

STATE OF NORTH CAROLINA

STREET TREE MAINTENANCE
AGREEMENT

WAKE COUNTY

THIS STREET TREE MAINTENANCE AGREEMENT (“Agreement”), is made this _____ day of _____, 2022, by and between **Depot 499 Owners Association, Inc.** hereinafter referred to as “**Association,**” and the Town of Apex, hereinafter referred to as the “**Town.**”

WHEREAS, the Association is the manager and administrator of the limitations, covenants, conditions, restrictions, easements, liens and equitable servitudes for a certain subdivision in the County of Wake, State of North Carolina, which is commonly known as **Depot 499 Subdivision (“Depot 499”)**, and which will be located on recombined lots as shown on that certain plat recorded in **Book of Maps 2022, Page 00214**, Wake County Registry (hereinafter the “**Property**”).

WHEREAS, Lennar Carolinas, LLC (the “**Developer**”), intends to plant trees (“Street Trees”) within the rights-of-way that have been dedicated or will be dedicated to the Town (hereinafter “Public ROW”). The Public ROW and Street Trees to be planted in Public ROW are shown on approved construction drawings L5.01; L5.02; L5.03; L5.04; L5.05; and L5.06, and are attached hereto and incorporated into this Agreement (hereinafter collectively referred to as “Exhibits”). Association is responsible for the maintenance of said Street Trees located in the Public ROWs owned, operated, and maintained by Town.

WHEREAS, Street Trees serve to clean air, sequester carbon, and aid in combatting global climate change. Street Trees offer more aesthetically appealing walking environments and serve to beautify and enhance neighborhoods while also helping to manage stormwater.

WHEREAS, the Town, under the terms and conditions herein set forth, is willing to allow the planting of the Street Trees in the Public ROW and perpetual maintenance thereof by the Association.

NOW, THEREFORE, in consideration of these promises and other consideration, the receipt and sufficiency of which is hereby acknowledged, Association and the Town hereby covenant and

agree:

1. Subject to the terms herein, the Town agrees to allow Association, at Association's sole risk and expense, to encroach and enter into the Public ROW within the Property for the purpose of installing, planting, maintaining, and replacing if needed, Street Trees. The Street Trees to be planted will be of the type and in the location as described in the Exhibits.

2. This Agreement shall not divest the Town of any rights or interest in said Public ROWs.

ASSOCIATION RESPONSIBILITIES

3. Association is responsible for any and all expenditures of labor or materials required for the installation, planting, repair, removal, replacement, and maintenance of the Street Trees and shall be allowed to maintain the Street Trees and to perform all needed repairs, maintenance, and replacement of the Street Trees as may be necessary from time to time. In the event replacement is necessary Street Trees will be replaced with the same type of tree and in the same location originally called for in the Exhibits. Association shall perform maintenance of the Street Trees to the same standard and shall exercise the same degree of care, skill and judgment in the performance of maintenance as is ordinarily provided by a similar professional under the same or similar circumstances at the time in North Carolina.

4. Maintenance includes, but is not limited to, all those actions necessary to promote the life, growth, health, or beauty of a tree, including watering, weed control, staking, fertilizing, adjustment and timely removal of stakes, ties, tree guards, tree gates and pest and disease management procedures. Maintenance shall also include pruning necessary to ensure the Street Trees do not cause any traffic sight visibility hazards, that pedestrians have clear access to any sidewalks, that stormwater flow will not be impeded, and electric utility lines and town facilities and infrastructure will not be negatively impacted. No Street Tree shall be planted or permitted to grow underneath overhead lines and all Street Trees shall be distanced at least 10 feet from sewer lines, 5 feet from water lines, and 3 feet from other utilities unless otherwise permitted by the Town. Street Trees, when at maturity, shall maintain a minimum distance of 10 feet from any conductor or any equipment that can become conductive.

5. Association shall hire certified arborists or tree care specialists to perform necessary

maintenance on Street Trees. Association will provide the Town with the name and contact information for the certified arborists or trained tree care specialists performing maintenance activities.

6. Association, and any entity working at Association's direction, shall not "top" Street Trees, meaning there will be no cutting of tree branches to stubs, or to lateral branches that are smaller than 1/3 the size of the branch being cut. Association is responsible for removing all maintenance-related debris and disposing of it properly.

7. Association shall ensure that the Public ROWs are free from any obstruction and are safe and usable for pedestrians upon completion of any maintenance activities. Association shall comply with Town of Apex Standard Specifications and Construction Details while performing work in the Public ROW that could obstruct vehicular or pedestrian traffic.

8. The Town shall not be held responsible for any property damage, injury, or death of any person which results from any defect in design, or negligence or omission created by or resulting from, the planting or maintenance of the Street Trees described herein, or any cause of action arising out of the installation, maintenance, removal, replacement, destruction, or location of said Street Trees.

9. Association agrees to and does hereby hold the Town, its officers, council members and employees harmless from any and all liability arising out of such negligence, omission, defect or other cause of action; that it will defend the Town, its officers, council members and employees, and pay all attorney fees in any and all actions brought as a result of such; and that it will indemnify the Town, its officers, council members, and employees against any and all loss sustained by reason of such negligence, omission, defect, or other cause of action, claim, cost, or expense arising out of the installation, maintenance, removal, or location of said Street Trees; provided that, Association shall not be obligated hereunder to indemnify the Town for any negligent acts or omissions of the Town, its contractor(s) (including sub-contractors) and their respective officers, agents and employees.

10. Paragraphs 8 and 9 of this Agreement shall survive the termination of this Agreement for any reason.

11. Association agrees to abide by all applicable laws, regulations, statutes and ordinances

in carrying out its obligations pursuant to this Agreement.

12. If the Town deems, within its sole discretion, that removal, pruning, or modification of all or a portion of the Street Trees is necessary in order to operate, protect, maintain, modify, replace, add-to or improve its facilities or infrastructure located within the Public ROWs, or to otherwise maintain the public health and safety, then Association shall cause such removal, pruning, or modification to be made at Association's sole expense within 30 days after receipt of notice from the Town and shall be completed in a manner that protects the public health and safety and will allow the Town complete and safe access to its facilities. In the event that the Association fails to timely remove, prune, or modify the Street Trees as directed, or in the event of an emergency associated with the condition of the Public ROWs or protection of Town facilities, the Town is authorized to remove or modify all or such portion of the Street Trees as the Town determines in its sole discretion to be reasonably necessary, convenient or advisable to operate, protect, maintain, modify, replace, add-to or improve its facilities located within the Public ROWs, or to otherwise protect the public health and safety. The Town shall have the sole discretion to determine the existence of an emergency, or a public health and safety condition, associated with the condition of the Public ROWs.

13. Association agrees to reimburse the Town the entire expense and cost of removal, pruning, or modification of the Street Trees in the event that the Town performs such actions pursuant to Paragraph 12 of this Agreement.

14. Association, during the life of this Agreement, agrees to procure and maintain, from a responsible insurance carrier or carriers authorized under the laws of the State of North Carolina, valid commercial general liability insurance in the minimum amount of \$1,000,000 covering full liability for any and all personal injury, property damage or wrongful death caused by the installation, planting, maintenance, location, repair or existence of Street Trees. If the policy has a blanket additional insured provision, the Association's insurance shall be primary and non-contributory to other insurance. Association shall furnish the Town, without demand, each July, a certification from the insurance carrier or carriers with whom the insurance herein mentioned is carried, stating that such compensation is covered by such carrier or carriers and showing such insurance to be in full force and effect. Both Association and the Town shall be named as insured parties by endorsement of the policy. In the event of any change in the insurance policy, Association shall give the Town thirty (30) days' notice of such change. Should Association fail

to pay premiums upon said insurance or to perform any of the Agreement, terms or conditions herein contained, the Town, at its option, by written notice may declare a breach of this Agreement. Notwithstanding the foregoing, neither the requirement of Association to have sufficient insurance nor the requirement that Town is named as an additional insured, shall constitute waiver of the Town's governmental immunity in any respect, under North Carolina law.

ASSIGNMENT

15. Neither this Agreement nor any duties or obligations hereunder may be assigned by Owner without written approval from the Town. Any purported assignment made in violation of this Paragraph shall be null and void.

NOTICES

16. All notices required herein shall be deemed given by depositing such in the United States mail, first class, and addressed to:

To Town: Assistant Town Manager
Town of
Apex
PO Box 250
Apex, NC 27502

To Association: Depot 499 Owners Association, Inc.
1100 Perimeter Park Drive, Suite 112
Raleigh, NC 27560-9119

MISCELLANEOUS

17. Neither Association nor Town, having taken commercially reasonable precautions, shall be in default of the provisions of this Agreement for delays in performance due to forces beyond the control of the parties. "Forces beyond the control of the parties" shall mean, but is not limited to, delay caused by natural disaster, fire, flood, earthquakes, storms, lightning, epidemic, pandemic, war, riot, civil disobedience, or other event reasonably outside of the parties' control. Due to the ever-changing circumstances surrounding the COVID-19 pandemic, situations may arise during the performance of this Agreement that affect availability of resources and staff of Association or the Town. There could

be changes in anticipated performance times and service costs. Association will exercise reasonable efforts to overcome the challenges presented by current circumstances. The Parties agree that they shall not be liable to each other for any delays, expenses, losses, or damages of any kind arising out of the impact of the COVID-19 pandemic.

18. In the event there is a dispute between the parties concerning the interpretation of the terms of this Agreement or their respective rights and obligations hereunder, such dispute or controversy shall be adjudged pursuant to the laws of the State of North Carolina.

19. No breach or non-performance of any term of this Agreement shall be deemed to be waived by either party unless said breach or non-performance is waived in writing and signed by the parties. No waiver of any breach or non-performance under this Agreement shall be deemed to constitute a waiver of any subsequent breach or non-performance and for any such breach or non-performance each party shall be relegated to such remedies as provided by law.

20. Should any portion of this Agreement require judicial interpretation, it is agreed that the Court or Tribunal construing the same shall not apply a presumption that the terms hereof shall be more strictly construed against any one party by reason of the rule of construction that a document is to be more strictly construed against the party who prepared the documents.

21. The parties hereby warrant that no representations about the nature or extent of any claims, demands, damages, or rights that they have, or may have, against one another have been made to them, or to anyone acting on their behalf, to induce them to execute this Agreement, and they rely on no such representations; that they have fully read and understood this Agreement before signing their names; and that they act voluntarily and with full advice of counsel.

22. In the event for any reason that any provision or portion of this Agreement shall be found to be void or invalid, then such provision or portion shall be deemed to be severable from the remaining provisions or portions of this Agreement, and it shall not affect the validity of the remaining portions, which portions shall be given full effect as if the void or invalid provision or portion had not been included herein.

23. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, and all of which together shall constitute one instrument.

24. The terms of this Agreement shall be binding upon the parties' heirs, successors, and assigns.

25. Pursuant to Section 3-2 of the Town of Apex Code of Ordinances, Association hereby warrants and agrees that Association will not discriminate against a protected class in employment, subcontracting practices, or the solicitation or hiring of vendors, suppliers, or commercial customers in connection with this Agreement. For the purposes of this Agreement "protected class" includes age, race, religious belief or non-belief, ethnicity, color, national origin, creed, sex, sexual orientation, gender identity, marital status, natural hair style, genetic information, pregnancy, familial status, disability, veteran or military status, or disabled veteran status.

26. The Association shall comply with the requirements of Article 2 of Chapter 64 of the North Carolina General Statutes (E-Verify). Association shall require all of the Association's contractors to comply with the requirements of Article 2 of Chapter 64 of the North Carolina General Statutes (E-Verify).

27. The Association warrants and agrees that no labor supplied by the Association or the Association's contractors in the performance of this Agreement shall be obtained by means of deception, coercion, intimidation or force, or otherwise in violation of North Carolina law, specifically Article 10A, Subchapter 3 of Chapter 14 of the North Carolina General Statutes, Human Trafficking.

28. Pursuant to Article 40 of Chapter 66 of the North Carolina General Statutes (the Uniform Electronic Transactions Act) this Agreement and all documents related hereto containing an electronic or digitized signature are legally binding in the same manner as are hard copy documents executed by hand signature. The Parties hereby consent to use electronic or digitized signatures in accordance with the Town's Electronic Signature Policy and intend to be bound by the Agreement and any related documents. If electronic signatures are used the Agreement shall be delivered in an electronic record capable of retention by the recipient at the time of receipt.

[The Remainder of this Page Intentionally Left Blank; Signatures Follow]

In testimony whereof, said Association and said Town have here unto set their hands and seals, the day and year first above written.

Association

Depot 499 Owners Association, Inc.

By: [Signature] (SEAL)

NORTH CAROLINA
COUNTY OF WAKE [county in which acknowledgement taken]

I, TREVOR N. ENNIS, a Notary Public of WAKE County, North Carolina, certify that Heather Gaster, personally appeared before me this day and acknowledged that he/she is the PRESIDENT for Depot 499 Owners Association, Inc. herein, and that by authority duly given as PRESIDENT for the corporation the foregoing instrument was signed and sealed by him/her on behalf of the corporation and acknowledged said writing to be the act and deed of said corporation.

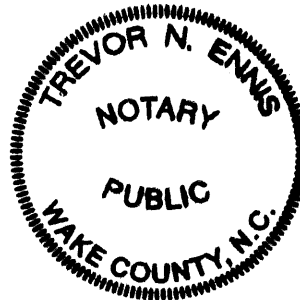
Witness my hand and official stamp or seal, this day of 15TH SEPTEMBER, 2022.

[Signature]

[Signature of Notary Public]

(Affix Notarial Stamp-

Seal) My Commission Expires: MAY 1ST, 2027



In testimony whereof, said Association and said Town have here unto set their hands and seals, the day and year first above written.

Association

Depot 499 Owners Association, Inc.

By: *Robert Smart* (SEAL)

NORTH CAROLINA

COUNTY OF Wake [*county in which acknowledgement taken*]

I, *Heather Gaster*, a Notary Public of *Johnston* County, North Carolina, certify that *Robert Smart*, personally appeared before me this day and acknowledged that he/she is the *Secretary* for *Depot 499 Owners Association, Inc.* herein, and that by authority duly given as *Secretary* for the corporation the foregoing instrument was signed and sealed by him/her on behalf of the corporation and acknowledged said writing to be the act and deed of said corporation.

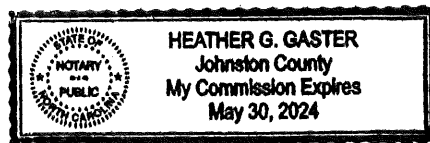
Witness my hand and official stamp or seal, this day of *14th September* 2022.

Heather Gaster

[*Signature of Notary Public*]

(Affix Notarial Stamp-

Seal) My Commission Expires: *May 30, 2024*



In testimony whereof, said Association and said Town have here unto set their hands and seals, the day and year first above written.

Association

Depot 499 Owners Association, Inc.

By: *Paula M. Wells* (SEAL)

NORTH CAROLINA

COUNTY OF Wake [county in which acknowledgement taken]

I, *Heather Gaster*, a Notary Public of *Johnston* County, North Carolina, certify that *Landon Walls*, personally appeared before me this day and acknowledged that he/she is the *Treasurer* for *Depot 499 Owners Association, Inc.* herein, and that by authority duly given as *Treasurer* for the corporation the foregoing instrument was signed and sealed by him/her on behalf of the corporation and acknowledged said writing to be the act and deed of said corporation.

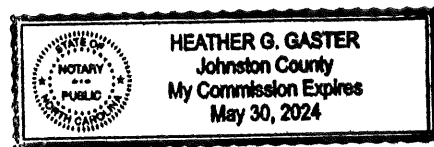
Witness my hand and official stamp or seal, this day of *14th* *September*, 2022.

Heather Gaster

[Signature of Notary Public]

(Affix Notarial Stamp-

Seal) My Commission Expires: *May 30, 2024*



TOWN OF APEX

Catherine Crosby
Town Manager

(Corporate Seal)

ATTEST:

Allen L. Coleman, CMC, NCCCC
Town Clerk

STATE OF NORTH CAROLINA

COUNTY OF _____ [*county in which acknowledgement taken*]

I, _____, a Notary Public of _____
County, North Carolina, certify that _____ personally came before me this day and
acknowledged that he is the Town Clerk of the Town of Apex, a North Carolina Municipal
Corporation, and that by authority duly given and as the act of the corporation, the foregoing
instrument was signed in its name by its Town Manager, sealed with its corporate seal and attested
by him as its Town Clerk.

Witness my hand and official stamp or seal, this _____ day of _____, 2022.

[Signature of Notary Public]

(Seal)

My Commission Expires: _____