

## ENCROACHMENT EASEMENT AND AGREEMENT

Prepared by and mail after recording to: Moore & Van Allen PLLC  
100 N. Tryon Street, Suite 4700  
Charlotte, North Carolina 28202  
Attn: Evan M. Bass

STATE OF NORTH CAROLINA

DURHAM COUNTY

THIS ENCROACHMENT EASEMENT AND AGREEMENT (this "Easement") is made, dated, and entered into as of the \_\_\_ day of January, 2015, by and between the City of Durham, a North Carolina municipal corporation ("City"), and Diamond View I, LLC, a North Carolina limited liability company ("DV I").

### WITNESSETH:

WHEREAS, the City is the owner of that certain real property located in the City of Durham and identified as Lot 1 ("Lot 1") as shown on plat and survey entitled "Final Plat – Property of City of Durham, Subdivision, Recombination and Blackwell St. and Vivian St. Right of Way Dedication of American Tobacco Campus Phase III" prepared by Jeffrey P. Williams, Professional Land Surveyor, NCPLS L-4204, dated September 27, 2006, last revised January 22, 2007, and recorded in Plat Book 176, Pages 73, 76 and 79, Durham County Registry, as the boundaries of such Lot 1 are modified by that certain plat and survey entitled "Exempt Final Recombination Plat, Property of Diamondview III/DBAP" prepared by Jeffrey P. Williams, Professional Land Surveyor, NCPLS L-4204, dated March 5, 2012, and recorded in Plat Book 189, Page 90, Durham County Registry, upon which the Durham Bulls Athletic Park (the "DBAP") is located; and

WHEREAS, DV I is the owner of that certain real property located in the City of Durham and being more particularly described on Exhibit A attached hereto and incorporated herein by this reference (the "DV I Lot"), upon which the Diamond View I office building (the "DV I Building") is located; and

WHEREAS, DV I desires to construct two (2) exterior balconies on the second floor of the DV I Building facing west towards the DBAP (collectively, the “DV I Balconies,” and each individually a “DV I Balcony”); and

WHEREAS, each DV I Balcony will encroach onto Lot 1 as depicted on Exhibit B attached hereto and incorporated herein by this reference (the DV I Balconies are labeled “Balcony 1” and “Balcony 2” on Exhibit B); and

WHEREAS, City, as the owner of Lot 1, desires to grant certain easement rights over Lot 1 in order to allow DV I, as the owner of the DV I Lot, to install, maintain, repair, replace and use the DV I Balconies; and

WHEREAS, DV I, as the owner of the DV I Lot, desires to execute this Easement for the purpose of acknowledging the terms of its use of Lot 1 for the installation, maintenance, repair, replacement and use of the DV I Balconies.

NOW, THEREFORE, in consideration of the premises; to enhance and protect the value of Lot 1 and the DV I Lot; and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, City does hereby grant, bargain, sell and convey unto DV I, its successors, heirs and assigns, the following easements, rights, covenants and undertakings pursuant to which Lot 1 and the DV I Lot shall be owned, sold, conveyed, transferred, occupied and used:

1. Incorporation of Recitals. The foregoing recitals shall constitute an integral part of this Easement, and this Easement shall be construed in light thereof.

2. Establishment of DV I Balconies Easement. City hereby grants, bargains, sells, and conveys to DV I, as owner of the DV I Lot, a non-exclusive, perpetual right, privilege and easement to install the DV I Balconies over Lot 1 in the locations shown on Exhibit B, attached hereto and incorporated herein by this reference (the “DV I Balconies Easement”). Please see Exhibit B for a more particular description of the location of the DV I Balconies Easement.

The DV I Balconies Easement shall include, but not be limited to, the right of construction, maintenance, repair, use and operation of the DV I Balconies by DV I within the portion of Lot 1 shown on Exhibit B. The DV I Balconies shall be considered a portion of the DV I building for ad valorem tax purposes. The owner of Lot 1 shall not construct any improvements within the portion of Lot 1 upon which the DV I Balconies are located.

3. Maintenance of DV I Balconies. The owner of the DV I Lot shall be solely responsible for the maintenance, repair and replacement of the DV I Balconies. The City shall have the right to enter the building located upon the DV I lot in order to inspect the DV I Balconies after providing reasonable written notice to DV I, unless the City has reasonable cause to believe that a health or safety risk to Lot 1 is posed by the DV I Balconies, in which case no prior notice shall be required, but City shall inform DV I thereof in writing as soon as reasonably possible thereafter. Should DV I fail to repair the DV I Balconies within thirty (30) days after receipt of written notice (or such longer period of time as is reasonably necessary, so long as DV I promptly commences and diligently pursues the repair), or in the case of a health or safety risk

to Lot 1, ten (10) days, the City shall have the right to take reasonable measures to eliminate the health or safety risk posed to Lot 1, up to and including removal of the DV I Balconies. DV I shall be responsible for the actual, out-of-pocket costs of such measures, and the provisions of Section 4 herein may also be applicable. Exercising this right shall not limit or waive any other of the City's rights or remedies.

4. Indemnification and Insurance.

(a) Insurance. DV I agrees to maintain, on a primary basis and at its sole expense, at all times during the life of this Agreement the following applicable coverages and limits. The requirements contained herein, as well as City's review or acceptance of insurance maintained by DV I is not intended to and shall not in any manner limit or qualify the liabilities or obligations assumed by DV I under this Agreement.

Commercial General Liability – Combined single limit of no less than \$1,000,000 each occurrence and \$2,000,000 aggregate. Coverage shall not contain any endorsement(s) excluding nor limiting Product/Completed Operations, Contractual Liability or Cross Liability. Additional Insured – DV I agrees to endorse the City as an Additional Insured on the Commercial General Liability. The Additional Insured shall read 'City of Durham as its interest may appear'.

Umbrella or Excess Liability – DV I will provide proof Umbrella or Excess Liability coverage wherein the Annual Aggregate limits shall not be less than the highest 'Each Occurrence' limit for required policies. DV I agrees to endorse City of Durham as an 'Additional Insured' on the Umbrella or Excess Liability, unless the Certificate of Insurance states the Umbrella or Excess Liability provides coverage on a 'Follow-Form' basis.

Certificate of Insurance – DV I agrees to provide City of Durham a Certificate of Insurance evidencing that all coverages, limits and endorsements required herein are maintained and in full force and effect, and Certificates of Insurance shall provide a minimum thirty (30) day endeavor to notify, when available, by DV I's insurer. If DV I receives a non-renewal or cancellation notice from an insurance carrier affording coverage required herein, or receives notice that coverage no longer complies with the insurance requirements herein, DV I agrees to notify the City within five (5) business days with a copy of the non-renewal or cancellation notice, or written specifics as to which coverage is no longer in compliance. The Certificate Holder address should read:

City of Durham

Attn: General Services Department – Real Estate Division

101 City Hall Plaza

Durham, NC 27701

(b) Indemnification. (i) To the maximum extent allowed by law, DV I shall defend, indemnify, and hold harmless Indemnitees (hereinafter defined) from and against all Charges that arise in any manner from, in connection with, or out of this Easement as a result of acts or omissions of DV I or its contractors or anyone directly or indirectly employed by any of

them, or, as determined by a court of law, anyone for whose acts any of the forenamed may be liable. In performing its duties under this subsection "i", DV I shall at its sole expense defend Indemnitees with legal counsel reasonably acceptable to City. (ii) Definitions. As used in subsections "i" above and "iii" below -- "Charges" means claims, judgments, costs, damages, losses, demands, liabilities, fines, penalties, 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 environmental laws, regulations, ordinances, rules, or orders). "Indemnitees" means City and its officers, officials, independent contractors, agents, and employees, excluding DV I. (iii) Limitation. In no event shall DV I be required to defend, indemnify or hold harmless the Indemnities for any Charges arising directly as a result of the negligence or willful misconduct of any of the Indemnitees. (iv) Other Provisions Separate. Nothing in this Section 4(b) shall affect any warranties, rights or duties in favor of the City that are otherwise provided in or arise out of this Easement. This Section 4(b) is in addition to and shall be construed separately from any other indemnification provisions that may be in this Easement. (v) Survival. This Section 4(b) shall remain in force despite termination of this Easement (whether by expiration of the term or otherwise).

5. Covenants Running with the Land. The DV I Balconies Easement and the easements, rights, covenants and undertakings contained within this Easement shall run with the land and be appurtenant to, and for the benefit of, the owner of the DV I Lot and shall be a burden upon the title to Lot 1. Any conveyance of the DV I Lot or Lot 1, or any portions thereof, shall be subject to the DV I Balconies Easement and the easements, rights, covenants and undertakings contained in this Easement, and, at the time of conveyance, the grantor in any deed of conveyance shall be relieved of future obligations thereafter arising by the owners of the Lot or property interest so conveyed, but the grantor in any deed of conveyance shall not be relieved of obligations that are based on acts, omissions, or events that occurred before the time of conveyance. Any grantee of DV I or the City, as applicable, or their successors, heirs, or assigns, by recordation of a deed or other instrument of transfer or conveyance, shall be deemed to have assumed the obligations under this Easement with respect to such Lot. If DV I shall fail to pay any amount owed to the City hereunder when due, and such failure shall continue for more than fifteen (15) days following DV I's receipt of written notice thereof, then the City shall have the right to file a lien against the DV I Lot.

6. Amendment and Termination. This Easement may be modified, amended or terminated only by written agreement of the owners of the DV I Lot and Lot 1, and shall be duly acknowledged in a manner suitable for and effective upon recording in the Office of the Register of Deeds of Durham County, North Carolina. In addition, should the balconies be removed and not replaced by DV I for a period of ten (10) consecutive years, this easement shall be terminated upon recording a notice of termination in the Office of the Register of Deeds of Durham County. This Section 6 is subject to Section 13 (Performance of Government Functions).

7. Governing Law. This Easement shall be governed by and construed in accordance with the laws of the State of North Carolina without regard to principles of conflict of laws.

8. No Public Dedication; No Third Party Beneficiaries or Consents. This Easement is not intended, and shall not be construed: (a) as a dedication to the public of any interests in the DV I Balconies described herein, (b) to give any member of the public, or any person, entity,

or party other than as provided herein, any right whatsoever herein or therein or (c) to require any consent or other action of any other person, entity, or party other than as expressly provided herein to any amendment to or waiver of any provision of this Easement.

9. Severability. This Easement is intended to be performed in accordance with, and only to the extent permitted by, all applicable laws, ordinances, rules and regulations. If any provision of this Easement or the application thereof to any person or circumstance shall, for any reason and to any extent, be invalid or unenforceable, but the extent of such invalidity or unenforceability does not destroy the basis of the bargain expressed herein, the remainder of this Easement and the application of such provision to other persons or circumstances shall not be affected thereby, but rather shall be enforced to the greatest extent permitted by law.

10. Compliance Certificate. Upon the written request of the owner of the DV I Lot or Lot 1, or the holder of any first lien deed of trust or first lien mortgage on any such parcel, any such owner shall execute, have acknowledged and deliver a certificate stating whether, to the knowledge of the signatory party, the requesting party is otherwise in compliance with this Easement.

11. Waiver. This Easement may not be waived orally or impliedly, but only by written document executed by the party against which such waiver is sought. Neither the failure of a party to complain of any violation of this Easement, regardless of how long such failure continues, nor the failure of a party to invoke (or the election by a party not to invoke) any right, remedy or recourse for a violation hereof, shall waive the rights, remedies and recourses of the party with respect to such violation. No waiver by a party of any provision of this Easement shall be deemed to be a waiver of any other provision hereof.

12. Rights Cumulative. All rights, powers and privileges conferred hereunder shall be cumulative and in addition to, and not to the exclusion of, those provided at law or in equity.

13. Performance of Government Functions. Nothing contained in this Easement shall be deemed or construed to in any way estop, limit, or impair the City from exercising or performing any regulatory, policing, legislative, governmental, or other powers or functions, including the power of eminent domain.

14. Counterparts. This Easement may be executed in one or more counterparts, each of which shall be deemed to be an original and all of which taken together shall be considered as one and the same instrument.

15. Headings. The paragraph headings in this Easement are for convenience only, and shall in no way define or limit the scope or content of this Easement, and shall not be considered in any construction or interpretation of this Easement or any part thereof.

16. Notice. (a) All notices and other communications required or permitted by this Easement 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 Manager  
City of Durham  
101 City Hall Plaza  
Durham, NC 27701  
The fax number is (919)\_\_\_\_\_.

To DV I:

Diamond View I, LLC  
c/o Blackwell Street Management Company, LLC  
300 Blackwell Street, Suite 104  
Durham, North Carolina 27701  
Attn: Property Manager  
Fax: 919-433-4278

With a copy to:

Capitol Broadcasting Company, Incorporated  
2619 Western Boulevard  
Raleigh, North Carolina 27606  
Attn: General Counsel  
Fax: 919-821-8733

(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 Easement 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.

TO HAVE AND TO HOLD the aforesaid DV I Balconies Easement and all privileges and appurtenances thereunto belonging to DV I as grantee.

And City covenants with DV I that City has done nothing to impair such title as City received.

[Signature page follows]

IN WITNESS WHEREOF, the City and DV I have each executed this Easement under seal by their respective duly authorized agents, managers or officers as of the day and year first above written.

Attest:

**City of Durham**

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

By: \_\_\_\_\_  
William V. Bell, Mayor

STATE OF NORTH CAROLINA

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

I, a Notary Public of \_\_\_\_\_ County, North Carolina, certify that \_\_\_\_\_ (the "Signatory") personally came before me this day and acknowledged that she is the City Clerk of the City of Durham, North Carolina and that by authority duly given and as the act of said City, the foregoing instrument was signed in its name by the Mayor of the City of Durham, North Carolina and attested by her as City Clerk to the City of Durham, North Carolina.

The Signatory acknowledged to me that she voluntarily signed the foregoing document for the purpose stated therein and in the capacity indicated.

Witness my hand and official stamp or seal, this the \_\_\_\_ day of \_\_\_\_\_, 2015.

\_\_\_\_\_  
Notary Public  
Print: Name: \_\_\_\_\_  
*[Note: Notary public must sign exactly as on notary seal]*

My Commission Expires: \_\_\_\_\_

**(MUST BE FULLY LEGIBLE)**

**(Notarial Stamp/Seal)**

**DIAMOND VIEW I, LLC,**  
a North Carolina limited liability company

By: Capitol Broadcasting Company, Incorporated,  
its Manager

By: \_\_\_\_\_  
Michael J. Goodman, Sr., Vice President

STATE OF NORTH CAROLINA

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

I certify that the following person(s) personally appeared before me this day, each acknowledging to me that he or she voluntarily signed the foregoing document for the purpose stated therein and in the capacity indicated:

Michael J. Goodman, Sr.

Date: \_\_\_\_\_, 2015      Official Signature of Notary: \_\_\_\_\_

Notary's printed or typed name: \_\_\_\_\_

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

**(Notarial Stamp/Seal)**

## Exhibit A

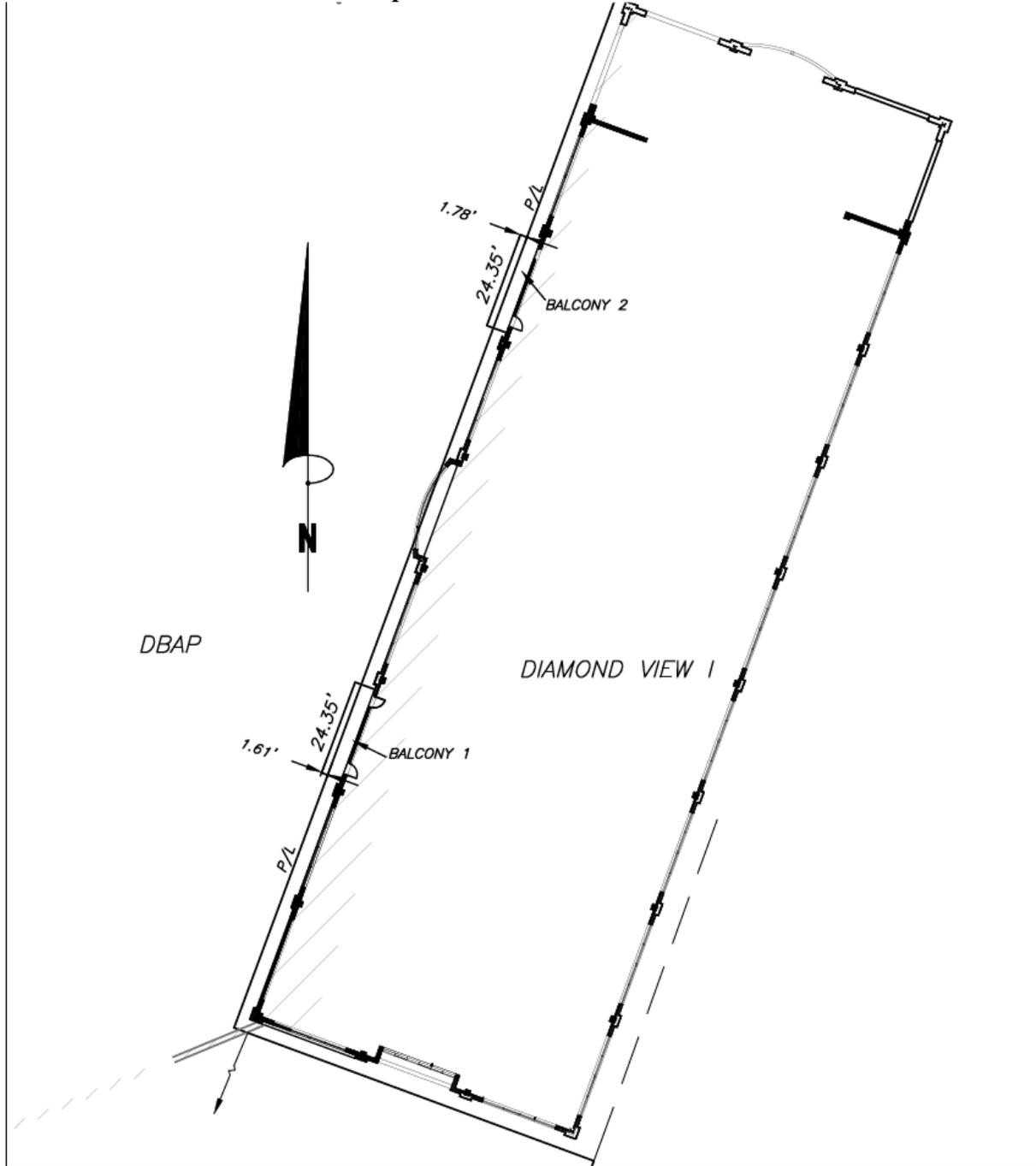
### **Legal Description of Diamond View I Lot**

Lying and being in the City of Durham, Durham County, North Carolina and containing 0.739 acres, more or less and being more particularly described as follows:

Beginning at a control corner in the Westernmost Right-of-Way line of South Mangum Street (70 foot Right-of-Way), at its intersection with the Southernmost Right-of-Way of Jackie Robinson Street (60 foot Right-of-Way, formerly known as Dillard Street) and run with the arc of a circular curve to the left having a radius of 20.00 feet, an arc distance of 30.40 feet and subtended by a chord bearing N 24-40-25 W 27.56 feet to a concrete monument; thence N 68-14-00 W 71.65 feet to a calculated point; thence leaving the Right-of-Way of Jackie Robinson Street and run thence S 18-53-10 W 58.38 feet to a calculated point, thence N 69-48-08 W 4.90 feet to a calculated point; thence S 20-11-52 W 168.47 feet to a calculated point; thence S 20-11-52 W 108.53 feet to a calculated point; thence S 69-48-08 E 96.56 feet to a calculated point in the Westernmost Right-of-Way of South Mangum Street; thence with the Right-of-Way of South Mangum Street the following two (2) bearings and distances: 1) N 22-12-10 E 90.63 feet to an existing iron pipe; 2) thence N 18-53-10 E 223.35 feet to the Point of Beginning and containing 0.739 acres, more or less, as shown on survey dated July 30, 1997 prepared by The John R. McAdams Company, Inc. entitled "Diamond View Office Building", which reference is made for a more particular description.

**Exhibit B**

**Depiction of DV I Balconies**



**EASEMENT EXHIBIT—DVI SECOND FLOOR BALCONIES**

**Coulter | Jewell | Thames<sub>RA</sub>**

ENGINEERING-LAND SURVEYING-LANDSCAPE ARCHITECTURE  
111 West Main Street Durham, North Carolina 27701  
p919.682.0368 f919.688.5646

Drawn By JPW  
Checked By JPW  
Scale: Not To Scale  
Project No. 1459  
Date Nov. 25, 2014