



## ARLINGTON COUNTY, VIRGINIA

**County Board Agenda Item  
Meeting of September 26, 2009**

**DATE:** September 8, 2009

**SUBJECT:** Enactment of an Ordinance of Encroachment to Allow 133 Separate Retaining Wall Tie-backs to Encroach into 3,892 Square Feet of the Right-of-Way of 25th Street South, Abutting Parcel C, Section 3, and Parcel D-1, Section 4, Shirlington Crest, RPC Nos. 31033270 and 31033313, with Conditions; and Approval of a Wall Maintenance and Tie-back Agreement with Covenants Running with the Land and a Deed of Easement for Access to Retaining Wall.

**Applicant/Owner:** Shirlington Neighborhoods, LLC

### **C. M. RECOMMENDATIONS:**

1. Enact the attached Ordinance to Allow the Encroachment of Retaining Wall Tie-backs into the Southern Portion of the County Right of Way for 25th Street South, Such Portion Being Located Adjacent to the Northern Property Line of Parcel C, Section 3 and Parcel D-1, Section 4, Shirlington Crest, Between the Intersection of 25th Street South and South Monroe Street to Approximately One Hundred Feet East of the Intersection of 25th Street South and South Lowell Street, Respectively, RPC Nos. 31033270 and 31033313, with Conditions.
2. Approve the attached Wall Maintenance and Tie-back Agreement with Covenants Running with the Land (the "Agreement").
3. Approve the attached Deed of Easement for Access to Retaining Wall (the "Easement").
4. Authorize the Real Estate Bureau Chief, Engineering and Capital Projects Division, Department of Environmental Services, to execute, on behalf of the County Board, all documents necessary to effectuate the Ordinance, including, but not limited to, the Agreement, and the Easement, subject to approval as to form by the County Attorney.

**ISSUES:** The Applicant has requested permission to install 133 permanent retaining wall tie-backs under a portion of the County's right-of-way for 25th Street South. There are no issues identified with this request.

County Manager: \_\_\_\_\_

County Attorney: \_\_\_\_\_

Staff: Linda Collier, Michael Halewski, Real Estate Bureau, DES

**SUMMARY:** The Applicant is requesting the enactment of the “Ordinance of Encroachment”, attached hereto as “Attachment 1”, which will allow the Applicant to install 133 permanent retaining wall tie-backs that will extend under a portion of the County’s right-of-way for 25th Street South. The Ordinance of Encroachment contains certain conditions designed to, among other things, protect the County’s right-of-way. If enacted, the requested Ordinance of Encroachment would continue in effect until the retaining wall tie-backs encroaching into the right-of-way are destroyed, removed, no longer in use, or not continuously and promptly maintained by the Applicant.

**BACKGROUND:** The Applicant is the owner and developer of the Shirlington Crest subdivision, a by-right townhouse development located at the northwest corner of South Four Mile Run Drive and Shirlington Road (See Vicinity Maps One and Two, attached hereto as “Attachments 5” and “Attachment 6”, respectively). The plans for the Shirlington Crest townhouse development require the developer to construct a large retaining wall on the northern portion of Parcel C, Section 3 and Parcel D-1, Section 4, of the Shirlington Crest subdivision. The retaining wall requires approximately 133 steel rebar tie-backs to be inserted laterally into subterranean portions of the adjacent and abutting property to support the retaining wall. The County is the owner of the right-of-way for 25th Street South that is adjacent to and abutting Parcel C, Section 3 and Parcel D-1, Section 4, of the Shirlington Crest subdivision. Therefore, the Applicant is seeking the Ordinance of Encroachment to permit the installation of the subterranean retaining wall tie-backs under a portion of the improved right-of-way constituting 25th Street South.

**DISCUSSION:** The subject site is a portion of the County right-of-way for 25th Street South between South Monroe Street and 25th Court South. The spatial locations of the proposed retaining wall tie-backs are more particularly depicted on the plans attached to this report as “Attachment 4”. The proposed encroaching subterranean tie-backs will not interfere with any existing or proposed future utilities in this portion of right-of-way.

No portion of the retaining wall will be on County-owned property. The retaining wall and tie-backs shall remain the property of the Applicant, its successors in title and interest. The ongoing inspection, maintenance and repair of the retaining wall and the tie-backs shall remain the responsibility of the Applicant and its successors in title and interest. As a condition of the proposed Ordinance of Encroachment, the Applicant has agreed to and executed the Agreement, attached hereto as Attachment 2, which details the Applicant’s (including its successors in title and interest) ongoing inspection and maintenance responsibilities. The Agreement also contains appropriate risk management provisions, such as insurance requirements, to protect the County’s interest in the right-of-way.

As discussed above, the Agreement obligates the Applicant and its successors in title and interest to bear full responsibility for the inspection, maintenance and repair of the retaining wall and the tie-backs. Because a homeowners’ association will likely become the successor in title and interest to the Applicant, the Agreement also requires the Applicant to amend the existing homeowners’ association documents to establish a separate fund to pay for the ongoing inspections, maintenance and repairs of the retaining wall and tie-backs. The Applicant has agreed to contribute an initial amount of one hundred thousand dollars (\$100,000) to the fund, with future contributions coming from the homeowners’ association dues. The Agreement also requires the Applicant and its successors in title and interest to maintain a commercial general

liability insurance policy, on an occurrence basis, insuring against all claims arising from the location, installation, construction, inspection, maintenance, replacement, repair, or removal of the retaining wall or the tie-backs pursuant to this Agreement. The insurance policy must have a minimum coverage of not less than five million dollars (\$5,000,000) per occurrence and not less than ten million dollars (\$10,000,000) in the aggregate, and must name the County Board of Arlington County as an additional insured and a loss payee. The County's Risk Manager has reviewed and approved of the insurance requirements.

To further ensure the integrity of the lateral support for the County's right-of-way adjacent to the retaining wall, the Ordinance of Encroachment contains a condition that requires the Applicant to grant to the County Board the Easement, attached hereto as Attachment 3, for emergency access and repair. If the Applicant or its successors in title and interest fail to meet their inspection, maintenance and/or repair obligations, then the Easement grants the County the right to enter the Applicant's or its successors in title and interest's land to perform such inspections, maintenance and/or repairs at the Applicant's or its successors in title and interest's sole cost and expense.

The Agreement and the Easement are required as conditions of the Ordinance of Encroachment to mitigate the risks associated with the construction, inspection, maintenance and repair of the retaining wall and tie-backs, and to ensure that any remaining minimal risk is completely borne by the Applicant and its successors in title and interest.

The Applicant and County staff investigated alternative retaining wall designs that would not require the Applicant to obtain the enactment of an encroachment ordinance. The County engineering staff concluded that the feasible alternative design, a cantilever wall, would be less structurally sound than the proposed tie-back wall, and thus pose a greater risk of subsidence of the County's adjacent and abutting right-of-way than the proposed retaining wall with tie-backs. Staff concludes that the proposed retaining wall with tie-backs poses a minimal long-term risk to the County's adjacent and abutting right-of-way. Staff further concludes that the provisions of the proposed Ordinance of Encroachment, the Agreement, and the Easement are sufficient to address the minimal risk associated with the proposed retaining wall with tie-backs.

If enacted, the requested Ordinance of Encroachment would continue in effect until the retaining wall tie-backs encroaching into the right-of-way are destroyed, removed, no longer in use or not continuously and promptly maintained by the Applicant.

Legal and Physical Description: The proposed encroachment areas are more particularly shown on the plans attached hereto as Attachment 4. The proposed retaining wall tie-backs will encroach into the subterranean portions of a portion of the County right-of-way for 25th Street South adjacent to and abutting Parcel C, Section 3 and Parcel D-1, Section 4, of the Shirlington Crest subdivision. The County acquired this portion of the right-of-way of 25th Street South by: 1) a Deed of Dedication from Charles T. Jesse and Annie G. Jesse, his wife, dated May 21, 1924, and recorded on June 30, 1924 in Deed Book 206, at Page 68, among the land records of Arlington County, Virginia; and 2) a Dedication from the United States of America, Federal Public Housing Authority, dated November 13, 1944, and recorded on December 30, 1944 in Deed Book 657, at Page 485, among the land records of Arlington County, Virginia.

Compensation: Staff obtained, from a licensed real estate appraiser, an appraisal of the value of the proposed encroachment. The appraised value of the encroachment is one hundred thirteen

thousand dollars (\$113,000). Therefore, Staff recommends that the Applicant pay one hundred thirteen thousand dollars (\$113,000) as compensation for the encroachment permitted by this encroachment ordinance; the Applicant has agreed to pay this compensation.

Public Notice: Public notice of the proposed Ordinance of Encroachment was given in accordance with the Code of Virginia. Notices were placed in the September 1, 2009 and September 8, 2009 issues of the Washington Times for the County Board Meeting of September 26, 2009.

**FISCAL IMPACT:** The County will receive compensation from the Applicant in the amount of one hundred thirteen thousand dollars (\$113,000), which will be deposited into a County paving fund (Account number: Fund 313, Natural Account 437405, Cost Center 43522, Project PV09, Source of Funds 0319, Task 0000) .

**CONCLUSION:** It is recommended that the County Board enact the attached Ordinance to Allow the Encroachment of Retaining Wall Tie-backs into the Southern Portion of the County Right of Way for 25th Street South, Such Portion Being Located Adjacent to the Northern Property Line of Parcel C, Section 3 and Parcel D-1, Section 4, Shirlington Crest, Between the Intersection of 25th Street South and South Monroe Street to Approximately One Hundred Feet East of the Intersection of 25th Street South and South Lowell Street, Respectively, RPC Nos. 31033270 and 31033313, with Conditions; and approve the Wall Maintenance and Tie-back Agreement with Covenants Running with the Land and the Deed of Easement for Access to Retaining Wall.

## ATTACHMENT 1

**ORDINANCE TO ALLOW THE ENCROACHMENT OF RETAINING WALL TIEBACKS INTO THE SOUTHERN PORTION OF THE COUNTY RIGHT OF WAY FOR 25<sup>TH</sup> STREET SOUTH, SUCH PORTION BEING LOCATED ADJACENT TO THE NORTHERN PROPERTY LINE OF PARCEL C, SECTION 3 AND PARCEL D-1, SECTION 4, SHIRLINGTON CREST, BETWEEN THE INTERSECTION OF 25<sup>TH</sup> STREET SOUTH AND SOUTH MONROE STREET TO APPROXIMATELY ONE HUNDRED FEET EAST OF THE INTERSECTION OF 25<sup>TH</sup> STREET SOUTH AND SOUTH LOWELL STREET, RESPECTIVELY, RPC NOS. 31033270 and 31033313, WITH CONDITIONS.**

BE IT ORDAINED, by the County Board of Arlington County, Virginia, that the Applicant/Owner, Shirlington Neighborhoods, LLC (“Applicant/Owner”), being the owner of the project known as “Shirlington Crest” is hereby permitted to construct retaining wall subterranean tiebacks, which tiebacks will encroach underground into the southern portion of the County right of way for 25<sup>th</sup> Street South, such portion being located adjacent to the northern property line of Parcel C, Section 3 and Parcel D-1, Section 4, Shirlington Crest, between the intersection of 25<sup>th</sup> Street South and South Monroe Street to approximately one hundred feet east of the intersection of 25<sup>th</sup> Street South and South Lowell Street, respectively, RPC Nos. 31033270 and 31033313, with conditions set forth herein. The dimensions (length, width and depth (by elevations)), and spatial location of the permitted encroachment (jointly, “Encroachment”) are depicted in Attachment 4 to the County Manager’s September 8, 2009 Report, entitled “Plat Showing Retaining Wall Tieback Encroachment Areas Into 25<sup>th</sup> Street South, Sections 3 and 4, Shirlington Crest, Deed Book 3941, Page 1447 Arlington County, Virginia”, Sheets 1 through 9, prepared by Bowman Consulting, dated January 27, 2009, revised May 4, 2009, revised August 26, 2009 (“Plat”).

BE IT FURTHER ORDAINED, that this permission for the Encroachment shall not begin until the Applicant/Owner completes, or causes to be completed, each of the following:

1. Execution by the Applicant/Owner, approval and execution by or on behalf of the County Board, and recordation by the Applicant/Owner of a Wall Maintenance and Tie Back Agreement With Covenants Running With the Land (the “Agreement”), which Agreement is attached to the County Manager’s September 8, 2009 Report as Attachment 2; and
2. Execution by the Applicant/Owner, acceptance by or on behalf of the County Board, and recordation by the Applicant/Owner of a Deed of Easement for Access to Retaining Wall (the “Easement”), which Easement is attached to the County Manager’s September 8, 2009 Report as Attachment 3; and
3. Securing an insurance policy as specified in the Agreement and delivering evidence thereof acceptable to the County Real Estate Bureau Chief and the County Risk Manager

BE IT FURTHER ORDAINED, that the permission, pursuant to this Encroachment Ordinance (“Ordinance”), for the Applicant/Owner to continue to encroach into the County right of way for 25<sup>th</sup> Street South as set forth on the Plat, is subject to, among other things, the Applicant/Owner faithfully performing or causing to be performed the following:

- A. Construction of the retaining wall located adjacent to the northern property line of Parcel C, Section 3 and Parcel D-1, Section 4, Shirlington Crest, between the intersection of 25<sup>th</sup> Street South and South Monroe Street to one hundred feet past the intersection of 25<sup>th</sup> Street South and South Lowell Street (“Retaining Wall”) in compliance with the approved engineering plans and all applicable County codes, ordinances, standards and specifications; and
- B. Bi-annual inspection by a licensed structural engineer of the Retaining Wall and, if necessary, the retaining wall tiebacks that anchor the Retaining Wall; and
- C. Periodic maintenance and immediate repair of the Retaining Wall, including the wall tiebacks, by the Applicant/Owner for all maintenance of and/or damage to the Retaining Wall and the tiebacks.

BE IT FURTHER ORDAINED, that this permission for the Encroachment shall continue until such time as that portion of the Retaining Wall tiebacks encroaching within the public right of way, and the Retaining Wall itself is destroyed, removed, no longer in use, or not continuously and promptly maintained by the Applicant/Owner, or if the Applicant/Owner fails either to comply with the requirements, obligations and conditions set forth in this Ordinance; or fails to comply with the requirements of the Agreement. Nothing in this Ordinance shall be construed either: to allow the installation by Applicant/Owner, or permit to exist, any structure whatsoever other than the Retaining Wall tiebacks within the Encroachment shown on the Plat; or, to allow any greater encroachment beyond the dimensions and spatial area shown on the Plat.

BE IT FURTHER ORDAINED, that the Applicant/Owner, and its successors in title and interest, shall continuously and promptly maintain the tiebacks and the Retaining Wall, and maintain, restore, repair, and replace all County owned facilities, within and adjacent to the public right-of-way, including, but not limited to, any sidewalk, curb and gutter, roadbed, utilities, landscaping and paved surface, which are damaged by the installation, maintenance, failure, deterioration, destruction, continued existence, repair or removal of the Retaining Wall and the Retaining Wall tiebacks. All installation, maintenance, repair or removal of the above described facilities shall be performed in accordance with all applicable County codes, ordinances, standards and specifications.

BE IT FURTHER ORDAINED, that this Ordinance shall not be construed to release the Applicant/Owner and its successors in title and interest, of negligence on their part on account of such Encroachment and the permissions provided by this Ordinance. The Applicant/Owner, by constructing, or causing to be constructed, and by continuing to have the Retaining Wall tiebacks encroach within the public right of way, thereby agrees for itself and its successors in title and interest to indemnify and hold harmless the County Board of Arlington County, Virginia and County officials, officers, employees, and agents from all claims, negligence, damages, costs and

expenses arising out of the location, construction, installation, maintenance, repair, removal failure, deterioration, destruction and continued existence of the Retaining Wall tiebacks, and the permission for the Retaining Wall tiebacks to encroach within the public right of way permitted by this Ordinance.

BE IT FURTHER ORDAINED, that no Retaining Wall tiebacks permitted by this Ordinance to encroach within the public right-of-way shall be constructed and or located until the Applicant/Owner has paid to the County the sum of One Hundred Thirteen Thousand (\$113,000) as compensation for the encroachment.

BE IT FURTHER ORDAINED, that the failure of the Applicant/Owner and its successors in title and interest, to fully comply with the requirements of the Agreement shall constitute a revocation of the permission provided by this Ordinance.

BE IT FURTHER ORDAINED, that on or before September 29, 2012, the Applicant/Owner, at its sole cost and expense, shall cause a certified copy of this Ordinance and the Plat, approved by the Director of the Department of Environmental Services or his designee, to be recorded in the Land Records and a copy thereof shall be promptly delivered by the Applicant/Owner to the Real Estate Bureau Chief, Engineering and Capital Projects Division, Department of Environmental Services.

## ATTACHMENT 2

**RECORDING REQUESTED BY,  
AND WHEN RECORDED RETURN TO:**

Real Estate Bureau Chief  
Engineering & Capital Projects Division  
Department of Environmental Services  
Arlington County Government  
2100 Clarendon Boulevard, Suite 900  
Arlington, Virginia 22201

RPC #: 31033270 &  
31033313

This document is exempt from Recordation Tax per Virginia Code § 58.1-811.A.3

**WALL MAINTENANCE AND TIE-BACK AGREEMENT  
WITH  
COVENANTS RUNNING WITH THE LAND**

THIS WALL MAINTENANCE AND TIE-BACK AGREEMENT WITH COVENANTS RUNNING WITH THE LAND (the "Agreement"), dated this \_\_\_\_ day of \_\_\_\_\_, 2009, made by and among SHIRLINGTON NEIGHBORHOOD, LLC, a Virginia limited liability company (the "Property Owner"), Grantor and Grantee; THE COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA, a body corporate (the "County Board"), Grantor and Grantee; TRSTE, INC., a Virginia corporation (the "Trustee"), Grantor and Grantee; and WACHOVIA BANK, N.A., a national banking association authorized to do business in Virginia (the "Noteholder"), Grantor and Grantee. The County Board and the Property Owner are sometimes jointly hereinafter referred to collectively as the "Parties".

RECITALS

R-1. WHEREAS, the Property Owner is the fee simple owner of two (2) parcels of real property, known as Parcel C, Section 3 (RPC # 31033270), and Parcel D-1, Section 4 (RPC # 31033313), Shirlington Crest, situate in Arlington County, Virginia, by virtue of: (i) a Special Warranty Deed dated January 12, 2006 and recorded among the land records of Arlington County, Virginia (the "Land Records") on January 12, 2006 in Deed Book 3941, at Page 1447; (ii) a Deed of Resubdivision, Vacation, Rededication, Easements, and Vacation of Easements dated February 25, 2009 and recorded among the Land Records on February 27, 2009 in Deed Book 4247, at Page 474 (Section 3, Shirlington Crest); and a Deed of Resubdivision and Easements dated March 13, 2009 and recorded among the Land Records on April 24, 2009 in Deed Book

4264, at Page 613 (Section 4, Shirlington Crest);

R-2 WHEREAS, Parcel C, Section 3 and Parcel D-1, Section 4, Shirlington Crest are hereinafter sometimes jointly referred to as the "Property";

R-3. WHEREAS, by a Credit Line Deed of Trust recorded among the Land Records in Deed Book 3952 at page 1911, the Property was conveyed in trust to the Trustee to secure an indebtedness unto the Noteholder;

R-4. WHEREAS, the Property Owner is currently constructing a by-right townhouse development ("Shirlington Crest"), on the Property;

R-5. WHEREAS, County Board, by a Deed of Dedication recorded among the Land Records in Deed Book 657 at page 485, owns such real property adjacent to and abutting the Property, which is known as 25<sup>th</sup> Street South (the "County Right-of-Way");

R-6. WHEREAS, the Property is adjacent to and abuts the southern right-of-way line of the County Right-of-Way;

R-7. WHEREAS, to facilitate construction of one of the remaining portions of Shirlington Crest, the Property Owner desires to erect a retaining wall (the "Wall") on the Property, and to support the Wall, seeks permission from the County Board, by means of an Ordinance of Encroachment, entitled, "Ordinance to Allow the Encroachment of Retaining Wall Tiebacks into the Southern Portion of the County Right of Way for 25<sup>th</sup> Street South, Such Portion Being Located Adjacent to the Northern Property Line of Parcel C, Section 3 and Parcel D-1, Section 4, Shirlington Crest, Between the Intersection of 25<sup>th</sup> Street South and South Monroe Street to Approximately One Hundred Feet East of the Intersection of 25<sup>th</sup> Street South and South Lowell Street, Respectively, RPC Nos. 31033270 and 31033313, with Conditions," enacted on \_\_\_\_\_ (the "Ordinance"), to locate, install, construct, inspect, maintain, replace, repair and remove approximately one hundred thirty-three (133) subterranean wall tie-backs, as hereinafter described in Section 2 (collectively, the "Tie-backs"), and depicted in Attachment 4 to the County Manager's Report, dated September 8, 2009, and entitled, "Plat Showing Retaining Wall Tieback Encroachment Areas Into 25<sup>th</sup> Street South, Sections 3 and 4, Shirlington Crest, Deed Book 3941, Page 1447, Arlington County, Virginia", Sheets 1 through 9, prepared by Bowman

Bowman Consulting, dated January 27, 2009, revised May 4, 2009, further revised on August 26, 2009 (the "Plat"), within portions of the County Right-of-Way, as permitted by the Ordinance, such portions of the County Right-of-Way hereinafter referred to as the "Encroachment Areas";

R-8. WHEREAS, the purposes of this Agreement include, but are not limited to: 1) obligating the Property Owner and its successors in title and interest, to locate, install, construct, inspect, maintain, replace, repair and remove the Wall and the Tie-backs in accordance with the terms of this Agreement and the Ordinance; and 2) stating the remedies available to the County Board in the event the Property Owner, its successors in title and interest, fail to locate, install, construct, inspect, maintain, replace, repair and remove the Wall and the Tie-backs in accordance with the terms of this Agreement and the Ordinance;

R-9. WHEREAS, the Property Owner has granted a perpetual easement to the County Board over, under, across and through those portions of the Property necessary for the County Manager's designee or designees to perform any or all of the location, installation, construction, inspection, maintenance, replacement, repair, or removal of the Wall or the Tie-backs in that certain Deed of Easement recorded among the Land Records in Deed Book \_\_\_\_\_ at Page \_\_\_\_\_ (the "Deed of Easement"); and

R-10 WHEREAS, by this Agreement, the County Board and the Property Owner, with the consent and approval of the Trustee and the Noteholder, set forth the Parties' respective rights pertaining to the location, installation, construction, inspection, maintenance, replacement, repair and removal of the Wall and the Tie-backs, which obligations shall be covenants running with the land (i.e. the Property).

W I T N E S S E T H:

NOW, THEREFORE, for and in consideration of the sum of Ten Dollars (\$10.00), cash in hand paid, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and in further consideration of the mutual benefits to be received by the Parties hereto, the Parties agree as follows:

1. Application of Agreement. This Agreement applies to those portions of

the County Right-of-Way within which the Property Owner is permitted to install Tie-Backs pursuant to the Ordinance, and further applies, as provided herein, to the Wall.

2. Location, Installation, Construction, Inspection, Maintenance, Replacement, Repair and Removal of the Tie-backs and the Wall by Property Owner.

(a) The Property Owner shall install the Tie-backs and otherwise construct the Wall according to and in strict compliance with all applicable laws, ordinances and regulations. The Property Owner shall provide prior written notice to the Real Estate Bureau Chief, Engineering and Capital Projects Division, Department of Environmental Services, Arlington County Government (the "REB Chief"), on behalf of the County Board, at least forty-eight (48) hours before entering the Encroachment Areas to install, maintain, inspect or repair any or all of the Tie-backs, unless the exigency of the circumstances reasonably require more immediate action by the Property Owner, in which case the Property Owner shall provide such notice to the REB Chief as soon as practicable. The Property Owner shall confine all location, installation, construction, inspection, maintenance, replacement, repair and removal activities and work regarding the Tie-backs and the Wall to the Encroachment Areas. The Property Owner shall have access to the Encroachment Areas only from the Property.

(b) The Property Owner shall remove neither the Tie-backs nor the Wall without restoring the lateral support of the County Right-of-Way to the condition on the date this Agreement is executed on behalf of the County Board (the "Effective Date"), or to such other condition as approved in writing by the County Manager. Beginning on the Effective Date, and continuing until such time as the Tie-backs and the Wall are removed, and the lateral support of the County Right-of-Way is restored to the condition on the Effective Date, or to such other condition as approved in writing by the County Manager, the Property Owner shall, at its sole cost and expense, maintain the Tie-backs and the Wall in a condition that prevents, without limitation, all damage, failure, settling, deterioration or collapse whatsoever (as determined solely by the County Board, its employees, agents or contractors) to the County Right-of-Way, structures and facilities, including the paved roadway, sidewalks, curb and gutter, all public utilities installed over, under, across or through the County Right-of-Way, all

appurtenances thereto, and any other real and personal property of the County Board located over, under, across or through the County Right-of-Way. The Property Owner, at its sole cost and expense, shall perform, or cause to be performed, an initial inspection and bi-annual (i.e. an initial inspection and subsequent inspections every second year thereafter) inspections of the Tie-backs and the Wall, which inspections shall be performed by a licensed structural engineer. The first of such inspections shall occur not later than two (2) years after the earlier of either: 1) the date construction of the Wall is completed; 2) the building permit issued by the County Inspection Services Division for the construction of the Wall is finalized (i.e. closed by the County Building Inspector); or 3) the building permit issued by the County Inspection Services Division for the construction of the Wall expires. The Property Owner shall cause a final report of the inspection prepared by the license structural engineer to be delivered to the REB Chief, not less than sixty (60) days after each bi-annual inspection has been completed. Notwithstanding the foregoing, if, at any time the Property Owner becomes aware that any or all of the Tie-backs, or any portion of the Wall, are failing or are not performing as intended or designed, then the Property Owner shall promptly notify the County Board in writing.

(c) The Property Owner acknowledges and agrees that the Wall and the Tie-backs shall be and remain the property of the Property Owner, its successors in title and interest. The Property Owner further acknowledges and agrees that the County Board shall neither be: 1) obligated to perform any location, installation, construction, inspection, maintenance, replacement, repair or removal of the Tie-backs or the Wall; nor 2) responsible in any way for any of the Tie-backs or the Wall, either during the location, installation and construction of the Tie-backs or thereafter when installed. Such obligations to perform any location, installation, construction, inspection, maintenance, replacement, repair or removal shall be the obligations solely of the Property Owner.

(d) The Property Owner shall be liable for, and shall promptly repair, at its sole cost and expense, without limitation, any and all damage to the County Right-of-Way, structures and facilities, including the paved roadway, sidewalks, curb and gutter, all public utilities installed over, under, across or through the County Right-of-

Way, including all appurtenances thereto, and any other real and personal property of the County Board located over, under, across or through the County Right-of-Way, resulting from the location, installation, construction, inspection, maintenance, replacement, repair or removal of the Tie-backs or the Wall, or arising from acts or omissions made by Property Owner (including its employees, agents, contractors, successors in title and interest). In addition, the Property Owner shall be liable to the County Board, without limitation, for any and all damage to the County Right-of-Way, structures and facilities, including the paved roadway, sidewalks, curb and gutter, all public utilities installed over, under, across or through the County Right-of-Way, including all appurtenances thereto, and any other real and personal property of the County Board located over, under, across or through the County Right-of-Way, which damage results from or arises out of any vertical or horizontal movement or shifting of any portion of the dirt within the underlying County Right-of-Way, or any vibrations, created or caused by the location, installation, construction, inspection, maintenance, replacement, repair or removal of the Tie-backs or the Wall or arising from acts or omissions made by the Property Owner (including its employees, agents, contractors, successors in title and interest, and assigns). The Property Owner shall provide prompt written notice to the County Board of any damage to the County Right-of-Way, structures and facilities, including the paved roadway, sidewalks, curb and gutter, all public utilities installed over, under, across or through the County Right-of-Way, including all appurtenances thereto, and any other real and personal property of the County Board located over, under, across or through the County Right-of-Way. The Property Owner further agrees that the County Board shall not be responsible for any damage to the Encroachment Areas, including, without limitation, the Tie-backs, or to any other portion of the County Right-of-Way or the Property, caused, resulting, or arising out of the location, installation, construction, inspection, maintenance, replacement, repair or removal of the Tie-backs or the Wall.

3. Inspection by County of Tie-Backs and Wall. The County Board, its employees, agents, and contractors, shall have the non-exclusive right, at all reasonable times and upon prior written notice to the Property Owner, to enter upon the Property in an area (or areas) that is reasonably necessary to conduct the inspection referenced in

this paragraph, to examine and inspect the Tie-backs and/or the Wall, and the work related thereto. Any such examination or inspection shall not be construed as either an express or implied acceptance or approval by the County Board, its elected and appointed officials, officers, employees, agents, contractors, or subcontractors, of the location, installation, construction, inspection, maintenance, replacement, repair, or removal of the Tie-backs, the Wall, or the performance of associated work.

4. Easement to the County. Prior to the execution of this Agreement on behalf of the County Board, the Property Owner shall execute and deliver to the REB Chief the Deed of Easement attached to the County Manager's September 8, 2009 Report as Attachment 3. Notwithstanding the foregoing, the Deed of Easement shall neither create, nor be construed to create, any affirmative obligation on the County Board to perform any location, installation, construction, inspection, maintenance, replacement, repair or removal of the Wall, the Tie-backs, or any associated work.

5. Additional Approvals. This Agreement is neither intended, nor shall be construed to, relieve the Property Owner, its employees, agents, contractors, successors in title and interest, from its independent obligation to obtain all required permits and comply with all applicable laws, ordinances and regulations.

6. County Parcel Documentation.

(a) Prior to commencing any location, installation or construction of the Tie-backs or the Wall, the Property Owner shall perform the following tasks, to the reasonable written satisfaction of the County Manager or his designee, for the purpose of establishing a baseline condition of the Encroachment Areas and County Right-of-Way, structures and facilities, including the paved roadway, sidewalks, curb and gutter, all public utilities installed over, under, across or through the County Right-of-Way, including all appurtenances thereto, existing on the County Right-of-Way as of the Effective Date:

(i) install permanent survey control monitoring points at a maximum of one hundred (100) foot intervals on the portion of the County Right-of-Way upon or within which public improvements presently exist;

(ii) perform a complete crack survey of the portion of all the County Right-of-Way upon or within which public improvements presently exist, which survey shall identify and characterize all existing cracks in said improvements; and

(iii) obtain color digital photographs, and written documentation of all the public improvements on the County Right-of-Way existing as of the Effective Date, with close-up images of cracks, staining, indications of settlement or other fragile conditions.

(b) The Property Owner shall deliver complete, true copies of all photographs, and written documentation required by this Paragraph 6 to the REB Chief prior to commencing any location, installation or construction of the Tie-backs.

7. Utilities.

(a) The Property Owner shall not enter upon or disturb any portion of the County Right-of-Way within five (5) feet, in any direction, of any public utility, related component or facility, such five (5) feet shall be measured from the outermost limits of any public utility, related component or related facility to the Tie-backs or to the ground-disturbing activity.

(b) The Property Owner, at its sole cost and expense, shall repair all damage to any and all utilities and related facilities located on, or installed within, the Encroachment Areas and/or County Right-of-Way caused by: any location, installation, construction, inspection, maintenance, replacement, repair, or removal of the Wall or the Tie-backs; entry upon the Encroachment Areas or the County Right-of-Way by the Property Owner; or, any damage, failure, settling, deterioration or collapse to the Tie-backs or the Wall. The County Board retains the right to excavate and work in the Encroachment Areas and the County Right-of-Way to repair and/or replace any utilities, provided that the County Board shall not unreasonably interfere with the Property Owner's location, installation, construction, inspection, maintenance, replacement, repair, or removal of the Wall or the Tie-backs. The County Board, for itself and for its employees, contractors and subcontractors, retains the right to enter and use the Encroachment Areas for all other uses and purposes not inconsistent with the Property Owner's location, installation, construction, inspection, maintenance, replacement,

repair, or removal of the Wall or the Tie-backs pursuant to this Agreement.

8. Insurance.

(a) The Property Owner, its successors in title and interest, at its sole cost and expense, shall obtain and maintain a commercial general liability insurance policy, including coverage for completed operations, from an insurance carrier satisfactory to the County Board, providing coverage on an occurrence basis (i.e. not a claims-made basis) for claims arising from or in connection with the exercise of the permission granted hereunder by the County Board for personal injury, death, property damage or loss suffered by any person, or entity (specifically including damage to the County Right-of-Way, structures and facilities, including the paved roadway, sidewalks, curb and gutter, all public utilities installed over, under, across or through the County Right-of-Way, including all appurtenances thereto, and any other real and personal property of the County Board located over, under, across or through the County Right-of-Way, due to damage, failure, settling, deterioration or collapse of the Wall or the Tie-Backs) with a minimum coverage of not less than Five Million Dollars (\$5,000,000) per occurrence and Ten Million Dollars (\$10,000,000) in the aggregate, which insurance coverage shall remain in full force and effect continuously at all times until such time as the Tie-backs and the Wall are removed, and the lateral support of the County Right-of-Way is restored to the condition it is in upon the Effective Date, or to such other condition as approved in writing by the County Manager.

Such insurance policy shall protect the persons and entities indemnified under Section 12 of this Agreement from liability. The insurance policies and policies' limits shall neither operate as a limit of the Property Owner's liability to the County Board under this Agreement, nor as a limit of the Property Owner's duty of indemnification hereunder.

(b) Prior to the Effective Date, and at the beginning of each year thereafter until such time as the Tie-backs and the Wall are removed, and the lateral support of the County Right-of-Way is restored to the condition it is in upon the Effective Date, or to such other condition as approved in writing by the County Manager, the Property Owner shall furnish the County Manager or his designee with

certificates of insurance for the insurance policy required by this Section 8, indicating that the premiums for the required insurance policy is prepaid for the policy period, that such policy insures all activity contemplated under this Agreement, and that such policy contains a thirty (30) day notice provision prior to termination, cancellation, non-renewal, material change, or reduction of coverage except in the event of nonpayment of premium in which case such notice provision shall be ten (10) days. The policy shall provide, among other things, that the actions or omissions of any insured party shall not invalidate the policy as against any other insured party or otherwise adversely affect the rights of any insured party under the policies. No provision contained in this Agreement shall act as a waiver of any rights of subrogation of the insurance company which is the primary insurer for the County Board.

(c) The insurance required to be carried by the Property Owner herein shall be with an insurance company licensed to do business in the Commonwealth of Virginia and rated not lower than A-X in the A.M. Best Rating Guide. Such insurance shall:

(i) contain an endorsement that such policy shall remain in full force and effect notwithstanding that the insured has released its right of action against any party before the occurrence of a loss; and

(ii) name the County Board and others listed hereinafter as additional insureds and loss payee; and

(iii) provide that the policy shall not be canceled, failed to be renewed or materially amended without at least thirty (30) days' prior written notice to the County Board except in the event of nonpayment of premium in which case such notice provision shall be ten (10) days. On or before the Effective Date and, thereafter, not less than thirty (30) days before the expiration date of the insurance policy, a certificate of insurance, together with evidence satisfactory to the County Manager or his designee of the payment of all premiums for such policy, shall be delivered to the County Manager or his designee. Such insurance policy shall name the County Board, its elected and appointed officials, officers, employees, agents, contractors, subcontractors, successors in title and interest, and assigns as additional insureds and the

certificate of insurance shall so state. Coverage afforded under this section shall be primary as respects the County Board, its elected and appointed officials, officers, employees, agents, contractors, subcontractors, successors in title and interest, and assigns.

(d) The following definition of the term "County Board" applies to all policies issued under this Agreement:

"The County Board of Arlington County, Virginia and any affiliated or subsidiary Board, Authority, Committee, or Independent Agency (including those newly constituted), provided that such affiliated or subsidiary Board, Authority, Committee, or Independent Agency is either a Body Politic created by the County Board of Arlington County, Virginia, or one in which controlling interest is vested in Arlington County; or Arlington County Constitutional Officers."

(e) All insurance policies and certificates of insurance required of the Property Owner hereunder shall be endorsed to include the following provision:

"It is agreed that this policy is not subject to cancellation, non-renewal, material change, or reduction in coverage until thirty (30) days prior written notice has been given to Arlington County, Virginia."

9. Owners' Association Declarations. If the Property Owner, its successors in title and interest, cause the Property, or any portion thereof, to be conveyed to or governed by, a homeowners' or condominium owners' association (the "Association"), then the Property Owner, its successors in title and interest, shall be obligated to ensure that such Association's documents (whether or not recorded) shall include the following provisions:

(a) The Association shall maintain, at all times until such time as the Tie-backs and the Wall are removed, and the lateral support of the County Right-of-Way is restored to the condition it is in upon the Effective Date, or to such other condition as

approved in writing by the County Manager, a policy or policies of commercial general liability insurance, insuring against liability for bodily injury, death and property damage occurring as a result of the location, installation, construction, inspection, maintenance, replacement, repair, removal, damage, failure, settling, deterioration or collapse of or to the Tie-backs or the Wall, including any damage to the County Right-of-Way, structures and facilities, including the paved roadway, sidewalks, curb and gutter, all public utilities, including all appurtenances thereto, installed over, under, across or through the County Right-of-Way, and any other real and personal property of the County Board located over, under, across or through the County Right-of-Way. Such coverage shall further include any damage, failure, settling, deterioration or collapse of or to the Tie-backs or the Wall, including any damage to the County Right-of-Way, structures and facilities, including the paved roadway, sidewalks, curb and gutter, all public utilities, including all appurtenances thereto, installed over, under, across or through the County Right-of-Way, and any other real and personal property of the County Board located over, under, across or through the County Right-of-Way, resulting from or arising out of any vertical or horizontal movement or shifting of any portion of the dirt within the underlying County Right-of-Way, or any vibrations, created or caused by the location, installation, construction, inspection, maintenance, replacement, repair, removal, damage, failure, settling, deterioration or collapse of or to the Tie-backs or the Wall, or arising from acts or omissions made by the Property Owner or the Association (including their employees, agents, contractors, successors in title and interest, and assigns). Such policy or policies shall afford protection to a limit of at least Five Million Dollars (\$5,000,000) per occurrence and Ten Million Dollars (\$10,000,000) in the aggregate, for bodily injury, death, and property damage, and shall name the County Board of Arlington County, Virginia, its elected and appointed officials, officers, employees and agents, as additional insureds, and shall be otherwise consistent with the other requirements of Section 8 of this Agreement.

(b) The Association shall establish and maintain a separate fund (the "Fund") for the payment of all expenses related to the Association's ongoing obligations as a successor in title and interest to the Property Owner for the location, installation, construction, inspection, maintenance, replacement, repair, or removal of the Tie-backs

and the Wall. The Property Owner shall make an initial contribution of One Hundred Thousand Dollars (\$100,000) to the Fund upon the earlier to occur of either: 1) the date construction of the Wall and is completed; 2) the building permit issued by the County Inspection Services Division for the construction of the Wall is finalized (i.e. closed by the County Building Inspector); or 3) the date the building permit issued by the County Inspection Services Division for the construction of the Wall expires. Thereafter, an additional amount not less than Ten Thousand Dollars (\$10,000) per year shall be added to the Fund on or before the anniversary date of the initial funding, which additional amount shall be funded by a portion of the Association's annual assessments.

10. Contractors and Subcontractors.

(a) The Property Owner may contract or subcontract any portion of the location, installation, construction, inspection, maintenance, replacement, repair, or removal of the Tie-back within the Encroachment Areas, and the Wall, to any entity which is competent to perform such work. Prior to commencement of any work or activities by a contractor or subcontractor covered by this Agreement or any work in or affecting the County Right-of-Way, the Property Owner shall deliver to the REB Chief evidence that the contractor or subcontractor maintains the same or additional insurance coverage as the Property Owner is herein required to maintain pursuant to this Agreement. In no event shall such contract or subcontract relieve the Property Owner of any of its obligations, responsibilities or liabilities under this Agreement.

(b) The Property Owner agrees to promptly pay all persons supplying labor, services and materials in the performance of any and all current and future work within the Encroachment Areas.

11. "As-built" Plans. The Property Owner shall maintain two (2) full-size sets of "as-built" plans for the Tie-backs and Wall, which plans shall be periodically kept current by the Property Owner during the installation of all Tie-backs and the construction of the Wall. All variations in the plans shall be shown in the same general detail as used in the Plat. Upon completion of the installation of the Tie-backs and the construction of the Wall, the as-built plans shall be made available for review by the County Manager or his designee as often as requested. Within fifteen (15) days after the

completion of the installation of the Tie-backs and the construction of the Wall, the Property Owner shall deliver to the REB Chief, two (2) completed sets of as-built plans for the Tie-backs and the Wall, approved and signed by the Property Owner's engineer, such final as-built plans shall indicate the actual locations, both vertically and horizontally, of the Tie-backs and the Wall as finally constructed.

12. No Liability, Indemnification.

(a) The existence and use of all real and personal property of the Property Owner, its employees, agents, contractors, subcontractors, successors in title and interest, and assigns, in and/or on the Encroachment Areas or the County Right-of-Way, shall be and remain, under any and all circumstances, at the sole risk and responsibility of the Property Owner, its employees, agents, contractors, subcontractors, successors in title and interest. The County Board, its elected and appointed officers, officials and employees, shall not be liable to any person or entity for any damage to, or loss of such real or personal property, or for any loss, damage or expense of any kind or nature caused, directly or indirectly, by the location, installation, construction, inspection, maintenance, replacement, repair, or removal of the Tie-backs, or by any delay or failure to provide any such location, installation, construction, inspection, maintenance, replacement, repair, or removal, or by any interruption of service or loss of use thereof or for any loss of business or delays in construction howsoever caused. The Property Owner hereby covenants to defend, indemnify and hold harmless the County Board and its elected and appointed officials, officers, employees, agents, contractors, subcontractors, successors in title and interest, and assigns from all liability, costs and expenses for lost, stolen, damaged or destroyed real and personal property arising out of the entry upon, or use of, the Encroachment Areas or County Right-of-Way pursuant to the terms of this Agreement by the Property Owner, its employees, agents, contractors, subcontractors, successors in title and interest.

(b) The Property Owner acknowledges and agrees that the County Board, its elected and appointed officials, officers, employees, agents, contractors, subcontractors, successors in title and interest, and assigns, shall neither be liable for, nor responsible for, any damages, special, consequential, punitive or otherwise, as a

result of any claim relating to this Agreement or the Property Owner's use of, or entry upon, the Encroachment Areas or the County Right-of-Way pursuant to the terms of this Agreement.

(c) The Property Owner, for its employees and agents, shall defend, indemnify and hold harmless the County Board, and its elected and appointed officials, officers, employees, agents, contractors, subcontractors, successors in title and interest, and assigns, individually and collectively, from and against all claims, causes of action, damages, liabilities, losses, costs, expenses, affidavits, liens, or suits asserted by any person, firm, or entity on account of:

(i) any work performed pursuant to the Agreement;

(ii) any labor, material or services furnished to the Property Owner during the performance of the location, installation, construction, inspection, maintenance, replacement, repair or removal of the Tie-backs; and

(iii) arising from or in connection with any injury or other damage to any person or property resulting from the work to be performed by the Property Owner, its employees, agents, contractors, subcontractors, successors in title and interest, and assigns, pursuant to the terms of this Agreement.

(d) All successors in title and interest to the Property Owner shall also indemnify and hold harmless the County Board, its elected and appointed officials, officers, employees, agents, contractors, subcontractors, successors in title and interest, and assigns, individually and collectively, in the same manner as the Property Owner in Section 12.(c), above.

(e) The Property Owner shall require all of the Property Owner's contractors and subcontractors involved in the location, installation, construction, inspection, maintenance, replacement, repair, or removal of the Tie-back within the Encroachment Areas, and the Wall, also to indemnify and hold harmless the County Board, its elected and appointed officials, officers, employees, agents, contractors, subcontractors, successors in title and interest, and assigns, individually and collectively, in the same manner as the Property Owner in Section 12.(c), above.

(f) The Property Owner acknowledges and agrees that the County Board shall neither be liable for, nor responsible to any person or entity for any damage, failure, settling, deterioration or collapse of the Wall or of the failure of the Tie-backs, during or after construction, from any cause or for any reason whatsoever.

13. Closure of Encroachment Areas and/or County Right-of-Way for Public Health, Safety and Welfare. The Property Owner understands and agrees that the County Board or the County Manager have the right to temporarily or permanently close the Encroachment Areas and/or the County Right-of-Way, in the interest of the public health, safety and welfare, without any liability whatsoever to the County Board or others.

14. Default. The term "Default," as used herein, shall mean any violation or failure by the Property Owner to perform any of the material conditions, covenants, obligations or agreements of this Agreement, as well as any failure whatsoever to abide by any of the terms of the Ordinance. In the event of Default, the Property Owner shall be and remain liable to the County Board for all monetary and other damages, liabilities, costs, and expenses arising from such Default.

15. Termination.

(a) If any Default shall continue for a period of thirty (30) days after a written notice thereof ("Notice of Default") has been delivered by the County Board to the Property Owner, then the County Board, at its sole option, may terminate this Agreement by written notice thereof to the Property Owner ("Notice of Termination").

(b) Notwithstanding the foregoing, if the Property Owner reasonably demonstrates in writing to the County Manager that such Default cannot be cured within thirty (30) days after the date of the County's written Notice of Default, and the Property Owner has commenced and continues to diligently pursue curing the Default within thirty (30) days after the date of the County's written Notice of Default, then the Property Owner shall continue to cure such defect without the County terminating this Agreement, provided, however, that the Property Owner is continuously, diligently, and reasonably pursuing such cure. If, in the County's sole and absolute opinion, the Property Owner fails to continue to diligently pursue curing the

Default at any time after the expiration of thirty (30) days after the date of the County's written Notice of Default, then the County may immediately terminate this Agreement by sending the Property Owner a written Notice of Termination.

(c) If this Agreement is terminated, then, upon the receipt of a written notice of termination from the County Manager, the Property Owner shall, at its sole cost and expense, remove the Tie-backs and the Wall, and restore the lateral support of the County Right-of-Way to the condition it is in upon the Effective Date, or to such other condition as approved in writing by the County Manager. If the Property Owner fails to promptly begin such removal and restoration activities, then the County Board shall have the right to prevent the Property Owner's entry to or access upon or within the Encroachment Areas or any other portion of the County Right-of-Way and to immediately remove, at the County Board's sole option, and at the Property Owner's sole cost, risk, and expense, any or all of the Tie-backs and any property of the Property Owner located upon or within the Encroachment Areas or the County Right-of-Way. If the Property Owner fails to terminate its use of the Encroachment Areas upon the termination of this Agreement, then the Property Owner shall be deemed a trespasser. The Property Owner may, by providing written notice to the County Board, terminate this Agreement at any time prior to commencing the location, installation or construction of the Tie-backs or the Wall, without cause, without penalty and without any liability whatsoever to the Property Owner, except any liability, cost and expense previously accrued or paid.

16. Agreement to Pay Attorneys' Fees and Expenses. The Property Owner shall pay to the County Board all reasonable costs and expenses, including, without limitation, reasonable attorneys' fees, incurred by the County Board in enforcing through a judicial proceeding any of the provisions of this Agreement, unless the judicial proceeding results in a final order or judgment dismissing with prejudice the action or suit filed by the County Board. All of the sums paid or obligations incurred by the County Board as aforesaid, shall be paid by the Property Owner to the County Board within fifteen (15) days after written demand by the County Board.

17. Notices. All notices or other communications hereunder shall be in

writing and shall be either hand delivered, sent by commercial courier (such as Federal Express) or sent by United States registered or certified mail, return receipt requested, at the following addresses or such other address hereafter provided by notice to the other party:

- If to County Board:           Arlington County Government  
Office of the County Manager  
2100 Clarendon Boulevard, Suite 302  
Arlington, VA 22201  
Attn: County Manager
  
- With a copy to:               Arlington County Government  
Department of Environmental Services  
Engineering & Capital Projects Division  
Real Estate Bureau  
2100 Clarendon Boulevard, Suite 900  
Arlington, VA 22201  
Attn: Real Estate Bureau Chief
  
- With a copy to:               Arlington County Government  
Department of Environmental Services  
Transportation Division  
2100 Clarendon Boulevard, Suite 900  
Arlington, VA 22201  
Attn: Director, Transportation Division
  
- With a copy to:               Arlington County Government  
Department of Environmental Services  
Engineering & Capital Projects Division  
Engineering Bureau  
2100 Clarendon Boulevard, Suite 810  
Arlington, VA 22201  
Attn: Engineering Bureau Chief
  
- If to the Property Owner:   Shirlington Neighborhoods, LLC  
11111 Sunset Hills Road, Suite 200  
Reston, Virginia 20190

Any party may, by notice given at least five (5) days before such change becomes effective, designate a new address to which such notices shall be sent. Notice shall be deemed effective when delivered.

18. No Partnership, Joint Venture, Lease, or Easement; Use by the County Board. The Parties hereby agree that nothing contained in this Agreement shall be deemed or construed as creating a partnership, joint venture, the relationship of landlord and tenant between the County Board and the Property Owner; or an ownership, leasehold interest, easement, or other property right in any portion of the County Right-of-Way, structures or facilities existing therein.

19. Role of the County Board/County Board Decisions; No Waiver. The execution of this Agreement on behalf of the County Board shall neither constitute nor be deemed to be governmental approval for any actions or interests contemplated herein, or for any other governmental approval or consent required to be obtained by the County Board. Whenever, in this Agreement, the County Board is required to join in, consent, give its approval, or otherwise act under this Agreement, it is understood that such obligations are meant to apply to the County Board acting in its capacity as a party hereto and not in its capacity as a governing authority or local governing body. Nothing in this Agreement shall be construed to waive any of the County Board's powers, rights or obligations as a governing authority of local governing body, whether or not affecting the Property and the Encroachment Areas, including, but not limited to its police power, right to grant or deny permits, right to collect taxes or fees, or any other power, right or obligation whatsoever.

20. No Waiver of Sovereign Immunity. Nothing in this Agreement, nor any action taken by the County Board pursuant to this Agreement, nor any document which arises out of this Agreement, shall constitute or be construed as a waiver of either the sovereign immunity or governmental immunity of the County Board, or of its elected and appointed officials, officers and employees.

21. No Rights in Third Parties. The Parties hereto mutually agree that no provision of this Agreement shall create in the public, or in any person or entity other than those signing this Agreement as parties hereto, rights as a third party beneficiary hereunder, or authorize any person or entity, not a party hereto, to maintain any action for personal injury, property damage, or breach of contract pursuant to the terms of this Agreement or otherwise.

22. Obligations Run with the Property; Real Covenants; Successors in Title and Interest; No Assignment by Property Owner; Recordation by Property Owner. The Property Owner, with the consent and approval of the Trustee and Noteholder, declares that the agreements, obligations, and covenants stated in this Agreement are not covenants personal to the Property Owner, but are covenants real, running with the land (i.e. the Property). Throughout this Agreement, where the term "County Board" is used, it shall include the County Board, its successors in title and interest, and assigns. Throughout this Agreement, where the term Property Owner is used, it shall include the Property Owner, its successors in title and interest. This Agreement shall not be assigned by the Property Owner. Promptly after the Effective Date, the Property Owner shall record this Agreement among the Land Records.

23. No Indemnification or Hold Harmless. Notwithstanding any other term or provision of this Agreement to the contrary, the County Board shall have no obligation to explicitly or implicitly indemnify or hold harmless the Property Owner or any third party or parties from any liability whatsoever.

24. Severability. If any term or provision of this Agreement shall be finally determined by a court of competent jurisdiction to be invalid or unenforceable, then the remainder of this Agreement, other than those terms or provisions which are held to be invalid or unenforceable, shall not be affected thereby, and each term and provision of this Agreement shall be valid and enforced to the fullest extent permitted by law.

25. Approval of Agreement by the County Board. This Agreement shall not become effective unless and until the County Board approves this Agreement and it is signed on behalf of the County Board. If this Agreement is not approved by the County Board and executed by an authorized person, then no liability whatsoever shall accrue to the County Board or the Property Owner, and the County Board and the Property Owner shall have no obligations whatsoever to each other.

26. Survival. Expiration or termination of this Agreement for any cause shall not release any party to this Agreement from any liability that, at the time of termination, has already accrued to it or that may thereafter accrue with respect to acts or omission made prior to such termination, and shall not affect in any way the survival of

any right or obligation of and party to this Agreement which is expressly or implicitly stated in this Agreement to survive termination hereof.

27. Entire Agreement/Applicable Law. This Agreement contains the entire agreement of the Parties with respect to the subject matter hereof. The Parties expressly acknowledge and represent that they have not relied on any oral or written representations, warranties, promises, statements, covenants or agreements, express or implied, direct or indirect, given or made by or on behalf of the other, except those representations, if any, expressly contained herein. This Agreement shall not be modified, changed or terminated, in whole or in part, in any manner other than by an agreement in writing signed by duly authorized representatives of the County Board and the Property Owner, with the consent and approval of the Trustee and the Noteholder. This Agreement shall be construed and enforced in accordance with the laws of the Commonwealth of Virginia. All legal actions instituted by the County Board or the Property Owner concerning this Agreement shall be filed solely in the Arlington County General District or Circuit Court and in no other court.

28. Incorporation of Recitals. The foregoing recitals are fully incorporated into this Agreement by this reference.

29. Exhibits Used for Tie-back Purposes Only. The Parties agree that each of the Attachments incorporated by reference herein, are included herein solely for the purposes of this Agreement. The County Board's use of these Attachments for such purpose shall not be deemed an acceptance, direct or implied, of such Attachments for any other purpose or agreement unless so specifically stated therein.

**[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]**

IN WITNESS WHEREOF, the County Board and the Property Owner have caused this Agreement to be executed and delivered as their respective acts, intending to be legally bound by its terms.

**COUNTY BOARD:**            **THE COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA**, a body corporate and politic

Approved this \_\_\_\_ day of \_\_\_\_\_, 20 \_\_, on behalf of the County Board of Arlington County, Virginia, a body corporate and politic, pursuant to a resolution, motion, or action of the said County Board duly adopted on \_\_\_\_\_, 20 \_\_.

BY: \_\_\_\_\_

NAME (PRINT): \_\_\_\_\_

TITLE: \_\_\_\_\_

DATE: \_\_\_\_\_

COMMONWEALTH OF VIRGINIA :  
COUNTY OF ARLINGTON            : to-wit

The foregoing instrument was acknowledged before me by \_\_\_\_\_, on behalf of THE COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA, a body corporate, this \_\_\_\_ day of \_\_\_\_\_, 200\_\_.

\_\_\_\_\_  
Notary Public

My Commission expires: \_\_\_\_\_

**PROPERTY OWNER:** SHIRLINGTON NEIGHBORHOODS, LLC, a Virginia limited liability company

BY: David W. Duggar

NAME (PRINT): David W. Duggar

TITLE: Vice President

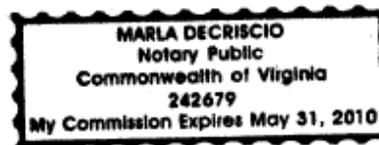
DATE: 9/10/09

STATE/Commonwealth of Virginia :  
CITY/COUNTY OF Fairfax : to-wit

The foregoing instrument was acknowledged before me on this 10<sup>th</sup> day of September, 2009, by David W. Duggar, Vice President of SHIRLINGTON NEIGHBORHOODS, LLC, a Virginia limited liability company.

Marla Decriscio  
Notary Public

My Commission expires: May 31, 2010



**TRUSTEE:**

**TRSTE, INC.**, a Virginia corporation

BY: Margaret J. Dunsmore

NAME (PRINT): Margaret J. Dunsmore

TITLE: Vice President

DATE: August 10, 2009

COMMONWEALTH OF VIRGINIA:

CITY/COUNTY OF LOUDOUN : to-wit

The foregoing instrument was acknowledged before me on this 10th day of August , 2009, by Margaret J. Dunsmore, Vice President of TRSTE, INC., a Virginia corporation.

Val W. Frame  
Notary Public

My Commission expires: 12/31/2012



**NOTEHOLDER:**

**WACHOVIA BANK, N.A.**, a national banking association authorized to do business in Virginia

BY: Margaret J. Dunsmore

NAME (PRINT): Margaret J. Dunsmore

TITLE: Vice President

DATE: August 10, 2009

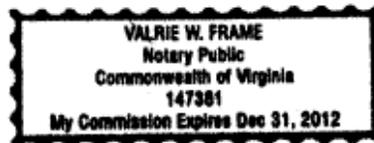
STATE/COMMONWEALTH OF VIRGINIA:

CITY/COUNTY OF LOUDOUN: to-wit

The foregoing instrument was acknowledged before me on this 10<sup>th</sup> day of August, 2009, by Margaret J. Dunsmore, Vice President of WACHOVIA BANK, N.A., a national banking association authorized to do business in Virginia.

Valrie W. Frame  
Notary Public

My Commission expires: 12/31/2012



APPROVED AS TO FORM:

\_\_\_\_\_  
COUNTY ATTORNEY

## ATTACHMENT 3

**RECORDING REQUESTED BY,  
AND WHEN RECORDED RETURN TO:**

Real Estate Bureau Chief  
Engineering & Capital Projects Division  
Department of Environmental Services  
Arlington County Government  
2100 Clarendon Boulevard, Suite 900  
Arlington, Virginia 22201

RPC #: 31033270 &  
31033313

This document is exempt from Recordation Tax per Virginia Code § 58.1-811.A.3

### DEED OF EASEMENT FOR ACCESS TO RETAINING WALL

THIS DEED OF EASEMENT FOR ACCESS TO RETAINING WALL (this "Easement") is made as of this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, by and among SHIRLINGTON NEIGHBORHOODS, LLC, a Virginia limited liability company (together with its successors in title and interest, collectively "Shirlington"), Grantor; TRSTE, INC. (the "Trustee"), Grantor; WACHOVIA BANK, N.A., (the "Noteholder"), Grantor; and THE COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA, a body corporate and politic and a political subdivision of the Commonwealth of Virginia (the "County"), Grantee.

### RECITALS

A. Shirlington is the owner of those certain parcels of real property, known as Parcel C, Section 3 and Parcel D-1, Section 4, Shirlington Crest, situate in Arlington County, Virginia, by virtue of a Special Warranty Deed recorded in Deed Book 3941, at Page 1447, a Deed of Resubdivision, Vacation, Rededication, Easements, and Vacation of Easements recorded in Deed Book 4247, at Page 474 (Section 3, Shirlington Crest), and a Deed of Resubdivision and Easements recorded in Deed Book 4264, at Page 613 (Section 4, Shirlington Crest) among the land records of Arlington County, Virginia (the "Land Records"), and further identified as Arlington County Real Property Code Nos. 31033270 and 31033303, respectively (the "Property").

B. The Property was conveyed in trust to the Trustee to secure an indebtedness unto the Noteholder consisting of a Credit Line Deed of Trust recorded among the Land Records in Deed Book 3952 at page 1911 (the "Deed of Trust").

C. Shirlington is developing the Property pursuant to Arlington County Site Plan #SWM-05-964 (the "Site Plan") which includes, but is not limited to, and the construction of a retaining wall adjacent to the northern property line of the Property, between the intersection of 25<sup>th</sup> Street South and South Monroe Street to approximately one hundred feet east of the intersection of 25<sup>th</sup> Street South and South Lowell Street (the "Retaining Wall"), as depicted on a plat entitled "Plat Showing Retaining Wall Tieback Encroachment Areas into 25<sup>th</sup> Street South, Sections 3 and 4, Shirlington Crest, Deed Book 3941, Page 1447, Arlington County, Virginia", Sheets 1 through 9, prepared by Bowman Consulting, dated January 27, 2009, revised May 4, 2009, and further revised August 26, 2009 (the "Plat"), which plat is attached as Attachment 4 to the County Manager's report, dated September 8, 2009, recorded herewith.

D. To enable the construction of the Retaining Wall (which Wall shall solely remain the property of Shirlington, its successors in title and interest), Shirlington filed with the County an Application for an Encroachment to permit Shirlington to locate and maintain 133 retaining wall tiebacks along the northern property line of the Property under and into the County right of way for 25<sup>th</sup> Street South.

E. By Ordinance of Encroachment entitled "Ordinance to Allow the Encroachment of Retaining Wall Tiebacks into the Southern Portion of the County Right of Way for 25<sup>th</sup> Street South, Such Portion Being Located Adjacent to the Northern Property Line of Parcel C, Section 3 and Parcel D-1, Section 4, Shirlington Crest, Between the Intersection of 25<sup>th</sup> Street South and South Monroe Street to Approximately One Hundred Feet East of the Intersection of 25<sup>th</sup> Street South and South Lowell Street, Respectively, RPC Nos. 31033270 and 31033313, With Conditions", enacted on September \_\_\_\_, 2009 (the "Ordinance"), the County permitted Shirlington to locate 133 retaining wall tiebacks under and into the County Right of Way for 25<sup>th</sup> Street South as set forth on the Plat, subject to such conditions as provided in the Ordinance.

F. As a condition of the Ordinance, Shirlington agreed to enter into a Deed of Easement to permit the County, its employees, agents, representatives, contractors and subcontractors to enter the Property to perform any inspections, maintenance, repairs or replacement (if the County elects to do so) on the Retaining Wall.

G. Contemporaneously with the execution of this Easement, Shirlington and County have entered into a Wall Maintenance and Tie-Back Agreement with Covenants Running with the Land, dated \_\_\_\_\_, 20\_\_ ("Agreement"), which Agreement sets forth specified duties and responsibilities of the Grantor and rights of the County. The Agreement is recorded among the Land Records.

H. It is the desire of Shirlington, with the consent and approval of the Trustee and the Noteholder, to grant and convey the following easement to the County.

NOW THEREFORE, in consideration of the sum of Ten Dollars (\$10.00), cash in hand paid, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Grantors do hereby create, establish, grant and convey unto the Grantee, its employees, agents, representatives, contractors, subcontractors, successors and assigns, a non-exclusive, perpetual easement over, under, across and through the following parcels of real property:

1. Parcel C, Section 3, Shirlington Crest, as the same is duly dedicated, platted, and recorded in Deed Book 4247 at Page 474 among the Land Records; and
2. Parcel D-1, Section 4, Shirlington Crest, as the same is duly dedicated, platted, and recorded in Deed Book 4264 at Page 613 among the Land Records.

(the "Easement Area"), for the purposes of emergency location, installation, construction, inspection, maintenance, replacement, repair or removal (if the County elects to do so in accordance with the terms of the Agreement and the Ordinance) of the Retaining Wall and/or the

tie-backs securing the Retaining Wall (such permitted uses or rights collectively referred to hereinafter as "Easement"). This Easement is subject to the following terms and conditions:

1. The County, its employees, agents, representatives, contractors, subcontractors, successors and assigns shall have full and free use of the Easement Area for the purposes named, and shall have all rights and privileges reasonably necessary to exercise the use of the Easement Area, including the right of access to and from the Easement, and the right to use the adjoining land of the Owner where necessary; provided, however, that this right to use adjoining land shall be exercised only during periods of actual installation, construction, inspection, maintenance, replacement, repair, or removal of the Retaining Wall, and this right to use the adjoining land of Owner shall not be construed to allow the County to erect any building, structure or facility of a permanent nature on such adjoining land.
2. The Grantor(s) reserve the right to use the Property in any manner not inconsistent with the Easement hereby granted.
3. The Grantor(s) covenant that the Grantor(s) are seized of and have the right to convey this Deed of Easement, and that Grantor(s) shall make no use of the Easement Area which is inconsistent with the rights hereby granted.
4. The County shall have no obligation to inspect, maintain, repair, remove or replace the Retaining Wall and shall not be obligated to bear any cost or expense relating to any of the foregoing.
5. This Deed of Easement shall be recorded, by and at the cost of the Grantor(s), among the Land Records of Arlington County, Virginia, and all of the rights and obligations of this Deed of Easement shall run with the land upon which it is located and shall be binding upon Grantor and its successors, in title and interest.
6. This Deed of Easement shall be interpreted and construed in accordance with the laws of the Commonwealth of Virginia.
7. This Deed of Easement may be amended and restated only by a duly recorded instrument signed by the Grantor, and its successors in title and interest, and accepted on behalf of the County.

The Recitals are incorporated into this Deed of Easement.

IN WITNESS WHEREOF, the parties have executed this Easement as of the date first above written.

**[SIGNATURES APPEAR ON THE FOLLOWING PAGES]**

GRANTOR:

SHIRLINGTON NEIGHBORHOODS, LLC,  
a Virginia limited liability company

By: David W. Duggar (SEAL)

Name: David W. Duggar

Title: Vice President

COMMONWEALTH OF VIRGINIA  
COUNTY OF Fairfax, to wit:

The foregoing instrument was acknowledged before me this 10<sup>th</sup> day of September,  
2009, by David W. Duggar as Vice President, (Title) of SHIRLINGTON  
NEIGHBORHOODS, LLC, a Virginia limited liability company.

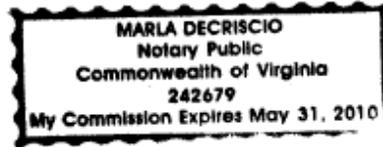
SEAL

Marla DeCriscio  
Notary Public

Marla DeCriscio  
Name

My commission expires: May 31, 2010

Registration Number: 242679



**JOINER AND SUBORDINATION TO DEED OF EASEMENT**

Wachovia Bank, N.A., as Noteholder under that certain Deed of Trust granted by Shirlington to TRSTE, INC., as Trustee, dated February 21, 2006, and recorded among the land records of Arlington County, Virginia on February 23, 2006 at Deed Book 3952, page 1911, hereby joins in the foregoing Easement solely for the purpose of consenting to and subordinating the lien of the Deed of Trust to the Easement granted with respect to the Property. The foregoing consent and subordination shall not affect in any way the lien of the Deed of Trust with respect to any other matter or thing not hereby consented to and subordinated, and the Deed of Trust shall otherwise remain in full force and effect.

**NOTEHOLDER:**

**WACHOVIA BANK, NATIONAL ASSOCIATION**, a national banking association

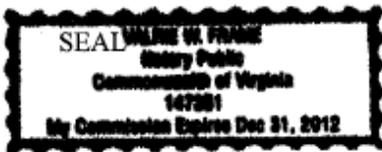
By: Margaret J. Dunsmore

Name: Margaret J. Dunsmore

Title: Vice President

COUNTY OF LOUDOUN)  
STATE OF VIRGINIA)

The foregoing instrument was acknowledged before me this 10th day of August, 2009, by Margaret J. Dunsmore, as Vice President, (Title) of WACHOVIA BANK, NATIONAL ASSOCIATION, a national banking association.



Valerie W. Frame  
Notary Public

Valerie W. Frame  
Name

My commission expires: 12/31/2012

Registration Number: 147381

TRUSTEE:

TRSTE, INC., a Virginia corporation

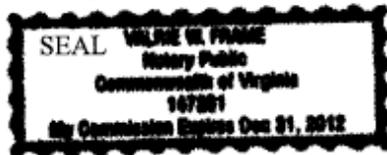
By: Margaret J. Dunsmore

Name: Margaret J. Dunsmore

Title: Vice President

COUNTY OF LOUDOUN)  
STATE OF VIRGINIA)

The foregoing instrument was acknowledged before me this 10th day of August, 2009, by Margaret J. Dunsmore, as Vice President, (Title) of TRSTE, INC., a Virginia corporation.



Valerie W. Frame

Notary Public

Valerie W. Frame

Name

My commission expires: 12/31/2012

Registration Number: 147381

**GRANTEE:**           **THE COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA**, a  
body corporate and politic and a political subdivision of the  
Commonwealth of Virginia

Accepted this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, on behalf of the County Board of  
Arlington County, Virginia, pursuant to a Resolution of the said Board adopted on  
\_\_\_\_\_, 20\_\_.

By: \_\_\_\_\_ (Seal)  
For the County Board of Arlington County, Virginia

Title: \_\_\_\_\_

COMMONWEALTH OF VIRGINIA  
COUNTY OF ARLINGTON, to wit:

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_,  
20\_\_, by \_\_\_\_\_, as \_\_\_\_\_ on behalf of  
the County Board of Arlington County, Virginia, a body corporate and politic and a political  
subdivision of the Commonwealth of Virginia.

SEAL

\_\_\_\_\_  
Notary Public

\_\_\_\_\_  
Name

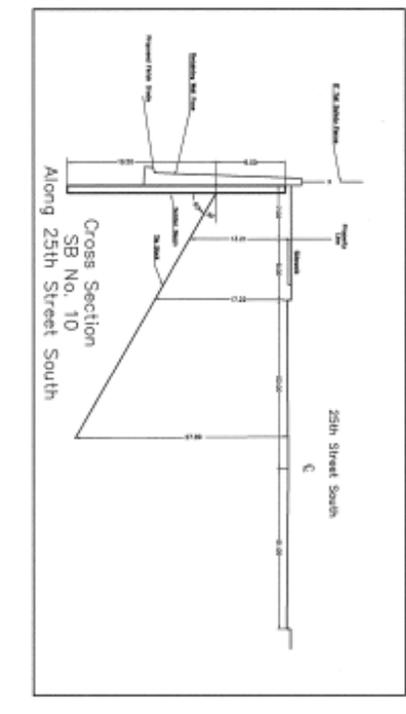
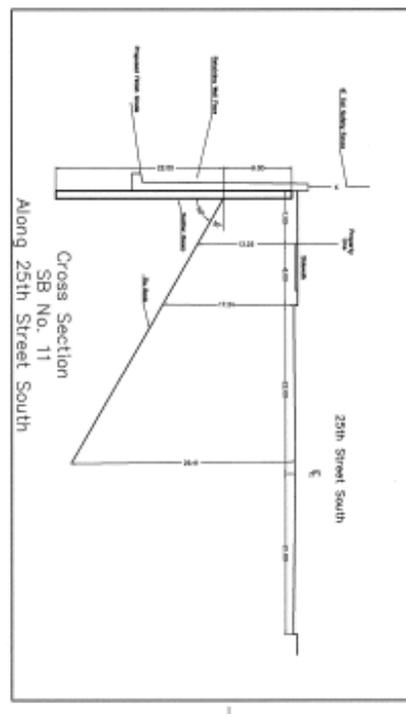
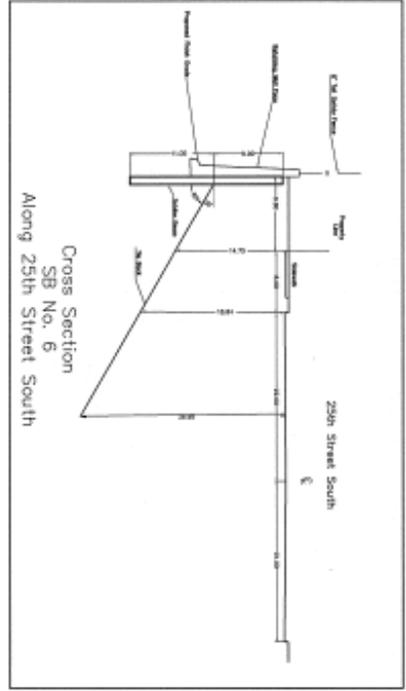
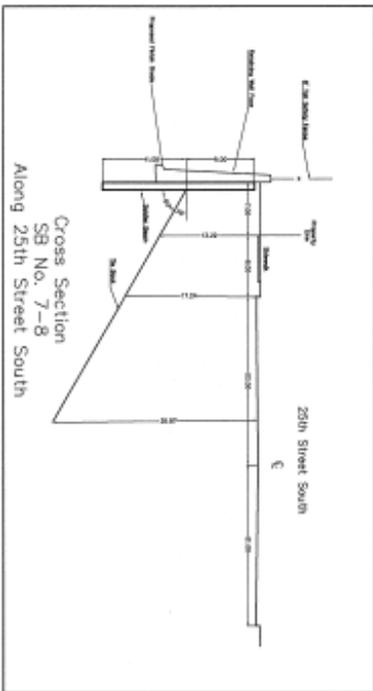
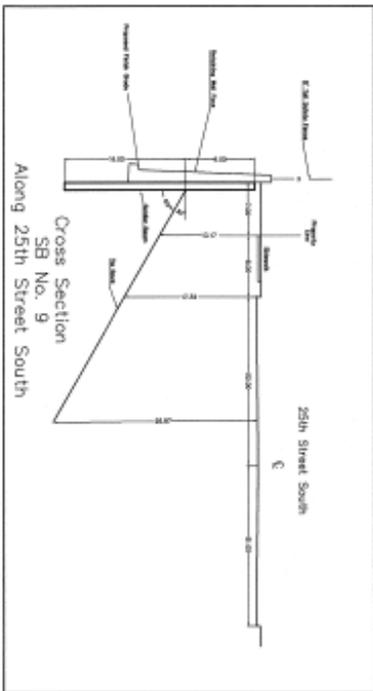
My commission expires: \_\_\_\_\_

APPROVED AS TO FORM:

\_\_\_\_\_  
COUNTY ATTORNEY (Seal)



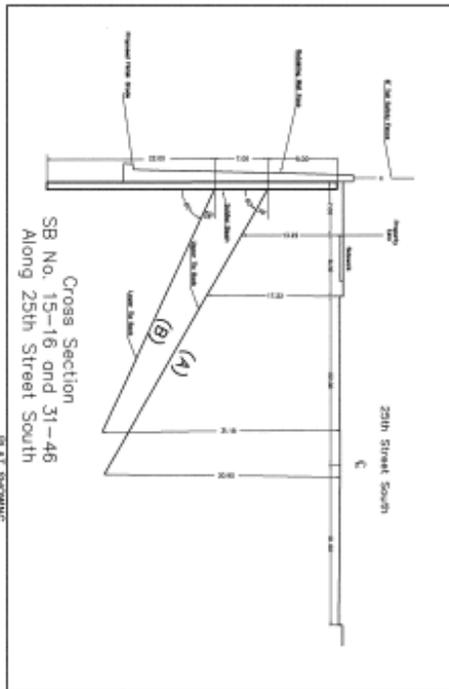
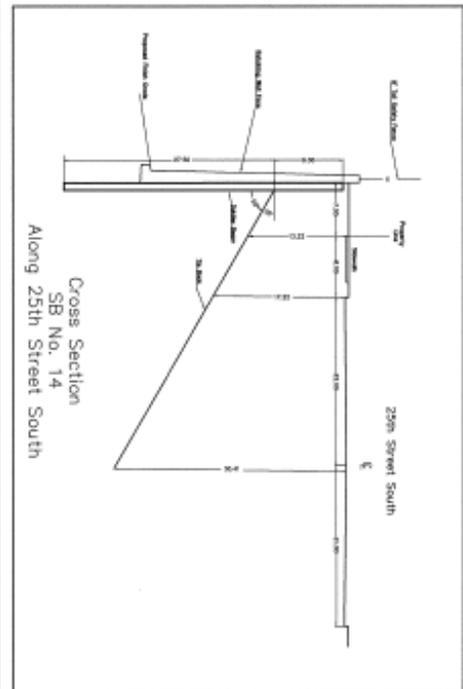
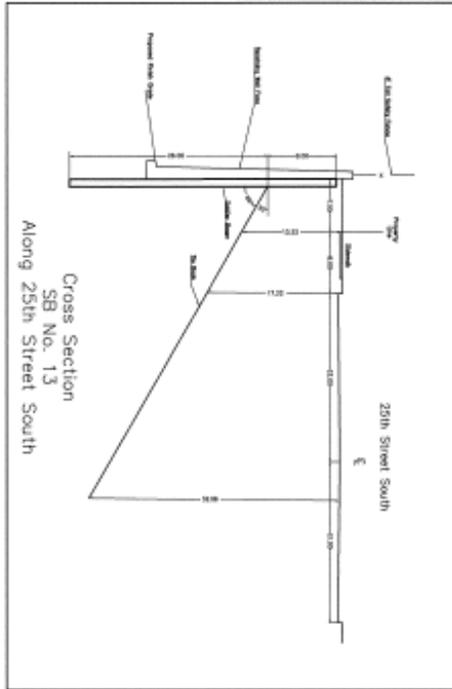
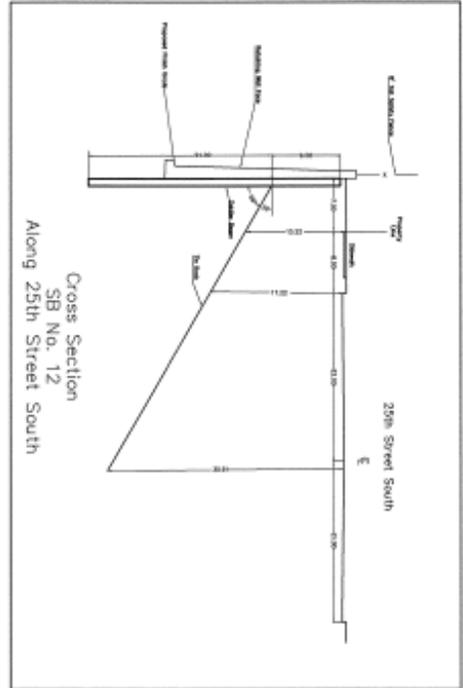
ATTACHMENT 4





DATE: JANUARY 27, 2009	SCALE: 1" = 10'
<p> <b>SHIRLINGTON CREST</b>                  RETAINING WALL, TERRACE                  ENHANCEMENT AREAS INTO                  SECTIONS 3 AND 4                  25TH STREET SOUTH                  WARD 2004, PAGE 1447                  KING COUNTY, WASHINGTON             </p>	
<p> <b>Bowman CONSULTING</b>                  12007 17th Avenue SW, Suite 200                  Seattle, WA 98148                  Phone: (206) 444-8800                  Fax: (206) 444-8800                  www.bowmanconsulting.com             </p>	
PROJECT NO. 3182-07-0111 SHEET NO. 3182-07-0111-00000000 COUNTY 007 003	SHEET 3 OF 8

ATTACHMENT 4



SCALE: 1" = 10'

REVISIONS

NO.	DATE	DESCRIPTION
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2		
3		
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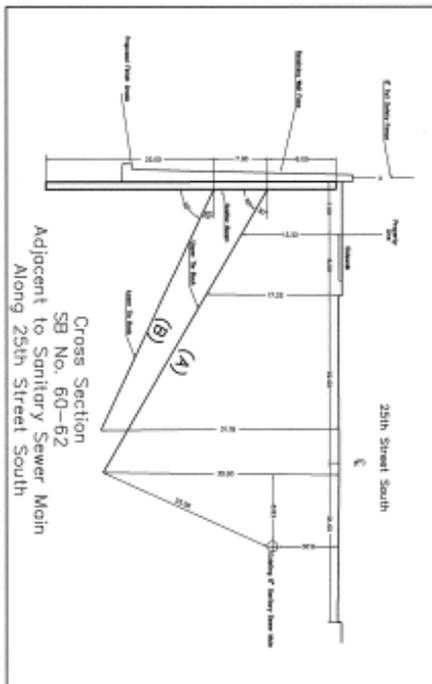
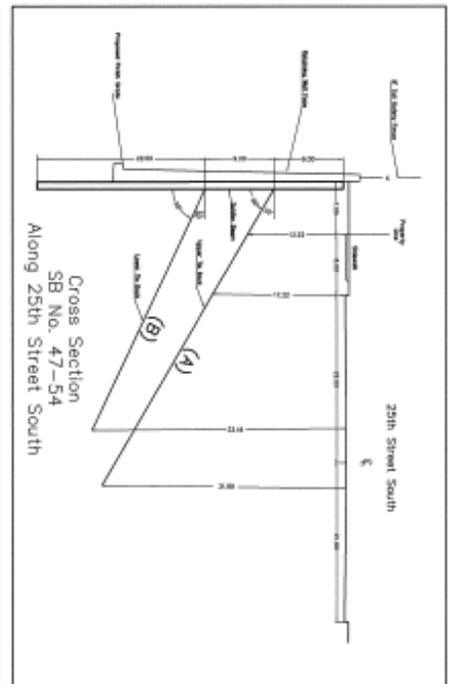
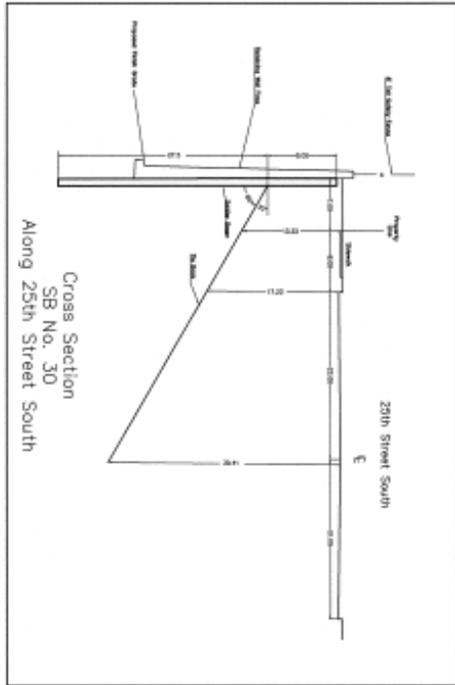
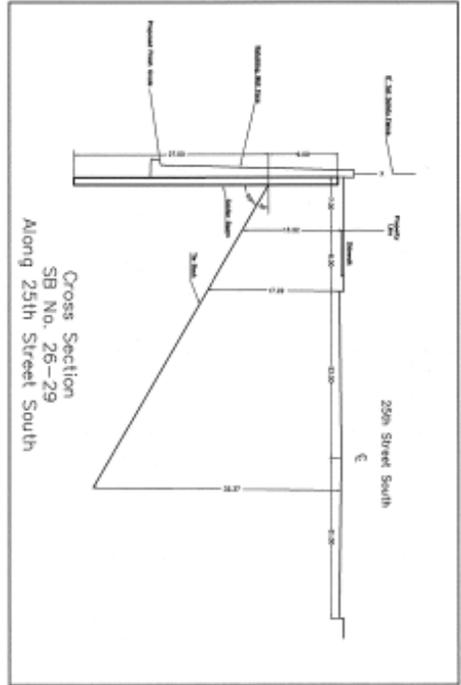
**Bowman**  
 CONSULTING  
 11000 Bowman's Lane  
 Suite 100  
 Fairfax, VA 22030  
 (703) 261-8800  
 www.bowmanconsulting.com

PROJECT NO. 2480-01-111 | DRAWING NO. 2480-01-111-01 | SHEET 4 OF 8

RETURNING WALL TIEBACK  
 ENDS INTO SOUTH STREET SOUTH  
 SECTIONS 3 AND 4  
**SHIRLINGTON CREST**  
 DEED BOOK 3941, PAGE 1447  
 ARLINGTON COUNTY, VIRGINIA  
 DATE: JANUARY 27, 2009



ATTACHMENT 4



PLAT SHOWING  
RETAINING WALL TERRACE  
ENHANCEMENT AREAS INTO  
25TH STREET SOUTH  
SECTIONS 3 AND 4  
**SHIRLINGTON CREST**  
DEED BOOK 2841, PAGE 1447  
ARLINGTON COUNTY, VIRGINIA

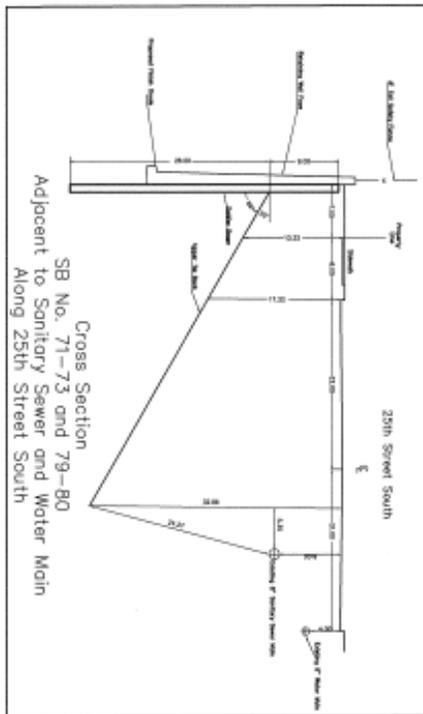
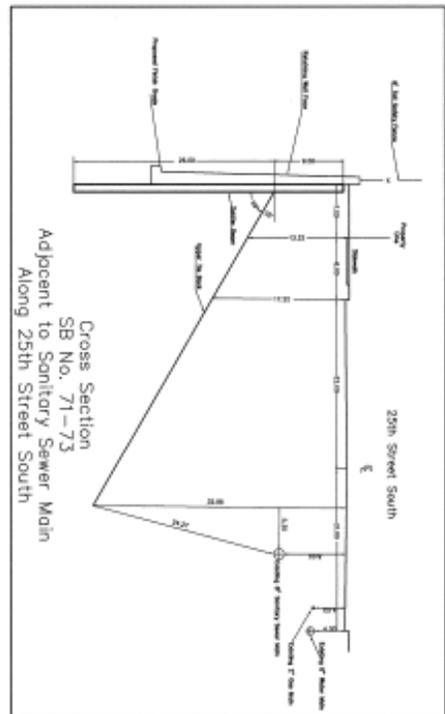
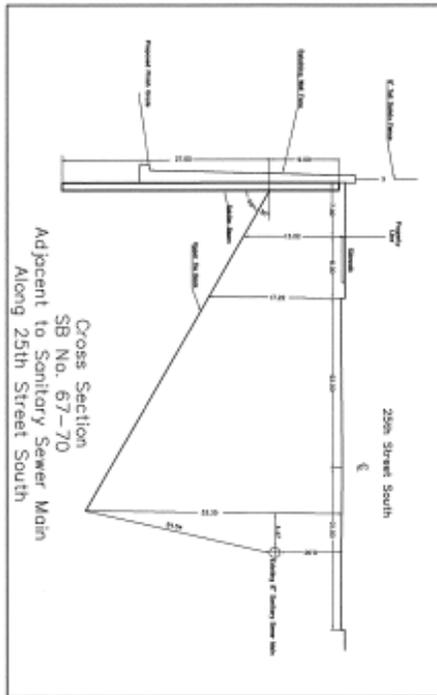
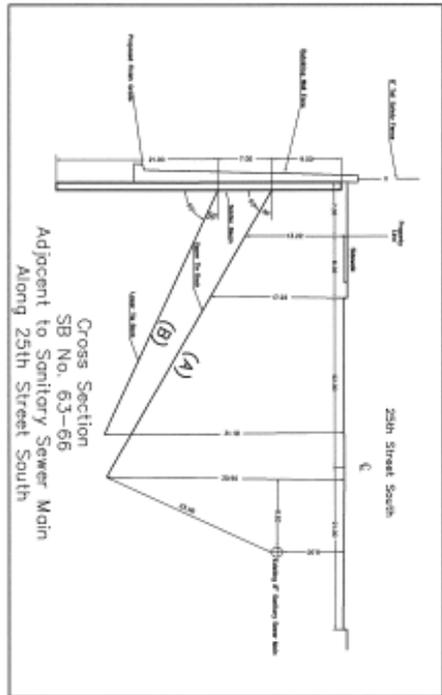
SCALE: 1" = 10'  
DATE: JANUARY 27, 2009



**Bowman CONSULTING**  
14000 Huntersville Road, Suite 200  
Charlotte, Virginia 28133  
Phone: (703) 444-1000  
Fax: (703) 444-1000  
www.bowmanconsulting.com

DATE: JANUARY 27, 2009  
SHEET 6 OF 8

ATTACHMENT 4



PLAT SHOWING  
REMAINING WALL TIEBACK  
ENCRUSTMENT AREAS INTO  
SECTIONS 3 AND 4  
SHIRLINGTON CREST  
DEED BOOK 2641, PAGE 1447  
ARLINGTON COUNTY, VIRGINIA

SCALE: 1" = 10'

DATE: JANUARY 27, 2009

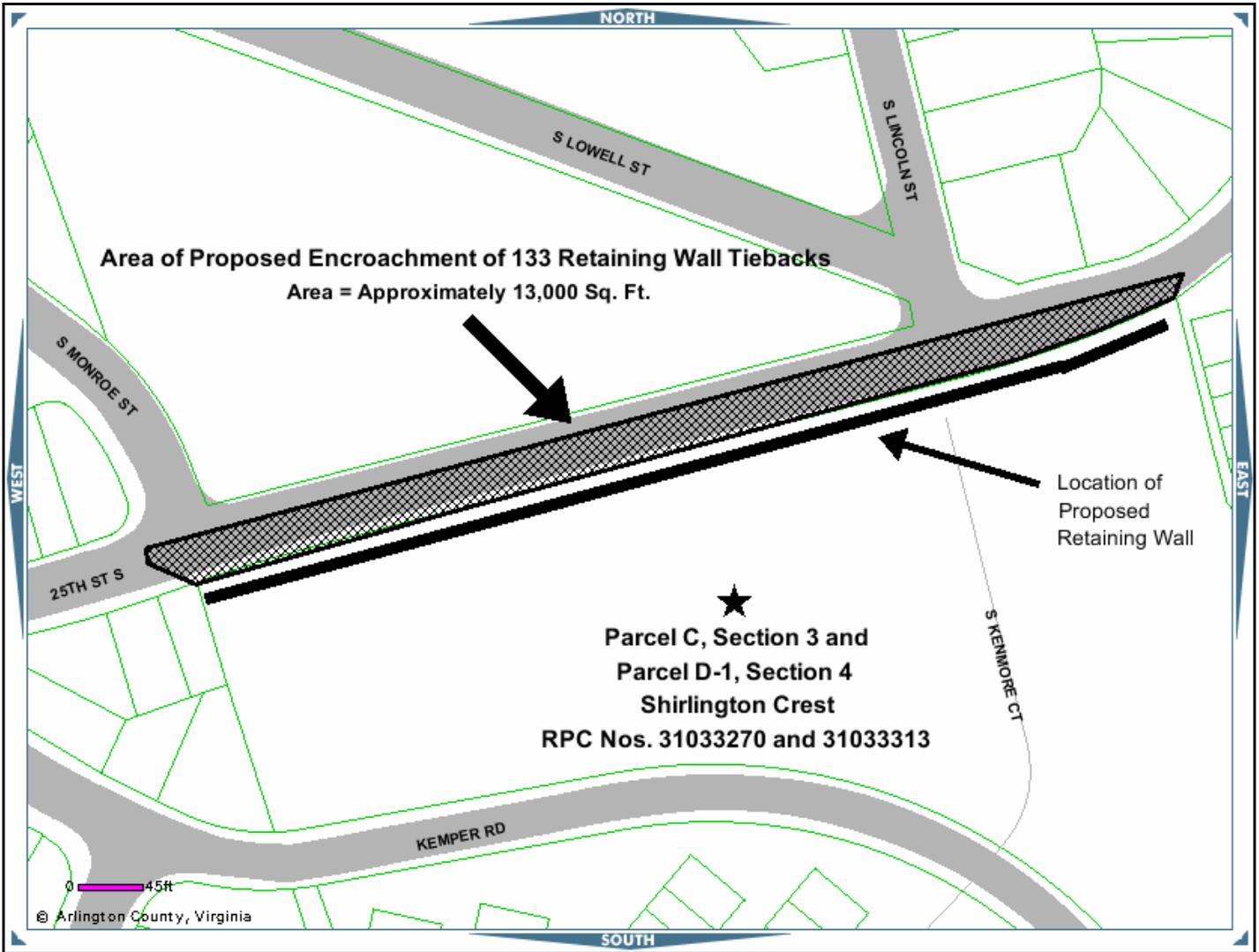


SCALE: 1" = 10'	DATE: JANUARY 27, 2009
OWNER: RETIREES BOWMAN CRESCENT COMMUNITY	PROJECT: SHIRLINGTON CREST
DESIGNER: BOWMAN CONSULTING GROUP, LLC 10000 WOODBRIDGE DRIVE, SUITE 100 ARLINGTON, VA 22204 TEL: 703-441-8800 WWW.BOWMANCONSULTING.COM	PROJECT NO: 2008-01-111
DATE: JANUARY 27, 2009	SCALE: 1" = 10'





**ATTACHMENT 5**  
**VICINITY MAP ONE**



**Proposed Encroachment of 133 Subterranean Retaining Wall Tiebacks into  
County Right-of-Way for 25th Street South**

**September 26, 2009**

