UTILITY EXTENSION AGREEMENT FOR WATER, SEWER, AND STORMWATER SERVICES

THIS UTILITY EXTENSION AGREEMENT (hereafter "Contract"), is made and entered into as of the ___ day of _____, 2014, by and between **DURHAM IMPERIAL INVESTORS, LLC** (hereafter "Developer") and the **CITY OF DURHAM,** a North Carolina municipal corporation (hereafter the "City");

WHEREAS, the Developer proposes to extend City water to serve **FIFTY FOUR PLAZA,** a proposed commercial development with approximately 4,000SF of restaurant space, 20,000SF of retail space and 9,000SF of office space, located at 5082 and 5904 South Miami Boulevard, southwest of the intersection of South Miami Boulevard and Emperor Boulevard, further described as PIN 0747-03-32-9022 and 0747-03-32-8264 ("the Property").

WHEREAS, the Developer requires water service that will connect to the City's water systems in order to enable construction of the above described development or such other development as may be approved by the Durham City Council; and

WHEREAS, the Property is outside the City limits and Developer has submitted a petition for annexation of the Property to the City;

WHEREAS, the City is not obligated to offer utility service to property outside its corporate limits and requires, among other things, that such properties enter into an extension agreement and be annexed into the City, unless annexation is excused by the City Council;

WHEREAS, unless annexation has been excused by the City Council, the City's obligations under an extension agreement are effective upon the effective date of City annexation of the property;

WHEREAS, under City ordinance, Developer is required to pay all costs associated with the extension agreement, in particular the water, sewer, and stormwater infrastructure, street infrastructure for streets that contain such systems, and other related costs; and

WHEREAS, at its meeting held _____, the City Council authorized this Contract in accordance with the terms set forth below;

NOW THEREFORE, in consideration of ten dollars and other valuable consideration, the receipt of which is hereby acknowledged, the Developer and the City, and their heirs, successors, and assigns agree:

1. **Included Appendices.** Appendix A (Annexation) and Appendix B (Project Specific Provisions) are a part of this Contract.

2. **Effective Date.** If Appendix A (Annexation) has been included in this Contract, the City's obligations under this Contract are effective upon the effective date of City annexation. This Contract creates no obligation for the City to annex the Property or to proceed on any

particular timetable, which decisions shall be in the discretion of the City Council. In the event the Property is not annexed, this Contract shall be null and void unless the City Council approves a modification to allow extension of utility services without annexation. If Appendix A (Annexation) is not part of this Contract, the obligations of this Contract shall become effective upon execution by the parties.

3. **Definitions and Rules of Interpretation.** In this Contract, the following terms, whether capitalized or not, shall have the meanings set forth below, unless it is clear in the Contract that the context requires otherwise. In addition, the rules of interpretation set forth below shall apply.

"City" means the City of Durham.

"City Requirements" mean all ordinances, policies, standards, and specifications prescribed by the City applicable to the development activity, work, or construction undertaken pursuant to this Contract. Such Requirements may include, but are not limited to, the Unified Development Ordinance, the City Code, and standards for processing of and construction of infrastructure many of which are contained in the City's Reference Guide for Development maintained by the City Department of Public Works.

"Developer" is the owner of the Property, and is the entity identified in the first paragraph of this Contract. "Developer" includes successors in interest and assigns.

"Improvements" means all infrastructure required by the City that allows water and sewer to be delivered to or from the Property and integrated into the City's utility system, and all infrastructure, which may include natural features, that allows stormwater from the Property to be managed in accordance with City Requirements. It includes, but is not limited to, lines, mains, outfalls, water and sewer connections to the street mains including meter box and meter yoke, water meters to the extent required under City Requirements, all construction and repair to streets and rights of way within which water, sewer, or stormwater infrastructure is located, pump stations, water towers, water booster stations, and all natural and constructed stormwater infrastructure that carries or treats stormwater, or mitigates the impact of stormwater. It may include, if allowed under City Requirements, natural features and improvements located on individual lots to the extent they are part of the planned stormwater system or contribute to meeting water quality requirements. "Person" includes natural persons, firms, companies, associations, partnerships, trusts, corporations, governmental agencies and units, and other legal entities.

"Project" means the development approved by the Durham City Council for the Property through a zoning action, and any development agreement that, if also approved, would establish additional conditions for such zoning.

"Property" means the land located at PIN 0747-03-32-9022 and 0747-03-32-8264.

"Water and/or sewer" refer to the particular utilities being installed by Developer, which may include water only or sewer only, or both, as generally described in Appendix

B and as ultimately determined through City review of site plans and construction drawings.

The following rules of interpretation apply: (1) The singular includes the plural, and the plural the singular; (2) The word "shall" is mandatory.

4. **Developer's Obligation.** The Developer shall bear the total cost and expense of all the obligations and duties created by this Contract unless otherwise explicitly stated in this Contract. Those obligations and duties are, generally, to create all Improvements as may be required by the City in accordance with this Contract and with City Requirements. Such Improvements include but are not limited to: i) all Improvements within the Project; ii) all Improvements connecting to water, sewer, or stormwater infrastructure outside the Project, whether existing or planned; iii) modifications to any existing water, sewer, or stormwater infrastructure outside the Project that facilitate provision of utility service to the Project, or compliance with City Requirements, or integration of the Improvements with the surrounding existing or planned water, sewer, or stormwater system; and iv) new streets or alterations to existing streets or rights of way within which the Improvements are located. The Developer's obligations also include all costs, including but not limited to legal costs, of acquiring all fees or easements within which the Improvements will be located.

5. **Improvements.** A general description of the Improvements to be constructed to serve the Project is set forth in Appendix B. The final determination of the number, scope, size, materials, and location of required Improvements shall be as determined in the discretion of the City with jurisdiction over the utility service provided and shall be made in connection with site plan and construction drawing approval.

6. **Street work.** Streets within the Project shall be constructed in accordance with City Requirements, which include payments for installation of particular types of streets.

7. **City Requirements.** Design, construction, materials, sizing, other specifications, permitting, inspections, testing, documentation and furnishing of as-built drawings, and acceptance of completed infrastructure shall be in accordance with City Requirements. Design and construction shall be by professionals licensed in the state of North Carolina to do the relevant work. City approval of the design of the Improvements shall be required prior to construction, as set forth in City Requirements. If Developer is connecting to the County sewer system, the City may require Developer to furnish the contract providing for such connection.

8. **Contracts.** Developer shall ensure that its contracts for design and construction of the Improvements do not shorten or limit any otherwise applicable warranties or statutes of limitation. In addition, Developer shall ensure that such contracts contain an assignment clause that allows assignment of any warranties regarding the constructed Improvements to the City. For certain Improvements, the City may require that Developer's contracts identify the City as a 3rd party beneficiary, or may require prior consultation regarding contractors for the project. If such requirements are applicable to this Project, it shall be shown in Appendix B, or the City will notify Developer in a timely manner of such requirements prior to the Developer's contracting for Improvements.

9. **Compliance; Permits**. All activity undertaken pursuant to this Contract shall be in compliance with federal and state law and regulations and City Requirements. Developer shall obtain all permits and approvals required to do the work authorized under this Contract.

10. **Conflicts.** In the event of conflict between this Contract and any law, state or federal regulation, or City Requirements, the stricter of the applicable provisions shall control.

11. **Testing.** Developer shall pay for any testing deemed necessary to determine that the Improvements, and their environmental impact, comply with federal or state law and regulations, or City Requirements.

12. **Dedication to City.** With the exception of Improvements that are designated in Appendix B or in site plan approvals as private, upon completion of the Improvements in accordance with City Requirements, the Developer shall dedicate to the City, in the manner specified by the City, the Improvements located within public streets, and all outfalls, pump stations, water booster stations, and water towers. In addition, any property in which the Improvements are located shall be dedicated if it has not already been dedicated. The City shall thereafter be responsible for maintenance. The determination as to whether the Improvements comply with City Requirements shall be made by the Director of Public Works or designee in his or her sole discretion. The City may require, among other things, certified as-built plans for the Improvements; a release of liens from contractors and subcontractors; additional plats or deeds for property containing the Improvements; releases of any mortgage or security interests in such property; and any other information the City deems to be necessary to accept the constructed Improvements.

13. **Warranty/Repair.** Developer warrants that the Improvements shall be constructed in accordance with City Requirements and other applicable professional standards, fit for the purpose for which they were constructed, and free from defects for a one year period which shall run from the time of acceptance by the City. Developer shall be responsible for repairs needed during the one year period. Upon request by the City, Developer will assign any warranty rights it has under its contracts to the City.

14. **City Extensions.** Developer agrees that in accordance with City Requirements, the City may make extensions from or connections to water, sewer, and stormwater improvements that it has dedicated to the City. City Requirements provide for reimbursements to be made to the Developer for such connections/extensions in certain circumstances. If such are available under this Contract, they are described in Appendix B.

15. **Assignments/Reimbursements.** Developer shall notify the City in writing of any assignment of the obligations under this Contract and/or change in the entity to receive reimbursements under this Contract, in the event that future reimbursements are provided for in Appendix B or pursuant to City Requirements. An assignment by Developer of the obligations under this Contract does not limit the obligations of successor owners of the property unless i) the assignee owns a substantial part of the property; and ii) there is a written modification of this Contract approved by the parties to replace the Developer with the assignee to the exclusion of

other owners. If reimbursements are provided for under this Contract, they shall be made to the original Developer or to a successor in interest who has been identified in writing as entitled to the reimbursements. In the absence of a party that legally exists that has been identified as entitled to the reimbursements, the City shall hold the reimbursements for three years from the various dates they are received. After the three year period, the reimbursements shall be forfeited to the City. The City may, but is not required to, provide notice of potential reimbursements to successors in interest to the original Developer. In the event of dispute between owners claiming an interest in the reimbursements, the City shall hold the reimbursements until legal resolution, if a lawsuit has been filed. If legal action is not filed within three years, the reimbursements shall be forfeited to the City. Identification of new owners entitled to reimbursements shall be in a manner which in form and substance meets the City's directives.

16. **No obligations.** This Contract does not create any express or implied obligation that the City: i) reserve or create water or wastewater treatment capacity; ii) approve a permit or connection, which shall be granted only upon compliance with all requirements of law, including City Requirements; iii) offer utility services to any user within the Project; iv) provide a particular quantity. quality, or pressure for the water serving the Project; v) waive or not charge fees that are otherwise applicable pursuant to City Requirements; or vi) approve annexation of the Property or a particular zoning of the Property.

17. **No vesting.** Developer agrees that no vested rights exist that would impact the City's consideration of its proposed development, and that no vested rights shall be claimed for the proposed development until and unless annexation and zoning are approved, if they are approved, and such further development approvals are given as would, under the law, create a claim regarding vested rights.

18. **Contract a Covenant that Runs with Land.** The obligations and entitlements of this Contract are covenants that run with the Property, and are binding on all heirs, assigns, successors in interest, and other subsequent owners. Within 30 days of Contract execution, Developer shall record this Contract, and shall furnish the City a copy of the recorded document and a statement from an attorney licensed to practice law in North Carolina, in form and substance acceptable to the City, that the Contract has been recorded, and that the obligations of the Contract are binding upon all subsequent owners of the Property. No development approvals shall be issued by the City in the absence of recordation and certification as described above.

19. **Notice.**

(a) *Mode and Designated Recipients.* All notices and other communications given under this Contract shall be written, and made by personal delivery, fax, Federal Express, or United States mail, addressed as follows. The parties are also requested to send a copy by email.

<u>To the City:</u>
Public Works Director
Department of Public Works

City of Durham
101 City Hall Plaza
Durham, NC 27701-3329
Fax: (919) 560-4316
Email: marvin.williams@durhamnc.gov

To the Developer:
Durham Imperial Investors, LLC
100 Weston Estates Way
Cary, NC 27513
Phone: 919-481-3000

(b) *Change of Address*. Notice of a change of address, fax number, or person to receive notice shall be provided to the other party in writing through one of the means described above.

(c) *Time of Receipt*. A notice or other communication is effective upon delivery to the other party if it is personally delivered or sent by fax. Notice sent by mail or Federal Express is effective upon the second work day after the date it was sent, as evidenced by a postmark or similar indicia, or upon actual delivery.

20. **No Third Party Rights.** This Contract is intended for the benefit of the City and Developer and not for any other Person, and no such Persons shall enjoy any right, benefit, or entitlement under this Contract.

21. **Nondiscrimination Policy; EEO.** The City of Durham opposes discrimination on the basis of race and sex and urges Developer to provide a fair opportunity for minorities and women to participate in its work force and to contract with Developer. During the performance of this Contract Developer agrees that it 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.

22. **Governmental Authority Retained.** Nothing contained in this Contract shall be deemed or construed to in any way stop, limit, or impair the City from exercising or performing any regulatory, policing, legislative, governmental, or other powers or functions, or shall limit the City's discretion in the exercise of such powers and functions.

23. **Remedies; Breach.** The parties shall have all remedies allowed by law to enforce this Contract. Substantial breach of this Contract shall result in the Contract becoming void, at the election of the nonbreaching party. Prior to voiding the Contract, the party alleging a substantial breach shall give notice to the other party and shall afford an opportunity to cure of at least 60 days. In addition, in the event of breach by Developer, the City may withhold any permit or approval related to development, construction, or occupancy in the Project. Enumeration of these remedies is not exclusive.

24. **Services Dependent on Improvements.** The City's furnishing of water and/or sewer service to “the Property” described in this Contract is dependent upon completion of the Improvements. In the event Developer does not complete the Improvements, Developer and its successors in interest shall have no entitlement to receive water and/or sewer service. Entitlement to water and/or sewer service is dependent upon: annexation (if required); city zoning; completion of and conformance with this Contract; construction of the Improvements by Developer or its successors in interest; water and/or sewer capacity at the time of completion; and compliance with all other lawful requirements.

25. **Termination.** Developer's failure to initiate substantial construction activity within five years of execution of this Contract, and continue said construction expeditiously toward completion, with adequate forces, and in good faith may result in termination of this Contract, at the election of the City. The City's Public Works Director shall determine if such failure exists, and shall notify Developer in writing. Developer shall have at least 90 days to initiate or increase construction activity. Final notice of termination shall be given by the City Manager or a Deputy City Manager.

26. **Waiver.** No action or failure to act by the City shall constitute a waiver of any of its rights or remedies that arise out of this Contract, or constitute approval of or acquiescence in a breach thereunder, except as may be specifically agreed in writing.

27. **Contract not Severable.** In the event any substantive provision of this Contract is declared unenforceable the Contract shall become void. This paragraph, however, does not prohibit the parties from agreeing to eliminate or modify the unenforceable provision or enter into a new agreement.

28. **Modifications.** Substantial modifications of the Contract shall be approved by the City Council. Minor modifications, modifications of Appendix B regarding Improvements, and substitution of an assignee owner of a substantial portion of the Property for the original Developer may be approved by the City Manager or deputy or assistant City Manager without Council approval. Without exclusion as to other minor modifications, a modification to the Project which both reduces the overall density of and utility demand within the Project or which would not be considered to be a significant deviation under the standards set forth in Section 3.5 of the Unified Development Ordinance is a "minor modification" under this Paragraph. A modification of this Contract is not valid unless it is signed by both parties and is otherwise in accordance with requirements of law. Further, a modification is not enforceable against the City unless it is signed by the City Manager or a deputy or assistant City Manager.

29. **Recordation of Status of Agreement.** The City shall cooperate with the Developer in executing any form to be filed by the Developer in the event that the Contract is voided, terminated or superseded, or its requirements are fully satisfied.

30. **Entire Agreement.** This Contract contains the entire agreement between the parties pertaining to the subject matter of this Contract. 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.

31. **Choice of Law and Forum; Process Agent.** This contract shall be deemed made in Durham County, North Carolina. This contract 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 contract 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 limitation, however, shall not apply to subsequent actions to enforce a judgment entered in actions heard pursuant to this subsection. Developer shall maintain a registered agent in North Carolina with the office of the N. C. Secretary of State.

32. **Indemnification.**

a. *Definitions.* In this Section 16 the following definitions shall apply:

"Claims" are claims, losses, damages, liabilities, fines, penalties, fees, royalties, costs, demands, actions, suits, and judgments of any kind or nature whatsoever, whether at law or in equity, including court costs and reasonable attorney's fees assessed as part of any of said items.

"Persons Connected with Developer" are Developer's officers, members, managers, board members, employees, agents, contractors, subcontractors of all tiers, and invitees, but excluding the City.

"City Indemnitees" are the City, its officers, officials, employees, agents, and independent contractors, but excluding Company.

b. Obligation. Developer shall indemnify, defend, and hold harmless the City Indemnitees from and against all Claims arising out of, relating to, or resulting from acts or omissions by Developer or Persons Connected with Developer arising out of, relating to, or resulting from Developer's obligations with respect to this Contract. Without limiting the preceding sentence, and as an additional obligation, it is agreed that Developer shall indemnify, defend, and hold harmless the City Indemnitees from and against all Claims made by its contractors, including subcontractors of all tiers, where the contractor was engaged by Developer to perform work pursuant to this Contract, except to the extent the Claim is the result of a negligent or wrongful act or omission by any of the City Indemnitees. In performing its duties under this Section, Developer shall defend City Indemnitees with legal counsel reasonably acceptable to City.

c. Survival. This Section shall remain in force despite termination of this Contract with respect to acts or omissions occurring before termination of this Contract (whether by expiration of the term or otherwise).

33. **E-Verify Compliance**. The contractor represents and covenants that the contractor and its subcontractors comply with the requirements of Article 2 of Chapter 64 of the North Carolina General Statutes (NCGS). The City is relying on this E-Verify Compliance section in entering into this contract. The parties agree to this section only to the extent authorized by law. If this

section is held to be unenforceable or invalid in whole or in part, it shall be deemed amended to the extent necessary to make this contract comply with NCGS 160A-20.1(b).

IN **TESTIMONY** WHEREOF, the parties hereto have executed this Contract as of the dates shown below.

APPENDIX A -ANNEXATION PROVISIONS

1. The Developer shall ensure that all actions are taken to ensure that the Property may be legally annexed by the City. Developer shall ensure that the annexation petition it has submitted and all supporting documents and certifications required by the City are updated as required in the discretion of the City and remain valid until the City Council gives final approval or disapproval to the annexation. Prior to the effective date of annexation, if the City determines to annex the Property, Developer shall not seek any development approvals from any governing unit other than the City of Durham. Such approvals include but are not limited to zoning (if it has not already been granted by the County for the development), and, in addition, site plans, preliminary plats, final plats, building permits, or construction drawings for properties or buildings contained within the Property. Applications for approval of a sedimentation and erosion control permit may be made to the County but if granted, no activity shall be conducted pursuant to any such approval.

2. A valid annexation petition shall consist of a petition signed by all owners of and within the Property that meets the requirements of State law for petitioned annexation for contiguous or noncontiguous areas, whichever is applicable. Necessary supporting documents shall include a certificate of title for the Property, current as of the date of submittal to the City, a metes and bounds description of the Property, a map of the Property that corresponds to the metes and bounds description of the Property, and any other information specifically requested by the City.

3. The City may terminate this Contract, and/or refuse to provide such service to any part of the Property, and/or void or deny permits to construct water and/or sewer lines to any part of the Property if the Developer does not comply with the annexation provisions of this Contract.

4. In the event the Property includes lots that have already been developed, or have already received building permits, Developer shall pay to the City the equivalent of the City's impact fees for such lots, calculated as of the date of execution of this Contract, unless the proposed development for the Project to be approved by City Council eliminates the already existing development from the Property. Such payment shall be made to the Department of Inspections prior to the approval of the first additional building permit requested within the Property, and prior to issuance of permits for construction of water and/or sewer lines within the Property.

APPENDIX B -PROJECT SPECIFIC PROVISIONS

1. Water service shall be provided by extending a waterline into the property from the existing 16-inch waterline in South Miami Boulevard. Water lines shall meet all City Requirements, including but not limited to size, design standards, loop feed requirements (with a second feed required prior to exceeding the 100th Certificate of Occupancy.), fire flow requirements, and system needs. There shall be no City participation in the cost. The Developer shall extend water lines through the Project to its boundaries as directed by the City to allow for future extension.

2. It is anticipated that sewer service will be provided by Durham County. Wastewater generated by City of Durham residents within the Northeast Creek Basin is treated at Durham County's Triangle Plant. The Developer is required to obtain all necessary approvals, permits, and easements from the City, Durham County, and/or any other party for any improvements to the wastewater collection and treatment systems required to serve the Project. All sewer Improvements, including size, location, and service area shall meet City and Durham County Requirements (in the case of a conflict the stricter of the two shall apply). There shall be no City participation in the cost. The Developer shall extend sewer and easements through the Project to its boundaries as directed by the City and Durham County to allow for future extensions. The Developer may request City or Durham County assistance in condemnation but, if approved, any acquisition shall be at the Developer's expense including reasonable attorney fees and all other litigation expenses and costs. If the Developer is unable to obtain a required approval from Durham County or any other party, Developer acknowledges that the City is under no obligation to provide an alternative means of wastewater treatment to the Project. This is consistent with the manner in which the City provides wastewater treatment service to all City residents within the Northeast Creek Basin.

3. The City will make refunds to the Developer for connections made by adjacent property owners to the City street water and/or sewer lines serving property not being developed by the Developer in accordance with City Requirements. These refunds will be made to the Developer for a period often (10) years after the completion of the water and/or sewer line. After ten (10) years have expired, charges made for connecting to the water and/or sewer lines will not be refunded to the Developer. These refunds will be in an amount equal to the frontage charge collected, not to exceed one-half the average cost to the Developer per linear foot of pipeline installed.

4. The Developer shall pay frontage charges at the prevailing rate to the City for any street frontages within or adjacent to the Project where the Developer does not install a City water or sewer line. These frontage charges shall be paid to the City prior to the time that the Project water or sewer lines are constructed (Section 70-17 of the City of Durham Code of Ordinances).

5. The Developer shall construct necessary Improvements to manage stormwater quantity, rate of runoff, and stormwater quality in accordance with City Requirements in effect at the time of site plan submission for each portion of the Project. Prior to submission of the first site plan within the Property, the Developer shall submit a plan that covers the entire Project that addresses storm water quantity and quality as required under City Requirements and that

proposes appropriate phasing of Improvements as part of such Plan. No site plan shall be issued until such stormwater plan is approved. In addition to compliance with City Requirements in effect at the time of site plan submission, the Developer shall ensure that any stormwater mitigation or offsite credits proposed as part of its stormwater plan is achieved within Durham County, or outside if none are available in Durham County, and meets any additional requirements regarding location that may exist in City ordinance at the time.

DURHAM IMPERIAL INVESTORS, LLC

By:_____
Manager

State of _____
County of _____

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

My commission expires: _____ _____
Notary Public

ATTEST **CITY OF DURHAM**

_____ By:_____

preaudit certificate, if applicable _____