limit of authority as set forth herein.

The Company may revoke this appointment at any time.

The execution of such bonds and undertakings in pursuance of these presents shall be as binding upon the said Company as fully and amply to all intents and purposes, as if the same had been duly executed and acknowledged by its regularly elected officers at its principal office in Kansas City, Missouri.

This Power of Attorney is executed by authority of resolutions adopted by unanimous consent of the Board of Directors of the Company on March 3, 2003, true and accurate copies of which are hereinafter set forth and are hereby certified to by the undersigned Secretary as being in full force and effect:

"VOTED, That the Chairman of the Board, the President, or any Vice President, or their appointees designated in writing and filed with the Secretary, or the Secretary shall have the power and authority to appoint agents and attorneys-in-fact, and to authorize them to execute on behalf of the Company, and attach the seal of the Company thereto, bonds and undertakings, recognizances, contracts of indemnity and other writings, obligatory in the nature thereof, and any such officers of the Company may appoint agents for acceptance of process."

This Power of Attorney is signed, sealed and certified by facsimile under and by authority of the following resolution adopted by the unanimous consent of the Board of Directors of the Company on March 3, 2003:

VOTED, That the signature of the Chairman of the Board, the President, or any Vice President, or their appointees designated in writing and filed with the Secretary, and the signature of the Secretary, the seal of the Company, and certifications by the Secretary, may be affixed by facsimile on any power of attorney or bond executed pursuant to the resolution adopted by the Board of Directors on March 3, 2003, and any such power so executed, sealed and certified with respect to any bond or undertaking to which it is attached, shall continue to be valid and binding upon the Company.

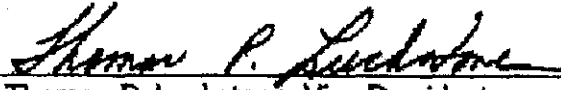
In Testimony Whereof, the Company has caused this instrument to be signed and its corporate seal to be affixed by their authorized officers, this 11th day of March, 2003.

Arch Insurance Company

Attested and Certified


Joseph S. Labell, Corporate Secretary

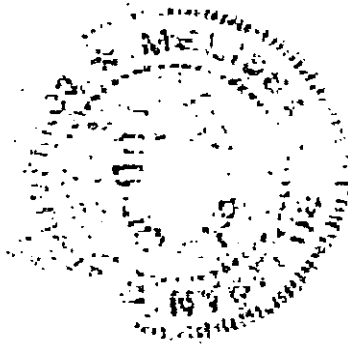



Thomas P. Luckstone, Vice President

STATE OF CONNECTICUT SS

COUNTY OF FAIRFIELD SS

I Melissa B. Gilligan, a Notary Public, do hereby certify that Thomas P. Luckstone and Joseph S. Labell personally known to me to be the same persons whose names are respectively as Vice President and Corporate Secretary of the Arch Insurance Company, a Corporation organized and existing under the laws of the State of Missouri, subscribed to the foregoing instrument, appeared before me this day in person and severally acknowledged that they being thereunto duly authorized signed, sealed with the corporate seal and delivered the said instrument as the free and voluntary act of said corporation and as their own free and voluntary acts for the uses and purposes therein set forth.




Melissa B. Gilligan, Notary Public
My commission expires 2-28-05

CERTIFICATION

I, Joseph S. Labell, Corporate Secretary of the Arch Insurance Company, do hereby certify that the attached Power of Attorney dated March 11, 2003 on behalf of the person(s) as listed above is a true and correct copy and that the same has been in full force and effect since the date thereof and is in full force and effect on the date of this certificate; and I do further certify that the said Thomas P. Luckstone, who executed the Power of Attorney as Vice President, was on the date of execution of the attached Power of Attorney the duly elected Vice President of the Arch Insurance Company.

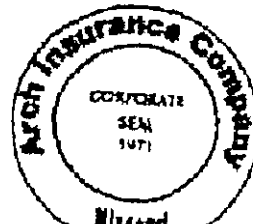
IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the corporate seal of the Arch Insurance Company on this 25th day of June, 2004.


Joseph S. Labell, Corporate Secretary

This Power of Attorney limits the acts of those named therein to the bonds and undertakings specifically named therein and they have no authority to bind the Company except in the manner and to the extent herein stated.

Home Office: Kansas City, MO

EXHIBIT "D"
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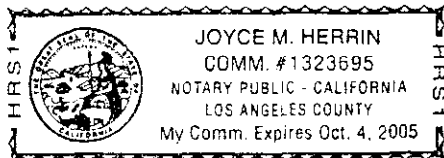
CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

State of California

County of Los Angeles

On June 25, 2004 before me, Joyce M. Herrin, Notary Public, personally appeared Maria Peña, personally known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same in her authorized capacity, and that by her signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.



Joyce M. Herrin
Joyce M. Herrin

EXHIBIT "D"

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IMPORTANT NOTICE CONCERNING THE TERRORISM RISK INSURANCE ACT OF 2002

The Terrorism Risk Insurance Act of 2002 establishes a mechanism by which the federal government will share, with the insurance industry, in losses arising out of "acts of terrorism" certified as such by the Secretary of the Treasury. "Certified acts of terrorism" are defined as events that cause more than \$5 million in losses and:

1. Are violent or dangerous to human life, property, or the infrastructure;
2. Result in damage within the United States, on a United States mission, or to a United States aircraft or vessel; *and*
3. Are committed by individuals, acting on behalf of foreign persons or interests, as part of an effort to coerce the civilian population of the United States or to influence the policies or conduct of the United States Government.

The Act specifies that coverage for "certified acts of terrorism" must be made available in commercial property and casualty policies of insurance, and it requires insurers to disclose any applicable premium charges and the federal share of compensation. We are making these disclosures in strict compliance with the Act.

Disclosure of Availability of Coverage for Terrorism Losses

Coverage for losses resulting from "certified acts of terrorism" is being made available to you on terms, amounts, and limitations generally applicable to losses resulting from perils other than acts of terrorism.

Disclosure of Federal Share of Compensation for Terrorism Losses

The federal government will pay a 90% share of an insurer's terrorism losses once the insurer has satisfied a significant aggregate annual deductible. For terrorism losses occurring in 2002, that deductible is 1% of the insurer's 2001 direct earned premium. For losses occurring in 2003, 2004 and 2005, the annual insurer deductibles are 7%, 10% and 15% of the prior year's direct earned premium, respectively. The Act provides that neither insurers nor the federal government are responsible for losses associated with "certified acts of terrorism" once aggregate annual insured losses exceed \$100 billion.

Disclosure of Terrorism Insurance Premium

Your Bond premium charge for "certified acts of terrorism" coverage is \$ 0.

EXHIBIT "D"
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