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FOR REGISTRATION REGISTER OF DEEDS
Willie L. Covington
DURHAM COUNTY, NC
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INSTRUMENT # 2005046447

STATE OF NORTH CAROLINA

CONSERVATION EASEMENT

DURHAM COUNTY
SPO File Number 32-AS
Prepared by: Property Control Section
Attorney General's Office
Return to: Blane Rice, State Property Office
1321 Mail Service Center
Raleigh, NC 27699-1321

THIS CONSERVATION EASEMENT DEED, made this 26th day of Sept, 2005, by the City of Durham, ("**Grantor**"), to the State of North Carolina, ("**Grantee**"), whose mailing address is State of North Carolina, Department of Administration, State Property Office, 1321 Mail Service Center, Raleigh, NC 27699-1321. The designations Grantor and Grantee as used herein shall include said parties, their heirs, successors, and assigns, and shall include singular, plural, masculine, feminine, or neuter as required by context.

WITNESSETH:

WHEREAS, pursuant to the provisions of N.C. Gen. Stat. § 143-214.8 et seq., the State of North Carolina has established the Ecosystem Enhancement Program (formerly known as the Wetlands Restoration Program) within the Department of Environment and Natural Resources for the purposes of acquiring, maintaining, restoring, enhancing, creating and preserving wetland and riparian resources that contribute to the protection and improvement of water quality, flood prevention, fisheries, aquatic habitat, wildlife habitat, and recreational opportunities; and

WHEREAS, The State of North Carolina is qualified to be the Grantee of a Conservation Easement pursuant to N.C. Gen. Stat. § 121-35; and

WHEREAS, the Ecosystem Enhancement Program in the Department of Environment and Natural Resources has approved acceptance of this instrument; and

WHEREAS, the Department of Environment and Natural Resources, the North Carolina Department of Transportation and the United States Army Corps of Engineers, Wilmington District entered into a Memorandum of Agreement, (MOA) duly executed by all parties in Greensboro, NC on July 22, 2003. This MOA recognizes that the Ecosystem Enhancement Program is to provide for compensatory mitigation by effective protection of the land, water and natural resources of the State by restoring, enhancing and preserving ecosystem functions; and

WHEREAS, the acceptance of this instrument for and on behalf of the State of North Carolina was granted to the Department of Administration by resolution as approved by the Governor and Council of State adopted at a meeting held in the City of Raleigh, North Carolina, on the 8th day of February 2000; and

WHEREAS, Grantor owns in fee simple certain real property situated, lying, and being in Durham, Durham County, North Carolina (the "**Property**"), and being more particularly described as that certain parcels of land containing approximately 5.442 acres and being further identified as PIN Number 812-07-67-5854:, and

WHEREAS, Grantor is willing to grant a Conservation Easement over the herein described areas of the Property, thereby restricting and limiting the use of the included areas of the Property to the terms and conditions and purposes hereinafter set forth, and Grantee is willing to accept such Conservation Easement. This Conservation Easement shall be for the protection and benefit of the waters of Ellerbe Creek.

NOW, THEREFORE, in consideration of the mutual covenants, terms, conditions, and restrictions hereinafter set forth, Grantor unconditionally and irrevocably hereby grants and conveys unto Grantee, its successors and assigns, forever and in perpetuity, a Conservation Easement of the nature and character and to the extent hereinafter set forth, over a described area of the Property, referred to hereafter as the "**Easement Area**", for the benefit of the people of North Carolina, and being all of the tract of land as identified as Tract 3A and containing 0.981 acres as shown on a plat of survey entitled "Conservation Easement Survey of the City of Durham Property at the Hillandale Golf Course" dated May 1, 2003 and revised November 8, 2004, certified by F. Rex Cooper PLS, L-4269 of Stantec Consulting, Inc., and **recorded in Map Book** 169, **Page** 175-190, Durham County Registry.

The purposes of this Conservation Easement are to maintain, restore, enhance, create and preserve wetland and/or riparian resources in the Easement Area that contribute to the protection and improvement of water quality, flood prevention, fisheries, aquatic habitat, wildlife habitat, and recreational opportunities; to maintain permanently the Easement Area in its natural condition, consistent with these purposes; and to prevent any use of the Easement Area that will significantly impair or interfere with these purposes. To achieve these purposes, the following conditions and restrictions are set forth:

I. DURATION OF EASEMENT

This Conservation Easement shall be perpetual. It is an easement in gross, runs with the land, and is enforceable by Grantee against Grantor, their personal representatives, heirs, successors, and assigns, lessees, agents, and licensees.

I. GRANTOR RESERVED USES AND RESTRICTED ACTIVITIES

The Easement Area shall be restricted from any development or usage that would impair or interfere with the purposes of this Conservation Easement. Unless expressly reserved as a compatible use herein, any activity in, or use of, the Easement Area by the Grantor is prohibited as inconsistent with the purposes of this Conservation Easement. Any rights not expressly reserved hereunder by the Grantor have been acquired by the Grantee. The following specific uses are prohibited, restricted, or reserved as indicated:

A. **Recreational Uses.** Grantor expressly reserves the right to undeveloped recreational uses, including golfing, hiking, bird watching, hunting and fishing, and access to the Easement Area for the purposes thereof. Usage of motorized vehicles in the Easement Area is prohibited, except as they are used exclusively by golfing invitees and for management, maintenance, or stewardship purposes on existing trails, paths or roads or as necessary for other expressly allowed uses in this conservation easement.

B. **Educational Uses.** The Grantor reserves the right to engage in and permit others to engage in educational uses in the Easement Area not inconsistent with this Conservation Easement, and the right of access to the Easement Area for such purposes including organized educational activities such as site visits and observations. Educational uses of the property shall not alter vegetation, hydrology or topography of the site.

C. **Vegetative Cutting.** Except as related to the removal of non-native plants, diseased or damaged trees, and the removal or pruning of vegetation that obstructs, destabilizes or renders unsafe the Easement Area to persons or natural habitat, or except as necessary to control invasive and/or exotic species, or except as necessary to provide for other expressly allowed uses in this conservation easement, all cutting, removal, mowing, harming, or destruction of any trees and vegetation in the Easement Area is prohibited. All vegetative cutting shall be done in a manner that maintains the integrity of the Conservation Easement and must be in compliance with the planting plan prepared by Stantec Consulting Services, Inc. dated 7/18/03 and revised 2/10/04.

D. **Industrial, Residential and Commercial Uses.** All are prohibited in the Easement Area.

E. **Agricultural Use.** All agricultural uses within the Easement Area including any use for cropland, waste lagoons, or pastureland are prohibited.

F. **New Construction.** There shall be no building, facility, mobile home, antenna, utility pole, tower, or other structure constructed or placed in the Easement Area except as described in this subsection or the subsection regarding "Utilities" below. Grantor reserves the right to repair, maintain, augment and/or renovate existing structures, including bridges, the existing sewer lines,

water lines and the pond emergency spillway (labeled 1.5M Base Ditch) within the conservation easement as shown on sheet number UC-2 of the Utility Construction Plans for North Carolina Department of Transportation Project Number I-306C, dated November 25, 2003, and Grantor reserves the right to repair, maintain, or widen Hillandale Road or Bellevue Avenue and add culverts and widen bridges located at the crossings of these roads.

Grantor may add or install other new structures or relocate other existing structures provided written permission is granted from EEP for such structures. In addition, Grantor may add or install an additional water line and sewer line as further provided below in the section regarding "Utilities." Bridges and cart paths are the sole responsibility of the Grantor. Any construction shall be in compliance with regulatory authorities and shall be done in a manner that maintains the integrity of the conservation easement. Vehicles used for maintenance and/or construction shall stay outside the conservation area to the greatest extent reasonably possible.

G. **Roads and Trails.** There shall be no construction of roads, trails, walkways, or paving in the Easement Area. Existing roads or trails located in the Easement Area may be maintained by Grantor in order to minimize runoff, sedimentation and for access to the interior of the Property for management, maintenance, stewardship purposes, or undeveloped recreational and educational uses of the Easement Area. Existing roads, trails or paths may be maintained with asphalt, concrete, loose gravel or permanent vegetation as are pre-existing to stabilize or cover the surfaces. Any maintenance requiring new asphalt/concrete shall not exceed the existing footprint of original material. Grantor may relocate roads or trails provided written permission is granted from EEP.

H. **Signs.** No signs shall be permitted in the Easement Area except stakes and signs customarily used for the operation of a golf course and interpretive signs describing restoration activities and the conservation values of the Easement Area, signs identifying the owner of the Property and the holder of the Conservation Easement, signs giving directions, or signs prescribing rules and regulations for the use of the Easement Area.

I. **Dumping or Storing.** Dumping or storage of soil, trash, ashes, garbage, waste, abandoned vehicles, appliances or machinery, or other material in the Easement Area is prohibited.

J. **Grading, Mineral Use, Excavation, Dredging.** There shall be no grading, filling, excavation, dredging, mining, or drilling; no removal of topsoil, sand, gravel, rock, peat, minerals, or other materials.

K. **Water Quality and Drainage Patterns.** There shall be no diking, draining, dredging, channeling, filling, leveling, pumping, impounding or diverting,

causing, allowing or permitting the diversion of surface or underground water. No altering or tampering with water control structures or devices, or disruption or alteration of the restored, enhanced, or created drainage patterns. All removal of wetlands, polluting or discharging into waters, springs, seeps, or wetlands, or use of pesticide or biocides is prohibited, except for herbicides and fertilizers customarily used in golf course maintenance provided these are used in accordance with current regulatory standards. In the event of an emergency interruption or shortage of all other water sources, water from within the Easement Area may temporarily be used for good cause shown as needed for the survival of livestock and agricultural production.

L. **Subdivision and Conveyance.** Any future conveyance of the remaining fee simple rights shall be subject to this Conservation Easement. Grantor agrees for itself, its successors and assigns, that in the event it transfers the Property, or any portion thereof, such transfer is subject to the Grantee's right of ingress, egress, and regress over and across the Property to the Easement Area for the purposes set forth herein.

M. **Development Rights.** All development rights are removed from the Easement Area and shall not be transferred.

N. **Disturbance of Natural Features.** Any change, disturbance, alteration or impairment of the natural features of the Easement Area or any intentional introduction of non-native plants, trees and/or animal species by Grantor is prohibited.

O. **Utilities.** Through, over, under and across the Easement Area, the following utility uses are allowed, conditioned as follows:

1. The City reserves permanent 30 foot sewer line, water line and drainage easement for its use in maintaining, repairing, replacing and augmenting the City's existing sewer lines, water lines and pond emergency spillway. The sewer line, water line and pond emergency spillway (labeled 1.5M base ditch) are shown on sheet number UC-2 of the Utility Construction Plans for North Carolina Department of Transportation Project Number I-306C, dated November 25, 2003. In addition, the City reserves the right to construct a proposed future sewer line and water line within the existing 30 foot retained utility easement described above if it is determined by the Grantor that it is reasonably practical to construct them there. If the Grantor determines that is is not practicable the future sewer line and water line may be constructed outside the retained easement area but as far away from the Easement Area as practicable. Prior to construction of a new sewer line or water line Grantor shall provide written notification to the Ecosystem Enhancement Program at 1652 Mail Service Center, Raleigh, NC 27699-1652 of its intent to construct any additional sewer and water lines within the Easement Area. Any new line constructed will be located as far away from the creek and restoration area as

practicably possible and in a manner that maintains the integrity of the restoration project.

2. Existing irrigation lines may be maintained and repaired in such a manner that any displaced vegetation is replaced with herbaceous species to achieve rapid recovery from the disturbance. Grantor may construct new irrigation lines in the area furthest away from the creek along the perimeter of the conservation easement with prior written permission from EEP.

3. All disturbed facilities; features and vegetation will be restored to their original condition to the greatest extent reasonably practicable. Due to the environmental sensitivity of the Conservation Easement Area, any disturbed and removed vegetation in access areas, staging areas, constructed areas, excluding the permanent utility easement, will be replaced with herbaceous species such that the Protected Property achieves a rapid recovery from the disturbance. The permanent utility easement shall be planted with suitable grass vegetation which shall be restored when disturbed.
4. Corridor and clearing width for construction will be limited to the minimum necessary to construct the needed facilities, subject to line size, equipment size and work zone. The temporary construction easements will be vegetated with native herbaceous species at the completion of construction.
5. Depth of underground construction shall be to a sufficient depth to avoid future exposure due to scouring to the greatest extent reasonably practicable.
6. Maintenance/repair of existing sewer shall be done within the existing sewer easement to the extent practicable. Vehicles used for maintenance and/or construction shall stay outside the conservation area to the greatest extent reasonably possible.

The Grantee, and authorized representatives of the Grantee, shall have the right to enter the Easement Area and shall have the right of reasonable ingress and egress to the Easement Area over the Protected Property, at reasonable times to undertake any activities to restore, manage, maintain, enhance, and monitor the wetland and riparian resources of the Easement Area. These activities include planting of trees, shrubs and herbaceous vegetation, installation of monitoring wells, utilization of heavy equipment to grade, fill, and prepare the soil, modification of the hydrology of the site, and installation of natural and manmade materials as needed to direct in-stream, above ground, and subterraneous water flow. In addition, the Grantee, and authorized representatives of the Grantee, shall have the right to enter the Easement Area, and shall have the right of reasonable ingress and egress to the Easement Area over the Protected Property, at reasonable times for the purpose of inspecting said property to determine if the Grantor is complying with the terms, conditions, restrictions, and purposes of this Conservation Easement. The Grantee and authorized representatives of the Grantee shall provide prior notification to the Grantor of the construction schedule including but not limited to bid opening, award, notice to proceed, and pre-construction meetings. The easement rights granted herein do not include public access rights.

The Grantor may request permission to vary from the above restrictions for good cause shown, provided that any such request is consistent with the purposes of this Conservation Easement. The Grantor shall not vary from the above restrictions without first obtaining written approval from the N.C. Ecosystem Enhancement Program, whose mailing address is 1652 Mail Services Center, Raleigh, NC 27699-1652.

III. GRANTEE RESERVED USES

A. **Ingress, Egress, Regress and Inspection.** The Grantee, its employees and agents, successors and assigns, with prior scheduling through the Director of Public Works, receive the perpetual right of general ingress, egress, and regress to the Easement Area over the Property at reasonable times to undertake any activities to restore, manage, maintain, enhance, and monitor the wetland and riparian resources of the Easement Area, in accordance with restoration activities or a long-term management plan. Unless otherwise specifically set forth in this Conservation Easement, the rights granted herein do not include or establish for the public any access rights.

B. **Restoration Activities.** These activities include planting of trees, shrubs and herbaceous vegetation, installation of monitoring wells, utilization of heavy equipment to grade, fill, and prepare the soil, modification of the hydrology of the site, and installation of natural and manmade materials as needed to direct in-stream, above ground, and subterraneous water flow.

IV. ENFORCEMENT AND REMEDIES

A. **Enforcement.** To accomplish the purposes of this Conservation Easement, Grantee is allowed to prevent any activity within the Easement Area that is inconsistent with this Easement and to require the restoration of such areas or features of the Easement Area that may have been damaged by such activity or use, as provided in this Easement. Upon any breach of the terms of this Conservation Easement by Grantor, their successors or assigns, that comes to the attention of the Grantee, the Grantee shall, except as provided below, notify the Grantor, their successors or assigns in writing of such breach. The Grantor shall have ninety (90) days after receipt of such notice to correct the conditions constituting such breach. If the breach remains uncured after ninety (90) days, the Grantee may enforce this Conservation Easement by appropriate legal proceedings including damages, injunctive and other relief. The Grantee shall also have the power and authority, consistent with its statutory authority: (a) to prevent any impairment of the Easement Area by acts which may be unlawful or in violation of this Conservation Easement; (b) to otherwise preserve or protect its interest in the Property; or (c) to seek damages from any appropriate person or entity. Notwithstanding the foregoing, the Grantee reserves the immediate right, without notice, to obtain a temporary restraining order, injunctive or other appropriate relief if the breach of the term of this Conservation Easement is or would irreversibly or otherwise materially impair the benefits to be derived from this Conservation Easement. The Grantor and Grantee acknowledge that under such circumstances damage to the Grantee would be irreparable and remedies at law will be inadequate. The rights and remedies of the Grantee provided hereunder shall be in addition to, and not in lieu of, all other rights and remedies available to Grantee in connection with this Conservation Easement.

B. **Inspection.** The Grantee, its employees and agents, successors and assigns, have the right, with reasonable notice, to enter the Easement Area over the Property at reasonable times for the purpose of inspection to determine whether the Grantor, their successors or assigns are complying with the terms, conditions and restrictions of this Conservation Easement.

C. **Acts Beyond Grantor's Control.** Nothing contained in this Conservation Easement shall be construed to entitle Grantee to bring any action against Grantor, their successors or assigns, for any injury or change in the Easement Area caused by third parties, resulting from causes beyond the Grantor's control, including, without limitation, fire, flood, storm, and earth movement, or from any prudent action taken in good faith by the Grantor under emergency conditions to prevent, abate, or mitigate significant injury to life, damage to property or harm to the Property resulting from such causes.

D. **Costs of Enforcement.** Beyond regular and typical monitoring, any costs incurred by Grantee in enforcing the terms of this Conservation Easement against Grantor, their successors or assigns, including, without limitation, any costs of restoration necessitated by Grantor's acts or omissions in violation of the terms of this Conservation Easement, shall be borne by Grantor.

E. **No Waiver.** Enforcement of this Easement shall be at the discretion of the Grantee and any forbearance, delay or omission by Grantee to exercise its rights hereunder in the event of any breach of any term set forth herein shall not be construed to be a waiver by Grantee.

V. MISCELLANEOUS

A. This instrument sets forth the entire agreement of the parties with respect to the Conservation Easement and supersedes all prior discussions, negotiations, understandings or agreements relating to the Conservation Easement. If any provision is found to be invalid, the remainder of the provisions of the Conservation Easement, and the application of such provision to persons or circumstances other than those as to which it is found to be invalid, shall not be affected thereby.

B. Any notices shall be sent by registered or certified mail, return receipt requested to the parties at their addresses shown above or to other address(es) as either party establishes in writing upon notification to the other.

C. Grantor shall notify Grantee in writing of the name and address and any party to whom the Property or any part thereof is to be transferred at or prior to the time said transfer is made. Grantor further agrees to make any subsequent lease, deed, or other legal instrument by which any interest in the Property is conveyed subject to the Conservation Easement herein created.

D. The Grantor and Grantee agree that the terms of this Conservation Easement shall

survive any merger of the fee and easement interests in the Property or any portion thereof.

E. This Conservation Easement may be amended, but only in writing signed by all parties hereto, and provided such amendment does not affect the qualification of this Conservation Easement or the status of the Grantee under any applicable laws, and is determined by the parties to be consistent with the general purposes of the Conservation Easement.

F. The parties recognize and agree that the benefits of this Conservation Easement are in gross and assignable provided, however, that the Grantee hereby covenants and agrees, that in the event it transfers or assigns this Conservation Easement, the organization receiving the interest will be a qualified holder under N.C. Gen. Stat. § 121-34 et seq. and § 170(h) of the Internal Revenue Code, and the Grantee further covenants and agrees that the terms of the transfer or assignment will be such that the transferee or assignee will be required to continue in perpetuity the conservation purposes described in this document.

G. If significant changes are made to the proposed channel design, the Grantee will provide an updated No-Rise analysis and certification to the Grantor. Also, upon completion of construction of the restoration project, the Grantee will provide certified as-built plans to the Grantor. In addition, the Grantee will prepare and request a Letter of Map Revision (LOMR) from the Federal Emergency Management Agency (FEMA) to revise the effective floodway and floodplain for the project area within six months from the end of construction.

VI.QUIET ENJOYMENT

Grantor reserves all remaining rights accruing from ownership of the Property, including the right to engage in or permit or invite others to engage in only those uses of the Easement Area that are expressly reserved herein, not prohibited or restricted herein, and are not inconsistent with the purposes of this Conservation Easement. Without limiting the generality of the foregoing, the Grantor expressly reserves to the Grantor, and the Grantor's employees, invitees, and licensees, the right of access to the Easement Area, and the right of quiet enjoyment of the Easement Area.

TO HAVE AND TO HOLD the said rights and easements perpetually unto the State of North Carolina for the aforesaid purposes.

AND Grantor covenants that Grantor is seized of said premises in fee and has the right to convey the permanent Conservation Easement herein granted; that the same are free from encumbrances and that Grantor will warrant and defend title to the same against the claims of all persons whomsoever.

IN TESTIMONY WHEREOF, the Grantor has hereunto set his hand and seal, the day and year first above written.

Grantor: **City of Durham**

By: _____

Title: _____

Attest: D. Ann Gray
City Clerk
9-26-05

NORTH CAROLINA

COUNTY OF Durham

I, Tonette Amos, a Notary Public in and for the County and State aforesaid, do hereby certify that Patrick W. Baker and D. Ann Gray of the City of Durham, personally appeared before me this day and acknowledged the execution of the foregoing instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and Notary Seal this the 26 day of Sept, 2005.

Tonette Amos
Notary Public

My commission expires:

07-17-07

WILLIE L. COVINGTON
REGISTER OF DEEDS, DURHAM COUNTY
DURHAM COUNTY COURTHOUSE
200 E. MAIN STREET
DURHAM, NC 27701

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