

*Prepared by City of Durham Department of Public Works, 101 City Hall Plaza, 3<sup>rd</sup> Floor, Durham, NC 27701.*

*Please return to Department of Public Works – Storm Water Services Division, 101 City Hall Plaza, 3<sup>rd</sup> Floor, Durham, NC 27701.*

STATE OF NORTH CAROLINA  
COUNTY OF DURHAM

STORMWATER FACILITY AGREEMENT  
AND COVENANTS

ATTACHMENT A TO THE AGREEMENT FOR REIMBURSEMENT OF CITY REQUIRED INFRASTRUCTURE,  
ENTERED INTO BY THE CITY OF DURHAM AND J & F INVESTMENTS, L.L.C. ON \_\_\_\_\_.

**THIS AGREEMENT ("Agreement")** is made among **J&F Investments, LLC ("Former Permittee")**, **Windermere Ridge Townhome Owner Association, Inc. ("Association")**, and the **City of Durham**, a North Carolina municipal corporation ("City") and is effective on the date of its recordation in the Durham County Register of Deeds. All parties identified may be collectively referred to as "the Parties".

## **1. Background and Definitions**

a. Scope; Purpose. Former Permittee entered into a Stormwater Facility Agreement and Covenant ("Existing Agreement") with the City on April 11, 2007, and the Existing Agreement was recorded in Durham County Register of Deeds BK 5810, PG 328-336 on December 3, 2007. Under the Existing Agreement, Former Permittee is obligated to construct stormwater improvements to control stormwater runoff and pollution from the Windermere Ridge Townhomes development, which property is described in Exhibit A of "Declaration of Covenants, Conditions and Restrictions for Windermere Ridge Townhomes" recorded in Durham County Register of Deeds BK 4662, PG 739-773 (the "Covenants") and identified as "Phase One and Two" on Plat Book 164, pages 220 and 223, Durham County Registry as partially revised per that Plat of Recombination recorded in Plat Book 180, Page 332 and comprising approximately 6.55 acres (hereinafter referred to as "Windermere Ridge Property"). The Existing Agreement required that the stormwater improvements be constructed and located on a property adjacent to the Windermere Ridge Property; however, the parties agree that the design and location of such stormwater improvements should be modified now that the Association has requested and received approval of an amended site plan from the City for the Windermere Ridge Townhomes development. Accordingly, the revised location of the stormwater improvements ("Facility/ies") shall be in the southwest portion of the Windermere Ridge Property, southwest of Windermere Drive. The Association consents to and accepts the construction of the Facility/ies on the Windermere Ridge Property. The Association agrees that its obligations under this Agreement shall include the obligations and terms of the Existing Agreement, except as modified by this Agreement, and that the obligations of this Agreement shall apply to the Facility/ies to be constructed on the Windermere Ridge Property instead of the property referenced in the Existing Agreement. Upon approval by the City of

the completion of construction of the Facility/ies, the Association shall be responsible for the perpetual maintenance, annual inspection, repair, reporting to the City, and reconstruction of the Facility/ies, if necessary. The obligations of the Former Permittee under the Existing Agreement shall terminate upon approval by the City of the completion of construction of the Facility/ies and the execution of this Agreement by all Parties.

This Agreement sets forth the obligations of the Association to allow construction of the Facility/ies in accordance with the obligations of this Agreement and other City Requirements, to inspect and certify the Facility/ies, and to pay certain monies toward the future replacement of the Facility/ies. This Agreement is appurtenant to and runs with the Property, described in Section 1(b) below. The purpose of this Agreement is to ensure construction of the Facility/ies per City Requirements, to ensure the perpetual inspection, maintenance, repair, and reconstruction of the Facility/ies, and to allow the City in its discretion to enforce these requirements, if necessary, for the benefit of the Lot Owners and the public at large. Pursuant to Paragraph 3 of the Existing Agreement, this Agreement is intended to transfer the obligations of the Former Permittee under the Existing Agreement to the Association. In addition, this Agreement supplements, and in some cases modifies or changes, the obligations of the Association under the Existing Agreement. Where the terms of this Agreement conflict with or are different from the terms of the Existing Agreement, the terms of this Agreement shall control. By signing this Agreement, the Association agrees to be bound by the terms of the Existing Agreement as supplemented, modified, or changed by this Agreement.

b. Property to which this Agreement Attaches. The Property is that property defined above under paragraph 1(a) and referred to as the “Windermere Ridge Property.” The Facility/ies that must be constructed, certified, maintained, inspected annually, repaired, and reconstructed pursuant to this Agreement is a level spreader(s) as generally described by the drawings prepared by Coulter Jewell Thames entitled “\_\_\_\_\_” and dated \_\_\_\_\_ (“LS”). It is located in the southwest portion of the Windermere Ridge Property, southwest of Windermere Drive.

c. Background. This Agreement is intended to comply with City ordinances and policies that implement State and Federal laws that require that developments contain stormwater facilities to control runoff and pollution and that such facilities be perpetually maintained and reconstructed.

d. Relationship to Ordinances, Policies, and Guidelines. This Agreement supplements other City Requirements. If this Agreement and such City Requirements conflict, the stricter requirements shall control.

e. Definitions. The terms in this Agreement have the following definitions:  
“Association” and “HOA” (the terms being used interchangeably) means the association that has executed this Agreement that was formed in compliance with statutory requirements (which may include the North Carolina Nonprofit Corporation Act, NCGS Chapter 55A, and the North Carolina Planned Community Act, NCGS Chapter 47F and successor statutes) for the purpose of owning and maintaining real property and improvements thereon intended for the common benefit of - Lot Owners within the Property-. In the absence of the Association, for whatever reason, the Lot Owners, collectively, shall be considered the Association and shall be responsible for the Association’s obligations under this Agreement. The “Association” may also include additional associations or lot owners not shown on the Property where such associations or owners have joined, or purchased subject to, the obligations of the Association in this Agreement.

“City Manager” means the Durham City Manager or a Deputy City Manager to whom authority to execute contracts has been delegated.

“City Fund” means “Stormwater Facility Replacement Fund” as defined below.

“City Requirements” means the legal obligations and standards set forth in City ordinances, and written City and Public Works policies, guidelines, manuals, protocols, standards, and/or handbooks, as such may be amended from time to time.

“Director” means the City's Director of Public Works or the Director of a successor department to the Department of Public Works and any Person to whom the Director’s duties have been delegated pursuant to City

Requirements.

"Facility/ies" means one or more stormwater control device(s) and/or areas that are created for the purpose of detaining and/or treating stormwater. Such facilities may include but are not limited to dry detention areas, wet detention ponds, wetlands, level spreaders and all associated constructed and natural features that allow such devices or areas to function as intended.

"Lot" means a lot within the Property, whether developed or undeveloped.

"Lot Owner" means the legal owner of any fee simple interest in a Lot.

"Permittee" means the party that owns the Property at the time of recordation and that executes this Agreement and successors in interest who take all or a portion of the Property.

"Person" includes but is not limited to natural persons, business trusts, joint ventures, governments, governmental subdivisions, governmental agencies, firms, corporations, limited liability companies, associations, partnerships, and other legal entities.

"Site" means a Lot or parcel within the Property which contains at least one Facility. Where there are multiple Facilities, there shall be multiple Sites.

"Stormwater Facility Replacement Fund" (also "City Fund") is the fund established by the City under ordinance to receive payments from various permittees for future use in the construction, repair, and reconstruction of facilities for which payment into the fund has been made, or for replacement facilities that mitigate the burden on or need for such original facilities.

"Transfer" includes sell, convey, assign or alienate all or a portion of an interest in property.

## 2. New Terms:

The following terms in this Agreement supplement, modify, or change the terms of the Existing Agreement:

- a. Payment to Stormwater Facility Replacement Fund. At the time of delivery to the City of this Agreement properly recorded with the Durham County Register of Deeds, Association shall pay the estimated Stormwater Facility Replacement Fund payment, prescribed by City Requirements, which shall equal 25% of the estimated cost of constructing the Facility/ies, calculated in accordance with City Requirements ("Fund Payment"). In this case, the required Fund Payment is **\$0.00**.
- b. Budget Line Items for Stormwater Expenses. The dues of the Association shall include amounts for upkeep and reconstruction of the Facility/ies and charges for these purposes shall be included in the dues charged to Lots from the date of this Agreement for so long as the Facility/ies shall be required by the City Requirements. The Association shall maintain two (2) separate funds in its budget for the Facility/ies. The first ("Inspection and Maintenance Fund") shall be for routine, yearly Facility/ies expenditures -- annual inspections, maintenance, and routine repairs -- and the funds for this purpose may be maintained as part of the Association's general account. The second ("Major Reconstruction Fund") shall be dedicated to a separate, increasing reserve fund that will build over time and provide money for major repairs to and eventual reconstruction of the Facility/ies. The Major Reconstruction Fund shall be maintained in an account that is separate from the Association's general account as described below. At a minimum, the Association shall earmark **\$1,298** annually from its collected dues for the Inspection and Maintenance Fund and **\$166** annually for the Major Reconstruction Fund. These minimum amounts shall be increased annually by 3% per year over the prior year's amount. The Association may set a higher amount in its discretion. The Association shall set a higher amount if the Director determines, in his/her reasonable discretion that additional amounts are necessary to provide for adequate inspections and maintenance or for an adequate reserve fund. The Association shall set dues at a sufficient amount to fund each of the two line items in addition to the Association's other obligations. The Association may compel payment of dues through all remedies provided in the Covenants for the Property or otherwise available under law.
- c. Separate Account for Major Reconstruction Fund; Requirements for Withdrawal. The Association shall maintain the major reconstruction fund for the Facility/ies in an account maintained at a bank or other similar institution

and such account (hereinafter referred to as the “Major Reconstruction Fund”) shall be separate from the Association’s general account. The Association shall use the Major Reconstruction Fund only for major repairs and reconstruction of the Facility/ies. The signatures of two Association officers shall be required to withdraw funds from the Major Reconstruction Fund.

d. Engineer Report prior to Major Repairs and Reconstruction. Prior to withdrawing funds from the Major Reconstruction Fund the Association shall (i) obtain a written report from an engineer approved in accordance with City Requirements regarding repairs or reconstruction needed, the approximate cost of such repair or reconstruction; and (ii) submit such report to the Director and notify the Director of the major repairs or reconstruction to be undertaken on the Facility/ies, the proposed date, and the amount to be withdrawn from the Major Reconstruction Fund. In the event of an emergency withdrawal an expenditure of funds from the Major Reconstruction Fund may be made after telephone notification to the Stormwater Services Division of the Department.

e. Annual Reports to City. The Association shall provide to the Director annual reports in substance and form as set forth in City Requirements. This annual report shall be signed by an officer of the Association, who shall attest as to the accuracy of the financial information in such report. If prepared by a professional management company hired to manage the Association’s affairs, the report shall so indicate. The officer’s signature and attestation shall be notarized. At a minimum each report shall include:

- i. the annual Facility/ies inspection report required by Paragraph 2(e) of the Existing Agreement;
- ii. a bank or account statement showing the existence of and balance in the separate Major Reconstruction Fund at the time of submission of the report;
- iii. other information regarding the Facility/ies as may be required under City Requirements;
- iv. the amount of Association dues being set aside for the current year for each of the two purposes – the Inspection and Maintenance Fund, and the Major Reconstruction Fund.

f. Notice. When notice is required or permitted by this Agreement, it shall be given in writing to the City, delivered to the Director of Public Works, 101 City Hall Plaza, Durham, NC 27701, FAX: (919) 560-4316 or upon New Permittee at \_\_\_\_\_ and the Association, at \_\_\_\_\_. Written notice shall be sent by first class mail, and in addition by facsimile, if a fax address can be determined. Parties’ addresses may be changed by sending a notice of the new address attached to a copy of the first page and execution pages of this Agreement.

IN WITNESS WHEREOF, the parties hereto have respectively set their hands and seals, or if corporate, have executed this under seal by their proper officers, to be effective as of the date of its recordation in the Durham County Register of Deeds.

**J&F Investments, LLC**

Signed: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Title: \_\_\_\_\_

**STATE OF** \_\_\_\_\_  
**COUNTY OF** \_\_\_\_\_

I, \_\_\_\_\_, a notary public for said county and state, certify that \_\_\_\_\_ personally appeared before me this day, and acknowledged he or she is a manager of **J&F Investments, LLC**, a limited liability company organized and existing under the laws of North Carolina, acknowledged that the foregoing instrument carries on in the usual way the business of the LLC and acknowledged execution of the foregoing agreement under seal with the City of Durham on behalf of said company.

This the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Notary Public

My commission expires:  
\_\_\_\_\_

**Windermere Ridge Townhome Owner Association, Inc.**

ATTEST:

Signed: \_\_\_\_\_

Signed: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Title: \_\_\_\_\_ Secretary

Title: \_\_\_\_\_ President

[Affix Corporate Seal]

**STATE OF** \_\_\_\_\_

**COUNTY OF** \_\_\_\_\_

I, \_\_\_\_\_, a notary public for said county and state, certify that \_\_\_\_\_ personally appeared before me this day, and acknowledged he or she is \_\_\_\_\_ Secretary of **Windermere Ridge Townhome Owner Association, Inc.**, a North Carolina corporation, and that by authority duly given and as the act of the corporation, the foregoing contract with the City of Durham was signed in its name by its \_\_\_\_\_ President, whose name is \_\_\_\_\_ and attested by him/herself as its said Secretary or Assistant Secretary.

This the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Notary Public

My commission expires:

\_\_\_\_\_

**CITY OF DURHAM**

ATTEST:

\_\_\_\_\_  
City Clerk

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

*Type or print name person signing for the City:* \_\_\_\_\_

**ACKNOWLEDGMENT BY CITY OF DURHAM**

*Name of other party to the contract:* J&F Investments, Inc.; Windermere Ridge Townhome Owner Association, Inc.

*Title of the contract:* Stormwater Facility Agreement and Covenants

I, \_\_\_\_\_, a notary public, certify:  
(Type or print name of Notary Public)

(1) \_\_\_\_\_ personally appeared before me  
(Type or print name of City Clerk or Deputy City Clerk who attested)

in Durham County, N. C. on this day; (2) I have personal knowledge of her identity; and (3) she acknowledged that by authority duly given and as the act of the City of Durham, the foregoing document was signed in its corporate name by its \_\_\_\_\_ City Manager, sealed with its corporate seal, and attested by its said City Clerk or Deputy City Clerk.

This the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

My commission expires:

\_\_\_\_\_  
Notary Public

\_\_\_\_\_