

NORTH CAROLINA) **AGREEMENT FOR REIMBURSEMENT**
) **OF CITY REQUIRED INFRASTRUCTURE**
COUNTY OF DURHAM)

This AGREEMENT FOR REIMBURSEMENT OF CITY REQUIRED INFRASTRUCTURE (“Agreement”) is dated, entered and made on this the ____ day of _____, 20____, between the City of Durham (“City”) and J & F INVESTMENTS, L.L.C. (“J&F” or “Developer”) a limited liability company organized under the laws of North Carolina. The parties hereto agree as follows:

1.0 DEFINITIONS

1.1 “City Required Infrastructure” -- all infrastructure required by City ordinance or approved site plan(s), construction drawings, etc. and which infrastructure must be approved and/or accepted by the City. City Required Infrastructure includes, without limitation, public water and sewer utilities, streets, sidewalks, and stormwater facilities.

1.2 “Developers” -- J&F and/or other entities not identified but responsible for obtaining site plan approval of the Windermere Subdivision.

1.3 “Street Infrastructure” – that portion of the City Required Infrastructure that includes all streets and sidewalk related construction within the dedicated public right of way identified as Windermere Drive on the approved site plan for the Windermere Subdivision and detailed in the approved construction drawings.

1.4 “Stormwater Infrastructure” – that portion of the City Required Infrastructure that includes all stormwater related structures and improvements required by the City pursuant to the approved site plan and stormwater infrastructure construction drawings for the Windermere Subdivision;

1.5 “SW Agreement” – the Stormwater Facility Agreement and Covenant Version 082203 executed by J&F and recorded with the Durham County Register of Deeds on December 3, 2007 at BK: 5810, PG: 328-336;

1.6 “Windermere Fund” – the maximum amount of funds available from the City to reimburse Developer for performance of the Work. The Windermere Fund was \$70,000, however it has been reduced to \$69,500.00 due to payments already received by J & F pursuant to a separate contract between the City and J & F dated November 15, 2011;

1.7 “Windermere Subdivision” – the residential development located in north Durham off of Infinity Road, also known as the Windermere Ridge Townhomes (“Windermere Subdivision”) and having a City/County Planning Department Case Number D0800036; and,

1.8 “Work” – all work necessary to complete the City Required Infrastructure to the satisfaction of the City, which work includes, but is not limited, engineering design, surveying, project management, construction and repair related activities, and City fees (including Planning, Inspections, and Public Works fees). The Work includes all services that Developer is required to perform pursuant to this Agreement and all of Developer’s duties to the City that arise out of this Agreement.

2.0 RECITALS

2.1 The Developers previously obtained site plan approval from the City for a the construction and completion of Windermere Subdivision;

2.2 As part of the site plan approval process, the Developers were responsible for completing certain City required infrastructure within or for the benefit of the Windermere Subdivision, including, without limitation, public utilities, streets, sidewalks, and a stormwater facility. The obligations relating to the stormwater facility were further documented in SW Agreement;

2.3 As of January 2011, Developers had failed to complete the City Required Infrastructure for the Windermere Subdivision and the City drew Letters of Credit Nos. 2007-252 and 2007-253 from SOUTHBank posted by the Developers to ensure the completion of the City required infrastructure. The total value of the Letters of Credit draw is \$70,000.00;

2.4 The City met with the Developers to discuss the obligations of the Developers as to the completion of the Windermere Subdivision and various options for completion of the Street Infrastructure and the Stormwater Infrastructure; and,

2.5 Upon completion and approval by the City of Durham, the City agrees to reimburse the Developer up to \$70,000.00 for Work directly related to the satisfactory completion of the City Required Infrastructure (NOTE: Pursuant to a separate contract between the City and J & F, dated November 15, 2011, the City has already paid \$500.00 in engineering fees to J & F and thus, future reimbursements for Work directly related to the satisfactory completion of the City Required Infrastructure shall not total more than \$69,500.00).

3.0 Required Site Plan Amendment and Amended Construction Drawings. Developer shall prepare and submit to the City/County Planning Department (“Planning Department”) for review and approval an amended site plan for the Windermere Subdivision. The amendment shall show the revisions to the stormwater facility to be relocated in the common area south of the townhomes across Windermere Drive. The amended site plan must comply with all Planning Department requirements and applicable ordinances. After final approval of the amended site plan for the Windermere Subdivision, the Developer shall prepare and submit to the Public Works Department construction drawings for the revised stormwater facility, including any required utilities and street related work as a result of the site plan amendment review and approval process.

4.0 HOA Declarations & Recording of Revised Final Plat. Developer shall revise the plat originally recorded for the Windermere Subdivision in Plat Book 164, Page 223 in the Durham County Register of Deeds Office to show the new location of the required Stormwater Infrastructure and dedicated rights of way. Before recording the revised final plat, Developer shall provide to the City a copy of the recorded Home Owners Association (“HOA”) declarations and other relevant HOA documents for the Windermere Subdivision. The HOA declarations must indicate that the HOA has control and authority over the common area property where the Stormwater Infrastructure is to be located. If the HOA declarations fail to provide such authority, Developer shall cause the appropriate changes to the HOA declarations to allow the HOA to have authority and control over the common area where the Stormwater Infrastructure is to be located. After final approval by the City of the revised plat and adequacy of the HOA declarations, the Developer shall record the new, revised final plat intended to replace the original plat.

5.0 Amended Stormwater Agreement and Recording. After completing the revisions to the new plat for the Windermere Subdivision, the Developer and HOA shall execute an amended SW Agreement. The amended SW Agreement shall outline the long term maintenance responsibilities of the HOA for the Stormwater Infrastructure. Attached to this Agreement is a sample draft of the proposed amendment to the SW Agreement, identified as Attachment A.

6.0 Completion of City Required Infrastructure. After approval, execution and recording of the revised final plat and the amended SW Agreement, Developer shall cause to be completed the City Required Infrastructure for the Windermere Subdivision in the City of Durham.

6.1 Engineering Design Work. Developer agrees to contract with a qualified, licensed engineer to perform any and all necessary design and engineering related Work. Among other City regulations and requirements, the selected engineer shall be familiar with City of Durham site planning requirements and the city’s Unified Development Ordinance.

6.2 Bids Required for Construction and Repair Work. Contract with Lowest, Responsible, Responsive Bidder. Prior to entering into any contract for construction and repair work for the City Required Infrastructure, the Developer shall obtain at least 3 informal bids from qualified contractors for the Work to be performed. The informal bids shall be documented and provided to the City Public Works Department. The Developer agrees to contract with the lowest, responsible responsive bidder after receiving approval from the City of Durham.

6.3 Project Management Work. The City acknowledges that Developer may also incur certain project management expenses directly related to coordinating, overseeing and supervising the Work. If project management work is required, it shall be performed by an experienced professional acceptable to the City. The City acknowledges that project

management work may be performed by the same contractor(s) that completes the City Required Infrastructure.

6.4 Review and Approval of Construction Work by City -- The Work shall not be deemed complete and eligible for reimbursement until the Work meets all City requirements and the City Department of Public Works has provided the Developer with written approval of the Street Infrastructure and the Stormwater Infrastructure Work.

6.5 Developer's Responsibility to Complete Construction – Developer acknowledges and agrees that the City will not reimburse Developer for any expenses beyond the amount available in the Windermere Fund. Developer shall assume all liability and costs incurred for performance of all Work required in excess of the Windermere Fund. In other words, if the cost of eligible reimbursable construction and repair Work, engineering and design Work and/or project management Work exceed the Windermere Fund, the Developer shall pay for such overage.

7.0 Developer's Billings to City. The parties agree that all reimbursement payments to the Developer from the City shall be made to J&F or jointly to J&F and the contractor responsible for performing the Work. Upon completion of the Work, J&F shall deliver to the City invoices and other appropriate documentation detailing the Work covered by the invoice to be paid, and in the case that J&F may have already paid for such Work, a receipt confirming the payment. The City agrees to make eligible reimbursement payment(s) to J&F for all undisputed amounts within 20 days of receipt of the adequate invoices and evidence of completed Work subject to the requirements of Section 8.0 below. In the case of reimbursement payments for expenses incurred and fully paid by the J&F, the City agrees to make direct payments to the J&F. In the case of invoices for Work completed, but not yet paid by J&F, the City shall make joint payments to J&F and the contractor that performed the Work. The City shall not be responsible for reimbursement of costs incurred by Developer that are not directly related to completion of the Work. The City shall not be obligated to reimburse Developer for any payments, fees, fines or expenses other than those authorized by this Agreement.

8.0 Reimbursement of Eligible Expenses Incurred. Eligibility for reimbursement shall be prioritized according to the nature of Work performed. Except as provided for under Section 8.2 below, no payments shall be made under this agreement until all Work is completed and has been approved and/or accepted by the City.

8.1 Reimbursement Procedure. The City's reimbursement obligation to Developer is limited to the funds available in the Windermere Fund. The City shall reimburse Developer's expenses (up to the availability of funds in the Windermere Fund) in the following priority order:

- A. Cost of constructing and repairing the Stormwater and Street Infrastructure;
- B. Up to \$14,500.00 for engineering and surveying work (\$500.00 of which has already been paid to J&F pursuant to

a separate contract between the City and J&F dated November 15, 2011);

- C. Up to \$1,274.00 in estimated City fees (e.g. simplified site plan, floodplain development permit, exempt plat review). In no case will the City reimburse Developer for any fees in excess of \$1,274.00.
- D. Project management expenses, which shall be no greater than twelve percent (12%) of the cost of constructing and repairing the Stormwater and Street Infrastructure.

The City will only deviate from the priority order stated above if the conditions stated in Section 8.2 below are met. The City shall retain any moneys remaining in the Windermere Fund after all eligible expenses are reimbursed in accordance with the terms of this Agreement.

8.2 Reimbursement of Expenses without Full Completion of Work.

8.2.1 Early Reimbursement for Engineering Related Expenses – If J&F is invoiced for eligible expenses directly related to surveying and engineering prior to the Work being completed and approved by the City, the City shall reimburse Developer for said surveying and engineering expenses from the Windermere Fund, but only up to a total of \$14,500.00 (\$500.00 of which has already been paid to J & F pursuant to a separate contract between the City and J & F dated November 15, 2011). Any surveying and engineering in excess of \$14,500.00 shall be the responsibility of J&F. As a condition of such early reimbursement, J&F shall require the Engineer to give the City ownership rights over all design and engineering drawings generated in performing the work in usable electronic form. The Developer shall obtain rights from the engineer/designer to allow the City to use such drawings for use with the Windermere Subdivision only.

8.2.2 Reimbursement for Good Faith Compliance with this Agreement - If the Work cannot be completed as described herein, but not due to any fault of the Developer, Developer shall be relieved of his obligation to complete the Work and the City agrees to reimburse Developer for reasonable expenses incurred for the Work performed in good faith up to the point that the Developer knew or should have known that the Work could not be completed. As a condition of such reimbursement, the Developer shall provide the City with all design and engineering drawings generated in performing the work in usable electronic form (if such engineering or design work is performed). The Developer shall obtain rights from the engineer/designer to allow the City to use such drawings for use with the Windermere Subdivision only.

9.0 Prompt Payment Within 7 days of receipt by the Developer of any payment from the City under this contract, the Developer shall pay all subcontractors (which term includes subconsultants and suppliers) (which requirement may include endorsement by

Developer to subcontractors of any joint checks issued) based on work completed or service provided under the subcontract. Should any payment to the Subcontractor be delayed by more than 7 days after receipt of payment by the Developer from the City under this contract, the Developer shall pay the Subcontractor interest, beginning on the 8th day, at the rate of 1% per month or fraction thereof on such unpaid balance as may be due. By appropriate litigation, Subcontractors shall have the right to enforce this section directly against the Developer, but not against the City of Durham.

10.0 Indemnification -- (a) To the maximum extent allowed by law, the Developer 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 agreement as a result of acts or omissions of the Developer 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 Developer 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, agents, and employees, excluding the Developer. (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 Developer under this contract. (e) Limitations of the Developer'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 Developer 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.

11.0 Compliance with all Governmental Requirements without Extra Cost.

The terms of this Agreement address the conditions for reimbursement for completion of the Work. Developer is fully responsible for acquiring all other governmental (including City and County) required permits, licenses, and certifications necessary to complete the Work, at no extra cost to the City, unless specifically authorized in this Agreement.

12.0 Term of Agreement. In order to be eligible for reimbursement under this Agreement, Developer shall cause the Work to be performed and completed in conformance with City requirements before _____. Except as otherwise provided for herein, the duties and obligations of the parties pursuant to this Agreement

shall terminate upon the earlier occurrence of either (1) final payment by the City of eligible reimbursable costs incurred by Developer in completing the Work in conformance with the terms of this Agreement, or (2) _____ (same date as above), if Developer fails to cause completion of the Work before this date.

13.0 Failure of Developer to Complete the Work. Waiver and Release. If Developer fails to complete the Work in accordance with this Agreement and within the terms of this Agreement, the City may, in its discretion, find some other means of ensuring that the Work is completed without any breach of this Agreement. Failure of Developer to complete the Work in accordance with this Agreement shall constitute a waiver of Developer's rights under this Agreement and release the City from any obligation or duty to reimburse Developer for any of its costs incurred in performing any portion of the Work.

14.0 Notice. (a) All notices and other communications required or permitted by this Agreement shall be in writing and shall be given either by personal delivery, fax, or certified United States mail, return receipt requested, addressed as follows:

To the City:

City of Durham
101 City Hall Plaza
Durham, NC 27701
The fax number is (919) 660-4316

To Developer:

The fax number is _____.

(b) 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.

15.0 Miscellaneous

(a) 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 (a) shall not apply to subsequent actions to enforce a judgment entered in actions heard pursuant to this section.

(b) 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 Agreement, 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.

(c) Performance of Government Functions. Nothing contained in this Agreement 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.

(d) Severability. If any provision of this Agreement shall be unenforceable, the remainder of this Agreement shall be enforceable to the extent permitted by law.

(e) Assignment. Successors and Assigns. Without the City's written consent, Developer 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, Developer and all assignees shall be subject to all of the City's defenses and shall be liable for all of Developer's duties that arise out of this Agreement and all of the City's claims that arise out of this Agreement. Without granting Developer the right to assign, it is agreed that the duties of Developer that arise out of this Agreement shall be binding upon it and its heirs, personal representatives, successors, and assigns.

(f) Compliance with Law. In performing all of the Work, Developer shall comply with all applicable law.

(g) 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 AGREEMENTS.

(h) EEO Provisions. As this Agreement is a strict, qualified reimbursement agreement and not a contract for services to be performed, the City policy requirements for equal employment opportunity provisions shall not be required, except as already required by State and Federal laws.

(i) No Third Party Rights Created. This Agreement is intended for the benefit of the City and Developers and not any other person.

(j) 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 Agreements 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 Agreement. (3) "Agreement" 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 Agreement. (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.

(k) Modifications. Entire Agreement. 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 Agreement 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 Agreement.

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

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

CITY OF DURHAM

ATTEST:

By: _____

Preaudit Certificate, if necessary:

DEVELOPER

J&F INVESTMENTS, L.L.C.

By: _____
Manager

State of _____

ACKNOWLEDGMENT BY
J&F INVESTMENTS, L.L.C.

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 J&F INVESTMENTS, L.L.C., 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