



**CITY OF PLANO
COUNCIL AGENDA ITEM**

CITY SECRETARY'S USE ONLY				
<input type="checkbox"/> Consent <input type="checkbox"/> Regular <input type="checkbox"/> Statutory				
Council Meeting Date:		4/25/11		
Department:		Public Works		
Department Head		Gerald P. Cosgrove		
Agenda Coordinator (include phone #): Irene Pegues (7198) Project No. 5814.1				
CAPTION				
A Resolution of the City Council of the City of Plano, Texas, ratifying the Takeover Agreement by and between North American Specialty Insurance Company and the City of Plano for completion of Mapleshade Sanitary Sewer and Force Main project; approving its execution by the City Manager or his authorized designee; and providing an effective date.				
FINANCIAL SUMMARY				
<input checked="" type="checkbox"/> NOT APPLICABLE <input type="checkbox"/> OPERATING EXPENSE <input type="checkbox"/> REVENUE <input type="checkbox"/> CIP				
FISCAL YEAR:	Prior Year (CIP Only)	Current Year	Future Years	TOTALS
Budget	0	0	0	0
Encumbered/Expended Amount	0	0	0	0
This Item	0	0	0	0
BALANCE	0	0	0	0
FUND(S): N/A				
COMMENTS: This item has no determinable fiscal impact at this time.				
STRATEGIC PLAN GOAL: Completion of this project relates to the City's Goal of Great Neighborhoods – 1 st Choice to Live.				
SUMMARY OF ITEM				
On November 29, 2010, the City of Plano received a letter from W.R. Hodgson Co., L.P., stating Hodgson was voluntarily defaulting and terminating the original contract. Hodgson was contracted with the City of Plano to construct Project No. 5814.1, Mapleshade Sanitary Sewer and Force Main. North American Specialty Insurance Company as surety for the performance bond has agreed to complete the project. The majority of the work required to complete the project is to establish the grass.				
This agenda item ratifies the Takeover Agreement between the bonding company, North American Specialty Insurance Company, and the City of Plano by which North American Specialty Insurance Company agreed to take over completion of the project.				
List of Supporting Documents:		Other Departments, Boards, Commissions or Agencies		
Location Map		N/A		

Plano Parkway

Ohio

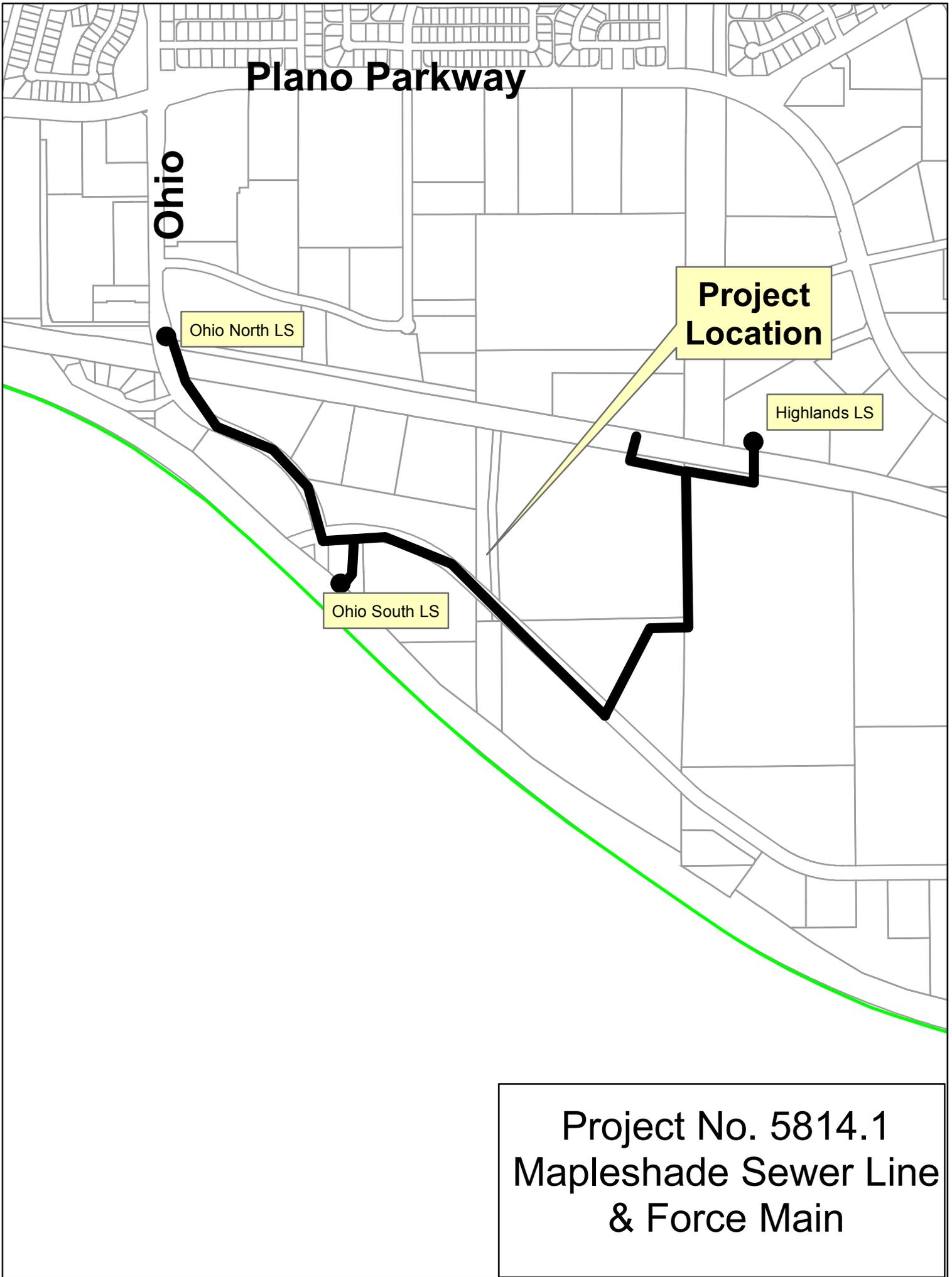
Ohio North LS

Project Location

Highlands LS

Ohio South LS

Project No. 5814.1
Mapleshade Sewer Line
& Force Main



A Resolution of the City Council of the City of Plano, Texas, ratifying the Takeover Agreement by and between North American Specialty Insurance Company and the City of Plano for completion of Mapleshade Sanitary Sewer and Force Main project; approving its execution by the City Manager or his authorized designee; and providing an effective date.

WHEREAS, the City of Plano and W. R. Hodgson Co., L. P., entered into a contract on May 26, 2009, for the construction of Mapleshade Sanitary Sewer and Force Main, Project No. 5814.1; and

WHEREAS, W. R. Hodgson Co., L. P., voluntarily defaulted and terminated the original contract on November 29, 2010, before completion of Mapleshade Sanitary Sewer and Force Main project; and

WHEREAS, North American Specialty Insurance Company is willing to complete the project as Surety for the performance bond, pursuant to the terms of the performance bond; and

WHEREAS, the City of Plano and North American Specialty Insurance Company have agreed to the terms for the Takeover Agreement to complete the Mapleshade Sanitary Sewer and Force Main project, a copy of which is attached hereto as Exhibit "A".

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF PLANO, TEXAS, THAT:

Section I. The Takeover Agreement, having been reviewed by the City Council of the City of Plano and found to be acceptable and in the best interests of the City of Plano and its citizens, is hereby in all things ratified and execution by the City Manager or his authorized designee on behalf of the City of Plano is hereby approved.

Section II. This Resolution shall become effective immediately upon its passage.

DULY PASSED AND APPROVED the 25th day of April, 2011.

Phil Dyer, MAYOR

ATTEST:

Diane Zucco, CITY SECRETARY

APPROVED AS TO FORM:

Diane C. Wetherbee, CITY ATTORNEY

Takeover Agreement

This Takeover Agreement ("Agreement") is entered into by and between North American Specialty Insurance Company ("Surety") and the City of Plano, Texas ("Owner"), and is made effective as of the ____ day of April, 2011.

Recitals:

WHEREAS, W. R. Hodgson Co., LP ("Contractor") and Owner entered into a written contract dated May 26, 2009, in the original amount of \$1,268,929.00 ("Original Contract") which is incorporated herein by reference as if copied verbatim and a true and accurate copy of which is kept on file at the City of Plano Public Works Department, whereby Contractor agreed to construct that certain construction project known as the Mapleshade Sanitary Sewer and Force Main, Project No. 5814.1, Plano, Texas (the "Project"), in accordance with the terms and provisions of the Original Contract;

WHEREAS, as required by law and under the terms of the Original Contract, Contractor and Surety executed and delivered to Owner a Performance Bond No. 2102780 ("Performance Bond") and a Payment Bond No. 2102780 ("Payment Bond"), each in the penal sum of \$1,268,929.00;

WHEREAS, Contractor voluntarily defaulted and terminated the Original Contract, and Owner has called upon Surety to fulfill its obligations as surety under the terms of the Performance Bond; and

WHEREAS, Owner and Surety agree that the remaining scope of work to complete the Project is set forth in the Construction Site Punch List attached hereto and incorporated herein as Exhibit "A", and Surety is willing to undertake the completion thereof in accordance with the terms of the Performance Bond and this Agreement provided that in doing so it will receive the entire Contract Balance as hereinafter defined below.

NOW, THEREFORE, in consideration of the agreements and undertakings hereinafter set forth, and for other good and valuable consideration, the receipt and sufficiency of which being hereby acknowledged, Owner and Surety agree as follows:

Agreement:

1. Surety hereby undertakes to cause the performance of the terms, covenants and conditions of the Original Contract, including all modifications thereto, and agrees to be bound by the Original Contract as modified herein. Owner acknowledges that Surety, by its execution of this Agreement, is acting in its capacity as the surety for Contractor in making arrangements for the performance and completion of the Original Contract, and not as a completing contractor, and that Surety is not assuming any obligations or liabilities beyond those set forth in the Performance Bond. As to the completion of the Original Contract, except as otherwise provided in this Agreement, Surety is entitled to

all rights, title and interest of Contractor in and to the Original Contract in all respects as if Surety were the original party to the Original Contract. The term "contractor" as used in the Original Contract shall be deemed, after the effective date of this Agreement, to refer to Surety rather than to Contractor.

2. Owner acknowledges that Surety will subcontract the performance of the work under the Original Contract to Sage Contractor Services, Inc., as completion contractor ("Completion Contractor"), and Owner hereby consents to Surety's designation of this entity as Completion Contractor to complete the work under the Original Contract provided that Surety will designate such other subcontractors as needed to complete the project if the Completion Contractor fails to complete the project in accordance with the Original Contract requirements. Surety may satisfy the required insurance obligations under the Original Contract by providing evidence of the required insurance coverage carried by Completion Contractor, with Surety and Owner being named as additional insureds under the policy or policies.
3. Owner represents and warrants to Surety that as of the date of this Agreement:
 - a. The adjusted amount of the Original Contract, including all approved change orders, is the sum of \$1,280,128.45 (through C.O.#1);
 - b. Contractor has been paid the sum of \$1,236,846.68 by Owner; and
 - c. The "Contract Balance" (including unpaid retainage) shall be defined as the sum of \$43,281.77 [subsection (a) minus subsection (b)]. The Contract Balance shall be increased or decreased, as appropriate, as a result of any change orders for extra work or reductions from the scope of work as requested or required by Owner after the date of the execution of this Agreement per the terms of the Original Contract.
4. Owner agrees that the entire Contract Balance is dedicated to and will be applied to the completion of the Original Contract pursuant to this Agreement. Owner shall pay directly to Surety (as indicated below) the Contract Balance, plus or minus any additional amounts of money on account of any modifications or changes requested by Owner and agreed to in writing signed by Owner and Surety, as the work progresses. The payment of the Contract Balance to Surety shall be made in accordance with the terms of the Original Contract as to the time, amount and method of payment, and no payment shall be delayed by reason of any slow down or cessation of work in connection with the takeover of the Original Contract by Surety. Surety agrees to spend its own funds (subject to the penal sum cap described below) as may be necessary from time to time to pay for the performance of the Original Contract by Completion Contractor in the event that the Contract Balance is insufficient, with any such payments being credited against the penal sum of the Performance Bond. Owner agrees that it will not assess any liquidated or other damages against progress and/or retainage payments from the Contract Balance payable to Surety under this Agreement alleged to have occurred on or before the

effective date of this Agreement, and Owner agrees to pay said Contract Balances to Surety, without offset, back charge, reduction or diminution whatsoever for any action or inaction of Contractor and/or Surety alleged to have occurred on or before the effective date of this Agreement, except as may be made in accordance with the terms of this Agreement. All payments under this Agreement shall be made payable to Surety and shall be sent to Surety at the following address, unless and until Owner is notified in writing of any different address:

North American Specialty Insurance Company
c/o Jeffrey Goldberg
Vice President
475 N. Martingale Road, Suite 850
Schaumburg, IL 60173.

5. Surety shall complete the work required under the Original Contract pursuant to this Agreement within 30 calendar days (excluding the requirement of obtaining 70% of vegetative cover on all unpaved areas where hydromulch or hydroseed has been or will be applied) after receipt of a written notice to proceed from Owner (the "Completion Date"). Surety is hereby granted a non-compensatory time extension from the original completion date in the Original Contract until the Completion Date. As consideration for the non-compensatory time extension, Surety hereby waives any right to any claim for any additional time extensions and/or damages as a result of any delays which may have been caused by Owner up to and including the date of this Agreement. The assessment of any liquidated damages under the Original Contract and this Agreement may begin on the day after the Completion Date; provided, however, that any such assessment of liquidated damages shall *not* include any alleged delays of Contractor which occurred at any time during Contractor's performance of the work under the Original Contract, and that the calculation and assessment of any such liquidated damages shall include the recognition of any excusable delays during Surety's performance of this Agreement in accordance with the terms of the Original Contract.
6. Insofar as the Owner has any right, title or interest therein, Owner agrees that Surety and Completion Contractor shall have the right to use, without charge, any of the equipment, materials and appurtenances furnished or supplied by Contractor which may be stored on or about the premises of the Project site or materials which may have been fabricated for use in connection with the Original Contract, whether or not presently upon the Project site.
7. Surety will not have any employees or other representatives on the Project site on a daily basis other than Completion Contractor. Prior to the issuance of the written notice to proceed, Surety shall specifically authorize in writing an individual with Completion Contractor to be its designated representative (the "Authorized Individual") solely for the purposes set forth in this paragraph. The Authorized Individual will represent Surety in dealing with Owner on day-to-day construction issues with respect to the Project. The Authorized Individual shall also have the authority to negotiate and sign change orders

for extra work requested or required by Owner without Surety's prior written approval, provided the change order does not exceed \$1,000 and Completion Contractor is given additional time to perform the change order. If the change order exceeds \$1,000, or no additional time is given to Completion Contractor to perform the change order, then Surety's prior written approval is required to negotiate the change order and the final change order must be signed by Surety and not the Authorized Individual. If the total of all of the approved change orders exceeds the sum of \$5,000, then Surety, not the Authorized Individual, must approve in writing all additional or subsequent change orders regardless of the amount of each such change order. The Authorized Individual has no authority to negotiate deductive change orders, credits, back charges or net deductions from the Original Contract or the Contract Balance of any nature whatsoever without Surety's prior written approval. Any agreements with respect to any warranty work of Contractor or corrective work as a result of any latent defects in the work performed by Contractor shall require the written approval of Surety.

8. The authority of the Authorized Individual to deal directly with Owner may be revoked by Surety on three (3) days' written notice to Completion Contractor and Owner. In the event any dispute arises between Owner and Completion Contractor, or Completion Contractor is alleged to be or is in actual default under the terms of the Original Contract or this Agreement, Owner shall give Surety written notice thereof within forty-eight (48) hours of Owner's knowledge of same.
9. The total liability of Surety under this Agreement and the Performance Bond for the performance of the work, after the expenditure of the Contract Balance if paid by Owner to Surety hereunder, is limited to and shall not exceed the penal sum of the Performance Bond in the amount of \$1,268,929.00. All payments properly made by Surety subsequent to the date of this Agreement for the performance of the Original Contract shall be credited against the penal sum of the Performance Bond. Nothing in this Agreement constitutes a waiver of such penal sum as the maximum limitation of Surety's liability under the Performance Bond. In the event that Surety expends the penal sum of the Performance Bond, after the expenditure of the Contract Balance if paid by Owner to Surety hereunder, in performance of the Original Contract and this Agreement, Owner agrees that Surety shall have no further liability or obligation to Owner under the Performance Bond, this Agreement, the Original Contract or otherwise, and Surety may immediately cease performance without further obligation to Owner.
10. In no event shall Owner withhold any of the Contract Balance from Surety because of or on account of any claims, liens, suits or demands by any persons or entities furnishing or alleging to have furnished labor and/or materials to the Project. The Payment Bond shall remain in full force and effect in accordance with its terms and provisions. The total liability of Surety under the Payment Bond is limited to and shall not exceed the penal sum of the Payment Bond in the amount of \$1,268,929.00. All payments properly made by Surety under the Payment Bond shall be credited against the penal sum of the Payment Bond. Nothing in this Agreement constitutes a waiver of such penal sum or an increase in the liability of Surety under the Payment Bond.

11. Owner agrees that it will not acknowledge or honor any claim or charges against the Contract Balance by Contractor or any alleged assignees, successors, creditors or transferees of Contractor, or any other party making claim to any such proceeds or balances, without the prior written consent of Surety, or except by order of a court of competent jurisdiction after due notice to Surety.
12. This Agreement constitutes the entire agreement between the parties regarding the subject of this Agreement and supersedes any and all prior discussions, agreements, arrangements and/or understandings by and between them, all of which are merged into this Agreement. This Agreement shall not be changed, amended or altered in any way except in writing and signed by both Owner and Surety. Owner and Surety acknowledge that there have been no oral, written or other agreements of any kind as a condition precedent to or to induce the execution and delivery of this Agreement. Any written or oral discussions conducted prior to the effective date of this Agreement shall not in any way vary or alter the terms of this Agreement. Except as herein modified, all terms and conditions of the Original Contract shall remain unchanged and in full force and effect. In the event of any conflict or inconsistency between the provisions set forth in this Agreement and the Original Contract, priority of interpretation shall be in the following order: this Agreement, then the Original Contract. The Recitals to this Agreement shall be considered substantive terms and conditions and not mere recitals in the interpretation of this Agreement.
13. This Agreement is solely for the benefit of Owner and Surety. Owner and Surety do not intend by any provision of this Agreement to create any rights in any third-party beneficiaries, nor to confer any benefit upon or enforceable rights under this Agreement or otherwise upon anyone other than Owner and Surety. Specifically, Owner and Surety acknowledge that nothing in this Agreement shall extend or increase the rights of any third-party claimants or the liabilities or obligations of Surety under the Bonds.
14. Surety covenants and agrees that Surety and Completion Contractor are independent contractors and not officers, agents, servants or employees of Owner; that Surety shall have exclusive control of and exclusive right to control the details of the work performed hereunder and all persons performing same, and shall be responsible for the acts and omissions of its officers, agents, employees, contractors, subcontractors and consultants; that the doctrine of respondeat superior shall not apply as between Owner and Surety, its officers, agents, employees, contractors, subcontractors and consultants, and nothing herein shall be construed as creating a partnership or joint enterprise between Owner and Surety.
15. This Agreement shall be governed by and controlled by the laws of the State of Texas and is performable in Collin County, Texas. Venue for any dispute arising out of this Agreement shall be in Collin County, Texas.
16. Any notices which are required to be given by the terms of this Agreement shall be sent via certified mail, return receipt requested, to the following persons and addresses:

Owner:

City of Plano, Texas
c/o Gerald P. Cosgrove
Director of Public Works
1520 K Avenue, Suite #250
Plano, Texas 75074

Surety:

North American Insurance Company
c/o Jeffrey Goldberg
Vice President
475 N. Martingale Road, Suite 850
Schaumburg, IL 60173

With a copy to:

Robert M. Fitzgerald
Law Offices of Robert M. Fitzgerald
1219 FM 314
Van, TX 75790.

17. This Agreement shall be binding upon the parties and their respective successors and assigns.
18. In the event that one or more provisions of this Agreement shall be declared to be invalid, illegal or unenforceable in any respect, unless such invalidity, illegality or unenforceability shall be tantamount to a complete failure of consideration, the validity, legality and enforceability of the remaining provisions contained in this Agreement shall not in any way be affected or impaired thereby.
19. It is understood and agreed by Owner and Surety that this Agreement shall be construed without regard to any presumption or other rule requiring construction against the party causing this Agreement to be drafted.
20. This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original.

IN WITNESS WHEREOF, the parties have executed this Agreement and made effective as of the date indicated above, and each of the undersigned personally represent and warrant that they have the full right, power and authority to execute this Agreement on behalf of the respective parties.

OWNER:

CITY OF PLANO, TEXAS

By: _____
Bruce D. Glasscock, City Manager

STATE OF TEXAS §
 §
COUNTY OF COLLIN §

This instrument was acknowledged before me on this ____ day of April, 2011, by Bruce D. Glasscock as City Manager of the City of Plano, Texas, a Texas municipality, on behalf of said municipality.

Notary Public, State of Texas

SURETY:

NORTH AMERICAN INSURANCE
INSURANCE COMPANY

By: _____
Jeffrey Goldberg, Vice President

STATE OF ILLINOIS §
 §
COUNTY OF COOK §

This instrument was acknowledged before me on this ____ day of April, 2011, by Jeffrey Goldberg, a Vice President of North American Specialty Insurance Company, a _____ corporation, on behalf of said corporation.

Notary Public, State of Illinois

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Construction Site Punch List

PO Box 860358

Plano, TX 75086-0358

1520 K Ave

Project Plat Name:	Mapleshade Sewer & force main	Proj #: 5814.1
Common Name:		Date: 1-27-11
Address:		Page: 1 of 1

Contractor Name & Company W.R.Hodgson	Utilities: W.R.Hodgson Paving: -	James Powell - Sr. Construction Inspector 972.941.7329 office 972.941.7397 fax 972.816.8132 cell E-Mail: jamespo@plano.gov
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Item	Item To Be Completed/Adjusted/Corrected	Done?
1.	70% grass coverage between back of curb to the fence, north & south of railroad tracks	
2.	Wet well on Ohio Drive, north of the railroad tracks in the median needs to be dug up and verify if outflowing and Inflowing pipes have been cut & plugged. The sink hole continues to appear.	
3.	Construction entrance on Mapleshade Dr. needs to be removed and grass planted.	
4.	SWPPP sign & poles need to be removed.	
5.	Affidavit from all property owners that had work done on their property to their satisfaction.	
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