

ECONOMIC REDEVELOPMENT AND HISTORIC PROPERTY
PRESERVATION AGREEMENT BETWEEN CONCORD HOSPITALITY ENTERPRISES
COMPANY AND THE CITY OF DURHAM

THIS AGREEMENT (the “Agreement”), is made, dated and entered into as of the _____ day of _____, 2013, by and between the City of Durham (the “City”), a North Carolina municipal corporation and Concord Hospitality Enterprises Company (“Concord” or “Company”), a corporation organized and existing under the laws 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

The purpose of this Agreement is to aid and encourage the development of the property located at 1108 W. Main Street, while preserving certain architectural elements of the historic McPherson Hospital. The property is located inside the Downtown Development Tier of the City of Durham. The City Council has found that the construction of the capital improvements to be made by the Company is likely to have a positive effect on the revitalization of the City of Durham’s downtown business district. The City Council also finds that it is in the City’s interest and of benefit to the Trinity Park neighborhood to preserve important architectural features of the historic McPherson Hospital, which front and partial side building facades will be incorporated into the Use Development Requirements.

2. DEFINITIONS

2.1. “Capital Investment,” refers to expenditures that are subject to City and County property taxes and are similar to the types of capital investment expenditures defined in the Resolution for an Economic Development Financial Assistance and Job Creation, Job Retention and Capital Investment Approved by the City Council on April 4, 2011.

2.2. “Certificate of Compliance,” refers to 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.

2.3. “City Payment,” refers to the payments the Company is eligible to receive if the Company meets the conditions of this Agreement.

2.4. ”Construction Activities,” refers to activities necessary for the construction of the Use Development Requirements to the Property evidenced by the required issuance of a city building permit equal to at least 25% of the Minimum Required Capital Investment.

2.5. “Continuous Operation,” refers to the operations of the hotel after completion of the Property into a 143-room hotel available to accept hotel room occupants at least 95% (i.e.,

346 days) of the applicable year.

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

2.7. “Minimum Required Capital Investment,” refers to a minimum expenditure of at least \$22,200,000 in Capital Investment to be made in the Property pursuant to the terms of the Agreement.

2.8 “McPherson Architectural Elements” refers to the architectural elements of the historic McPherson Hospital, which must be preserved by the Company as part of the Use Development Requirements. The specific McPherson Architectural Elements are detailed under Section 3.1.3 below.

2.9. “Property,” refers to the property located at 1108 W. Main Street identified by the following Durham County tax parcel identification number: 101908.

2.10. “Use Development Requirements,” refers to the specific development improvements or renovations to be made to the Property by the Company, which development shall deliver a 143-room hotel.

3. PARTY REQUIREMENTS AND OBLIGATIONS

3.1. Company Requirements for City Payment. As a precondition to eligibility for City Payments and to maintain continuing eligibility for City Payments, Company shall comply with the following requirements:

3.1.1. Commencement and Completion of Construction. The Company shall begin Construction Activities no later than January 1, 2014 (“Commencement Date”) and secure a final Certificate of Compliance by June 30, 2015 (hereinafter, “Completion Date”).

3.1.2. Use Development Requirements. As part of the Use Development Requirements, the Company shall cause to be invested the Minimum Required Capital Investment in connection with development of the Property that meets the Use Development Requirements. The Company shall provide marketing material or other appropriate documentation verifying the type and quantity of use development for the Property necessary to comply with the Use Development Requirements.

3.1.3 McPherson Architectural Elements. The Company shall incorporate the existing front and partial side facades of the original McPherson hospital as an integral part of the Use Development Requirements. The completed Use Development Requirements must preserve, maintain, or restore the McPherson Architectural Elements consistent with the original appearance. The McPherson Architectural Elements shall

include the following:

3.1.3.1 Roof and Roofline

- (a) Hipped roof with central palladian dormer
- (b) Eaves with modillions and denticulated cornice

3.1.3.2 South (West Main Street) Facade

- (a) Three story, symmetrical brick façade
- (b) Double-hung windows with monolithic keystones and sills vertically aligned in columns
 - (i) 2nd and 3rd floor center windows are comprised of three window units: a 6 over 6 unit flanked by narrow 4 over 4 units on either side
 - (ii) 1st, 2nd, and 3rd floor windows to the left and right of the center windows are 8 over 8
- (c) Balustraded widow's walk balcony at center third floor window supported by two sets of three square columns (arranged in an L configuration at the front corners of the stoop) and two pilasters engaged at the facade
- (d) Juliet balcony with metal railing at 2nd floor center window
- (e) 15-light first floor center door with single light sidelights on either side and half round transom; full door surround around transom and sidelights with keystone to match windows

3.1.3.3 East and West Facades -- Double-hung windows with monolithic keystones and sills vertically aligned in columns

- (a) 2nd and 3rd floors have three units each floor: two discrete 6 over 6 units next to a single 8 over 8 units located closest to the south facade
- (b) 1st floor has two 8 over 8 units; one centered under the pairs above and the other aligned with the same units above

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

3.1.4.1. Company shall meet with the Director of the City's Office of Economic and Workforce Development ("Director" and "OEWD", respectively) prior to the Company entering into any contract(s) for construction of the Property in order to discuss potential contracting opportunities for goods and services or construction and repair work with Durham-based firms.

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

identified Durham-based firms.

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

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

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

3.1.4. Maintenance of Jobs through Continuous Operations. Subject to Section 23 below and to ensure job creation and maintenance, the Company shall maintain the hotel in Continuous Operation throughout the term of this Agreement in order to retain its eligibility for ongoing City Payments. Failure to maintain Continuous Operations shall result in the forfeiture of all subsequent City Payments and this Agreement shall terminate. Notwithstanding the Continuous Operations requirement, the Company shall be permitted to temporarily cease operations at the hotel for a period not to exceed 60 days one time during any five year period.

3.2. City Obligations to Pay Incentives. After the Company has satisfied the preconditions of Sections 3.1.1, 3.1.2, and 3.1.3, the City agrees to make an initial incentive payment (for "Year 1") to the Company according to the conditions of this Section 3.2. In order to be eligible for the remaining City Payments Year 2 through Year 8, the Company must also comply with the requirements of Section 3.1.4 for each consecutive year to remain eligible for each annual payment. The amounts of each annual City Payments shall be as follows:

Year 1 = \$215,275
Year 2 = \$156,933
Year 3 = \$167,514

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Year 4 = \$170,204
Year 5 = \$151,217
Year 6 = \$154,071
Year 7 = \$157,012
Year 8 = \$160,040

The total maximum possible City Payments shall not exceed \$1,332,266.00 over the term of this Agreement.

3.2.1. Invoicing and Timing of Incentive Payments -- The Company shall send invoices to the City for the aforementioned City Payment amounts to be paid pursuant to this Agreement. Each invoice shall document, to the reasonable satisfaction of the City: confirmation that the Company has complied with required preconditions to be eligible for the City Payments, including such additional information as may be reasonably requested by the City. Within 60 days after the City receives a City Payment invoice, with appropriate documentation, the City shall send the Company a check for the applicable City Payment.

3.2.1.1 Year 1 City Payment Timing. Upon establishment of the First Date of Operations, the Company may invoice the City for the Year 1 City Payment no earlier than January 1 of the calendar year after the 1st year anniversary of the First Date of Operations. By way of example, if the First Date of Operations is determined to be March 1, 2015, the earliest that the Company could invoice the City for the Year 1 City Payment would be January 1, 2017. If, however, the First Date of Operations was established to be December 20, 2014, the earliest the Company could invoice the City for the Year 1 City Payment would be January 1, 2016.

3.2.1.2 Year 2 through Year 8 City Payment Timing. The Company may invoice the City annually for each City Payments Year 2 through Year 8 beginning on the 1st anniversary of the Company's receipt of the Year 1 City Payment. To be eligible for each annual City Payment, the invoice shall show proof of compliance with Section 3.1.4 (Maintenance of Jobs through Continuous Operations).

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 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 Property. 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 Property. Notwithstanding the foregoing, the Company shall not be prohibited from seeking or obtaining the continuation of the existing landmark status of the 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 Payment otherwise required and shall allow the City to seek reimbursement for all City Payment made as of the date of non-compliance by the Company of this Section 3.4 in an amount equal to the City Payment(s) made to the Company for the year(s) during which such ad valorem property tax exemption applied.

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 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:

Attn:

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

Director
Office of Economic and Workforce Development
City of Durham
302 East Pettigrew Street, Suite 190
Durham, North Carolina 27701
FAX – 919-560-4986

6. CHANGE OF ADDRESS. DATE NOTICE DEEMED GIVEN

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

7. EEO PROVISIONS

During the performance of this Agreement the Company agrees as follows: (1) The Company shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, national origin, political affiliation or belief, age, or handicap. The Company shall take affirmative action to insure that applicants are employed and that employees are treated equally during employment, without regard to race, color, religion, sex, national origin, political affiliation or belief, age, or handicap. Such action shall include but not be limited to the following:

employment, upgrading, demotion, transfer, recruitment or advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship. The Company shall post in conspicuous places, available to employees and applicants for employment, notices setting forth these EEO provisions. (2) The Company shall in all solicitations or advertisement for employees placed by or on behalf of the Company, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, national origin, political affiliation or belief, age, or handicap. (3) The Company shall send a copy of the EEO provisions to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding. (4) In the event of the Company's noncompliance with these EEO provisions, the City may cancel, terminate, or suspend this contract, in whole or in part, and the City may declare the Company ineligible for further City contracts. (5) Unless exempted by the City Council of the City of Durham, the Company shall include these EEO provisions in every purchase order for goods to be used in performing this contract and in every subcontract related to this contract so that these EEO provisions will be binding upon such subcontractors and vendors.

8. CITY POLICY

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

9. ASSIGNMENT. SUCCESSORS AND ASSIGNS

Without the City's written consent, the Company shall not assign (which includes to delegate) any of its rights (including the right to payment) or duties that arise out of this Agreement. The City Manager may consent to an assignment without action by the City Council. Unless the City otherwise agrees in writing, the Company and all assignees shall be subject to all of the City's defenses and shall be liable for all of the Company's duties that arise out of this Agreement and all of the City's claims that arise out of this Agreement. Without granting the Company the right to assign, it is agreed that the duties of the Company that arise out of this Agreement shall be binding upon it and its heirs, personal representatives, successors, and assigns. Notwithstanding the foregoing limitations on assignment, the City's consent shall not be required for an assignment of the Company's rights and duties hereunder if: a) the Company makes such assignment to any entity that is under majority control of the Company; or b) the Company makes such assignment in connection with the sale of the Property, but the property continues to be operated as a Residence Inn by Marriott hotel pursuant to a management agreement between the purchaser and Company (or other entity under majority control of Company).

10. DEFAULT. TERMINATION. –If the Company fails to fulfill any of its material obligations under the Agreement, or if any certification made by the Company is materially false, then in that event, subject to the notice and cure provisions in Section 25, the City may hold the Company in default and (a) terminate this Agreement and make no further payments to Company, and (b) in the case of a materially false certification by Company, recover all prior payments and reasonable direct expenses incurred by the City in connection with the Company's materially false certifications or failure to fulfill its obligations pursuant to this Agreement, including reasonable attorney's fees. If the Company does not deliver to the City the

certification of compliance with Section 3.1, and does not seek payment under Section 3.2., the Company shall not be considered in default for failing to deliver the required certification. In the event the Company fails to provide such required certification(s) pursuant to Section 3.1 above within 18 months after the First Date of Operations, either party shall have the right to terminate this Agreement. The Parties agree that the only obligation of the City under this agreement is to pay the company the City Payment pursuant to the terms herein under Section 3.2. Accordingly, if the City defaults on its obligation to make such incentive payment pursuant to this Agreement, the Company's sole claim or remedy at law shall be the value of the incentive payment(s) that the City was found obligated to pay, including reasonable direct expenses and attorney's fees incurred in obtaining such incentive payment.

11. 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. The exclusive forum and venue for all actions arising out of this Agreement shall be the North Carolina General Court of Justice, in Durham County. Such actions shall neither be commenced in nor removed to federal court. This subsection shall not apply to subsequent actions to enforce a judgment entered in actions heard pursuant to this section.

12. MODIFICATIONS. ENTIRE CONTRACT

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

13. CITY MANAGER'S AUTHORITY

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

14. PRINCIPLES OF INTERPRETATION AND DEFINITIONS

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

15. EXHIBITS

The following exhibits are made a part of this Agreement:

Exhibit A, "Durham Based Business Plan," (containing 5 pages);

Exhibit B, "Workforce Development Plan," (containing 4 pages); and,

Exhibit C, "City of Durham Subcontractor Quarterly Record of Payment Report," (containing 2 pages).

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

16. INDEMNIFICATION

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

17. WAIVER

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

18. PERFORMANCE OF GOVERNMENT FUNCTIONS

Nothing contained in this contract 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.

19. SEVERABILITY

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

20. COMPLIANCE WITH LAW

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

21. NO THIRD PARTY RIGHTS CREATED

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

22. TIME PERIODS.

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

23. FORCE MAJEURE.

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

24. REGULATORY PROCESS.

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

25. CURE PERIOD.

No default by either party hereto shall result in a termination or limitation of any rights of such party hereunder unless and until the other party shall have notified the defaulting party in writing

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of said default, and the defaulting party shall have failed to cure said default within thirty (30) days after the receipt of said written notice provided, however, that if the default cannot, by its nature, be cured within such thirty (30) day period, but the defaulting party commences and diligently pursues a cure of such default promptly within the initial thirty (30) day cure period, then the other party shall not exercise its remedies or limit the rights of the defaulting party unless such default remains uncured for more than ninety (90) days after the initial delivery of the other parties original default notice; provided, however, that the cure period for any default related to the making of the Capital Investment shall be one hundred eighty (180) days.

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

[SIGNATURES APPEAR ON FOLLOWING PAGE(S)]

ATTEST:

CITY OF DURHAM

_____ By: _____

Pre Audit Certificate

**CONCORD HOSPITALITY
ENTERPRISES COMPANY**

By: _____ (SEAL)
Title of officer: _____

[The following officers may sign for the corporation: chairperson; president; chief executive officer; vice-president; assistant vice-president; treasurer; or chief financial officer.]

State of _____

**ACKNOWLEDGMENT BY
CONCORD HOSPITALITY
ENTERPRISES COMPANY**

County of _____

I, a notary public in and for the aforesaid county and state, certify that

_____ personally appeared before me this day and stated that he or she is (strike through the inapplicable:) chairperson/ president/ chief executive officer/ vice-president/ assistant vice-president/ treasurer/ chief financial officer of CONCORD HOSPITALITY ENTERPRISES COMPANY, a corporation, and that by authority duly given and as the act of the corporation, he or she signed, under seal, the foregoing contract or agreement with the City of Durham. This the _____ day of _____, 20_____.

My commission expires:

Notary Public