

Prepared by Donald T. O'Toole, Attorney. Return after recording to City of Durham.

NORTH CAROLINA
DURHAM COUNTY

TEMPORARY CONSTRUCTION EASEMENT
AND REVOCABLE USE EASEMENT

THIS TEMPORARY CONSTRUCTION EASEMENT AND REVOCABLE USE EASEMENT (hereinafter collectively referred to as "the Easement") is made and entered into this the ____ day of _____, 2015, by and between the City of Durham, a North Carolina municipal corporation, hereinafter referred to as "the Owner" or "the City," and Empress Development LLC, hereinafter referred to as "the Grantee."

Background

The Grantee is in the process of developing the property located at 112 West Main Street in Durham, North Carolina, identified more precisely as Durham County Parcel Identification Number 0821-12-97-3238 and Parcel I.D. 102775, ("the Property") into a mixed use development consisting of ground-floor restaurant-retail and second-floor Class A office space ("the Development").

The City of Durham, Office of Economic and Workforce Development has determined that the development of the Property is likely to have a positive impact on the revitalization of the City of Durham's central business district, and it entered into an economic incentive contract with the Grantee July 31, 2013 ("Incentive Contract").

The Durham City Council approved an air rights easement for the Development April 7, 2014.

As shown in the Durham County Register of Deeds Office in Book 27, Pages 497-498, a 20-foot (+/-) wide L-shaped right-of-way (“the Alley”) starts perpendicularly along the eastern side of the Property and makes a left turn, terminating on West Parrish Street. The Alley is public right-of-way within the City. For ease of reference, the Alley is also depicted on Exhibit A, which is attached hereto and incorporated herein by reference.

As part of the development of the Property, Grantee desires to make certain improvements in a portion of the Alley, to make non-exclusive use of portions of the Alley, and to maintain certain features for the benefit of both the City and the Development.

In consideration of the benefits received by both the Owner and Grantee under the terms of this Easement, the sufficiency of which as mutual consideration is hereby acknowledged, the City does hereby grant, bargain, sell and convey unto the Grantee, its successors and assigns, the following interests in land, lying and being in said County and State, described as follows:

1. Easement Areas

A. Temporary Construction Easement

The temporary construction easement area (“TCE Area”) is shown on Exhibit A. Grantee may make reasonable use of the TCE Area, which is a portion of the Alley, in order to complete the planned improvements in the Improvement Area as shown on Exhibit A. Construction in the TCE Area shall comply with all applicable regulations and requirements. Owner grants to Grantee the right to construct specified improvements in the Improvement Area, which is a portion of the Alley as shown on Exhibit A. Grantee will construct the following improvements in the Improvement Area: 1. A 9.7 foot wide concrete paver walkway extending from the east side of the building at 112 West Main Street to the existing paver walkway, and matching the materials and construction of that existing walkway. 2. Landscape plantings on both sides of the new walkway as shown on the approved site plan. Improvements in the Improvement Area shall be constructed pursuant to a site plan approved by the City, the approved Certificate of Appropriateness (“COA”), and all other City requirements. This temporary construction easement shall expire sixty (60) days after issuance of a COA by the City/County Historic Preservation Commission for the planned improvements. **NOTE:** The Alley will remain public right-of-way upon the expiration of the temporary construction easement.

B. Revocable Non-Exclusive Use Easement

The revocable non-exclusive use easement area encompasses the entire Alley, as shown on Exhibit A. Owner grants Grantee the revocable, non-exclusive right to use the Alley primarily for ingress/egress to the building at 112 West Main Street and for trash removal from the Property. The Alley may be used for trash removal from the Property so long as the trash is removed from the Property in

containers that do not permit the discharge of fluids or trash onto the Alley or adjacent property, and so long as the removal of trash from the Property does not unreasonably interfere with the right of the public to use and enjoy the Alley or adjacent property.

Grantee is obligated to maintain the improvements within the Improvement Area in a clean, safe, and fully operational condition, including maintenance of landscaping and replacement of diseased or deceased landscaping within the Improvement Area. The Improvement Area shall be open and available for public use and access and is not being constructed solely for the tenants or patrons of the Development.

Grantee and the City acknowledge that the City may terminate this Easement or seek the removal of the improvements in the Improvement Area upon the happening of any of the following events:

1. Grantee fails to properly maintain the Improvement Area or the Alley in conformance with this Agreement and the condition of improper or insufficient maintenance continues for thirty days following issuance of written notice regarding the offending condition from the City to the Grantee; or
2. A determination by the City that the Improvement Area or the Alley is needed for a public purpose; or
3. Failure to obtain the City's written approval prior to the sale, assignment, or lease of any right contained in this Agreement.

Upon termination of this Easement or upon the City taking any action that it is authorized to take pursuant to this Easement, improvements permanently affixed to the ground in any portion of the Improvement Area shall remain in place, unless the City determines that any or all improvements permanently affixed to the ground are to be removed by Grantee at Grantee's sole expense. The City shall provide Grantee with 90 days' written notice if Grantee will be responsible for the removal of any improvements permanently affixed to the ground, and Grantee will be responsible for removing those improvements within the 90 day written notice period.

Owner grants to Grantee the right to access the Improvement Area in a reasonable manner in order to maintain the improvements within the Improvement Area.

TO HAVE AND TO HOLD the aforesaid Temporary Construction Easement and Revocable Non-exclusive Use Easement, Grantee, its successors and assigns in accordance with the terms of this Easement.

2. Tree pruning, maintenance and tree replacement in the Improvement Area will be the responsibility of the Grantee and will occur exclusively pursuant to specifications

approved by the City of Durham, General Services Department.

3. Grantee shall take reasonable precautions to minimize the impact of its actions and those of its agents on adjacent property owned either by the City or other property owners. Grantee will restore and bear the cost of restoring any damage to Owner's property or other property, whether real or personal that is caused by Grantee or its contractors, agents, or employees.
4. All equipment, property, or tools brought into or near the TCE Area by Grantee's contractors, agents, or employees and all waste material generated as a result of the work performed pursuant to this Easement shall be the sole property and sole responsibility of Grantee. Owner assumes no liability or responsibility for the use, theft, or disposal of equipment or property brought into or near the TCE Area by Grantee's contractors, agents, or employees. Grantee shall have the sole responsibility and resulting liability, if any, for the handling, storage and disposal of equipment, property, tools, or waste material generated as a result of the work performed pursuant to this Easement in accordance with all applicable laws. Grantee's contractors, agents, or employees shall remove from the TCE Area all equipment, property, tools, or waste material generated as a result of the work performed pursuant to this Agreement as soon as reasonably possible after completion of construction.
5. Grantee agrees to comply with all local, state, and federal laws, rules and ordinances applicable to the work and further agrees to exercise due care in the performance of all work in the TCE Area.
6. Grantee is responsible for determining the location of all underground utilities prior to the commencement of any work and safeguarding those utilities from damage, as well as repairing any damage that occurs as a result of or reasonably believed to be as a result of actions by Grantee or its contractors, agents, or employees.
7. INDEMNIFICATION:

(a) To the maximum extent allowed by law, Grantee 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 Easement or out of the construction, maintenance, use by Grantee and its invitees, and related activities performed in the Alley pursuant to this Easement. Indemnitees shall cooperate with Grantee in any defense against any such Charges to the extent reasonably requested by Grantee. In performing its duties under this subsection "a," Grantee shall at its sole expense defend Indemnitees with legal counsel reasonably acceptable to Owner and shall reimburse Owner for other costs associated with litigation, in addition to, but not limited to, cost of production of documents, expert fees, etc.

(b) Definitions. As used in subsections "a" and "c" of this section: "Charges"

means claims, judgments, cost, damages, losses, demand, liabilities, obligations, fines, penalties, settlements, and expenses (included within "Charges" are interest and reasonable attorney's fees assessed as part of any such item). "Environmental Contamination" means contamination from petroleum products (including oil, gasoline, and kerosene), hazardous wastes, hazardous substances, hazardous materials, toxic substances, toxic wastes, hazardous air pollutants, and toxic pollutants, as those terms are used in any federal, state, or local laws, rules, regulations, codes, and ordinances, as amended from time to time. "Indemnitees" means Owner and its officers, officials, independent contractors, agents, and employees, and does not include Grantee.

(c) Limitations of Grantee's Obligation. Subsection "a" of this section shall not require Grantee to indemnify or hold harmless Indemnitees against liability for Charges proximately caused by or resulting from the negligence of Indemnitees.

(d) Owner shall defend, indemnify, and save harmless Grantee, its general partners, officers, officials, independent contractors, agents, and employees, from and against all Charges concerning the Alley except for Charges occurring after the date that Grantee begins work pursuant to this Easement and caused in whole or in part by Grantee, its general partners, officers, officials, independent contractors, agents, and employees.

8. Neither party shall be responsible for lost profits or other consequential damages that may arise out of a breach of this Easement.
9. This Easement constitutes the entire understanding between the parties with respect to the activities contemplated by this Easement. All prior agreements or understandings, whether oral or written, are superseded. This Easement may be amended only by a written document duly executed by the parties.
10. This Easement is governed by the laws of the State of North Carolina, and jurisdiction over all disputes concerning it shall be in Durham County.
11. The City makes no warranties regarding title to the Alley. To the extent that this Easement makes specified grants of use to Grantee, those grants are only extended to Grantee to the extent that the City has title in the Alley sufficient to make the grant of use. The City assumes no liability to Grantee if the City lacks sufficient title in the Alley to make any grant of use contained within this Easement.
12. The City must provide written approval prior to the sale, assignment, or lease of any right contained in this Easement.
13. Nothing in this Easement shall limit the City of Durham's governmental powers in the Alley, including eminent domain, zoning, subdivision, sanitation, and police.

IN WITNESS WHEREOF, as of the day and year first above written, the foregoing Easement has been duly executed by the parties hereto.

City of Durham

William V. Bell, Mayor

Attest:

City Clerk

STATE OF NORTH CAROLINA
COUNTY OF _____

ACKNOWLEDGEMENT BY
CITY OF DURHAM

I, _____, a notary public in and for the aforesaid county and state, certify that _____ personally appeared before me this day, and acknowledged that she is _____ Clerk of the City of Durham, a municipal corporation, and that by authority duly given and as the act of the City, the foregoing Easement was signed in its name by the Mayor of the City of Durham and attested by her as _____ City Clerk to the City of Durham, North Carolina.

This the _____ day of _____, 2015.

Notary Public

My commission expires: _____

Empress Development LLC

Managing Member of Empress Development LLC
(SEAL)

STATE OF NORTH CAROLINA
COUNTY OF _____

ACKNOWLEDGEMENT BY
EMPRESS DEVELOPMENT LLC

I, _____, a Notary Public for said County and State, do hereby certify that _____, Managing Member of Empress Development LLC, a limited liability corporation, personally appeared before me this day and acknowledged the due execution of the foregoing instrument under seal, carries on the usual business of the company.

Witness my hand and official seal, this the ____ day of _____, 2015.

Notary Public

My commission expires: _____