



## COUNTY OF LINCOLN, NORTH CAROLINA

302 NORTH ACADEMY STREET, SUITE A, LINCOLNTON, NORTH CAROLINA 28092

PLANNING AND INSPECTIONS DEPARTMENT  
704-736-8440 OFFICE  
704-732-9010 FAX

To: Alex Patton, Board of Commissioners Chairman  
George Wood, County Manager  
Jeff Frushtick, Planning Board Chairman

From: Randy Hawkins, Zoning Administrator

Date: February 23, 2011

Re: PCUR #110A-3  
Fifth Third Bank, applicant  
Parcel ID# 88709-88731

*The following information is for use by the Lincoln County Board of Commissioners and the Planning Board at their joint meeting/public hearing on March 7, 2011.*

### Request

The applicant is requesting an amendment to the conditional use permit for the Burton Creek development. The proposed amendment calls for the suspension of certain conditions while no development is occurring and for the modification of those conditions effective upon the resumption of development.

The two conditions at issue were set by the Board of Commissioners, with the consent of the then-developer, when changes in the development plans were approved in 2006 (see approval letter in packet):

1) That the developer post a bond or letter of credit in the amount of \$500,000 with the county to cover the cost of removal of sediment determined to have been deposited from this development.

2) That the developer hire an independent firm to measure the depth of the five coves downstream from this development and to monitor the depth monthly and report the results to Lincoln County.

The applicant is asking that the two conditions be suspended while no new development is taking place, or not required; and, if a bond or letter or credit is required, that the amount be reduced to \$140,000.

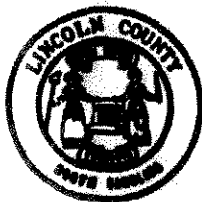
### Site Area & Description

The 250-acre development borders Blades Trail, Burton Lane and Webbs Road. It is zoned P-R CU (Conditional Use Planned Residential) and is approved for 385 single-family homes. No homes have been built so far. This property is adjoined by property zoned R-20 and R-SF. Land uses in this area are predominately residential. The Lincoln County Land Use Plan designates this area as Suburban Residential.

### CONDITIONAL USE PERMIT REQUIREMENTS

Section 9.11 of the Lincoln County Unified Development Ordinance requires that four findings be determined by the Board of Commissioners in deciding whether to approve an amendment to a conditional use permit:

- A. The use will not materially endanger the public health or safety if located where proposed and developed according to plan.
- B. The use meets all required conditions and specifications.
- C. The use will not substantially injure the value of adjoining or abutting property unless the use is a public necessity.
- D. The location and character of the use, if developed according to the plan as submitted and approved, will be in harmony with the area in which it is to be located and will be in general conformity with the approved Land Development Plan for the area in question.



# COUNTY OF LINCOLN, NORTH CAROLINA

302 NORTH ACADEMY STREET, SUITE A, LINCOLNTON, NORTH CAROLINA 28092

BUILDING AND LAND DEVELOPMENT  
(704) 736-8440 OFFICE  
(704) 736-8434 INSPECTION REQUEST  
(704) 732-8010 FAX

September 21, 2006

Greg Duncan  
Burton Creek Investment LLC  
PO Box 748  
Monroe, NC 28111

Dear Mr. Duncan:

This letter is to serve notice that on September 18, 2006, the Lincoln County Board of Commissioners took the following action regarding your request to amend a conditional use district (PCUR #110A) to allow 385 single-family homes and no townhomes and changes in vehicular access and circulation:

*Voted 4-1 to approve the changes as proposed with the following conditions:*

- 1) That the developer shift Seagull Way to exist on Red Robin Trail/Sarah Drive, subject to NCDOT granting a driveway permit for that connection.*
- 2) That the technical memorandum recommended by NCDOT be prepared and that the developer and Board of Commissioners be advised of the responsibility of the developer as set forth in that memorandum.*
- 3) That the developer hire an independent firm to measure the depth of the five coves downstream from this development within 30 days of the approval of this amendment and to monitor the depth monthly and report the results to Lincoln County Building and Land Development until NCDENR gives final approval of the final phase of construction, and that the developer clean up any proven sediment flow from this development as determined by NCDENR or such other authority as the county may choose.*
- 4) That the developer provide crushed stone entries as required by NCDENR and if they have been installed that they be re-installed due to the fact that they are not effective.*
- 5) That in the areas that have been cleared that the grassing operations typically required by NCDENR begin immediately.*
- 6) That the developer post a bond or letter of credit in the amount of \$500,000 with the county to cover the cost of removal of sediment determined to have been deposited from this development under Condition #3 and that the county will withhold building permits if the developer fails to take the necessary correction action.*

If you have any questions concerning this matter, please feel free to contact me at (704) 748-1507.

Sincerely,

Randy Hawkins  
Zoning Administrator



### **Application to Amend Conditional Use Permit**

Lincoln County Planning and Inspections Department  
Zoning Administrator  
302 N. Academy St., Suit A, Lincolnton, NC 28092  
Phone: (704) 736-8440 Fax (704) 732-9010

#### **PART I**

Applicant Name Fifth Third Bank – Attn: Charles Krawitz

Applicant Address 201 North Tryon Street, Sixteenth Floor, Charlotte, NC 28202

Applicant Phone Number (312) 636-3955

Property Owner Name [same]

Property Owner Address \_\_\_\_\_

Property Owner Phone Number \_\_\_\_\_

#### **PART II**

Property Location Burton Creek Development

Tax Parcel ID 88709-88731

Property ID (10 digits) PIN 4604-99-5391 Property size 250 acres

Parcel # (5 digits) 56262 Deed Book(s) 2207 Page(s) 496

#### **PART III**

Zoning District CUP-R

Briefly explain the proposed change in the conditional use permit.

Fifth Third Bank ("the Bank") requests that certain current conditional use permit conditions be activated, if required, only upon the issuance of applicable development permits. The Bank has entered into contracts to stabilize and maintain the property but will not develop the property.

(Please see attached.)

#### **\$750 APPLICATION FEE MUST BE RECEIVED BEFORE PROCESSING.**

*I hereby certify that all knowledge of the information provided for this application and attachments is true and correct to the best of my knowledge.*

Walter W. Pitt, Jr.  
APPLICANT: FIFTH THIRD BANK by Walter W. Pitt, Jr., Esq.

Jan 3, 2011  
Date

**Attachment To**  
**Application to Amend Conditional Use Permit**

The conditional use permit as previously amended does not address the present situation where Burton Creek is held not by a developer but by an involuntary owner holding the property as a result of foreclosure. Fifth Third Bank (“the Bank”) acquired Burton Creek in September 2010 and is actively seeking a responsible buyer—it has no intention of developing Burton Creek. The Bank is working diligently to resolve and will resolve existing erosion issues caused by the developer and will repair and stabilize the property pursuant to applicable regulations and requirements of the North Carolina Department of Environment and Natural Resources (DENR) and the Lincoln County Natural Resources Department. The Bank has entered into contracts (the “Erosion Contracts”—see attached except for dredging contract which has not yet been signed) to undertake the necessary work at an initial cost of approximately \$232,000.

The interests of Lincoln County and the Bank are the same—purchase and development of Burton Creek by a developer who will work with the County to develop the property in accordance with applicable plans and conditions. The Bank is not going to sell or develop individual lots. Once the property is stabilized there will be no site work by the Bank, and no need for a bond or letter of credit from the Bank.

Based on (1) the Bank’s position as a lender, not a developer; and (2) the Bank’s work and commitment to stabilize the property (as witnessed by the Erosion Contracts) and abide by the relevant requirements of DENR and the Lincoln County Natural Resources Department, the Bank requests that the conditional use permit be amended so that if a bond or letter of credit is required it only be required prior to the issuance of further permits for building or road construction at Burton Creek. Burton Creek and neighbors will be protected due to the Bank’s work and the fact that no new development will take place during the Bank’s ownership. The Bank is glad to work with staff on appropriate language to properly implement this amendment.

The Bank notes that a \$500,000 bond or letter of credit for a developer is a significant amount which could deter potential buyers of the property. If it is necessary to require a bond or letter of credit for future developers the Bank would respectfully request that the amount be lowered to \$140,000, the amount estimated by the County in 2009 for a “worst case scenario” of dredging four coves.

The Bank also requests that the requirement to monitor five downstream coves on a monthly basis be stayed and activated, if required, only upon application for applicable further development permits. The Bank’s stabilization work, and the lack of any development work by the Bank, makes this requirement unnecessary under present circumstances.

The Lincoln County UDO requires that four findings be determined by the Board of Commissioners in deciding whether to amend a conditional use permit. They are

- A. *The proposed development will not materially endanger the public health or safety if located where proposed and developed according to plan.*

The Bank's work, as evidenced by the Erosion Contracts, and the stay of any additional development during the Bank's ownership of the property fully protect the public's health and safety. The property will be stabilized and maintained in accordance with applicable DENR and Lincoln County Department of Natural Resources regulations. A lowered bond/letter of credit amount for future developers would cover the dredging of four coves.

*B. The proposed development meets all required conditions and specifications.*

The proposed amendment will meet required conditions and specifications.

*C. The proposed development will not substantially injure the value of adjoining or abutting property unless the use is a public necessity.*

The proposed amendment will not substantially injure the value of adjoining or abutting property. The Bank's work will benefit adjoining or abutting property by stabilizing Burton Creek until an appropriate developer is found.

*D. The location and character of the use, if developed according to the plan as submitted and approved, will be in harmony with the area in which it is to be located and will be in general conformity with an adopted Land Development Plan.*

Stabilization of Burton Creek in compliance with applicable DENR and Lincoln County Department of Natural Resources regulations in preparation for an appropriate developer is in harmony with the area and all applicable plans.

The Bank intends to meet with neighbors to discuss the proposed amendment and listen to their concerns.

The Bank desires to remedy the immediate erosion and sedimentation issues, maintain the property while in its ownership, work cooperatively with the County, and turn the property over to an appropriate developer. The attached contracts are evidence of the Bank's efforts and the lack of a need for a bond or letter of credit from the Bank.

## Attachments

**LINCOLN COUNTY PLANNING BOARD'S**  
**RECOMMENDATION ON FINDINGS OF FACT**  
**FOR AMENDING CONDITIONAL USE PERMIT**

Application # PCUR #110A-3 Date March 7, 2011

Applicant Name Fifth Third Bank

Applicant Address 201 N. Tryon St., Sixteenth Floor, Charlotte, NC 28202

Property Location Webbs Rd., Blades Tr., Burton Ln. Existing Zoning CU P-R

Proposed Amendment suspend/eliminate conditions; reduce bond/letter of credit

**FINDINGS OF FACT**

1. The use will not materially endanger the public health or safety if located where proposed and developed according to plan. YES \_\_\_\_\_ NO \_\_\_\_\_

FACTUAL REASON CITED: \_\_\_\_\_  
\_\_\_\_\_

2. The use meets all required conditions and specifications. YES \_\_\_\_\_ NO \_\_\_\_\_

FACTUAL REASON CITED: \_\_\_\_\_  
\_\_\_\_\_

3. The use will not substantially injure the value of adjoining or abutting property unless the use is a public necessity  
YES \_\_\_\_\_ NO \_\_\_\_\_

FACTUAL REASON CITED: \_\_\_\_\_  
\_\_\_\_\_

4. The location and character of use, if developed according to the plan as submitted and approved, will be in harmony with the area in which it is to be located and will be in general conformity with the Land Use Plan for the area in question.

YES \_\_\_\_\_ NO \_\_\_\_\_

FACTUAL REASON CITED: \_\_\_\_\_  
\_\_\_\_\_

After having held a Public Hearing on \_\_\_\_\_ and in light of the Findings of Facts listed herein, the following action was taken by the Lincoln County Planning Board:

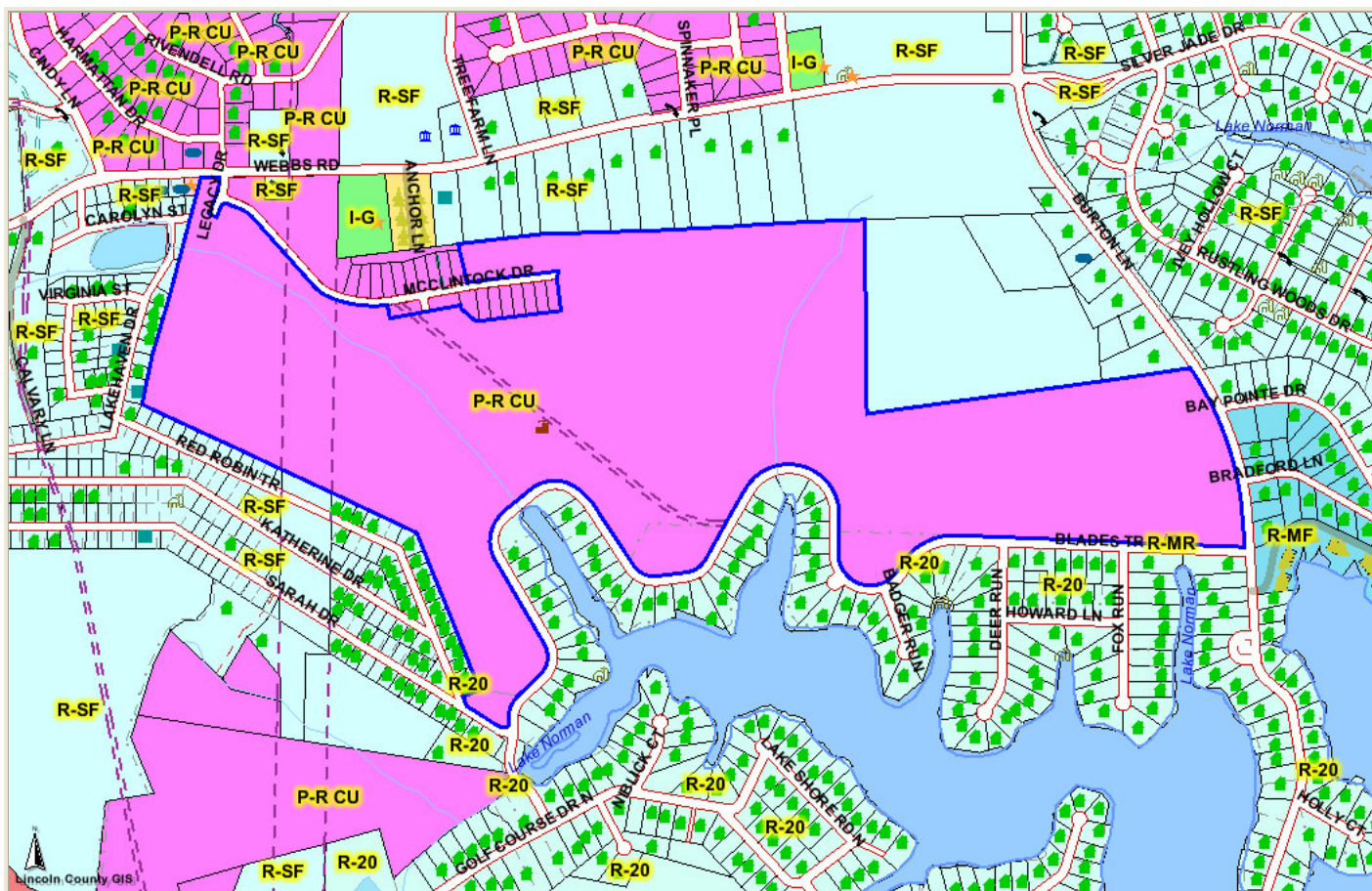
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## Lincoln County, NC

**Office of the Tax Administrator, GIS Mapping Division**  
Lincoln County and its mapping contractors assume no legal responsibility for the information contained on this map. This map is not to be used for land conveyance. The map is based on NC State Plane Coordinate System 1983 NAD.

**Date: 2/10/2011      Scale: 1 Inch = 1200 Feet**



## PHOTOS



Photo Not Available

## PARCEL INFORMATION FOR 4604-99-5391

<b>Parcel ID</b>	<b>88709</b>	<b>Owner</b>	FIFTH THIRD BANK		
<b>Map</b>	<b>4604-08</b>	<b>Mailing</b>	10200 DAVID TAYLOR DR		
<b>Account</b>	0228470	<b>Address</b>	CHARLOTTE NC 28262		
<b>Deed</b>	2207-496	<b>Recorded</b>	9/15/2010	<b>Sale Price</b>	\$6,263,000
<b>Land Value</b>	\$3,349,634	<b>Total Value</b>	\$3,349,634	<b>Previous Parcel</b>	56262
----- All values are for tax year 2010. -----					
<b>Subdivision</b>	Lot BLADES TRAIL/WESTPORT TRACT			<b>Plat</b>	9-5
<b>Description</b>	UNDEV BURTON CREEK PH2M1			<b>Deed Acres</b>	0
<b>Address</b>	MCCLINTOCK DR			<b>Tax Acres</b>	231.52
<b>Township</b>	CATAWBA SPRINGS		<b>Tax/Fire District</b>	DENVER / EL SEWER	
<b>Improvement</b>	No Improvements				
<b>Zoning District</b>	<b>Calculated Acres</b>	<b>Voting Precinct</b>	<b>Calculated Acres</b>		
P-R CU	231.43	WESTPORT (WP32)	231.52		
Unknown	0.09				
<b>Watershed Class</b>		<b>Sewer District</b>			
WS-IVC	230.68	In the sewer District	231.52		
WS-IVP	0.84				
<b>2000 Census County</b>		<b>Tract</b>	<b>Block</b>		
37109		071100	2000	26.36	
37109		071200	1024	164.09	
37109		071200	1046	37.45	
37109		071200	1047	2.89	
37109		071200	1050	0.73	
<b>FloodZone Description</b>				<b>Panel</b>	
AE	SPECIAL FLOOD HAZARD AREA BASE ELEVATION DETERMINED - 100 YEAR			4604	0.1
AE	SPECIAL FLOOD HAZARD AREA BASE ELEVATION DETERMINED - 100 YEAR			4614	0.01



X	NO FLOOD HAZARD	4604	115.24
X	NO FLOOD HAZARD	4605	24.64
X	NO FLOOD HAZARD	4614	80.28
X	NO FLOOD HAZARD	4615	11.24



MECA

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**COLDWELL BANKER COMMERCIAL**

**MECA**

1815 S. Tryon Street, Suite A  
Charlotte, North Carolina 28203  
(BUS) 704.971.3000  
(FAX) 704.348-2477

January 5, 2011

Charles Krawitz  
Fifth Third Bank  
201 N. Tryon Street  
Charlotte, NC 2820277

Re: Burton Creek Consulting Agreement

Dear Charles,

The following is a fee agreement ("Agreement") for construction management and consulting services between Coldwell Banker Commercial MECA ("Management Firm") and Fifth Third Bank ("Client") related to erosion control and compliance issues at the Burton Creek Subdivision in Lincoln County, NC.

Our services will include, among others as needed, the following:

- Onsite management of stabilization work
- Coordinate contractors and engineer
- Negotiate with local and State agencies
- Manage the ongoing required site erosion control maintenance

Our approved fee schedule is as follows:

**Travel Expenses:** \$75.00 per hour + \$0.48 per mile

**Management Fee:** \$150.00 per hour

**Lodging and Meals:** N/A

**Construction work:** Our firm will not be providing actual construction services but instead coordinating and supervising contractor work, negotiating with Lincoln County and dealing with other parties such as adjoining property owners. All construction contracts will be between Fifth Third Bank and the contractor directly.

**Note:** Professional Engineering services are not expected to be required at this time. Should Lincoln County require services of a civil engineer those fees will be incurred by Fifth Third at customary hourly rates. The need for such services will be approved by Fifth Third prior to authorization. The cost of those services, if required, will not exceed \$1200.

**Construction Management Estimate:**

On site management	8 Hours per week – 6 weeks @\$150/Hr
Admin and County Meetings	15 Hours
Trip Charge	2 Hours twice a week @ \$75/Hr
Mileage Fee	84 mi. round trip twice a week @ .48/mile

<b>Estimated Management Total</b>	<b>\$12,258.00</b>
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**Site Inspections-** It should be noted that once in compliance weekly onsite inspections must be performed per State statute. The cost to complete the inspections and prepare the required report will cost \$750.00 per month and are not included in this scope of work.

***Estimated Project Total***

Site Construction (SM Smith)	\$ 87,842.00
Stabilization (ECS)	\$ 98,010.00
Dredging (Seawalls)	\$ 33,650.00
Management (CBC MECA):	<u>\$ 12,258.00</u>

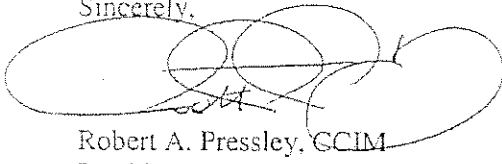
<b>Estimated Project Total</b>	<b>\$231,760.00</b>
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Burton Creek Stabilization Proposal, cont...  
November 15, 2011  
Page 3

Provided these terms are acceptable please sign below where indicated and return this document and the attached contractor agreements to my attention. We will immediately begin mobilization.

In the event you have questions lease call me at (704) 904-4053.

Sincerely,



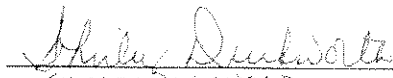
Robert A. Pressley, GCIM  
President

CC: John Brunner

ACCEPTED AND AGREED:

**FIFTH THIRD BANK**

By:

  
SHIRLEY DUCKWORTH

Title:

VICE PRESIDENT

Date:

1-6-2011

EROSION CONTROL SERVICES, INC.

Agreement between Contractor and Owner

Contract amount: \$ 98,010.65

This Agreement is entered into as of January 5, 2011

Between Owner:

Fifth Third Bank  
Attn: Chris C. Cagle, VP  
Asset Disposition Team  
165 Nash Street  
Lawrenceville, GA 30046  
Phone: (678) 906-4721 - Atlanta  
Phone: (704) 808-5135 - Charlotte  
Fax: (770) 995-9601

and Contractor

Erosion Control Services, Inc.  
4006 Vandyke Ct.  
Monroe, NC 28110  
Attn: Grayson Glover  
Phone: (704) 821-4427  
Fax: (704) 821-2628

The Project:

Burton Creek Subdivision  
Denver, NC

Contractor and Owner (collectively, "the Parties") agree as follows:

## ARTICLE 1

### THE CONTRACT DOCUMENTS

1.1 The Contract Documents comprising the agreement between Contractor and Owner (the "Contract Documents") consist of this Agreement, including the attached Exhibits, any modifications or amendments of this Agreement, and the following Exhibits:

Exhibits:       A. Scope of the Work-on site work associated with Site Stabilization  
                  B. Scope of the Work-work associated with the repairs to the Reiser and Franck properties.

1.2 Contractor acknowledges that it has reviewed or had the opportunity to review the Contract Documents, and that is bound by the Contract Documents.

1.3 If inconsistencies or omissions appear in the Contract Documents, Contractor will notify Owner in writing within three (3) working days after Contractor discovers any inconsistency or omission.

## ARTICLE 2

### THE WORK

2.1 Contractor shall use its best care, skill, and diligence in performing the work described in this Agreement (the "Work"). Contractor shall be solely responsible for performing the Work, including the construction methods, techniques, means, and sequences for coordinating and completing various portions of the Work.

2.2 The Scope of the Site Stabilization Work is contained in Exhibits A and B and includes the stated tasks required to cause the Burton Creek Subdivisions ("the Site") to be returned to full compliance with the requirements of their NPDES Stormwater Permits.

2.3 Ongoing Maintenance Work (If any) will be provided under separate contract at unit prices to be stated therein. "Ongoing Maintenance Work" is defined as all work not set out in Exhibits A and B and other work necessary to comply with terms and conditions of applicable permits, laws, and regulations of regulating agencies.

## ARTICLE 3

### TIME OF COMMENCEMENT AND COMPLETION, TERMINATION

3.1 The Work shall be commenced within 5 business days after final acceptance by both Parties. The Site Stabilization Work specified in Exhibits A and B shall be completed within 60 calendar days thereafter, conditions permitting. Upon completion of the Site Stabilization Work, Contractor shall deliver written certification to Owner that all Site Stabilization Work has been completed in compliance with Exhibits A and B and all applicable State and Federal regulations and requirements.

3.2 Time is of the essence for the Site Stabilization Work.

## ARTICLE 4

### THE CONTRACT SUM

4.1 Owner shall, subject to the other provisions of this Agreement, pay Contractor in current funds for performing the Burton Creek Stabilization Work **Ninety Eight Thousand and Ten Dollars and 65/100 (\$98,010.65)**. Owner shall pay for the Site Stabilization Work within 30 days of receipt of the certificate provided for in paragraph 3.1 above.

## ARTICLE 5

### INSURANCE

5.1 Before Contractor does any work at or prepares or delivers material to the Project, Contractor shall provide to Owner certificates of insurance evidencing coverage acceptable to Contractor in the following amounts:

5.1.1 Worker's Compensation. Worker's compensation insurance coverage is required with the following minimum limits of liability:

Each Accident	\$500,000
Disease - Policy Limit	\$500,000
Disease - Each Employee	\$500,000

Contractor shall furnish Owner a certificate of insurance confirming the liability coverages and the waiver of subrogation.

5.1.2 General Liability. Commercial liability insurance on an occurrence basis insuring personal injury and property damage against the hazards of Premises and Operations.. Products and Completed Operations. Independent Contractor's and Contractual Liability (specifically covering the indemnity set forth in Subparagraph 9.10) and the following minimum limits of liability:

- Minimum \$1,000,000 General Aggregate
- Minimum \$1,000,000 Products--Comp/OP Aggregate
- Minimum \$1,000,000 Personal & Advertising Injury
- Minimum \$1,000,000 Each Occurrence
- Minimum \$1,000,000 Fire Damage (anyone fire)
- Medical Expense \$5,000 (any one person)

Umbrella Liability (Excess of above underlying limits of Employer's Liability, General Liability and Auto Liability)

- Minimum \$2,000,000 per occurrence
- Minimum \$2,000,000 Aggregate

Such insurance shall name Owner as an additional insured party. Contractor shall furnish a certificate of insurance confirming the liability coverages and that Owner is an additional insured.

5.1.3 Automobile Liability. Comprehensive automobile liability insurance in connection with owned, hired, and non-owned automobiles with the minimum limits of \$1,000,000 combined. Such insurance shall name Owner as an additional insured party. Contractor shall furnish a certificate of insurance confirming the liability coverages and that Owner is an additional insured.

5.1.4 The certificates evidencing the above-required coverages shall provide that such coverage shall not be cancelled or reduced except by written notice to Owner at least 30 days before the effective date of such cancellation or material reduction in coverage. New or renewal certificates shall evidence all the above required coverages.

## ARTICLE 6 RIGHTS AND RESPONSIBILITIES

6.1 Contractor is prohibited from delegating, transferring, conveying, subcontracting, relinquishing or otherwise disposing of the whole or any part of its duties under this Agreement without the prior written approval of Owner.

## ARTICLE 7 EXECUTION AND PROGRESS OF THE WORK

7.1.1 Owner hereby agrees to provide Contractor with access to the Site to perform the Site Stabilization Work.



7.1.2 Contractor shall cooperate with Owner in scheduling and performing the Work to avoid conflict or interference with the work of others, if any other activities are occurring on the site.

7.1.3 Contractor shall pay for all materials, equipment, and labor used in, or in conjunction with, the performance of the Work and shall furnish satisfactory evidence, when requested by Owner, to verify compliance with this requirement.

7.1.4 Contractor shall furnish all of the labor, materials, equipment, and services, including, but not limited to, competent supervision, shop drawings, samples, tools, and equipment as are necessary for the proper performance of the Work in accordance with the Contract Documents.

7.1.5 Contractor acknowledges that it has visited the Site and visually inspected the general and local conditions and reviewed all soils and other reports that could affect the Work. Any failure of Contractor to reasonably ascertain from a visual inspection of the Site, the general and local conditions that could affect the Work, will not relieve Contractor from its responsibility to properly complete the Work without additional expense to Owner.

7.1.6 Owner is entitled to rely on the accuracy and completeness of any professional certifications required to be held by Contractor to perform the Work.

7.1.7 Contractor shall schedule and perform all inspections of the Work or portions of the Work. Contractor shall give proper written notice to all required parties of such inspections. Contractor shall bear all expenses associated with inspections, and approvals required of Contractor to perform the Work.

7.1.8 Every part of the Work shall be executed in accordance with the Contract Documents in a good and workmanlike manner. All materials used in the Work shall be furnished in sufficient quantities to facilitate the proper and expeditious execution of the Work, and shall be new except as may be expressly provided otherwise in the Contract Documents. No substitutions shall be made in the Work unless permitted in the Contract Documents and only then upon Contractor's first receiving all approvals, in writing, from Owner.

7.1.9 Contractor is required to correct in a timely fashion any Work rejected by Owner for failing to comply with the Contract Documents. Contractor shall correct at its cost and time and bear the expense of additional services for any nonconforming.

## ARTICLE 8 LAWS, PERMITS, FEES AND NOTICES

8.1.1 Contractor shall give all notices and comply with all laws, ordinances, rules, regulations, codes, and orders of any public authority bearing on the performance of the Work. Contractor shall secure and pay for all permits and governmental fees, licenses, sales tax, and inspections necessary for the proper execution and completion of the Work. If Contractor performs any portion of the Work contrary to any Laws, then Contractor shall assume full responsibility for correcting such Work and shall bear all associated costs, charges, fees, damages, and expenses necessarily incurred to remedy the violation, including fines for noncompliance, defense costs, and costs of corrective measures to return the project to compliance with requirements of permits, laws, and regulations.

8.1.2 Contractor shall comply with Laws relating to employment of individuals, including social security acts, unemployment compensation acts, and workers' compensation acts insofar as applicable to the performance of this Agreement.

## ARTICLE 9 WORK OF OTHERS

9.1.1 In carrying out the Work, Contractor shall take necessary precautions to protect the work of other trades from damage caused by its operations.

## ARTICLE 10 SAFETY PRECAUTIONS AND PROCEDURES

10.1.1 Contractor shall take all reasonable safety precautions regarding the Work, shall comply with all safety measures initiated by Contractor and with all Laws for the safety of persons or property in accordance with the requirements of the Contract Documents. Such obligation shall include taking reasonable steps to protect:

- (a) employees and other persons at the site;
- (b) materials and equipment stored at the site or at off-site locations for use in performance of the Work; and
- (c) all property and structures located at the site and adjacent to work areas, whether or not the property or structures are part of the Sites or involved in the Work.

Contractor shall inform the Owner in writing prior to the Contractor's mobilization on the Sites the name and title of the Contractor's competent person for administration of the Contractor's safety program and for OSHA- and other governmental agency compliance requirements, including compliance with NPDES Stormwater Permits. Contractor must inform Owner in writing in advance of any change in status of the Contractor's competent person.

## ARTICLE 11. CLEANING UP

11.1 Contractor shall follow Owner's cleanup directions, and at all times keep the Project free from debris resulting from the Work and place all debris in job site containers.

11.2 If Contractor fails to comply, then Owner may implement appropriate cleanup measures without further notice and deduct the cost thereof from any amounts due or to become due Contractor under this Agreement.

## ARTICLE 12. WARRANTY

12.1 Contractor warrants to the Owner that all materials and equipment furnished shall be new unless otherwise specified, and that all Work shall be of good quality, free from faults and defects, and in conformance with the Contract Documents and Laws, permits, and regulations applicable to work under this Agreement. All Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective. The warranty provided in this paragraph shall be in addition to any other warranty or remedy provided by law or any of the Contract Documents.

12.2 Contractor warrants that its Site Stabilization Work shall achieve full stabilization (as defined by applicable State and Federal regulations) with the exception of damage caused by extraordinary weather events (as defined by applicable State and Federal regulations).

12.3 Omitted.

12.4 The warranties survive performance and termination of this Agreement.

## ARTICLE 13. INDEMNIFICATION

13.1 Contractor shall indemnify, protect, defend, and hold harmless the Owner and its agents, consultants, and employees (collectively, "**Indemnitee**"), from and against any and all demands, claims, suits, causes of action, liabilities, losses, costs, settlements, damages, and judgments (including, without limitation, court costs and attorneys' fees) (collectively "**Claims**"), whether arising in equity, at common law, or by statute, including unfair trade practices claims, or under the law of contracts or torts (including, without limitation, negligence and strict liability without regard to fault), of every kind or character (including, without limitation, Claims for personal injury or real or personal property damage and economic loss), arising out of the performance of the Work, due to or arising out of the negligence or misconduct of, or breach of contract by, Contractor, any of its equipment or material suppliers, or any of the foregoing person's respective agents, representatives, suppliers, employees or other persons directly or indirectly employed by them or for whose actions they may be liable or arising out of the Work. The indemnification obligations arising under this paragraph shall not be construed to negate, abridge or reduce other rights or obligations of indemnification that would otherwise exist as to a party or person described in this paragraph.

13.2 In any claim against the Owner any of its agents or employees by any employee of Contractor, anyone directly or indirectly employed by Contractor or anyone for whose acts Contractor may be liable, the indemnification obligation under paragraph 13.1 shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for Contractor under workers' or workmen's compensation acts, disability benefits acts or other employee benefit acts.

13.3 Contractor waives all rights against Owner and its agents or employees, for loss or damage to the extent covered by builder's risk or any other insurance, except such rights as it may have to the proceeds of such insurance.

#### ARTICLE 14 ARBITRATION

14.1 All claims, disputes, and other matters in question arising out of or relating to this Agreement or breach thereof, shall be decided by arbitration. Arbitration shall be conducted in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then prevailing unless the parties mutually agree otherwise. Arbitration will be held in Charlotte, NC, before a single arbitrator. The arbitrator in such Arbitration shall award attorneys' fees and costs to the prevailing party. North Carolina law shall apply.

14.2 Except by written consent of the person sought to be joined, no arbitration arising out of or relating to the Contract Documents shall include, by consolidation, joinder or in any other manner, any person or entity not a party to this Agreement under which such arbitration arises, unless it is shown at the time the demand for arbitration is filed that (1) such person or entity is substantially involved in a common question of fact or law, (2) the presence of such person or entity is required if complete relief is to be accorded in the arbitration, and (3) the interest or responsibility of such person or entity in the matter is not insubstantial. Any disagreement between Owner and Contractor regarding whether such person should be joined shall be determined by Arbitration. Owner and Contractor consent with this agreement to Arbitrate and any other written agreement to Arbitrate with an additional person or persons referred herein and that such Agreement shall be specifically enforceable under the prevailing arbitration law.

14.3 In such Arbitration, no party shall be required to conduct discovery, including deposition discovery or exchange of documents, except that each party shall provide copies of all documents that are to be offered into evidence 30 days prior to such hearing.

14.4 The award rendered by the arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

14.5 If any claim shall be made by Owner against Contractor that any part of the Work performed by Contractor hereunder is defective or fails to comply with the plans and specifications, Contractor shall perform at its expense the Work necessary to correct the defective or non-complying Work to the satisfaction of the Owner, including repairs to the work of the trades damaged by the rework of Contractor. If Contractor disputes the claim of the Owner, Contractor shall notify Owner that Contractor is performing the work under protest and will submit to Contractor a written demand for compensation for extra work which Contractor will submit to the Owner.

14.6 Contractor shall carry on the Work notwithstanding the existence of a claim under this subsection, unless this Agreement has been terminated. If Contractor is continuing to perform in accordance with this Agreement, Owner shall continue to make payments as required by this Agreement.

14.7 To the extent not prohibited by their contracts with others, the claims and disputes of Owner and Contractor concerning a common question of fact or law, shall be heard by the same arbitrator in a single proceeding.

## ARTICLE 15 MISCELLANEOUS PROVISIONS

15.1 If either party becomes involved in litigation or arbitration arising out of this Agreement or the performance thereof, the court or arbitration panel in such litigation or arbitration or in a separate suit shall award reasonable attorneys' fees to the prevailing party.

15.2 Any notices required or permitted under this Agreement shall be in writing and shall be deemed duly served only if hand-delivered, sent by a nationally recognized overnight courier service, sent by facsimile transmission or given by certified mail, returned receipt requested, addressed to the address contained in this Agreement, as it may be changed from time to time by written notice given by one party to the other. Notice shall be effective upon delivery to the intended addresses of the addressee.

15.3 Section headings herein are inserted only for convenience or reference, and shall in no way define, limit or prescribe the scope or extent of any provision of this Agreement.

15.4 All previous oral or written promises, agreements, and/or representations relating to this Agreement are hereby superseded to the extent they may be inconsistent herewith, it being expressly agreed and understood that the terms and provisions of this Agreement shall constitute the full and complete agreement between Owner and Contractor.

15.5 If any term or provision of this Agreement shall be held to any extent to be invalid or unenforceable, the remaining terms and conditions of this Agreement shall be valid and shall be enforceable to the fullest extent permitted by Law.

15.6 All covenants, agreements, indemnities, guaranties and warranties made by Contractor shall survive completion of the Work and any payment of the Contract Sums, and shall inure to the benefit of Owner and its respective successors and assigns.

15.7 No waiver by Contractor, whether express or implied, of any breach or failure to comply with any provision of this Agreement shall be deemed to be a waiver of any such breach or failure to comply with any other provision of this Agreement or of any subsequent breach by Contractor of the same provision or any other provisions.

15.8 Owner shall pay the sum herein set forth in current funds for such work and materials, and in the manner and at the time herein set forth. Such sum is intended to include all increases in cost, foreseen or unforeseen, including without limiting the generality of the foregoing, taxes, labor, materials, and transportation costs, all of which are to be borne solely by Contractor. All loss or damage arising from any of the Work performed under this Agreement through unforeseen or unusual obstructions, difficulties or delays which may be encountered in the prosecution of the Work, or through the action of the elements, shall be borne by Contractor. No payment made under this Agreement shall be conclusive of the performance of this Agreement, either wholly or in part, nor shall it be construed to be an acceptance of defective work or improper materials, or an approval of any of the items in any requisition made or bill rendered.

15.9 Contractor shall indemnify, defend and save Owner harmless from and against all liability for fines, penalties, or other enforcement actions, claims, and liens for labor performed or equipment or material used or furnished to be used in connection with the Work, including any costs for attorney's fees, premiums for bond required by any title company, or Owner, and all incidental or consequential damages incurred by Owner as a result of such fines, penalties, or other enforcement actions, claims or liens. Further, in case suit on such claim is brought, Contractor shall defend the suit at its cost, and shall pay and satisfy any such fines, penalties, or other enforcement actions, lien or judgment as may be established by the decision of the court in the suit. Contractor shall, within ten days after written demand, cause the effect of any suit or lien to be removed from the Project and to provide corrective measures to remedy violations of Laws, and in the event Contractor shall fail to do so, Owner may use whatever means, in its discretion, it deems appropriate to cause the violations to be remediated or lien to be removed or dismissed and the cost thereof, together with reasonable attorneys' fees, shall be immediately due and payable to Owner by Contractor. Contractor may litigate any lien or suit above described provided it causes the effect thereof to be removed promptly, in advance, from the Project, and shall further do such things as may be necessary to cause the Owner not to withhold any monies due to Contractor from the Owner by reason of such liens or suits. Notwithstanding anything to the contrary set forth above in this paragraph, Contractor shall not be construed to be foregoing its lien rights in the event of a dispute over payments due to services rendered and materials furnished to the Sites.

OWNER

Fifth Third Bank  
Attn: Chris C. Cagle, VP  
Asset Disposition Team  
165 Nash Street  
Lawrenceville, GA 30046  
Phone: (678) 906-4721 - Atlanta  
Phone: (704) 808-5135 - Charlotte  
Fax: (770) 995-9601

CONTRACTOR

Erosion Control Services, Inc.  
4006 Vandyke Ct.  
Monroe, NC 28110  
Attn: Grayson Glover  
Phone: (704) 821-4427  
Fax: (704) 821-2628

BY Shirley Duckworth, VP  
Signature

SHIRLEY DUCKWORTH  
Printed Name

VICE PRESIDENT  
Title

1/4/2011  
Date

BY Grayson Glover  
Signature

GRAYSON GLOVER  
Printed Name

PRESIDENT  
Title

1/05/2011  
Date

Exhibit "A"



Erosion Control Services

4806 Van Dyke Ct., Monroe, NC 28110

O: 704-821-4427 F: 704-821-2528

[www.erosioncontrolservices.biz](http://www.erosioncontrolservices.biz)

CBC MECA  
John Brunner  
Burton Creek Project  
11/29/2010

### PHASE 3

1. stabilize entrance area to phase 3: 1.56 acres permanent seed & straw @ \$1,300/AC = \$2,028.00
2. slope at basin #17: 1,945 SY of curlex matting with permanent seed mix @ \$1.35/SY = \$2,625.75
3. slope at right of phase 3 entrance: 1,045 SY of Flexterra hydromulch with permanent seed mix @ \$1.17/SY = \$1,222.65
4. temp basin between basins #17 & #15: 1,010 SY of 70:30 blended hydromulch with permanent seed mix @ \$0.55/SY = \$555.50
5. basin #15: 4,104 SY of 70:30 blended hydromulch with permanent seed mix @ \$0.55/SY = \$2,257.75; 0.61 acres permanent seed & straw @ \$1,300/AC = \$793.00

Total for Phase 3: \$9,482.65

### PHASE 2

1. paved areas: bushhog all right-of-ways, weed eat curb line, clean debris from storm inlet grates and remove old rotten silt fence: \$3,100.00
2. basin #14: 300 LF of silt fence for sediment containment @ \$1.50/LF = \$450.00; 5,135 SY of 70:30 blended hydromulch with permanent seed mix @ \$0.55/SY = \$1,724.25; 2.46 acres permanent seed & straw @ \$1,300/AC = \$3,198.00



3. creek crossing between basins #13 & #14: repair creek banks: 1,800 SY of C-125 coconut matting with permanent seed mix @ \$2.25/SY = \$4,050.00
4. basin #13: 1.18 acres permanent seed & straw @ \$1,300/AC = \$1,534.00
5. basin #12: 1,475 SY of 70:30 blended hydromulch @ \$0.55/SY = \$811.25; 0.96 acres permanent seed & straw @ \$1,300/AC = \$1,248.00
6. basin #11: 1,435 SY of 70:30 blended hydromulch @ \$0.55/SY = \$789.25; 1.08 acres permanent seed & straw @ \$1,300/AC = \$1,404.00; 400 LF of coir baffles inside basin @ \$2.75/LF = \$1,100.00
7. basin #9: 1,320 SY of 70:30 blended hydromulch @ \$0.55/SY = \$726.00; 1.15 acres permanent seed & straw @ \$1,300/AC = \$1,495.00
8. basin #8: 1,175 SY of 70:30 blended hydromulch @ \$0.55/SY = \$646.25; 0.92 acres permanent seed & straw @ \$1,300/AC = \$1,196.00
9. lower half of phase 2 drainage area: 27.90 acres permanent seed & straw @ \$1,300/AC = \$36,270.00
10. lot 123: 0.46 acres permanent seed & straw @ \$1,300/AC = \$598.00
11. lots 128 - 135 and rear cut slope: 2.94 acres permanent seed & straw @ \$1,300/AC = \$3,822.00

Total for Phase 2: \$63,162.00

#### PHASE 1

1. basin #1: 1,475 SY of 70:30 blended hydromulch @ \$0.55/SY = \$811.25; 2.07 acres permanent seed & straw @ \$1,300/AC = \$2,691.00
2. basin #4: 1,310 SY of 70:30 blended hydromulch @ \$0.55/SY = \$720.50; 0.78 acres permanent seed & straw @ \$1,300/AC = \$1,014.00
3. basin #8 and road leading to it: 1,530 SY of 70:30 blended hydromulch @ \$0.55/SY = \$841.50; 1.27 acres permanent seed & fertilizer @ \$1,300/AC = \$1,651.00
4. basins #6 & #7: 2,890 SY of 70:30 blended hydromulch @ \$0.55/SY = \$1,589.50; 2.11 acres permanent seed & straw @ \$1,300/AC = \$2,743.00

5. basin #5: 1.12 acres permanent seed & straw @ \$1,300/AC = \$1,456.00
6. drainage area above basins #6 & #7: 1.68 acres permanent seed & straw @ \$1,300/AC = \$2,184.00
7. basin #2: 94% S/V of T5/RU blended hydromulch @ \$58.57 = \$547.25; 1.04 acres permanent seed & straw @ \$1,300/AC = \$1,352.00

Total for Phase 3: \$18,701.00

TOTAL COST FOR ENTIRE PROJECT: \$91,345.65

Exhibit "B"



*Erosion Control Services*

4906 Van Dyke Ct., Monroe, NC 28110

O: 704-521-4427 F: 704-521-2628

[www.erosioncontrolservices.biz](http://www.erosioncontrolservices.biz)

CBC MECA

John Brunner

Reiser & Frank Property

11/02/2010

1. 300 LF of coir baffles (in woods below basin #11) @ \$2.75/LF = \$825.00
2. 18 hours labor (to spread wood mulch in woods below basin #11) @ \$30.00/HR = \$540.00
3. replace damaged crape myrtle and juniper shrubs: \$3,500.00
4. 4,000 SF of fescue sod (to repair yard damage) @ \$0.45/SF = \$1,800.00

Total with sod: \$6,665.00

**S.M. SMITH AND SONS, INC.**

**Agreement between Contractor and Owner**

**Contract amount:        \$ 87,842.00**

This **Agreement** is entered into as of January 4, 2011

Between **Owner:**

Fifth Third Bank  
Attn: Chris C. Cagle, VP  
Asset Disposition Team  
165 Nash Street  
Lawrenceville, GA 30046  
Phone: (678) 906-4721 - Atlanta  
Phone: (704) 808-5135 - Charlotte  
Fax: (770) 995-9601

and **Contractor**

S.M. Smith and Sons, Inc.  
10107 Truelight Church Road  
Charlotte, NC 28277  
Attn: Michael Smith  
Phone: (704) 545-4177  
Fax    (704 ) 545-4172

The **Project:**

Burton Creek Subdivision  
Denver, NC



Contractor and Owner (collectively, "the Parties") agree as follows:

## ARTICLE 1

### THE CONTRACT DOCUMENTS

1.1 The Contract Documents comprising the agreement between Contractor and Owner (the "Contract Documents") consist of this Agreement, including the attached Exhibits, any modifications or amendments of this Agreement, and the following Exhibits:

Exhibits:      A. Scope of the Work-on site earthwork associated with Site Stabilization  
                    B. Scope of the Work-earthwork associated with the repairs to the Reiser and Franck properties.

1.2 Contractor acknowledges that it has reviewed or had the opportunity to review the Contract Documents, and that is bound by the Contract Documents.

1.3 If inconsistencies or omissions appear in the Contract Documents, Contractor will notify Owner in writing within three (3) working days after Contractor discovers any inconsistency or omission.

## ARTICLE 2

### THE WORK

2.1 Contractor shall use its best care, skill, and diligence in performing the work described in this Agreement (the "Work"). Contractor shall be solely responsible for performing the Work, including the construction methods, techniques, means, and sequences for coordinating and completing various portions of the Work.

2.2 The Scope of the Site Stabilization Work is contained in Exhibits A and B and includes the stated tasks required to cause the Burton Creek Subdivisions ("the Site") to be returned to full compliance with the requirements of their NPDES Stormwater Permits.

2.3 Ongoing Maintenance Work (If any) will be provided under separate contract at unit prices to be stated therein. "Ongoing Maintenance Work" is defined as all work not set out in Exhibits A and B and other work necessary to comply with terms and conditions of applicable permits, laws, and regulations of regulating agencies.



## ARTICLE 3

### TIME OF COMMENCEMENT AND COMPLETION, TERMINATION

3.1 The Work shall be commenced within 5 business days after final acceptance by both Parties. The Site Stabilization Work specified in Exhibits A and B shall be completed within 60 calendar days thereafter, conditions permitting. Upon completion of the Site Stabilization Work, Contractor shall deliver written certification to Owner that all Site Stabilization Work has been completed in compliance with Exhibits A and B and all applicable State and Federal regulations and requirements.

3.2 Time is of the essence for the Site Stabilization Work.

## ARTICLE 4

### THE CONTRACT SUM

4.1 Owner shall, subject to the other provisions of this Agreement; pay Contractor in current funds for performing the Burton Creek Stabilization Work **Eighty Seven Thousand Eight Hundred and Forty Two Dollars and 00/100 (\$87,842.00**. Owner shall pay for the Site Stabilization Work within 30 days of receipt of the certificate provided for in paragraph 3.1 above.

## ARTICLE 5

### INSURANCE

5.1 Before Contractor does any work at or prepares or delivers material to the Project, Contractor shall provide to Owner certificates of insurance evidencing coverage acceptable to Contractor in the following amounts:

5.1.1 Worker's Compensation. Worker's compensation insurance coverage is required with the following minimum limits of liability:

Each Accident	\$500,000
Disease - Policy Limit	\$500,000
Disease - Each Employee	\$500,000

Contractor shall furnish Owner a certificate of insurance confirming the liability coverages and the waiver of subrogation.



5.1.2 General Liability. Commercial liability insurance on an occurrence basis insuring personal injury and property damage against the hazards of Premises and Operations,. Products and Completed Operations, Independent Contractor's and Contractual Liability (specifically covering the indemnity set forth in Subparagraph 9.10) and the following minimum limits of liability:

- Minimum \$1,000,000 General Aggregate
- Minimum \$1,000,000 Products--Comp/OP Aggregate
- Minimum \$1,000,000 Personal & Advertising Injury
- Minimum \$1,000,000 Each Occurrence
- Minimum \$1,000,000 Fire Damage (anyone fire)
- Medical Expense \$5,000 (any one person)

Umbrella Liability (Excess of above underlying limits of Employer's Liability, General Liability and Auto Liability)

- Minimum \$2,000,000 per occurrence
- Minimum \$2,000,000 Aggregate

Such insurance shall name Owner as an additional insured party. Contractor shall furnish a certificate of insurance confirming the liability coverages and that Owner is an additional insured.

5.1.3 Automobile Liability. Comprehensive automobile liability insurance in connection with owned, hired, and non-owned automobiles with the minimum limits of \$1,000,000 combined. Such insurance shall name Owner as an additional insured party. Contractor shall furnish a certificate of insurance confirming the liability coverages and that Owner is an additional insured.

5.1.4 The certificates evidencing the above-required coverages shall provide that such coverage shall not be cancelled or reduced except by written notice to Owner at least 30 days before the effective date of such cancellation or material reduction in coverage. New or renewal certificates shall evidence all the above required coverages.

## **ARTICLE 6 RIGHTS AND RESPONSIBILITIES**

6.1 Contractor is prohibited from delegating, transferring, conveying, subcontracting, relinquishing or otherwise disposing of the whole or any part of its duties under this Agreement without the prior written approval of Owner.

## **ARTICLE 7 EXECUTION AND PROGRESS OF THE WORK**

7.1.1 Owner hereby agrees to provide Contractor with access to the Site to perform the Site Stabilization Work.



7.1.2 Contractor shall cooperate with Owner in scheduling and performing the Work to avoid conflict or interference with the work of others, if any other activities are occurring on the site.

7.1.3 Contractor shall pay for all materials, equipment, and labor used in, or in conjunction with, the performance of the Work and shall furnish satisfactory evidence, when requested by Owner, to verify compliance with this requirement.

7.1.4 Contractor shall furnish all of the labor, materials, equipment, and services, including, but not limited to, competent supervision, shop drawings, samples, tools, and equipment as are necessary for the proper performance of the Work in accordance with the Contract Documents.

7.1.5 Contractor acknowledges that it has visited the Site and visually inspected the general and local conditions and reviewed all soils and other reports that could affect the Work. Any failure of Contractor to reasonably ascertain from a visual inspection of the Site, the general and local conditions that could affect the Work, will not relieve Contractor from its responsibility to properly complete the Work without additional expense to Owner.

7.1.6 Owner is entitled to rely on the accuracy and completeness of any professional certifications required to be held by Contractor to perform the Work.

7.1.7 Contractor shall schedule and perform all inspections of the Work or portions of the Work. Contractor shall give proper written notice to all required parties of such inspections. Contractor shall bear all expenses associated with inspections, and approvals required of Contractor to perform the Work.

7.1.8 Every part of the Work shall be executed in accordance with the Contract Documents in a good and workmanlike manner. All materials used in the Work shall be furnished in sufficient quantities to facilitate the proper and expeditious execution of the Work, and shall be new except as may be expressly provided otherwise in the Contract Documents. No substitutions shall be made in the Work unless permitted in the Contract Documents and only then upon Contractor's first receiving all approvals, in writing, from Owner.

7.1.9 Contractor is required to correct in a timely fashion any Work rejected by Owner for failing to comply with the Contract Documents. Contractor shall correct at its cost and time and bear the expense of additional services for any nonconforming.





## **ARTICLE 8 LAWS, PERMITS, FEES AND NOTICES**

8.1.1 Contractor shall give all notices and comply with all laws, ordinances, rules, regulations, codes, and orders of any public authority bearing on the performance of the Work. Contractor shall secure and pay for all permits and governmental fees, licenses, sales tax, and inspections necessary for the proper execution and completion of the Work. If Contractor performs any portion of the Work contrary to any Laws, then Contractor shall assume full responsibility for correcting such Work and shall bear all associated costs, charges, fees, damages, and expenses necessarily incurred to remedy the violation, including fines for noncompliance, defense costs, and costs of corrective measures to return the project to compliance with requirements of permits, laws, and regulations.

8.1.2 Contractor shall comply with Laws relating to employment of individuals, including social security acts, unemployment compensation acts, and workers' compensation acts insofar as applicable to the performance of this Agreement.

## **ARTICLE 9 WORK OF OTHERS**

9.1.1 In carrying out the Work, Contractor shall take necessary precautions to protect the work of other trades from damage caused by its operations.

## **ARTICLE 10 SAFETY PRECAUTIONS AND PROCEDURES**

10.1.1 Contractor shall take all reasonable safety precautions regarding the Work, shall comply with all safety measures initiated by Contractor and with all Laws for the safety of persons or property in accordance with the requirements of the Contract Documents. Such obligation shall include taking reasonable steps to protect:

- (a) employees and other persons at the site;
- (b) materials and equipment stored at the site or at off-site locations for use in performance of the Work; and
- (c) all property and structures located at the site and adjacent to work areas, whether or not the property or structures are part of the Sites or involved in the Work.

Contractor shall inform the Owner in writing prior to the Contractor's mobilization on the Sites the name and title of the Contractor's competent person for administration of the Contractor's safety program and for OSHA and other governmental agency compliance requirements, including compliance with NPDES Stormwater Permits. Contractor must inform Owner in writing in advance of any change in status of the Contractor's competent person.



## ARTICLE 11. CLEANING UP

11.1 Contractor shall follow Owner's cleanup directions, and at all times keep the Project free from debris resulting from the Work and place all debris in job site containers.

11.2 If Contractor fails to comply, then Owner may implement appropriate cleanup measures without further notice and deduct the cost thereof from any amounts due or to become due Contractor under this Agreement.

## ARTICLE 12. WARRANTY

12.1 Contractor warrants to the Owner that all materials and equipment furnished shall be new unless otherwise specified, and that all Work shall be of good quality, free from faults and defects, and in conformance with the Contract Documents and Laws, permits, and regulations applicable to work under this Agreement. All Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective. The warranty provided in this paragraph shall be in addition to any other warranty or remedy provided by law or any of the Contract Documents.

12.2 Omitted.

12.3 Omitted.

12.4 The warranties survive performance and termination of this Agreement.

## ARTICLE 13. INDEMNIFICATION

13.1 Contractor shall indemnify, protect, defend, and hold harmless the Owner and its agents, consultants, and employees (collectively, "**Indemnitee**"), from and against any and all demands, claims, suits, causes of action, liabilities, losses, costs, settlements, damages, and judgments (including, without limitation, court costs and attorneys' fees) (collectively "**Claims**"), whether arising in equity, at common law, or by statute, including unfair trade practices claims, or under the law of contracts or torts (including, without limitation, negligence and strict liability without regard to fault), of every kind or character (including, without limitation, Claims for personal injury or real or personal property damage and economic loss), arising out of the performance of the Work, due to or arising out of the negligence or misconduct of, or breach of contract by, Contractor, any of its equipment or material suppliers, or any of the foregoing person's respective agents, representatives, suppliers, employees or other persons directly or indirectly employed by them or for whose actions they may be liable or arising out of the Work. The indemnification obligations arising under this paragraph shall not be construed to negate, abridge or reduce other rights or obligations of indemnification that would otherwise exist as to a party or person described in this paragraph.



13.2 In any claim against the Owner any of its agents or employees by any employee of Contractor, anyone directly or indirectly employed by Contractor or anyone for whose acts Contractor may be liable, the indemnification obligation under paragraph 13.1 shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for Contractor under workers' or workmen's compensation acts, disability benefits acts or other employee benefit acts.

13.3 Contractor waives all rights against Owner and its agents or employees, for loss or damage to the extent covered by builder's risk or any other insurance, except such rights as it may have to the proceeds of such insurance.

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14.2 Except by written consent of the person sought to be joined, no arbitration arising out of or relating to the Contract Documents shall include, by consolidation, joinder or in any other manner, any person or entity not a party to this Agreement under which such arbitration arises, unless it is shown at the time the demand for arbitration is filed that (1) such person or entity is substantially involved in a common question of fact or law, (2) the presence of such person or entity is required if complete relief is to be accorded in the arbitration, and (3) the interest or responsibility of such person or entity in the matter is not insubstantial. Any disagreement between Owner and Contractor regarding whether such person should be joined shall be determined by Arbitration. Owner and Contractor consent with this agreement to Arbitrate and any other written agreement to Arbitrate with an additional person or persons referred herein and that such Agreement shall be specifically enforceable under the prevailing arbitration law.

14.3 In such Arbitration, no party shall be required to conduct discovery, including deposition discovery or exchange of documents, except that each party shall provide copies of all documents that are to be offered into evidence 30 days prior to such hearing.

14.4 The award rendered by the arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.



14.5 If any claim shall be made by Owner against Contractor that any part of the Work performed by Contractor hereunder is defective or fails to comply with the plans and specifications, Contractor shall perform at its expense the Work necessary to correct the defective or non-complying Work to the satisfaction of the Owner, including repairs to the work of the trades damaged by the rework of Contractor. If Contractor disputes the claim of the Owner, Contractor shall notify Owner that Contractor is performing the work under protest and will submit to Contractor a written demand for compensation for extra work which Contractor will submit to the Owner.

14.6 Contractor shall carry on the Work notwithstanding the existence of a claim under this subsection, unless this Agreement has been terminated. If Contractor is continuing to perform in accordance with this Agreement, Owner shall continue to make payments as required by this Agreement.

14.7 To the extent not prohibited by their contracts with others, the claims and disputes of Owner and Contractor concerning a common question of fact or law, shall be heard by the same arbitrator in a single proceeding.

## **ARTICLE 15 MISCELLANEOUS PROVISIONS**

15.1 If either party becomes involved in litigation or arbitration arising out of this Agreement or the performance thereof, the court or arbitration panel in such litigation or arbitration or in a separate suit shall award reasonable attorneys' fees to the prevailing party.

15.2 Any notices required or permitted under this Agreement shall be in writing and shall be deemed duly served only if hand-delivered, sent by a nationally recognized overnight courier service, sent by facsimile transmission or given by certified mail, returned receipt requested, addressed to the address contained in this Agreement, as it may be changed from time to time by written notice given by one party to the other. Notice shall be effective upon delivery to the intended addresses of the addressee.

15.3 Section headings herein are inserted only for convenience or reference, and shall in no way define, limit or prescribe the scope or extent of any provision of this Agreement.

15.4 All previous oral or written promises, agreements, and/or representations relating to this Agreement are hereby superseded to the extent they may be inconsistent herewith, it being expressly agreed and understood that the terms and provisions of this Agreement shall constitute the full and complete agreement between Owner and Contractor.

15.5 If any term or provision of this Agreement shall be held to any extent to be invalid or unenforceable, the remaining terms and conditions of this Agreement shall be valid and shall be enforceable to the fullest extent permitted by Law.



15.6 All covenants, agreements, indemnities, guaranties and warranties made by Contractor shall survive completion of the Work and any payment of the Contract Sums, and shall inure to the benefit of Owner and its respective successors and assigns.

15.7 No waiver by Contractor, whether express or implied, of any breach or failure to comply with any provision of this Agreement shall be deemed to be a waiver of any such breach or failure to comply with any other provision of this Agreement or of any subsequent breach by Contractor of the same provision or any other provisions.

15.8 Owner shall pay the sum herein set forth in current funds for such work and materials, and in the manner and at the time herein set forth. Such sum is intended to include all increases in cost, foreseen or unforeseen, including without limiting the generality of the foregoing, taxes, labor, materials, and transportation costs, all of which are to be borne solely by Contractor. All loss or damage arising from any of the Work performed under this Agreement through unforeseen or unusual obstructions, difficulties or delays which may be encountered in the prosecution of the Work, or through the action of the elements, shall be borne by Contractor. No payment made under this Agreement shall be conclusive of the performance of this Agreement, either wholly or in part, nor shall it be construed to be an acceptance of defective work or improper materials, or an approval of any of the items in any requisition made or bill rendered.

15.9 Contractor shall indemnify, defend and save Owner harmless from and against all liability for fines, penalties, or other enforcement actions, claims, and liens for labor performed or equipment or material used or furnished to be used in connection with the Work, including any costs for attorney's fees, premiums for bond required by any title company, or Owner, and all incidental or consequential damages incurred by Owner as a result of such fines, penalties, or other enforcement actions, claims or liens. Further, in case suit on such claim is brought, Contractor shall defend the suit at its cost, and shall pay and satisfy any such fines, penalties, or other enforcement actions, lien or judgment as may be established by the decision of the court in the suit. Contractor shall, within ten days after written demand, cause the effect of any suit or lien to be removed from the Project and to provide corrective measures to remedy violations of Laws, and in the event Contractor shall fail to do so, Owner may use whatever means, in its discretion, it deems appropriate to cause the violations to be remediated or lien to be removed or dismissed and the cost thereof, together with reasonable attorneys' fees, shall be immediately due and payable to Owner by Contractor. Contractor may litigate any lien or suit above described provided it causes the effect thereof to be removed promptly, in advance, from the Project, and shall further do such things as may be necessary to cause the Owner not to withhold any monies due to Contractor from the Owner by reason of such liens or suits. Notwithstanding anything to the contrary set forth above in this paragraph, Contractor shall not be construed to be foregoing its lien rights in the event of a dispute over payments due to services rendered and materials furnished to the Sites.

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Exhibit "A"

**S.M. Smith and Sons, Inc**  
**10107 Truelight Church Road**  
**Charlotte NC 28227**  
**704-545-4177 (phone) 704-545-4172 (fax)**

**QUOTE**

Prepared For: Erosion Control Services  
Project: Burton Creek

<u>Location:</u>	<u>Description:</u>	<u>Total:</u>
Entrance	Mobilization	\$3000.00
	Place Fence and Cable at Entrance	\$1000.00
Basin 17	2 Loads Rip Rap, 1 Load #5	\$1350.00
	1.5 Days- Track Hoe	\$1500.00
	1 Days on Walking Slopes (Dozer)	\$760.00
	1 Day on Phase III Entrance Road	\$760.00
	1 Days on Dozer for Blading Roads	\$760.00
Stockpile Beside #5	1 Day on Dozer	\$760.00
	6 Hours for Off Road Trucking (Hauling Mulch)	\$750.00
	6 Hours for Track Hoe (To Load Mulch)	\$750.00
Basin 15	1 Days on Dozer	\$760.00
	1 Day on Track Hoe	\$1000.00
	Block Entrance Past Basin 15	\$300.00
	Haul Off 3 Loads of Trash to C&D Landfill	\$750.00
	1 Week for Skid Steer to Grade and Backfill Curb	\$3400.00
On Delaware Rd	Replace 15 (2x3) Storm Drain Grates	\$3000.00
	1 Day for Welder to Tack Storm Drains Back	\$680.00
	1 Day for Skid Steer and Dump Truck to Remove Debris and Leave Outside.	\$1200.00

Continued-

<u>Location:</u>	<u>Description:</u>	<u>Total:</u>
Basin 14- Dip Basin	2 Days on Track Hoe & Off Rd Truck	\$4000.00
	½ Load #5 Stone	\$240.00
	1 Day on Dozer to Fill Pipe Ravine	\$760.00
	200' of 24" Slope Drain Pipe with 90 Degree Elbow/Reroute Water from 13 to 14	\$5300.00
Basin 13&14	Pump to Delaware Basins	\$1200.00
Basin 13	2 Loads of Rip Rap	\$900.00
	1 Day for Dozer	\$760.00
	6 Hours on Track Hoe	\$750.00
Basin 12	1 Days on Track Hoe and Off Rd. Truck	\$2000.00
	½ Load of #5 Stone	\$240.00
	½ Day on Dozer (fix reels)	\$380.00
Basin 11	2 Days on Track Hoe and Off Rd. Truck	
	Dip Basin Out	\$4000.00
	½ Load of #5 Stone	\$240.00
In Front of Basin 11	Build New Basin	
	1 Days on Dozer	\$760.00
	1 Days on Track Hoe	\$1000.00
	3 Loads of Rip Rap	\$1350.00
	1 Load of #5 Stone	\$450.00
Basin 9	½ Load of #5 Stone	\$240.00
	6 Hours on Track Hoe	\$750.00
Basin 8	Dip Out Basin	
	1 Day on Track Hoe	\$1000.00
	1 Day on Dozer	\$760.00
	½ Load of #5 Stone	\$240.00
	½ Load of Rip Rap	\$240.00



Continued-

<u>Location:</u>	<u>Description:</u>	<u>Total:</u>
Lower Half of Ph II Drainage	Approximately 27.89 Acres	
	4 Days on Dozer	\$3040.00
	1 Day on Loader and Off Road Truck	\$1760.00
	Tractor and Phillips Hare-2 Days	\$2187.00
Lot 123/124	6 Hours on Dozer to Fix Wash Out	\$570.00
Lot 128-135	Repair Back Slopes and Wash Outs	
	9 Loads of Rip Rap	\$4050.00
	Track Hoe for 2 Days	\$2000.00
	2 Days on Dozer	\$1520.00
Phase I	Place Cable or Gate at Entrance	\$1000.00
Basin 1	1 Load of #5 Stone	\$450.00
	2 Days on Dozer	\$1520.00
	1 Day on Track Hoe	\$1000.00
	1 Load of Rip Rap	\$450.00
Basin 4	1 Days on Dozer	\$760.00
	1/2 Load of #5 Stone	\$240.00
	1/2 Day on Track Hoe	\$500.00
Basin 6&7	Regrade Slopes	
	1 Load of #5 Stone	\$450.00
	3 Days on Dozer	\$2280.00
	2 Days on Track Hoe	\$2000.00
Basin 5	1 Day on Dozer	\$760.00
Basin 2	1 Day on Dozer	\$760.00
	1/2 Day on Track Hoe	\$625.00
		<u>\$ 77 962.00</u>

# REISER AND FRANK PROPERTIES

DESCRIPTION OF WORK:	PRICE:
1 Load of Mulch	\$500.00
3 Days on Mini Hoe and Truck	\$2800.00
5 Loads of Compactable Dirt	\$500.00
2 Days on Roller	\$600.00
3 Days Laborer	\$720.00
1 Load of Trash to Dump	\$250.00
2 Days on Skid Steer	\$1360.00
Move Irrigation System	\$1500.00
1 Roll of Matting	\$300.00
2 Loads of #67 Stone	\$900.00
1 Load of Rip Rap	<u>\$450.00</u>
	<u>\$9850.00</u>

**OWNER**

Fifth Third Bank  
Attn: Chris C. Cagle, VP  
Asset Disposition Team  
165 Nash Street  
Lawrenceville, GA 30046  
Phone: (678) 906-4721 - Atlanta  
Phone: (704) 808-5135 - Charlotte  
Fax: (770) 995-9601

**CONTRACTOR**

S.M. Smith and Sons, Inc.  
10107 Truelight Church Road  
Charlotte, NC 28277  
Attn: Michael Smith  
Phone: (704) 545-4177  
Fax (704) 545-4172

BY Shirley Duckworth, Jr  
Signature

SHIRLEY DUCKWORTH  
Printed Name

VICE PRESIDENT  
Title

1/6/11  
Date

BY Michael Smith  
Signature

Michael Smith  
Printed Name

President  
Title

1/04/11  
Date

