

NORTH CAROLINA
WAKE COUNTY

AGREEMENT FOR TRIANGLE AQUATIC CENTER IMPROVEMENTS PROJECT FUNDING

THIS AGREEMENT entered into as of the _____ day of _____, 20____, by and between the COUNTY OF WAKE, a body politic and corporate of the State of North Carolina (“County”) and the TRIANGLE AQUATIC CENTER, a 501(c)(3) non-profit organization (“TAC”) (together referred to as the “Parties”).

PRELIMINARY STATEMENT

WHEREAS, pursuant to Session Law 1991-594, Wake County authorized a prepared food and beverage tax of up to 1% of the sales price of prepared food and beverages sold at retail; and

WHEREAS, pursuant to Session Law 1991-594, Wake County and City of Raleigh subsequently entered an Interlocal Agreement (“ILA”) designating funds from the Occupancy and Prepared Food/Beverage Taxes for the purpose of acquiring, constructing, or financing convention centers, civic centers, performing arts centers, coliseums, auditoriums, and facilities related to sports and cultural events; and

WHEREAS, the terms of the ILA and subsequent amendments provide a basis for distribution of funds by the City and County consistent with the enabling legislation; and

WHEREAS, in October 2017 the Wake County Board of Commissioners approved a competitive process open to any non-profit or for-profit organization to allocate up to Three Million Five Hundred Thousand Dollars (\$3,500,000) of the Major Facilities Project Fund established with hotel/motel and prepared food and beverage taxes and subsequently issued a Request for Proposals (“RFP #18-001”) for projects meeting the criteria set forth in the ILA; and

WHEREAS, TAC submitted a response to RFP #18-001 on or before February 8, 2018 for the construction of a project described as the Triangle Aquatic Center Proposal (the “TAC Project”); and

WHEREAS, the TAC Project meets all criteria of RFP #18-001; and

WHEREAS, the County selected the TAC Project after due consideration of all proposals submitted through the use of a competitive selection process; and

WHEREAS, on May 21, 2018, the Wake County Board of Commissioners authorized a funding commitment to the TAC in the amount of One Million Dollars Two Hundred Fifty Thousand (\$1,250,000) (“Funding Commitment”) for capital costs related to the construction and development of the TAC Project contingent upon the terms and conditions set forth herein; and

WHEREAS, TAC has accepted the Funding Commitment for capital costs related to the construction and development of the TAC Project contingent upon the terms and conditions set forth herein.

NOW THEREFORE, in consideration of the mutual promises contained herein, County and TAC agree as follows:

ARTICLE I
SCOPE AND DESCRIPTION OF THE TAC PROJECT

The TAC Project shall be located in Cary, Wake County, North Carolina. The purpose of the TAC Project is to expand the existing Triangle Aquatic Center at 275 Convention Drive, Cary NC to accommodate additional parking for a total of 200 spaces, expand spectator seating by 500 seats to a total seating capacity of 1,500, construct 4,000 square foot administrative office space and 12,000 square foot high performance fitness center and add a 50-meter outdoor pool. The expansion of the TAC will allow the facility to continue to be the largest host of aquatic events in the state of North Carolina and will positively impact hotel occupancy and prepared food/beverage sales in Wake County.

The original TAC Project Proposal is attached to this Agreement as **Exhibit "A"** and incorporated by reference.

ARTICLE II
OWNERSHIP OF TAC PROJECT

TAC shall be the owner of the TAC Project and shall be solely responsible for all TAC Project costs, decisions, preparation of all plans and specifications, and completion of the TAC Project in accordance with this Agreement and the incorporated TAC Project Proposal. Any comments or suggestions provided by the County, except as otherwise required by the Agreement, shall be given solely for the purposes of monitoring compliance with the terms of the Agreement, and shall not in any event be construed as a representative or directive regarding the TAC Project.

ARTICLE III
OWNERSHIP of REAL PROPERTY

The TAC currently owns the 23.5 acres of real estate to construct the TAC Project. TAC shall retain full ownership and control of the Project land. Notwithstanding the provisions of this Section, TAC shall be required to notify the County as soon as practicable but in any event within three (3) business days of the execution of a contract for sale of the TAC Project or any Phase of the project; or any other transfer of interest in the TAC Project to an entity other than TAC, including a transfer of rights, possession, or operation of the Project not set forth in a written contract.

ARTICLE IV
TOTAL FUNDING FOR TAC PROJECT

- A. The total of estimated funding needed for the TAC Project is EIGHT MILLION SEVEN HUNDRED FORTY-THREE THOUSAND ONE HUNDRED AND SIXTY AND NO/HUNDREDTHS DOLLARS (\$8,743,160) as set forth in the TAC Project Proposal. In addition to the County committing funding in the amount of \$1,250,000 pursuant to this Agreement, the TAC will provide funding from the following sources:
- Bank Loan = \$2,500,000
 - Curran Family Foundation = \$4,993,160
- B. The County Funding Commitment, defined in Article V of this Agreement, shall be delivered to TAC based on the conditions defined in Article V. The above-listed descriptions of both dollar amounts and funding sources are for illustrative purposes to show the funding required by the TAC for the TAC Project relative to the County's grant. Nothing herein shall bind the TAC to draw specific dollar amounts from any particular funding source as described.
- C. County shall only provide the applicable funding when due and upon satisfaction of conditions as outlined in Article V of this Agreement. Any funds not paid by County to TAC under this Funding Agreement shall be returned to the Major Facilities Capital Trust Fund.
- D. The TAC Project plan has been conceptually designed with construction drawings & permitting to commence by March 2019. County and TAC agree that the TAC Project shall be completed by March 2021 ("Completion Date"). This date is intended to be tentative and TAC shall not be subject to any penalties or liquidated damages related to the Completion Date; therefore, time is not of the essence with respect to the Completion Date for purposes of this Funding Agreement. Prior to or on the Completion Date, TAC may request, and the Wake County Manager may reasonably grant, extensions of time for the completion of the TAC Project, subject to the conditions of funding set forth in Section V. Any such extensions of time shall not be unreasonably withheld by the Wake County Manager. Manager may consult the Board about any requested extension of time.
- E. If requested by TAC, County agrees to provide additional documentation to evidence the County's Funding Commitment as outlined herein for the purpose of TAC financing the TAC Project. This includes, but is not limited to, providing a written affirmation of County's contribution to the TAC Project. In no event shall the County be required to guarantee any commercial or private loan or provide any manner of commitment or financing beyond what is set forth in this Agreement.
- F. TAC represents that this TAC Project shall not require the on-going support of Wake County's general operating funds. Nothing herein shall obligate County to provide

operating funds for the TAC Project after completion.

- G. County shall not fine or penalize TAC in any way, unless specifically permitted in this Agreement.
- H. TAC agrees to abide by any review, reporting, or other legal requirements established by state or local law, or Interlocal Agreement relating to the use of these funds.

ARTICLE V
CONDITIONS OF FUNDING

Subject to TAC performance of the obligations of this Agreement, County shall tender the Funding Commitment in the amount defined below for the construction of the TAC Project upon the following terms:

- A. The parties acknowledge that the Triangle Aquatic Center is a 501(c)(3) non-profit organization and does not have financial capacity to advance the cost of completing the project and then seek reimbursement, as is standard practice for the County. Therefore, the conditions of funding are structured to phase the investment in the project at the beginning of each phase, based on completion of the prior phase.
- B. Subject to the TAC's performance of the obligations of this Agreement, County shall tender the Funding Commitment in the amount of One Million Two Hundred Fifty Thousand and no/100s Dollars (\$1,250,000.00) for the TAC Project upon the following terms and schedule:
 - 1. Up to the amount of **Two Hundred Fifty Thousand and no/1.00s Dollars (\$250,000.00)** shall be paid to TAC to be used for the completion of schematic design, design development, and construction documents upon submittal of 1) a letter of request detailing the specific items to be paid out of the \$250,000.00, accompanied by 1) the actual estimates for the work and 2) the total TAC Project budget and documentation of TAC funding commitments for the entire Project 3) documentation of any encumbrances on the Property or Project securing amounts in the budget, including deeds of trust or liens, and satisfactory evidence of ability to pay. The estimated date of payment is on or about November 15, 2018, contingent upon meeting the conditions of payment. Any unused portion of the \$250,000.00 may be credited towards the next payment of up to \$650,000.00.
 - 2. The amount of **Six Hundred Fifty Thousand and no/1.00s Dollars (\$650,000.00)** shall be paid to TAC) to be used for construction costs, including bidding, contract administration, and FF&E purchase for the additional parking, spectator stadium expansion and administrative offices and fitness center expansion. Payment shall be made by Wake County to TAC upon the submittal of 1) documentation demonstrating the completion of schematic design, design development and construction

documents completed with the previous payment, 2) documentation of payment in full of all consultants performing the work included in the \$250,000.00 payment and 3) an updated budget showing all paid and unpaid costs and expenses for the TAC Project. 4)documentation of any encumbrances on the Property or Project securing amounts in the budget, including deeds of trust or liens, and satisfactory evidence of ability to pay. The estimated date of payment is on or about March 1, 2019, contingent upon meeting the conditions of payment. Any unused portion of the \$650,000.00 may be credited towards the next payment of up to \$350,000.00.

3. The amount of **Three Hundred Fifty Thousand and no/1.00s Dollars (\$350,000.00)** shall be paid to TAC to be used for construction costs, including bidding, contract administration and FF&E purchase for the construction of the 50-meter outdoor pool upon the submittal of 1) documentation demonstrating the completion of construction completed with the previous payment of up to \$650,000.00 2) documentation of payment in full to all vendors providing goods and services included in the \$650,000.00 payment and 3) most current updated budget showing all paid and unpaid costs and expenses for the TAC Project. 4)documentation of any encumbrances on the Property or Project securing amounts in the budget, including deeds of trust or liens, and satisfactory evidence of ability to pay. The estimated date of payment is on or about January 1, 2020, contingent upon meeting the conditions of payment.
 4. Upon obtaining a Certificate of Occupancy, a letter must to be submitted to the County from the TAC Board of Directors or the Architect designee authorized by the TAC Board of Directors certifying that the parking expansion, spectator seating expansion, administrative offices and fitness center construction and 50-meter outdoor pool construction has been completed and the building is operational. This letter shall include a copy of the permanent Certificate of Occupancy (or conditional Certificate of Occupancy with a time frame for meeting outstanding conditions), a copy of all scheduled use of the building, and any other details that demonstrate use of building to benefit Wake County residents.
- C. The County reserves the right to request any additional documentation to confirm meeting appropriate milestones, or current funds or commitment of funds to complete the Project, and the TAC agrees to produce such documentation as a condition of receiving any funding under this Agreement.
- D. The County reserves the right to conduct a site inspection to verify any phase of the TAC Project completion and the facility readiness prior to authorizing disbursement of payment to TAC.

- E. All requests for disbursement of the Funding Commitment under this section must be made within twenty-four (24) months of the effective date of this Agreement unless TAC has requested a reasonable extension for good cause documented to the County and entered into an amendment approved by the Board of Commissioners as required by Article XII. The Board of Commissioners shall consider, but is not required, to approve any requests for amendments or extensions.
- F. If TAC does not make a request for disbursement or does not meet the conditions precedent to disbursement under this section such that all or part of the funds committed are not disbursed, then such funds shall remain a part of the Major Facilities Capital Trust Fund free and clear of any further obligation to Museum under this Agreement.

**ARTICLE VI
PERFORMANCE GOALS**

TAC acknowledges that by accepting the County’s Funding Commitment and by signing the Agreement, the TAC Project is subject to certain Performance Goals as described below in Table 1:

Table 1:

Year of Operation	Target Number of Planned Event Days (excess can be rolled over) (annual target)
1	100
2	100
3	100
4	100
5	100
6	100
7	100

A Planned Event Day will be defined as an event (including but not limited to competitions) that generate participants and spectators from beyond a 50-mile radius of the aquatic facility. An event is not to include practice for recreational teams. Events must generate at least 500 spectators to be considered an event day. Events that generate in excess of 2,000 spectators will be valued as two event days. Table 1A represents the event day calculations for Spectators.

Table 1A:

# of Spectators	Event Day Value
500-2,000	1
2,000 +	2

Events must generate a minimum of 100 competitors from beyond a 50-mile radius of the aquatic center to be considered an event day. Events that generate in excess of 300 competitors will be valued according to Table 1B. An event is not to include practice for recreational teams:

Table 1B:

# of Competitors	Event Day Value
100-300	1
301-600	2
601+	3

Year of Operation shall be defined as a 12-month period beginning on the date of completion of the TAC Project.

- A. Performance Reporting. TAC shall agree to provide annual reporting to the County Manager including a list of events held at the aquatic facility with number of Event Days, number of spectators and/or number of teams competing in an event where the members (and spectators for that team) are from outside a 50-mile radius of the facility. Annual performance reporting shall be submitted using attached forms. In the event that the park performance does not achieve the target event days at the end of each Performance Reporting Period, TAC must submit a plan to the County Manager to achieve performance goals. For the purpose of calculating performance goals, any Event Days exceeding the required number in a reporting period may be rolled over and counted towards the performance goals for other reporting periods. For the purpose of calculating performance goals, any target event days exceeding the required number in a reporting period may be rolled over and counted towards the performance goals for other reporting periods.

- B. Expiration of Performance Goals. After the TAC Project has reported seven (7) years of operations or the Total Number of Event Days exceeds the cumulative total of target Event Days (700 total event days), whichever is sooner, the TAC Project shall no longer be bound by Performance Goals of any kind, and all obligations regarding Performance Goals will be deemed to have been satisfied.

- C. Good Faith. The Parties agree to abide by the terms of this Agreement in good faith and shall, in addition to Table review all reasonable and good faith efforts made by TAC to fulfill all Performance Goals in any evaluation of Performance Goals, and in the event Performance Goals are not met, commit to discuss how to reach Performance Goals. Furthermore, the Parties hereby agree that Article VIII of the Agreement shall also apply to any evaluation of Performance Goals.

ARTICLE VII
INDEPENDENT CONTRACTOR

The parties acknowledge that TAC is an independent contractor, and that nothing in this Agreement is intended, and nothing will be construed, to create any form of partnership or joint venture relationship between TAC and the County, or to allow either to exercise control or direction over the other; notwithstanding that each party is bound by the terms and conditions of this Agreement. Neither party is an officer, agent, or employee of the other party for any purpose.

ARTICLE VIII
LIABILITY FOR DELAY IN PERFORMANCE

Neither party shall be liable to the other or be deemed to be in breach of this Agreement, for any failure or delay in rendering performance arising out of causes beyond its reasonable control and without its fault or negligence. Such causes may include, but are not limited to, acts of God or of a public enemy, fires, floods, epidemics, quarantine restrictions, strikes, freight, embargoes, or unusually severe weather. Date or times of performance, including the term of this Agreement or eligibility for funding, may, but are not required, to be extended by the parties to the extent of delays excused by this section, provided that the party whose performance is affected notifies the other promptly of the existence and nature of such delay.

ARTICLE IX
TERMINATION OF TAC PROJECT PRIOR TO COMPLETION

Should the TAC Project become terminated prior to completion, County shall have no funding obligation and no ownership claim to any part of the TAC Project unless expressly described in this Agreement. If the performance goals of the Funding Agreement can no longer be achieved by reason of non-completion, then within sixty (60) days of demand, TAC shall be required to repay any portion of the Funding Commitment actually received from the County, and the TAC shall not be eligible to apply for future Major Facilities Capital Trust Funds until the previous amount is paid in full.

The County's obligation to fund under this Agreement is not transferrable to any subsequent owner or interest holder of the TAC Project or any Phase of the TAC Project.

ARTICLE X
INTERRUPTION OF OPERATION OF TAC PROJECT AFTER COMPLETION

Should the TAC Project or any part thereof cease to operate at any time after the County has tendered the Funding Commitment but before Performance Goals are met, and the TAC transfers all or part of the property upon which the TAC Project is located to an owner who does not operate the Facilities for the purpose intended under this Agreement

such that the Performance Goals of the Funding Agreement are frustrated (“Subsequent Operation”), then the TAC shall require the new owner to repay the County the Funding Commitment based on the year of operation in which operation ceases per the schedule below. TAC shall make this term a legal requirement of any transfer of the Property with or without consideration such that the term shall be binding on transferee(s).

Unamortized Portion of Original Facility Cost to be Paid to the County Upon Contract Termination	
Total Repayment Amount = \$1,250,000	
Year of Ceased Operation	Repayment to County
1	\$ 1,000,000
2	\$ 750,000
3	\$ 500,000
4	\$ 250,000
5	\$ 0

Regardless of ownership of the TAC Project, if the TAC Project continues in operation for the purpose intended under this Agreement such that the Performance Goals are not frustrated, there will be no repayment required. “Operation” shall be defined as a state of readiness of the TAC Project that allows it to be open and ready for intended operations in the ordinary course of business.

**ARTICLE XI
NO THIRD-PARTY BENEFICIARIES**

This Agreement is not intended to and shall not be interpreted to inure to the benefit of any third parties.

**ARTICLE XII
MODIFICATION**

This Agreement may only be modified in writing signed by both Parties; provided that any change in the scope of the TAC Project or manner or amount of the payment obligation of the County hereunder shall require approval of the Board of Commissioners.

**ARTICLE XIII
ASSIGNMENT**

TAC shall not assign this Agreement, either in whole or in part, without the prior written approval of the County. County shall not assign any of its duties under this

Agreement to any private or public agency, corporation, firm, or individual without the prior written approval of TAC.

ARTICLE XIV
MISCELLANEOUS

1. Notices. All notices or other communications hereunder to TAC and the County shall be sufficiently given and shall be deemed to have been received five (5) Business Days after deposit in the United States mail in certified form, postage prepaid, to the County and TAC, as the case may be, at the following addresses:

If to the County: Mr. David Ellis, County Manager
Suite 4900, Wake County Justice Center
301 South McDowell Street
PO Box 550
Raleigh, North Carolina 27602
Tel: (919) 856-6160

If to TAC: Mr. Michael Curran, President
Triangle Aquatic Center
275 Convention Drive
Cary, NC 27511
Tel: (919) 459-4045

2. Severability. In the event any provision in this Agreement shall be held invalid or unenforceable by a court of competent jurisdiction, such holding shall not invalidate or render unenforceable any other provision hereof.
3. Execution. This Agreement may be executed in any number of counterparts, each of which shall be an original and all of which shall constitute but one and the same instrument.
4. Applicable Law. This Agreement shall be governed by and be construed in accordance with the laws of the State of North Carolina. Jurisdiction for the resolution of any conflict arising from this Funding Agreement shall lie with the General Court of Justice of the State of North Carolina with venue in Wake County, North Carolina.
5. Headings. Paragraph or other headings contained in this Agreement are for reference purposes only and are not intended to affect in any way the meaning or interpretation of the Agreement.
6. Representations and Warranties. The Parties each represent, covenant and warrant for the other's benefit as follows:
 - a. Each Party has all necessary power and authority to enter into this Agreement and to carry out the transactions contemplated by this Agreement, and this

Agreement has been authorized by each Party's governing body. This Agreement is a valid and binding obligation of each Party.

- b. To the knowledge of each Party, neither the execution and delivery of this Agreement, nor the fulfillment of or compliance with its terms and conditions, nor the consummation of the transactions contemplated by this Agreement, results in a breach of the terms, conditions and provisions of any agreement or instrument to which either Party is now a party or by which either is bound, or constitutes a default under any of the foregoing.
 - c. To the knowledge of each Party, there is no litigation or other court or administrative proceeding pending or threatened against such Party (or against any other person) affecting such Party's rights to execute or deliver this Agreement or to comply with its obligations under this Agreement. Neither such Party's execution and delivery of this Agreement, nor its compliance with its obligations under this Agreement, requires the approval of any regulatory body or any other entity the approval of which has not been obtained.
 - d. The Parties agree to work together in good faith and with all due diligence to provide for and carry out the purpose of this Agreement.
7. Dispute Resolution. In the event of conflict or default that might arise for matters associated with this Agreement, the Parties agree to informally communicate to resolve the conflict. If any such dispute cannot be informally resolved, then such dispute, or any other matter arising under this Agreement, shall be subject to resolution in a court of competent jurisdiction.
8. No Waiver of Non-Compliance with Agreement. No provision of this Agreement shall be deemed to have been waived by any Party hereto unless such waiver shall be in writing and executed by the same formality as this Agreement. The failure of any Party hereto at any time to require strict performance by the other of any provision hereof shall in no way affect the right of the other Party to thereafter enforce the same. In addition, no waiver or acquiescence by a Party hereto of any breach of any provision hereof by another Party shall be taken to be a waiver of any succeeding breach of such provision or as a waiver of the provision itself.
9. Execution in Counterparts/Electronic Version of Agreement. This Agreement may be executed in any number of counterparts, each of which shall be an original and all of which shall constitute but one and the same instrument. Any Party may convert a signed original of the Agreement to an electronic record pursuant to a North Carolina Department of Natural and Cultural Resources approved procedure and process for converting paper records to electronic records for record retention purposes. Such electronic record of the Agreement shall be deemed for all purposes to be an original signed Agreement.

10. No Waiver of Sovereign Immunity. Nothing in this Agreement shall be construed to mandate purchase of insurance by Wake County pursuant to N.C.G.S. 153A-435 or purchase of insurance by any municipality pursuant to N.C.G.S. 160A-485; or to be inconsistent with Wake County's "Resolution Regarding Limited Waiver of Sovereign Immunity" enacted October 6, 2003; or to in any other way waive any Party's defense of sovereign or governmental immunity from any cause of action alleged or brought against any Party for any reason if otherwise available as a matter of law.
11. No Waiver of Qualified Immunity. No officer, agent or employee of any Party shall be subject to any personal liability by reason of the execution of this Agreement or any other documents related to the transactions contemplated hereby. Such officers, agents, or employees shall be deemed to execute this Agreement in their official capacities only, and not in their individual capacities. This section shall not relieve any such officer, agent or employee from the performance of any official duty provided by law.
12. Verification of Work Authorization. All Parties, and any permitted subcontractors, performing work with the funds expended under this Agreement shall comply with Article 2, Chapter 64, of the North Carolina General Statutes.
13. Recitals. The Recitals are incorporated in this Agreement.

IN WITNESS WHEREOF, TAC has caused this Agreement to be executed in its name by its duly authorized officers and its corporate seal to be impressed hereon, and the County has caused this Agreement to be executed in its name by its duly authorized officers and its corporate seal to be impressed hereon, as of the Effective Date.

Triangle Aquatic Center

ATTEST:

By _____
 Michael Curran
 Title: TAC President

By: _____

SEAL

COUNTY OF WAKE, NORTH CAROLINA:

By _____
Chairperson

Denise Hogan
Clerk to the Board of Commissioners

Approved as to form:

Scott W. Warren
County Attorney

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

FINANCE DIRECTOR

The person responsible for monitoring the contract performance requirements is:

_____ Department Head Initials

Event Detail
(This form shall be attached to all Performance Reporting Summaries)

Event Description (Include date)	Estimated Day Visitors	Estimated Visitors outside 50-mile range	Number of Event Days (Competitors)	Number of Event Days (Spectators)