

STATE OF NORTH CAROLINA
COUNTY OF WAKE

**FUNDING AGREEMENT for
MIDDLE CREEK GREENWAY - APEX**

THIS AGREEMENT entered into as of the _____ day of _____, 20____, by and between the COUNTY OF WAKE, a body politic and corporate of the State of North Carolina (“County”) and the TOWN OF APEX, a North Carolina municipal corporation (“Town”) (together referred to as the “Parties”).

PRELIMINARY STATEMENT

WHEREAS, the Town has planned and is currently developing the Middle Creek Greenway Project, specifically Phases I and Phase II totaling 1.02 miles: Phase I is .35 miles and crosses Sunset Lake Road and NC 540; Phase II begins at the north end of Reunion Pointe and is .67 miles and contains two crossings of Middle Creek and is predominately boardwalk and provides connections to five existing and proposed. (“Greenway Project” or “Project”); and

WHEREAS, the County and the Town recognize the mutual benefits to their citizens and the public at large in the development of the Project and the connecting of the communities within Wake County; and

WHEREAS, on January 3, 2022, the Wake County Board of Commissioners authorized a funding commitment to the Town in the amount of \$1,544,686 to be paid out of the funding approved as part of the Parks, Recreation, Greenways and Open Space element of the Capital Improvement Fund Project Ordinance for FY 2021 and used for the Project subject to the terms and conditions herein; and

WHEREAS, the Town will develop the Project and for this purpose has accepted the County’s funding commitment in the amount of \$1,544,686 subject to the terms and conditions herein.

NOW THEREFORE, in consideration of the mutual promises, goals and objectives contained herein, and the mutual benefits resulting therefrom, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

**ARTICLE I
SCOPE AND DESCRIPTION OF THE GREENWAY PROJECT**

- A. The Greenway Project shall be located in Apex, Wake County, North Carolina. The purpose of the Project is to extend the Middle Creek Greenway in two phases totaling approximately 1.02 miles of trail with a 12-foot-wide asphalt path as noted in the Town’s

submittal for funding attached to this Agreement as Exhibit “A” and incorporated by reference.

- B. The Greenway Project includes the construction of the Project estimated to be completed on or about August 31, 2024 (the “Completion Date”). A schedule for the design/construction of the Greenway Project is attached to this Agreement as Exhibit “B” and incorporated by reference, with construction to commence thereafter.

ARTICLE II TOWN RESPONSIBILITIES AND COVENANTS

- A. The Town is solely responsible for all Greenway Project costs, decisions, the procurement process, preparations of all plans and specifications, design, permitting and construction related to the Greenway Project as shown in Exhibit A, including those elements funded by the County.
- B. The Town is responsible for funding the Greenway Project, including any overruns, new or additional costs arising during the Project. The anticipated sources of funding for the Greenway Project are set forth in Article V and Exhibit C.
- C. The Town is responsible for acquiring all rights of way and easements needed for the Greenway Project. Costs for these acquisitions could include but are not limited to: direct purchase price; appraisal expenses; Phase 1 Environmental Assessment expenses; title investigation and title insurance secured through the Town Attorney or outside counsel, as necessary and appropriate; recordation expenses.
- D. Acquisitions and easements acquired by the Town will be in the name of the Town of Apex and the Town shall retain full ownership and/or interest in the acquisition of any property and/or easements necessary to construct the Greenway Project. To the best of the Town’s knowledge, there are no disputes concerning the location and/or boundaries of the easement interests associated with the Greenway Project, and the Town shall be responsible for expenses associated with any disputes that may arise.
- E. The Town shall be responsible for all phases of design, construction and construction management of the Greenway Project. The Town shall provide to the County the 100% Final Construction Documents for the sole purpose of reviewing compliance with this Agreement prior to start of construction. The Town shall not commence construction of the Greenway Project until all required approvals, acquisitions, easements, and financing have been obtained.

- F. The Town agrees to abide by any review, reporting, or other legal requirements established by state or local law, County resolution, open space bond requirements, or other agreement relating to the use of these funds.
- G. The Town has determined that the renovations planned as part of the Greenway Project will not cause a negative impact on existing infrastructure such as roads or water and sewer facilities.
- H. The Town acknowledges that any comments or suggestions provided by the County, except as otherwise provided by the Agreement, shall be given solely for the purposes of monitoring compliance with the terms of the Agreement, and shall not in any event be construed as a representative or directive regarding the Greenway Project decision.
- I. The County and the Town agree that, following project completion and acceptance by the Town, the Greenway Project shall be included as a component of the Town's Greenway System. The Greenway Project will be owned and managed by, and shall be the responsibility of, the Town, including future operation, maintenance, and repair. Nothing in this Agreement shall be construed to make the County responsible for any costs or obligation beyond the funding commitment up to \$1,544,686.
- J. The Town shall install appropriate signage, upon completion of the Greenway Project, which shall include acknowledgement of the County's participation in the project. The Town shall provide copies of proposed signage to the County Parks, Recreation, and Open Space Director prior to installation and shall not install signage until approved by the County to ensure proper content and usage of County logo, if applicable.
- K. To the extent permitted by law, the Town agrees to defend, indemnify, and hold harmless the County, for all loss, liability, claims or expense (including reasonable attorney's fees) arising from bodily injury, including death or property damage, to any person or persons caused in whole or in part by the negligence or misconduct of the Town, except to the extent same are caused by the negligence or willful misconduct of the County. It is the intent of this section to require the Town to indemnify Wake County to the extent permitted under North Carolina law.

ARTICLE III
COUNTY RESPONSIBILITIES AND COVENANTS

- A. The County is responsible for tendering a commitment of up to One Million Five Hundred Forty-four Thousand, Six Hundred Eighty-Six and no/1.00s Dollars (\$1,544,686) to the Town (“County Funding Commitment”) to be paid out of the Parks, Recreation, Greenways and Open Space element of the Capital Improvement Fund Project Ordinance for FY 2021 and used exclusively for the Greenway Project subject to the terms and conditions herein and the approval of the Wake County Board of Commissioners.

- B. If requested by the Town, the County agrees to provide additional documentation to evidence the County’s Funding Commitment as outlined herein for the purpose of the Town financing the Greenway Project. This includes, but is not limited to, providing a written affirmation of the County’s contribution to the Greenway Project upon the terms and conditions of this Agreement. In no event shall the County be required to guarantee any commercial or private loan or provide any manner of commitment or financing beyond what is set forth in this Agreement.

- C. The County shall not fine or penalize Town in any way, unless specifically permitted in this Agreement.

ARTICLE IV
REPRESENTATIONS OF COUNTY AND TOWN

The County and the Town each represent, covenant, and warrant for the other’s benefit as follows:

- A. Each party has all necessary power and authority to enter into this Agreement and to carry out the transactions contemplated by this Agreement, and this Agreement has been properly authorized by the party’s governing body. This Agreement is a valid and binding obligation of each party.

- B. The continuation of this Agreement is contingent upon the appropriation of funds to fulfill the requirements of the Agreement by the Wake County Board of Commissioners (BOC) and the Apex Town Council. If either governing body fails to appropriate sufficient monies to provide for the continuation of the Agreement, then it shall terminate on the date of the beginning of the first fiscal year for which funds are not appropriated.

- C. Neither the execution and delivery of this Agreement, nor the fulfillment of or compliance with its terms and conditions, nor the consummation of the transactions contemplated by this Agreement, results in a breach of the terms, conditions and provisions of any agreement or instrument to which either is now a party or by which either is bound, or constitutes a default under any of the foregoing.
- D. To the knowledge of each party, there is no litigation or other court or administrative proceeding pending or threatened against such party (or against any other person) affecting such party's rights to execute or deliver this Agreement or to comply with its obligations under this Agreement. Neither such party's execution nor delivery of this Agreement, nor its compliance with its obligations under this Agreement, requires the approval of any regulatory body or any other entity the approval of which has not been obtained.
- E. No party has dealt with any real estate broker or brokerage firm regarding the transactions contemplated by this Agreement, and no person or firm has a claim for real estate commissions arising out of the acquisition or sale of the property upon which the Greenway Project shall be constructed.
- F. The County and the Town agree that nothing in this Agreement shall be construed to mandate purchase of insurance by Wake County pursuant to N.C.G.S. 153A-435; or to be inconsistent with Wake County's "Resolution Regarding Limited Waiver of Sovereign Immunity" enacted October 6, 2003; or to in any other way waive Wake County's defense or the Town's defense of sovereign or governmental immunity from any cause of action alleged or brought against either for any reason if otherwise available as a matter of law.
- G. The Town and the County agree to cooperate to meet their mutual goals and objectives as set forth in this Agreement. The County Manager and the Town Manager will allocate personnel to the purposes outlined in this Agreement to the extent required to complete the obligations of this Agreement.
- H. In consideration of the signing and with respect to the subject matter of this Agreement, the parties for themselves, their agents, officers, and employees, agree not to discriminate in any manner on the basis of race, color, creed, national origin, sex, age, handicap, or sexual orientation, no matter how remote.

ARTICLE V
CONDITIONS OF FUNDING

- A. The total estimated budget for the Greenway Project, including design, construction, contingency and inflation factors, is THREE MILLION ONE HUNDRED THIRTY-NINE FIVE HUNDRED FORTY-FIVE and no/1.00s Dollars as set forth in Exhibit C attached hereto. The anticipated sources of funding are as follows:

Wake County Funding Commitment	\$1,544,686
Town of Apex	\$1,594,859
TOTAL	\$3,139,545

- B. The County Funding Commitment shall be delivered to Town as follows:
1. Construction of the project is eligible for reimbursement up to one hundred percent (100%) of the County Funding Commitment.
 2. Following commencement of construction, the Town shall pay its general contractor each month, based upon Greenway Project work completed. The Town shall, at agreed upon substantial milestones, but no more frequently than monthly, prepare and submit to the County a reimbursement invoice less than or equal to the Town's payment of or construction costs for the Project up to the agreed upon funding amount . Invoices shall be paid to the Town within 30 days of receipt by the County. Cover letter for the invoice must show the calculation of the requested Wake County reimbursement amount. The calculation should include what was paid by the Town of Apex, as well as the NCDOT reimbursement amount.
 3. A copy of the contractor's request for payment(s) and all supporting documentation shall be provided to the County with the invoice, including work contractor notes, design schedule, and evidence of full payment by the Town of invoices submitted for reimbursement. The County in its discretion may withhold or delay funding in the event that all required approvals, acquisitions, easements, and financing have not been obtained by the Town, supporting payment documentation is not provided, the work has not been completed, or the Town deviates significantly from the construction documents in any manner that materially affects the Project without the written approval of the County. The County Funding Commitment shall be

tendered as a reimbursement for allowable expenses only, and not as an advance of funds.

- C. The County shall only provide the applicable funding when due and upon satisfaction of conditions as outlined in this Agreement. All requests for reimbursement by the Town must be submitted no later than August 31, 2024. Any unused portion of the Funding Commitment expires after August 31, 2024 unless this deadline is extended in writing by the County.
- D. Any funds not paid by the County to the Town under this Funding Agreement due to nonfulfillment of conditions or the expiration of the time to draw the County Funding Commitment shall remain in the Wake County Parks Recreation Greenways and Open Space element of the CIP until an alternate use for the funding is determined. The Town shall not have any claim to such funding for any project or use other than the Greenway Project.
- E. The Town represents that this Greenway Project shall not require the on-going support of the County's general operating funds. Nothing herein shall obligate the County to provide operating funds for the Greenway Project after completion.
- F. In consideration of the signing and with respect to the subject matter of this Agreement, the parties for themselves, their agents, officers, and employees, agree not to discriminate in any manner on the basis of race, color, creed, national origin, sex, age, handicap, or sexual orientation, no matter how remote.

ARTICLE VI INDEPENDENT CONTRACTOR

The parties acknowledge that the Town is an independent contractor, and that nothing in this Agreement is intended, and nothing will be construed, to create any form of partnership or joint venture relationship between the Town and the County, or to allow either to exercise control or direction over the other; notwithstanding that each party is bound by the terms and conditions of this Agreement. Neither party is an officer, agent, or employee of the other party for any purpose.

ARTICLE VII
TERMINATION OF GREENWAY PROJECT PRIOR TO COMPLETION

Should the Greenway Project or any Phase thereof become terminated prior to completion, the Town shall remain the sole owner of the Greenway Project property, including all land, structures, and equipment. The County shall have no further funding obligation and no ownership claim to any part of the Greenway Project unless expressly described in this Agreement.

The County's obligation to fund under this Agreement is specific to the parties and not transferrable to any subsequent owner or interest holder of the property upon which the Greenway Project or any phase of the Greenway Project is being constructed.

ARTICLE VIII
NO THIRD-PARTY BENEFICIARIES

This Agreement is not intended to and shall not be interpreted to inure to the benefit of any third parties.

ARTICLE IX
OFFICIAL CAPACITY

No officer, agent or employee of any party will be subject to any personal liability or accountability by reason of the execution of this Agreement or any other documents related to the transactions contemplated hereby. Such officers, agents, or employees will be deemed to execute such documents in their official capacities only, and not in their individual capacities. This Section will not relieve any such officer, agent or employee from the performance of any official duty provided by law.

ARTICLE X
MODIFICATION

This Agreement may only be modified in writing signed by both Parties; provided that any change in the scope of the Greenway Project resulting in a change in the amount of the payment obligation of the County hereunder shall require approval of the governing boards of each party.

ARTICLE XII
ASSIGNMENT

The Town shall not assign this Agreement, either in whole or in part, without the prior written approval of the County. The County shall not assign any of its duties under this Agreement to any private or public agency, corporation, firm, or individual without the prior written approval of Town.

ARTICLE XIII
MISCELLANEOUS

- A. Notices. All notices or other communications hereunder to the Town and the County shall be sufficiently given and shall be deemed to have been received five (5) Business Days after deposit in the United States mail in certified form, postage prepaid, to the County and the Town, as the case may be, at the following addresses:

If to the County: Mr. Chris Snow, Wake County Parks Recreation and Open Space Director

Deliver to: 337 S. Salisbury Street, 10th Floor
Mail to: PO Box 550
Raleigh, North Carolina 27602
Tel: (919) 856-6677
E-mail: csnow@wakegov.com

If to Town: Craig Setzer, Apex Parks, Recreation and Cultural Resources Director

Deliver to: John M. Brown Community Center
Mail to: PO Box 250
Apex, North Carolina 27502
Tel: (919) 249-3511
E-mail: Craig.Setzer@apexnc.org;

- B. Severability. In the event any provision in this Agreement shall be held invalid or unenforceable by a court of competent jurisdiction, such holding shall not invalidate or render unenforceable any other provision hereof.
- C. Execution. This Agreement may be executed in any number of counterparts, each of which shall be an original and all of which shall constitute but one and the same instrument.

- D. Applicable Law. This Agreement shall be governed by and be construed in accordance with the laws of the State of North Carolina. Jurisdiction for the resolution of any conflict arising from this Funding Agreement shall lie with the General Court of Justice of the State of North Carolina with venue in Wake County, North Carolina.

- E. Headings. Paragraph or other headings contained in this Agreement are for reference purposes only and are not intended to affect in any way the meaning or interpretation of the Agreement.

IN WITNESS WHEREOF, the County has caused this Agreement to be executed in its name by its duly authorized officials and its corporate seal to be impressed hereon, and the Town has caused this Agreement to be executed in its name by its duly authorized officials and its corporate seal to be impressed hereon, as of the Effective Date.

COUNTY OF WAKE, NORTH CAROLINA

David Ellis, Wake County Manager

ATTEST:

Yvonne C Gilyard
Deputy Clerk to the Board of Commissioners

Approved as to form:

Scott W. Warren
County Attorney

This instrument has been pre-audited in the manner required by the Local Government Budget and Fiscal Control Act.

Finance Director

Frank Cope
Community Services Director

TOWN OF APEX

ATTEST:

Catherine Crosby
Town Manager

Town Clerk (Interim)

SEAL

This instrument has been pre-audited in the manner required by the Local Government Budget and Fiscal Control Act.

Vance Holloman
Finance Director

Approved as to form:

Laurie Hohe
Town Attorney

Exhibit A – Project Location & Graphical Description

GREENWAY CONSTRUCTION GRANT PROPOSAL

#20-001

TOWN OF APEX

MIDDLE CREEK GREENWAY

(PHI & PHII)

January 16, 2020

(Attached at End)

Exhibit B – Project Schedule

April 5, 2022	Advertise for Construction
May 4, 2022	Open Bids
May 31, 2022	NCDOT Concurrence
June 1, 2022	Award Bid
June 30, 2022	Signed Contract
July 31, 2022	Notice to Proceed
August 2024	Construction Complete

Exhibit C – Estimated Budget

Middle Creek Greenway (PHI and PHII) Town of Apex

Greenways Attachment 2 - Budget Worksheet						
Budget						
	<u>Town of Apex*</u>	<u>Other Partner**</u>	<u>Other Partner**</u>	<u>Other Partner**</u>	<u>Requested from Wake County</u>	<u>Total</u>
Est. Construction Cost (Materials, Construction, Permits, and Fees)	\$1,166,686				\$1,166,686	\$2,333,372
Construction Engineering & Inspection Services (Construction Project Management, Materials Testing, and Inspections)	\$228,173				\$228,000	\$456,173
Contingency Costs	\$200,000				\$150,000	\$350,000
Total Cost	\$1,594,859	\$0	\$0	\$0	\$1,544,686	\$3,139,545
10% of Project	51%	0%	0%	0%	49%	
Miles of Greenway	1.020					
Price per Mile	\$ 1,563,587					