

After recording return to: Box 5

**STATE OF NORTH CAROLINA
COUNTY OF FORSYTH**

**STORMWATER OPERATION AND
MAINTENANCE AGREEMENT AND
GRANT OF EASEMENT**

THIS STORMWATER OPERATION AND MAINTENANCE AGREEMENT is made and entered into on this the ___ day of _____, 2018, pursuant to the Salem Lake Watershed Protection Ordinance, Chapter C – Environmental Ordinance, Article III – Salem Lake Watershed Protection, of the Unified Development Ordinances Winston-Salem/Forsyth County North Carolina, by _____ (hereinafter known as the “Developer”), for the benefit of the City of Winston-Salem (the “City”).

RECITALS:

A. WHEREAS, the Developer wholly owns certain land lying within the limits of the Salem Lake Watershed described in Exhibit A attached hereto (the “Property”), and upon which Developer intends to construct improvements; and

B. WHEREAS, the development of the Property will require the construction of a stormwater management control structure, including pipes, stormwater detention and retention ponds, vegetative filters, berms, dikes, and other stormwater control structures, as necessary, and in accordance with approved plans, specifications, and applicable manuals (“Stormwater Control System”), to serve the Property; and

C. WHEREAS, the Developer has applied to the City for the issuance of a Stormwater Management Permit (“Permit”), which will allow Developer to construct, maintain and operate the Stormwater Control System; and

D. WHEREAS, the City desires to ensure that the Stormwater Control System is properly constructed, maintained and operated in accordance with the Permit and all other applicable ordinance provisions, and, therefore, requires the execution of this Agreement by Developer prior to issuance of a Permit.

NOW, THEREFORE, in consideration of the benefits to be derived by the Developer in obtaining the Permit and developing the Property and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Developer does hereby agree as follows:

1. Generally. Developer shall construct the Stormwater Control System in accordance with the Permit and the plans and specifications for the Stormwater Control System, as approved by the City, and shall, thereafter, operate and maintain the Stormwater Control System in accordance with applicable Permit provisions, the plans and specifications, the Operation and Maintenance Manual, and all other applicable law.

2. Transfers. Developer agrees that it shall not transfer ownership and/or control of the Stormwater Control System until construction has been completed in accordance with the Permit, and the Stormwater Director has approved the completed construction. If Developer, thereafter, desires to transfer ownership and/or control of the Stormwater Control System, Developer and the proposed transferee must secure the Stormwater Director's or his/her designee's approval of the transfer and the re-issuance of the Permit to the proposed transferee. The purpose of the second approval (of transfer) is to ensure that the transferee has the legal and financial wherewithal to assume the Developer's obligations, hereunder, and that the Stormwater Control System has been appropriately maintained, since completion of construction, and will function as designed and intended on the date of transfer, as the Stormwater Director or his/her designee shall, in their sole and absolute discretion, determine.

Developer shall remain responsible for the operation and maintenance of the Stormwater Control System until the Stormwater Director has approved the transfer and the Permit has been re-issued to the proposed transferee, at which time the Developer shall be released from any obligations, hereunder arising, from events or circumstances occurring thereafter.

3. Right to Construct and Maintain. If the Developer for any reason, or at any time, fails, within thirty (30) days after receiving written notice, to adequately complete construction of, repair, maintain, or reconstruct such as is necessary for completion or continued maintenance of, the Stormwater Control System, as required by the Operation and Maintenance Manual, this Agreement, or the Permit, the City may complete such construction or perform such maintenance, repair, or reconstruction, and the Developer, hereby, agrees to pay the City or other governmental authority all reasonable costs incurred thereby. As security for the payment of these costs, the Developer agrees to provide the City a performance bond or irrevocable letter of credit, satisfactory to the City Attorney's Office, as valid, sufficient, and enforceable, or to deposit funds in escrow, under the same terms and conditions applicable to bonds and satisfactory to the City Attorney's Office. The security posted or deposited shall be in an amount the City's Stormwater Director or his/her designee deems adequate to cover the total cost of construction of the Stormwater Control System, including the cost of all materials, piping, and other structures, seeding, soil stabilization,

design and engineering, grading, excavation, fill, and other work the City deems necessary. Costs shall be computed in accordance with, and predicated upon, unit cost information the Developer submits to the City for Stormwater Control System components and bids from contractors hired to perform the work, and the costs required for an independent mobilization, whether or not such is, in actuality, necessary. Developer's failure to adequately complete construction, repair, maintenance, or reconstruction, as indicated above, will entitle the City to obtain and use the funds secured by the performance bond, letter of credit, or escrow account to perform the required activity.

As further security for the payment of the aforesaid costs, Developer also, hereby, grants and conveys to the City a lien on the Property subordinate only to the lien of any recorded first deed of trust now or hereafter encumbering the Property. Developer warrants that the lien created by this paragraph has no less than a second priority status, excluding ad valorem property tax and other statutory liens. The City may bring an action at law against the Developer to pay any such sums coming due hereunder or foreclose the lien created herein against the Property in the same manner as prescribed by the laws of the State of North Carolina for the foreclosures of deeds of trust. Interest at the legal rate, costs and reasonable attorneys' fees for representation of the City in such action or foreclosure shall be added to the indebtedness secured by such lien. Upon removal of the Stormwater Control System in accordance with applicable law, any applicable provisions of the Permit, and upon inspection and approval of the same by the Stormwater Director, the lien herein granted and conveyed to the City shall be of no further force and effect.

4. Easement for Inspection, Construction and Maintenance. Developer hereby grants and conveys to the City, a non-exclusive easement or easements ("Easement") across those portions of the Property necessary and sufficient for the inspection, completion of construction, monitoring, maintenance, repair, and reconstruction of the Stormwater Control System, as shown on Exhibit B, and for ingress, egress, and regress to and from a public street. Developer represents and warrants that it is seized of the aforesaid Property in fee, has the right to convey the Easement hereby granted, that the same is free from encumbrances, and that Developer will warrant and defend said title to said Easement against the claims of all persons, whomsoever and whatsoever. Developer, furthermore, agrees to execute, acknowledge, and deliver all such further documents and instruments of conveyance or transfer, to provide all such information, and to take or refrain from taking such further actions as may be required to carry out and effectuate the intent and purpose of this Agreement and Easement, or to confirm or perfect any right created hereunder. This Easement shall terminate upon the removal of the Stormwater Control System in accordance with applicable law and any applicable provisions of the Permit, regulations and procedures, the permit and approval plans, and the inspection and approval of the removal by the Stormwater Director.

Nothing herein contained shall be deemed a gift or dedication of any portion of the Property described herein to the general public or for any public use or purpose, whatsoever, it being the intent of the parties that this Easement shall be strictly limited to, and for the purposes, herein, expressed, and shall be solely for the benefit of the parties, hereto, and their respective heirs, successors, and assigns, and successors in title to their respective properties.

Developer, hereby, agrees to release, indemnify, defend, and hold the City, its officials, officers, agents, and employees harmless from and against any and all claims, actions, suits, liabilities, losses, costs, expenses, reasonable attorneys' fees, and costs of litigation, of any nature, whatsoever, including, but not limited to, claims for special, incidental, indirect, consequential, and exemplary damages, arising out of, or in any way related to, the Stormwater Control System and/or the City's entry onto the Property and use of the Easement, thereupon.

5. Restrictive Covenant. All future transferees of the Property shall be subject to the restrictive covenant that they will construct, maintain, repair, and reconstruct the Stormwater Control System in conformance with the applicable Operation and Maintenance Manual, the Permit, and this Agreement. The City shall have the right to enforce the restrictive covenant, and the Developer's failure to comply herewith shall constitute a violation of the Salem Lake Watershed Protection Ordinance. Said restrictive covenant shall run with the land, provided, however, that, with the approval of the Stormwater Director, the Developer may transfer all responsibilities and obligations, hereunder, to another entity having the legal and financial ability and authority to assure fulfillment of Developer's responsibilities under the Permit, the Operation and Maintenance Manual, and this Agreement.

6. Disclosure Statements in Deeds. In addition to the restrictive covenant which is to be recorded by virtue of the recording of this Agreement, the Developer and all subsequent transferees of the Property must disclose in all deeds conveying the Property the continuous, ongoing obligation of all subsequent property owners to operate, maintain, repair, and reconstruct the Stormwater Control System in accordance with this Agreement, the Operation and Maintenance Manual, and the Permit, as well as the existence of the restrictive covenant and contractual lien imposed hereby. All subsequent deeds conveying the Property must contain the following statement:

“NOTICE: THIS PROPERTY IS LOCATED IN A PUBLIC WATER SUPPLY WATERSHED. DEVELOPMENT RESTRICTIONS APPLY. THIS PROPERTY IS SUBJECT TO A RESTRICTIVE COVENANT AND A CONTRACTUAL LIEN REQUIRING MAINTENANCE OF A STORMWATER CONTROL SYSTEM.”

7. Notice. Any notice which any party, hereto, may send to the other pertaining to this Agreement shall be in writing and shall be considered delivered when deposited in the United States mail, certified with postage pre-paid. The addresses are as stated below:

City of Winston Salem _____
Stormwater Division _____
101 North Main Street _____
Winston-Salem, NC 27101 _____

8. Modification and Amendment. This Agreement may only be amended by a written agreement signed by City and Developer or their respective successors and assigns. This Agreement contains the entire agreement between the parties. There are merged, herein, all prior

and collateral representations, promises, and conditions, in connection with the subject matter, hereof. Any representation, promise, or condition not incorporated, herein, shall not be binding upon either party.

9. Severability. Invalidation of any one of these covenants or restrictions by judgment or court order will, in no way, affect any other provisions, which shall remain in full force and effect.

10. Beneficiaries of this Agreement. The City is the governmental authority which has jurisdiction over Stormwater Management Permit issuance, and shall be deemed to be a beneficiary of this Agreement, both in its own right, and also for the purpose of protecting the interests of the community and other parties, public or private, in whose favor, or for whose benefit, this Agreement has been provided. This Agreement shall run in favor of the City for the entire period during which this Agreement shall be in force and in effect, without regard to whether the City has, at any time, been, remains, or is an owner of the Property or any portion, thereof. The City shall have the right, in the event of any breach of this Agreement, following notice and a reasonable period to cure, to exercise all the rights and remedies, and to maintain any action or suit, at law or in equity, or other proper proceeding, to enforce the curing of such breach of this Agreement to which it may be entitled.

11. Caption Headings. The headings and captions used in this Agreement are used for convenience, only, and shall not be deemed to limit, amplify, or modify the terms of this Agreement.

12. Governing Law. This Agreement shall be construed in accordance with the laws of the State of North Carolina. Venue for any litigation pertaining to this Agreement shall be laid in Forsyth County Superior Court in Forsyth County, North Carolina.

13. Binding Effect. The parties agree that the terms and provisions of this Agreement shall be binding upon, and inure to the benefit of, the parties, their heirs, executors, administrators, successors in interest, and assigns.

14. Recording. A copy of this Agreement and all exhibits and modifications, hereto, shall be filed in the office of the Forsyth County Register of Deeds and in the office of the Stormwater Director.

TO HAVE AND TO HOLD the aforesaid Easement and all privileges and appurtenances thereunto belonging to City and its successors and assigns.

IN WITNESS, WHEREOF, Developer has caused this Agreement to be executed under seal, by its duly authorized representative, the day and year first above written.

By: _____
Name: _____
Title: _____

Seal:

Attest: _____
Name: _____
Title: _____

APPROVED AND ACCEPTED BY:

Seal:

Keith Huff, Stormwater Director

Melanie Johnson, City Secretary

Approved as to form and legality this, the ____
day of _____, 2018, by

Angela Carmon, City Attorney

EXHIBIT A

EXHIBIT B

EXHIBIT C