

WAKE COUNTY, NC 275
LAURA M RIDDICK
REGISTER OF DEEDS
PRESENTED & RECORDED ON
07/12/2012 AT 14:08:19

BOOK:014840 PAGE:00813 - 00825

Instrument Prepared By: Kilpatrick Townsend LLP
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Mail After Recording To: City of Raleigh, Stormwater Utility Division
222 W. Hargett St. (Rm 301), Raleigh, NC 27601

STATE OF NORTH CAROLINA

COUNTY OF WAKE

FIRST AMENDMENT TO AMENDED AND RESTATED
STORMWATER REPLACEMENT AGREEMENT

THIS FIRST AMENDMENT TO AMENDED AND RESTATED STORMWATER REPLACEMENT AGREEMENT (this "AMENDMENT") is made this 25th day of April, 2012, by and between Avery Developers, Inc., whose address and telephone number are 3700 Glenwood Ave., Suite 510, Raleigh, NC 27612 (919) 786-9905 (hereinafter referred to as "Developer"), and Whitaker Park Neighborhood Association, Inc., a North Carolina non-profit corporation, whose address and telephone number are 3700 Glenwood Ave., Suite 510, Raleigh, NC 27612 (919) 786-9905, (hereinafter referred to as the "Association" and, together with Developer, "Grantors"), with, to and for the benefit of the CITY OF RALEIGH, a municipal corporation of the State of North Carolina, whose address is P. O. Box 590, Raleigh, North Carolina 27602 (hereinafter referred to as the "Grantee" or the "City"). These parties shall hereinafter sometimes be referred to collectively as the "Parties", and individually as a "Party".

RECITALS

WHEREAS, the Parties have previously entered into an agreement, recorded in Book 13173 Page 2129 Wake County Registry, as may be amended from time to time (collectively, the "Stormwater Replacement Agreement"). Capitalized terms within this Amendment that are not defined within the body text of this Amendment shall bear the same meaning as defined in the Stormwater Replacement Agreement;

WHEREAS, the Stormwater Replacement Agreement has

☒ not been previously amended.

[] been previously amended, with amendments recorded at [11] [5] County Registry.

WHEREAS, the Raleigh City Council has enacted Ordinance No (2010) - 791 TC 337 which amends the requirements for existing stormwater replacement agreements required by the City. Said ordinance eliminates the existing privately-funded general replacement account and, in lieu thereof, substitutes a developer-funded replacement fund and a system of special assessments in the manner of Article 10 Chapter 160A of the North Carolina General Statutes, all in accordance with North Carolina Session Law 2009-293 and Ordinance No (2010) - 791 TC 337 and private assessments

WHEREAS, the Parties wish to amend the Stormwater Replacement Agreement to conform to recent changes in State and City laws.

NOW, THEREFORE, for a valuable consideration, including the benefits Grantors may derive therefrom, the receipt of which is hereby acknowledged, the Parties hereby agree as follows:

1. RECITALS. The foregoing recitals shall constitute an integral part of this Amendment and are therefore incorporated herein and made a part hereof.

2. AMENDMENTS TO STORMWATER REPLACEMENT AGREEMENT.

- (a) Section four (4) of the Stormwater Replacement Agreement (relating to General Replacement Fund) is hereby deleted in its entirety, and said section is reserved for future use.
- (b) The first sentence of the first paragraph of section six (6) of the Stormwater Replacement Agreement (relating to Default) is hereby amended to delete all language following the language, "the City, in its sole discretion, may perform such work" and in lieu of the deleted language, the following is substituted: "and recover the cost thereof from (i) the Party who is the then owner of the Stormwater Control Measure or the Stormwater Control Facility, as the case may be, -- the "Owner" or the "Responsible Party," as the case may be, -- or (ii) from the lot owners of portions of the Property served by the Stormwater Control Measures or the Stormwater Control Facilities, as the case may be, subject to the Stormwater Replacement Agreement. However, the City will give the owner of the Stormwater Control Measure or Stormwater Control Facility, as the case may be, timely written notice of and an reasonable opportunity to cure the default hereunder."
- (c) The last sentence of section eleven (11) of the Stormwater Replacement Agreement (relating to Amendments) is hereby deleted, and rewritten to read as follows: "No amendment to this agreement shall become effective until executed by the appropriate Parties, approved by the City's Director

of Public Works and recorded in the office of the local county register of deeds.”.

- (d) Two new exhibits are hereby added to the Stormwater Replacement Agreement:
 - (i) The first exhibit is a proposed reserve fund schedule derived from dividing the initial construction cost of each Stormwater Control Measure or Stormwater Control Facility, as the case may be, by the expected life of that measure or facility. The intent of this exhibit is to provide guidance to the Association as to the amount of money that would be needed to establish a reserve fund for major repairs and/or replacement of the Stormwater Control Measure(s) and Stormwater Control Facilit(ies), as the case may be. The Association is strongly urged to establish and maintain a reserve fund so that the Association has monies available to it to have the work done by its contractors, or, if the City performs the work, to reimburse the City for the costs thereof, and, either event, thereby avoid future City assessments against the lots for reimbursement of costs incurred by the City. If the City is not reimbursed fully for the costs incurred by the City, the City will assess these costs against the lots as permitted by law.
 - (ii) The second exhibit is a certified letter prepared under seal by an engineer licensed in the State of North Carolina, listing which recorded lots are served, in whole or in part, by each Stormwater Control Measure or Stormwater Control Facility, as the case may be, described in the stormwater operations and maintenance manual and budget and for which estimated construction costs are stated in such manual. The certified letter may be based on the original designs as shown on the City-approved construction drawings and as-built plans presented to the City, and may be, but are not required to be, verified by aerial photos. The purpose of this exhibit is to enable the City to identify which lots may be subject to future assessment.

The two exhibits are attached hereto as Exhibit 1 and Exhibit 2 respectively and made part of this Amendment as if fully set forth herein.

3. AMENDMENTS TO THE STORMWATER OPERATIONS AND MAINTENANCE MANUAL AND BUDGET (attached as an exhibit to either the Stormwater Replacement Agreement or the Declaration of Maintenance Covenant for Stormwater Control Facilities [Maintenance Covenant] for projects recorded after 5 August 2008). This provision modifies the stormwater operations and maintenance manual and budget found within either the Stormwater Replacement Agreement or the Maintenance Covenant as follows:

- (a) All provisions relating to major repairs recorded in Book 13173, specific Page(s) 2153, Wake County Registry are hereby deleted in their entirety.
- (b) All provisions of the budget relating to replacement contribution to the City of Raleigh recorded in Book 13173 specific Page(s) 2154-2155 Wake County Registry are hereby deleted in their entirety.
- (c) All provisions relating to annual replacement contribution payments paid to the City of Raleigh recorded in Book 13173 specific Page(s) 2161-2162 Wake County Registry are hereby deleted in their entirety.

4. Upon presentation to the City of this original recorded a Amendment, the City will pay the Association, in accordance with the City's accounting procedures, the sum of \$20,765.25, said sum being all monies paid into the General Replacement Account for or on behalf of the Association that exceed twenty-four percent (24%) of the estimated initial construction cost of the Stormwater Control Measure or Stormwater Control Facility, as the case may be, as contained in the stormwater operations and maintenance manual and budget. The Developer and the Association and its members each agree, represent and acknowledge that the Association is the only Party entitled to said funds. By and upon the Association's receipt of such reimbursement the Developer and the Association (through the Association, its members) hereby waive and release forever any and all claims, rights and demands of any kind whatsoever, now existing or existing in the future, to any funds paid into the General Replacement Account and any other stormwater replacement account held by the City.

5. The Association agrees to indemnify and hold harmless the City, its officers, and employees for any damages, costs, or penalties (including attorneys' fees) associated with any claim made by any person or entity relating to or arising from the payment of the funds to the Association pursuant to the terms of this Amendment. The City has acted in reliance on the representations made by the Association in this instrument that no other person or entity has a right to the funds being paid to the Association by the City, and the Association acknowledges that these representations and this indemnity provision are a material inducement to the City's payment of these funds to the Association.

6. The Developer and the Association hereby represent and warrant that all Stormwater Control Measures and Stormwater Control Facilities, as the case may be, subject to the Stormwater Replacement Agreement are currently in good working order and are performing as designed. The Developer and the Association also hereby represent and warrant for themselves that it has not made any assignment for the benefit of its creditor, it is not insolvent or involved in a liquidation or termination of its business, it is not subject to any bankruptcy petition, voluntary or involuntary, nor has it been adjudicated bankrupt.

7. Except as modified and amended by this Amendment, all terms and conditions of the Stormwater Replacement Agreement, as may be previously amended, shall remain in full force and effect.

8. Each person signing this Amendment certifies that he/she is properly authorized to sign this Amendment on behalf of the entity and to bind the entity to the provisions hereof,

and that all applicable covenants, conditions, bylaws and requirements of the entity have been met.

[SIGNATURE PAGES FOLLOW]

IN WITNESS WHEREOF, the Parties hereto have each executed and sealed this Amendment to Stormwater Replacement Agreement as its binding legal act and deed; as of the day and year first written above

THE PERSON SIGNING ON BEHALF OF THE ASSOCIATION AND DEVELOPER SECIFICALLY ACKNOWLEDGES THE CERTIFICATION MADE IN PARAGRAPH 8 OF THIS AMENDMENT

ASSOCIATION:

WHITAKER PARK NEIGHBORHOOD ASSOCIATION, INC.

By: R Gordon Grubb (SEAL)
Name: R. GORDON GRUBB
Title: President

DEVELOPER:

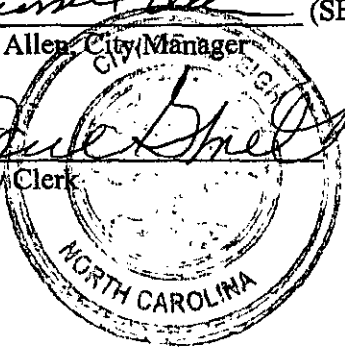
AVERY DEVELOPERS INC.

By: R Gordon Grubb (SEAL)
Name: R. GORDON GRUBB
Title: President

CITY OF RALEIGH

By: J. Russell Allen (SEAL)
J. Russell Allen, City Manager

Attest: [Signature]
City Clerk



STATE OF NORTH CAROLINA
COUNTY OF Wake

ASSOCIATION
ACKNOWLEDGMENT

I, certify that the following person personally appeared before me this day and acknowledged to me that he or she voluntarily signed the foregoing document for the purpose stated therein and in the capacity indicated: R. Gordon Grubb
(Print name of signatory in blank)

This the 25th day of April, 20 12

My Commission Expires: Aug 31, 2014

Karen T. King
Notary Public
Print Name: Karen T. King



STATE OF NORTH CAROLINA
COUNTY OF Wake

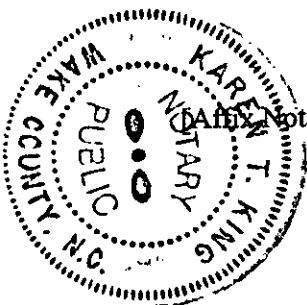
DEVELOPER
ACKNOWLEDGMENT

I, certify that the following person personally appeared before me this day and acknowledged to me that he or she voluntarily signed the foregoing document for the purpose stated therein and in the capacity indicated: R. Gordon Grubb
(Print name of signatory in blank)

This the 25th day of April, 20 12

My Commission Expires: Aug 31, 2014

Karen T. King
Notary Public
Print Name: Karen T. King



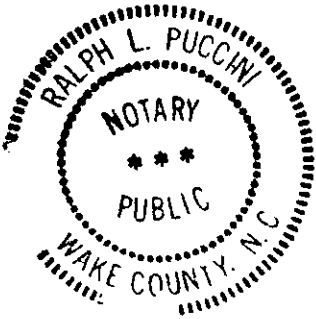
STATE OF NORTH CAROLINA
COUNTY OF WAKE

CITY MANAGER
ACKNOWLEDGEMENT

This is to certify that on the 2ND day of July, 2012, before me personally came GAIL G. SMITH, with whom I am personally acquainted, who, being by me duly sworn, says that she is the City Clerk and Treasurer and J. Russell Allen is the City Manager of the City of Raleigh, the municipal corporation described in and which executed the foregoing; that she knows the corporate seal of said municipal corporation; that the seal affixed to the foregoing instrument is said corporate seal, and the name of the municipal corporation was subscribed thereto by the said City Clerk and Treasurer and that the said corporate seal was affixed, all by order of the governing body of said municipal corporation, and that the said instrument is the act and deed of said municipal corporation.

WITNESS my hand and official seal this the 2nd day of July, 2012.
(SEAL) Ralph L. Puccini
Notary Public
RALPH L. PUCCINI

My Commission Expires: 9/19/16



LIST OF EXHIBITS

- 1. Exhibit 1 Proposed Reserve Fund Schedule
- 2. Exhibit 2. A listing, certified and sealed by an engineer licensed in North Carolina, showing which recorded lots are served by each Stormwater Control Measure or Stormwater Control Facility, as the case may be, described in the stormwater operations and maintenance manual and budget for which estimated initial construction costs are stated in the manual

ATTORNEY CERTIFICATION

I, Barry Ford Robertson, Jr., an attorney licensed to practice law in the State of North Carolina, certify to the City of Raleigh that this Amendment has been prepared in accordance with the instructions provided by the City of Raleigh, and that I have investigated the county land records necessary to prepare this instrument.


Attorney at Law

NC Bar #: 29676

EXHIBIT 1

WHITAKER PARK aka OAKS AT FALLON PARK HOA
STORMWATER REPLACEMENT RESERVE

Description	Construction Value	Estimated Life (Years)	Current Age (Years)	Renew Date (Year)	Cost @ Renew Date **	Annual Contribution	Projected Stormwater Reserve Balance as of 12/31/11	Notes	1/16/2012
Bioretention Basin	\$52,500	20	4	2027	\$52,500	\$2,625	\$10,500	Construction price as listed in stormwater O&M Manual for Phase 1 & 2, prepared by John A. Edwards & Co.	
Underground Detention Basin	\$30,000	40	4	2047	\$30,000	\$750	\$3,000		

Note: The HOA also has a \$2,500.00 budget annually for inspections and repairs for both devices. Capital Replacement Reserve balance as of 4/30/11 is \$4,967. Funds received from the City of Raleigh will be placed in Capital Reserves for funding.

** assumes interest rate of 2% annually and inflation at 2% annually.

EXHIBIT 2

CIVIL & SANITARY
ENGINEERING
LAND PLANNING
LAND SURVEYING

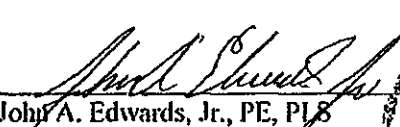
John A. Edwards & Company
Consulting Engineers
333 WADE AVE. - P.O. BOX 10422
RALEIGH, NORTH CAROLINA 27605

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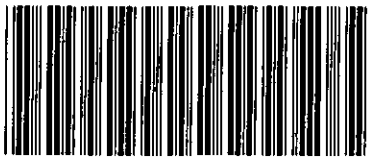
May 11, 2011

I, John A. Edwards, Jr., certify that the stormwater control measures located in Whitaker Park, a/k/a, Oakes at Fallon Park, serve residential Lots 1-86 and the recreation Lot 94.

The stormwater control measures consist of an underground pipe detention system located in a private drainage easement on Lots 66-72, and a bio-retention basin located on Lot 92. The basin will be connected to 1,700 feet of 12", 15" and 18" pipe located in a private drainage on Lots 33-63.


John A. Edwards, Jr., PE, PL 8





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Yellow probate sheet is a vital part of your recorded document.
Please retain with original document and submit for rerecording.



Wake County Register of Deeds
Laura M. Riddick
Register of Deeds

This Customer Group
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