

**WAKE COUNTY
NORTH CAROLINA**

**AGREEMENT FOR THE RIGHT TO CONSTRUCT, INDEMNITY &
MAINTENANCE AGREEMENT**

THIS AGREEMENT FOR THE RIGHT TO CONSTRUCT, INDEMNITY & MAINTENANCE AGREEMENT (hereinafter referred to as “the Agreement”), regarding the management, operations and maintenance of a certain greenway improvement known as the Apex West Greenway Connection to the American Tobacco Trail (the “Project”) on Wake County licensed property (“Property”) is made and entered into this _____ day of _____ 2022, by and between WAKE COUNTY, a body politic and corporate (hereinafter referred to as “the County”) and THE TOWN OF APEX, Wake County, North Carolina, a body politic and corporate, (hereinafter referred to as “ the Town”) (County and Town are collectively referred to herein as the “the Parties”).

WITNESSETH

WHEREAS, the Parties recognize that cooperation and action between the County and Town shall ensure that the best facilities and services are provided to the citizens with the least expenditure of public funds; and

WHEREAS, the Parties are mutually interested in quality recreation facilities for their citizens; and

WHEREAS, the Secretary of the Army, on behalf of the United State of America did grant the North Carolina Department of Transportation (NCDOT) Easement DACW21-2-99-6617 (“Easement”) for the construction, installation, operation and maintenance of a multiuse transportation facility on certain real property in Wake, Durham and Chatham counties North Carolina; and

WHEREAS, the County entered into a License Agreement with NCDOT (“NCDOT License Agreement”) in 2002 for the use of the Easement within Wake County (“County Licensed Premises”) as a recreational trail now known as the American Tobacco Trail which automatically renews for 5 year terms; and

WHEREAS, the Town wishes to connect its greenway system, and more specifically connect the Town’s Apex West Greenway to the American Tobacco Trail at a point and matter more specifically identified in the CONSTRUCTION PLANS FOR THE APEX WEST GREENWAY – OLIVE CHAPEL ROAD TO AMERICAN TOBACCO TRAIL, and attached hereto as “Exhibit A” and incorporated herein by this reference (hereinafter referred to as "the Plan");

WHEREAS, the County has approved a one-time funding commitment to the Town in the amount of \$150,000 with the Town in association with the Project pursuant to a separate Funding Agreement, but the Town will be solely responsible for all aspects of the Project and the new greenway connection will become a segment of the Town's greenway system; and

WHEREAS, the Town will be solely responsible for the management, operations and maintenance of the Project as of the date of this Agreement;

NOW, THEREFORE, in consideration of the above-stated desires of the Parties and such other mutual promises and covenants as are hereinafter set forth, County and Town do hereby agree as follows:

1. **Recitals Incorporated.** The recitals above are incorporated herein and made part of this Agreement.
2. **Limited Right to Construct & Right of Entry.** The County hereby grants unto the Town, its employees, agents, consultants and cooperating parties, the right and privilege to enter the County Licensed Premises in the area depicted in the attached *Exhibit A* for the purpose of constructing the Apex West Greenway connection to the American Tobacco Trail and making improvements associated therewith to include drainage ditch improvements, signage, landscaping and all other associated appurtenances ("Improvements") as noted on the Plan & Profile Sheet 5 as referenced in *Exhibit A*.

In conducting the above activities, the Town agrees to exercise reasonable care in order to minimize physical damage to the County's Licensed Premises and in a manner which shall not impede use of the American Tobacco Trail. The Town agrees that it will not store materials or construction equipment on the County's Licensed Premises.

3. Town's Responsibilities for Maintenance.

The Town shall be solely responsible for all ongoing and future maintenance required in association with the Project, without request of contribution from the County, including maintenance required for any Town Improvements as depicted on the PLAN & PROFILE SHEET 5 of Exhibit A, which incorporates all aspects of the Apex West Greenway connection to the American Tobacco Trail including the greenway trail, drainage ditch improvements, signage, landscaping and other all associated appurtenances.

Specifically, the Town's maintenance area for the greenway trail is located between station -L- STA. 10+08.00 and -L- PT Sta.10+72.00 and includes the entire fourteen (14) foot width of the trail with shoulders. The drainage ditch improvements are specifically located between -D- STA. 10+00.00 and -D- STA. 12+00.00 and include the installation of rip-rap stone, rigid corrugated pipe, including the greenway trail, drainage ditch improvements, signage, landscaping and other all associated appurtenances.

4. **Term; Extension of Term.**

The term of this Agreement shall be conditioned upon the NCDOT License Agreement and shall coincide with the term of that agreement which automatically renews for five (5) year terms and is subject to renew in 2022. This Agreement will automatically extend upon extension of the County's renewal of the NCDOT License Agreement. In the event NCDOT terminates the NCDOT License Agreement or the County no longer retains a license over the American Tobacco Trail, this Agreement shall automatically terminate.

5. **Enhancements, Modifications, or Renovation.**

The Town may make any enhancements, modifications, or renovations on the County License Premises in the area described in Section 2 as further depicted in *Exhibit A* of this Agreement.

The County may make any enhancements, modifications, or renovations, to the American Tobacco Trail adjacent to the Project without permission from the Town.

Notwithstanding the above, the Parties agree to coordinate any enhancements, modifications, or renovations as to not impede the use of the American Tobacco Trail or the Apex West Greenway.

6. **Ownership of Improvements.**

All Improvements made as a part of the Project shall be the property of the Town. In the event of termination of this Agreement, the Town shall have a right to remove any Improvements located on the County's Licensed Premises at their own expense, subject to a right of entry and permission from the County and NCDOT.

7. **Administration & Use.**

The Parties agree that administration and use of the Project shall be in accordance with the following conditions and provisions:

A. *Administrative Control.*

The Town shall have administrative control of the Project at all times and the County shall have administrative control of the American Tobacco Trail at all times, with the goal of providing access from one to another.

B. *Maintenance Access.*

The Town shall use access points from the Town's Apex West Greenway and the Town's greenway system. The County may grant access from the American Tobacco Trail upon the Town's request, provided the request is made in writing and does not unreasonably interfere with use of the American Tobacco Trail.

C. *Programming.*

The Town shall have programming control associated with the Project. The Town hereby covenants that it shall not program the Project in such a way as to impact the structure or use of the American Tobacco Trail.

D. Closing of Project.

The Town at its sole discretion may choose to close the Project for any reason it deems necessary, including but not limited to, inclement weather and/or safety. In the event of closure by the Town, the Town shall be solely responsible for the erection of signage and notice of closure to the public and securing and necessary repairs in a timely manner to the Improvements.

8. Routine/Preventive Maintenance, and Major Repair or Life-Cycle Replacement.

The Town is responsible, at its sole expense, for routine/preventive maintenance, and major repair or life-cycle replacement of the Project. In the event the Town abandons the Project or fails to undertake any necessary maintenance, the County may terminate this Agreement and remove any Improvements at the expense of the Town located on the County's Licensed Premises in accordance with the termination and notice provisions set forth in Section 10 below.

9. Insurance and Financial Responsibility.

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, in association with the Project and related Improvements. It is the intent of this section to require the Town to indemnify Wake County for any loss, liability, claims or expense associated with Improvements made on or across the County's Licensed Premises, to the extent permitted under North Carolina law. 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 of sovereign or governmental immunity from any cause of action alleged or brought against Wake County for any reason if otherwise available as a matter of law.

10. Rights to Terminate.

The Parties hereby agree to the following rights to terminate this Agreement either in part or in its entirety and the conditions that arise as a result of such termination:

A. Project Needed for Sole Use

The County reserves the right to terminate this Agreement as it pertains to the Project if directed to do so by NCDOT or the US Army Corps of Engineers for the United States of America. This termination would only be invoked if the American Tobacco Trail ceases to function as a recreation trail and/or the County's license over the American Tobacco Trail is terminated.

B. Town Termination. The Town shall have the right to terminate this Agreement with twelve (12) months prior written notice to the County. Should the Town exercise its right to terminate this Agreement as it pertains the Project, then Town must identify the agency assuming responsibility and facilitate the exchange in responsibility between this new agency and the County. If the Town cannot identify a suitable agency, the County may elect to assume maintenance responsibility for the Project. If the Town terminates this

Agreement and no other agency is identified to assume responsibility and/or the County declines to assume responsibility, the Town at its sole cost, shall remove the Project and return the area to its pre-Project condition.

C. County Termination

County shall have the right to terminate this Agreement with twelve (12) months prior written notice to the Town subject to Section 8 above.

11. Notices.

All notices, requests, approvals, or consents required to be given hereunder shall be in writing and hand delivered or sent by certified mail, return receipt requested, postage prepaid, and addressed as follows:

Wake County Parks Recreation & Open Space
Attn: Parks, Recreation & Open Space Director
P.O. Box 550
Raleigh, NC 27602

Apex Parks Recreation & Cultural Resources
Attn: Parks, Recreation & Cultural Resources Director
53 Hunter Street
Apex, NC 27502

or to such other address as either Party may specify in the manner hereinabove prescribed.

12. Severability.

In the event any term or provision of this Agreement shall be adjudged to be partially or completely invalid or unenforceable, then such term or provision shall be severed from this Agreement, and the remainder of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

13. Non-Assignment.

Town may not assign this Agreement except as contemplated in Section 10B. above.

14. Entire Agreement.

The Parties agree that this document and the Exhibits attached constitute the entire agreement between the parties and may only be modified by a written mutual agreement signed by both Parties, unless otherwise specified herein.

WAKE COUNTY:

By: _____
David Ellis, County Manager

Attest: _____

By: _____
Frank Cope, Community Services Director

TOWN OF APEX:

By: _____
Catherine Crosby, Town Manager

Attest: _____

Exhibit A:

CONSTRUCTION PLANS FOR THE APEX WEST GREENWAY – OLIVE CHAPEL ROAD TO
AMERICAN TOBACCO TRAIL, dated March 4, 2020