

NORTH CAROLINA  
WAKE COUNTY

**AGREEMENT**

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 (the "County") and the TOWN OF FUQUAY VARINA, a North Carolina municipal corporation ("Town") (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 April 2016 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 three hundred fifty thousand and no/100s Dollars (\$3,350,000.00) of the Major Facilities Capital Trust Fund established with hotel/motel and prepared food and beverage taxes and subsequently issued a Request for Proposals ("RFP #16-045") for projects meeting the criteria set forth in the ILA; and

WHEREAS, Town submitted a response to RFP #16-045 on or before June 15, 2016 for the construction of a project described as the Fleming Loop Recreational Park Proposal (the "Park Project"); and

WHEREAS, the Park Project meets all criteria of RFP #16-045; and

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

WHEREAS, on November 7, 2016 the Wake County Board of Commissioners authorized a funding commitment to the Town in the requested amount of Five Hundred Thousand and no/100s Dollars (\$500,000.00) ("Funding Commitment") for capital costs related to the construction and development of the Park Project contingent upon the terms and conditions set forth herein; and

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

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

## ARTICLE I SCOPE AND DESCRIPTION OF THE PARK PROJECT

The Park Project shall be located in Fuquay Varina, Wake County, North Carolina. The purpose of the Park Project is to develop 36-acres of Town owned land located at 301 Fleming Loop Road, Fuquay Varina, NC into an outdoor park with multi-purpose fields and amenities to be owned by the Town that will positively impact hotel occupancy and prepared food/beverage sales in Wake County. The park will be managed by Fuquay Varina through its Parks, Recreation and Cultural Resources Department to support local programming and regional and national sports tournaments and special events such as the WRAL Balloon Festival.

The Park Project shall consist of constructing seven full sized multi-purpose lighted fields, a walking trail/path with a length of at least one mile, playground, picnic shelter, storage/maintenance building, improved and paved parking for 320 vehicles with curb, gutter and stormwater management structures. The original Park Project Proposal is attached to this Agreement as **Exhibit "A"** and incorporated by reference.

## ARTICLE II PARK PROJECT SCOPE

Town, as Owner of the Park Project, is solely responsible for all Park Project costs, decisions, the preparations of all plans and specifications, and for developing the Park Project in accordance with this Agreement and the incorporated Park Project Proposal. Any comments or suggestions provided by the County, except as otherwise provided 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 Park Project decision.

## ARTICLE III OWNERSHIP of REAL PROPERTY

Town currently owns the 36 acres of real property required to construct the Park Project. Town shall retain full ownership and control of the Project structures, land, equipment, revenues, and any other related land values or profits, unless otherwise expressly provided for in this Agreement. Notwithstanding the provisions of this Section, Town 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 Park Project or any Phase

of the project; or if there is no contract, if any interest in the Park Project or any phase of the Project is transferred to an owner other than Town.

#### ARTICLE IV TOTAL FUNDING FOR PARK PROJECT

- A. The total of estimated funding needed for the Park Project is Two Million, Six Hundred Eighty Thousand Dollars (\$2,682,549.00) as set forth in the Town's presentation to the Wake County Board of Commissioners on October 10, 2016. In addition to County committing funding in the amount of \$500,000 pursuant to this Agreement, the Town will provide funding from the following sources:
- NC Parks and Recreation Trust Fund (PARTF) Grant \$500,000
  - Town Recreation Unit Fees \$1,182,549
  - Capital Area Soccer League (CASL) Facility Use Agreement \$500,000

The County Funding Commitment shall be delivered to Town based on the conditions defined in Article V of this Agreement. The above-listed descriptions of both dollar amounts and funding sources are for illustrative purposes to show the funding required by the Town for the Park Project relative to the County's grant. Nothing herein shall bind the Town to draw specific dollar amounts from any particular funding source as described.

- B. 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 Town under this Funding Agreement shall be returned to the Major Facilities Capital Trust Fund.
- C. The Park Project is under design with construction to be completed within twenty (20) months. County and Town agree that the Park Project shall be completed on or about May 19, 2019 (the "Completion Date"). This date is intended to be tentative and Town 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, Town may request, and the Wake County Manager may reasonably grant, extensions of time for the completion of the Park 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.
- D. If requested by Town, County agrees to use best efforts to provide additional documentation to evidence the County's Funding Commitment as outlined herein for the purpose of Town financing the Park Project. This includes, but is not limited to, providing a written affirmation of County's contribution to the Park 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.

- E. Town represents that this Park 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 Park Project after completion.
- F. County shall not fine or penalize Town in any way, unless specifically permitted in this Agreement.
- G. Town agrees to abide by any review, reporting, or other legal requirements established by state or local law, County resolution, or Interlocal Agreement relating to the use of these funds.

#### ARTICLE V CONDITIONS OF FUNDING

Subject to Town's performance of the obligations of this Agreement, County shall tender the Funding Commitment in the amount of Five Hundred Thousand and no/100s Dollars (\$500,000.00) for the construction of the Park Project upon the following terms:

- A. The County shall tender the total Funding Commitment of Five Hundred Thousand and no/100s (\$500,000.00) to Town at such time as Town has provided:
  - 1. Satisfactory documentation of total Park Project budget and Town funding commitments at time of funding request.
  - 2. A letter from the Town Manager certifying that all seven multi-purpose fields are operational, including working permanent field lighting for nighttime use, the playground and picnic shelter are complete and a permanent certificate of occupancy has been provided for the concessions/restroom/storage facilities. This letter shall include a copy of the certificate of occupancy and confirmation of all scheduled tournament dates and special events and details of the events.
  - 3. The County reserves the right to conduct a site inspection to verify completion of the Park Project and its individual component field readiness prior to authorizing disbursement of payment to Town.
- B. 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 the parties have entered into a written agreement for an extension of this date.
- C. If Town 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 Town under this Agreement.



**ARTICLE VI**  
**PERFORMANCE GOALS**

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

Year of Operation	Target Number of Planned Event Days (excess can be rolled over)
1	25
2	50
3	75
4	100
5	125
6	150
7	175

A Planned Event Day will be defined as an event (including but not limited to games) that generates between 500 and 2,000 visitors (participants/spectators). An event is not to include practice for recreational teams. Events that generate in excess of 2,000 spectators will be valued as 2 event days.

**Table A:**

# of Spectators	Event Day Value
500 – 2,000	1
2,001 +	2

A Planned Event Day will be defined as an event that generates at least 50 competitors from beyond 50 mile radius of the facility. Event Day Value will be determined according to Table B:

**Table B:**

# of Competitors	Event Day Value
50 - 200	1
201 – 400	2
401 – 600	3
601 – 800	4
801+	5

Year of Operation shall be defined as a 12 month period beginning July 1, 2019 or the date of the first Planned Event Day after the completion of the Project, whichever comes sooner.

- a. Performance Reporting. Town shall agree to provide annual reporting to the County Manager including a list of events held at the park with number of Event Days, number of spectators and/or number of teams competing in a sporting 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 facility performance does not achieve the target event days at the end of each Performance Reporting Period, Town 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 Park Project has reported seven (7) years of operations or the Total Number of Event Days exceeds the cumulative total of target Event Days, whichever is sooner, the Park Project shall no longer be bound by Performance Goals of any kind and any such provision herein or in the Agreement shall expire.
- c. Good Faith. The Parties agree to enforce and abide by the terms of this agreement in good faith and shall, in addition to Table 1, annual reports, and applicable performance plans, review all reasonable and good faith efforts made by Town to fulfill all Park Project requirements in any evaluation of Performance Goals, and in the event project goals are not met, commit to discuss further mitigation efforts. Furthermore, the Parties hereby agree that Article VIII of the Agreement shall also apply to this MOU and any evaluation of Performance Goals.

#### ARTICLE VII INDEPENDENT CONTRACTOR

The parties acknowledge that Town 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 Town 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 County 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 PARK PROJECT PRIOR TO COMPLETION

Should the Park Project or any Phase thereof become terminated prior to completion, Town shall remain the sole owner of the Park Project property, including all land, structures, and equipment. County shall have no funding obligation and no ownership claim to any part of the Park Project unless expressly described in this Agreement.

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

#### ARTICLE X INTERRUPTION OF PROJECT OPERATION AFTER COMPLETION

Should the Park 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 Town transfers all or part of the property upon which it is located to an owner who does not operate the property for the purpose intended under this Agreement such that the performance goals of the Funding Agreement are frustrated ("Subsequent Operation"), then the Town shall require the new owner to repay the County all or part of the Funding Commitment to the County based on the year of operation in which operation ceases per the schedule below.

<b>Unamortized Portion of Original Facility Cost to be Paid to the County Upon Contract Termination</b>	
Repayment Amount = \$500,000	
<b>Year of Subsequent Operation</b>	<b>Payment to County</b>
1	\$ 400,000
2	\$ 300,000
3	\$ 200,000

4	\$ 100,000
5	\$ -

Regardless of ownership of the Property, if the property continues in Operation for the purpose intended under this Agreement such that the performance goals of the Funding Agreement are not frustrated, there will be no adjustment required. "Operation" shall be defined as a state of readiness of the Park Project that allows the facility or facilities 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 Park Project or manner or amount of the payment obligation of the County hereunder shall require approval of the Board of Commissioners.

#### ARTICLE XIII ASSIGNMENT

Town 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 Town.

#### ARTICLE XIV MISCELLANEOUS

1. Notices. All notices or other communications hereunder to Town 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 Town, as the case may be, at the following addresses:

If to the County: Mr. James K. Hartmann, County Manager  
301 South McDowell Street, Fourth Floor

Raleigh, North Carolina 27601  
Tel: (919) 856-5555  
E-mail: Jim.Hartmann@wakegov.com

If to Town: Mr. Adam Mitchell, Town Manager  
401 Old Honeycutt Rd  
Fuquay-Varina, NC 27526  
Tel: (919) 552-1400  
E-mail: amitchell@fuquay-varina.org

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.

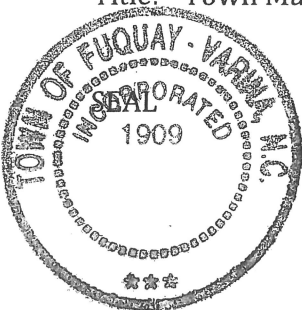
IN WITNESS WHEREOF, Town has caused this Agreement to be executed in its name by its duly authorized officers and its corporate seal to be impressed hereon, and the County has caused this Agreement to be executed in its name by its duly authorized officers and its corporate seal to be impressed hereon,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

TOWN OF FUQUAY-VARINA

By: Mr. Adam Mitchell  
Adam Mitchell *Mark Matthews*  
Title: Town Manager *Asst Town Manager on behalf of*

ATTEST:

By: Rose H. Rich  
Rose Rich  
Title: Town Clerk



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

Nicole Stevens  
Carla Morgan      Asst. Finance  
FINANCE DIRECTOR      Dir.

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 completed for each operating field and attached to all Performance Reporting Summaries)

Fiscal Year of Operation: \_\_\_\_\_

Report Date:

[illegible]
