

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

NORTH CAROLINA  
DURHAM COUNTY

TEMPORARY CONSTRUCTION EASEMENT;  
REVOCABLE USE EASEMENT; AND  
IMPROVEMENT AND MAINTENANCE  
AGREEMENT

THIS TEMPORARY CONSTRUCTION EASEMENT, REVOCABLE USE EASEMENT, and IMPROVEMENT AND MAINTENANCE AGREEMENT (hereinafter collectively referred to as "the Agreement") is made and entered into this the 16th day of December, 2013, by and between the City of Durham, a North Carolina municipal corporation, hereinafter referred to as "the Owner" or "the City," and Gentian Group, LLC, hereinafter referred to as "the Grantee."

### **Background**

The Grantee will develop the property located at 315 East Chapel Hill ("the Property") Street into a select service hotel ("Hotel Durham").

City Council has determined that the development of the Hotel Durham 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 on October 26, 2012 ("Incentive Contract").

As shown in the Durham County Register of Deeds Office in DB128, PG114, a 40 foot (+/-) wide right of way, called Holland Street Mall ("the Alley"), runs along the eastern side of

the Property. The Alley is public right-of-way within the City.

As part of the development of the Property, Grantee desires to make certain improvements in the Alley, to make use of portions of the Alley, to perform construction in the Alley, and to maintain certain features for the benefit of the City and the Hotel Durham.

In consideration of the benefits received by both the Owner and Grantee under the terms of this Agreement, the sufficiency of which as mutual consideration is hereby acknowledged, the parties agree as follows:

**1. Easement Areas**

**A. Temporary Construction Easement Area (Temporary Construction Easement)**

The temporary construction easement area ("TCE Area") includes the "Temporary Construction Easement Area" shown on Exhibit A to this Agreement. Grantee may make reasonable use of the TCE Area in order to complete the planned improvements in the Revocable Use Easement Area, the Pedestrian Use Area, and the abandonment of the twelve (12) inch water line that runs through the Alley. Construction in the TCE Area shall comply with all applicable regulations and requirements. Grantee shall maintain a safe five foot wide path for pedestrian access through or around the TCE Area throughout its construction in the Alley. Grantee shall provide property owner's directly adjacent to the Alley with sufficient means of ingress and egress through the TCE Area. This temporary construction easement shall expire upon issuance of a certificate of compliance for the Hotel Durham by the City.

**B. Revocable Use Easement Area (Revocable Use Easement)**

The revocable use easement area ("UE Area") is the area denoted as such on Exhibit A to this Agreement. Owner grants to Grantee the right to construct specified improvements in the UE Area and to use the UE Area primarily for outdoor dining associated with the operation of the Hotel Durham, and for trash removal. Grantee will construct the following improvements in the UE Area: a dining terrace, basement access, and a wall separating the dining terrace from the basement access as shown generally on Exhibit A. Improvements in the UE Area shall be constructed pursuant to a site plan approved by the City and all other City requirements. Grantee is obligated to keep the UE Area in a clean and sanitary condition, and to keep the UE Area in a state of general good repair. The outdoor dining terrace shall be open to dining terrace patrons who are not guests of the Hotel Durham. A certificate of compliance shall not be issued for the dining terrace within the UE Area until all of the required improvements in the UE Area and the Pedestrian Use Area have been completed in conformance with all applicable City requirements.

Grantee and the City acknowledge that Grantee's right to use the UE Area may be revoked in writing by the City and by recording a termination of easement with the Durham County Register of Deed's Office upon the happening of any of the following events:

1. The UE Area is not used for outdoor dining for a period of six months or longer after issuance of the certificate of compliance for the Hotel Durham; or
2. Grantee fails to properly maintain the UE Area or the Pedestrian Area 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;
3. Grantee fails to construct the Improvements that it is required to construct in the Pedestrian Area;
4. A determination by the City that the UE Area is needed for a public purpose; or
5. Failure to obtain the City's written approval prior to the sale, assignment, or lease of any right contained in this Agreement.

Upon revocation of the UE Area easement, Grantee shall remove its personal property from the UE Area within 90 days of issuance of the City's written revocation notice. Any improvements permanently affixed to the ground in any portion of the Alley 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.

#### C. Pedestrian Use Area (Improvement and Maintenance Agreement)

The pedestrian use area ("Pedestrian Area") is the area denoted as such on Exhibit A to this Agreement. Owner grants to Grantee the right and Grantee assumes the obligation to construct certain improvements in the Pedestrian Area. These improvements ("Improvements") include: a) Construction and/or installation, according to a site plan approved by the City, of a five (5) foot wide concrete walk extending from the existing sidewalk along Chapel Hill Street to the northern extent of Alley #23; b) Incorporation of design elements that reuse a majority of any cobbles removed from their current location in the Alley. The Grantee shall document compliance with this requirement.

Until revocation of the UE Area Easement by the City, Grantee is obligated to maintain the Improvements in a clean, safe, and fully operational condition, including

maintenance of landscaping and replacement of diseased or deceased landscaping within the Pedestrian Area. Grantee shall keep any lighting that it installs in the Alley in working condition and in good repair, and shall pay associated utility expenses.

Owner grants to Grantee the right to access the Pedestrian Area in a reasonable manner in order to maintain the Improvements, landscaping, and any lighting installed by Grantee.

2. Tree pruning, maintenance and tree replacement in the Pedestrian Area and UE 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. The Grantee may improve the lighting in the Alley, through improvements submitted on and approved through a site plan submitted to and approved by the City. Any lighting improvements must meet Durham Unified Development Ordinance (UDO) and associated standards.
4. 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.
5. 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 Agreement shall be the sole property and sole responsibility of Grantee. Owner assumes no liability or responsibility for the safe 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 proper handling, storage and disposal of equipment, property, tools or waste material generated as a result of the work performed pursuant to this Agreement in accordance with all applicable laws. Grantee's contractors, agents, or employees shall remove all equipment, property, tools or waste material generated as a result of the work performed pursuant to this Agreement from the TCE Area as soon as reasonably possible after completion of construction, and in any case, prior to issuance of the certificate of compliance for the dining area.
6. 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.
7. 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.

#### 8. 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 Agreement or out of the construction, maintenance, use by Grantee and its invitees, and related activities performed in the Alley pursuant to this Agreement. 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 Agreement and caused in whole or in part by Grantee, its general partners, officers, officials, independent contractors, agents, and employees.

9. Neither party shall be responsible for lost profits or other consequential damages that may arise out of a breach of this Agreement.

10. This Agreement constitutes the entire understanding between the parties with respect to the activities contemplated by this Agreement. All prior agreements or

understandings, whether oral or written, are superseded. This Agreement may be amended only by a written document duly executed by the parties.

- 11 This Agreement is governed by the laws of the State of North Carolina, and jurisdiction over all disputes concerning it shall be in Durham County.
12. The City makes no warranties regarding title to the Alley. To the extent that this Agreement 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 Agreement.
13. The City must provide written approval prior to the sale, assignment, or lease of any right contained in this Agreement.
14. Nothing in this Agreement shall limit the City of Durham's governmental powers in the Alley, including eminent domain, zoning, subdivision, and police.

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

City of Durham

\_\_\_\_\_  
City Manager

Attest:

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

STATE OF NORTH CAROLINA  
COUNTY OF DURHAM

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 Right of Entry Agreement was signed in its corporate name by its \_\_\_\_\_ City Manager, sealed with its corporate seal, and attested by herself as its said City Clerk or Deputy City Clerk.

This the \_\_\_\_\_ day of \_\_\_\_\_, 2013.

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

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

DRAFT

STATE OF NORTH CAROLINA  
COUNTY OF \_\_\_\_\_

ACKNOWLEDGEMENT BY  
GENTIAN GROUP, LLC

I, \_\_\_\_\_, a Notary Public for said County and State, do hereby certify that \_\_\_\_\_, Managing Member of Gentian Group, 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 \_\_\_\_\_, 2012.

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

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