2009041624

FOR REGISTRATION REGISTER OF DEEDS
Willie L. Covington
DURHAM COUNTY, NC
2009 NOV 25 12:18:55 PM
BK:6372 PG:284-293 FEE:$38.00

INSTRUMENT # 2009041624

STATE OF NORTH CAROLINA
DURHAM COUNTY
SPO # 32-52.2
EEP # 322

Please return to: City of Durham, Dept. of Public Works, Attn: Sandra Wilbur, 101 City Hall Plaza, Durham, NC 27701.

CONSERVATION EASEMENT
Phase 2 Sandy Creek
(Phase 1 see DB 3238 PG 254)

THIS CONSERVATION EASEMENT DEED, is made this 20th day of NOVEMBER, 2009, by and between the **CITY OF DURHAM**, a North Carolina municipal corporation, (hereinafter the "Grantor"), and the **State of North Carolina**, (hereinafter the Grantee), whose mailing address is State of North Carolina State Property Office, 116 West Jones Street, Raleigh, NC 27603-8003. 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 Triangle Township, Durham County, North Carolina (the "Protected Property"), and being more particularly described as that certain parcel of land identified as **TM – 464 -01-002, Parcel ID 139204** and being conveyed to the Grantor by deed recorded in **Deed Book 88 at Page 620 and Deed Book 347 at Page 130** of the Durham County Registry, North Carolina; and

WHEREAS, Grantor is willing to grant a Conservation Easement on the Protected Property, thereby restricting and limiting the use of the Protected Property to the terms and conditions and for the purposes hereinafter set forth, and Grantee is willing to accept such easement.

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**" along Sandy Creek, for the benefit of the people of North Carolina, and being all of the tracts of land as listed below containing 12.243 +/- acres as shown on Map entitled "New Conservation Easements, City of Durham Tract 564," prepared for the State of North Carolina by Phillip Riley , PLS and recorded in Plat Book 157 Page 181 and revised and corrected July 21, 2009 in Plat Book 184 Page 195 of the Durham County Registry and described in **"Exhibit A"** attached and incorporated hereinto:

Phase 2 Sandy Creek Restoration Project
Conservation Easement "A" being 12.134+/- acres
Conservation Easement "B" being 0.109 +/- acres

Note: The Conservation Easement Deed for Phase 1 of the Sandy Creek restoration project is recorded in DB 3238, Page 254, Durham County Registry.

The purposes of this Conservation Easement are to maintain, restore, enhance, and create wetland and/or riparian resources in the Easement Area that contributes 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.

II. RESERVED USES AND RESTRICTED ACTIVITES

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 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 undeveloped educational uses and the right of access to the Easement Area for such purposes including organized educational activities such as site visits, studies, and observations.
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 Use.** Industrial activities in the Easement Area are prohibited.
E. **Residential Use.** Residential use of the Easement Area is prohibited.
F. **Commercial Use.** Commercial activities in the Easement Area are prohibited.
G. **Agricultural Use.** Agricultural use of the Easement Area including use for cropland, waste lagoons, or pastureland is prohibited.

H. **New Construction.** There shall be no building, facility, mobile home, or other structure constructed or placed in the Easement Area without prior written approval from EEP or its successors.

I. **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, and signs giving directions or proscribing rules and regulations for the use of the Easement Area.

J. **Dumping.** Dumping of soil, trash, ashes, garbage, waste, abandoned vehicles, appliance or machinery, or other material in the Easement Area is prohibited.

K. **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.

L. **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. In addition, diverting or causing or permitting the diversion of surface or underground water into, within or out of the easement area by any means, removal of wetlands, polluting or discharging into waters, springs, seeps, or wetlands, or use of pesticide or biocides except as necessary for control of invasive species is prohibited.

M. **Subdivision.** Subdivision, partitioning, or dividing the Easement Area is prohibited.

N. **Development Rights.** No development rights which 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.

O. **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.

P. **Sanitary Sewer outfall.** Grantor expressly reserves the right to operate, maintain, repair, and perform all tasks necessary to operate the existing sewer outfall and the 40 foot strip of land that it is centered in. Operating includes but is not limited to mowing, pipe repair, pipe replacement, additional pipe installation, excavating, cleaning, and access with maintenance vehicles.

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 and with prior notification to the Grantor to undertake any activities to restore, manage, maintain, enhance, and monitor the wetland and riparian resources of the Easement Area. Point of contact shall be designated by Grantor. 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 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 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 Ecosystem Enhancement Program (formerly Wetlands Restoration Program) whose mailing address is 1652 Mail Services Center, Raleigh, NC 27699-1652.

III. 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.

IV. 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 (formerly Wetlands Restoration 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. 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.

V. QUIET ENJOYMENT

Grantor reserves all 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 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.

ATTEST:

D. Ann Gray

City Clerk
Print name D. ANN GRAY

CITY OF DURHAM

By: _____
Mayor
Print name WILLIAM V. BELL

(Corporate Seal)

STATE OF NORTH CAROLINA
COUNTY OF DURHAM

I, Tonette Amos, a Notary Public in and for the County and State aforesaid, do hereby certify that D. Ann Gray personally came before me this day and acknowledged that he/she is Town Clerk of the City of Durham, and that by authority duly given and as an act of the corporation, the foregoing instrument was signed in its name by William V. Bell, its Mayor and sealed with its corporate seal, and attested by himself/herself as its Town Clerk.

IN WITNESS WHEREOF, I have hereunto set my hand and Notarial Seal this the 20th day of November, 2009

Tonette Amos
Notary Public

My Commission Expires:

_____

(Notary Seal)

TONETTE AMOS
NOTARY PUBLIC
DURHAM COUNTY, N.C.
My Commission Expires 7-17-2012.

"EXHIBIT A"

SANDY CREEK RESTORATION PROJECT
PHASE 2

Conservation Easements City Tract 564
Property of
City of Durham

Conservation Easement "A"

Beginning at point , said point being a concrete monument in the northern line of City of Durham Tract 564, DurhamTownship, Durham County, North Carolina, said concrete monument being the southeast corner of Cresset Baptist Church as shown in Plat Book 60 page 7 of the Durham County Registry; thence, with the eastern line of Cresset Baptist Church, N 00°21'02" E 278.48' to an iron pipe set(IPS); thence, leaving said eastern line and through the City of Durham property for the following nine calls: S 33°21'22" E 373.08' to an IPS, S 03°01'24" W 194.33' to an IPS, S 20°53'10" W 487.73' to an IPS, S 18°54'22" W 467.24' to an IPS, N 62°34'32" W 240.83' to an IPS, N 06°00'48" E 49.07' to an IPS, N 65°12'39" W 254.11' to an IPS, N 27°25'50" E 512.11' to an IPS, and N 00°33'10" W 405.00' to an IPS in the southern line of Cresset Baptist Church; thence, with said southern line, S 89°51'15" E 336.00' to the point or place of beginning and containing 12.134 acres, more or less as shown in Plat Book 184 Page 195 of the Durham County Registry.

Conservation Easement "B"

Beginning at point , said point being an iron pipe set(IPS) in the property of City of Durham Tract 564 DurhamTownship, Durham County, North Carolina, said IPS being located the following six calls from the southeast corner of Cresset Baptist Church as shown in Plat Book 60 page 7 of the Durham County Registry: N 00°21'02" E 278.48', S 33°21'22" E 373.08', S 03°01'24" W 194.33', S 20°53'10" W 487.73', S 18°54'22" W 467.24', and S 17°22'31" E 61.38' to the True Point of Beginning; thence, through the property of the City of Durham the following five calls: S 01°53'00" E 30.06' to an IPS, S 28°55'26" W 133.03' to an IPS, S 25°56'55" W 167.83 ' to an IPS, N 83°34'09"W 20.14' to an IPS and N 27°58'50" E 334.21' to the point or place of beginning and containing 0.109 acres, more or less as shown in Plat Book 184 Page 195 of the Durham County Registry.