

1. 1 ECONOMIC INCENTIVE CONTRACT BETWEEN 21c DURHAM LLC AND THE CITY OF  
1. 2 DURHAM FOR CAPITAL INVESTMENTS IN DOWNTOWN DURHAM  
1. 3

1. 4 **THIS AGREEMENT** (the “Agreement”), is made, dated and entered into as of the  
1. 5 \_\_\_\_\_ day of \_\_\_\_\_, 2012, by and between the City of Durham (the “City”), a North  
1. 6 Carolina municipal corporation and 21c Durham LLC (“21c Durham” or “Company”), a limited  
1. 7 liability corporation organized and existing under the laws of North Carolina. The City and  
1. 8 Company are also referred to individually as “Party” and collectively as “Parties.”  
1. 9

1. 10 The parties, intending to be legally bound, agree as follows:  
1. 11

1. 12 **1. BACKGROUND AND PURPOSE**  
1. 13

1. 14 The purpose of this Agreement is to aid and encourage the development of the Hill Building  
1. 15 Property into a downtown boutique hotel and contemporary art museum for the promotion of  
1. 16 economic development in the City of Durham. The City Council has found that the construction  
1. 17 of the capital improvements to be made by the Company is likely to have a significant effect on  
1. 18 the revitalization of the City of Durham’s central business district. This Agreement is made  
1. 19 pursuant to N.C.G.S. § 158-7.1.  
1. 20

1. 21 **2. DEFINITIONS**  
1. 22

1. 23 **2.1. “Base Incentive Payment,”** refers to that portion of the City Incentive Payment  
1. 24 resulting from the Company’s Minimum Required Capital Investment that must be made to the  
1. 25 Hill Building Property pursuant to the Agreement and in the amounts identified in Exhibit C.  
1. 26

1. 27 **2.2. “Capital Investment,”** refers to expenditures listed in Exhibit F that are subject  
1. 28 to City and County property taxes and are similar to activities defined in the Resolution for an  
1. 29 Economic Development Financial Assistance and Job Creation, Job Retention and Capital  
1. 30 Investment Approved by the City Council on April 4, 2011. The investment may include related  
1. 31 engineering and design fees, as well as associated development fees that are charged by the City.  
1. 32

1. 33 **2.3. “Certificate of Compliance,”** refers to the final, official document issued by the  
1. 34 local governing authority certifying that a newly constructed or renovated building or structure is  
1. 35 in compliance with applicable building codes, regulations and laws, such that said building or  
1. 36 structure may be lawfully and beneficially occupied for its intended purpose as contemplated by  
1. 37 the Parties pursuant to this Agreement.

1. 38 **2.4. “City Incentive Payment,”** refers to the payments the Company is eligible to  
1. 39 receive if the Company meets the conditions of this Agreement. The City Incentive Payment  
1. 40 collectively includes the following incentives: (a) the Base Incentive Payment, and (b) the  
1. 41 Performance Based Incentive Payment.  
1. 42

1. 43 **2.5. “Construction Activities,”** refers to activities necessary for the construction of  
1. 44 the Use Development Requirements to the Hill Building Property evidenced by the required  
1. 45 issuance of a city building permit equal to at least 25% of the Minimum Required Capital  
1. 46 Investment.

1. 47  
1. 48       **2.6. “Continuous Operation,”** refers to the operations of the hotel after completion of  
1. 49 the Hill Building Improvements into an Upscale Hotel and contemporary art museum, such that  
1. 50 the hotel is open and available to accept hotel room occupants at least 95% (i.e., 346 days) of the  
1. 51 applicable year.  
1. 52

1. 53       **2.7. “First Date of Operations,”** refers to the first day of the calendar month  
1. 54 immediately following the date on which the Company demonstrates to the satisfaction of the  
1. 55 City that the Company has fully complied with all the provisions of Subsections 3.1.1, 3.1.2, and  
1. 56 3.1.3 of Section 3.1, unless such date actually falls on the first day of any calendar month.  
1. 57

1. 58       **2.8. “Guaranteed Revenue Gap Payment,”** refers to the payment from the Company  
1. 59 more fully described in Section 3.3.1.  
1. 60

1. 61       **2.9. “Hill Building Property,”** refers to the property identified by the following  
1. 62 Durham County tax parcel identification numbers: (a) 103044 and (b) 103043.  
1. 63

1. 64       **2.10. “Minimum Required Capital Investment,”** refers to a minimum expenditure of  
1. 65 approximately \$33.6 million in Capital Investment to be made in the Hill Building Property  
1. 66 pursuant to the terms of the Agreement  
1. 67

1. 68       **2.11 “Occupancy Tax,”** refers to that portion of the Durham County Hotel/Motel  
1. 69 Occupancy Tax imposed pursuant to G.S. 105-164.4(3) generated directly from the operations of  
1. 70 the Hill Building Property and paid by the Company to the County that is subsequently distributed  
1. 71 to the City by the County. This does not include the 1% portion of the tax that is dedicated to  
1. 72 funding of the Durham Performing Arts Center (DPAC). As of the date of this Agreement, the  
1. 73 effective rate that is distributed to the City is 1.275%.  
1. 74

1. 75       **2.12. “Performance Based Incentive Payment”** refers to that portion of the City  
1. 76 Incentive Payment that is based upon the City’s receipt of Retail Sales Tax and Occupancy Tax  
1. 77 generated directly from the operations of the Hill Building Property as described in Section 3.3.  
1. 78 in the amounts identified in Exhibit C.  
1. 79

1. 80       **2.13. “Performance Carry-Over Balance,”** refers to the excess of Occupancy Tax and  
1. 81 Retail Sales Tax revenues generated directly from the operations of the Hill Building Property  
1. 82 and received by the City in excess of 125% of the Performance Based Incentive Payment in any  
1. 83 given 12-month payment year period. This Performance Carry-Over Balance is calculated by the  
1. 84 City on an annual and cumulative basis (and “carried-over”) for the term of this Agreement and  
1. 85 shall be available to be applied to any Guaranteed Revenue Gap Payment as specified in  
1. 86 Subsection 3.3.1 of Section 3.3.  
1. 87

1. 88  
1. 89       **2.14 “Retail Sales Tax,”** refers to that portion of the sales tax collected by the  
1. 90 Company directly from the operations of the Hill Building Property and remitted to the State that  
1. 91 is ultimately distributed to the City by Durham County pursuant to any interlocal agreement  
1. 92 regarding the distribution of sales taxes that may exist. As of the date of this Agreement, the

93 effective rate that is distributed to the City is 1.05%.

94  
95 **2.15. “Upscale Hotel,”** refers to a hotel having the minimum amenities described  
96 according to the Use Development Requirements and maintained and operated in a manner  
97 consistent with other 21c hotels that are generally recognized in the industry as being first class,  
98 full-service accommodations capable of providing guests with a quality experience in all material  
99 respects. In determining whether the hotel is considered “Upscale,” the parties may rely upon  
100 initial representations made by the Company to the City, such as examples of their other hotel  
101 products..

102  
103 **2.16. “Use Development Requirements,”** refers to the specific development  
104 improvements or renovations to be made to the Hill Building Property by the Company, which  
105 development shall deliver an Upscale Hotel with approximately one hundred twenty-five (125)  
106 guest rooms and the following hotel amenities (with approximate area indicated): gallery space  
107 (5,000 sq ft), and Restaurant and Bar (3,000 sq ft).

### 108 109 **3. PARTY REQUIREMENTS AND OBLIGATIONS**

110  
111 **3.1. Company Requirements for City Incentive Payment.** As a precondition to  
112 eligibility for receiving City Incentive Payments, Company shall complete the provisions of  
113 3.1.1, 3.1.2 and 3.1.3 below, and to maintain continuing eligibility for City Incentive Payments,  
114 Company shall at all times maintain the requirements of subsections 3.1.4 and 3.1.5 below:

115  
116 3.1.1. Commencement and Completion of Construction. The Company shall  
117 begin Construction Activities no later than June 30, 2013 (“Commencement Date”) and  
118 secure a final Certificate of Compliance by June 30, 2015 (hereinafter, “Completion  
119 Date”).

120  
121 3.1.2. Use Development Requirements for Hill Building. As part of the Hill  
122 Building project, the Company shall cause to be invested the Minimum Required Capital  
123 Investment in connection with development of the Upscale Hotel that meets the Use  
124 Development Requirements. The Company shall provide marketing material or other  
125 appropriate documentation verifying the type and quantity of use development for the  
126 Hill Building Property necessary to confirm general conformance with the Use  
127 Development Requirements.

128  
129 3.1.3. Workforce Plan and Durham Based-Business Plan Conditions. Company  
130 shall complete and return the document entitled “Durham Based Business Plan” (attached  
131 hereto as Exhibit A) upon execution of this Agreement and comply with its provisions  
132 during the term of this Agreement. Company shall complete and return the document  
133 entitled “Workforce Development Plan” (attached hereto as Exhibit B) upon execution of  
134 this Agreement and comply with its provisions during the term of this Agreement.

135  
136 3.1.3.1. Company shall meet with the Director of the City’s Office of  
137 Economic and Workforce Development (“Director” and “OEWD”, respectively)  
138 prior to the Company entering into any contract(s) for construction of the Hill

1. 139 Building Property in order to discuss potential contracting opportunities for goods  
1. 140 and services or construction and repair work with Durham-based firms.

1. 141  
1. 142 3.1.3.2. The Director will provide the Company with a list of identified  
1. 143 Durham-based firms that may be qualified to provide the goods and services or  
1. 144 construction and repair work required by the Company for the Hill Building  
1. 145 Property. The Director will also provide the Company with recommended goals  
1. 146 for hiring such identified Durham-based firms.

1. 147  
1. 148 3.1.3.3. In all solicitations for which goal(s) are established, Company, or  
1. 149 Company's contractor responsible for hiring construction related firms, will not  
1. 150 enter into contracts without first soliciting bids from Durham-based firms and  
1. 151 requiring bidders to submit a participation plan identifying whether it is a  
1. 152 Durham-based firm (as defined by OEWD) and the level of participation of other  
1. 153 Durham-based firms as subcontractors. If a bidder fails to achieve the goal(s), the  
1. 154 bidder must submit documentation to Company of its good faith efforts to achieve  
1. 155 the goal(s) within two working days after bid opening. Company shall take all  
1. 156 reasonable actions needed to see that bidders comply with this subsection.  
1. 157 Company shall make bids and documentation of good faith efforts available to the  
1. 158 Director.

1. 159  
1. 160 3.1.3.4. Company will notify the Director of OEWD of upcoming  
1. 161 contracting opportunities to ascertain the availability of Durham-based firms that  
1. 162 might be capable of providing the pertinent work. Each such notice shall be given  
1. 163 in a manner and schedule so that the Durham-based firms will have a reasonable  
1. 164 amount of time to respond.

1. 165  
1. 166 3.1.3.5. Company will provide quarterly reports using the attached form,  
1. 167 Exhibit D "City Of Durham Subcontractor Quarterly Record Of Payment Report",  
1. 168 on all contracting activity to the Director for reporting to the City Council. The  
1. 169 reports are due the last day of April (for January – March), July (for April – June),  
1. 170 October (for July – September) and January (for October – December).

1. 171  
1. 172 3.1.3.6. Workforce Development Plan  
1. 173 The Company shall comply with the Workforce Development Plan attached as  
1. 174 Exhibit B to the extent allowed by applicable law.

1. 175  
1. 176 3.1.4. Maintenance of Continuous Operations. Subject to Section 23 below, the  
1. 177 Company shall maintain the Upscale Hotel and museum in Continuous Operation  
1. 178 throughout the term of this Agreement in order to retain its eligibility for ongoing City  
1. 179 Incentive Payments. Failure to maintain Continuous Operations shall result in the  
1. 180 forfeiture of all subsequent City Incentive Payments and this Agreement shall terminate.  
1. 181 Notwithstanding the Continuous Operations requirement, the Company shall be permitted  
1. 182 to temporarily cease operations at the hotel for a period not to exceed 60 days one time  
1. 183 during any five year period.

1. 185           3.1.5. Timely Receipt of Guaranteed Revenue Gap Payment. Company shall  
1. 186 make timely payment to the City of the Guarantee Revenue Gap Payment, as described  
1. 187 below. Failure to make timely payments shall result in the forfeiture of all subsequent  
1. 188 City Incentive Payments and this Agreement shall terminate.  
1. 189

1. 190           **3.2. City Obligations to Pay Incentives.** After the Company has satisfied the  
1. 191 preconditions of Sections 3.1.1, 3.1.2, and 3.1.3, the City shall make incentive payments  
1. 192 to the Company according to the conditions of this Section 3.2 during the term of this  
1. 193 Agreement, so long as the Company remains in compliance with Sections 3.1.4 and 3.1.5.  
1. 194 As long as the Company continues its eligibility for the City Incentive Payments under  
1. 195 this Agreement, the City shall, within 30 days of being invoiced, pay the Company the  
1. 196 semi-annual payments outlined in Exhibit C, “City Incentive Payment Schedule,”  
1. 197 attached hereto. The total maximum possible City Incentive Payments shall not exceed  
1. 198 \$5,723,537 over the term of this Agreement. Prior to the payment of any 2<sup>nd</sup> semi-annual  
1. 199 City Incentive Payment , the Company shall provide such information requested by the  
1. 200 City necessary to confirm the Occupancy Taxes and Retail Sales Taxes paid by the  
1. 201 Company for the prior 12 month period.  
1. 202

1. 203           3.2.1. Timing of Incentive Payments – No sooner than 9-months after the First  
1. 204 Date of Operations, the Company may invoice the City for the 1<sup>st</sup> semi-annual Base  
1. 205 Incentive Payment for payment year 1 as outlined in Exhibit C, “City Incentive Payment  
1. 206 Schedule.” The Company may invoice the City for the 2<sup>nd</sup> semi-annual Base Incentive  
1. 207 Payment for payment year 1 no sooner than 15 months after the First Date of Operations  
1. 208 and only after the Company has paid the City the Guaranteed Revenue Gap Payment for  
1. 209 payment year 1, if required. The Company may invoice the City for all subsequent semi-  
1. 210 annual payments every 6 months subject to all other requirements in this Section 3.2.  
1. 211

1. 212  
1. 213           **3.3. Guaranteed Performance Criteria and Use of Performance Carry-Over**  
1. 214           **Balance.**

1. 215  
1. 216           3.3.1. Performance Guaranteed Revenue Gap Payment – If the total of the actual  
1. 217 Occupancy Tax and Retail Sales Tax Revenue received by the City is less than 125% of  
1. 218 the Performance Based Incentive Payment for the applicable payment year, then the  
1. 219 Company shall remit to the City (along with its invoice for the 2<sup>nd</sup> semi-annual payment)  
1. 220 the difference between the total actual Occupancy Tax and Retail Sales Tax revenue and  
1. 221 125% of the Performance Based Incentive Payment; provided, however, that if in the  
1. 222 future the effective rate of Occupancy Tax and/ or Retail Sales Tax distributed to the City  
1. 223 is lower than set forth in Sections 2.11 and 2.14 due to changes in tax rates, distribution  
1. 224 methodology or any other reason outside the control of the Company, the Performance  
1. 225 Based Incentive Payment threshold shall be proportionately reduced only for the  
1. 226 purposes of this calculation.  
1. 227

1. 228           3.3.2. Use of Performance Carry Over Balance– In the case when a Guaranteed  
1. 229 Revenue Gap Payment is required to be made to the City (as described in 3.3.1 above),  
1. 230 the Company may first apply any remaining Performance Carry-Over Balance against

such amount. Any shortfall or deficit that cannot be covered by the Performance Carry-Over Balance must be made by direct payment to the City.

Example 1: Assume for payment year 10, the actual Occupancy Tax and Retail Sales Tax revenue received by the City for the 12-months following the 9<sup>th</sup> anniversary of the First Date of Operations is \$275,000. No Performance Guaranteed Revenue Gap Payment is required, since the tax revenue sources exceed 125% of the Performance Based Incentive Payment amount of \$219,056 for payment year 10.

Example 2: If, instead, for payment year 10, the actual Occupancy Tax and Retail Sales Tax revenue received by the City for the 12-months following the 9<sup>th</sup> anniversary of the First Date of Operations is \$250,000, then the Company is required to make the Guaranteed Revenue Gap Payment to the City in the amount of \$23,820 which is the difference between \$250,000 and \$273,820 (125% of \$219,056) unless there is any Performance Carry Over Balance that can be applied towards this balance.

**3.4. No additional Tax Credits or Tax Exemptions.** To induce the City to enter into this Agreement, Company covenants and agrees that during the Term of this Agreement, no new or additional application for designation of any portion of the Hill Building Property pursuant to N.C.G.S. § 160A-400.5 or any similar or successor statute, shall be submitted to the City or County which would have the effect of reducing the tax revenue of the City for all or any portion of the real estate which comprises the Hill Building Property. The City acknowledges that the Hill Building Property currently benefits from a historic landmark designation which entitles the Hill Building Property to pay 50% of the otherwise required property taxes. This designation will remain in effect and is unaffected by this Agreement. The Company further agrees that no application for exemption from ad valorem property taxes shall be submitted to the City or County for any portion of the Hill Building Property. Notwithstanding the foregoing, the Company shall not be prohibited from seeking or obtaining the continuation of the existing landmark status of the Hill Building Property or from pursuing or participating in programs for credits or deductions related to state or federal income tax. Unless the City waives such Section 3.4 requirement in writing, failure of the Company to comply with this Section 3.4 shall release the City of its obligation to make any further City Incentive Payment otherwise required. and shall allow the City to seek reimbursement for all City Incentive Payment made as of the date of non-compliance by the Company of this Section 3.4 in an amount equal to the tax savings to the Company not paid to the City due to such ad valorem property tax exemption for the year(s) that a City Incentive Payment had been made.

#### **4. TIME OF ESSENCE**

Notwithstanding any other provision contained in this Agreement, the City shall have no obligation to and shall not make any payment to the Company pursuant to this Agreement if the construction activities on the Hill Building Property are not started by the Commencement Date and completed by the Completion Date as described in Section 3.1.1.

#### **5. ADDRESS CONTACT INFORMATION**

The payment by the Company pursuant to this Agreement shall be mailed to:

1. 277  
1. 278       Attn: Corporate Controller  
1. 279       21c Museum Hotels  
1. 280       710 West Main Street, Suite 201  
1. 281       Louisville, KY 40202  
1. 282  
1. 283

1. 284       When a notice is required or permitted by this Agreement, it shall be given by written notice to  
1. 285       the City by delivery to:

1. 286  
1. 287       Director  
1. 288       Office of Economic and Workforce Development  
1. 289       City of Durham  
1. 290       302 East Pettigrew Street, Suite 190  
1. 291       Durham, North Carolina 27701  
1. 292       FAX – 919-560-4986  
1. 293

1. 294       **6. CHANGE OF ADDRESS. DATE NOTICE DEEMED GIVEN**

1. 295       A change of address, fax number, or person to receive notice may be made by either party by  
1. 296       notice given to the other party. Any notice or other communication under this agreement shall  
1. 297       be deemed given at the time of actual delivery, if it is personally delivered or sent by fax. If the  
1. 298       notice or other communication is sent by United States mail, it shall be deemed given upon the  
1. 299       third calendar day following the day on which such notice or other communication is deposited  
1. 300       with the United States Postal Service or upon actual delivery, whichever first occurs.  
1. 301  
1. 302  
1. 303

1. 304       **7. EEO PROVISIONS**

1. 305       During the performance of this Agreement the Company agrees as follows: (1) The Company shall  
1. 306       not discriminate against any employee or applicant for employment because of race, color, religion,  
1. 307       sex, national origin, political affiliation or belief, age, or handicap. The Company shall take  
1. 308       affirmative action to insure that applicants are employed and that employees are treated equally  
1. 309       during employment, without regard to race, color, religion, sex, national origin, political affiliation  
1. 310       or belief, age, or handicap. Such action shall include but not be limited to the following:  
1. 311       employment, upgrading, demotion, transfer, recruitment or advertising, layoff or termination, rates  
1. 312       of pay or other forms of compensation, and selection for training, including apprenticeship. The  
1. 313       Company shall post in conspicuous places, available to employees and applicants for employment,  
1. 314       notices setting forth these EEO provisions. (2) The Company shall in all solicitations or  
1. 315       advertisement for employees placed by or on behalf of the Company, state that all qualified  
1. 316       applicants will receive consideration for employment without regard to race, color, religion, sex,  
1. 317       national origin, political affiliation or belief, age, or handicap. (3) The Company shall send a copy  
1. 318       of the EEO provisions to each labor union or representative of workers with which it has a  
1. 319       collective bargaining agreement or other contract or understanding. (4) In the event of the  
1. 320       Company's noncompliance with these EEO provisions, the City may cancel, terminate, or suspend  
1. 321       this contract, in whole or in part, and the City may declare the Company ineligible for further City  
1. 322       contracts. (5) Unless exempted by the City Council of the City of Durham, the Company shall

1. 323 include these EEO provisions in every purchase order for goods to be used in performing this  
1. 324 contract and in every subcontract related to this contract so that these EEO provisions will be  
1. 325 binding upon such subcontractors and vendors.  
1. 326

1. 327 **8. CITY POLICY**

1. 328 THE CITY OPPOSES DISCRIMINATION ON THE BASIS OF RACE AND SEX AND  
1. 329 URGES ALL OF ITS CONTRACTORS TO PROVIDE A FAIR OPPORTUNITY FOR  
1. 330 MINORITIES AND WOMEN TO PARTICIPATE IN THEIR WORK FORCE AND AS  
1. 331 SUBCONTRACTORS AND VENDORS UNDER CITY CONTRACTS.  
1. 332

1. 333 **9. ASSIGNMENT. SUCCESSORS AND ASSIGNS**

1. 334 Without the City's written consent, the Company shall not assign (which includes to delegate)  
1. 335 any of its rights (including the right to payment) or duties that arise out of this Agreement. The  
1. 336 City Manager may consent to an assignment without action by the City Council. Unless the City  
1. 337 otherwise agrees in writing, the Company and all assignees shall be subject to all of the City's  
1. 338 defenses and shall be liable for all of the Company's duties that arise out of this Agreement and  
1. 339 all of the City's claims that arise out of this Agreement. Without granting the Company the right  
1. 340 to assign, it is agreed that the duties of the Company that arise out of this Agreement shall be  
1. 341 binding upon it and its heirs, personal representatives, successors, and assigns. Notwithstanding  
1. 342 the foregoing limitations on assignment, the City's consent shall not be required for an  
1. 343 assignment of the Company's rights and duties hereunder if: a) the Company makes such  
1. 344 assignment to any entity that is under majority control of 21c Museum Hotels LLC; or b) the  
1. 345 Company makes such assignment in connection with the sale of the Hill Building Property, but  
1. 346 the property continues to be operated as a 21c Museum Hotel pursuant to a Management  
1. 347 Agreement between the purchaser and 21c Management LLC (or other entity under majority  
1. 348 control of 21c Museum Hotels LLC).  
1. 349  
1. 350

1. 351 **10. DEFAULT. TERMINATION.** –If the Company fails to fulfill any of its material  
1. 352 obligations under the Agreement, or if any certification made by the Company is materially false,  
1. 353 then in that event, subject to the notice and cure provisions in Section 25, the City may hold the  
1. 354 Company in default and (a) terminate this Agreement and make no further payments to  
1. 355 Company, and (b) in the case of a materially false certification by Company, recover all prior  
1. 356 payments and reasonable direct expenses incurred by the City in connection with the Company's  
1. 357 materially false certifications or failure to fulfill its obligations pursuant to this Agreement,  
1. 358 including reasonable attorney's fees. If the Company does not deliver to the City the  
1. 359 certification of project completion, and does not seek payment under Section 3.2., the Company  
1. 360 shall not be considered in default for failing to deliver the required certification. In such event  
1. 361 the Company may terminate this Agreement. The Parties agree that the only obligation of the  
1. 362 City under this agreement is to pay the company the City Incentive Payment pursuant to the  
1. 363 terms herein under Section 3.2. Accordingly, if the City defaults on its obligation to make such  
1. 364 incentive payment pursuant to this Agreement, the Company's sole claim or remedy at law shall  
1. 365 be the value of the incentive payment(s) that the City was found obligated to pay, including  
1. 366 reasonable direct expenses and attorney's fees incurred in obtaining such incentive payment.  
1. 367

1. 368 **11. CHOICE OF LAW AND FORUM**

1. 369 This Agreement shall be deemed made in Durham County, North Carolina. This Agreement  
1. 370 shall be governed by and construed in accordance with the law of North Carolina. The exclusive  
1. 371 forum and venue for all actions arising out of this Agreement shall be the North Carolina General  
1. 372 Court of Justice, in Durham County. Such actions shall neither be commenced in nor removed to  
1. 373 federal court. This subsection shall not apply to subsequent actions to enforce a judgment entered  
1. 374 in actions heard pursuant to this section.  
1. 375

1. 376 **12. MODIFICATIONS. ENTIRE CONTRACT**

1. 377 A modification of this Agreement is not valid unless signed by both parties and otherwise in  
1. 378 accordance with requirements of law. Further, a modification is not enforceable against the City  
1. 379 unless the City Manager or a Deputy or Assistant City Manager signs it for the City. This  
1. 380 contract contains the entire agreement between the parties pertaining to the subject matter of this  
1. 381 Agreement. With respect to that subject matter, there are no promises, agreements, conditions,  
1. 382 inducements, warranties, or understandings, written or oral, expressed or implied, between the  
1. 383 parties, other than as set forth or referenced in this contract.  
1. 384

1. 385 **13. CITY MANAGER'S AUTHORITY**

1. 386 To the extent, if any, the City has the power to suspend or terminate this Agreement or the  
1. 387 Company's services under this Agreement, that power may be exercised by City Manager or a  
1. 388 deputy or assistant City Manager without City Council action.  
1. 389

1. 390 **14. PRINCIPLES OF INTERPRETATION AND DEFINITIONS**

1. 391 In this Agreement, unless the context requires otherwise: (1) The singular includes the plural  
1. 392 and the plural the singular. The pronouns "it" and "its" include the masculine and feminine.  
1. 393 References to statutes or regulations include all statutory or regulatory provisions consolidating,  
1. 394 amending, or replacing the statute or regulation. References to contracts and agreements shall be  
1. 395 deemed to include all amendments to them. The words "include," "including," etc. mean  
1. 396 include, including, etc. without limitation. (2) References to a "Section" or "section" shall mean  
1. 397 a section of this contract. (3) "Contract" and "Agreement," whether or not capitalized, refer to  
1. 398 this instrument. (4) Titles of sections, paragraphs, and articles are for convenience only, and  
1. 399 shall not be construed to affect the meaning of this contract. (5) "Duties" includes obligations.  
1. 400 (6) The word "person" includes natural persons, firms, companies, associations, partnerships,  
1. 401 trusts, corporations, governmental agencies and units, and other legal entities. (7) The word  
1. 402 "shall" is mandatory. (8) The word "day" means calendar day.  
1. 403

1. 404 **15. EXHIBITS**

1. 405 The following exhibits are made a part of this Agreement:  
1. 406 Exhibit A, "Durham Based Business Plan," (containing 5 pages);  
1. 407 Exhibit B, "Workforce Development Plan," (containing 4 pages);  
1. 408 Exhibit C, "City Incentive Payment Schedule," (containing 1 pages); and,  
1. 409 Exhibit D, "City of Durham Subcontractor Quarterly Record of Payment Report," (containing 2  
1. 410 pages).  
1. 411 Exhibit E, "Cash Flow Analysis (1 page)  
1. 412 Exhibit F, "Construction Budget" (1 page)  
1. 413

1. 414 In case of conflict between an exhibit and the text of this Agreement excluding the exhibit, the

1. 415 text of this Agreement shall control.  
1. 416

1. 417 **16. INDEMNIFICATION**

1. 418 (a) To the maximum extent allowed by law, the Company shall defend, indemnify, and save  
1. 419 harmless Indemnitees from and against all Charges that arise in any manner from, in connection  
1. 420 with, or out of this contract as a result of acts or omissions of the Company or subcontractors or  
1. 421 anyone directly or indirectly employed by any of them or anyone for whose acts any of them  
1. 422 may be liable. In performing its duties under this subsection "a," the Company shall at its sole  
1. 423 expense defend Indemnitees with legal counsel reasonably acceptable to City. (b) Definitions.  
1. 424 As used in subsections "a" above and "c" below -- "Charges" means claims, judgments, costs,  
1. 425 damages, losses, demands, liabilities, duties, obligations, fines, penalties, royalties, settlements,  
1. 426 and expenses (included without limitation within "Charges" are (1) interest and reasonable  
1. 427 attorneys' fees assessed as part of any such item, and (2) amounts for alleged violations of  
1. 428 sedimentation pollution, erosion control, pollution, or other environmental laws, regulations,  
1. 429 ordinances, rules, or orders -- including but not limited to any such alleged violation that arises  
1. 430 out of the handling, transportation, deposit, or delivery of the items that are the subject of this  
1. 431 contract). "Indemnitees" means City and its officers, officials, independent contractors, agents,  
1. 432 and employees, excluding the Company. (c) Other Provisions Separate. Nothing in this section  
1. 433 shall affect any warranties in favor of the City that are otherwise provided in or arise out of this  
1. 434 contract. This section is in addition to and shall be construed separately from any other  
1. 435 indemnification provisions that may be in this contract. (d) Survival. This section shall remain  
1. 436 in force despite termination of this contract (whether by expiration of the term or otherwise) and  
1. 437 termination of the services of the Company under this contract. (e) Limitations of the  
1. 438 Company's Obligation. If this section is in, or is in connection with, a contract relative to the  
1. 439 design, planning, construction, alteration, repair or maintenance of a building, structure,  
1. 440 highway, road, appurtenance or appliance, including moving, demolition and excavating  
1. 441 connected therewith, then subsection "a" above shall not require the Company to indemnify or  
1. 442 hold harmless Indemnitees against liability for damages arising out of bodily injury to persons or  
1. 443 damage to property proximately caused by or resulting from the negligence, in whole or in part,  
1. 444 of Indemnitees.

1. 445  
1. 446 **17. WAIVER**

1. 447 No action or failure to act by either party shall constitute a waiver of any of its rights or remedies  
1. 448 that arise out of this contract, nor shall such action or failure to act constitute approval of or  
1. 449 acquiescence in a breach thereunder, except as may be specifically agreed in writing.

1. 450  
1. 451 **18. PERFORMANCE OF GOVERNMENT FUNCTIONS**

1. 452 Nothing contained in this contract shall be deemed or construed so as to in any way estop, limit,  
1. 453 or impair the City from exercising or performing any regulatory, policing, legislative,  
1. 454 governmental, or other powers or functions.

1. 455  
1. 456 **19. SEVERABILITY**

1. 457 If any provision of this agreement shall be unenforceable, the remainder of this contract shall be  
1. 458 enforceable to the extent permitted by law.

1. 459  
1. 460 **20. COMPLIANCE WITH LAW**

1. 461 In performing all of the Work, the Company shall comply with all applicable law.  
1. 462

1. 463 **21. NO THIRD PARTY RIGHTS CREATED**

1. 464 This Agreement is intended for the benefit of the City and the Company and not any other  
1. 465 person.  
1. 466

1. 467 **22. TIME PERIODS.**

1. 468 Unless otherwise specified, in computing any period of time described herein, the day of the act,  
1. 469 event, notice, or default after which the designated period of time begins to run is not to be  
1. 470 included and the last day of the period so computed is to be included, unless such last day is a  
1. 471 Saturday, Sunday or legal holiday for national banks in the county where the Property is located,  
1. 472 in which event the period shall run until the end of the next day which is neither a Saturday,  
1. 473 Sunday, or legal holiday. The last day of any period of time described herein shall be deemed to  
1. 474 end at 5:00 p.m. (measured by the time of the county in which the Property is located).  
1. 475

1. 476 **23. FORCE MAJEURE.**

1. 477 In the event that either party hereto shall be delayed or hindered in or prevented from the  
1. 478 performance of any act required hereunder by reason of the following: labor dispute, including  
1. 479 strike and lockout; unavailability of essential materials, riot; epidemic; war, acts of God, fire;  
1. 480 explosion; accident; delays or default of the other party, then performance of such act shall be  
1. 481 excused for the period of the delay, and thereafter the period for the performance of any such act  
1. 482 shall be extended for a period equivalent to the period of such delay. However, a party may take  
1. 483 advantage of the preceding sentence only to the extent that the event is not substantially caused  
1. 484 by the party to this Agreement who seeks to use said event as an excuse for failure to perform. A  
1. 485 party must use its best efforts to perform despite said events and its best efforts to prevent or cure  
1. 486 the effects of said event insofar as it prevents performance.  
1. 487

1. 488 **24. REGULATORY PROCESS.**

1. 489 If the Durham Planning Department or other regulatory agency delays or does not grant promptly  
1. 490 an application for a permit or site plan approval made by the Company, then each of the  
1. 491 deadlines contained herein may be extended by the length of such delay, subject to discussion by  
1. 492 the Parties.  
1. 493

1. 494 **25. CURE PERIOD.**

1. 495 No default by either party hereto shall result in a termination or limitation of any rights of such  
1. 496 party hereunder unless and until the other party shall have notified the defaulting party in writing  
1. 497 of said default, and the defaulting party shall have failed to cure said default within thirty (30)  
1. 498 days after the receipt of said written notice provided, however, that if the default cannot, by its  
1. 499 nature, be cured within such thirty (30) day period, but the defaulting party commences and  
1. 500 diligently pursues a cure of such default promptly within the initial thirty (30) day cure period,  
1. 501 then the other party shall not exercise its remedies or limit the rights of the defaulting party  
1. 502 unless such default remains uncured for more than ninety (90) days after the initial delivery of  
1. 503 the other parties original default notice; provided, however, that the cure period for any default  
1. 504 related to the making of the Capital Investment shall be one hundred eighty (180) days.  
1. 505

1. 506 IN WITNESS WHEREOF, the City and the Company have caused this agreement to be executed

*Economic Incentive Contract between 21c Durham LLC and the City of Durham  
for Capital Investments in Downtown Durham*

1. 507 under seal themselves or by their respective duly authorized agents or officers.

1. 508  
1. 509 ATTEST: CITY OF DURHAM

1. 510  
1. 511  
1. 512  
1. 513  
1. 514  
1. 515 \_\_\_\_\_ By: \_\_\_\_\_

1. 516  
1. 517  
1. 518 Pre Audit Certificate

1. 519  
1. 520  
1. 521  
1. 522  
1. 523  
1. 524 21c DURHAM LLC

1. 525  
1. 526  
1. 527 By: \_\_\_\_\_  
1. 528 Manager

1. 529  
1. 530  
1. 531  
1. 532 State of \_\_\_\_\_

ACKNOWLEDGMENT BY  
21c DURHAM LLC

1. 533  
1. 534 County of \_\_\_\_\_

1. 535  
1. 536 I, a notary public in and for said county and state, certify that  
1. 537 \_\_\_\_\_ personally (1) appeared before me this day, (2)  
1. 538 stated that he or she is a manager of 21c DURHAM LLC, a limited liability company  
1. 539 organized and existing under the laws of the State of  
1. 540 \_\_\_\_\_, (3) acknowledged that the foregoing contract or  
1. 541 agreement with the City of Durham carries on the company's business in the usual way, and  
1. 542 (4) acknowledged the due execution of the contract on behalf of the company. This the  
1. 543 \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

1. 544  
1. 545 My commission expires: \_\_\_\_\_  
1. 546 \_\_\_\_\_ Notary Public  
1. 547