

**STATE OF NORTH CAROLINA
COUNTY OF WAKE**

**ENCROACHMENT AGREEMENT
TOWN RIGHT OF WAY**

THIS ENCROACHMENT AGREEMENT, being made this ____ day of _____, 2019, by and between Townes at North Salem Homeowners Association, Inc., hereinafter referred to as "Grantee," and the Town of Apex, hereinafter referred to as the "Town."

WHEREAS, Grantee desires to encroach on a certain street right(s) of way (hereinafter collectively "ROW") under the Town's jurisdiction in the subdivision know as Townes at North Salem subdivision, as shown on those certain plats recorded in Book of Maps 2018, Pages 1564-1566 and Book of Maps 2019, Pages 996-1000, Wake County Registry (hereinafter the "Subdivision Plats") for the purpose of installing art pieces (hereinafter "Art Displays"); and

WHEREAS, Town and Grantee share a mutual interest and goal of maintaining and increasing the aesthetic appeal of its communities by way of art projects displayed on public and private property; and

WHEREAS, Town and Grantee agree that it is in their mutual best interests that the Art Displays are an integral part of the community and function as a community benefit; and

WHEREAS, Town and Grantee agree that it is in their mutual best interests to place the Art Displays which will provide a convenient and aesthetically pleasing centerpiece, for observation by guests and residents of the subdivision and the community in general; and

WHEREAS, the Town, under the terms and conditions herein set forth, is willing to allow the above described encroachment into the ROW in the locations approved by the Town for the purposes described in this Encroachment Agreement.

NOW, THEREFORE, the parties agree as follows:

1. Permission to Encroach. The Town hereby grants the Grantee permission to encroach at the two (2) roundabout locations at the intersection of Danvers Loop and Amley Place (West Roundabout) and Danvers

Loop and Dalton Ridge Place (East Roundabout), as shown on the attached Exhibit A and Exhibit B, respectively. Encroachments are for the purpose of construction and/or erection, maintenance, and operation of the Art Displays. Applicant understands and agrees that, notwithstanding any language in this Agreement to the contrary, Town grants permission to encroach only to the extent authorized by law and the terms of the conveyance of the right-of-way, fee, easement, or other property interest to Town in the ROW or public streets. Nothing in this Agreement shall constitute or create an assignment to Grantee by the Town of any easement or license held by Town or of any rights under any easement or license held by Town. Nothing herein contained shall be construed to confer on Grantee an exclusive right to encroach on ROW or public streets or confer any rights to any third party.

2. Grantee's Obligations. Grantee, its contractors, employees, agents, successors, and assigns shall:

(a) Take all necessary steps, including but not limited to, contacting North Carolina 811 at least three days prior to any digging or excavation to ensure that any activity or operation by Grantee will not interfere with, damage, disrupt, or interrupt any utility located in the ROW;

(b) In the event Grantee will be placing a portion of the Art Displays in the ROW within three (3) feet of a town water or sewer line or any other town owned utility line, Grantee shall use non-mechanical excavation prior to placement of the structure to ensure that the structure will not damage or interfere with any town owned infrastructure currently in place in the ROW.

(c) Provide proper traffic control devices in conformance with the latest Manual on Uniform Traffic Control Devices for Streets and Highways ("MUTCD"), including but not limited to signs, signal lights, and flagmen for the protection of traffic and amendments or supplements thereto during any installation or maintenance of the Art Displays pursuant to this Agreement; Grantee shall provide at least three (3) business days' notice to Town (as identified in Section 6 of this Agreement) of any work which will require lane closure or traffic control measures lasting more than twenty-four hours; Grantee shall follow all federal, state, and local accessibility regulations, including the MUTCD and the Americans with Disabilities Act;

(d) install, operate, and maintain the Art Displays at Grantee's sole cost and expense and in accordance with Town's UDO and the Town Standard Specifications and Standard Details. Construction, installation, operation, and maintenance of Art Displays shall not endanger, inhibit, prevent, or interfere (i) with use of a ROW as a way of passage, (ii) with traffic on any ROW, (iii) with the maintenance of any ROW, (iv) with operation or maintenance of any Town-owned infrastructure located within or adjacent to the ROW, including but not limited to underground fiber and water or sewer lines, or (v) with operation or maintenance of any other infrastructure or equipment lawfully located within the ROW;

(e) promptly repair any damage to the ROW, all Town-owned infrastructure, and all other areas disturbed during installation, operation, and maintenance of the Art Displays, including but not limited to pavement, sidewalk, curb and gutter, drainage systems, signs, pavement markings, underground fiber, utility poles, electric lines, and water or sewer lines, and shall restore same to the condition existing prior to Grantee's disturbance, re-establishing grass cover with seeding and spreading of straw for finishing, all to the Town's satisfaction which shall be based on the industry standards for such activity;

(f) comply with all Town ordinances, rules, and regulations regarding stormwater discharge and soil erosion and sedimentation control as well as the Town's Standard Specifications and Standard Details for roadway and utility construction;

(g) give written notice to the Town representative identified in Section 6 of this Agreement prior to any work being initiated on or in a ROW pursuant to this Agreement and provide notice to Town when such work is completed;

(h) reimburse Town for any reasonable costs or expenses of Town for any repairs or maintenance to the ROW, any Town-owned infrastructure, or other Town-owned structures resulting from or related to the installation, operation, maintenance or existence of the Art Displays following receipt of invoices from the Town detailing those costs and/or expenses, including supporting documentation evidencing them, if requested and available;

(i) in the event that Town, its employees, agents, or contractors, in Town's sole discretion, need to conduct work in the ROW that will conflict with the Art Displays, Grantee shall within a commercially reasonable time, remove or alter the Art Displays at its cost, unless applicable law provides otherwise; provided however, that if in connection with a specific Town project the Town compensates any similarly situated person for relocating or moving its Art Displays, Town will, at Grantee's request, compensate Grantee for relocation or moving its Art Displays in connection with the same Town project using Town's standard processes and practices applicable to all third parties;

(j) understand and agree that damage or destruction may occur to Art Displays and other property of Grantee in the course of Town's operations and that Town has no obligation to protect Grantee, Grantee's property, or Art Displays or to minimize, mitigate, or avoid any such damage; and release, waive, and discharge any legal rights or claims to seek payment or relief of any kind from the Town, its elected officials, commissions, and employees, for any damages resulting from Town's operations, maintenance, or other use of the ROW;

(k) understand and agree that permission granted through this Agreement is non-exclusive, that additional encroachments by others may currently exist and be permitted in the future in the ROW ("Third Party Encroachments"), and that Town is not liable for any damage to Art Displays that arise from the installation,

operation, maintenance, or existence of Third Party Encroachments; and that any recourse for such damage must be from the Third Party Encroacher;

(l) release, waive, and discharge any legal rights to seek payment or relief of any kind from the Town, its elected officials, commissions, and employees, for any damages due to or resulting from Third Party Encroachments;

(m) hold the Town, its officers, council members and employees harmless from any and all liability arising out of the construction, installation, maintenance or existence of the Art Displays and associated restoration activities in the ROW; 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 arising out of the installation, maintenance, operation, removal, or location of said Encroachment;

(n) comply with all applicable Federal, State, and local laws and regulations. Grantee, and all subcontractors, shall comply with Article 2, Chapter 64, of the North Carolina General Statutes;

(o) Grantee, during the life of this Agreement, agrees to procure or cause to be procured from a responsible insurance carrier or carriers authorized under the laws of the State of North Carolina, insurance in the minimum amounts of \$300,000/\$500,000/\$300,000 covering full liability for any and all personal injury, property damage or wrongful death caused by the construction, installation, maintenance, location, repair or visual obstruction of Art Displays. Additionally, Grantee shall maintain and show proof of workers' compensation within the NC statutory limits and employer's liability insurance in the minimum amount of \$1,000,000. Grantee shall provide notice of cancellation, non-renewal or material change in coverage to the Town of Apex within 10 days of their receipt of notice from the insurance company. All required certificates of insurance, endorsements, and blanket additional insured policy provisions are attached and considered part of this document. Notwithstanding the foregoing, neither the requirement of Grantee 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; and

(p) Grantee shall comply with the UDO, all Town ordinances, and the Town's Standard Specifications and Standard Details for roadway and utility construction.

3. Selection of Public Art. Grantee shall be responsible for determining the art pieces that will be displayed at the locations described in this Agreement. However, Grantee acknowledges and agrees that the Town will be consulted prior to the actual installation of any Art Displays and no Art Displays will be installed without the prior written consent of the Town. That consent shall not be unreasonably withheld and shall be for

the purpose of confirming appropriateness of sight distances. The Town and Grantee hereby acknowledge and agree that the Art Displays at the locations described in this Agreement are subject to change, the selection of which shall be performed in accordance with this Section.

4. Effective Date and Term. This Agreement shall become effective upon being executed by the Town and Grantee and shall remain in full force and effect until such time as either party terminates this agreement as provided in Section 5 hereof or the term expires. The term of this Agreement is twenty (20) years. At the end of the Term, the Agreement shall automatically renew for successive twenty-year terms unless terminated by either party in accordance with this Agreement or unless superseded by a new or amended agreement.

5. Termination. Either party may terminate this Agreement for convenience upon thirty days written notice to the other party. At the time this Agreement is terminated, Grantee shall remove the Art Displays and all of the Grantee's equipment at the locations described in this Agreement.

6. Notice. Notices under this Agreement shall be sent to the following respective addresses:

Grantee: Townes at North Salem Homeowners Association, Inc.

Attention: Matthew Leffer

Address 11010 Raven Ridge Road
Raleigh, NC 27614

Town: Town of Apex

Attention: Assistant Town Manager – Public Works Administration Building
PO Box 250, Apex, NC 27502

7. Recitals. The Recitals are incorporated herein.

8. Governing Law. This Agreement shall be governed by the laws of the State of North Carolina and the parties agree that the proper venue for all suits or actions related to Agreement shall be in Wake County, North Carolina.

9. Recording. Town and Grantee hereby acknowledge and agree that this Agreement shall be recorded with the Wake County Register of Deeds for the purpose of placing future purchasers on notice. Grantee, upon the written request of Town, will provide a written statement to prospective purchasers or lenders confirming the status of this Agreement and whether any defaults exist hereunder. Upon termination of this Agreement by Town pursuant to Section 5, Town and Grantee agree that a notice of termination of this Agreement executed by Town and recorded in the Wake County Register of Deeds shall be effective notice of termination of this Agreement to all third parties.

10. Miscellaneous.

(a) Neither party waives any rights it may have under applicable law with respect to the subject matter in this Agreement and no breach or non-performance 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.

(b) There are no third party beneficiaries to this Agreement.

(c) The individual signing this Agreement warrants that he/she has the authority to do so and binds the Grantee to the obligations set forth herein.

(d) Applicant acknowledges that records in the custody of Town are public records and subject to public records requests. Town may release copies and permit examination of such records in accordance with North Carolina law without being in breach of this Agreement or otherwise liable to Grantee.

(e) Nothing contained in this Agreement shall be deemed or construed so as to restrict or inhibit the Town's police powers or regulatory authority.

(f) No elected official, agent, or employee of Town shall be subject to any personal liability by reason of the execution of this Agreement. Such officers, agents, or employees shall be deemed to execute this Agreement in their official capacities only, and not in their individual capacities.

(g) 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.

(h) This Agreement represents the entire agreement between the Parties and supersedes all prior negotiations, representations, or agreements, either written or oral, and may only be amended only by written amendment in a writing signed by the both parties.

(i) In the event of conflict between the requirements of this Encroachment Agreement, the Town's UDO or ordinances, the more restrictive requirement shall apply.

(j) The Encroachment shall not be enlarged or increased beyond that shown in the document attached to this Agreement as Exhibit A and Exhibit B.

(k) Grantee binds itself, its successors, permitted assigns and legal representatives to the terms of this Agreement. Grantee shall be released from its obligation under this Agreement only upon the assumption of said obligations either by a successor in title to real property upon which the Art Displays sit, or by assumption of said obligations by an incorporated property or condominium owners

association for Townes at North Salem subdivision. The Town's consent to such assumption and release shall be required but shall not be withheld, conditioned or delayed if, as reasonably determined by the Town, the party assuming Grantee's obligations possesses adequate financial resources and ownership interest, and Grantee's delegate and proposed assignee assume and agree to fulfill, in writing, all of Grantee's duties set forth in this Agreement. In the event Grantee retains subcontractors to perform any activities covered by this Agreement, Grantee shall be and remain responsible for all activities and all required insurance. All entities performing the work must be North Carolina licensed and bonded contractors.

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

IN WITNESS WHEREOF, each of the parties to this Agreement has caused the same to be executed in the day and year first above written.

GRANTEE

By: William Sutphin
(signature)

Name: William Sutphin

Title: President

STATE OF NC

COUNTY OF Wake

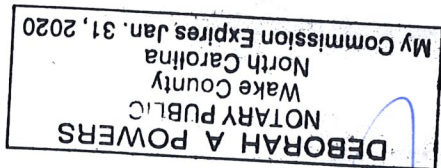
I, Deborah A Powers, a Notary Public of the County and State aforesaid, do hereby certify that William Sutphin personally appeared before me this day and acknowledged that he/she is President of **Townes at North Salem Homeowners Association, Inc.**, and that, by authority duly given and as the act of the corporation, the foregoing instrument was signed in its name by him/her as its President.

Witness my hand and official seal, this the 13th day of November, 2019.

Deborah A Powers

[OFFICIAL SEAL]

Notary Public



Deborah A Powers

Printed name of Notary Public

My Commission expires: January 31, 2020

TOWN OF APEX

(Corporate Seal)

Andrew L. Havens
Town Manager

ATTEST:

Donna B. Hosch, CMC, NCCMC
Town Clerk

STATE OF NORTH CAROLINA
COUNTY OF WAKE

I, _____, a Notary Public of _____ County, North Carolina, certify that Donna B. Hosch personally came before me this day and acknowledged that she is 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 her as its Town Clerk.

Witness my hand and official stamp or seal, this ____ day of _____, 2019.

[Signature of Notary Public]

(Seal)

My Commission Expires: _____