

ECONOMIC INCENTIVE CONTRACT FOR CAPITAL INVESTMENTS FOR  
THE "UNIVERSITY MARKET PLACE"

**THIS AGREEMENT** (the "Agreement"), is made, dated and entered into as of the \_\_\_\_\_ day of \_\_\_\_\_, 2012, by the City of Durham ("City") a North Carolina municipal corporation and Hawthorne Durham, LLC. ("Company"), a limited liability corporation organized and existing under the laws of the State of North Carolina. The City and Company are also referred to individually as "party" and collectively as "parties."

The parties, intending to be legally bound, agree as follows:

**1. BACKGROUND AND PURPOSE**

**1.1.** Company has acquired or is in the process of acquiring a property within the Urban Growth Area in the City of Durham and for the purpose of this Agreement intends to develop the University Marketplace Property into an Urban Growth mixed use development defined herein as the "University Marketplace Improvements." The City Council has found that the construction of the capital improvements to be made by the Company is likely to have a significant effect on the revitalization of the City of Durham's Urban Growth Area in the city of Durham. This Agreement is made pursuant to N.C.G.S. § 158-7.1.

**1.2.** The purpose of this Agreement is to allow the Company to proceed with University Marketplace Improvements.

**2. DEFINITIONS**

**2.1. Certificate of Compliance.** "Certificate of Compliance" is defined as the final, official document issued by the local governing authority certifying that a newly constructed or renovated building or structure is in compliance with applicable building codes, regulations and laws, such that said building or structure may be lawfully and beneficially occupied for its intended purpose as contemplated by the Parties pursuant to this Agreement.

**2.2. University Marketplace Property.** The "University Marketplace Property" means collectively, the properties identified by the following Durham County tax parcel identification numbers:

Description	Parcel ID
3802 University Dr	121591
3904 University Dr	210543
3103 Auto Dr	210544
3101 Auto Dr	210545

3810 University Dr	210546
EN Space #01	210547
EN Space #02	210548
EN Space #03	210549

1. 37  
 1. 38       **2.3. City Incentive Payments.** “City Incentive Payments” shall refer to the incentives  
 1. 39 for the proposed University Market Place Property improvements. The payments include a 7-  
 1. 40 Year Incentive Payment plan comprising 6 annual incentive payments of \$142,857 and a single  
 1. 41 \$142,858 payment made during the initial year. The total of all potential City Incentive  
 1. 42 Payments over the term of the Agreement equals \$1,000,000. Accordingly, assuming Company  
 1. 43 meets all conditions of the Agreement and remains eligible for all City Incentive Payments, they  
 1. 44 shall be as follows:

1. 45		
1. 46	Year 1	\$142,858.00
1. 47	Year 2	\$142,857.00
1. 48	Year 3	\$142,857.00
1. 49	Year 4	\$142,857.00
1. 50	Year 5	\$142,857.00
1. 51	Year 6	\$142,857.00
1. 52	Year 7	\$142,857.00
1. 53		

1. 54       **2.4. Construction Activities.** “Construction Activities” means the activities  
 1. 55 necessary for construction of the Development Requirements to the University Marketplace  
 1. 56 Property after the issuance of a City building permit.

1. 57  
 1. 58       **2.5. Development Requirements.** The “Development Requirements” refers to the  
 1. 59 specific development improvements or renovations to be made to the University Marketplace  
 1. 60 Property by the Company, which development shall deliver a mixed use development with the  
 1. 61 following minimum area and/or quantity requirements:

- 1. 62       (a) Approximately 365 residential units, totaling approximately 326,602 sq ft of  
 1. 63             residential with 15% reserved as Workforce Housing Units.
- 1. 64       (b) Approximately 92,000 sq ft of new commercial retail and office space
- 1. 65       (c) Renovation of one existing buildings into approximately 15,200 sq ft  
 1. 66             commercial retail space
- 1. 67       (d) Construction of a new 700 space parking deck

1. 68 For purposes of this definition only, the term “approximately” shall include deviations from the  
 1. 69 referenced quantity of no more than 10%. For example, if the final number of residential units  
 1. 70 constructed are 335 and not 365, the Company shall still meet its Development Requirements for  
 1. 71 residential units as 335 is within a 10% deviation of 365 (i.e., about 8% less than 365).

1. 72  
 1. 73       **2.6. Mixed Use Development.** “Mixed Use Development” means a development that  
 1. 74 includes both residential and non residential uses as a principal uses on the same development  
 1. 75 site..

1. 77           **2.7. Workforce Housing Unit.** means a dwelling unit that is offered for rent at a  
1. 78 monthly rate that does not exceed an amount equal to thirty percent of eighty percent of the  
1. 79 monthly median income level for a family of four in the Metropolitan Statistical Area to which  
1. 80 Durham is assigned by the United States Department of Housing and Urban Development at the  
1. 81 time of the calculation. Company may adjust the rental rate for an Affordable Housing Unit  
1. 82 annually when United States Department of Housing and Urban Development publishes income  
1. 83 information.  
1. 84

1. 85 EXAMPLE: As of the date of this Agreement the United States Department of Housing and  
1. 86 Urban Development reports, which report is available at  
1. 87 [http://www.huduser.org/datasets/il/il2012/2012summary.odn?inputname=METRO20500M2050](http://www.huduser.org/datasets/il/il2012/2012summary.odn?inputname=METRO20500M20500*Durham%2C+NC+HUD+Metro+FMR+Area&selection_type=hmfa&year=2012)  
1. 88 [0\\*Durham%2C+NC+HUD+Metro+FMR+Area&selection\\_type=hmfa&year=2012](http://www.huduser.org/datasets/il/il2012/2012summary.odn?inputname=METRO20500M20500*Durham%2C+NC+HUD+Metro+FMR+Area&selection_type=hmfa&year=2012) that a family  
1. 89 of four earning eighty percent of the annual median income for the Durham Metropolitan  
1. 90 Statistical Area earns \$54,950 per year (median income is reported to be \$68,700). That annual  
1. 91 income equals a monthly income of \$4,579.17 per month. Thirty percent of that monthly income  
1. 92 is \$1,373.75. As of the date of this agreement, the maximum rental for a Workforce Housing  
1. 93 Unit would be \$1,373.75.  
1. 94

### 1. 95           **3. PARTY REQUIREMENTS AND OBLIGATIONS**

#### 1. 96           **3.1. Company Requirements for Incentive Payment Eligibility.**

1. 97           3.1.1. Completion of Construction. The Company shall begin Construction  
1. 98 Activities no later than July, 2013 ("Commencement Date") and secure a final Certificate  
1. 99 of Compliance by July, 2015 (hereinafter, "Completion Date").  
1. 100  
1. 101  
1. 102

1. 103           3.1.2. Development Requirements for University Marketplace. As part of the  
1. 104 University Marketplace project, the Company shall expend no less than \$46 million in  
1. 105 Qualified Capital Investment expenditures.  
1. 106

1. 107           3.1.3. Maintain Workforce Housing Units. Company shall be obligated to  
1. 108 maintain the availability of the Workforce Housing Units as a percentage of total  
1. 109 residential units for each year that Company invoices the City for an incentive payment.  
1. 110

1. 111           3.1.4. Workforce Plan and Durham Based-Business Plan Conditions. Company  
1. 112 shall complete and return the document entitled "Durham Based Business Plan" (attached  
1. 113 hereto as Exhibit A) upon execution of this Agreement and comply with its provisions  
1. 114 during the term of this Agreement. Company shall complete and return the document  
1. 115 entitled "Workforce Development Plan" (attached hereto as Exhibit B) upon execution of  
1. 116 this Agreement and comply with its provisions during the term of this Agreement.  
1. 117

1. 118           3.1.4.1. Company shall meet with the Director of the City's Office of  
1. 119 Economic and Workforce Development ("Director" and "OEWD", respectively)  
1. 120 prior to the Company entering into any contract(s) for construction of the  
1. 121 University Market Place Property in order to discuss potential contracting  
1. 122 opportunities for goods and services or construction and repair work with

1. 123 Durham-based firms.  
1. 124

1. 125 3.1.4.2. The Director will provide the Company with a list of identified  
1. 126 Durham-based firms that may be qualified to provide the goods and services or  
1. 127 construction and repair work required by the Company for the University Market  
1. 128 Place Property. The Director will also provide the Company with recommended  
1. 129 goals for hiring such identified Durham-based firms.  
1. 130

1. 131 3.1.4.3. In all solicitations for which goal(s) are established, Company, or  
1. 132 Company’s contractor responsible for hiring construction related firms, will not  
1. 133 enter into contracts without first soliciting bids from Durham-based firms and  
1. 134 requiring bidders to submit a participation plan identifying whether it is a  
1. 135 Durham-based firm (as defined by OEWD) and the level of participation of other  
1. 136 Durham-based firms as subcontractors. If a bidder fails to achieve the goal(s), the  
1. 137 bidder must submit documentation to Company of its good faith efforts to achieve  
1. 138 the goal(s) within two working days after bid opening. Company shall take all  
1. 139 reasonable actions needed to see that bidders comply with this subsection.  
1. 140 Company shall make bids and documentation of good faith efforts available to the  
1. 141 Director.  
1. 142

1. 143 3.1.4.4. Company will notify the Director of OEWD of upcoming  
1. 144 contracting opportunities to ascertain the availability of Durham-based firms that  
1. 145 might be capable of providing the pertinent work. Each such notice shall be given  
1. 146 in a manner and schedule so that the Durham-based firms will have a reasonable  
1. 147 amount of time to respond.  
1. 148

1. 149 3.1.4.5. Company will provide quarterly reports using the attached form,  
1. 150 Exhibit C “City Of Durham Subcontractor Quarterly Record Of Payment Report”,  
1. 151 on all contracting activity to the Director for reporting to the City Council. The  
1. 152 reports are due the last day of April (for January – March), July (for April – June),  
1. 153 October (for July – September) and January (for October – December).  
1. 154

1. 155  
1. 156 **3.2. City Obligations to Pay Incentives.** After the Company has satisfied all of the  
1. 157 requirements outlined in Section 3.1, including all subsections, the City shall provide incentive  
1. 158 payments as follows:  
1. 159

1. 160 3.2.1. First Incentive Payment—Year 1 Payment – Within 7 days of receipt of  
1. 161 evidence of issuance of the final Certificate of Compliance for the Residential  
1. 162 Component and initial Certificate of Occupancy for the Retail Component and with at  
1. 163 least 30 days prior receipt of all other documentation supporting satisfaction of the  
1. 164 requirements of Section 3.1. (including all subsections), above, and notification to the  
1. 165 City of City’s obligation to respond, the City shall make the first incentive payment of  
1. 166 \$142,858.00. However, if within the 30 days of receipt of the documentation supporting  
1. 167 satisfaction of the requirements of Section 3.1 (excluding the Certificate of Compliance),  
1. 168 the City determines that the submission of the supporting documentation is insufficient, it

1. 169 shall give the Company written notice of the deficiency, which must list with particularity  
1. 170 the specific items the City claims were omitted from the submission; thereafter, the  
1. 171 Company shall have 15 days after the receipt of such notice to submit the supplemental  
1. 172 information described in the notice. Within 5 days after the City receives the  
1. 173 supplemental submission, it shall either confirm that the information is sufficient or  
1. 174 identify, in the manner described above, any continuing deficiency. Following notice of a  
1. 175 continuing deficiency, the Company may submit additional documents. The process  
1. 176 shall continue until the City definitively concludes, or is deemed to have concluded, that  
1. 177 the submission is complete or fatally incomplete.

1. 178  
1. 179 3.2.2. Remaining Incentive Payments—Years 2 through 7 – to be eligible for each of  
1. 180 the remaining City Incentive Payments for years 2 through 7, the Company shall send an  
1. 181 annual invoice to the City requesting payment for the amount to be paid pursuant to this  
1. 182 Agreement, including an accounting of all prior payments made and the remaining  
1. 183 potential balance. The Company shall include with each annual invoice, documentation  
1. 184 that Company continues to comply with the requirements of Subsections 3.1.3  
1. 185 (Workforce Housing Units) If the City determines that Company has complied with such  
1. 186 continued requirements, the City shall pay the Company within 30 days of receipt of the  
1. 187 annual invoice and confirmation that Company complied with the continued  
1. 188 requirements. Failure to meet the incentive requirements of Section 3.1.3 shall be  
1. 189 deemed a default by Company and Company shall not be eligible for that year’s incentive  
1. 190 payment or any further City Incentive Payments.

1. 191  
1. 192 **3.3. No additional Tax Credits or Tax Exemptions.** The Company further agrees  
1. 193 that no application for exemption from ad valorem property taxes shall be submitted to the City,  
1. 194 County, or any other entity for any portion of the University Market Place Building Property.  
1. 195 Unless the City waives such Section 3.3 requirement in writing, failure of the Company to  
1. 196 comply with this Section 3.3 shall release the City of its obligation to make any further City  
1. 197 Incentive Payment otherwise required and shall allow the City to seek reimbursement for all City  
1. 198 Incentive Payments made as of the date of non-compliance by the Company of this Section 3.3  
1. 199 in an amount equal to the tax savings to the Company not paid to the City due to such ad valorem  
1. 200 property tax exemption for the year(s) that a City Incentive Payment had been made.

1. 201  
1. 202 **4. TIME OF ESSENCE**

1. 203 Notwithstanding any other provision contained in this Agreement, the City shall have no  
1. 204 obligation to and shall not make any payment to the Company pursuant to this Agreement if the  
1. 205 construction activities on the University Place Building Property are not started by the  
1. 206 Commencement Date and completed by the Completion Date as described in Section 3.1.1.

1. 207  
1. 208 **5. ADDRESS CONTACT INFORMATION**

1. 209 The payments by the Company pursuant to this Agreement shall be mailed to:

1. 210  
1. 211 Shoff Allison  
1. 212 Hawthorne Durham, LLC  
1. 213 200 Providence Road  
1. 214 Suite 105

1. 215 Charlotte, North Carolina 28207  
1. 216 Phone – 704-333-7430  
1. 217 Email: [sallison@hawthorneretailpartners.com](mailto:sallison@hawthorneretailpartners.com)  
1. 218

1. 219 When a notice is required or permitted by this Agreement, it shall be given by written notice to  
1. 220 the City by delivery to:

1. 221  
1. 222 Director  
1. 223 Office of Economic and Workforce Development  
1. 224 City of Durham  
1. 225 302 East Pettigrew Street, Suite 190  
1. 226 Durham, North Carolina 27701  
1. 227 FAX – 919-560-4986  
1. 228

1. 229 **6. CHANGE OF ADDRESS. DATE NOTICE DEEMED GIVEN**

1. 230 A change of address, fax number, or person to receive notice may be made by either party by  
1. 231 notice given to the other party. Any notice or other communication under this agreement shall  
1. 232 be deemed given at the time of actual delivery, if it is personally delivered or sent by fax. If the  
1. 233 notice or other communication is sent by United States mail, it shall be deemed given upon the  
1. 234 third calendar day following the day on which such notice or other communication is deposited  
1. 235 with the United States Postal Service or upon actual delivery, whichever first occurs.  
1. 236

1. 237 **7. EEO PROVISIONS**

1. 238 During the performance of this Agreement the Company agrees as follows: (1) The Company shall  
1. 239 not discriminate against any employee or applicant for employment because of race, color, religion,  
1. 240 sex, national origin, political affiliation or belief, age, or handicap. The Company shall take  
1. 241 affirmative action to insure that applicants are employed and that employees are treated equally  
1. 242 during employment, without regard to race, color, religion, sex, national origin, political affiliation  
1. 243 or belief, age, or handicap. Such action shall include but not be limited to the following:  
1. 244 employment, upgrading, demotion, transfer, recruitment or advertising, layoff or termination, rates  
1. 245 of pay or other forms of compensation, and selection for training, including apprenticeship. The  
1. 246 Company shall post in conspicuous places, available to employees and applicants for employment,  
1. 247 notices setting forth these EEO provisions. (2) The Company shall in all solicitations or  
1. 248 advertisement for employees placed by or on behalf of the Company, state that all qualified  
1. 249 applicants will receive consideration for employment without regard to race, color, religion, sex,  
1. 250 national origin, political affiliation or belief, age, or handicap. (3) The Company shall send a copy  
1. 251 of the EEO provisions to each labor union or representative of workers with which it has a  
1. 252 collective bargaining agreement or other contract or understanding. (4) In the event of the  
1. 253 Company's noncompliance with these EEO provisions, the City may cancel, terminate, or suspend  
1. 254 this contract, in whole or in part, and the City may declare the Company ineligible for further City  
1. 255 contracts. (5) Unless exempted by the City Council of the City of Durham, the Company shall  
1. 256 include these EEO provisions in every purchase order for goods to be used in performing this  
1. 257 contract and in every subcontract related to this contract so that these EEO provisions will be  
1. 258 binding upon such subcontractors and vendors.  
1. 259

1. 260 **8. CITY POLICY**

1. 261 THE CITY OPPOSES DISCRIMINATION ON THE BASIS OF RACE AND SEX AND  
1. 262 URGES ALL OF ITS CONTRACTORS TO PROVIDE A FAIR OPPORTUNITY FOR  
1. 263 MINORITIES AND WOMEN TO PARTICIPATE IN THEIR WORK FORCE AND AS  
1. 264 SUBCONTRACTORS AND VENDORS UNDER CITY CONTRACTS.

1. 265  
1. 266 **9. ASSIGNMENT. SUCCESSORS AND ASSIGNS**

1. 267 Except as permitted in this Section, Company shall not assign this Agreement, or any portion  
1. 268 thereof, which includes delegation of any of its rights (including the right to payment), or duties  
1. 269 that arise out of this Agreement without first obtaining the prior written consent of City.

1. 270 Company may assign this Agreement or any portion thereof without City’s consent to any party  
1. 271 who is not a Prohibited Person. Such assignment shall not relieve Company of its duties or  
1. 272 obligations, including indemnity obligations, arising out of or pursuant to this Agreement, unless  
1. 273 City consents in writing to release Company from any further obligations under this Agreement.  
1. 274 Notwithstanding the foregoing, Company may assign all or a portion of this Agreement without  
1. 275 City’s consent to (i) an entity that is wholly owned or controlled by Company and be relieved of  
1. 276 the obligations under this Agreement occurring after the date of the assignment by providing to  
1. 277 City an instrument in form and substance reasonably satisfactory to City under which the  
1. 278 assignee expressly assumes in writing all obligations and provisions of this Agreement assigned  
1. 279 to such entity, or (ii) to Company’s first mortgage holder.

1. 280  
1. 281 **9.1 “Prohibited Person”** shall mean any of the following:

1. 282  
1. 283 9.1.1 Any Person (A) that is in default or in breach of its obligations under any  
1. 284 written agreement (including, but not limited to any service or performance agreement,  
1. 285 any loan agreement or mortgage, or regulatory agreement) with City, or (B) that directly  
1. 286 or indirectly controls, is controlled by, or is under common control with a Person that is  
1. 287 in default or in breach of its obligations under any written agreement with City, unless  
1. 288 this default or breach has been waived in writing by City.

1. 289  
1. 290 9.1.2 Any Person (A) that has been convicted in a criminal proceeding of a felony  
1. 291 for any crime involving moral turpitude or that is an organized crime figure or is reputed  
1. 292 (as determined according to the criteria specified in the next paragraph) to have  
1. 293 substantial business or other affiliations with an organized crime figure, or (B) that  
1. 294 directly or indirectly controls, is controlled by, or is under common control with a Person  
1. 295 that has been convicted in a criminal proceeding of a felony for any crime involving  
1. 296 moral turpitude or that is an organized crime figure or is reputed to have substantial  
1. 297 business or other affiliations with an organized crime figure.

1. 298  
1. 299 9.1.3 The determination as to whether any Person is an organized crime figure or is  
1. 300 reputed to have substantial business or other affiliations with an organized crime figure or  
1. 301 directly or indirectly controls, is controlled by, or is under common control with a Person  
1. 302 that is an organized crime figure or is reputed to have substantial business or other  
1. 303 affiliations with an organized crime figure shall be within the sole discretion of City.

1. 304  
1. 305 9.1.4 Any “enemy” or “ally of enemy” with which trading is prohibited by the  
1. 306 Trading with the Enemy Act, codified at 50 USGS Appendix Section 3, as amended.

1. 307  
1. 308  
1. 309  
1. 310 **10. DEFAULT. TERMINATION.** –If the Company fails to fulfill any of its obligations  
1. 311 under the Agreement, or if any certification made by the Company is materially false, then in  
1. 312 that event, the City may hold the Company in default and (a) terminate this Agreement and make  
1. 313 no further payments to Company, and (b) in the case of a materially false certification by  
1. 314 Company, recover all prior payments and reasonable direct expenses incurred by the City in  
1. 315 connection with the Company’s materially false certifications or failure to fulfill its obligations  
1. 316 pursuant to this Agreement, including reasonable attorney’s fees. The Parties agree that the only  
1. 317 obligation of the City under this agreement is to pay the company the City Incentive Payments  
1. 318 pursuant to the terms herein under Section 3.2. Accordingly, if the City defaults on its obligation  
1. 319 to make such incentive payments pursuant to this Agreement, the Company’s sole claim or  
1. 320 remedy at law shall be the value of the incentive payments(s) that the City was found obligated  
1. 321 to pay.  
1. 322

1. 323 **11. CHOICE OF LAW AND FORUM**

1. 324 This Agreement shall be deemed made in Durham County, North Carolina. This Agreement  
1. 325 shall be governed by and construed in accordance with the law of North Carolina. The exclusive  
1. 326 forum and venue for all actions arising out of this Agreement shall be the North Carolina General  
1. 327 Court of Justice, in Durham County. Such actions shall neither be commenced in nor removed to  
1. 328 federal court. This subsection shall not apply to subsequent actions to enforce a judgment  
1. 329 entered in actions heard pursuant to this section.  
1. 330

1. 331 **12. MODIFICATIONS. ENTIRE CONTRACT**

1. 332 A modification of this Agreement is not valid unless signed by both parties and otherwise in  
1. 333 accordance with requirements of law. Further, a modification is not enforceable against the City  
1. 334 unless the City Manager or a Deputy or Assistant City Manager signs it for the City. This  
1. 335 contract contains the entire agreement between the parties pertaining to the subject matter of this  
1. 336 Agreement. With respect to that subject matter, there are no promises, agreements, conditions,  
1. 337 inducements, warranties, or understandings, written or oral, expressed or implied, between the  
1. 338 parties, other than as set forth or referenced in this contract.  
1. 339

1. 340 **13. CITY MANAGER’S AUTHORITY**

1. 341 To the extent, if any, the City has the power to suspend or terminate this Agreement or the  
1. 342 Company’s services under this Agreement, that power may be exercised by City Manager or a  
1. 343 deputy or assistant City Manager without City Council action.  
1. 344

1. 345 **14. PRINCIPLES OF INTERPRETATION AND DEFINITIONS**

1. 346 In this Agreement, unless the context requires otherwise: (1) The singular includes the plural  
1. 347 and the plural the singular. The pronouns “it” and “its” include the masculine and feminine.  
1. 348 References to statutes or regulations include all statutory or regulatory provisions consolidating,  
1. 349 amending, or replacing the statute or regulation. References to contracts and agreements shall be  
1. 350 deemed to include all amendments to them. The words “include,” “including,” etc. mean  
1. 351 include, including, etc. without limitation. (2) References to a “Section” or “section” shall mean  
1. 352 a section of this contract. (3) “Contract” and “Agreement,” whether or not capitalized, refer to

1. 353 this instrument. (4) Titles of sections, paragraphs, and articles are for convenience only, and  
1. 354 shall not be construed to affect the meaning of this contract. (5) "Duties" includes obligations.  
1. 355 (6) The word "person" includes natural persons, firms, companies, associations, partnerships,  
1. 356 trusts, corporations, governmental agencies and units, and other legal entities. (7) The word  
1. 357 "shall" is mandatory. (8) The word "day" means calendar day.

1. 358  
1. 359 **15. EXHIBITS**

1. 360 The following exhibits are made a part of this Agreement:  
1. 361 Exhibit A, "Durham Based Business Plan" (containing 5 pages);  
1. 362 Exhibit B, "Workforce Development Plan, (containing 4 pages); and  
1. 363 Exhibit C, "City of Durham Subcontractor Quarterly Record of Payment Report," (containing 2  
1. 364 pages).

1. 365  
1. 366 In case of conflict between an exhibit and the text of this Agreement excluding the exhibit, the  
1. 367 text of this Agreement shall control.

1. 368  
1. 369 **16. INDEMNIFICATION**

1. 370 (a) To the maximum extent allowed by law, the Company shall defend, indemnify, and save  
1. 371 harmless Indemnitees from and against all Charges that arise in any manner from, in connection  
1. 372 with, or out of this contract as a result of acts or omissions of the Company or subcontractors or  
1. 373 anyone directly or indirectly employed by any of them or anyone for whose acts any of them  
1. 374 may be liable. In performing its duties under this subsection "a," the Company shall at its sole  
1. 375 expense defend Indemnitees with legal counsel reasonably acceptable to City. (b) Definitions.  
1. 376 As used in subsections "a" above and "c" below -- "Charges" means claims, judgments, costs,  
1. 377 damages, losses, demands, liabilities, duties, obligations, fines, penalties, royalties, settlements,  
1. 378 and expenses (included without limitation within "Charges" are (1) interest and reasonable  
1. 379 attorneys' fees assessed as part of any such item, and (2) amounts for alleged violations of  
1. 380 sedimentation pollution, erosion control, pollution, or other environmental laws, regulations,  
1. 381 ordinances, rules, or orders -- including but not limited to any such alleged violation that arises  
1. 382 out of the handling, transportation, deposit, or delivery of the items that are the subject of this  
1. 383 contract). "Indemnitees" means City and its officers, officials, independent contractors, agents,  
1. 384 and employees, excluding the Company. (c) Other Provisions Separate. Nothing in this section  
1. 385 shall affect any warranties in favor of the City that are otherwise provided in or arise out of this  
1. 386 contract. This section is in addition to and shall be construed separately from any other  
1. 387 indemnification provisions that may be in this contract. (d) Survival. This section shall remain  
1. 388 in force despite termination of this contract (whether by expiration of the term or otherwise) and  
1. 389 termination of the services of the Company under this contract. (e) Limitations of the  
1. 390 Company's Obligation. If this section is in, or is in connection with, a contract relative to the  
1. 391 design, planning, construction, alteration, repair or maintenance of a building, structure,  
1. 392 highway, road, appurtenance or appliance, including moving, demolition and excavating  
1. 393 connected therewith, then subsection "a" above shall not require the Company to indemnify or  
1. 394 hold harmless Indemnitees against liability for damages arising out of bodily injury to persons or  
1. 395 damage to property proximately caused by or resulting from the negligence, in whole or in part,  
1. 396 of Indemnitees.

1. 397  
1. 398 **17. WAIVER**

1. 399 No action or failure to act by either party shall constitute a waiver of any of its rights or remedies  
1. 400 that arise out of this contract, nor shall such action or failure to act constitute approval of or  
1. 401 acquiescence in a breach thereunder, except as may be specifically agreed in writing.  
1. 402

1. 403 **18. PERFORMANCE OF GOVERNMENT FUNCTIONS**

1. 404 Nothing contained in this contract shall be deemed or construed so as to in any way estop, limit,  
1. 405 or impair the City from exercising or performing any regulatory, policing, legislative,  
1. 406 governmental, or other powers or functions.  
1. 407

1. 408 **19. SEVERABILITY**

1. 409 If any provision of this agreement shall be unenforceable, the remainder of this contract shall be  
1. 410 enforceable to the extent permitted by law.  
1. 411

1. 412 **20. COMPLIANCE WITH LAW**

1. 413 In performing all of the Work, the Company shall comply with all applicable law.  
1. 414

1. 415 **21. NO THIRD PARTY RIGHTS CREATED**

1. 416 This Agreement is intended for the benefit of the City and the Company and not any other  
1. 417 person.  
1. 418

1. 419 **22. TIME PERIODS.**

1. 420 Unless otherwise specified, in computing any period of time described herein, the day of the act,  
1. 421 event, notice, or default after which the designated period of time begins to run is not to be  
1. 422 included and the last day of the period so computed is to be included, unless such last day is a  
1. 423 Saturday, Sunday or legal holiday for national banks in the county where the Property is located,  
1. 424 in which event the period shall run until the end of the next day which is neither a Saturday,  
1. 425 Sunday, or legal holiday. The last day of any period of time described herein shall be deemed to  
1. 426 end at 5:00 p.m. (measured by the time of the county in which the Property is located).  
1. 427

1. 428 **23. FORCE MAJEURE.**

1. 429 In the event that either party hereto shall be delayed or hindered in or prevented from the  
1. 430 performance of any act required hereunder by reason of the following: labor dispute, including  
1. 431 strike and lockout; unavailability of essential materials, riot; epidemic; war, acts of God, fire;  
1. 432 explosion; accident; delays or default of the other party, then performance of such act shall be  
1. 433 excused for the period of the delay, and thereafter the period for the performance of any such act  
1. 434 shall be extended for a period equivalent to the period of such delay. However, a party may take  
1. 435 advantage of the preceding sentence only to the extent that the event is not substantially caused  
1. 436 by the party to this Agreement who seeks to use said event as an excuse for failure to perform. A  
1. 437 party must use its best efforts to perform despite said events and its best efforts to prevent or cure  
1. 438 the effects of said event insofar as it prevents performance.  
1. 439  
1. 440  
1. 441

1. 442  
1. 443 IN WITNESS WHEREOF, the City and the Company have caused this agreement to be executed  
1. 444 under seal themselves or by their respective duly authorized agents or officers.

Economic Incentive Contract for Capital Investments for the "University Market Place" within the Urban Growth Area in the City of Durham

ATTEST: CITY OF DURHAM

By: \_\_\_\_\_

Pre Audit Certificate

HAWTHORNE DURHAM, LLC.

By: \_\_\_\_\_  
Manager

State of \_\_\_\_\_

ACKNOWLEDGMENT BY  
Hawthorne Durham, LLC.

County of \_\_\_\_\_

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

My commission expires: \_\_\_\_\_  
Notary Public