



INSTRUMENT # 2017022411

FOR REGISTRATION REGISTER OF DEEDS  
Stephanie A. Norman  
Burke County, NC  
11/30/2018 at 09:22:22 AM  
Book 2377 Page 806 (8)  
FEE: \$26.00

INSTRUMENT # 2017022411

## TRAIL EASEMENT AGREEMENT

THIS TRAIL EASEMENT AGREEMENT (this “**Agreement**”), dated as of Nov. 29 2018 (the “**Agreement Date**”), is entered into between **BFH Partners LLC**, a North Carolina limited liability company (“**BFH Partners LLC**”); and **BURKE COUNTY**, a political subdivision of the State of North Carolina (the “**County**”).

### ARTICLE I Background

#### 1.01 Property.

- (a) BFH Partners LLC is the owner in fee simple of multiple parcels of land, containing an aggregate of approximately 202.17 acres, located along the south side of South Mountain Institute Rd, in Burke County, North Carolina (the “**BFH Partners LLC Property**”). The BFH Partners LLC Property is shown on that Deed recorded in Deed Book 2337 at Page 665 in the Public Records (as defined below).
- (b) BFH Partners LLC has agreed to grant to the County a perpetual non-exclusive easement and right-of-way to construct, maintain and operate a public trail and park (the “**Trail**”), as part of the Lake James Loop/Overmountain Victory Trail system, on a portion of the BFH Partners LLC Property (the “**Walking Trail Easement Area**”), on the terms and conditions set forth in this Agreement. The width and location of the Walking Trail Easement is shown on that Plat recorded in Plat Book 49 at Page 43 (6).

**1.02 Purpose.** The purpose of this Agreement is to set forth the terms under which the Trail Facilities described in Article II can be constructed, established and maintained for activities and uses by the general public described in Article III.

**1.03 Consideration.** BFH Partners LLC acknowledges receipt of the sum of \$1.00 in consideration of the grant of easements to the County under this Agreement and other good and valuable consideration, including the promises of the County set forth in this Agreement.

### ARTICLE II Construction and Maintenance of Trail Facilities

**2.01 Grant of Trail Facilities Easement.** BFH Partners LLC, intending to be legally bound, grants, bargains, sells and conveys to the County a perpetual non-exclusive easement (“**Trail Facilities Easement**”) to enter on the Trail Easement Area at any time to construct, maintain,

repair and replace the Trail, and any one or more of the Trail Facilities described in paragraph (a) of Section 2.02. The Trail Facilities Easement is granted subject to conditions, covenants, restrictions, easements and other matters of record.

**2.02 Construction of Trail Facilities.** The County shall have the right to construct and maintain the Trail within the Trail Easement Area, along with the other items (collectively, with the Trail, the “Trail Facilities”) described in paragraph (a) of this Section 2.02.

(a) **Description of Trail Facilities.**

- (1) An unpaved trail constructed of soft surface natural materials, not to exceed six feet (6’) in width, together with steps, railings, and other surface structures which, as to wet areas, may include bridges, boardwalks and culverts (collectively, the “Trail”).
- (2) Signs to mark the Trail, to provide information related to the Trail and for interpretive purposes.
- (3) Facilities incidental to and for the convenience of users of the Trail, such as benches and wastebaskets.
- (4) A public trail parking area in the designated location on the western terminus of the Trail Easement

(b) **Maintenance of Trail Facilities.** Following the construction of the Trail, the County, at its sole expense, shall keep the Trail free from debris, obstructions and undergrowth, and shall maintain the Trail and the other Trail Facilities in an orderly condition consistent with their intended use, including any repair and replacement of trail surfaces.

**2.03 Exercise of Rights.**

(a) **Scope of Construction.** BFH Partners LLC acknowledges that the creation of the Trail and other construction, installation, maintenance and repair of the Trail Facilities includes all activities necessary for the proper construction, installation, maintenance and repair of the Trail Facilities, and may include, without limitation, installation of signage; mowing, cutting or removal of soil, rock, trees or vegetation; application of gravel, crushed stone, wood chips or paving; or other means of creating the Trail and/or identifying the Trail’s path. These activities may include vehicular use.

(b) **Standards for Construction.** The County, its employees, contractors or agents shall (i) perform all construction, maintenance, repair and replacement of the Trail Facilities in a good and workmanlike manner, in accordance with all applicable federal, state and local laws and regulations and in accordance with any standards which may apply to the performance thereof, including any professional engineering standards; (ii) obtain all necessary governmental permits and approvals for the performance of all construction, maintenance, repair and replacement of the Trail Facilities; and (iii) be responsible for all costs of performing all construction,

maintenance, repair and replacement of the Trail Facilities, including permitting costs. BFH Partners LLC shall cooperate with the County to obtain any such permits if reasonably requested at no cost to BFH Partners LLC.

- (c) **Removal of Trees.** In connection with the construction of the Trail Facilities, the County, or its contractors or agents will minimize any large tree removal, it being understood, however, that although the trail will be constructed in such a manner as to minimize tree removal, where necessary to create a level trail, it may be necessary to cut into some tree roots.

### **ARTICLE III Grant of Easement for Public Access**

**3.01 Grant of Public Access Trail Easement.** BFH Partners LLC, intending to be legally bound, grants to the County the right to make available to the public a perpetual non-exclusive easement and right-of-way over the Trail, and the right to use Trail Facilities for the purposes (“**Permitted Trail Uses**”) described in Section 3.02 (“**Public Access Trail Easement**”). The Public Access Trail Easement is granted subject to conditions, covenants, restrictions, easements and other matters of record. BFH Partners LLC and the County shall work together in good faith to develop mutually acceptable rules and regulations for the use of the Trail Facilities.

**3.02 Permitted Trail Uses.** The Trail Facilities shall be used solely:

- (a) As a right-of-way for (i) walking, hiking, jogging, bicycling, bird watching, or nature study; (ii) wheelchair use by persons who need to use wheelchairs; (iii) maintenance vehicles used in the construction, management, maintenance or stewardship purposes of the Trail Facilities; and (iv) emergency vehicles in the case of emergency within the Trail Easement Area. Any other use of or event held on the Trail Facilities shall require prior notification to, and written consent from, BFH Partners LLC.
- (b) For resource management, including the right (but not obligation) to mow, cut or remove trees, vegetation, or plant vegetation, within the Trail Easement Area.
- (c) For public trail parking only in the designated public parking area

### **ARTICLE IV Rights of BFH Partners LLC**

**4.01 Reserved Rights.** BFH Partners LLC has the rights accorded to the general public to use the Trail Facilities located on the Trail Easement Area, as well as exercise any one or more of the following rights:

- (a) **Ownership Rights.** BFH Partners LLC may exercise all rights accruing from ownership of the BFH Partners LLC Property, including, the right to engage in, or permit or invite others to engage in, all uses of the BFH Partners LLC Property, that are not expressly prohibited by this Agreement or inconsistent with the easement rights granted hereby and do not interfere with same. Without limiting the foregoing, BFH Partners LLC may construct, install, maintain, replace and use and or all of the following improvements within the Trail Easement Area in

connection with its development of the BFH Partners LLC Property: public and private roads, driveways and sidewalks (with concrete, asphalt, gravel or other similar surfaces); permanent or temporary signage of any kind; public or private utility or service lines; mail delivery and collection areas; designated areas for refuse collection; and landscaping and related non-building improvements. The County acknowledges that such development activities may lead to temporary closures of portions of the Trail from time to time.

- (b) **Enforcement Rights.** BFH Partners LLC may remove or exclude from the BFH Partners LLC Property any Persons (as defined in Section 6.04) other than the County, the County's contractors or agents, who are (i) in locations other than the Trail or other Trail Facilities located within the Trail Easement Area, or (ii) not engaged in Permitted Trail Uses.
- (c) **Grant Utility Easements.** From time to time, BFH Partners LLC may grant utility easements within the Trail Easement Area for underground utilities.
- (d) **Relocation of Trail Easement Area.** From time to time, BFH Partners LLC may relocate all or any portion of the Trail Easement Area by recording an Amendment to this Agreement whenever it becomes necessary to re-route the Trail in order to accommodate development of the BFH Partners LLC Property; provided, however, that such right may not be exercised in a manner that prevents use of the Trail, and further, that BFH Partners LLC, at their sole expense, will rebuild and replace to the same standards, any Trail Facilities removed, damaged or destroyed as a result of the exercise of such right. The County acknowledges that such activities may lead to temporary closures of portions of the Trail from time to time. Should the County desire to relocate the Trail within the Trail Easement Area at any time, such relocation shall be subject to BFH Partners LLC's prior written approval, and be completed at the County's sole expense.

## ARTICLE V      Liability Issues

**5.01 Immunity under Applicable Law.** Nothing in this Agreement limits the ability of BFH Partners LLC and the County to avail themselves of the protections offered by any applicable law affording immunity to BFH Partners LLC or the County, including, to the extent applicable, the North Carolina recreational use statutes, codified in N.C.G.S. Section 38A-1 *et. seq.*, or the North Carolina Trails System Act, codified in N.C.G.S. Section 113A-83 *et. seq.*, as they may be amended from time to time.

**5.02 Public Enters at Own Risk.** Use of any portion of the BFH Partners LLC Property by members of the general public is at their own risk. Notwithstanding any provision herein to the contrary, neither the County nor BFH Partners LLC by entering into this Agreement assume any duty to or for the benefit of the general public for defects in the location, design, installation, maintenance or repair of the Trail Facilities; for any unsafe conditions within the BFH Partners LLC Property; or for the failure to inspect for or warn against possibly unsafe conditions; or to close the Trail Facilities to public access when unsafe conditions may be present. The County will endeavor to repair damaged Trail Facilities but has no duty to do so unless and until the County receives actual notice given in accordance with Article VI of this Agreement of the need to repair an unreasonably dangerous condition.

**5.03 Covenant Against Liens.** The County shall promptly pay and discharge on or before the due date any claim or obligation for labor or materials furnished at the direction of the County which, if not paid or discharged, would result in a lien on the BFH Partners LLC Property. This Section 5.05 shall survive the termination of this Agreement.

## **ARTICLE VI Miscellaneous**

**6.01 Beneficiaries and Agents.** The rights of the County under this Agreement may be exercised by the County and any of the contractors, agents and employees acting at the direction of the County. This Agreement may be assigned by the County to another governmental entity or agency, or to another non-profit corporation whose mission includes creation and/or operation of trails or greenways, in each case without the prior consent of BFH Partners LLC. Upon any assignment of this Agreement by the County, all references in this Agreement to “the County” shall thereafter be deemed to refer to the assignee.

**6.02 Binding Agreement.** This Agreement is a servitude running with the land binding upon the BFH Partners LLC Property and, upon recordation in the in the Public Records, any subsequent owner of the Trail Easement Area shall be bound by its terms, whether or not the owner had actual notice of this Agreement, and whether or not the deed of transfer specifically referred to the transfer being under and subject to this Agreement. Subject to such limitations (if any) on the County’s right to assign as may be set forth in this Agreement, this Agreement binds and benefits BFH Partners LLC and the County, and their respective successors and assigns.

**6.03 Governing Law.** The interpretation and performance of this Agreement shall be governed by the laws of the State of North Carolina.

**6.04 Definition and Interpretation of Capitalized and Other Terms.** The following terms, whenever used in this Agreement, are to be interpreted as follows:

- (a) **“BFH Partners LLC”** means each owner of all or any portion of the Trail Easement Area for so long as that owner owns all or any portion of the Trail Easement Area.
- (b) **“Person”** means an individual, organization, trust, or other entity.
- (c) **“Public Records”** means the public records of the Office of the Register of Deeds for Burke County, North Carolina.
- (d) **“Including”** means “including, without limitation.”
- (e) **“May”** is permissive and implies no obligation; **“must”** or **“shall”** are obligatory.

**6.05 Incorporation by Reference.** Each exhibit or schedule referred to in this Agreement is incorporated into this Agreement by this reference.

**6.06 Amendments; Waivers.** No amendment or waiver of any provision of this Agreement or consent to any departure by a party from the terms of this Agreement is effective unless the amendment, waiver or consent is in writing and signed by an authorized signatory for the other party. A waiver or consent is effective only in the specific instance and for the specific purpose given. An amendment must be recorded in the Public Records.



**6.07 Severability.** If any provision of this Agreement is determined to be invalid, illegal or unenforceable, the remaining provisions of this Agreement remain valid, binding, and enforceable. To the extent permitted by applicable law, the parties waive any provision of applicable law that renders any provision of this Agreement invalid, illegal, or unenforceable in any respect.

**6.08 Recordation.** The County may record this instrument in the Public Records at its expense.

**6.09 Successors.** Subject to the terms of Section 6.01, the covenants, terms, conditions and restrictions of this Agreement shall be binding upon, and inure to the benefit of, the parties hereto and their respective successors and assigns, and shall continue as a servitude running in perpetuity with the BFH Partners LLC Property. Specifically, but without limitation, BFH Partners LLC may assign and convey all of its rights and obligations hereunder to The Enclave on Lake James POA Inc.

**6.10 Counterparts.** This Agreement may be signed in multiple counterparts, each of which constitutes an original, and all of which, collectively, constitute only one agreement.

**6.11 Entire Agreement.** This is the entire agreement of BFH Partners LLC and the County pertaining to the subject matter of this Agreement. The terms of this Agreement supersede in full all statements and writings between BFH Partners LLC, the County, and others pertaining to the matters set forth in this Agreement.

**6.12 Notices.** Any notice contemplated by this Agreement must be in writing, addressed as set forth below and shall be either (a) sent by United States Mail, postage prepaid, registered or certified mail, return receipt requested, in which case the notice will be deemed delivered two (2) business days after being deposited in the United States mail; (b) sent by overnight delivery using a nationally recognized overnight courier, in which case the notice shall be deemed delivered one (1) business day after deposit with such courier; (c) sent by e-mail in which case the notice shall be deemed delivered upon confirmed transmission of such notice; provided that no later than the next business day after the e-mail is sent, a hard copy of the e-mail transmission is also sent in the manner set forth in (a), (b) or (d) of this Section 6.12; or (d) sent by personal delivery, in which case the notice will be deemed delivered on the date of delivery. Either party may change its address by giving the other party five (5) days advance written notice of such change.

If to BFH Partners LLC, to:

BFH Partners LLC  
200 N Harbor Place Suite D  
Davidson, NC 28036  
Attention: Jim Deal  
E-mail: jdeal@premierland.com

If to the County, to: BURKE COUNTY

P.O. Box 219  
Morganton, North Carolina 28680  
Attention: County Manager  
E-mail: bryan.steen@burkenc.org

IN WITNESS WHEREOF, BFH Partners LLC and the County by their respective duly authorized representatives, have caused this Agreement to be executed as of the day and year first above written.

**BFH PARTNERS LLC**, a North Carolina limited liability company

By: *Ben Vanhook*  
Name: *Benjamin Vanhook*  
Its: *Managing member*

**THE COUNTY:**

**BURKE COUNTY**, a political subdivision of the State of North Carolina

By: *Jeffrey C Brittain*  
Name: *Jeffrey C. Brittain*  
Its: *Chairman, Board of Commissioners*

STATE OF NORTH CAROLINA  
COUNTY OF *Burke*

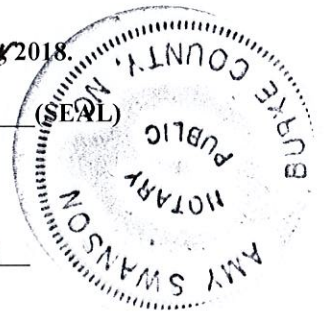
I, *Amy Swanson* the undersigned Notary Public of the County and State aforesaid, certify that *Benjamin Vanhook*, personally came before me this day and acknowledged that he is the *Managing member* of BFH PARTNERS, LLC, a North Carolina limited liability company and that by authority duly given and as the act of such entity, he signed the foregoing instrument in its name on its behalf as its act and deed.

Witness my hand and notarial seal, this the *27* day of *November* 2018.

My Commission Expires: *8-25-21*  
NOTARY PUBLIC

*Amy Swanson*

Print Name: *Amy Swanson*



STATE OF NORTH CAROLINA  
COUNTY OF Burke

I, Kay Honeycutt Draughn the undersigned Notary Public of the County and State aforesaid, certify that Jeffrey C. Brittain, personally came before me this day and acknowledged that — he is the BOC Chairman of the COUNTY OF BURKE, a political subdivision of the State of North Carolina, and that by authority duly given and as the act of such entity, he signed the foregoing instrument in its name on its behalf as its act and deed.

Witness my hand and notarial seal, this the 29<sup>th</sup> day of Nov., 2018.

My Commission Expires: 10-15-2022 Kay Honeycutt Draughn (SEAL)  
NOTARY PUBLIC



Print Name: Kay Honeycutt Draughn