

# BERG MOUNTAIN HOMES

**THE QUALITY IS IN THE DETAILS**

WWW.BERGMOUNTAINHOMES.COM • BOX 221 BRASSTOWN, NC 28902 • PHONE (828) 361-5050 • FAX (678) 212-4011

## **Construction Agreement and Custom Home Warranty <insert date>**

AGREEMENT between

(herein "Customer"), and Berg Mountain Homes  
PO Box 221  
Brasstown, NC 28092

(herein "Builder"), and

WHEREAS, Customer is the owner of certain real property referred and/or described as follows:

(herein "the Property"), and

WHEREAS, Customer is desirous of constructing a residence on the Property (herein "Customer's Residence") and is furthermore desirous that Builder construct Customer's Residence.

Now, THEREFORE, in consideration of the mutual promises contained herein, the parties agree as follows:

### **SECTION ONE Description of Work**

Builder will construct Customer's Residence using the floor plan provided by \_\_\_\_\_ and modified in accordance with various meetings between Berg Mountain Homes and Customer and including the features agreed upon in the "Proposal for Residential Construction" signed by both Customer and Builder attached hereto and incorporated herein by reference (such documents hereinafter referred to as the "Construction Documents").

\_\_\_\_\_ These plans have been provided by Customer, and Customer and/or Customer's architect represent that the plans are adequate and contain no errors or omissions. Defects in the plan are the Customer's responsibility.

\_\_\_\_\_ These plans will be provided by Builder based on interviews with Customer.

Other documentation developed and mutually agreed upon subsequent to the creation of the plans by Customer and Builder shall control in any area of conflict with the plans. The Customers and Builder acknowledge that they have thoroughly reviewed the plans and specifications.

**SECTION TWO**  
**Responsibility of Customer to Provide Documentation and Liability for Payment of Construction Costs and Fees to Builder**

Within fourteen (14) days after execution hereof Customer will provide Builder, in a form satisfactory to Builder, with such documents (including but not limited to loan commitments or financial information) as are reasonably necessary to assure Builder that Customer has taken such steps as are reasonable to secure a sufficient and unconditional source of funds necessary to pay the construction costs, Customer will thereafter be responsible and liable for the prompt payment of all costs and fees in connection with the construction and completion of Customer’s Residence as set forth herein.

In addition and within the same time frame, Customer will also provide to Builder copies of the following documents:

1. Warranty deed evidencing ownership of the building lot.
2. Development covenants and restrictions.
3. Septic operating permit.
4. Survey / plat of lot.

**SECTION THREE**  
**Construction Costs**

\_\_\_\_\_ Builder shall construct and Customer shall pay total cost of construction of an amount equal to \$\_\_\_\_\_. The total amount shall be paid in accordance with the below draw schedule.

Initial	Deposit	\$5,000
Draw 1	Concrete, Excavation	\$_____
Draw 2	Framing	\$_____
Draw 3	Exterior Doors, Windows, Siding, Roofing	\$_____
Draw 4	Mechanicals, Exterior Paint	\$_____
Draw 5	Insulation, Drywall, Exterior Masonry	\$_____
Draw 6	Interior Paint, Tile, Fixtures, Interior Masonry	\$_____
Draw 7	Trim, Wood Flooring, Cabinetry	\$_____
Final	Completion	\$_____

\_\_\_\_\_ Builder shall construct and Customer shall pay total cost of construction of an amount to be determined and agreed upon contractually in a supplementary document called the Proposal for Residential Construction. The total amount shall be paid in accordance with a draw schedule to be determined.

An initial deposit of \$5,000 is due upon execution of this Agreement. Upon commencement of construction, this deposit will be credited towards the first construction draw amount. Deposit is non-refundable unless:

- \_\_\_\_\_ Home fails to obtain a conventional septic permit.
- \_\_\_\_\_ Customer is unable to find satisfactory financing for the project.

Customer agrees to fund all draw requests within seven (7) days of request. It is understood that Customer and/or Customer’s Bank will monitor construction progress to ensure that Builder’s draws do not exceed immediate construction needs. Builder agrees to provide photographic evidence of progress if requested.

Builder will deposit all funds received from Customer into a checking account designated for construction expenses only (herein “Construction Account”). All funds deposited will be segregated from other project’s construction funds by classifying each deposit (and all subsequent payments and withdrawals) to the Customer’s ‘job’ within Builder’s accounting system.

**SECTION FOUR  
Discretionary Items**

As part of Builder’s services rendered hereunder Builder shall notify Customer at least ten (10) days prior to the deadline for the selection of any fixtures, colors or materials or any items for which allowances are made in the Construction Documents and Customer shall indicate his selection or preference prior to the deadline date. It is the obligation of Customer to make selections of materials, colors and other selections in a timely manner, and Customer agrees to fully cooperate and make every reasonable effort to assist Builder.

**SECTION FIVE  
Change Orders**

The provisions as set out in the Construction Documents may be altered or amended only by agreement of Customer and Builder. If Customer wishes to make any changes in the Residence after execution of this Agreement, Customer must first submit a request in a form approved in writing by Builder. Builder will then review the specified changes and will calculate the additional costs associated with the change (increases and decreases). Customer must then approve the change before work will proceed on the specified changes.

Any change that results in additional project costs and whose cost is not otherwise specified in the Proposal will be billed to Customer at actual cost plus 15%. Excluded from this 15% charge are any overages on material allowance items such as lighting fixtures, plumbing fixtures, etc.

The first twenty (20) changes are included in the cost of construction from Section Three. After the first twenty (20) changes, each additional Change Order will result in a \$50 administrative fee charged to Customer.

**SECTION SIX  
Allowances**

The descriptions of all specific items to be included in the Customer’s Residence for which Customer has a choice and the allowances for such specific items are included in the Construction Documents.

If Customer exceeds the allowance set for any such item, Customer agrees to allow Builder to execute a written Change Order on Customer’s behalf specifying the details and amount of the overage. Customer agrees to pay any such excess within ten (10) days of Builder’s request.

If Customer does not spend the full allowance limit for any allowance item, Builder will adjust the Final Draw accordingly.

**SECTION SEVEN  
Commencement and Completion of Construction**

Customer and Builder will each expend their best efforts to effect the commencement of the construction of Customer’s Residence no later than \_\_\_\_\_. Builder will use his best efforts to cause construction to proceed diligently until completion.

Completion of construction will be indicated by the issuance of the Certificate of Occupancy from the local building department and the subsequent delivery of this document to Customer.

Customer has the right to complete a pre-occupancy inspection (Walkthrough) of the home prior to disbursement of the Final Draw. Customer must schedule and complete the Walkthrough no later than fourteen (14) days after the receipt of the Certificate of Occupancy. Builder must be present during the Walkthrough and Customer must use a Builder approved form to a) acknowledge that all features and functions of the home have been explained; b) acknowledge that all items in the home have been visually inspected and approved; and c) list any items that are either not yet completed or need repair.

Once the Walkthrough is completed, Customer will disburse the Final Draw to Builder in accordance with Section Three of this Agreement. Builder agrees to complete any repairs or other items noted as soon as possible, but in no case later than thirty (30) days from the date of the Walkthrough.

If Customer fails to schedule and complete the Walkthrough within fourteen (14) days of receipt of the Certificate of Occupancy, Customer will retain the right to perform the Walkthrough at a later time, but will become immediately obligated to disburse the Final Draw to Builder in accordance with Section Three of this Agreement.

Customer agrees that he will not occupy Customer's Residence, without the written consent of Builder, until all payments due and payable to Builder and all subcontractors and suppliers under this Construction Agreement have been made.

On completion of the work, Builder will remove debris and surplus material from Customer's property and leave it in a neat and clean condition.

Prior to disbursement of the Final Draw, Builder, if requested by Customer, agrees to sign an affidavit attesting to the fact that all subcontractors and material bills related to the construction of the house have been paid and that any bills originating under the original scope of work, any approved Change Orders or any approved Warranty items that are received after the signing of said affidavit will be the sole responsibility of the Builder.

## **SECTION EIGHT**

### **Right to Stop Work and Termination**

Builder shall have the right, on forty-eight (48) hours written notice to Customer, to stop work if any payment shall not be made to Builder under the terms of Section Three of this Agreement. Builder may keep the job idle until all payments due are received, and may on an additional forty-eight (48) hours written notice permanently terminate performance under this Agreement.

Customer and Builder agree that all Warranties, whether express or implied, shall be void and unenforceable if Builder shall terminate its performance under this Agreement due to nonpayment by Customer.

Additionally, Customer or Builder may, upon thirty (30) days written notice, terminate this Agreement for any reason.

Upon termination (for any reason), Builder will calculate the amount of fee owed to Builder as of the termination date. This amount will be a prorated portion of the entire Builder's fee for the project based on costs incurred through the termination date. The Builder's fee will be considered part of construction costs.

In the event that Builder has performed design services for Customer, 100% of the design service fees will be payable to Builder upon termination and will also be considered part of construction costs. For this Construction Agreement, design service fees are \$ \_\_\_\_\_.

Builder has the authority to pay from the Construction Account any construction costs that are due and payable as of the termination date. If the Construction Account has insufficient funds to pay for these costs, Customer shall, within ten (10) days of termination, pay the balance of these costs.

Builder may retain in the Construction Account sufficient funds to pay for any anticipated construction costs that were incurred prior to the termination date but were not yet billed. If the Construction Account has insufficient funds to pay for these trailing expenses, Customer shall, within ten (10) days of receipt of an invoice, pay these construction costs.

After payment of all construction costs, Builder will return balance of Construction Account to Customer.

**SECTION NINE  
Limited Warranty**

This Limited Warranty (herein “Warranty”) is extended by Builder to Customer and shall commence on the date of the Certificate of Occupancy and continue for a period of eighteen (18) months.

- 1. Coverage: Builder will repair, replace, adjust or correct any observable defects or omissions (such as missing equipment or hardware; sticking doors, drawers, and windows; dripping faucets; paint and trim touchup; and other reported malfunctions or adjustments) that were identified during the initial Customer inspection of the home (the Walkthrough).

In addition and through the expiration date of the Warranty, Builder will repair or replace (at Builder’s sole discretion) any latent defects (not apparent or ascertainable at the time of Walkthrough) in the building materials or workmanship as defined by the standards of construction set out in the current edition of the *Residential Construction Performance Guidelines*. Customer acknowledges receipt of these guidelines.

Builder has the option to reimburse Customer for the reasonable cost of repair or replacement. Also, Customer agrees to accept reasonable matches in repair or replacement in the event the specified or originally used item is no longer available.

Except as identified during Walkthrough, readily identifiable defects in workmanship or aesthetics are not covered by this Warranty. The defect must be such that it affects the ability of Customer to use the home in some significant manner or that causes a serious health or safety concern. Likewise, this Warranty only applies to latent

defects. It does not apply to visible defects which could have been found by reasonable inspection at Walkthrough. If Customer completes Walkthrough of the home without objection to these visible defects, this Warranty will not apply to a subsequent claim based on such defects.

2. Obtaining Service: If a problem develops during the warranty period, Customer must notify Builder of the specific problem in writing delivered to Builder's published address on Builder's website or via e-mail at warranty@bergmountainhomes.com. This notification must include Customer's name, address, phone number and a description of the problem.

Within fifteen (15) days of receipt, Builder will inspect to determine if the problem is covered under this Warranty. If covered, Builder will perform the repair or replacement obligations under this Warranty within a reasonable time and will diligently pursue their remediation.

In emergency situations only (where delay may cause additional damage), it is acceptable to contact Builder by telephone.

Repair work will be done during Builder's normal working hours (Monday – Friday between 7am and 6pm), except in emergency situations where delay may cause additional damage. Customer agrees to provide Builder or Builder's representative access to the house for all inspections and repairs. Customer also agrees to be present or to have present a responsible adult with authority to authorize and sign off on repair completion.

3. Items Not Covered: This Warranty does not cover the following items:
- A. Damage resulting from fires, floods, storms, electrical malfunctions, accidents, or other acts of nature.
  - B. Insect or animal damage.
  - C. Damage from alterations, misuse, or abuse of the covered items by any person.
  - D. Damage resulting from Customer's failure to perform reasonable home maintenance.
  - E. Damage resulting from a Customer's failure to observe any operating instructions furnished by Builder at the time of installation.
  - F. Damaging caused or made worse by failure of Customer to take timely action to minimize loss or damage or failure of Customer to give Builder timely notice of defect.
  - G. Damage resulting from a malfunction of equipment or lines of the telephone, gas, power, or water companies.
  - H. Any item furnished or installed by Customer or any item that was not part of the original home as constructed by Builder.

- I. Any construction work performed by Customer or Customer provided subcontractors.
  - J. Any materials provide by Customer or purchased on behalf of Customer that did not come from Builder’s recommended suppliers.
  - K. Cost of mitigating the presence of radon gas in the home.
  - L. Well water related issues including but not limited to water pressure, sediment, iron and other contaminants.
  - M. Any appliance, piece of equipment, or other item that is a consumer product for the purposes of the Magnuson-Moss Warranty Act, 15 United States Code 2301 et seq., installed or included in Customer’s property. Examples of consumer products include, but are not limited to dishwasher, garbage disposer, gas or electric range, range hood, refrigerator, microwave oven, trash compactor, garage door opener, washer, dryer, whirlpool tub, water heater, furnace, or heat pump. The only warranties for any appliance, pieces of equipment, or other items considered to be a consumer product for the purposes of the Magnuson-Moss Act are those provided by the manufacturers. With respect to manufacturer’s warranties:
    - (1) Builder hereby assigns (to the extent that they are assignable) and conveys to Customer all warranties provided to Builder on any manufactured items that have been installed or included in Customer’s property. Customer accepts this assignment and acknowledges that Builder’s only responsibility related to such items is to lend assistance to Customer in settling any claim resulting from the installation of these products.
    - (2) Builder has made any manufacturers’ warranties available to Customer for inspection, and Customer acknowledges their receipt.
4. Insurance: In the event Builder repairs, replaces or pays the cost of repairing or replacing any defect covered by this Warranty for which Customer is covered by insurance or a warranty provided by another party, Customer must, upon request of Builder, assign the proceeds of such insurance or other warranty to Builder to the extent of the cost to Builder of such repair or replacement.
5. Remedies and Limitations: Customer understands that the sole remedies under this Warranty are repair and replacement (or reimbursement for cost of repair or replacement), as set forth herein.

With respect to any future claim whatsoever that may be asserted by Customer against Builder or Builder’s employees, Customer will have no right to recover, or to request compensation for, and Builder shall not be liable for the following:

- A. Incidental, consequential, secondary, or punitive damages.
- B. Damages for aggravation, mental anguish, emotional distress, or pain and suffering.
- C. Attorney’s fees or costs.



Notwithstanding the provisions of this Warranty, if any liability arises on the part of Builder, Builder will pay only the amount of actual provable damages arising from such liability, but, in any event, this amount shall not exceed \$25,000. This amount, fixed as liquidated damages and not as a penalty, shall be Builder's complete and exclusive amount of liability.

This Warranty is personal to the original Customer and does not run with the property or with the items contained in the house. The original Customer may not assign, transfer, or convey this Warranty without the prior written consent of Builder.

6. Only Warranty and Exclusive Remedy: This express Warranty constitutes the exclusive remedy of all claims by Customer against Builder or Builder's employees. No implied warranties whatsoever apply to the structure of the house or items that are functionally part of the house. This limitation shall be enforceable only to the extent permitted by the law.

In addition, neither Builder, nor Builder's representative, makes or has the authority to make any guarantees, warranties, understandings, or representations that are not set forth in this Warranty. Customer specifically waives the right to seek damages or to assert any claims against Builder or Builder's employees, except as may be provided in this Warranty.

## **SECTION TEN Dispute Resolution**

1. **Alternative Dispute Resolution:** Any controversy arising out of the construction of Customer's Residence or the interpretation of this Agreement, including, but not limited to, any claim for damages against Builder, or any claim of negligence, fraud, breach of express warranty, breach of implied warranty, what constitutes a defect under the Warranty, consumer protection act violations, and breach of contract, shall be decided by alternative dispute resolution.
2. **Mediation:** The parties agree to initially mediate in good faith and to attempt to achieve resolution of any dispute.
3. **Binding Arbitration:** In the event that the dispute is not fully resolved in mediation, the dispute shall then be submitted to binding arbitration. Arbitration shall be conducted in accordance with the Construction Industry Rules of the American Arbitration Association that are in effect at the time of the dispute. In the event of a question of defect in construction, the arbitrator shall employ the standards of construction contained in the current edition of the *Residential Construction Performance Guidelines* in determining what constitutes a defect. Should any party refuse or neglect to appear or to participate in arbitration proceedings, the arbitrator is empowered to decide the controversy in accordance with whatever evidence is presented. Each party shall be responsible for their own expenses and the cost of any expert witnesses.

4. Any costs incurred for Mediation or Binding Arbitration services (exclusive of representation, travel and expert witness costs) shall be borne by Customer or Builder in direct proportion to the results of the mediation or arbitration.

**SECTION ELEVEN**  
**Additional Provisions – Construction**

1. Builder shall have the right to subcontract any portion of the work hereunder, and all work performed by subcontractors shall be subject to all of the applicable terms and conditions of this Agreement and any other contracts or agreements executed jointly by Customer and Builder.
2. A separate Limited Warranty Agreement will govern the warranty obligations of Builder and Customer. This Limited Warranty Agreement shall be executed concurrently with the execution of this Construction Agreement.
3. Customer will be responsible for ensuring the home plans are reviewed and approved by any applicable design review committee and Builder will not be responsible for the costs of any changes due to non-compliance assuming the home is built according to Construction Documents.
4. Retainage (a good faith initial deposit on the part of the Builder, repaid at completion of the project) is not a common practice in residential construction and is not allowed under this Agreement.
5. Materials selected by Customer for the house must be obtained from Builder's existing suppliers, be available for immediate installation, and be installed by Builder or his employees, agents, contractors or subcontractors. Any deviation must be mutually approved by Customer and Builder. Builder reserves the right not to warrant materials that are not selected from Builder's existing suppliers.
6. In the event that Customer supplies their own subcontractors, the following restriction will apply to those subcontractors:
  - a. Builder will not warrant the subcontractor's work.
  - b. Builder will give an allowance for the total expense of the work to be completed and will pay that amount to the subcontractor. Customer must pay any difference in price. The subcontractor must sign a lien release stating that they have been paid in full.
  - c. Builder will perform all scheduling and supervision of the subcontractor. The subcontractor's inability to meet Builder's schedule may have an adverse affect on the overall home completion schedule.
  - d. Subcontractors must meet all local, state and national building codes and licensing requirements. Subcontractors are also required to provide proof of worker's compensation and general liability insurance.
  - e. Subcontractors are required to remove their work product debris.

7. All salvage materials become the property of Builder unless claimed by Customer prior to the start of the job. Builder will leave Customer small surpluses of tile, grout, paint, stain and wood flooring.
8. Customer agrees that prior to occupancy, the Customer's lot and house site is a construction site and therefore may be a dangerous place. Customer agrees that any visits they make during construction are at their own risk. Builder takes no responsibility for making the construction site safe for anyone who is not a construction worker, including Customer.
9. Customer agrees that for a period of two years from the date of the Certificate of Occupancy, Customer will not hire any of Builder's subcontractors that performed subcontracting work on Customer's Residence without written permission from Builder. And, unless agreed to by Builder in writing, if Customer does hire Builder's subcontractors, Customer agrees to pay Builder a fifteen percent (15%) general contracting fee for all labor performed and material provided by said subcontractor.
10. Builder shall promptly pay valid claims of all persons, firms or corporations performing labor or furnishing equipment, materials, and other items used in the construction of Customer's Residence provided that payment has been received by Builder from Customer for the labor, equipment, materials, and other items upon which said claim is based. Customer warrants the Builder's right to a Mechanic's Lien has not been and will not be waived by Customer or anyone else without specific approval of Builder.
11. Builder may impose a service fee of 1.5% for any fees due Builder under Section Three not paid within the specified period(s) and an additional service fee of 1.5% for each thirty (30) days elapsed thereafter. Customer recognizes that material suppliers and subcontractors working on the construction may also levy service or finance charges for failure to promptly pay invoices. Customer will be responsible for any such service or finance charges should Customer not pay Construction Costs within the timeframe specified under the terms of Section Three of this Agreement.

**SECTION TWELVE**  
**Optional Provisions – Construction**

Customer to initial below where applicable:

1. Customer agrees to allow Builder to display on Customer's property one standard size yard sign displaying Builder's company name and phone number after construction is complete (initial one item only):
  - yes, for 6 months after construction is complete
  - yes, for 12 months after construction is complete
  - no, no sign will be allowed in the yard after construction is complete
2. Customer agrees to allow Builder to display the Customer's home on Builder's website (initial all items that apply):
  - yes, Builder may display photographs or videos of the completed project

- yes, Builder may include floorplans and elevation drawings of the project
  - yes, Builder may provide a written description of the project which may also include the Customer’s primary goals for the project
  - yes, Builder may use Customer’s name in the description of the project
  - yes, Builder may include the project location in the description of the project
  - no, Builder may not display any photographs, description or plans
3. Customer agrees to allow Builder to provide Customer’s name and contact information to prospective clients who may ask Builder for references. Builder acknowledges that contact information will only be given out privately and not displayed on Builder’s web site or in any of Builder’s printed marketing material. (initial one item only):
- yes, Builder may provide Customer’s contact information to prospective clients
  - no, Builder may not provide Customer’s contact information to prospective clients
4. Customer agrees to allow Builder to bring prospective clients to view the inside of Customer’s finished home. Builder acknowledges that Customer must be given at least three days advanced notice; that Customer must be present during the viewing unless Customer agrees otherwise; and that Customer has the right to refuse to show their house for any reason and at any time (initial one item only):
- yes, Builder may show Customer’s home to prospective clients
  - no, Builder may not show Customer’s home to prospective clients

**SECTION THIRTEEN**  
**Additional Provisions – Legal**

1. This Agreement shall be deemed to be a North Carolina/Georgia agreement and shall be construed and constructed under the laws of that state.
2. Customer in executing and performing this Agreement does not rely upon any statement, report and/or information to whomsoever made or given, directly or indirectly, verbally or in writing, by Builder or any other party, excepting any contractual agreement which had been agreed to and signed by both Customer and Builder.
3. This Agreement can be amended in writing with all parties hereto executing said amendment.
4. In the event of any conflict in the terms of this Agreement and any Construction Documents, the terms of this Agreement shall control.
5. Failure to enforce any rights hereunder shall not waive any rights in respect to other or future occurrences.
6. In the event one or more persons or entities are identified herein as Customers, then they shall be jointly and severally liable hereunder; and furthermore, the terms hereof shall bind the heirs, executors, successors, assigns and legal representatives of the

parties hereto. The signature of one Customer shall be binding on all Customers with respect to any changes in this Agreement or the Construction Documents.

- 7. This Agreement shall be binding on the heirs, successors, and assigns of Builder.
- 8. In the event of default on or material breach of this Agreement by either party, the non-breaching party shall be entitled to recover from the defaulting or breaching party its reasonable attorney’s fees and costs expended in the enforcement of its rights hereunder.
- 9. Builder is not liable for any sales commission relating to this Agreement or any sale/building agreement regarding the Customer’s lot or property.

I acknowledge having read, understood, and received a copy of this Construction Agreement and Custom Home Warranty.

\_\_\_\_\_  
(Customer)

\_\_\_\_\_  
(Builder)

\_\_\_\_\_  
(Customer)

By \_\_\_\_\_

Date \_\_\_\_\_

Date \_\_\_\_\_