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P.O. Box 550, Raleigh, N.C. 27602

**STATE OF NORTH CAROLINA
COUNTY OF WAKE**

**ENCROACHMENT AND INDEMNITY
AGREEMENT FOR CONSTRUCTION OF
CRABTREE CREEK NATURE PARK**

THIS ENCROACHMENT AND INDEMNITY AGREEMENT FOR CONSTRUCTION OF CRABTREE CREEK NATURE PARK (this "Agreement") is made and executed as of the ____ day of _____, 20__, by and among TOWN OF MORRISVILLE, a municipal corporation of the State of North Carolina ("Indemnitor" or "Owner"); , and WAKE COUNTY, a political subdivision of the State of North Carolina ("Indemnitee" or "County").

WITNESSETH:

WHEREAS, the Town of Morrisville is the owner of that certain parcel of real estate located in Wake County, North Carolina, having a PIN 0755347581, and being further described on the attached Exhibit A (the "Owned Parcel"); and

WHEREAS, the Indemnitee owns a number of easements in the Crabtree Creek Watershed Basin, one of which it acquired under that certain Easement dated September 7th, 1979, and recorded at Deed Book 2768, Page 0292, by and between Sidney A. Martin and Wachovia Bank and Trust Co., N.A., a national banking association organized and existing under the laws of the United States as Co-Trustees under the will of Leroy Martin, deceased; and Raymond E. Earp, Jr., Co-Executor and Wachovia Bank and Trust Co., N.A. Co-Executor and Trustee under the Will of Raymond Elmore Earp, Sr., deceased; and Raymond E. Earp, Jr., individually and wife, Nancy Crews Earp, and Mary W. Earp Moore and husband, William Richard Moore, predecessors in interest to Indemnitor, as grantor, and Grantee (the "Flood

Easement”), for the purposes of developing a watershed improvement project within that area more particularly described on the Flood Easement attached hereto as Exhibit B (the “Easement Area”); and

WHEREAS, Indemnitor desires to construct and install the Morrisville Crabtree Creek Nature Park Project (“Project”) within the Easement Area utilized by Indemnitee for the Crabtree Creek Watershed Project Flood Control Structure 23 (“Structure 23”) Site Number 23 to complement its planned development of the Owned Parcel for Parks and Recreation use; and

WHEREAS, Structure 23 is one of 10 earthen berm flood impoundment structures along the tributaries of Crabtree Creek that is subject to an Operation & Maintenance agreement (“O&M Agreement”) between the County and the U.S. Department of Agriculture Natural Resource Conservation Agency (“USDA/NRCS”) (previously the Soil Conservation Service) which requires the County, among other obligations, to obtain approval from NRCS of all plans or alterations to Structure 23 and to prohibit the installation of any improvements that will interfere with the operation and maintenance of Structure 23 and to ensure the project does not adversely affect the Site 23 dam structure (embankment, spillways, flood pool, associated appurtenances, etc.) or operations under normal and extreme precipitation/flow events; and

WHEREAS, the Flood Easement provides Indemnitee the perpetual and exclusive right and privilege to construct, install, improve, remove, replace, inspect, repair, operate and maintain a watershed improvement project across the Property, consisting of a flood water retarding structure, dam, spillway for impoundment and storage associated therewith on the Property and reasonable rights of ingress and egress across the Property in association with Crabtree Creek Flood Control Structure 23; and

WHEREAS, in connection with the Indemnitor’s development of the Owned Parcel, Indemnitor desires to remove fill that had been placed without approval when a private developer constructed the athletic field during the 1990s. No new fill material will be placed within the flood pool and the flood capacity will remain the same as part of this Project. Engineering drawings and a cut/fill analysis that show the specific remediation plans related to the 1990 encroachment and the flood pool elevation of 284.9 feet are attached hereto as Exhibit C; and

WHEREAS, the Indemnitee and NRCS have evaluated the Indemnitor’s construction plans more particularly detailed in the attached Exhibit C and have determined that the Morrisville Crabtree Creek Nature Park Project , as planned, should not reduce the County’s existing flood pool capacity for Structure 23 or result in a net loss of flood pool capacity for Structure 23 and as such, Indemnitee agrees to allow the Morrisville Crabtree Creek Nature Park Project Encroachment, subject to the terms and conditions set forth in this Agreement.

NOW, THEREFORE, in consideration of the agreements set forth herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto, intending to be legally bound hereby, agree as follows:

1. Recitals. The foregoing recitals are hereby incorporated herein by this reference.

2. Right to the Morrisville Crabtree Creek Nature Park Project & Right of Entry.

The County hereby grants unto the Indemnitor, its employees, agents, contractors, consultants and cooperating parties, the right and privilege to enter Structure 23 for the purpose of constructing the Morrisville Crabtree Creek Nature Park Project in the Easement Area depicted in the attached Exhibit C after obtaining: 1) an approved site plan from the governing Municipal entity, 2) an approved erosion control plan from the governing Municipal entity, 3) any other local, state, federal permitting requirements, and 4) following the Indemnitor's surveyed demarcation/staking of the County's flood pool elevation associated with Structure 23. The staking of the flood pool elevation shall be required to remain the entire time during construction of the Crabtree Creek Nature Park Project. The Indemnitor agrees to perform all work contemplated in this Section at its sole expense and without a request of contribution from the County. In conducting the above activities, the Indemnitor, its contractors, agents or employees agree to exercise reasonable care in order to minimize physical damage to Structure 23. This right of entry is conditioned on the Indemnitor constructing the Crabtree Creek Nature Park Project as depicted on the plans attached hereto in Exhibit C. Based on NRCS recommendation, the Indemnitor shall install a minimum of two warning signs: One at the main entrance, and one at the trail to the boardwalk. Both signs should state that the park is within the flood pool area, and that visitors should take the proper precautions for potential flooding when using the facilities.

Indemnitor shall not construct any Morrisville Crabtree Creek Nature Park Project improvements other than those detailed and as depicted in Exhibit C. Indemnitor shall construct the improvements in the exact location depicted in Exhibit C and nothing herein shall constitute permission for any other improvements, materials, or alterations to Structure 23. Further, the Indemnitor agrees that it shall not store materials or construction equipment within the County's flood pool area. The County reserves all of its rights under the Flood Easement to object to any other projects, improvements, or encroachments within the Easement Area.

The Indemnitor shall exercise precaution and best engineering practices during construction and installation of the Morrisville Crabtree Creek Nature Park Project to prevent soil erosion, additional sediment accumulation in the flood control structure, silting, or other pollution of any surface water or groundwater, and otherwise comply with all applicable laws, rules and regulations, including the Municipal Erosion Control Ordinances.

3. Obligation to Indemnify.

The Indemnitor acknowledges and agrees that, pursuant to the terms and conditions of this Agreement, it shall indemnify, defend and hold the Indemnitee harmless from and against any and all claims, losses, injuries or other damages (collectively "Damages") incurred by the Indemnitee with respect to or otherwise arising from the Morrisville Crabtree Nature Park Project to the extent not caused by the gross negligence or willful misconduct of the Indemnitee or its employees, agents, or affiliates. Indemnitor further releases any and all claims against the County for damages to the Owned Parcel or injuries to persons which may arise from or be incident to the flooding and/or erosion that may occur within the Easement Area or for damages to the property or injuries to the person of Indemnitor's officers, agents, or employees or others who may be on the premises at their invitation or the invitation of any one of them as a result of or incident to the flooding and/or erosion within the Easement Area. Indemnitor shall indemnify

and hold the County harmless from any and all such claims except for damages due to the negligence of County or its contractors. Indemnitor acknowledges that there are inherent risks with the construction of permanent improvements within and abutting the Easement Area utilized as an active flood control structure and as such, agree to indemnify the County in the event any claim or demand is made upon County by any third-party claiming damages to property or person, wherever situate, as a result of or incident to the flooding or erosion within the Easement Area. Indemnitor agrees and acknowledges that nothing herein should or shall be construed as a waiver of any immunity available to Wake County whether governmental, sovereign or statutory immunity and further agrees that Wake County preserves and the County in no way intends to waive its immunity as by law allowed by entering into this Agreement.

THE OBLIGATION OF THE INDEMNITOR AS SET FORTH HEREIN SHALL RUN WITH THE LAND AND SHALL BE BINDING UPON ANY SUCCESSOR OWNERS, ASSIGNS IN TITLE, PERSONS OR ENTITIES HAVING AN INTEREST OR OPERATION IN THE PROPERTY.

Every contract, deed or other instrument hereafter executed conveying the Property or any portion thereof shall conclusively be held to have been executed, delivered and accepted subject to this Agreement and the indemnities set forth herein, regardless of whether such reservations are set forth in such contract, deed or other instruments.

4. Procedure for Indemnification.

(a) The Indemnitee shall give the Indemnitor prompt written notice of any Damages (a “Claim Notice”), but in no event more than thirty (30) days after such Indemnitee gains actual knowledge thereof. Each Claim Notice must contain a description of the Damages and the nature and amount of the related Damages (to the extent that the nature and amount of the losses are known at the time). Indemnitor shall reimburse Indemnitee for documented Damages within thirty (30) days following a final determination of Indemnitor’s obligation to pay Damages hereunder.

(b) Indemnitor shall have the right, but not the obligation, at Indemnitor’s sole option, to control the defense and settlement of any Claim Notice and shall keep the Indemnitee apprised of any such defense, compromise or settlement of the Damages.

5. Governing Law; Jurisdiction. This Agreement and its validity, construction, enforcement, and interpretation shall be governed by and construed in accordance with the laws of the State of North Carolina, without regard to its or any other jurisdiction’s conflicts of laws principles. Each of Indemnitor and Indemnitee irrevocably and unconditionally waives trial by jury hereunder.

6. Notices. The Indemnitor shall provide written notice to the Indemnitee when work initially begins and when all work is completed in the Easement Area pursuant to this Agreement to allow for the Indemnitee to inspect the Easement Area. All notices, demands, approvals, reports and other communications provided for in this Agreement shall be in writing and shall be delivered to the

parties by first class or express mail, postage prepaid, by overnight courier service, charges prepaid, or by hand delivery, charges prepaid, to Indemnitor at the following address:

c/o Town of Morrisville

Attention: Town Manager
PO Box 166
Raleigh, North Carolina 27560

with a copy to:

Jordan Price Wall Gray Jones & Carlton
Attn: Frank Gray
1951 Clark Avenue
Raleigh, NC 27605

and to Indemnitee at the following address:

Wake County General Services Administration
Attention: GSA Director & GSA Facility and Field Services Director.
PO Box 550
Raleigh, NC 27602

With a copy to

Wake County Attorney's Office
P.O. Box 550
Raleigh, NC 27601

Any such notice, request or communication shall be deemed to be delivered, given and received for all purposes of this Agreement (a) as of the date so delivered, if delivered personally to the Person entitled thereto, (b) three (3) business days after being deposited in the United States mail, if delivered by first class or express mail, postage prepaid, or (c) one (1) business day after being deposited with an overnight courier service for delivery if notice is sent by courier service.

7. Modification. No modification, amendment, extension, discharge, termination or waiver of any provision of this Agreement shall in any event be effective unless the same shall be in a writing signed by the party against whom enforcement is sought, and then such waiver or consent shall be effective only in the specific instance, and for the purpose, for which given.
8. Validity. If it is determined that any term or provision of this Agreement is invalid, illegal or incapable of being enforced by any law or public policy, all other terms and provisions of this Agreement shall nevertheless remain in full

force and effect.

9. Entire Agreement. This Agreement contains the entire agreement of the parties hereto in respect of the transactions contemplated hereby, and all prior agreements among or between such parties, whether oral or written, are superseded by the terms of this Agreement.
10. No Third-Party Beneficiaries. Notwithstanding anything to the contrary contained herein, no provision of this Agreement is intended to benefit any party other than the parties hereto and their successors and assigns and no provision hereof shall be enforceable by any other Person.
11. Termination. The rights granted herein may be terminated at the election of the County upon thirty (30) days written notice to Indemnitors if the County determines that they impede County's operation and maintenance of Flood Control Structure 23. This Agreement may also be revoked by the County for Indemnitor's failure to comply with any or all of the conditions of this Agreement.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK.]
[SIGNATURES APPEAR ON FOLLOWING PAGES.]

IN WITNESS WHEREOF, the parties have caused this instrument to be executed in their respective names by order of their respective governing bodies, with their corporate seals affixed hereto and attested by their respective Clerks, the day and year first above written.

INDEMNITOR:

TOWN OF MORRISVILLE

By: _____
Print Name: _____ Title: _____

STATE OF NORTH CAROLINA

COUNTY OF _____

I, a Notary Public of the County and State aforesaid certify that _____
as _____ of Town of Morrisville, a municipal corporation of the State of North Carolina personally appeared before me this day and acknowledging to me the due execution of the foregoing instrument on behalf of the company.

Witness my hand and official stamp or seal, this the _____ day of _____, 20__.

Signature of Notary Public

(SEAL)

Printed Name of Notary Public

My Commission Expires: _____

INDEMNITEE:

WAKE COUNTY, a body politic and corporate

By: _____
Shinica Thomas, Chair
Wake County Board of Commissioners

ATTEST:

By: Yvonne C. Gilyard
Title: Clerk to the Board

(Official Seal)

APPROVED AS TO FORM:

(Deputy/Asst.) County Attorney

STATE OF NORTH CAROLINA

COUNTY OF WAKE

I, a Notary Public of the County and State aforesaid, certify that Yvonne C. Gilyard, personally appeared before me this day and acknowledged that she is the Clerk of the Wake County Board of Commissioners and that by authority duly given, the foregoing instrument was signed in its name by its Chair of the Wake County Board of Commissioners, sealed with its corporate seal and attested by Yvonne C. Gilyard as its Clerk.

Witness my hand and official stamp or seal, this the ____ day of _____, 20__.

Signature of Notary Public

(SEAL)

Printed Name of Notary Public

My Commission Expires: _____

EXHIBIT A

EXHIBIT B

EXHIBIT C