

RIGHT OF ENTRY AGREEMENT

(116 West Parrish Street, Durham, North Carolina)

This RIGHT OF ENTRY AGREEMENT (the "Agreement") made, dated and entered into on this 7th day of April, 2011, by and between the City of Durham, North Carolina, a municipal corporation, (the "City"), and the North Carolina Institute for Minority Economic Development, a non-profit corporation existing under the laws of North Carolina ("NCIMED"), and hereinafter collectively referred to as the "Parties."

BACKGROUND

WHEREAS, NCIMED is the owner in fee simple of that certain real property, including improvements consisting of a six (6) story brick and stone commercial building, located at 116 West Parrish Street, Durham, North Carolina, having Parcel Identification Number (PIN): 0821-12-97-3458, and hereinafter referred to as the "Property;" and

WHEREAS, the Property includes a sub-grade basement area that extends approximately six (6) feet under the existing City maintained right-of-way which includes the street sidewalk, curb and street pavement abutting the Property (hereinafter, "Basement Right-of-Way Area"); and

WHEREAS, the City has undertaken certain street improvements within the downtown area, including along West Parrish Street, which include, but are not limited to, sidewalk and curb repair and replacement; and

WHEREAS, in consultation with NCIMED, the City has delayed completion of said sidewalk and curb repair and replacement immediately adjacent to the Property due to needed repairs performed to the exterior of the Property in response to certain structural engineering findings; and

WHEREAS, the City is now prepared to proceed with the improvements to the right-of-way through consultation and cooperation with NCIMED pursuant to this Agreement; and

WHEREAS, the parties wish to enter into this Agreement whereby NCIMED will allow the City to enter the Property on a temporary basis for the purpose of completing the Project, as hereinafter defined.

In consideration of the mutual promises and other valuable consideration, the receipt and adequacy of which are hereby acknowledged, the City and NCIMED agree as follows:

1. Project Description and Acknowledgment by NCIMED. The term Project shall have the same meaning as defined and more particularly described in Exhibit A, referred to and incorporated herein by reference. NCIMED acknowledges and represents to the City that prior to entering into this Agreement, NCIMED contracted for certain structural engineering work and

analyses to be performed on the Property, with particular focus on the restoration of the two front terra cotta balconies (the "Balconies"). In response to such analyses, certain restorative work was performed to strengthen the Balconies. NCIMED represents to the City that, to the best of its knowledge, the building façade, balconies and cornice are structurally sound and secure.

2. **Property Access.** NCIMED hereby grants the temporary right to the City and City consultants and contractors, including engineering consultants and general contractors, including sub-consultants and sub-contractors, (collectively hereinafter referred to as "City Contractors") to enter onto the Property for the purpose of completing the Project at the City's sole expense and pursuant to the Plan of Construction, as defined and more particularly described in Exhibit B, referred to and incorporated herein by reference, and for no other purpose. NCIMED and the City Contract Administrator (to be identified by the City Public Works Department) shall provide written approval of the Plan of Construction prior to commencing the work. Where unforeseen circumstances or details of construction may arise during the performance of the work that are not explicitly addressed in the Plan of Construction, the City Contract Administrator and NCIMED shall negotiate in good faith the resolutions to such circumstances or details as necessary to complete the work consistent with the purpose of the Plan of Construction. NCIMED shall cooperate with the City and/or City Contractors as reasonably necessary to create sufficient working space and access to the areas of the Property affected by the Project. Such cooperation shall include the clearing of areas where the work is to be performed.

3. **Term.** The term of this Agreement shall automatically terminate 18 months from the first date written above unless earlier terminated as provided herein. The City's rights under this Agreement shall be subordinate to all prior or future rights and obligations of NCIMED in the Property, except that NCIMED shall grant no rights inconsistent with the reasonable exercise of the City's rights under this Agreement.

4. **Initial Inspection of Property.** Prior to the commencement of work on the Project pursuant to the Plan of Construction, NCIMED will allow the City and City Contractors reasonable access to (a) conduct non-invasive inspections and investigations of the Property building structure, both interior and exterior, for the purpose of identifying existing conditions including any observable cracks or deterioration, and (b) determine how best to relocate utilities and associated equipment located in the Basement Right-of-Way Area. This investigation and inspection shall include the taking of photographs, measurements and placement of non-destructive monitoring devices to assist in monitoring the condition of the building while the Project work is being performed. The City shall provide to NCIMED a copy of any documentation generated from the aforementioned inspection.

5. **Implementation of Plan of Construction.** After bidding out the work and following award of the contract, the City's Contractor shall commence with the implementation of the Plan of Construction. Any deviation from the Plan of Construction shall require the prior written consent of the City, through the City Contract Administrator, and NCIMED. The City shall make all reasonable efforts to minimize any disturbance to NCIMED's tenants and/or other business or community activities ongoing or planned at the Property.

6. **Project Completion and Final Inspection.** Before or immediately after completion of the Project (meaning within 10 business days) pursuant to the Plan of Construction, the City shall provide NCIMED with all relevant documentation in connection with the construction and relocation activities, including any applicable warranty materials, concerning the relocation and/or replacement of the basement utility equipment. In addition to conducting a final inspection of the Project work, the City and/or City's Contractors will also complete any necessary final inspection and/or examination of the Property and any impacts that the Project may have had on the Property structure. The City shall provide to NCIMED a copy of any documentation generated from the aforementioned final inspection and investigation of the Property.

7. **City Obligations.** The City shall be obligated to perform or cause to be performed and supply or cause to be supplied all services, work, materials, equipment and supplies necessary or desirable to complete the Project pursuant to the Plan of Construction, at its sole expense, including but not limited to the following tasks:

- (a) The City shall monitor the construction activities of its employees and the City Contractors and suppliers to ensure completion of the Project in accordance with the Plan of Construction.
- (b) All the activities performed under this Agreement by or on behalf of the City shall be provided in accordance with standards, criteria and other requirements imposed by applicable statutes, regulations, ordinances, and orders of all governmental authorities having jurisdiction over the Project, and generally accepted standards for construction and repair of commercial buildings of similar age and character as the Property in the Durham, North Carolina area. In addition, the City shall ensure that the Project is constructed in a proper, workmanlike manner and that all equipment, fixtures and materials used in the construction shall be of the most suitable grade.
- (c) The City and/or City Contractors shall obtain all building and construction permits, licenses, easements and approvals necessary to complete the Project.
- (d) The City, to the extent provided by law, and as to City Contractors only, shall not permit to be placed against the Property or any part thereof, any design professionals', mechanics', materialmen's contractors' or subcontractors' liens or claims of liens, which liens or claims of lien shall be discharged, bonded, stayed or vacated upon demand by NCIMED.
- (e) The City shall perform all duties listed in Exhibit A ("Project Description") and Exhibit B ("Plan of Construction") herein.

8. **Inspection.** NCIMED and its representatives, employees, agents or independent contractors may enter and inspect the Property or any portion thereof or any improvements thereon at any time and from time to time at reasonable times to verify the City's compliance with the terms and conditions of this Agreement.

9. **No Real Property Interest.** It is expressly understood that this Agreement does not in any way whatsoever grant or convey any permanent easement, lease, fee or other interest in the Property to the City. This Right of Entry is not exclusive to the City and/or City Contractors and NCIMED specifically reserves the right to grant other rights of entry within the vicinity of the Property that are consistent with the rights granted herein, so long as such rights granted do not interfere with the ability of the City and/or City Contractors to perform the work described herein.

10. **Indemnification.** To the full extent permitted by law, the City hereby agrees to indemnify, protect and save NCIMED, its directors, officers, agents or employees thereof, harmless from all liability, obligations, losses, claims, damages, actions, suits, proceedings, costs and expenses, including reasonable attorneys' fees, arising out of, connected with, or resulting, directly or indirectly, arising out of or relating to the City's negligent activities or conduct on the Property or with respect to the implementation of the Plan of Construction, including, without limitation, the possession, condition, repair, construction or use thereof. The indemnification arising under this paragraph shall continue in full force and effect notwithstanding the termination of this Agreement. The City shall require that the construction contract entered into between the City and the city's general contractor (responsible for performing the Project work) shall include the city's standard indemnification provision, which will identify NCIMED as one of the "Indemnitees," in addition to the City. More specifically, the City shall require the general contractor indemnification provision to indemnify NCIMED (and other "Indemnitees") for all claims arising out of performance of the work pursuant to the Plan of Construction as a result of acts or omissions of the general contractor. The City shall also require, in the construction contract, that the general contractor name NCIMED as an additional insured under the insurance policy/policies coverage required by the City. The City will also be named as an additional insured. The City shall provide NCIMED with a copy of the certificate of insurance of the general contractor before issuance of a notice to proceed with the work.

11. **City Acknowledges Its Duty To Repair.** Except as otherwise provided pursuant to the Plan of Construction, and with respect to any portion of the Property damaged by the activities of the City or City's Contractors, the City shall cause the Property to return to its approximate previous condition as of the date of this Agreement, to the extent practicable. The City and/or City Contractors shall bear all financial responsibility for repairing damages caused to the Property not contemplated by the Plan of Construction.

12. **Reimbursable Expenses incurred by NCIMED.** If NCIMED is required by the City or City Contractors to assume or incur any expenses or costs due to the implementation of the Plan of Construction and until the Project is completed, the City shall reimburse NCIMED for such actual expenses or costs incurred after first being presented with a written statement of the estimated expenses or costs to be incurred. Reimbursement will be made for actual expenses or costs incurred by NCIMED. If NCIMED believes it will incur expenses or costs due to the

implementation of the Plan of Construction, without first being required to incur such expenses or costs by the City or City Contractors, the City agrees to reimburse NCIMED, but only after the City has first given advanced written approval of such expenses or costs and if the City agrees, in good faith, that such expenses or costs are in fact due to the implementation of the Plan of Construction.

13. **Communications.** The parties hereto agree that in order to facilitate full cooperation of the parties and to best coordinate the work to be performed by the City, that communication between the parties should be clearly established to address issues and concerns. It is therefore agreed that for the purposes of coordinating efforts under this Agreement that all communications made under this Agreement shall be made to:

THE CITY:

Communications with City Engineering Consultant(s):

Todd Ireland, CET
Kimley-Horn & Associates, Inc.
102 City Hall Plaza
Durham, North Carolina 27701
Office: (919) 677-2042
Mobile: (919) 669-4194

Communications with the City:

Ed Venable
Manager of Engineering and Stormwater
City of Durham
101 City Hall Plaza
Durham, North Carolina 27701
(919) 560-4326, ext. 30233

NCIMED:

Communication with NCIMED:

Ms. Andrea Harris
President
114 West Parish Street
Durham, North Carolina 27701
(919) 956-8889

Ms. Linda Gunn
Vice President
114 West Parrish Street
Durham, North Carolina 27701
(919) 856-8889

If for any reason, the above identified contacts should change, it shall be the responsibility of the respective party, the City or NCIMED, to alert the other party of such change as soon as practicable.

14. Miscellaneous.

(a) Choice of Law and Forum. This Agreement shall be deemed made in Durham County, North Carolina. This Agreement shall be governed by and construed in accordance with the law of North Carolina.

(b) Performance of Government Functions. Nothing contained in this Agreement shall be deemed or construed so as to in any way estop, limit, or impair the City from exercising or performing any regulatory, policing, legislative, governmental, or other powers or functions.

(c) Severability. If any provision of this Agreement shall be unenforceable, the remainder of this Agreement shall be enforceable to the extent permitted by law.

(d) No Third Party Rights Created. This Agreement is intended for the benefit of the City and NCIMED as custodian of the Property and not any other entity.

(e) This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original and all of which shall be deemed to constitute one and the same agreement.

(f) As of the effective date hereof, this Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof. The parties agree that that they will enter into such further documents that may be necessary or required to evidence and reflect the transactions. Except as otherwise allowed by the terms herein, neither this Agreement, nor any provision hereof may be changed, waived, discharged, modified or terminated orally, but only by an instrument in writing signed by the party against whom enforcement is sought.

[SIGNATURES APPEAR ON FOLLOWING PAGE]

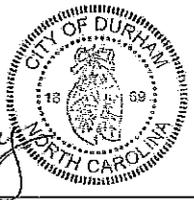
IN WITNESS WHEREOF, the City and NCIMED have caused this Agreement to be executed under seal themselves or by their respective duly authorized agents or officers.

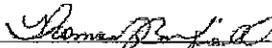
CITY OF DURHAM

ATTEST:

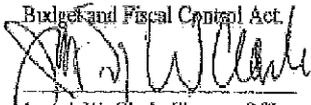
Attest:

City Clerk

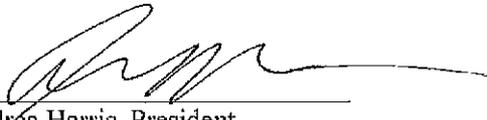


By: 
Thomas J. Bonfield
City Manager

Pre-Audit Certification: This instrument has been pre-audited in a manner required by the Local Government Budget and Fiscal Control Act.


Joseph W. Clark, Finance Officer

NORTH CAROLINA INSTITUTE OF MINORITY ECONOMIC DEVELOPMENT

By: 
Andrea Harris, President

State of NORTH CAROLINA

County of DURHAM

I, a notary public in and for the aforesaid county and state, certify that Andrea Harris personally appeared before me this day and stated that she is the President of the NORTH CAROLINA INSTITUTE OF MINORITY ECONOMIC DEVELOPMENT, a non profit corporation, and that by authority duly given and as the act of the corporation, the foregoing Agreement with the City of Durham was signed in her capacity as President. This the 8th day of February, 20 11.

My commission expires:

10-15-12


Notary Public



EXHIBIT A

(Project Description)

General Project Overview and Purpose

The Project is to replace the existing sidewalk adjacent to the Property and to perform any associated repair or replacement (if necessary) to abutting curbs and street pavement to conform to the surrounding streetscape improvements already made in the downtown area. The Project will include substantial work be performed in the Basement Right-of-Way Area prior to replacing the sidewalks. Existing utilities will need to be relocated from the Basement Right-of-Way Area. The known utilities that will require relocation include electrical, security, communications, fire protection and water systems. After the existing utilities have been relocated from the Basement Right-of-Way Area, the City will construct a concrete masonry wall in the basement so that the Basement Right-of-Way Area can be filled with flowable fill from the sidewalk area above. After the flowable fill is in place, the sidewalks will be replaced without exposing the basement of the Property to the elements and allowing long term sidewalk maintenance and repair to occur with disturbing the Property basement area.

Utility Relocation Work

Prior to scheduling the work to be performed pursuant to the Project, NCIMED shall allow the City and City Contractors access to the Property for the purpose of inspecting the utilities and equipment located in the Basement Right-of-Way Area, including access to all connections and conduits for such utilities and associated equipment for the purpose of determining how best to relocate such utilities. Upon completion of the utility equipment investigation and inspection, the City and/or City engineering consultant shall prepare a detailed plan and proposal for the relocation and (if necessary) replacement of utilities currently located in the Basement Right-of-Way Area (hereinafter, "Utility Relocation Plan"). The City and NCIMED agree that the purpose of the Utility Relocation Plan is to relocate the utilities currently located in the Basement Right-of-Way Area that will be impacted by the Project work. NCIMED, in consultation with the City, shall designate a best area for the equipment relocation based on economics and technical feasibility. If the existing utility equipment impacted by the Project cannot be practicably removed and relocated without replacement, the City agrees to replace the impacted utility equipment with the same or comparable equipment. If NCIMED wishes to upgrade or improve the impacted utility equipment (above comparably equivalent equipment), it agrees to pay for the added cost of such upgrade or improvement. NCIMED and the City Contract Administrator shall provide written approval of the Utility Relocation Plan prior to commencing the work.

EXHIBIT B

(Plan of Construction)

NOTE: THE FOLLOWING PLAN OF CONSTRUCTION DESCRIPTION REPRESENTS THE CURRENT CONSTRUCTION PLAN AS CONTEMPLATED BY THE CITY AND CITY CONSULTING ENGINEER(S). CERTAIN DETAILED ELEMENTS OF THE PLAN OF CONSTRUCTION MAY BE FURTHER DEVELOPED OR MODIFIED BASED UPON ON-SITE INSPECTIONS AND EVALUATIONS. THIS IS ESPECIALLY THE CASE AS IT PERTAINS TO THE PROPOSED UTILITY RELOCATION PLAN FOR BASEMENT UTILITIES, WHICH DETAILED RELOCATION PLAN WILL BE PRESENTED TO NCIMED BEFORE FINAL DRAWINGS AND PLANS ARE COMPLETED.

Work Plan and Schedule

ESTIMATED PROJECT SCHEDULE*

(116 W. Parrish Street Sidewalk Repair using Flowable Fill System)

Task	Duration	Begin	End
Notice to Proceed		1 day	7/1/11
Install Electrical Infrastructure	20 days	7/4/11	7/29/11
Relocate Security System	5 days	7/4/11	7/8/11
Rework Phone Room and System	15 days	7/4/11	7/22/11
Relocate Fire Detection System	5 days	7/4/11	7/8/11
Relocated Backflow Preventer	5 days	7/4/11	7/8/11
Build CMU Wall	10 days	7/29/11	8/13/11
Fill Basement Void with Flowable Fill	5 days	8/16/11	8/20/11
Shift M&F Bank Traffic Access to NCIMED Door	1 days	8/23/11	8/23/11
Remove Roof Slabs	2 days	8/24/11	8/25/11
Waterproof Slab	2 days	8/26/11	8/27/11
Form and Pour Sidewalk over Roof Slabs	2 days	8/30/11	8/31/11
Shift M&F Bank Traffic Access to Center Door	1 days	9/1/11	9/1/11
Complete Adjacent Paver and Wheelchair Ramp	2 days	9/2/11	9/3/11
Interior Cleanup and Demobilize	5 days	9/6/11	9/10/11

* This sample schedule is only intended to be representative of the final estimated schedule. The final schedule will require review and approval by the parties. It is not known at this time when the work will actually commence and be completed.

Utility Relocation Plan

The detailed utility plan shall be prepared and provided to NCIMED after the City and City Contractors have obtained initial access to the Property for the purpose of inspecting the utilities and equipment located in the Basement Right-of-Way Area. Upon completion of the utility equipment investigation and inspection, the City and/or city engineering consultant shall prepare for review by NCIMED the detailed plan and proposal for the relocation and (if necessary) replacement of utilities currently located in the Basement Right-of-Way Area.

Plan of Access

After bidding out the work and following award of the contract, the City's Contractor shall commence with the implementation of the Project work, which will require transporting equipment and materials from a designated front entrance of the Property to the basement of the Property. After the City's Contractors relocate the utility equipment and the concrete masonry wall is constructed and sealed in the Basement Right of Way Area, the Project work will move to sidewalk level where flowable fill will be placed into the Basement Right of Way Area through the sidewalk above with minimal disruption to Owner and tenants of the Property. The City's Contractors will develop a work schedule that limits any disruption to the flow of traffic in and out the 1st floor of the Owner's Property and respect the customer traffic, particularly for the elderly and disabled (which shall result in little to no disruption during the first week of each month).