2008009060

FOR REGISTRATION REGISTER OF DEEDS
Willie L. Covington
DURHAM COUNTY, NC
2008 MAR 07 09:33:10 AM
BK:5890 PG:778-788 FEE:$41.00

INSTRUMENT # 2008009060

STATE OF NORTH CAROLINA

DURHAM COUNTY
SPO File Number 32-aah
Prepared by and return to:
Blane Rice, State Property Office
1321 Mail Service Center
Raleigh, NC 27699-1321

CONSERVATION EASEMENT

THIS CONSERVATION EASEMENT DEED, made this 6th day of March, 2008, 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, pursuant to the provisions of N.C. Gen. Stat. § 143-214.8, two of the components of the Ecosystem Enhancement Program are (1) restoration and perpetual maintenance of wetlands, riparian areas, and surface waters and (2) land ownership and management; and

WHEREAS, Grantor owns in fee simple certain real property situated, lying, and being in Durham County, North Carolina (the "**Protected Property**"), and being more particularly described as that certain parcels of land identified as PIN# 0832-09-6-7612, 0822-12-97-8325, and 0822-05-97-8855 being conveyed to the Grantor by deed as recorded in **Deed Book 125 at Page 365, Deed Book 135 at page 585, and Deed Book 252 at Page 613** of the Durham County Registry, North Carolina; and

WHEREAS, Grantor is willing to grant a Conservation Easement over the herein described areas of the Protected Property, thereby restricting and limiting the use of the included areas of the Protected Property to the terms and conditions and purposes hereinafter set forth, and Grantee is willing to accept such 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, to have and to hold 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 Protected Property, referred to hereafter as the "**Easement Area**", for the benefit of the people of North Carolina, and being all of the tracts of land containing 7.48 +/- acres as shown on a plat of survey entitled "Conservation Easement Survey of Ellerbe Creek Restoration for Ecosystem Enhancement Program" dated October 8, 2007, certified by Randy S. Rambeau, Sr., PLS, and **recorded in Map Book** 181 **, Page** 111 , Durham County Registry; provided, however, that if the restoration project described hereinbelow is not substantially completed within three (3) years from the date first written above, this easement will cease and determine. The tracts being more particularly described as follows:

Area 1 – containing 0.18 +/- acres
Area 2 – containing 2.06 +/- acres
Area 4 – containing 0.38 +/- acres
Area 5 – containing 1.51 +/- acres
Area 6 – containing 3.35 +/- acres

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.

RESTORATION PROJECT

By acceptance of this easement, Grantee acknowledges that it has informed Grantor of Grantee's intention to construct and implement certain stream restoration and stormwater wetlands improvements within the Easement Area (hereinafter, "Restoration Project") pursuant to the final construction plans entitled, "Construction Drawings for Ellerbe Creek (Northgate Park) Stream Restoration Project," dated May 2007, including all revision dates, prepared by URS Corporation – North Carolina, and associated specifications (hereinafter "Restoration Project Plans and Specs"). The Restoration Project Plans and Specs can be found in the offices of the EEP located at 2728 Capital Boulevard Raleigh, NC, 27604 and the City of Durham Public Works Department, Stormwater Services, 101 City Hall Plaza, Durham, NC 27701.

To achieve the purposes of the Conservation Easement, the following conditions and restrictions are set forth:

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.

II. 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. Pursuant to,

and consistent with, a "Letter of Understanding" between the EEP and the Grantor dated March 6, 2008, and attached hereto as Exhibit A, Grantor retains the right to maintain and repair, including the sole financial responsibility, for the stormwater best management practices (i.e., "Stormwater BMP" areas) shown in areas 4 and 6 on Sheet # 2 of 2 of the plat dated October 8, 2007 and entitled "Conservation Easement Survey of Ellerbe Creek Restoration for Ecosystem Enhancement Program" recorded in Plat Book 181, Page 111 the Durham County Registry (hereinafter, "Restoration Plat"). Exhibit A includes a detailed Stormwater BMP maintenance and repair plan entitled, "Ellerbe Creek Stream Restoration Project Northgate Park – Stormwater Wetland Maintenance and Repair Plan." The Stormwater BMP maintenance and repair obligation of Grantor shall not take effect until after completion of the Restoration Project and transfer of maintenance responsibilities to the City of Durham pursuant to Exhibit A.

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 for the general public, including but not limited to hunting and fishing, and access to the Easement Area for the purposes thereof. Usage of motorized vehicles for recreational uses in the Easement Area is prohibited.

B. Educational Uses. The Grantor reserves the right 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 diseased or damaged trees and vegetation that obstructs, destabilizes or renders unsafe the Easement Area, or except as necessary to control invasive and/or exotic species, or except as necessary to provide for the other expressly allowed uses in the 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.

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/Existing Improvements. There shall be no building, facility, mobile home, antenna, utility pole, tower, or other structure constructed or placed in the Easement Area.

G. Roads and Trails. There shall be no construction of roads, trails, walkways, or asphalt or concrete paving in the Easement Area except with prior written permission from EEP or its successors or as otherwise indicated on the Restoration Plat.

H. Signs. No signs shall be permitted in the Easement Area except interpretive signs describing restoration activities and the conservation values of the Easement Area, signs identifying the owner of the Protected Property and the holder of the Conservation Easement, signs giving directions, or signs prescribing rules and regulations for the use of the Easement Area may be allowed.

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 related activities, or altering or tampering with water control structures or devices, or disruption or alteration of the restored, enhanced, or created drainage patterns except within the designated Stormwater Best Management Practices (BMP) areas shown in Areas 4 and 6 on the plat dated October 8, 2007 and entitled "Conservation Easement Survey of Ellerbe Creek for the Ecosystem Enhancement Program" recorded in Plat Book 181, Page 111 of the Durham County Registry. In addition, any activity by the Grantor diverting, causing, allowing or permitting the diversion of surface or underground water into, within or out of the Easement Area excepted as noted above in this paragraph is not allowed. All removal of wetlands, polluting or discharging into waters, springs, seeps, or wetlands, or use of pesticide or biocides is prohibited. In the event of an emergency interruption or shortage of 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. No further subdivision, partitioning, or dividing of the Easement Area is allowed. Unless agreed to by the Grantee in writing, any future conveyance of the Easement Area and the rights as conveyed herein shall be as a single block of property. Any future division of the remaining fee simple rights shall be subject to this Conservation Easement

M. Development Rights. No development rights that have been encumbered or extinguished by this Conservation Easement shall be transferred pursuant to a transferable development rights scheme or cluster development arrangement or otherwise.

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 is prohibited.

III. GRANTEE RESERVED USES

The Grantee, authorized representatives of the Grantee and their successors or assigns 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 all 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 a long-term management plan. These activities include actions necessary to implement the Restoration Project pursuant to the Restoration Plans, including 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 all 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 for the Restoration Project including but not limited to any bid opening, award, notice to proceed and pre-construction meetings. The easement rights granted herein do not include or establish for the public any 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 Ecosystem Enhancement Program, whose mailing address is 1652 Mail Services Center, Raleigh, NC 27699-1619.

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 the purposes of 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. Upon any breach of the terms of this Conservation Easement by Grantor, Grantor's their successors or assigns, that comes to the attention of the Grantee, the Grantee shall, except as provided below, notify the Grantor in writing of such breach. The Grantor shall have one hundred-eighty (180) days after receipt of such notice to correct the conditions constituting such breach. If the breach remains uncured after one hundred-eighty (180) 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 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, or Grantor's successors or assigns for any injury or change in the Easement Area caused by third parties, or resulting from acts of God or 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, or Grantor's successors or assigns where Grantor or its successors or assigns have not complied with the terms of this Easement, shall be borne by Grantor. These costs shall include, without limitation, any costs of restoration necessitated by Grantor's acts or omissions in violation of the terms of this Conservation Easement.

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

V. MISCELLANEOUS

A. This Conservation Easement shall be construed to promote the purposes of N.C. Gen Stat. § 143-214.8 et seq., the Ecosystem Enhancement Program.

B. 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.

C. 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.

D. Grantor shall notify Grantee in writing of the name and address and any party to whom the Protected 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 Protected Property is conveyed subject to the Conservation Easement herein created.

E. 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.

F. This Conservation Easement may be amended, but only in a 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 consistent with the purposes of the Conservation Easement.

G. 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.

VI. QUIET ENJOYMENT

Grantor reserves all remaining rights accruing from ownership of the Protected 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 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 Grantee 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 City has caused this instrument to be signed in its name by its Mayor, and attested by its Deputy City Clerk and its corporate seal to be affixed, all by order of its City Council.

CITY OF DURHAM

By: _____
WILLIAM V. BELL, MAYOR

ATTEST:

_____
Deputy City Clerk

NORTH CAROLINA – DURHAM COUNTY

I, a Notary Public in and for the County and State aforesaid, certify that Linda E. Bratcher personally appeared before me this day, and acknowledged that she is Deputy City Clerk of the City of Durham, a municipal corporation, and that by authority duly given and as the act of the City, the foregoing Deed was signed in its corporate name by its Mayor, WILLIAM V. BELL, sealed with its corporate seal, and attested by herself as its said City Clerk or Deputy City Clerk.

IN WITNESS WHEREOF, I have hereunto set my hand and Notary Seal this the 6th day of March, 2008.

_____
Notary Public

TONETTE AMOS NOTARY PUBLIC DURHAM COUNTY NC

My Commission Expires 7-17-2012.

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

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Filed For Registration: **03/07/2008 09:33:10 AM**

Book: **RE 5890 Page: 778-788**

Document No.: **2008009060**

EASE 11 PGS $41.00

Recorder: **JENNIFER H SMITH**

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