

STATE OF NORTH CAROLINA  
COUNTY OF DURHAM

### DEVELOPMENT AGREEMENT

This DEVELOPMENT AGREEMENT ("Agreement") is entered into and made effective as of the \_\_\_ day of \_\_\_\_\_, 2015 (the "Effective Date") by and between BH-AG Durham Foster, LLC, a North Carolina limited liability company ("Developer"), and the City of Durham, a municipality of the State of North Carolina (the "City").

#### Witnesseth:

**WHEREAS**, Developer has purchased certain real property having an address of 539 Foster Street, Durham, North Carolina 27701 (the "Property") upon which Developer plans to develop a residential condominium project containing approximately 100 residential condominium units to be developed in one or more phases, as determined by Developer, (the "Project"); and

**WHEREAS**, the Project will be adjacent to Durham Central Park (the "Park"), which is owned by the City, which provides the Park for the use and benefit of the public; and

**WHEREAS**, the City and Developer agree and acknowledge that the development of the Project may create additional usage of the Park which Developer is willing to address through certain commitments set forth in this Agreement; and

**WHEREAS**, in connection with its development of the Project, Developer desires to obtain from the City certain rights of easement within the Park and/or adjacent property owned by the City; and

**WHEREAS**, the City is agreeable to granting such rights of easement in consideration of Developer's commitments contained in this Agreement.

#### Agreement:

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and includes but is not limited to the mutual promises contained herein, Developer and the City agree as follows:

1. Easement Agreement. For purposes of this Agreement, that portion of Roney Street from Corporation Street to the southwest corner of the Property shall be deemed to be the "Roney Street Area." The date on which the Easement Agreement is fully executed, delivered and recorded with the Durham County Register of Deeds (the "Registry") shall be referred to herein as the "Closing Date."

For payment from Developer to the City of the sum of Forty-one thousand seven hundred eighty-eight and 76/100 dollars (\$41,788.76), and for an additional payment in the same amount

to Habitat for Humanity of Durham, Inc., prior to the issuance of the thirtieth (30<sup>th</sup>) certificate of compliance for dwelling units within the Project, for the purpose of creating affordable housing within the Durham City limits, the sufficiency of which consideration is acknowledged by the Parties, the City and Developer shall execute and enter into an Easement Agreement in a form acceptable to both parties and without undue delay after the closing of the public street within the Roney Street Area, pursuant to which:

- (A) the City will grant Developer the following easement rights, all of which shall have provisions in the Easement Agreement for reduction or termination to provide the least burden upon the City Park property that is consistent with the use of the Property:
- (i) A non-exclusive fire separation easement along the southern line of the Property and the northern property line of the Park, sufficient to allow Developer to meet the requirements of the NC Building Code as written and interpreted at the time the Code is first applied to the building after its construction, or as the Code and interpretations of it may be revised from time-to-time, whichever may impose the least restriction on the City's property. The fire separation easement shall be up to fifty-seven (57) feet long, and the width of the easement may be up to fifteen (15) feet, but shall be no wider than necessary to allow Developer to meet the fire separation requirements of the NC Building Code, and this easement shall be terminable should it become unnecessary or the building be unoccupied as a residence for twenty-four consecutive months or more.
  - (ii)
    - a. A non-exclusive easement of up to one hundred sixty-four and nine/tenths (164.9) feet long and six (6) feet wide along the southern line of the Property and the northern property line of the Park to permit encroachments from the Project's below-grade footings.
    - b. A portion of the six (6) foot-wide strip described in subsection (ii)a up to sixty (60) feet long shall be a non-exclusive easement to allow roof extensions to overhang the Park property ("Overhang").
    - c. A non-exclusive easement of up to forty (40) feet long and forty (40) feet wide along the southern line of the Property and the northern property line of the Park, near the southeast corner of the Property where it meets Foster Street, to permit the Developer to construct concrete stairs.
    - d. The Developer or subsequent owner of the Property shall be solely responsible for the maintenance, repair and replacement of the structures that are part of the Project allowed by easement to be located on, over or below the Park by this subsection (ii) ("Structures"). The City shall have the right to enter the building located upon the Property in order to inspect the Structures and to gain evidence of their structural status after providing reasonable written notice to Developer, unless the City has reasonable cause to believe that a health or safety risk is posed by the Structures to the City property, currently used as a Park, in which case no prior notice shall be required, but City shall inform Developer

thereof in writing as soon as reasonably possible thereafter. Should Developer fail to repair the Structures within thirty (30) days after receipt of written notice (or such longer period of time as is reasonably necessary, so long as the Developer promptly commences and diligently pursues the repair), or in the case of a health or safety risk to the Park or its users, ten (10) days, the City shall have the right to take reasonable measures to eliminate the health or safety risk posed, up to and including removal of the Structures or portions thereof and replacement or other structural repair. Developer shall be responsible for the actual, out-of-pocket costs of such measures, and other provisions of this Agreement may also be applicable. Exercising this right shall not limit or waive any other of the City's rights or remedies.

- (iii) A temporary non-exclusive thirty (30) foot-wide construction and staging easement along the southern line of the Property and the northern property line of the Park. Damage to the Park shall be minimized, including that property tree protection shall be maintained.
- (iv) An easement to relocate onto the Park property: (a) a portion of the existing storm culvert; and (b) an existing sanitary sewer line, each of which presently crosses the southwest corner of the Property. Developer shall upsize the relocated sanitary sewer line to a fifteen (15) inch-diameter pipe, construct the relocated storm and sanitary sewer facilities in accordance with the City's policies and standards governing such facilities, and with written approval of designs for the relocated facilities required by the City. Developer shall provide as-built drawings for these facilities, with such drawings sealed by the relevant licensed professional, and such as-built drawings are hereby made part of this Agreement as if fully set forth herein. Developer warrants that these facilities shall be built in accordance with all legal requirements and applicable standards of workmanship.
- (v) A reciprocal cross-access easement over and upon the Roney Street Area that is owned by the City following the Roney Street Closing, provided however that Developer shall maintain the entire Roney Street Area in accordance with the standards the City uses to maintain its public streets ("City Standards"). If, in the City's opinion, Developer fails to maintain the Roney Street Area to City Standards, the City has the right, but not the obligation, to perform the necessary repairs and/or maintenance in order to bring the condition of the pavement into compliance with City Standards. The City shall have the right to be reimbursed by Developer for the costs of said repairs and/or maintenance and shall send Developer an invoice for said costs in accordance with the Notices section of this Agreement.
- (vi) As part of Developer's obligation to maintain the Roney Street Area, Developer will coordinate all tree maintenance and replacement with the City's Urban Forestry manager, with all such maintenance meeting with the reasonable satisfaction of the Urban Forestry manager, including maintenance required to accommodate Duke Energy utility lines, and the City shall not be responsible for

the cost or implementation of any such tree maintenance.

- (vii) Damage or changed conditions resulting to the Park or other City property from Developer's use of these easements, including but not limited to contamination of soil, compaction of soil, removal of top soil, damage to trees and other plantings, shall all be remedied to the City's satisfaction at Developer's sole cost.

(B) Developer will grant the City the following easement rights:

- (i) A reciprocal cross-access easement over and upon that portion of the Roney Street Area that is owned by Developer following the Roney Street Closing.
- (ii) An easement for the location and maintenance of the existing sanitary sewer line and relocated storm culvert within that portion of the Roney Street Area that is owned by Developer following the Roney Street Closing.

2. Additional Developer Covenants. Following the Closing Date, and within the periods prescribed herein, Developer shall, at Developer's sole cost and expense (unless otherwise noted below) conduct the following, all of which shall require that specific construction plans obtain written approval from the Director of Parks and Recreation (the "Director"):

- (i) Cause the existing pavement within the Roney Street Area to be narrowed to a width of twenty (20) feet, with all pavement being removed from the westernmost side of the Roney Street Area owned by the City. The foregoing shall be completed within eighteen (18) months following the Closing Date.
- (ii) Construct an approximately ten (10) foot-wide concrete greenway trail (the "New Trail"), which shall connect to and become a part of the North/South Greenway Trail. The New Trail shall be constructed on the City-owned portion of the Roney Street Area starting at Corporation Street and connecting to the existing greenway path endpoint, which is currently located at the western boundary of the Park adjacent to the south of the Property, all as set forth on **Exhibit A**, which is hereby made part of this Agreement. In addition, Developer shall install plant landscaping along the western edge of the Roney Street Area in the location to be shown on an amendment to the approved site plan for the Project (D1400231), which shall reflect the landscaping depicted within the particular rendering within **Exhibit B** showing the western edge of Roney Street. The foregoing shall be completed within eighteen (18) months following the Closing Date.
- (iii) Construct a trash handling enclosure for the Durham Central Park dumpster, which enclosure and location shall be per City standards and otherwise subject to the City's approval. The foregoing shall be completed within ten (10) months following the Closing Date. Furthermore, in no event shall any trash dumpster at the Park be taken out of service by Developer at any time during the construction of the Project or the carrying out of the terms of this Agreement.

- (iv) Developer shall install plant landscaping at the northeast corner of Hunt Street and Roney Street, adjacent to the Durham Farmer's Market building, in the location shown on **Exhibit A**. The foregoing shall be completed within ten (10) months following the Closing Date.
- (v) Design of the southern wall of the Project parking garage that will face the Park shall be submitted to the Director for written approval. Developer shall include one or more green wall sections, meaning that the wall itself is landscaped with espaliered or other plants trained to grow vertically parallel and close to the wall, totaling approximately 300 square feet.
- (vi) In exercising its rights under the Easement Agreement, Developer shall utilize commercially reasonable efforts to protect, and if necessary relocate to an alternative location that is reasonably acceptable to both parties to this Agreement, the three (3) memorial trees and the Kontek Bench located within the Park along Foster Street. If any of the memorial trees does not survive being relocated, Developer shall replace the tree with a tree of the same species and cultivar and a caliper at time of planting at 2.5-3 inches or more. The tree form and quality shall be in accordance with ANSI Z60.1-2014: American Standard for Nursery Stock. After removing the Kontek bench from the Park, Developer shall safely store the bench at a location proposed to and accepted by the City until such time as Developer reinstalls the bench with concrete footings in the approximate location shown in drawings prepared by Cline Design Associates, dated April 1, 2015 (the "CDA Drawings"). The CDA Drawings are hereby incorporated by reference and made part of this Agreement as **Exhibit B**.
- (vii) To the extent that Developer removes three (3) Sister Cities Grove trees and two (2) Park trees, Developer shall: (a) plant and install six (6) trees of the same species and cultivar as the trees being removed, unless otherwise agreed by written permission of the City's Urban Forestry manager (with caliper at time of planting at 2.5-3 inches or more, and the tree form and quality shall be in accordance with ANSI Z60.1-2014: American Standard for Nursery Stock); and (b) install seven (7) plaques reasonably selected by the City which shall be composed of metal and shall be firmly attached to the ground.
- (viii) Collaborate with the City to complete a terraced, landscaped berm improvement (the "Terrace") within the Park along the southern line of the Property. The Terrace improvements will be completed in accordance with the CDA Drawings, **Exhibit B**, and shall be used as a passive seating area. In connection with the foregoing, Developer will: (a) provide the required fill material; (b) place and grade the fill material; (c) install a retaining wall between the Terrace berm and the Project's podium; (d) install granite seating slabs and boulders and surface water drainage improvements; and (e) assume the cost of all landscape plants and their installation associated with the Terrace (including two (2) additional street trees along Foster Street adjacent to the Terrace area). The Developer shall maintain the Terrace at its sole cost, shall maintain liability insurance covering the Terrace, and include the

Terrace as an area covered by its indemnification obligations hereunder, which shall be considered ongoing obligations for the purposes of Section 14.

- (ix) Install additional granite slabs and boulders at the southwest corner of Corporation Street and Roney Street to create a small seating area as provided for on the CDA Drawings, **Exhibit B**. The City and DCP shall assist Developer in sourcing the slabs and boulders required under this subsection (ix) and the foregoing subsection (viii), but the cost of same shall be borne by Developer.
- (x) Engage with the City and prior to commencing construction of the Project, obtain the City's written confirmation, in its role as the adjacent property owner and Party to this Agreement, that Developer's final construction plans with respect to the Project are not inconsistent with the terms of this Agreement. The City's confirmation shall not be unreasonably withheld, conditioned or delayed.

3. Additional City Covenants. Following the Closing Date, and within the periods prescribed herein, the City shall, at City's sole cost and expense (unless noted below), if not previously done:

- (i) Grant to Duke Energy a non-exclusive revocable utility easement, in a form reasonably acceptable to both the City and Duke Energy, over and upon the area between: (a) the westernmost edge of the pavement within the Roney Street Area following Developer's performance of its obligation under Section 2(i) and (b) the western edge of the New Trail, as shown on **Exhibit A**, for the relocation and future maintenance of overhead power lines from Roney Street. Under no circumstances shall any power poles, transformers, or other equipment be located within the ten (10) feet containing the New Trail. The foregoing shall be completed within two (2) months following Developer's completion of its obligation under Section 2(i). Developer shall bear any expenses related to drafting and recording said utility easement.
- (ii) Agree to execute and deliver instruments abandoning existing easement rights in or with respect to the Property to the extent not previously abandoned and no longer intended to be effective by virtue of the agreements contained herein.

4. Indemnification.

- (i) To the maximum extent allowed by law, 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 or any easements granted pursuant to it as a result of acts or omissions of Developer or anyone directly or indirectly employed by Developer or anyone for whose acts any of them may be liable. In performing its duties under this subsection "(i)," Developer shall at its sole expense defend Indemnitees with legal counsel reasonably acceptable to the City. This duty to defend and indemnify shall include any Charges that Indemnitees lacked proper authority to enter into any portion of the obligations or easements agreed to herein.

- (ii) **Definitions.** As used in subsections “(i)” above and “(iii)” 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 Agreement). “Indemnitees” means the City and its officers, officials, independent contractors, agents, and employees, excluding Developer.
  - (iii) **Other Provisions Separate.** Nothing in this section shall affect any warranties in favor of the City that are otherwise provided at law or arise out of this Development Agreement or any other Agreement between the Parties. This section is in addition to and shall be construed separately from any other indemnification provisions that may be in this Development Agreement.
  - (iv) **Survival.** This section shall remain in force despite termination of this Development Agreement or termination of the easements granted to Developer under this Agreement.
5. **Insurance.** The Developer shall carry liability and other insurance meeting the written approval of the City’s Risk Manager, and the City shall be named an additional insured on such policies, with notice to be provided from the policy provider to the City should the policy lapse or be terminated.
6. **Compliance with Laws.** In performing their respective obligations under this Agreement, the City and Developer shall each comply with all federal, state and municipal laws, ordinances and regulations.
7. **City Manager’s Authority.** Where this Agreement requires the written approval of the City, the City Manager is authorized to provide that approval, and reference to “City Manager” or “the City” shall include the City Manager or the City Manager’s designee. To the extent, if any, the City has the power to suspend or terminate this Agreement or Developer’s rights or performance under this Agreement, that power may be exercised by the City Manager or a deputy or assistant City Manager without City Council action. Whenever the written permission of the City or one of its designees is required by this Agreement, such plan or other matter requiring permission shall be submitted early enough in the Developer’s process that the City’s suggested revisions, if any, are relevant, actionable, and will be incorporated into the final plan. The City’s approval shall not be unreasonably withheld, conditioned or delayed.
8. **Changes to Approved Plans.** When designs, construction drawings or any other document requiring approval by the City are changed, Developer shall be required to obtain new written approval from the City.

9. City's Rights; Performance of Government Functions. Nothing contained in this Agreement 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. The rights and obligations of the City hereunder are in addition to, and shall not in any way inhibit or constrict, the City's governmental functions, including but not limited to its regulatory procedures under applicable Planning and Development ordinances. Where the City's or the City Manager's written permission or approval is required by the terms of this Agreement, such permission and approval is separate and apart from any regulatory functions of the City. As an example and not by way of limitation, if Developer obtains approval for a site plan for a new building on the Developer Property, such approval shall not fulfill the obligation under this Agreement for the City Manager to approve in writing the design and construction drawings for any of Developer's obligations under this Agreement.

10. Waiver. A waiver or consent to a breach or default shall not be deemed a waiver or consent to any other breach or default. Failure of either party to complain of any act or to declare the other in default, irrespective of how long since failure to continue, shall not constitute a waiver by such party of its rights.

11. No Consequential Damages, Lost Profits. Neither Party shall be responsible for lost profits or other consequential damages that may arise out of a breach of this Agreement.

12. Notices. Notice under this Agreement shall be deemed given or served in accordance with the provisions of this Agreement if notice is given using one or more of the following methods: (i) personal delivery, which notice will be deemed given on the day personal delivery is made; (ii) electronic mail, which notice will be deemed to be given on the day the email is sent; (iii) United States registered or certified mail, return receipt requested, postage prepaid, which notice will be deemed given three (3) business days after deposit in the mail; or (iv) overnight courier, which notice will be deemed given one (1) business day after the package is deposited with the courier for pickup. The notice addresses for the parties are:

if to Developer:

BH – Durham Foster, LLC  
c/o Blue Heron Asset Management, LLC  
111 Cloister Court, Suite 114  
Chapel Hill, NC 27514  
Attn: Maurice Malfatti  
Email: Maurice@blueheronfund.com

if to City:

City of Durham  
101 City Hall Plaza  
Durham, NC 27701  
Attn: City Manager's Office  
Email: Thomas.Bonfield@durhamnc.gov  
Tel: (919) 560-4222

Either party hereto may change its address for the service of notice hereunder by delivering written notice of said change to the other party hereunder, in the manner above specified ten (10) days prior to the effective date of such change.

13. Choice of Law and Forum; Service of Process. (i) This Agreement shall be deemed made in Durham County, North Carolina, and 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 (i) shall not apply to subsequent actions to enforce a judgment entered in actions heard pursuant to this subsection. (ii) If Developer is not a natural person (for instance, Developer is a corporation or limited liability company), this subsection (ii) applies. "Agent for Service of Process" means every person now or hereafter appointed by Developer to be served or to accept service of process in any State of the United States. Without excluding any other method of service authorized by law, Developer agrees that every Agent for Service of Process is designated as its non-exclusive agent for service of process, summons, and complaint. Developer will instruct each Agent for Service of Process that after such agent receives the process, summons, or complaint, such agent shall promptly send it to Developer. This subsection (ii) does not apply while Developer maintains a registered agent in North Carolina with the office of the N. C. Secretary of State and such registered agent can be found with due diligence at the registered office.

14. Assignment, Successors and Assigns.

- (i) Without the City's written consent, Developer shall not assign (which includes to delegate) any of its rights or duties that arise out of this Agreement, except as expressly set forth in the last sentence of this Section 14. 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. Any grantee of Developer 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 Development Agreement and any Easement Agreement executed pursuant to this Agreement. If Developer 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 Developer's receipt of written notice thereof, then the City shall have the right to file a lien against the Property.
- (ii) 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. Notwithstanding anything contained in this Section 14 or otherwise in this Agreement to the contrary, Developer shall have the right to assign those Developer obligations under this Agreement which are on-going obligations, including specifically, those maintenance obligations set forth in Sections 1(A)(v) and 1(A)(vi), to a duly incorporated non-profit corporation that serves as the condominium owners association with respect to the Project and is intended to be called 539 Foster Condominium Owners Association, Inc.
- (iii) Developer shall ensure that the covenants and obligations made by Developer under this Development Agreement which are ongoing shall be incorporated into

the covenants and by-laws of a duly incorporated non-profit corporation that serves as the condominium owners association with respect to the Project, including a covenants for the maintenance obligations named immediately above.

15. No Third Party Rights Created. This Agreement is intended for the benefit of the City and Developer and not any other person.

16. Authority. Developer and City each represent to the other that they have the authority to enter into this Agreement, and that entry into this Agreement will not violate any other agreement to which it is a party.

17. Modifications. 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 it is signed by the City Manager or the City Manager's designee.

18. Entire Agreement; Counterparts. This Agreement (which shall include the exhibits attached hereto and made a part hereof) constitutes the entire Agreement of Developer and the City, and there are no representations, inducements, or other provisions other than those expressed herein. All changes, additions, or deletions of this Agreement must be in writing and signed by both Developer and the City. This Agreement may be executed in counterparts, which, when taken together, shall constitute one and the same Agreement.

[Signatures Follow]

IN WITNESS WHEREOF, Developer and the City each hereby acknowledge execution of this Agreement by a duly authorized agent, as of the Effective Date first written above.

Developer:

BH-AG Durham Foster, LLC

By: BH-Durham Foster, LLC

By: Blue Heron Asset Management, LLC

\_\_\_\_\_  
Maurice Malfatti  
Title: Manager

State of \_\_\_\_\_ ACKNOWLEDGMENT BY LIMITED LIABILITY COMPANY

County of \_\_\_\_\_

I, a notary public in and for said county and state, certify that Maurice Malfatti personally (1) appeared before me this day, (2) stated that he is a manager of Blue Heron Asset Management, LLC, a limited liability company organized and existing under the laws of the State of North Carolina, and that if he is a manager of the company automatically by reason of being a member of the company, the operating agreement does not change that status, (3) acknowledged that the foregoing contract with the City of Durham carries on the company's business in the usual way, and (4) acknowledged the due execution, under seal, of the contract on behalf of the company. This the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

My commission expires:

\_\_\_\_\_

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

City:

ATTEST:

CITY OF DURHAM

\_\_\_\_\_ By: \_\_\_\_\_

preaudit certificate, if applicable \_\_\_\_\_

EXHIBIT A

Layout of Property, City Property and Location of Work to be Performed

EXHIBIT B