

Excise Tax: N/A

Prepared by and return to:
Parker Poe Adams & Bernstein, LLP
301 Fayetteville Street
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Raleigh, NC 27601

STATE OF NORTH CAROLINA

DEVELOPMENT AGREEMENT

COUNTY OF WAKE

This Development Agreement (hereinafter the “Agreement”) is made and entered into as of the ____ day of _____ by and among **East Garner Holdings, LLC**, a North Carolina limited liability company (“Holdings”), and the **Town of Garner, North Carolina** (“Town”), a municipal corporation of the State of North Carolina (each, a “Party” and together, the “Parties”).

ARTICLE 1. LEGAL FRAMEWORK

1.1 North Carolina General Statutes (hereinafter “G.S.”) G.S. 160D-1001(b) and 160D-1003 expressly authorize local governments and agencies to enter into development agreements with developers pursuant to the procedures and requirements of G.S. 160D-1001 through 160D-1012, which procedures and requirements include approval of the development agreement by the governing body of the local government after a duly noticed public hearing.

ARTICLE 2. DEFINITIONS

In the construction of this Agreement and its incorporated Exhibits, the following capitalized terms shall have the respective meanings set forth below wherever they appear in this Agreement. Except as otherwise provided in this Agreement, terms used in the relevant portions of the North Carolina General Statutes and the Town of Garner Unified Development Ordinance (“UDO”) shall have the same meanings as employed in those statutes and ordinances.

2.1 *Developer.* The term “Developer” shall mean Holdings and any successor in title who acquires a Parcel in fee simple from the Developer and to whom the Developer, with respect to that Parcel, expressly assigns all of its then existing rights and obligations as Developer under this Agreement to the Person acquiring the Parcel from the Developer, which assignment shall be recorded in the Wake County Registry (the “Registry”). Any other Person who acquires a Parcel in fee simple title from the Developer shall be a “Parcel

- Owner” and not a “Developer.” On the Effective Date of this Agreement, Holdings, is the Developer.
- 2.2 *Development or Develop.* The term “Development” or “Develop” shall mean any of the following on the Property: (1) the construction, erection, alteration, enlargement, renovation, substantial repair, movement to another site, or demolition of any structure; (2) the excavation, grading, filling, clearing, or alteration of land; (3) the subdivision of land as defined in G.S. 160D-802; or (4) the initiation or substantial change in the use of land or the intensity of use of land.
- 2.3 *Effective Date.* The term “Effective Date” shall mean the effective date of this Agreement, which is _____ [to be inserted upon adoption].
- 2.4 *Existing Owner.* As of the Effective Date, Holdings is the Existing Owner pursuant to deed recorded in Deed Book 19048, Page 1191 of the Registry.
- 2.5 *Parcel.* The term “Parcel” shall mean each separate tract of the Property as the same may be constituted from time to time, including a tract as acquired by the Developer, a tract that has been subdivided out of another tract, or a tract that results from the recombination of two or more tracts. Each separate portion of a tract remaining after dedication of road right of way from that tract also constitutes a Parcel for the purposes of this definition.
- 2.6 *Parcel Owner.* The term “Parcel Owner” shall mean each Person, other than the Developer, who owns a fee simple title interest in a Parcel including the Existing Owner.
- 2.7 *Participant or Participants.* The term “Participants” shall mean the Town, the Developer, and the Parcel Owners.
- 2.8 *Person.* The term “Person” shall mean a natural person or persons, a corporation, a limited liability company, a partnership, a joint venture, a trust, or any other legal entity.
- 2.9 *Property.* The term “Property” shall mean the land described in Exhibit A attached hereto. The Property also includes any public street rights-of-way and private streets that may be located within the Property.
- 2.10 *Project.* The term “Project” shall mean the Park at Garner Station development including all future stages of plan approval and phases of construction.
- 2.11 *PUD.* The term “PUD” shall mean the Planned Unit Development Text and attached exhibits for the Park at Garner Station Planned Unit Development, CZ-PD-22-04, approved by the Town Council on _____. [to be inserted upon adoption]
- 2.12 *Representative.* The term “Representative” shall mean a Person designated by the Developer to act for and on behalf of the Developer and Parcel Owners wherever indicated and subject to the terms of this Agreement. As of the Effective Date, the Representative is Robert Shunk. At any time and from time to time the Developer may designate a successor or replacement Representative and shall notify the Town of any change in the Representative.
- 2.13 *Unified Development Ordinance.* Unified Development Ordinance, or “UDO,” shall mean the Town’s 2003 UDO. The PUD application was submitted prior to July 5, 2022, and the

Project is therefore governed by the 2003 Unified Development Ordinance, G.S. 160D Compliance Version. The Project, and all subsequent development approval applications and permits, shall be reviewed for compliance with the 2003 UDO and the Project shall not be required to meet requirements of the Garner Forward Unified Development Ordinance adopted July 5, 2022.

ARTICLE 3. RECITALS

- 3.1 The Existing Owner is the fee simple owner of the Property on the Effective Date.
- 3.2 On _____[*to be inserted upon adoption*], the Town of Garner Town Council (the “Town Council”) approved the Developer’s rezoning request to amend the zoning map of the Town to rezone the Property from Residential-12 (R-12), Residential-40 (R-40), and Multifamily Residential-1 (MF-1) to Planned Unit Development Conditional (“PUD-CZ”) and approved the PUD submitted with Developer’s rezoning request.
- 3.3 The purpose of this Agreement is to facilitate the Development of the Property in a way that best realizes the public benefits to the Parties. The Development of the Property requires a major investment by the Developer and/or Parcel Owners in infrastructure, substantial initial investment in on-site and off-site improvements, and substantial commitment of resources to achieve the benefits of the Development for the Parties. The Developer will be unable to make and realize the benefits from such commitments without the assurances of the Town as provided by this Agreement.
- 3.4 The general benefits to be received by the Town from Development of the Property include, without limitation:
 - a) The provision of recreational facilities as set forth in Section 4.9 of this Agreement;
 - b) Transportation Infrastructure Improvements to be constructed by Developer as set forth in Section 4.8 of this Agreement;
 - c) Protection of natural resources and environmentally sensitive property within the Property, minimization of adverse off-site impacts, and additional recreation opportunities for residents of Garner;
 - d) Provision of an efficient, effective, and practical overall plan for addressing the Development of the Property, including the protection of natural resources, the provision of open space and recreation uses, and commitments with respect to curb and gutter, sidewalks and road improvements;
 - e) Substantial commitments to public infrastructure, including the dedication of easements, and amenities as a result of Development of the Property and the expedited construction of utility infrastructure;
 - f) Implementation of the Garner Forward Comprehensive Plan, including the CLUE update (the “Comprehensive Plan”);
 - g) Implementation of the PUD to create mixed-use project; and
 - h) Increased tax base and resident population.

- 3.5 The general benefits to be received by the Developer and Parcel Owners from Development of the Property include without limitation:
- a) Obtaining sufficient certainty, timeliness, and predictability in the Town's development review and approval process to justify the required substantial initial capital investment for Development projects on the Property that will require multiple years to complete;
 - b) Realization of the opportunity to implement the PUD for a mix of residential and commercial uses consistent with Parties' goals and needs; and
 - c) Coordination with the Town to achieve the public benefits necessary for the Development.
- 3.6 In exchange for providing these benefits to the Town, the Developer, for itself and future Parcel Owners, desires to receive the assurance that Development projects on the Property may proceed in accordance with this Agreement, the UDO, and the current zoning of the Property as it exists on the Effective Date.
- 3.7 The terms and conditions of this Agreement have undergone extensive review by the Town's staff, the Town Attorney, and the Town Council and have been determined to be fair, just and reasonable. After careful review and deliberation, the Town Council has determined and concluded that the Agreement meets the goals and needs of the Parties and complies with all statutory requirements and Town regulations.
- 3.8 The Town, by electing to enter into this Agreement in accordance with statutory procedures and Town regulations, acknowledges that the obligations of the Town shall survive beyond the term or terms of the present Town Council and that such action will serve to bind the Town and future Town Councils to the obligations thereby undertaken. By approving this Agreement, the Town Council has elected to exercise certain governmental powers at the time of entering into this Agreement rather than deferring its actions to some undetermined future date.
- 3.9 Pursuant to G.S. 160D-1005, the Town Council conducted a public hearing on this Agreement on November 21, 2023. The notice of public hearing specified, among other things, the location of the Property subject to this Agreement, the development uses proposed on the Property in accordance with the PUD, and a place where a copy of the proposed Agreement could be obtained.
- 3.10 On _____ [*to be inserted upon adoption*] the Town Council approved this Agreement and authorized the Town's execution of the same. The approval of this Agreement constitutes a legislative act of the Town Council.

ARTICLE 4. TERMS

NOW, THEREFORE, based upon the terms and conditions set forth herein and in consideration of the mutual promises and assurances provided herein, the Parties hereby agree as follows:

- 4.1 Recitals. The Parties agree that the foregoing Recitals in Article 3 are true and correct and are incorporated herein by reference.

- 4.2 Agreement Term. The period of duration of this Agreement (the “Agreement Term”) shall commence upon the Effective Date and it shall expire on the day that is fifteen (15) years after the Effective Date, unless sooner terminated in accordance with the provisions of this Agreement. The Agreement Term has been established by the Parties as a reasonable estimate of the time required to complete most, if not all, of the Development projects on the Property subject to this Agreement and to obtain the public benefits of such Development projects. The Town finds that the Agreement Term is reasonably necessary to assure the Town of the realization of the public benefits from the various Development projects in the Property. Expiration of the Agreement Term shall not terminate mutually agreed to obligations and commitments included within this Agreement that are expressly specified to extend beyond the Agreement Term. The Agreement Term may be extended as provided in Section 4.12.
- 4.3 Land Subject to Agreement. The land subject to this Agreement includes all of the Property.
- 4.4 Vested Rights.
- a) Except as provided in G.S. 160D-1007, G.S. 160D-1010(b), the PUD, and this Agreement, the Town may not apply subsequently adopted Town regulations to the Property during the Agreement Term without the written consent of the Developer. The consent of Parcel Owners shall not be required unless the Parcel owned by the Parcel Owner is directly affected by such subsequently adopted Town regulations, in which case the affected Parcel Owner must also provide written consent under this Section of this Agreement for such subsequently adopted Town regulations to be effective with respect to that Parcel. During the Agreement Term the Developer and Parcel Owners shall have a vested right to Develop their respective portions of the Property in accordance with (i) this Agreement, (ii) the PUD, (iii) the UDO, (iv) Town regulations, and (v) any other applicable laws (except to the extent modified by the PUD), all of the foregoing (i) through (v) as defined in this Agreement on the Effective Date. This Agreement does not abrogate any rights that may vest pursuant to statutory or common law or otherwise in the absence of this Agreement. The Parties agree, intend, and understand that the obligations imposed by this Agreement are only such as are consistent with state and federal law. In accordance with G.S. 160D-1007(c), in the event State or federal law is changed after the Effective Date and the change prevents or precludes compliance with one or more provisions of this Agreement, the Town may modify the affected provisions with the consent of the Developer, upon a finding that the change in State or federal law has a fundamental effect on the Agreement, by ordinance and after notice of a hearing, and upon such modification the Town shall record the modification in the Registry. If the Developer does not consent, the Developer may terminate this Agreement (with the Developer and any Parcel Owners retaining any rights with respect to any Parcel obtained prior to termination) and said termination will be recorded in the Registry.
- b) In the event that Town adopts new, different, or amended development regulations that Developer views as more favorable to the Development than the regulations in effect at the time of adoption of this Agreement, Developer may elect to be bound by the new regulations or ordinance (the “After-Adopted Regulation”), subject to approval by the Planning Director. In the event that Developer elects to be bound by the After-Adopted Regulation, Developer will communicate that fact to the

Planning Director in writing and, upon approval by the Planning Director, note such change on any future permit applications affected by the change.

- 4.5 Development Uses. In accordance with G.S. 160D-1006(a)(3) a range of residential and commercial land uses are authorized and provided for in the PUD Permitted Use Table.

Uses will be located generally as depicted in the PUD and more specifically as provided in subsequent site and subdivision plans approved by the Town. Residential building types may include townhomes, condominiums, multifamily apartments, upper story residential, single-family detached dwelling units, residential clusters, and two-unit dwelling units.

- 4.6 Public Facilities. Developer shall be responsible for installation of all of the items below, as shown on the PUD, and according to the Project phasing.

- 1) On-site water lines
- 2) Sewer infrastructure
- 3) Streets, curb and gutter, and roadway improvements
- 4) Electric utility infrastructure
- 5) Sidewalks and greenways

b) Construction of streets, with curb and gutter, on the Property will be provided by the Developer as necessary to serve the applicable Development projects in the Property.

c) Stormwater facilities serving the Property will be private facilities under management by the Developer or a property owners association established for the Property. However, stormwater pipes and drains located in publicly dedicated street rights of way will be public facilities owned and maintained by the Town.

d) Applicable public facilities that are to serve a Parcel will be provided, or payments-in-lieu of such public facilities will be made, prior to the issuance of a certificate of occupancy for the first building on a Parcel, unless otherwise agreed by the Town.

e) The Project will include construction of a sewer outfall interceptor that will connect sewer to the existing 18-inch sewer pipe on PIN 1711992165 and extend sewer to the northern limits of the Yeargan Park Property (the "Offsite Sewer Extension"). Upon request by Developer, the Town shall assist Developer in obtaining a right of entry, or other agreement, from the City of Raleigh to facilitate construction of the Offsite Sewer Extension.

- 4.7 Dedication or Reservation of Land for Public Purposes. Land to be reserved and/or dedicated for public purposes is described in Sections 4.8 of this Agreement. Additional Land to be reserved and/or dedicated for public purposes not directly addressed in this Agreement, is described in the PUD and generally includes rights of way for public roads, sidewalks, and pedestrian paths.

- 4.8 Transportation Improvements.

a) Developer Obligations. Pursuant to the terms of the PUD and the Traffic Impact Analysis prepared by Ramey Kemp Associates dated January 6, 2023, as may be amended (the "TIA"), Developer shall design and construct, or pay fees in lieu of, transportation infrastructure improvements set forth below (collectively, the

“Transportation Improvements”). Updates to the TIA may be required during review and approval of the Project. TIA updates for each phase may be memorialized through technical memos and/or phasing studies submitted by the Developer and reviewed by Town staff. TIA Updates shall be approved administratively and shall not require approval of the Planning Commission or Town Council. In the event the TIA is updated following execution of this Agreement, the Transportation Improvements outlined in this Section 4.8 shall be automatically adjusted consistent with the TIA updates and shall not require an amendment to this Agreement.

- 1) Developer shall construct a major collector street from East Garner Road to Creech Road across the Town owned Garner Recreational Park (PIN 1711738251) property (the “Garner Rec Park Property”) as more particularly shown on the PUD Vehicular and Pedestrian Circulation plan (the “Major Collector”). Because Garner Recreational Park received funding through federal Land and Water Conservation Fund grants, construction of the Major Collector requires approval of a Conversion of Use Request by the National Park Service (the “National Park Service Approval”). Such applications are facilitated by the North Carolina Department of Natural & Cultural Resources - Division of Parks & Recreation (“NCDPR”). Developer shall pay for any land appraisals, surveys, environmental studies, stream and wetland delineations, or other documentation required by NCDPR for the National Park Service Approval including a stream and wetlands delineation on the Garner Rec Park Property. The parties understand that approval of a Conversion of Use Request is not guaranteed.
- 2) Developer shall construct improvements at the intersection of New Rand Road and East Garner Road as more particularly set forth in the TIA, including a westbound left turn lane, eastbound right turn lane, and installation of traffic signalization including pedestrian crossing signals following NCDOT and North Carolina Railroad authorization or approval, as applicable.
- 3) Developer shall construct a new driveway connection from the existing tennis court parking lot on the Garner Rec Park Property to the Major Collector (the “Town Driveway”).
- 4) Developer shall construct a local street on the Property with its eastern right-of-way adjacent to the common lot line with the Town owned Yeargan Park property (PINs 1721033394, 1721021090, and 1721027050) (the “Yeargan Park Property”) to allow future cross access connections between the Property and the Yeargan Park Property as more particularly shown on the PUD Vehicular and Pedestrian Circulation Plan (the “Local Street”). The location of the connection shall be subject to Town approval with respect to avoiding or minimizing impacts to the existing Yeargan house and pecan grove. In addition, should Developer’s Project need a fire apparatus access road which crosses the Yeargan Park Property, Developer shall be responsible for all costs associated with the access road or connection, including but not limited to stormwater, street lighting, and security gating.

- 5) Developer shall complete road widening along East Garner Road from the Property's entrance drive to the intersection of East Garner Road and New Rand Road together with any other improvements to East Garner Road required by the TIA (collectively, the "East Garner Road Improvements"). Developer shall extend a Multi-use Path from the development's East Garner Road frontage to the existing sidewalk at the New Rand Road / East Garner Road intersection. Developer shall be responsible for the costs of construction of the East Garner Road Improvements.
 - 6) Prior to the issuance of the 1st building permit, Developer shall pay a fee-in-Lieu for Eastbound Right Turn Lane improvements at the intersection of East Garner Road and Jones Sausage Road (the "Jones Sausage FIL") required by the TIA. The amount of the Jones Sausage FIL shall be determined at the Subdivision phase based on the estimated cost of the TIA required improvement. The timing of the construction of this improvement shall not delay the issuance of any Building Permits.
 - 7) Developer shall be responsible for acquiring any off-site public rights-of-way, permanent drainage or utility easements, and Temporary Construction Easements needed for construction of the Transportation Improvements (the "Public ROW").
 - 8) Developer shall maintain, and enter subsequent agreements to maintain, landscaping in all public rights of way within the Development.
- b) Town Obligations. To facilitate the design and construction of the Transportation Improvements by Developer, Town, upon written request from Developer, shall:
- 1) Convey to Developer and its consultants access easements or rights of entry over and across the Garner Rec Park Property and Yeargan Park Property for surveying, environmental delineations, and any other tests or studies required for design and construction of the Transportation Improvements.
 - 2) Convey to Developer temporary construction easements over portions of the Garner Rec Park Property and Yeargan Park Property necessary to construct the Major Collector and the Town Driveway (the "Major Collector TCEs"). The Major Collector TCEs shall have a minimum term of six months and shall be recorded prior to the start of construction, subject to approval by the National Park Service. Developer shall provide the Town 60 days' written notice prior to any construction on the Garner Rec Park Property or the Yeargan Park Property. Final location, size, and term of the Major Collector TCEs shall be determined at the Preliminary Subdivision stage.
 - 3) Convey to Developer a temporary construction easement over portions of the Yeargan Park Property necessary to construct the Local Street (the "Local Street TCE"). The Local Street TCE shall have a minimum term of six months. Developer shall provide the Town 60 days' written notice prior to any construction on the Yeargan Park Property. Final location, size, and term of the local Street TCE shall be determined at the Preliminary Subdivision stage.

- 4) Dedicate by plat right of way over portions of the Garner Rec Park Property necessary for construction of the Major Collector. ROW dedication shall be reflected on Subdivision plat and subsequent Final Plat for recordation.
- 5) Dedicate to Developer right of way over portions of Yeargan Park necessary to construct East Garner Road Improvements unless already dedicated by the Town of Garner for its Park project. ROW dedication shall be reflected on Subdivision plat and subsequent Final Plat for recordation and shall be subject to Town approval with respect to avoiding or minimizing impacts to the existing Yeargan house and pecan grove.
- 6) In the event Developer is unable to acquire the Public ROW and/or Temporary Construction Easements for market value, the Town shall institute condemnation proceedings to acquire the Public ROW and Temporary Construction Easements. Following completion of the condemnation proceedings, Developer shall reimburse the Town for the costs to acquire the Public ROW.

4.9 Parks and Recreation.

- a) Developer Obligations. As part of the Project, Developer agrees to make certain parks and recreation commitments above those required by the UDO (the "Parks and Rec Improvements"), subject to the following terms and conditions:
 - 1) Developer shall construct a public multi-use path, which complies with the Town's Engineering Manual and Standard Details, across the Property to create a continuous pedestrian connection from the Garner Rec Park Property to the Yeargan Park Property in the approximate location shown on the PUD Vehicular and Pedestrian Circulation Plan (the "Multi-Use Path").
 - 2) Developer shall be responsible for all costs related to the National Parks Service Approval including, but not limited to, applicable filing fees, environmental assessments, costs of surveys, appraisals, site plans, and plats for impacted land, recording fees for subdivision or recombination plats, deeds, and conservation easements required by the National Park Service or UDO.
 - 3) Developer shall extend a public sanitary sewer easement and sewer line meeting City of Raleigh Public Utility Standards to the northern property line of Yeargan Park as shown in the PUD.
- b) Town Obligations. To facilitate the design and construction of the Parks and Rec Improvements by Developer, Town shall:
 - 1) Within 45 days of approval of the PUD, provided the Town has received the required surveys and studies from Developer, apply to NCDPR, and any other applicable governmental agencies, for the National Park Service Approval.

- 4.10 Local Development Permits. In accordance with G.S. 160D-1001(d), the development authorized by this Agreement shall comply with all applicable laws, including all ordinances, resolutions, regulations, permits, policies, and laws affecting the development

of the Property, including laws governing permitted uses of the Property, density, intensity, design, and improvements.

- 4.11 Subsequent Approvals Required. The Project may require subsequent quasi-judicial and/or administrative approvals or modifications including, but not limited to, Special Use Permits, Variances, Design Alternates, and administrative modifications (the "Subsequent Approvals"). The Subsequent Approvals, and any associated conditions or terms, shall automatically amend this Agreement and shall not require a formal Amendment as set forth in Section 4.12.
- 4.12 Amendment; Modification; Termination; or Extension of the Agreement Term. This Agreement may be amended, modified, or terminated, or the Agreement Term extended, by the mutual consent of the Parties. Amendment, modification, or termination of this Agreement, or extension of the Agreement Term, shall not require the consent of any Parcel Owner. Either Party may propose a modification to this Agreement. Within fifteen (15) days after receipt of a proposed modification of this Agreement, the Town Planning Director shall determine whether it is a major modification or a minor modification and shall notify the Developer of that determination. The Town Planning Director shall consider the following criteria in making the determination as to whether a proposed modification is a major modification or a minor modification to this Agreement:
- a) A proposed increase or decrease in the acreage of the Property subject to this Agreement of no more than five (5) percent shall be considered a minor modification. A cumulative increase of fifteen (15) percent or more in the acreage of the Property subject to this Agreement shall be considered a major modification.
 - b) A change in the Agreement Term is a major modification.
 - c) The addition of uses not shown on the PUD, the increase or reduction of more than 10% in the number of each type of residential use shown on the PUD is a major modification.
 - d) The Developer assisting the Town with additional transportation improvements.
 - e) It shall be in the discretion of the Planning Director as to whether any other proposed modifications to this Agreement shall be considered a major or minor modification. Examples of minor modifications include, but are not limited to, changes in the location of individual buildings or the layout of streets. This decision may not be appealed to the Garner Board of Adjustment.

A major modification of this Agreement shall follow the same procedures as required by North Carolina law for the adoption of a development agreement, including but not limited to a public hearing, and shall follow any applicable provisions of the UDO. The Developer shall file an application for approval of a major modification on the applicable Town form, if any. A minor modification may be approved by the Town Planning Director without following the same procedures as required by North Carolina law for the adoption of a proposed development agreement. Approval or disapproval of a minor modification by the Town Planning Director shall be memorialized by letter from the Town Planning Director to the Developer and shall include written findings by the Town Planning Director that the proposed minor modification would be consistent with the purposes and goals of this Agreement, would comply with the UDO, and would not adversely affect the public health, safety, or general welfare. The Town may modify or suspend the provisions of this Agreement if the Town determines that the failure to do so would place the residents of

the Property subject to this Agreement, or residents of the Town, or both, in a condition dangerous to their health or safety, or both. A copy of each minor modification approved by the Town Planning Director shall be maintained on file by the Town Clerk.

4.13 Recordation/Binding Effect. Within fourteen (14) days after the Town executes this Agreement, the Developer shall record this Agreement in the Registry. Within fourteen (14) days after the Town provides the Developer with a document in a form acceptable for recording in the Registry evidencing approval of a major modification of this Agreement, the Developer shall record such document in the Registry. The burdens of this Agreement shall be binding upon, and the benefits of this Agreement shall inure to, the Town and its successors in interest, to the Developer and its assignees to whom such burdens and/or benefits are assigned in accordance with this Agreement, and, to the extent provided in this Agreement, to the Parcel Owners and their successors and assigns, including successors in title. All of the provisions of this Agreement shall be enforceable during the Agreement Term as equitable servitudes and constitute covenants running with the land pursuant to applicable law.

4.14 Periodic Compliance Review and Enforcement.

a) Periodic Review. Pursuant to G.S. 160D-1008, the Town Manager shall have the right, but not the obligation to conduct periodic compliance reviews at which time the Developer, or the Representative on behalf of the Developer, shall be required to demonstrate good faith compliance with the terms of this Agreement. The Town Manager shall promptly report the results of this review to the Developer and Town Council.

b) Material Breach. If the Town Council finds and determines that the Developer has committed a material breach of the Agreement, the Town shall serve notice in writing to the Developer (the "Notice"), setting forth with reasonable particularity the nature of the material breach and the evidence supporting the finding and determination. A material breach by a Parcel Owner shall not be deemed or considered a material breach by the Developer.

c) Right to Cure. After such notice of material breach has been served, the Developer shall have a reasonable time in which to cure the material breach (the "Cure"), but in no event shall the Developer have less than thirty (30) days after issuance of the Notice for the Cure. Notwithstanding the foregoing, the Developer shall be afforded an additional reasonable period of time to cure the material breach if cure is commenced within the applicable time period and thereafter diligently pursued but cannot be completed within said time period.

d) Termination or Modification by the Town. If the Developer fails to timely cure its material breach of this Agreement, then the Town Council may elect to terminate or modify this Agreement. If the material breach issue cannot be resolved through mediation, the Town may elect to terminate or modify this Agreement by giving the Developer notice of its election to terminate or modify this Agreement. The notice shall contain the effective date of the termination or proposed modification, which shall not be less than thirty (30) days immediately following Developer's receipt of the notice. If the election is to modify this Agreement, the notice shall describe the proposed modifications. Within thirty (30) days of receiving notice of the proposed modification, Developer may elect to terminate the Agreement.

- 4.15 Mediation. In the event any Party believes another Party is in default under this Agreement, the applicable Parties shall make a good faith effort to negotiate and informally resolve the issues in dispute prior to terminating or modifying this Agreement. In the event of an impasse between the Parties in reaching any mutual agreement under this Agreement, the Parties shall make good faith efforts to negotiate and informally resolve the issue in dispute (the "Claim"). If the Parties do not resolve the Claim through negotiation within thirty (30) days of the date of the notice of default, the Parties agree to submit the claim to mediation pursuant to the following process:
- a) The non-defaulting Party (the "Claimant") shall have thirty (30) additional days within which to submit the Claim to mediation under the auspices of any dispute resolution center or other such independent agency or certified mediator upon which the Parties may mutually agree. Any mediation pursuant to this section shall take place in Wake County.
 - b) If Claimant does not submit the claim to mediation within sixty (60) days after notice of default, Claimant shall be deemed to have waived the claim, and the defaulting Party (the "Respondent") shall be released and discharged from any and all liability to Claimant on account of such Claim; provided, nothing herein shall release or discharge Respondent from any liability to Persons other than a Party.
 - c) If the Parties do not settle the Claim within thirty (30) days after submission of the matter to the mediation process, or within such time as determined reasonable or appropriate by the mediator, the mediator shall issue a notice of termination of the mediation proceedings. Such notice shall set forth when and where the Parties met, that the Parties are at an impasse, and the date that mediation was terminated.
 - d) If settlement does not occur and mediation is terminated, the Parties may pursue any and all actions at law and equity permitted under this Agreement subject to any applicable right to notice and cure provided for in this Agreement.
 - e) The costs of the mediation shall be paid in equal shares by the Parties; provided, however, a Party who abandons mediation after having agreed to it may be assessed the entire costs of the mediation.
- 4.16 Development Timing. The Developer and Parcel Owners shall be obligated to develop the Property pursuant to this Agreement. The Development shall be done in such order and sequence as the Developer or Parcel Owner, as applicable, establish through site plan submissions. Phasing of the Development shall be based on sound engineering practices as determined by the Developer's engineers to ensure functional and safe street circulation and utility systems at all times. Phasing shall be based in such a way that all infrastructure improvements to be constructed within the Property will be provided when or before they are necessary for that phase of the Development.
- 4.17 Default. Apart from the Periodic Review process set forth in Section 4.14 of this Agreement, the failure of any Party to comply with the terms of this Agreement shall constitute a default, entitling the non-defaulting Party or Parties to pursue such remedies as allowed under applicable law against the defaulting Party, after following mediation requirements in Section 4.15 of this Agreement, provided, however, that no termination of this Agreement may be declared by a Party prior to the notice and opportunity to cure process set out in Section 4.14 of this Agreement. A Parcel Owner shall not have the right to terminate this Agreement. A Party believing another Party to be in default shall provide

written notice of that default to the other Party within fifteen (15) days of the date that the non-defaulting Party first has knowledge of such default, and shall provide the defaulting Party and the Developer on behalf of the defaulting Party, if a Parcel Owner, an opportunity to cure any default as provided in the manner for providing for cure in Section 4.14 of this Agreement.

- 4.18 Force Majeure. In addition to specific provisions of this Agreement, no Party shall be responsible for any default, delay or failure to perform if such default, delay or failure to perform is due to causes beyond such Party's reasonable control, including, but not limited to, strikes, lockouts, actions or inactions of governmental authorities other than the Town, epidemics, wars, embargoes, fires, hurricanes, adverse weather, acts of God, lawful work stoppages ordered by a governmental entity, interference duly caused by any other Party, or the default of a common carrier. In the event of a default, delay or failure to perform due to causes beyond such Party's reasonable control or due to interference by another Party, any date or times by which the Parties are otherwise scheduled to perform, if any, shall be extended automatically for a period of time equal in duration to the time lost by reason of the cause beyond the reasonable control of such Party. If written notice of such delay is given to the other Party after the commencement of such delay, an extension of time for such cause shall be deemed granted for the period of the enforced delay, or longer as may be mutually agreed to by the Parties.
- 4.19 Disclaimer of Joint Venture, Partnership and Agency. This Agreement shall not be interpreted or construed to create an association, joint venture, or partnership between or among the Parties, or to impose any partnership obligation or liability upon such Parties.
- 4.20 No Third Party Beneficiaries. The Agreement is not intended to and does not confer any right or benefit on any third party that is not a Party.
- 4.21 Legal Actions. In addition to any other rights or remedies, and subject to the mediation requirements in Section 4.15 of this Agreement, and further subject to the notice and right to cure provisions in Section 4.14 of this Agreement, any Party may institute legal action against a defaulting Party or a defaulting Parcel Owner to cure, correct, or remedy any default or breach, to specifically enforce any covenants or agreements set forth in the Agreement or to enjoin any threatened or attempted violation of the Agreement, or to obtain any remedies consistent with the purposes of the Agreement. Legal actions shall be instituted in the Superior Court of the County of Wake, State of North Carolina, and the Parties submit to the personal jurisdiction of such court without application of any conflicts of laws provisions of any jurisdiction.
- 4.22 Notices. Unless specifically provided otherwise by this Agreement, any notice, demand, request, consent, approval or communication which a Party is required to or may give to another Party hereunder shall be in writing and shall be delivered or addressed to other applicable Parties at the address below set forth or to such other address as such Party may from time to time direct by written notice given in the manner herein prescribed. Such notice or communication shall be deemed to have been given or made when communicated by personal delivery or by independent courier service or by facsimile or by email with a hard copy to be delivered by independent courier service by the next business day. Unless a Parcel Owner gives notice of a change of address in the manner required herein for giving notices, notice to a Parcel Owner shall be to the address for the Parcel Owner in the records of the Wake County Tax Administrator.

All notices, demands, requests, consents, approvals or communications to the Town shall be addressed to:

Town Attorney
Terri Jones
900 7th Avenue
Garner, NC 27529
tjones@garnernc.gov

All notices, demands, requests, consents, approvals or communications to the Developer shall be addressed to:

Robert C. Shunk
Director of Entitlements, Gander Development
2310 S. Miami Blvd, Suite 238
Durham, NC 27703
robert@ganderdev.com

w/ a copy to:

Collier Marsh
Parker Poe Adams & Bernstein LLP
301 Fayetteville Street
Suite 1400
Raleigh, NC 27601
colliermarsh@parkerpoe.com

- 4.23 Entire Agreement. This Agreement sets forth and incorporates by reference all of the agreements, conditions and understandings between the Parties relative to this Agreement and the Property. There are no promises, agreements, conditions or understandings, oral or written, expressed or implied, among the Parties relative to the matters addressed herein other than as set forth or as referred to in this Agreement or as contained in the UDO or the PUD as of the Effective Date.
- 4.24 Construction. All Parties agree that, in the interpretation of this Agreement, any amendments to this Agreement, or any Exhibits to this Agreement, there shall be no presumptions, preferences, or resolution of ambiguities in favor of or against any Party with respect to any part of this Agreement drafted by legal counsel of that Party.
- 4.25 Assignment. The Developer, or a Parcel Owner may at any time and from time to time assign such Person's respective rights and responsibilities hereunder, which assignee and subsequent assignees will also retain the right to assign their respective rights and/or responsibilities hereunder or any part of all or any portion of the Property as Developer or Parcel Owner. The Developer shall provide the Town with written notice of any assignment and a written assignment of rights and responsibilities shall be executed by the Developer and the assignee and recorded in the Registry. A deed from a Parcel Owner to a subsequent Parcel Owner shall be deemed to assign the conveying Parcel Owner's rights and obligations under this Agreement to the subsequent Parcel Owner. Any violation of the terms and conditions of this Agreement occurring after such an assignment will be the responsibility of the then current Developer or Parcel Owner in violation.
- 4.26 Governing Law. This Agreement shall be governed by the laws of the State of North Carolina. Any reference in this Agreement to a North Carolina General Statute ("G.S.") shall be deemed to include any successor or replacement statute as to the same matters subject to the statute that has been succeeded or replaced.

- 4.27 Counterparts. This Agreement may be executed in several counterparts, each of which shall be deemed an original and such counterparts shall constitute one and the same instrument.
- 4.28 Agreement to Cooperate. In the event of any legal action instituted by a third party or other governmental entity or official challenging the validity of any provision of this Agreement, the applicable Parties hereby agree to cooperate in defending such action; provided, however, each Party shall retain the right to pursue its own independent legal defense.
- 4.29 Termination. Unless the Agreement Term is extended by the Town and Developer, this Agreement shall terminate on the earlier of the expiration of the Agreement Term specified in Section 4.2 of this Agreement or by agreement of the Parties. In the event consideration is given to termination of this Agreement, the Parties agree that each will identify appropriate representatives to meet and participate in good faith negotiations and mediation as provided in Section 4.15 of this Agreement, aimed at resolving the issues prompting that consideration.
- 4.30 No Deemed Waiver. Except as provided in Section 4.14(b), failure of a Party to exercise any right under this Agreement shall not be deemed a waiver of any such right and shall not affect the right of such Party to exercise at some future time said right or any other right it may have hereunder.
- 4.31 Severability. If any term or provision herein shall be judicially determined to be void or of no effect, such determination shall not affect the validity of the remaining terms and provisions. The Parties agree that if any provision of this Agreement is judicially determined to be invalid because it is inconsistent with a provision of state or federal law, this Agreement shall be amended to the extent necessary to make it consistent with state or federal law and the balance of the Agreement shall remain in full force and effect.
- 4.32 Authority. Each Party and Existing Parcel Owner represents that it has undertaken all actions necessary for approval of this Agreement, and that the person signing this Agreement on behalf of such Party or Existing Parcel Owner has the authority to bind that Party or Existing Parcel Owner.
- 4.33 Estoppel. Each Party agrees, from time to time, within twenty (20) days after request of another Party, to deliver to the requesting Party or such Party's designee, an estoppel certificate stating that this Agreement is in full force and effect, the unexpired term of this Agreement, and whether or not, to such Party's knowledge, there are any existing defaults or matters which, with the passage of time, would become defaults under this Agreement. It is understood and agreed that the Party's obligations to furnish such estoppel certificates in a timely fashion is a material inducement for execution of this Agreement.
- 4.34 Representations and Warranties of the Developer. The Developer represents and warrants to the Town that:
- a) it is an entity duly organized, existing, and in good standing under the laws of the State of North Carolina; and
 - b) it has the full right, power, and authority to enter into this Agreement and to perform its obligations hereunder.

- 4.35 Indemnification. Developer and each Parcel Owner agrees to indemnify, defend, and hold harmless the Town and its authorized agents from liability for injury or death to any Person, or damage to any property, that arises out of or results from the direct or indirect acts or omissions of the indemnifying Developer or Parcel Owner, as applicable, in connection with any one or more of the following: (i) Development by the applicable Developer or Parcel Owner on the Property; and (ii) operation of any portion of the Property owned by the applicable Developer or Parcel Owner.

IN WITNESS WHEREOF, the Parties hereby set their hands and seals, effective the date first above written.

Town of Garner

By: _____
Title: _____

=====
State of North Carolina

County of _____

I, the undersigned, a Notary Public of the County and State aforesaid, do hereby certify that _____ personally came before me this day and acknowledged that he or she is _____ of the Town of Garner and acknowledged, on behalf of the Town of Garner, the due execution of the foregoing instrument. Witness my hand and official stamp or seal, this the _____ day of _____, 20_____.

Notary Public

My Commission Expires:

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

Town of Garner

By: _____
Title: Finance Director

Approved as to form: _____

By: Terri Jones
Title: Town Attorney

March 19, 2024 Meeting Draft

IN WITNESS WHEREOF, the Parties hereby set their hands and seals, effective the date first above written.

DEVELOPER:

EAST GARNER HOLDINGS LLC,
a North Carolina limited liability company

By: _____
Name:
Title

=====

STATE OF _____
_____ COUNTY

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: _____.

Date: _____

_____, Notary Public

[Affix Notary Stamp or Seal]

My Commission Expires: _____

EXHIBIT A

Description of the Property

- 0 E. Garner Road (PIN 1711925082)
- 0 E. Garner Road (PIN 1711923791)
- 0 E. Garner Road (PIN 1711827887)
- 0 E. Garner Road (PIN 1711833114)
- 0 E. Garner Road (PIN 1711833775)
- 0 E. Garner Road (PIN 1711838749)
- 0 E. Garner Road (PIN 1711933576)
- 0 Wilmington Road (PIN 1711944672)