

**DEVELOPMENT AGREEMENT  
BY AND BETWEEN  
THE CITY OF DURHAM, NORTH CAROLINA  
AND  
CKE V LLC**

**Date: October \_\_, 2020**

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## EXHIBITS

- Exhibit A: Ordinance
- Exhibit B: Property
- Exhibit C: Development Plan, including Development Standards
- Exhibit D: Development Schedule and Public Facilities Schedule
- Exhibit E: Utility Extension Agreement
- Exhibit F: Option Agreement

## DEVELOPMENT AGREEMENT

THIS **DEVELOPMENT AGREEMENT** (together with the Exhibits attached hereto, the “**Agreement**”) is entered into effective as of the 19th day of October, 2020 (the “**Effective Date**”), by and between **THE CITY OF DURHAM**, a municipal corporation of the State of North Carolina (the “**City**”) and **CKE V LLC**, a North Carolina limited liability company (with its successors in interest, the “**Developer**”). The City and the Developer are sometimes separately referred to in this Agreement as a “party” or jointly referred to as the “parties.”

### LEGAL FRAMEWORK

The North Carolina General Statutes (“N.C.G.S.”) §160D-1001 through §160D-1012, as it exists on the Effective Date of this Agreement (the “**Development Agreement Act**”), enables cities to enter into binding development agreements with entities intending to develop real property under certain conditions set forth in the Development Agreement Act.

N.C.G.S. 160D-1001(a)(1) provides that “Development projects often occur in multiple phases over several years, requiring a long-term commitment of both public and private resources.”

N.C.G.S. 160D-1001(a)(3) provides that “Because of their scale and duration, such projects often require careful coordination of public capital facilities planning, financing, and construction schedules and phasing of the private development.”

N.C.G.S. 160D-1001 (a)(4) provides that “Such projects involve substantial commitments of private capital, which developers are usually unwilling to risk without sufficient assurances that development standards will remain stable through the extended period of development.”

N.C.G.S. 160D-1001 (a)(5) provides that “Such developments often permit communities and developers to experiment with different or nontraditional types of development concepts and standards, while still managing impacts on the surrounding areas.”

N.C.G.S. 160D-1001 (a)(6) provides that “To better structure and manage development approvals for such developments and ensure their proper integration into local capital facilities programs, local governments need flexibility to negotiate such developments.”

In view of the foregoing, N.C.G.S. §160D-1001 through §160D-1012 expressly authorize local governments and agencies to enter into development agreements with developers pursuant to the procedures and requirements of N.C.G.S. 160D-1001 through 1012, which procedures and requirements include approval of the development agreement by the governing body of the local government by ordinance after a duly noticed public hearing.

N.C.G.S. 160D-1004 provides that “a local government may enter into a development agreement with a developer for the development of property as provided in this Article for developable property of any size,” and that “development agreements shall be of a reasonable term specified in the agreement.”

In addition to any force of law conferred upon this Agreement by North Carolina law related to local governments, the terms of this Agreement are also contractual in nature, are a significant inducement and consideration to enter into this Agreement, and may be enforced as contractual terms.

Section 1.12 of the City's Unified Development Ordinance (the "UDO") authorizes the use of development agreements, and provides additional requirements for such agreements.

### RECITALS

- A. Developer and the City desire to enter into this Agreement for the development of certain real property containing approximately 8.03 acres and consisting of thirteen (13) parcels denoted by Durham County Parcel ID's 141669, 141668, 141651, 141650, 141649, 141647, 141648, 141645, 141644, 141654, 141642, 141643, and 141653 (collectively hereinafter the "Property") and more particularly described and depicted on **Exhibit B** attached hereto.
- B. Section 1.12 of the UDO authorizes the use of development agreements and specifies additional requirements applicable to such agreements.
- C. Developer submitted a draft of this Agreement to the City on July 10, 2020.
- D. The purpose of this Agreement is to facilitate the Development (as defined herein) of the Property in a way that best realizes the benefits to the Parties. The Development of the Property requires a major investment by the Developer and substantial commitment of resources to achieve the benefits of the Development for the Parties. The Developer will be unable to make and realize the benefits from such commitments without the assurances of the City as provided by this Agreement.
- E. The Development of the Property is consistent with the City's adopted policy guidance, and is reasonable and in the public interest for the following reasons, each of which serve as a benefit to the City:
  - 1. Furthering the goals of securing the affordability of certain income restricted units to be built on the Property as well as securing an appropriate residential density on the Property and implementation of the Development Plan (as defined below); and
  - 2. Provision of an efficient, effective, and practical overall plan for addressing the Development of the Property.
- F. The general benefits to be received by the Developer from the Development of the Property include, without limitation:
  - 1. Development rights only for 89 additional market rate units such that the total number of market rate multifamily units within the Project (as defined below) will be 250.
- G. The general benefits to be received by the City from the Development of the Property include, without limitation:

1. Construction by the DAHS, as defined in Paragraph 2(c) below, of 82 units of affordable rental housing to include 18 units for households earning 30% or below the Area Median Income, 42 units for households earning 60% or below the Area Median Income, and 22 units for households earning 80% or below the Area Median Income, with an affordability period of 30 years (collectively, the “Affordable Housing Units”) and the multifamily residential will include a mix of 1, 2, and 3 bedroom units and be offered at income rates of 30%, 60%, and 80% AMI;
  2. Execution and delivery of an option agreement for land in favor of the City (the “Option,” as defined below) for the parcels located at 5520 Crescent Drive, Parcel ID 141669 and 5608 Crescent Drive, Parcel ID 141668, (Parcels 1 and 2 respectively on Exhibit B). Should DAHS not have received Building Permits and executed a Construction Completion Guarantee, deemed acceptable to the City, for the Affordable Housing Units by June 30, 2024, then the City may for the sum of \$10 exercise its Option to Parcels 1 and 2 on Exhibit B;
  3. Construction by Developer of public infrastructure as described in Exhibit D; and
  4. Development of the Property in accordance with the City’s Comprehensive Plan.
- H. City staff recommend that this Agreement be approved as a companion item to Zoning Map Change Case #Z1900036.
- I. This Agreement was considered by the Durham Planning Commission at its August 25, 2020 meeting, as part of a public hearing on zoning case Z1900036. The Agreement is incorporated into the Development Plan for Zoning Map Change Case Z1900036 as a text commitment. The Planning Commission recommended approval of Zoning Map Change Case #Z1900036, by a vote of 6-5.
- J. Pursuant to N.C.G.S. 160D-1005, a public hearing regarding this Agreement was held at the October 19, 2020 meeting of the City Council. The notice of public hearing specified, among other things, the location of the Property subject to this Agreement, the development uses proposed on the Property in accordance with the Development Plan, and a place where a copy of the proposed Agreement could be obtained. The Agreement was available for public inspection on the City’s website and at City Hall.
- K. The City Council adopted the following at its meeting on October 19, 2020: (a) an annexation ordinance; (b) a consistency statement pursuant to N.C. Gen. Stat. § 160A-383; (c) a zoning map change and (d) an ordinance approving this Agreement (“Ordinance”). A copy of the Ordinance is attached hereto as **Exhibit A**.

**NOW, THEREFORE**, in consideration of the premises of this Agreement and the mutual benefits to the parties, the parties agree as follows:

- 1) The Property. The Property to be developed pursuant to this Agreement consists of approximately 8.03 acres, as more particularly described and depicted on **Exhibit B** attached hereto.
- 2) Definitions. Capitalized terms in the Agreement shall have the meanings assigned to them below or elsewhere herein:
  - a) “**Applicable Law**” means all federal, state, and local statutes, ordinances, regulations, and requirements governing the Project, including, without limitation, the Current Regulations.
  - b) “**Current Regulations**” means all ordinances, resolutions, regulations, and comprehensive plans adopted by the City on or before the Effective Date affecting the Development of the Property and includes, without limitation, laws governing permitted uses of the Property, density, design, and improvements, subject to **Section 6** below.
  - c) “**Developer’s Affordable Housing Successor in Interest**” or “**DAHS**” means the anticipated Property Owner of the AHU Parcels (as defined in Paragraph 11(a)).
  - d) “**Development**” shall have the same meaning as it does in UDO section 17.3.
  - e) “**Development Permit**” means any building permit, site plan, subdivision approval, rezoning certification, variance, certificate of occupancy and any other official action of Local Government having the effect of permitting the Development for the use of the Property contemplated in this Agreement.
  - f) “**Development Plan**” means a type of plan that becomes part of the zoning of a property that establishes the level of development allowed absent further zoning action except as otherwise allowed or required under this Agreement, and which is incorporated into the zoning map change approved as part of Case Number Z1900036, and as set forth on **Exhibit C** hereto.
  - g) “**Infrastructure**” means major capital or community developments including, but not limited to, transportation, sanitary sewer, solid waste, drainage, and potable water.
  - h) “**Local Government**” means any municipality or governmental entity of the State of North Carolina established pursuant to Applicable Law which exercises regulatory authority over, and grants Development Permits for land Development or which provides public Infrastructure.
  - i) “**Parcel**” means any lot of record on which Development may occur in accordance with the Development Plan.
  - j) “**Project**” means the Development that will occur within and upon the Property pursuant to this Agreement and in accordance with the Development Plan.
  - k) “**Property Owner**” means (i) any person or entity, other than the City, which shall have acquired any portion of the fee interest in the Property from and after the Effective Date, and (ii) any successor in interest to such person or entity.

- 3) Relationship of the Parties. This Agreement creates a contractual relationship between the parties. This Agreement shall not be interpreted or construed to create the relationship of master/servant, principal/agent, association, partnership, joint venture, or any other relationship where one party may be held responsible for acts of the other party. This Agreement does not impose any partnership obligation or liability upon either party. Further, this Agreement is not intended to create, nor does it create, a relationship whereby the conduct of Developer constitutes “state action” for any purposes.
- 4) Legislative Act. Any change in the Development Standards established by this Agreement and as set forth on **Exhibit C**, shall require the approval of City Council, subject to compliance with applicable statutory procedures and consistent with **Section 6(a)**. This Agreement constitutes a legislative act of City Council. City Council adopted this Agreement only after following procedures required by Applicable Law.
- 5) Covenants Running with the Property. Subject to the provisions of Section 12 hereof, the conditions, covenants, and benefits set forth in this Agreement shall run with the Property, and every purchaser, assignee or transferee of an interest in the Property or any portion thereof, shall be obligated and bound by the terms and conditions of this Agreement, and shall be entitled to the benefits of this Agreement for a duration of ten (10) years in accordance with the terms of this Agreement. Note however, that the Affordable Housing Units shall have a period of affordability for thirty (30) years beginning on the date of the issuance of the applicable certificate of compliance. In addition, even after the term of this Agreement shall have expired, the zoning for the Property as described in the Development Plan shall survive and shall apply to future development of the Property, unless the Property is subsequently rezoned.
- 6) Applicable Regulations.
  - a) Applicable Law and Development Standards. Except as otherwise provided by this Agreement and in accordance with N.C.G.S. § 160D-1007, Development of the Property, including, without limitation, approval procedures and impact fees applicable thereto, shall be in conformance with the Current Regulations and all other Applicable Law.
  - b) Vested Rights. Pursuant to the authority granted therefor in N.C.G.S. § 160D-1001 through 1012 and subject to the provisions of subparagraph (a) above, all rights and prerogatives accorded the Developer by this Agreement, including, without limitation, application of the Current Regulations, shall constitute vested rights for the Development of the Property throughout the term of this Agreement, provided that the City’s current fee schedule for Fiscal Year 2020-21 shall be applicable through December 31, 2024.
  - c) Building Codes and Laws Other Than Land Use Regulations. Developer, notwithstanding any provision which may be construed to the contrary in this Agreement, must comply with any building, housing, electrical, mechanical, plumbing and gas codes subsequently adopted by the City or other governmental entity. This Agreement shall not be construed to supersede or contravene the requirements of any building, housing, electrical, mechanical, plumbing and gas codes subsequently adopted by the City or other governmental entity.
  - d) Updates to City Ordinances. Where any City ordinance, fee structure, resolution, or regulation adopted after of the date hereof (a “**New Ordinance**”), differs from the Current

Regulations, Developer may, at any time after adoption of such New Ordinance, request that such New Ordinance, or any portion thereof, be incorporated into the Current Regulations. The parties recognize that this section shall not apply to any commitments reflected in the Development Plan or this Agreement. Developer shall submit such request in writing to the City, and the City shall review and respond to such request within sixty (60) days. Incorporation of a New Ordinance, or any portion thereof, into the Current Regulations shall be a non-material change to the Agreement.

- 7) Local Development Permits and Other Permits Needed. The parties anticipate that the following local Development Permits and other regulatory permits will be needed to complete the Development of the Project: Site Plan approval, plat approvals (preliminary or final), street, water, sewer and stormwater construction drawing approval, building permits, certificates of compliance, city water and sewer permits, and stormwater control measure agreements. The failure of this Agreement to address a particular permit, condition, term, or restriction does not relieve the Developer of the necessity of complying with all laws governing permit requirements, conditions, terms, or restrictions.
- 8) Project Development.
  - a) Project Development. Developer and the DAHS shall construct the Project substantially in accordance with the provisions of **Exhibit C (Development Plan)** attached hereto and this Agreement.
  - i) Significant Changes. Significant changes to the Development Plan or the Development Agreement, which is incorporated into the Development Plan as a text commitment, shall be considered in accordance with the procedures set forth in the UDO and State law.
- 9) City Obligations.
  - a) Developer is seeking the annexation of the Property, approval of Zoning Map Change Case Number Z1900036, and this Development Agreement.
  - b) Developer only agrees to the terms of this Agreement if the annexation and Zoning Map Change Case are approved.
  - c) The parties understand that Developer and the DAHS seek approval of a Residential Compact District with Development Plan “(RC(D))” zoning for the Property.
  - d) In order for the DAHS to construct the Affordable Housing Units, Developer is seeking approval to construct an additional 171 units above the allowed base density of 161 units, of which 82 of the units will be the Affordable Housing Units as defined in this Agreement. Accordingly, the total number of multifamily units constructed on the Property will total 332.
- 10) Other Approvals. To the extent that any county or other Local Government, state or federal approvals are required in connection with the Development of the Project, the City shall use reasonable efforts to assist Developer and the DAHS in obtaining such approvals. For purposes of “approvals,” this shall not include any applications for grant funds or financial assistance made available by the City for affordable housing to the DAHS. These funds or this assistance is awarded strictly in accordance with the criteria established by the City.

11) Developer Obligations.

- a) In return for the increased density of residential development allowed on the Property, and provided that no action is pending in Durham County Superior Court contesting Zoning Map Change Case #Z1900036, Developer will donate on or before the later of (i) December 29, 2020, and (ii) 120 days after approval of the Zoning Map Change Case #Z1900036, the parcels located at 5608 Crescent Drive, Parcel ID 141668, and 5520 Crescent Drive, Parcel ID 141669 (Parcels 2 and 1 respectively on Exhibit B, collectively referred to herein as the “AHU Parcels”), and the associated development rights to build 82 Affordable Housing Units, to the DAHS in order to increase the availability of affordable housing in the City of Durham.
- b) In return for the increased density of residential development allowed on the Property, Developer will extend and construct Crescent Drive approximately 580 linear feet (the “Crescent Drive Extension”, see Exhibit D) as required by all applicable City of Durham requirements to provide access to the Affordable Housing Units. The Crescent Drive Extension will include the required water and sewer infrastructure to serve the AHU Parcels as required by the Utility Extension Agreement which is attached hereto as **Exhibit E** and incorporated herein by reference. All work shall be completed no later than January 1, 2023.
- c) Developer or its affiliate(s) has entered into a conditional purchase and sale agreement for the AHU Parcels, conveying such parcels and development rights to build 82 Affordable Housing Units with a proposed DAHS, for consideration of \$10, contingent on approval of the Development Plan and the Agreement by the City.

12) AHU Parcel Obligations. The following obligations of Developer apply solely to the AHU Parcels, and such obligations will run with the land, becoming sole obligations of the DAHS pursuant to the provisions of Section 11(a) hereof, provided, that upon any conveyance of the AHU Parcels to the City pursuant to Section 16(a)(ii) hereof, this section 12 shall be automatically terminated and of no further force or effect.

- a) Developer, on or before June 30, 2024, shall obtain building permits for the construction of the Affordable Housing Units
- b) Developer, prior to June 30, 2024, will have executed a construction completion guarantee in favor of the City, and in a form deemed acceptable by the City, for the completion of construction of the Affordable Housing Units.
- c) Developer will construct the Affordable Housing Units in buildings that contain four (4) stories, are served by elevators, will have internal corridors, and will not be clad with vinyl siding.
- d) The Affordable Housing Units will not be age-restricted.
- e) Developer will comply with the requirements of Section 6.6.1.G of the UDO.

- f) Upon conveyance of the AHU parcels to the DAHS, and provided that there has been no action filed contesting the validity of Zoning Map Change Case #Z1900036 within the time allowed under N.C.G.S. 1-54.1, Developer must record a restrictive covenant that locks in the affordability requirements for a period of 30 years and DAHS will comply with all requirements of the City as typically applied in connection with its granting of an Affordable Housing Bonus pursuant to Section 6.6.1.H of the UDO (*See* Rules and Procedures for the Affordable Housing Bonus as adopted by the Durham City Council), which may include, but is not limited to, contracts, restrictive covenants, deed restrictions, and stipulated penalties.
- g) Upon conveyance of the AHU Parcels to the DAHS, the DAHS shall remit to Developer the amount of \$50,000. Developer shall provide written notice of the conveyance of the AHU Parcels to the City.

13) INTENTIONALLY OMITTED.

- 14) Estimated Benefits to City. The appraised value of what City is receiving can be estimated as follows:

Land for 82 units of affordable housing, in conjunction with the Crescent Drive Extension, having an appraised value of Two Million and Nine Hundred Thousand Dollars 00/100 (\$2,900,000.00).

15) Default.

- a) Developer Default. Provided that no action is pending in Durham County Superior Court contesting the approval of Zoning Map Change Case #Z1900036, if Developer fails to donate the AHU Parcels and the associated development rights to build 82 multifamily units to increase the availability of affordable housing in the City of Durham to the DAHS on or before the later of (i) December 29, 2020, and (ii) 120 days after approval of the Zoning Map Change Case #Z1900036, such failure will constitute a material default under the terms of this Agreement.
- b) AHU Parcel Default. From and after the date the AHU Parcels shall have been conveyed to the DAHS, any default hereunder in connection with the AHU Parcels shall constitute a default hereunder solely by the Property Owner of the AHU Parcels and shall not constitute a default hereunder in connection with the remainder of the Property.
- c) City Default. If the City commits a material breach of the terms or conditions of this Agreement, Developer shall serve notice in writing upon the City setting forth with reasonable particularity the nature of the breach and the evidence supporting the finding and determination, and the City shall have sixty (60) days to cure such breach, provided that if such breach cannot be cured within sixty (60) days using commercially reasonable efforts, the City shall be permitted such time as reasonably necessary to effect such cure so long as the City shall use commercially reasonable efforts to diligently prosecute such cure.

16) Remedies.

a) City Remedies.

- i) No certificates of compliance for the 250 market-rate multifamily units to be built on 5526, 5580, 5534 Farrington Road (Parcel ID's 141653, 141648 and 141654) and 5519, 5521, 5523, 5609, 5701 Crescent Drive (Parcel ID's 141642, 141643, 141644, 141645, 141647) and 2926, 2922, and 2920 Rutgers Place (Parcel ID's 141649, 141650, and 141651) pursuant to the Development Plan and this Agreement will be issued prior to the completion of the Crescent Drive Extension and related infrastructure referenced in this paragraph.
- ii) Provided that no action is pending in Durham County Superior Court contesting Zoning Map Change Case #Z1900036, then if, (A) on or before the later of (i) December 29, 2020, and (ii) 120 days after approval of the Zoning Map Change Case #Z1900036, Developer has not donated the AHU Parcels to the DAHS, or (B) on or before June 30, 2024, Developer has not both: 1) received all necessary Building Permits for the Affordable Housing Units; and 2) executed a construction completion guarantee in favor of the City, in a form deemed acceptable by the City, for the completion of construction of the Affordable Housing Units, then the City will have the right to purchase the AHU Parcels, from Developer or the DAHS, as applicable, through the Option Agreement to be recorded immediately after the recording of this Agreement, for the sum of Ten Dollars (the "Option"). The form of the Option Agreement to be recorded pursuant to this Section 16(a)(ii) is attached hereto as Exhibit F. The Option may be exercised by the City by giving written notice to the Developer or the DAHS, as applicable, at its address, of the City's intent to exercise the Option in accordance with the terms of the Option. Upon the City's exercise of the Option, Developer or the DAHS, as applicable, shall record the special warranty deed conveying the Parcels to the City. Real estate taxes due for the year the Option is exercised shall be apportioned as of the date of closing (in other words, the grantor shall pay any real estate taxes due from prior years). Developer or DAHS (whichever entity is the owner of record of the AHU Parcels) shall be responsible for the payment of any mortgages, liens or penalties accrued against the AHU Parcels prior to the recordation of the deed conveying the Parcels to the City. The City shall tender the Option price of \$10.00 at closing.
- iii) Developer shall make a \$50,000.00 escrow deposit ("Escrow Funds") with the City upon execution of this Agreement. The Escrow Funds will be available for use by the City if Developer or DAHS fail to comply with the City's exercise of its rights under the Option. The Escrow Funds may be used to pay for any legal action required to transfer title pursuant to the Option or to pay any mortgages, liens, taxes, fees, or penalties incurred on the property prior to the time the deed from Developer to the City is recorded. Any Escrow Funds not required to pay for expenses incurred prior to recording of the deed from Developer to the City as set forth above, shall be returned to Developer, or, if notice of transfer has been delivered to the city pursuant to the terms of Section 12(g) hereof, then to the DAHS, within 30 days after the earlier of either (a) Developer has both (i) received Building Permits and (ii) executed a Construction

Completion Guarantee, deemed acceptable to the City, for the Affordable Housing Units by June 30, 2024, or (b) the transfer of title for the AHU Parcels to the City.

- b) Developer Remedies. If the City fails to cure any material breach within the 60-day period stated below, then such breach shall be a “**City Default**” hereunder, and Developer may be entitled to reimbursement of an amount of actual damages suffered by Developer to the extent such amounts have been reasonably documented and such documentation delivered to the City; provided that, regardless of the remedy elected by Developer, Developer has first allowed a 60-day period during which the City shall have the opportunity to remedy Developer’s claimed breach.

17) General Provisions.

- a) Term. The term of this Agreement shall commence only upon the full execution of this Agreement. This Agreement shall terminate ten (10) years thereafter (the end of the term of this Agreement, as may be extended from time to time by the parties or earlier terminated in accordance with the provisions of this Agreement, the “**Termination Date**”).
- b) Amendment. As required by N.C.G.S. §160D-1006(e), major modifications or significant changes to this Agreement shall follow the same notice, public hearing, and approval procedures as were followed initially when the parties formed this Agreement. A major modification or a significant change of this agreement shall include, by way of example: (i) any change in the required allocation of affordability requirements for development of the AHU Parcels resulting in an average affordability exceeding 60% AMI for the AHU Parcels as a whole, (ii) any reduction in the number of dwelling units to be constructed on the AHU Parcels, (iii) any change to Developer’s obligation to extend Crescent Drive, (iv) any increase in the overall number of dwelling units permitted on the Property, and (v) any change not agreed to by both parties hereto. Except as otherwise set forth herein, this Agreement may be amended only by written mutual consent of the parties or by their successors in interest. Wherever said consent or approval is required, the same shall not be unreasonably withheld. In the event state or federal laws or regulations prevent or preclude compliance with one or more provisions of this Agreement, the pertinent provisions of this Agreement shall be modified or suspended as may be necessary to comply with the state or federal laws or regulations. In such event, compliance with all other provisions of this Agreement shall remain unaffected and unmodified.
- c) Severability. If any word, phrase, sentence, paragraph or provision of this Agreement shall be finally adjudicated to be invalid, void, or illegal, it shall be deleted and in no way affect, impair, or invalidate any other provision hereof.
- d) Merger. This Agreement, coupled with its Exhibits, which are incorporated herein by reference, state the final and complete expression of the parties’ intentions with respect to the subject matter hereof.
- e) Further Assurances. The parties hereto shall cooperate with each other to effectuate the provisions of this Agreement and to act reasonably and expeditiously in all obligations under the Agreement. In the event of any legal action instituted by a third party or other

governmental entity or official challenging the validity of any provision of this Agreement, the parties shall cooperate in defending such action.

- f) Governing Law and Venue. This Agreement shall be construed and enforced in accordance with the substantive laws of the State of North Carolina, without regard to principles of conflicts of laws. The only proper venue and court for litigation related to, arising out of, or connected with this Agreement or the relationships between the parties established by this Agreement shall be Durham County Superior Court.
- g) Successors in Interest and Recordation. The burdens of this Agreement are binding upon, and the benefits of this Agreement shall inure to, all assignees or successors in interest of the Parties to this Agreement. The term “Developer” as used herein, shall denote (i) the named Developer herein, and (ii) any successor of Developer hereunder. This Agreement, and the Option Agreement, shall be recorded against the Property by Developer within fourteen (14) days after the execution of the Agreement by the Parties. The rights and obligations of Developer contained herein shall run with the land.
- h) Third Parties. Notwithstanding any provision herein to the contrary, this Agreement shall not be binding and shall have no force or effect as to persons or entities not parties or successors and assigns to this Agreement. It is specifically acknowledged that DAHS is Developer’s successor and assign with respect to the AHU parcels.
- i) City Approval of Agreement. The City Council has approved Zoning Map Change Case Number Z1900036 pursuant to all applicable statutory and UDO requirements.
- j) Estoppel. Each party agrees, from time to time, within thirty (30) days after request of another party, to deliver to the requesting party or such party’s designee, an estoppel certificate stating that this Agreement is in full force and effect, the unexpired term of this Agreement, and whether or not, to such party’s knowledge, there are any existing defaults or matters which, with the passage of time, would become defaults under this Agreement. It is understood and agreed that the party’s obligations to furnish such estoppel certificates in a timely fashion is a material inducement for execution of this Agreement.
- k) Representations and Warranties of the Developer. The Developer represents and warrants to the City that:
  - i) it is an entity duly organized, existing, and in good standing under the laws of the State of North Carolina; and
  - ii) it has the full right, power, and authority to enter into this Agreement and to perform its obligations hereunder.

l) Indemnification.

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Part I (Applicability and Interpretation of Parts; Survival). Note: Subsections (a)-(d) of this Part state which Parts of this Section 11 apply. When Parts apply, it is according to their terms and conditions.

- (a) If this contract is a construction agreement or a design professional agreement, all seven Parts apply.
- (b) If this contract is neither a construction agreement nor a design professional agreement, then only Parts I, II, and III apply.
- (c) Parts IV, V, VI, and VII do not affect an insurance contract, workers' compensation, or any other agreement issued by an insurer; and those Parts do not apply to lien or bond claims asserted under Chapter 44A of the N.C. General Statutes.
- (d) When Part IV, Part V, or Part VI or any combination of those Parts applies, they apply to every provision in this contract outside of Section 11 that would require the Contractor to indemnify, hold harmless, or defend Indemnitees.
- (e) To the extent of any conflict, this Part I controls the other Parts of this Section 11.
- (f) Parts I, II, IV, V, VI, and VII are not to be construed in favor or against any party as the drafter. The preceding sentence is not intended to imply how the remainder of this Section 11 or of this contract is to be construed.
- (g) Parts IV, V, VI, and VII apply to this section and all other sections of this contract regardless of whether the section in question is titled "indemnification," "warranty," or otherwise, and any clause that purports to contain requirements contrary to Parts IV, V, VI, and VII shall be construed consistently with those Parts.
- (h) This Section 11 shall remain in force despite termination of this contract (whether by expiration of the term or otherwise) and termination of the services of the Contractor under this contract.

Part II (Definitions). These definitions apply to this Section 11 unless otherwise stated.

Contractor – Each party to this contract except the City of Durham.

Construction agreement -- any promise or agreement in, or in connection with, a contract or agreement 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.

Defend – In Part I, Part VI, and Part VII, "defend" means to pay for or furnish counsel at the expense of the Contractor to defend any of the Indemnitees against claims alleged or brought against any of the Indemnitees by a third party alleged or brought in any court or other tribunal, including forms of alternative dispute resolution required by law or contract, before the court or tribunal has reached a final determination of fault. In Part III, "defend" means to pay for or furnish counsel at the expense of the Contractor to defend any of the Indemnitees against claims alleged or brought against any of the Indemnitees by a third party alleged or brought in any court or other tribunal, including forms of alternative dispute resolution required by law or contract, before, during, and after the court or tribunal has reached a final determination of fault.

Derivative parties -- with respect to a party, any of that party's subcontractors, agents, employees, or other persons or entities for which the party may be liable or responsible as a result of any statutory, tort, or contractual duty.

Design professional -- a person or entity who is licensed under and provides professional services regulated by Chapters 83A, 89A, 89C, 89E, or 89F of the N. C. General Statutes.

Design professional agreement -- any promise or agreement in, or in connection with, a contract or agreement with a design professional to provide design professional services.

Design professional services -- a service or work performed by a design professional for which licensure is required under Chapters 83A, 89A, 89C, 89E, or 89F of the N. C. General Statutes.

Fault – a breach of contract; negligent, reckless, or intentional act or omission constituting a tort under applicable statutes or common law; or violations of applicable statutes or regulations.

Indemnitees -- City and its officers, officials, independent contractors, agents, and employees, excluding the Contractor.

Subcontractor – any person or entity, of any tier, providing labor or material through the Contractor for use on the project at issue in the applicable construction agreement or design professional agreement.

Part III (Standard Indemnification). (a) To the maximum extent allowed by law, the Contractor shall defend, indemnify, and hold harmless Indemnitees from and against all Charges that arise in any manner from, in connection with, or out of this contract as a result of acts or omissions of the Contractor or its derivative parties. In performing its duties under this subsection “a,” the Contractor shall at its sole expense defend Indemnitees with legal counsel reasonably acceptable to City. (b) “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 attorney’s 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. By appropriate litigation, each Indemnitee, severally, shall have the right to enforce this section (titled “Indemnification”) directly against the Contractor, but not against the City of Durham.

Part IV (Restriction regarding Indemnitees’ Negligence). This contract shall not require the Contractor 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.

Part V (Restriction regarding Fault). Nothing in this contract requires the Contractor to indemnify or hold harmless Indemnitees or any other person or entity against losses, damages, or expenses unless the fault of the Contractor or its derivative parties is a proximate cause of the loss, damage, or expense indemnified.

Part VI (Restriction regarding Negligence). Nothing in this contract requires the Contractor, provided that it is a design professional, to defend Indemnitees or any other person or entity against liability or claims for damages, or expenses, including attorney’s fees, proximately caused or alleged caused by the professional negligence, in whole or in part of the Contractor, the City, or their derivative parties, whether the claim is alleged or brought in tort or contract.

Part VII (Liability When at Fault). It is agreed without limitation that nothing in this contract shall be interpreted to exclude from any indemnity or hold harmless provisions enforceable under Parts IV and V any attorneys' fees, litigation or arbitration expenses, or

court costs actually incurred by the City to defend against third party claims alleged in any court, tribunal, or alternative dispute resolution procedure required of the City by law or by contract, if the fault of the Contractor or its derivative parties is a proximate cause of the attorney's fees litigation or arbitration expenses, or court costs to be indemnified.

- m) Force Majeure. In addition to specific provisions of this Agreement, no Party shall be responsible for any default, delay or failure to perform if such default, delay or failure to perform is due to causes beyond such Party's reasonable control, including, but not limited to, strikes, lockouts, actions or inactions of governmental authorities, epidemics, pandemics (including but not limited to COVID-19), wars, embargoes, fires, hurricanes, adverse weather, acts of God, interference duly caused by any other Party, or the default of a common carrier. In the event of a default, delay or failure to perform due to causes beyond such Party's reasonable control or due to interference by another Party, any date or times by which the Parties are otherwise scheduled to perform, if any, shall be extended for a period of time equal in duration to the time lost by reason of the cause beyond the reasonable control of such Party. Written notice of such alleged delay shall be given to the other Party within thirty days of the commencement of such delay. An extension of time, if any, for such cause shall be mutually agreed upon in writing by the Parties. The Parties agree that such consent to an extension of time shall not be unreasonably withheld.
- n) Construction of Agreement. Both parties hereto have been represented by counsel in the negotiation of this Agreement, and neither this Agreement nor any provision hereof shall be construed against a party hereto because such party drafted it or caused it to be drafted.
- o) No Waiver. Failure of a party hereto to exercise any right hereunder shall not be deemed a waiver of any such right and shall not affect the right of such party to exercise at some future time said right or any other right it may have hereunder. Unless this Agreement is amended by vote of the City Council taken with the same formality as the vote approving this Agreement, no officer, official or agent of the City has the power to amend, modify or alter this Agreement or waive any of its conditions except as set forth herein.
- p) E-Verify Requirements. (A) If this contract is awarded pursuant to North Carolina General Statutes (NCGS) 143-129 – (i) the contractor represents and covenants that the contractor and its subcontractors comply with the requirements of Article 2 of Chapter 64 of the NCGS; (ii) the words "contractor," "contractor's subcontractors," and "comply" as used in this subsection (A) shall have the meanings intended by NCGS 143-129(j); and (iii) the City is relying on this subsection (A) in entering into this contract. (B) If this contract is subject to NCGS 143-133.3, the contractor and its subcontractors shall comply with the requirements of Article 2 of Chapter 64 of the NCGS.
- q) Notices. All notices hereunder shall be given in writing by certified mail, postage prepaid, or by delivery through a nationally recognized overnight carrier, delivery confirmation required, provided that such notices may be delivered via electronic mail if such notice shall also be delivered by one of the other methods described in this section. Delivery shall be deemed effective as of the date of the delivery receipt, or, for notices delivered electronically, on the date such notice was sent via electronic mail without automatic notification of any delivery error. Notices shall be delivered to the following addresses:

**To the City:**

City Manager's Office  
City of Durham  
101 City Hall Plaza, Second Floor  
Durham, NC 27701  
Email: Thomas.Bonfield@durhamnc.gov

**With copies to:**

City Attorney's Office  
City of Durham  
101 City Hall Plaza, Second Floor  
Durham, NC 27701  
Email: Donald.O'Toole@durhamnc.gov

**To the Developer:**

CKE V LLC  
16122 Morehead  
Chapel Hill, NC 27517  
Attn: Edward C. Lammas  
Email: ELammas@beaconpropertiesgroup.com

**With copies to:**

Morningstar Law Group  
112 W. Main Street, Second Floor  
Durham, NC 27701  
Attn: Patrick L. Byker  
Email: [pbyker@morningstarlawgroup.com](mailto:pbyker@morningstarlawgroup.com)

- r) Execution of Agreement. This Agreement may be executed in multiple parts as originals or by facsimile or scanned copies of executed originals and may further be executed by counterpart signature pages.
- s) Time for Performance. Any reference to "day" or "days" herein shall mean calendar day(s) unless otherwise specified, and any deadline or outside date set forth herein falling on a Saturday, Sunday, or holiday on which banks are closed for business in Durham, North Carolina shall be automatically extended to the following business day.
- t) Conflicting Terms; Conflicting Requirements. In the event of a conflict between the requirements of this Agreement and the requirements of any Exhibits or any of the Related Agreements, the more stringent requirements shall apply.

[Separate signature pages to follow.]

IN WITNESS WHEREOF, this Development Agreement has been executed by the parties on the day and year first above written.

Witness:

CITY OF DURHAM

\_\_\_\_\_

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

Attest: \_\_\_\_\_  
\_\_\_\_\_, City Clerk

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

PERSONALLY appeared before me the undersigned witness who, being duly sworn, deposes and says that (s)he saw the within named City of Durham, by \_\_\_\_\_, its City Manager, and \_\_\_\_\_, its City Clerk, sign and seal the within written Development Agreement, and as the act and deed of City of Durham deliver the same, and that (s)he with the other witness subscribed above witnessed the execution thereof.

\_\_\_\_\_

SWORN to before me this  
\_\_\_\_ day of \_\_\_\_\_, 2020

\_\_\_\_\_  
Notary Public for North Carolina

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

Witness:

CKE V LLC

Patrick Byler

By: Edward Lumma

STATE OF North Carolina )  
COUNTY OF Durham )

PERSONALLY appeared before me the undersigned witness who, being duly sworn, deposes and says that (s)he saw the within named CKE V LLC, by Edward Lumma its Manager, sign and seal the within written Development Agreement, and as the act and deed of CKE V LLC deliver the same, and that (s)he with the other witness subscribed above witnessed the execution thereof.

Patrick Byler

SWORN to before me this  
2nd day of September, 2020

Jeffrey Phillips  
Notary Public for Morningstar Law Group

My Commission Expires: 02-24-2024



**EXHIBIT A**

**Ordinance**

**AN ORDINANCE TO ADOPT THE DEVELOPMENT AGREEMENT BY AND  
BETWEEN THE CITY OF DURHAM  
AND CKE V LLC**

**WHEREAS**, N.C.G.S. §160D-1001 through §160D-1012 (the “Act”), authorizes municipalities to enter into development agreements with developers under the terms and conditions stated in the statutes, and

**WHEREAS**, the City of Durham (“City”) and CKE V LLC (“Developer”) have negotiated an agreement in accord with and under the authority of the cited statutes, and

**WHEREAS**, a public hearing was held on October 19, 2020 as set forth in N.C.G.S. §160D-1003 providing public review of the Development Agreement, as defined below; and

**WHEREAS**, the City finds that the Development Agreement is consistent with the Act, the City’s adopted policy guidance, and the Current Regulations, as defined in the Development Agreement, and is reasonable and in the public interest for the reasons set forth in the Development Agreement:

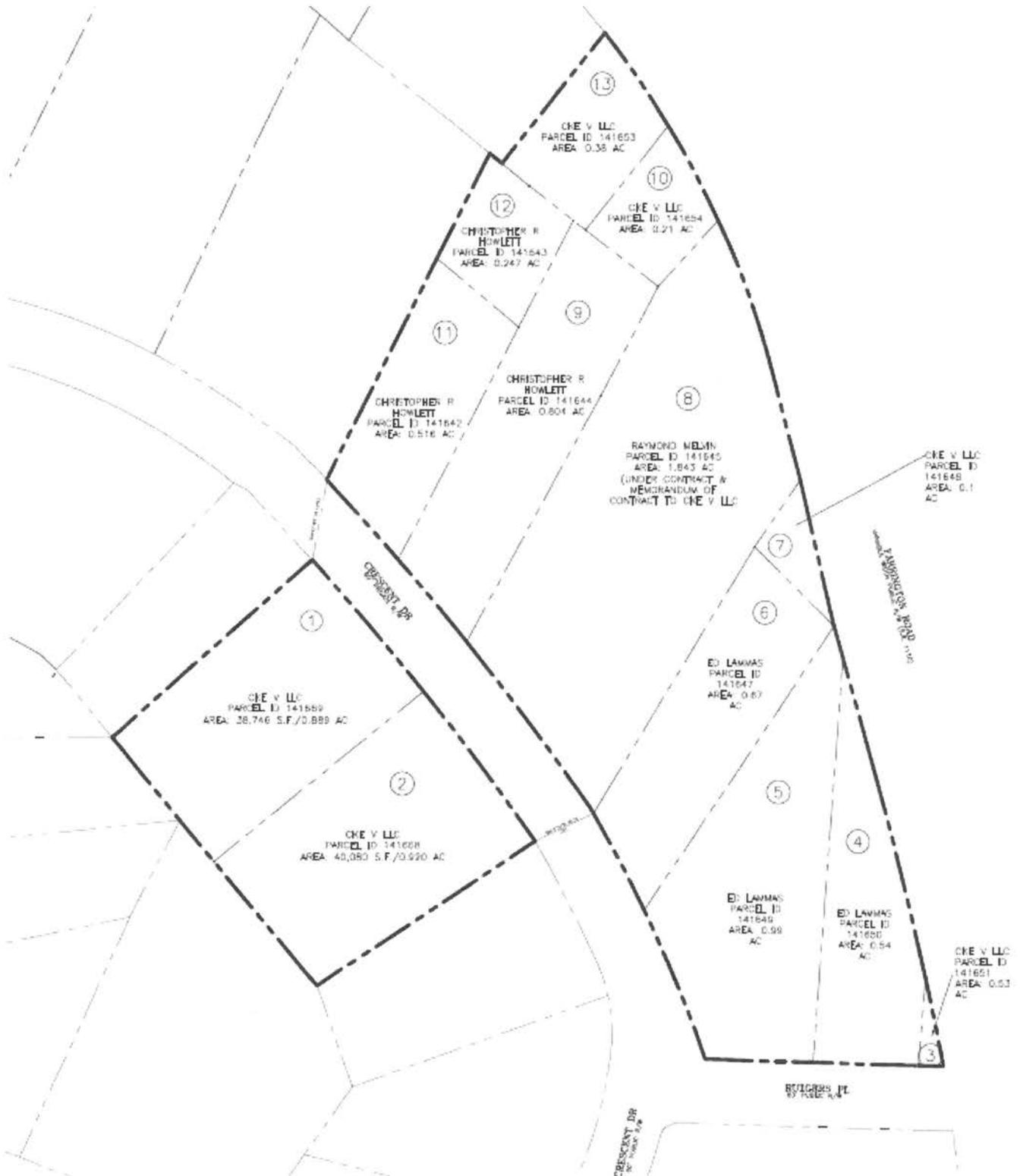
**NOW, THEREFORE, BE IT ORDAINED**, by the Durham City Council that:

1. Pursuant to the authority granted to the City by Article 10 of Chapter 160D of the North Carolina General Statutes, the City hereby adopts the Development Agreement by and among the City and the Developer, attached hereto (the “Development Agreement”), and authorizes the Manager to execute the Development Agreement.
2. This ordinance is effective upon adoption.

[Separate signature page to follow.]

Adopted this \_\_\_\_\_ day of \_\_\_\_\_, 2020.

**EXHIBIT B**  
**Property (13 parcels)**



LEGAL DESCRIPTION  
CRESCENT DRIVE LOTS REZONING

That certain lots or parcels of land lying and being in the City of Durham, Triangle Township, Durham County, State of North Carolina and more particularly described as follows:

Beginning at a point located at the intersection of the northern right-of-way line of Rutgers Place, a 60' public right-of-way, with the western right-of-way line of Farrington Road, a variable width public right-of-way, thence running along the northern right-of-way line of Rutgers Place, S88°36'16"E a distance of 223.41 feet to a point in the eastern right-of-way line of Crescent Drive, a 60' public right-of-way, thence along the eastern line of Crescent Drive along the arc of a circular curve to the left having a radius of 1330.00 feet, a length of 150.09 feet, said arc being defined by the chord N22°07'10"W a chord distance of 150.01 feet, thence continuing along the eastern right-of-way line of Crescent Drive along the arc of a circular curve to the left having a radius of 1330.00 feet a length of 101.73 feet, said arc being defined by the chord N27°32'37"W a chord distance of 101.71 feet, thence running S64°37'51"W a distance of 60.18 feet to a point in the western right-of-way line of Crescent Drive, thence running S56°19'44"W a distance of 243.05 feet to a point, thence running N39°28'22"W a distance of 299.93 feet to a point, thence running N48°12'19"E a distance of 248.23 feet to a point in the eastern right-of-way line of Crescent Drive, thence running N09°43'12"E a distance of 76.14 feet to a point in the eastern right-of-way line of Crescent Drive, thence running N26°08'21"E a distance of 229.71 feet to a point, thence running N26°30'24"E a distance of 109.33 feet to a point, thence running S50°47'47"E a distance of 14.70 feet to a point, thence running N38°26'11"E a distance of 154.55 feet to a point in the eastern right-of-way line of Farrington Road, thence running along the western right-of-way line of Farrington Road along the arc of a circular curve to the right having a radius of 889.82 feet a length of 104.15 feet, said arc being defined by the chord S34°15'29"E a chord distance of 104.09 feet to a point, thence continuing along the western right-of-way line of Farrington Road along the arc of a circular curve to the right having a radius of 894.93 feet a length of 99.42 feet, said arc being defined by the chord S27°43'21"E a chord distance of 99.36 feet to a point, thence continuing the western right-of-way line of Farrington Road along the arc of a circular curve to the right having a radius of 894.93 feet a distance of 130.48 feet, said arc being defined by the chord S20°21'48"E a chord distance of 130.36 feet, thence continuing along the western right-of-way line of Farrington Road S14°46'15"E a distance of 123.47 feet to a point, thence continuing along the western right-of-way line of Farrington Road S13°22'10"E a distance of 139.96 feet to a point, thence continuing along the western right-of-way line of Farrington Road S16°06'19"E a distance of 137.03 feet to a point, thence continuing along the western right-of-way line of Farrington Road along the arc of a circular curve to the right having a radius of 3130.00 feet, a length of 201.84 feet, said arc being defined by the chord S14°15'29"E a chord distance of 201.81 feet to a point, thence continuing along the western right-of-way line of Farrington Road along the arc of a circular curve to the right having a radius of 3130.00 feet a length of 84.62 feet to a point, said arc being defined by the chord S11°38'10"E a chord distance of 84.62 feet to the point or place of beginning containing 8.535 acres as shown on that plat entitled "Final

Plat of Rezoning for CRESCENT DRIVE LOTS” prepared by Triangle Surveyors, Inc.,  
Ronald D. Carpenter, PLS dated August 9, 2019.

**EXHIBIT C**

**Development Plan**

**[DEVELOPMENT PLAN TO BE INSERTED AFTER  
CITY COUNCIL APPROVAL]**



**EXHIBIT E**

**UTILITY EXTENSION AGREEMENT FOR WATER, SEWER, AND  
STORMWATER SERVICES**

**THIS UTILITY EXTENSION AGREEMENT** (hereafter "Contract"), is made and entered into as of the \_\_\_ day of \_\_\_\_\_, 20\_\_\_, by and between **CKE V LLC**, a limited liability company (hereafter "Developer") and the **CITY OF DURHAM**, a North Carolina municipal corporation (hereafter the "City");

**WHEREAS**, the Developer proposes to extend water and sewer to serve **Farrington Multi-Family**, a multi-family residential development with a maximum of 332 units, located at 5609 Crescent Drive, further described as Parcel ID's 141651, 141650, 141649, 141648, 141647, 141645, 141654, 141653, 141644, 141643, 141642, 141669, and 141668 ("the Property").

**WHEREAS**, the Developer requires water and sewer lines that will connect to the City's water and sewer systems in order to enable construction of the above described development or such other development as may be approved by the Durham City Council; and

**WHEREAS**, the Property is outside the City limits and Developer has submitted a petition for annexation of the Property to the City;

**WHEREAS**, the City is not obligated to offer utility service to property outside its corporate limits and requires, among other things, that such properties enter into a utility extension agreement and be annexed into the City, unless annexation is excused by the City Council;

**WHEREAS**, unless annexation has been excused by the City Council, the City's obligations under this Contract are effective upon the effective date of City annexation of the property;

**WHEREAS**, under City ordinance, Developer is required to pay all costs associated with this Contract, in particular the costs associated with the design, materials, and installation of water, sewer, and stormwater infrastructure, required street infrastructure, and other related costs; and

**WHEREAS**, at its meeting held \_\_\_\_\_, 20\_\_\_, the City Council authorized this Contract in accordance with the terms set forth below;

**NOW THEREFORE**, in consideration of ten dollars and other valuable consideration, the receipt of which is hereby acknowledged, the Developer and the City, and their heirs, successors, and assigns agree:

1. **Included Appendices.** Appendix A (Annexation) and Appendix B (Project Specific Provisions) are a part of this Contract.
2. **Effective Date.** If Appendix A (Annexation) has been included in this Contract, the City's obligations under this Contract are effective upon the effective date of City annexation. This Contract creates no obligation for the City to annex the Property or to proceed with the annexation of the Property on any particular timetable, which decisions shall be in the discretion of the City Council. In the event the Property is not annexed, this Contract shall be null and void unless the City Council approves a Contract modification to allow extension of utility services without annexation. If Appendix A (Annexation) is not part of this Contract, the obligations of this Contract shall become effective upon execution by the parties.
3. **Definitions and Rules of Interpretation.** In this Contract, the following terms, whether capitalized or not, shall have the meanings set forth below, unless it is clear in the Contract that the context requires otherwise. In addition, the rules of interpretation set forth below shall apply.

"City" means the City of Durham.

"City Requirements" mean all ordinances, policies, standards, and specifications prescribed by the City applicable to the development activity, work, or construction undertaken pursuant to this Contract. Such Requirements may include, but are not limited to, the Unified Development Ordinance, the City Code, and standards for processing of and construction of infrastructure many of which are contained in the City's Reference Guide for Development maintained by the City Department of Public Works.

"Developer" is the owner of the Property or the entity which has contracted to purchase the various parcels composing the Property thereby becoming the owner of the Property, and is the entity identified in the first paragraph of this Contract. "Developer" includes successors in interest and assigns.

"Improvements" means all infrastructure required by the City that allows water and sewer to be delivered to or from the Property and integrated into the City's utility system, and all infrastructure, which may include natural features, that allows stormwater from the Property to be managed in accordance with City Requirements. It includes, but is not limited to, lines, mains, outfalls, water and sewer connections to the street mains including meter box and meter yoke, water meters to the extent required under City Requirements, all construction and repair to streets and rights of way within which water, sewer, or stormwater infrastructure is located, pump stations, water towers, water booster stations, and all natural and constructed stormwater infrastructure that carries or treats stormwater, or mitigates the impact of stormwater. It may include, if allowed under City Requirements, natural features and improvements located on individual lots to the extent

they are part of the planned stormwater system or contribute to meeting water quality requirements.

"Person" includes natural persons, firms, companies, associations, partnerships, trusts, corporations, governmental agencies and units, and other legal entities.

"Project" means the development approved by the Durham City Council for the Property through a zoning action, and any committed elements that, if also approved, would establish additional conditions for such zoning.

"Property" means the land located at Parcel ID's 141651, 141650, 141649, 141648, 141647, 141645, 141654, 141653, 141644, 141643, 141642, 141669, and 141668.

"Water and/or sewer" refer to the particular utilities being installed by Developer, which may include water only or sewer only, or both, as generally described in Appendix B and as ultimately determined through City review of site plans and construction drawings.

The following rules of interpretation apply: (1) The singular includes the plural, and the plural the singular; (2) The word "shall" is mandatory.

4. **Developer's Obligation.** The Developer shall bear the total cost and expense of all the obligations and duties created by this Contract unless otherwise explicitly stated in this Contract. Those obligations and duties are, generally, to create all Improvements as may be required by the City in accordance with this Contract and with City Requirements. Such Improvements include but are not limited to: i) all Improvements within the Project; ii) all Improvements connecting to water, sewer, or stormwater infrastructure outside the Project, whether existing or planned; iii) modifications to any existing water, sewer, or stormwater infrastructure outside the Project that facilitate provision of utility service to the Project, or compliance with City Requirements, or integration of the Improvements with the surrounding existing or planned water, sewer, or stormwater system; and iv) new streets or alterations to existing streets or rights of way within which the Improvements are located. The Developer's obligations also include all costs, including but not limited to legal costs, of acquiring all fees or easements within which the Improvements will be located.

5. **Improvements.** A general description of the Improvements to be constructed to serve the Project is set forth in Appendix B. The final determination of the number, scope, size, materials, and location of required Improvements shall be as determined in the discretion of the City with jurisdiction over the utility service provided and shall be made in connection with site plan and construction drawing approval.

6. **Street work.** Streets within the Project shall be constructed in accordance with City Requirements, which include payments for installation of particular types of streets.

7. **City Requirements.** Design, construction, materials, sizing, other specifications, permitting, inspections, testing, documentation and furnishing of as-built drawings, and acceptance of completed infrastructure shall be in accordance with City Requirements. Design and construction shall be by professionals licensed in the state of North Carolina to do the relevant work. City approval of the design of the Improvements shall be required prior to construction, as set forth in City Requirements. If Developer is connecting to the County sewer system, the City may require Developer to furnish the contract providing for such connection.
8. **Contracts.** Developer shall ensure that its contracts for design and construction of the Improvements do not shorten or limit any otherwise applicable warranties or statutes of limitation. In addition, Developer shall ensure that such contracts contain an assignment clause that allows assignment of any warranties regarding the constructed Improvements to the City. For certain Improvements, the City may require that Developer's contracts identify the City as a 3<sup>rd</sup> party beneficiary, or may require prior consultation regarding contractors for the project. If such requirements are applicable to this Project, it shall be shown in Appendix B, or the City will notify Developer in a timely manner of such requirements prior to the Developer's contracting for Improvements.
9. **Compliance; Permits.** All activity undertaken pursuant to this Contract shall be in compliance with federal and state law and regulations and City Requirements. Developer shall obtain all permits and approvals required to do the work authorized under this Contract.
10. **Conflicts.** In the event of conflict between this Contract and any law, state or federal regulation, or City Requirements, the stricter of the applicable provisions shall control.
11. **Testing.** Developer shall pay for any testing deemed necessary to determine that the Improvements, and their environmental impact, comply with federal or state law and regulations, or City Requirements.
12. **Dedication to City.** With the exception of Improvements that are designated in Appendix B or in site plan approvals as private, upon completion of the Improvements in accordance with City Requirements, the Developer shall dedicate to the City, in the manner specified by the City, the Improvements located within public streets, and all outfalls, pump stations, water booster stations, and water towers. In addition, any property in which the Improvements are located shall be dedicated if it has not already been dedicated. Upon acceptance of the dedicated Improvements by City Council, the City shall thereafter be responsible for maintenance. The determination as to whether the Improvements comply with City Requirements shall be made by the Director of Public Works or designee in his or her sole discretion. The City may require, among other things, certified as-built plans for the Improvements; a release of liens from contractors and subcontractors; additional plats or deeds for property containing the Improvements; releases of any mortgage or security interests in such property; and any other information the City deems to be necessary to accept the constructed Improvements.
13. **Warranty/Repair.** Developer warrants that the Improvements shall be constructed in accordance with City Requirements and other applicable professional standards, fit for the

purpose for which they were constructed, and free from defects for a one year period which shall run from the time of acceptance by the City. Developer shall be responsible for repairs needed during the one year period. Upon request by the City, Developer will assign any warranty rights it has under its contracts to the City.

14. **City Extensions.** Developer agrees that in accordance with City Requirements, the City may make extensions from or connections to water, sewer, and stormwater improvements that Developer has dedicated to the City. City Requirements provide for reimbursements to be made to the Developer for such connections/extensions in certain circumstances. If such are available under this Contract, they are described in Appendix B.

15. **Assignments/Reimbursements.** Developer shall notify the City in writing of any assignment of the obligations under this Contract and/or change in the entity to receive reimbursements under this Contract, in the event that future reimbursements are provided for in Appendix B or pursuant to City Requirements. An assignment by Developer of the obligations under this Contract does not limit the obligations of successor owners of the property unless i) the assignee owns a substantial part of the property; and ii) there is a written modification of this Contract approved by the parties to replace the Developer with the assignee to the exclusion of other owners. If reimbursements are provided for under this Contract, they shall be made to the original Developer or to a successor in interest who has been identified in writing as entitled to the reimbursements. In the absence of a party that legally exists that has been identified as entitled to the reimbursements, the City shall hold the reimbursements for three years from the various dates they are received. After the three year period, the reimbursements shall be forfeited to the City. The City may, but is not required to, provide notice of potential reimbursements to successors in interest to the original Developer. In the event of dispute between owners claiming an interest in the reimbursements, the City shall hold the reimbursements until legal resolution, if a lawsuit has been filed. If legal action is not filed within three years, the reimbursements shall be forfeited to the City. Identification of new owners entitled to reimbursements shall be in a manner which in form and substance meets the City's directives.

16. **No obligations.** This Contract does not create any express or implied obligation that the City: i) reserve or create water or wastewater treatment capacity; ii) approve a permit or connection, which shall be granted only upon compliance with all requirements of law, including City Requirements; iii) offer utility services to any user within the Project; iv) provide a particular quantity, quality, or pressure for the water serving the Project; v) waive or not charge fees that are otherwise applicable pursuant to City Requirements; or vi) approve annexation of the Property or a particular zoning of the Property.

17. **No vesting.** Developer agrees that no vested rights exist that would impact the City's consideration of its proposed development, and that no vested rights shall be claimed for the proposed development until and unless annexation and zoning are approved, if they are approved, and such further development approvals are given as would, under the law, create a claim regarding vested rights.

18. **Contract a Covenant that Runs with Land.** The obligations and entitlements of this Contract are covenants that run with the Property, and are binding on all heirs, assigns, successors in interest, and other subsequent owners. Within 30 days of Contract execution, Developer shall record this Contract, and shall furnish the City a copy of the recorded document and a statement from an attorney licensed to practice law in North Carolina, in form and substance acceptable to the City, that the Contract has been recorded, and that the obligations of the Contract are binding upon all subsequent owners of the Property. No development approvals shall be issued by the City in the absence of recordation and certification as described above.

19. **Notice.**

(a) *Mode and Designated Recipients.* All notices and other communications given under this Contract shall be written, and made by personal delivery, fax, Federal Express, or United States mail, addressed as follows. The parties are also requested to send a copy by email.

To the City:

Public Works Director  
Department of Public Works  
City of Durham  
101 City Hall Plaza  
Durham, NC 27701-3329  
Fax: (919) 560-4316  
Email: Marvin.Williams@durhamnc.gov

To the Developer:

CKE V LLC  
Attention: Edward Lammas  
16122 Morehead  
Chapel Hill, NC 27517  
Phone: 919-491-1633  
Email: elammas@beaconpropertiesgroup.com

(b) *Change of Address.* Notice of a change of address, fax number, or person to receive notice shall be provided to the other party in writing through one of the means described above.

(c) *Time of Receipt.* A notice or other communication is effective upon delivery to the other party if it is personally delivered or sent by fax. Notice sent by mail or Federal Express is effective upon the second work day after the date it was sent, as evidenced by a postmark or similar indicia, or upon actual delivery.

20. **No Third Party Rights.** This Contract is intended for the benefit of the City and Developer and not for any other Person, and no such Persons shall enjoy any right, benefit, or entitlement under this Contract.

21. **Nondiscrimination Policy; EEO.** The City of Durham opposes discrimination on the basis of race and sex and urges Developer to provide a fair opportunity for minorities and women to participate in its work force and to contract with Developer. During the performance of this Contract Developer agrees that it shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, national origin, political affiliation or belief, age, or handicap.

22. **Governmental Authority Retained.** Nothing contained in this Contract shall be deemed or construed to in any way stop, limit, or impair the City from exercising or performing any regulatory, policing, legislative, governmental, or other powers or functions, or shall limit the City's discretion in the exercise of such powers and functions.

23. **Remedies; Breach.** The parties shall have all remedies allowed by law to enforce this Contract. Substantial breach of this Contract shall result in the Contract becoming void, at the election of the nonbreaching party. Prior to voiding the Contract, the party alleging a substantial breach shall give notice to the other party and shall afford an opportunity to cure of at least 60 days. In addition, in the event of breach by Developer, the City may withhold any permit or approval related to development, construction, or occupancy in the Project. Enumeration of these remedies is not exclusive.

24. **Services Dependent on Improvements.** The City's furnishing of water and/or sewer service to the Property is dependent upon completion of the Improvements. In the event Developer does not complete the Improvements, Developer and its successors in interest shall have no entitlement to receive water and/or sewer service. Entitlement to water and/or sewer service is dependent upon: annexation (if required); city zoning; completion of and conformance with this Contract; construction of the Improvements by Developer or its successors in interest; water and/or sewer capacity at the time of completion; and compliance with all other lawful requirements.

25. **Termination.** Developer's failure to comply with its obligations under the Development Agreement may result in termination of this Contract, at the election of the City. The City shall determine if such failure exists, and shall notify Developer in writing. Developer shall have at least 90 days to initiate or increase construction activity. Final notice of termination shall be given by the City Manager or a Deputy City Manager.

26. **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 Contract, or constitute approval of or acquiescence in a breach thereunder, except as may be specifically agreed in writing.

27. **Contract not Severable.** In the event any substantive provision of this Contract is declared unenforceable the Contract shall become void. This paragraph, however, does not prohibit the parties from agreeing to eliminate or modify the unenforceable provision or enter into a new agreement.

28. **Modifications.** Substantial modifications of the Contract shall be approved by the City Council. Minor modifications, modifications of Appendix B regarding Improvements, and substitution of an assignee owner of a substantial portion of the Property for the original Developer may be approved by the City Manager or deputy or assistant City Manager without Council approval. Without exclusion as to other minor modifications, a modification to the Project which both reduces the overall density of and utility demand within the Project or which would not be considered to be a significant deviation under the standards set forth in Section 3.5 of the Unified Development Ordinance is a "minor modification" under this Paragraph. A modification of this Contract is not valid unless it is signed by both parties and is 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 a deputy or assistant City Manager.

29. **Recordation of Status of Agreement.** The City shall cooperate with the Developer in executing any form to be filed by the Developer in the event that the Contract is voided, terminated or superseded, or its requirements are fully satisfied.

30. **Entire Agreement.** This Contract contains the entire agreement between the parties pertaining to the subject matter of this Contract. 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 Contract.

31. **Choice of Law and Forum; Process Agent.** This Contract shall be deemed made in Durham County, North Carolina. This Contract 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 Contract 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 limitation, however, shall not apply to subsequent actions to enforce a judgment entered in actions heard pursuant to this subsection. Developer shall maintain a registered agent in North Carolina with the office of the N. C. Secretary of State.

32. **Indemnification.**

Contents

Applicability of Parts	Part I
Definitions	Part II
Standard Indemnification	Part III
Restriction regarding Indemnitees' Negligence	Part IV
Restriction regarding Fault	Part V
Restriction regarding Negligence	Part VI
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Part I (Applicability of Parts). Note: This Part states which Parts of this Section 32 apply.

- (a) If this contract is a construction agreement or a design professional agreement, Parts I, II, III, IV, V, and VII apply.
- (b) If this contract is a construction agreement that includes design professional services or a design professional agreement purporting to require a design professional to defend the Indemnitees or any other person or entity against liability or claims for damages or expenses, including attorney's fees, proximately caused or allegedly caused by the professional negligence, in whole or in part, of the Contractor, the City, or their derivative parties, whether the claim is alleged or brought in tort or contract, then all seven Parts apply.
- (c) If this contract is neither a construction agreement nor a design professional agreement, then only Parts I, II, and III apply.
- (d) Parts IV, V, VI, and VII do not affect an insurance contract, workers' compensation, or any other agreement issued by an insurer; and those Parts do not apply to lien or bond claims asserted under Chapter 44A of the N.C. General Statutes.
- (e) When Part IV, Part V, or Part VI or any combination of those Parts applies, they apply to every provision in this contract outside of Section 32 that would require the Contractor to indemnify, hold harmless, or defend Indemnitees.
- (f) To the extent of any conflict, this Part I controls the other Parts of this Section 32.

Part II (Definitions). These definitions apply to this Section 32 unless otherwise stated.

Contractor – Each party to this contract except the City of Durham.

Construction agreement – any promise or agreement in, or in connection with, a contract or agreement 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.

Defend – to pay for or furnish counsel at the expense of the Contractor to defend any of the Indemnitees against claims alleged or brought against any of the Indemnitees by a third party alleged or brought in any court or other tribunal, including forms of alternative dispute resolution required by law or contract, before the court or tribunal has reached a final determination of fault. In Part III, “before the court or tribunal has reached a final determination of fault” does not apply.

Derivative parties – with respect to a party, any of that party's subcontractors, agents, employees, or other persons or entities for which the party may be liable or responsible as a result of any statutory, tort, or contractual duty.

Design professional – a person or entity who is licensed under and provides professional services regulated by Chapters 83A, 89A, 89C, 89E, or 89F of the N. C. General Statutes.

Design professional agreement – any promise or agreement in, or in connection with, a contract or agreement with a design professional to provide design professional services.

Design professional services – a service or work performed by a design professional for which licensure is required under Chapters 83A, 89A, 89C, 89E, or 89F of the N. C. General Statutes.

Fault – a breach of contract; negligent, reckless, or intentional act or omission constituting a tort under applicable statutes or common law; or violations of applicable statutes or regulations.

Indemnitees – City and its officers, officials, independent contractors, agents, and employees, excluding the Contractor.

Subcontractor – any person or entity, of any tier, providing labor or material through the Contractor for use on the project at issue in the applicable construction agreement or design professional agreement.

Part III (Standard Indemnification). (a) To the maximum extent allowed by law, the Contractor shall defend, indemnify, and hold harmless Indemnitees from and against all Charges that arise in any manner from, in connection with, or out of this contract as a result of acts or omissions of the Contractor or its derivative parties. In performing its duties under this subsection “a,” the Contractor shall at its sole expense defend Indemnitees with legal counsel reasonably acceptable to City. (b) “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 attorney’s 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. (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 Contractor under this contract.

Part IV (Restriction regarding Indemnitees’ Negligence). This contract shall not require the Contractor 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.

Part V (Restriction regarding Fault). Nothing in this contract requires the Contractor to indemnify or hold harmless Indemnitees or any other person or entity against losses, damages, or

expenses unless the fault of the Contractor or its derivative parties is a proximate cause of the loss, damage, or expense indemnified.

Part VI (Restriction regarding Negligence). Nothing in this contract requires the Contractor to defend Indemnitees or any other person or entity against liability or claims for damages, or expenses, including attorney's fees, proximately caused or alleged caused by the professional negligence, in whole or in part of the Contractor, the City, or their derivative parties, whether the claim is alleged or brought in tort or contract.

Part VII (Liability When at Fault). It is agreed without limitation that nothing in this contract shall be interpreted to exclude from any indemnity or hold harmless provisions enforceable under Parts IV and V any attorneys' fees, litigation or arbitration expenses, or court costs actually incurred by the City to defend against third party claims alleged in any court, tribunal, or alternative dispute resolution procedure required of the City by law or by contract, if the fault of the Contractor or its derivative parties is a proximate cause of the attorney's fees litigation or arbitration expenses, or court costs to be indemnified.

33. **E-Verify Requirements.** (a) If this contract is awarded pursuant to North Carolina General Statutes (NCGS) 143-129 – (i) the Developer represents and covenants that its contractor and its subcontractors comply with the requirements of Article 2 of Chapter 64 of the NCGS; (ii) the words "contractor," "contractor's subcontractors," and "comply" as used in this subsection (a) shall have the meanings intended by NCGS 143-129(j); and (iii) the City is relying on this subsection (a) in entering into this contract. (b) If this contract is subject to NCGS 143-133.3, the contractor and subcontractors shall comply with the requirements of Article 2 of Chapter 64 of the NCGS.

34. **Iran Divestment Act Certification.** Developer certifies that, if it submitted a successful bid for this contract, then as of the date it submitted the bid, the Developer was not identified on the Iran List. If it did not submit a bid for this contract, the Developer certifies that as of the date that this contract is entered into, the Developer is not identified on the Iran List. It is a material breach of contract for Developer to be identified on the Iran List during the term of this contract or to utilize on this contract any contractor or subcontractor that is identified on the Iran List. In this Iran Divestment Act Certification section -- "Developer" means the person entering into this contract with the City of Durham; and "Iran List" means the Final Divestment List – Iran, the Parent and Subsidiary Guidance List – Iran, and all other lists issued from time to time by the N.C. State Treasurer to comply with G. S. 147-86.58 of the N.C. Iran Divestment Act.

IN **TESTIMONY** WHEREOF, the parties hereto have executed this Contract as of the dates shown below.

## APPENDIX A -ANNEXATION PROVISIONS

1. The Developer shall ensure that all actions are taken to ensure that the Property may be legally annexed by the City. Developer shall ensure that the annexation petition it has submitted and all supporting documents and certifications required by the City are updated as required in the discretion of the City and remain valid until the City Council gives final approval or disapproval to the annexation. Prior to the effective date of annexation, if the City determines to annex the Property, Developer shall not seek any development approvals from any governing unit other than the City of Durham. Such approvals include, but are not limited to, zoning (if it has not already been granted by the County for the Property), and in addition site plans, preliminary plats, final plats, building permits, or construction drawings for properties or buildings contained within the Property, except where another governmental entity has jurisdiction. Applications for approval of a sedimentation and erosion control permits, and other State and Federal permits, may be made, but if granted, no activity shall be conducted pursuant to any such approval.

2. A valid annexation petition shall consist of a petition signed by all owners of and within the Property that meets the requirements of State law for petitioned annexation for contiguous or noncontiguous areas, whichever is applicable. Necessary supporting documents shall include a certificate of title for the Property, current as of the date of submittal to the City, a metes and bounds description of the Property, a map of the Property that corresponds to the metes and bounds description of the Property, and any other information specifically requested by the City.

3. The City may terminate this Contract, and/or refuse to provide such service to any part of the Property, and/or void or deny permits to construct water and/or sewer lines to any part of the Property if the Developer does not comply with the annexation provisions of this Contract.

4. In the event the Property includes lots that have already been developed, or have already received building permits, Developer shall pay to the City the equivalent of the City's capital facility fees for such lots, calculated as of the date of execution of this Contract, unless the proposed development for the Project to be approved by City Council eliminates the already existing development from the Property. Such payment shall be made to the Department of Inspections prior to the approval of the first additional building permit requested within the Property, and prior to issuance of permits for construction of water and/or sewer lines within the Property.

## APPENDIX B -PROJECT SPECIFIC PROVISIONS

1. Water service shall be provided by constructing an 8-inch waterline in Crescent Drive extension from the existing 8-inch waterline at the intersection of Rutgers Place and Crescent Drive. Water service shall also be provided by tapping the existing 12-inch waterline in Farrington Road. Water lines shall meet all City Requirements, including but not limited to size, design standards, loop feed requirements (with two waterline feeds constructed and operational prior to issuance of the 100th Certificate of Compliance for any phase designated in the Project , fire flow requirements, and system needs. There shall be no City participation in the cost. The Developer shall extend water lines through the Project to its boundaries as directed by the City to allow for future extension.

2. Sewer service shall be provided by extending the existing 8-inch sanitary sewer in Crescent Drive. All sewer Improvements, including size, location, and service area shall meet City Requirements and shall be installed pursuant to any additional requirements in the Development Agreement. There shall be no City participation in the cost. The Developer shall extend sewer and easements through the Project to its boundaries as directed by the City to allow for future extensions. The Developer shall acquire all offsite sewer easements. The Developer may request City assistance in condemnation but, if approved, any acquisition shall be at the Developer's expense including reasonable attorney fees and all other litigation expenses and costs.

3. The Property is located within the Service Area for the Farrington Road Waterline Extension established pursuant to Durham Code section 70-50. The Developer shall pay the following Service Area Fees, which Developer acknowledges serve to reimburse the City for services furnished by the City in designing and constructing the Farrington Road Waterline Extension which is being constructed in part to serve the Development:

Non-Residential Unit	\$1.16/Gallon of Average Daily Flow
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The fees shall increase 5%, compounding annually effective July 1 of each year, with the first annual increase occurring on July 1, 2018. The rates shall be rounded up to the nearest cent with each increase. The payment for each phase of the Project is due prior to the City's issuance of the water and sewer extension permits for each respective phase. No Frontage Charges shall be due for the frontage along Farrington Road.

4. The City will make refunds to the Developer for connections made by subsequent property owners to City water, and/or sewer lines constructed by the Developer in a street, if any, in accordance with City Requirements. These refunds will be made to the Developer for a period of ten (10) years after the completion of the water and/or sewer line. After ten (10) years have expired, charges received for connecting to the water and/or sewer lines will not be refunded to the Developer. These refunds will be in an amount equal to the frontage charge collected, not to exceed one-half the average cost to the Developer per linear foot of pipeline installed.

5. The Developer shall pay frontage charges at the prevailing rate to the City for the portion of the project along Rutgers Place. No frontage charges are required for the frontage along either Farrington Road or Crescent Drive. The required frontage charges shall be paid to the

City prior to the time that the Project's water or sewer lines are constructed (Section 70-17 of the City of Durham Code of Ordinances). Developer acknowledges that frontage charges are paid to the City as payment for the City's past investment in water and sewer line infrastructure that will serve the Project, and also anticipated future maintenance and upgrades to this water and sewer line infrastructure.

6. The Developer shall pay water and/or sewer capital facility fees at the current rate as set by City Council for all new water and/or sewer connections to the City's water and/or sewer system. These capital facility fees shall be paid to the City at the time of the purchase of the water meter for each building within the Project. The Developer shall pay the City for the installation of water and/or sewer service laterals installed by the City (Durham City Code of Ordinances § 70-50). Developer acknowledges that these fees and charges are reimbursement to the City for services provided to the Project by the City and for the City's past investment in the City's water and wastewater treatment facilities and also anticipated future maintenance and upgrades to these facilities.

7. The Developer shall construct necessary Improvements to manage stormwater quantity, rate of runoff, and stormwater quality in accordance with City Requirements in effect at the time of site plan submission for each portion of the Project. At the time of site plan submittal for an individual phase of the Project, the Developer shall submit a stormwater plan that covers the individual phase of the Project and that addresses storm water quantity and quality as required under City Requirements. No site plan shall be issued until such stormwater plan is approved. In addition to compliance with City Requirements in effect at the time of site plan submission, the Developer shall ensure that any stormwater mitigation or offsite credits proposed as part of its stormwater plan is achieved within Durham County, or outside Durham County if none are available in Durham County, and meets any additional requirements regarding location that may exist in City ordinance at the time.

CKE V LLC

By: *[Signature]*  
Manager

State of North Carolina  
County of Durham

I certify that Edward Lemmas personally (1) appeared before me this day, (2) stated that he or she is a manager of CKE V LLC, a limited liability company organized and existing under the laws of the State of North Carolina, (3) acknowledged that the foregoing agreement with the City of Durham carries on in the usual way the company's business, and (4) acknowledged the due execution of the contract on behalf of the company. This the 2<sup>nd</sup> day of September 20 20.

My commission expires: 02-24-2024

*[Signature]*  
Notary Public



ATTEST:

CITY OF DURHAM

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

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



WHEREAS, Grantor and Grantee desire to enter into this Agreement to set forth the terms and conditions upon which Grantor will sell, and Grantee will purchase, the Property.

NOW THEREFORE, in consideration of the mutual promises hereinafter set forth and of other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. RECITALS. The recitals set forth above are incorporated herein by reference.
2. OPTION.
  - a. Grant of Option. Grantor hereby grants to Grantee an exclusive right and option (the “**Option**”) to purchase the Property upon the terms and conditions set forth herein.
  - b. Trigger. Provided that no action is pending in Durham County Superior Court contesting Zoning Map Change Case #Z1900036, then, if, as of 5:00 pm on the later of (i) December 29, 2020, and (ii) 120 days after approval of the Zoning Map Change Case #Z1900036, Grantor has not donated the AHU Parcels to the DAHS, each as defined in the Development Agreement, or, if as of 5:00 pm on June 30, 2024, Grantor has not (i) obtained all necessary permits for the construction of the Project, or (ii) caused a construction completion guarantee in favor of the City, and deemed acceptable by the City, for the completion of construction of the Project to be executed and evidence thereof delivered to Grantee on behalf of Grantor, (each of the foregoing events, a “**Trigger Event**”), then Grantee shall have the right to exercise its Option described herein. Each deadline set forth in this Section 2(b) is hereinafter a “**Trigger Date**.”
  - c. Expiration. If, as of June 30, 2024, none of the Trigger Events have occurred, then this Agreement shall automatically terminate, whereupon the Parties shall have no further rights or obligations each to the other.
  - d. Exercise of Option. Grantee shall exercise its option within 90 days after any of the applicable Trigger Dates by delivering a written notice (the “**Option Notice**”) to Grantor at the following address \_\_\_\_\_, or at the address of Grantor on file with the Durham County Tax Office, or via electronic mail in accordance with the Notices provision in the Development Agreement, stating that it is exercising its Option pursuant to the terms herein, and that Grantee desires to purchase the Property.
  - e. Conveyance of the Property. Upon the valid and timely exercise of the Option by Grantee, Grantor, shall within 10 business days after its receipt of the Option Notice deliver to Grantee a Special Warranty Deed conveying the Property to Grantee in fee simple. Grantor and Grantee

shall each be responsible for third party costs in accordance with local custom, and all prorations and adjustments related to the Property similarly shall be handled in accordance with local custom and the Development Agreement.

- f. Environmental Contamination. Grantor represents and warrants that, as of the date of this Option, it has not received written notice from any governmental authority that the Property contains any "Environmental Contamination," as defined below, and, in the event Grantor receives any such notice prior to the date of conveyance of the Property to Grantee, it shall promptly notify Grantee thereof. If before conveyance of the Property to the Grantee, Grantee discovers any reason to suspect that the Property contains any Environmental Contamination, it may rescind any obligations to purchase the Property. This subsection (b) shall not be construed to reduce any rights the Grantee may have with respect to Environmental Contamination that would exist in the absence of this subsection (b). Grantor and Grantee stipulate that Grantee is relying on this subsection (b) in acquiring the Property. This subsection (b) shall survive the deed and closing. For the purposes of this subsection (b), "Environmental Contamination" means petroleum products (including, but not limited to, 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, that exist on the Property in violation of any state or federal statute, rule, or regulation.

### 3. TERMINATION OF OPTION.

If Grantee fails to timely deliver its Option Notice pursuant to Section 2 above, then Grantee shall be deemed to have waived and terminated its Option described herein, whereupon this Agreement shall terminate, and the Parties shall have no further rights or obligations to each other pursuant to this Agreement.

### 4. SUCCESSORS AND ASSIGNS; RUNS WITH THE LAND.

This Agreement shall be binding upon, enforceable against, and inure to the benefit of the Parties and their heirs, successors, and assigns. This Agreement shall run with the Property and the rights and obligations of Grantor shall be binding upon future owners thereof.

### 5. MISCELLANEOUS PROVISIONS.

- a. Severability. Invalidation of any of the restrictions or other provisions of this Agreement shall in no way affect any of the other restrictions or provisions of this Agreement.

- b. Headings. The captions and headings of the various sections of this Agreement are for convenience and identification only and shall not be deemed to limit or define the contents of their respective sections.
- c. North Carolina Law. This Agreement shall be governed by the laws of the State of North Carolina, and litigation required to enforce this Agreement shall be filed in Durham County Superior Court.
- d. Counterparts. This Agreement may be executed in any number of counterparts. Each such counterpart hereof shall be deemed an original, but all counterparts shall constitute one agreement.



**GRANTEE**

City of Durham

By: \_\_\_\_\_ (SEAL)  
Thomas J. Bonfield, City Manager

ATTEST: \_\_\_\_\_  
\_\_\_\_\_ City Clerk

NORTH CAROLINA  
COUNTY of DURHAM

ACKNOWLEDGMENT OF CITY

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 the \_\_\_\_\_ City Clerk for the City of Durham, a municipal corporation, and that by authority duly given and as the act of the City, the foregoing Agreement was signed in its corporate name by its City Manager, sealed with its corporate seal, and attested by its said Clerk. This the \_\_\_\_\_ day of \_\_\_\_\_, 2020.

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

My commission expires:

\_\_\_\_\_

**Exhibit A**  
**The Property**

Lot 1 (5520 Crescent Drive)

BEGINNING at a stake on the southwest side of Crescent Drive, said stake being 575 feet in a southeasterly direction from the southeast intersection of Crescent Drive and Hudson Road at the easternmost corner of Lot 7 on the plat hereinafter referred to, and running thence along and with the southwest side of Crescent Drive in a southeasterly direction 160 feet to a point; thence South 54° 39' West 250 feet to a point in the northeast line of Lot 12; thence North 35° 21' West 150 feet to a stake, the southernmost corner of Lot 7; thence along and with the southeast line of Lot 7 North 52° 32' East 248.4 feet to a stake on the southwest side of Crescent Drive, the point of Beginning and being Lot 6 and the northern one-half of Lot 5 of Woodland Acres, Tract No. 2, as shown in Plat Book 35 at Page 12, Durham County Registry, to which reference is hereby made for a more particular description. For further reference and chain of title see Deed Book 381, Page 640, Durham County Registry.

Lot 2 (5608 Crescent Drive)

BEGINNING at a stake on the southwest side of Crescent Drive, said stake being 910 feet in a southeasterly direction from the southeast intersection of Crescent Drive and Hudson Road, at the northeast corner of Lot No. 3 on the Plat hereinafter referred to, and running thence along and with the North line of Lot No. 3 South 60° 24' West 244 feet to a stake in the East line of Lot No. 11 shown on said Plat; thence North 35° 21' East 150 feet to a stake; thence North 54° 39' East 250 feet to a stake on the southwest side of Crescent Drive; thence along and with the southwest side of Crescent Drive in a southeasterly direction 175 feet to a stake, the point and place of BEGINNING, and being Lot No. 4 and the southern one-half (1/2) of Lot No. 5 of Woodland Acres, Tract No. 2 as shown in Plat Book 35, Page 12, Durham County Registry, to which reference is made for a more particular description.