

NORTH CAROLINA
WAKE COUNTY

AGREEMENT

THIS AGREEMENT entered into as of the 2 day of February, 2015, by and between the COUNTY OF WAKE, a body politic and corporate of the State of North Carolina (the "County") and the AMMONS BUILDING CORPORATION, a corporation organized and existing under the laws of the State of North Carolina ("Ammons") (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 July 2013 the Wake County Board of Commissioners approved a competitive process open to any non-profit or for-profit organization to allocate up to Six Million and no/100s Dollars (\$6,000,000.00) 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 #13-074") for projects meeting the criteria set forth in the ILA; and

WHEREAS, Ammons submitted a response to RFP #13-074 on or before October 1, 2013 for the construction of a project described as the Wake Competition Center (the "Project") and the Project meets all criteria of RFP #13-074; and

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

WHEREAS, the Board of Commissioners has authorized a funding commitment to Ammons in the amount of Three Million and no/100s Dollars (\$3,000,000.00) ("Funding Commitment") for capital costs related to the construction and development of the Project contingent upon the terms and conditions set forth herein;

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

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

ARTICLE I SCOPE AND DESCRIPTION OF THE PROJECT

The Project shall be located in Morrisville, Wake County, North Carolina. The purpose of the Project is to construct a large multi-use indoor sports facility that will enhance sports activities in Wake County and positively impact hotel occupancy and prepared food/beverage sales.

The Project shall consist of two (2) National Hockey League ("NHL") regulation size ice rinks with seating for 1,250+ spectators, a volleyball facility with at least 8 professional-grade indoor courts and four outdoor courts, and a gymnastics facility. There will also be included practice space and rooms dedicated for physical therapy. The facility will promote the needs of local indoor sports, as well as the needs of national and/or regional amateur and/or professional sporting events. Initial marketing has attracted the Carolina Hurricanes as a primary tenant for equipment and training uses, as well as the volleyball tenant. The original Project Proposal is attached to this Agreement as **Exhibit "A"** and incorporated by reference.

ARTICLE II PROJECT SCOPE

Ammons, as Owner of the Competition Center, is solely responsible for all Project costs, decisions, the preparations of all plans and specifications, and for developing the Project in accordance with this Agreement and the incorporated 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 Project decision.

ARTICLE III OWNERSHIP of REAL PROPERTY

Ammons shall obtain private financing for the purchase of the necessary acreage of real property required to construct the Project. No County funding will be used for the purchase of this real property. Ammons 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, Ammons 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 Project or any Phase of the Project; or if there is no contract, if any interest in the Project or any phase of the Project is transferred to an owner other than Ammons.

ARTICLE IV TOTAL FUNDING FOR PROJECT

- A. The total of estimated funding needed for the Project is \$13.99 million as set forth in the Project Proposal. In addition to County committing funding pursuant to this Agreement, , the Town of Morrisville has stated its intent to contribute Five Hundred and Seventy-Five Thousand and no/100s Dollars (\$575,000.00) to the Project to be used for road construction. Ammons shall acquire the remaining funds necessary to complete the Project through private financing, estimated to be Ten Million Four Hundred Fifteen Thousand and no/100s (\$10,415,000.00). The County Funding Commitment shall be delivered to Ammons based on the schedule of Phases and conditions defined in Article V of this Agreement.
- B. Should any Phase fail to reach completion due to total abandonment of the Project, Ammons shall be required to re-pay to County all amounts paid as to that Phase provided by County to Ammons under this Funding Agreement as of the date of failure, which funds shall be returned to the Major Facilities Capital Trust Fund. Ammons shall not be required to pay any amount of the County's Funding Commitment that is not actually paid to Ammons for the Project. Furthermore, County shall only provide the applicable funding when due and upon satisfaction of conditions as outlined in Article V of this Agreement.
- C. The Project is estimated to take thirty-six (36) months to build. County and Ammons agree that the Project shall be completed on or about December 1, 2017 (the "Completion Date"). This date is intended to be tentative and Ammons shall not be subject to any penalties or liquidated damages related to the Completion Date. Prior to or on the Completion Date, Ammons may request, and the Wake County Manager may reasonably grant, extensions of time for the completion of the 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 Ammons, County agrees to use best efforts to provide additional documentation to evidence the County's Funding Commitment as outlined herein for the purpose of Ammons financing the project through private loans. This includes, but is not limited to, providing a written affirmation of County's contribution to the 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. Ammons represents that this 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 Project after completion.

- F. County shall not fine or penalize Ammons in any way, unless specifically permitted in this Agreement. Nothing herein shall prevent County from recouping all or part of funds paid in the event of non-performance as specifically set out in this or other agreements.
- G. Ammons 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 CONSTRUCTION PHASES; CONDITIONS OF FUNDING

Subject to Ammons' performance of the obligations of this Agreement, County shall tender the Funding Commitment in the amount of up to Three Million and no/100s Dollars (\$3,000,000.00) for the construction of the project, payable to Ammons in three (3) phases of construction, upon the following terms:

- A. **PHASE ONE:** Construction of the two NHL-sized ice rinks and 1,250+ spectator seating. This phase will require approximately 80% of total funding. The County shall tender Two Million One Hundred Thousand and no/100s (\$2,100,000.00) to Ammons at such time as Ammons has provided:
 - 1. Satisfactory documentation of total project budget and funding commitments at time of funding request.
 - 2. Written notice of Completion and a copy of the temporary certificate of occupancy for Phase One, for a facility including two NHL-sized ice rinks and 1,250+ spectator seating. (material deviation from Project Proposal for Phase One may disqualify Phase One for funding) .

An additional \$300,000 of funding for PHASE ONE (The ice project), in the form of one \$150,000 payment per PHASE, will be eligible for payment to Ammons upon completion respectively of PHASES TWO and THREE as set forth in Sections B and C. .

- B. **PHASE TWO:** Construction of the volleyball area. This phase will require approximately 10% of total funding. The County shall tender Three Hundred Thousand and no/100s (\$300,000.00) plus One Hundred and Fifty Thousand and no/100s (\$150,000) to Ammons at such time as Ammons has provided:
 - 1. Proof of Completion of Phase One. Funding of PHASE TWO is contingent upon completion of PHASE ONE.
 - 2. Satisfactory updated documentation of total remaining project budget and funding commitments at time of funding request.

3. Written notice of Completion and a copy of the temporary certificate of occupancy for Phase Two (material deviation from Project Proposal for Phase Two may disqualify Phase Two for funding) .

C. **PHASE THREE:** Construction of the gymnastics area. This phase will require approximately 10% of total funding. The County shall tender Three Hundred Thousand and no/100s (\$300,000.00) plus One Hundred and Fifty Thousand and no/100s (\$150,000) to Ammons at such time as Ammons has provided:

1. Satisfactory updated documentation of total project budget and funding commitments at time of funding request.
2. Written notice of Completion and a copy of the temporary certificate of occupancy for Phase Three (material deviation from Project Proposal for Phase Three may disqualify Phase Three for funding).
3. Funding of PHASE THREE will not be contingent on completion of PHASE TWO; however, funding of PHASE THREE is contingent upon completion of PHASE ONE.

D. All requests for disbursement of the Funding Commitment under this section must be made within thirty-six (36) months of the effective date of this Agreement unless the parties have entered into a written agreement for an extension of this date.

E. If Ammons 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 Ammons under this Agreement.

**ARTICLE VI
PERFORMANCE GOALS**

Ammons 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:

ICE FACILITY		
Performance Reporting Period	Years of Operation	Target Number of Planned Event Days (Cumulative)
1	1, 2 and 3	138
2	4, 5 and 6	207
3	7, 8 and 9	207
4 (Rollover Period)	10, 11 and 12	0

VOLLEYBALL FACILITY		
Performance Reporting Period	Years of Operation	Target Number of Planned Event Days (Cumulative)
1	1, 2 and 3	48
2	4, 5 and 6	114
3	7, 8 and 9	114
4 (Rollover Period)	10, 11 and 12	0

GYMNASTICS FACILITY		
Performance Reporting Period	Years of Operation	Target Number of Planned Event Days (Cumulative)
1	1, 2 and 3	26
2	4, 5 and 6	39
3	7, 8 and 9	39
4 (Rollover Period)	10, 11 and 12	0

Performance goals are based on the target number of Planned Event Days for year one (1) through year nine (9). Planned Event Day is defined as event day that has been scheduled by Ammons for use at the Project Facility that brings participants from beyond 50 mile radius of the facility. Events that include 40 to 100 competitors from beyond a 50 mile radius may be defined as an event day. Events that include greater than 100 competitors from beyond a 50 mile radius of the facility may be defined as two event days.

- a. Failure To Meet Performance Goals. Ammons shall agree to provide annual reporting to the County Manager including the number of events held, the number of event days, and number of competitors from outside 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, Ammons must submit a plan to the County Manager to achieve performance goals. If after 9 years of operations, the cumulative performance goal of 932 target event days is not met, Ammons will have another three year Performance Reporting Period to achieve the performance goal. 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. If after 12 years of operation, the cumulative performance goal of 932 event days is not met, Ammons shall return funds to the County in the amount of \$3,000 per event day not met. This amount is agreed by the parties to be a reasonable measure of the amount of funding that should be returned in proportion to failure to meet Project goals. In the event that Phases Two and/or Three do not become operational, the Total Number of Event Days shall be reduced by the number of event days planned for that respective phase per reporting period.
- b. Expiration Of Performance Goals. After the Project has been in operation for nine (9) years or the Total Number of Event Days exceeds the cumulative total of events in all three reporting periods (932 or as adjusted per terms of section (a)), whichever is sooner, the 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 Ammons to fulfill all Project requirements in any evaluation of Performance Goals, and in the event project goals are not met, commit to discuss further mitigation efforts prior to or in lieu of enforcement of payment remittance. 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 Ammons 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 Ammons 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 PROJECT PRIOR TO COMPLETION

Should the Project or any Phase thereof become terminated prior to completion, Ammons shall remain the sole owner of the Project property, including all land, structures, and equipment. "Termination" shall be defined as a substantial cessation of all building and failure to achieve operation for a period of One Hundred and Twenty (120) days. County shall have no ownership claim to any part of the Project unless expressly described in this Agreement.

In the event of a Termination prior to the initial Completion of the Project or any Phase of the Project for which the County has tendered a funding commitment under this Agreement, Ammons shall be required to repay the County the Funding Commitment tendered for the Project or the terminated Phase of the Project. Such repayment shall be due within ninety (90) days of a written demand for repayment from the County. The obligation to repay the County shall survive any transfer of ownership of the Project or its Phases by Ammons. In the event of a Termination of any Phase under this Section, the operation of Section V shall be suspended such that the County shall have no further obligation to fund the Project of any Phase thereof until or unless the terminated Phase is completed and in Operation in the sole discretion of the County Manager. "Operation"

shall be defined as a state of readiness of the Project or any Phase that allows the facility or facilities to be open and ready for intended operations in the ordinary course of business. The County's obligation to fund under this Agreement is not transferrable to any subsequent owner or interest holder of the Project or any Phase of the Project.

ARTICLE X TERMINATION OF PROJECT AFTER COMPLETION

Should the Project or any Phase thereof become voluntarily terminated after completion, or if Ammons ceases to be the fee simple owner of the Project property, including all land, structures, and equipment, Ammons shall be required to repay the County based on the year of operation in which operation ceases per the schedule below. If property continues in Operation for the purpose intended under this Agreement, then no termination, as defined in this Article, shall occur. "Termination" shall be defined as a substantial cessation of all building construction and failure to operate for a period of Ninety (90) days.

Unamortized Portion of Original Facility Cost to be Paid to County Upon Contract Termination				
Year of Operation in Which	Phase One	Phase Two	Phase Three	Total
	Hockey	Volleyball	Gymnastics	
Project Cost	\$ 2,400,000	\$ 300,000	\$ 300,000	\$ 3,000,000
1	\$ 2,160,000	\$ 270,000	\$ 270,000	\$ 2,700,000
2	\$ 1,920,000	\$ 240,000	\$ 240,000	\$ 2,400,000
3	\$ 1,680,000	\$ 210,000	\$ 210,000	\$ 2,100,000
4	\$ 1,440,000	\$ 180,000	\$ 180,000	\$ 1,800,000
5	\$ 1,200,000	\$ 150,000	\$ 150,000	\$ 1,500,000
6	\$ 960,000	\$ 120,000	\$ 120,000	\$ 1,200,000
7	\$ 720,000	\$ 90,000	\$ 90,000	\$ 900,000
8	\$ 480,000	\$ 60,000	\$ 60,000	\$ 600,000
9	\$ 240,000	\$ 30,000	\$ 30,000	\$ 300,000
10	\$ -	\$ -	\$ -	\$ -

Such repayment shall be due within ninety (90) days of a written demand for repayment from the County. The obligation to repay the County shall survive any transfer of ownership of the Project or its Phases by Ammons. In the event of a Termination of any Phase under this Section, the operation of Section V shall be suspended such that the County shall have no further obligation to fund the Project of any Phase thereof until or unless the terminated Phase is completed and in Operation in the sole discretion of the

County Manager. "Operation" shall be defined as a state of readiness of the Project or any Phase 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 Project or manner or amount of the payment obligation of the County hereunder shall require approval of the Board of Commissioners.

ARTICLE XIII ASSIGNMENT

Ammons 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 Ammons.

ARTICLE XIV MISCELLANEOUS

1. Notices. All notices or other communications hereunder to Ammons 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 Ammons, 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

If to Ammons: Mr. Jeffrey Ammons
7200-101 ACC Boulevard
Raleigh, North Carolina 27617

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 installment Financial 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, Ammons 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.

Ammons Building Corporation:

By [Signature]
Title: PRESIDENT

ATTEST:

By: Kamela Alston
Title: Executive Assistant

SEAL

COUNTY OF WAKE, NORTH CAROLINA:

By [Signature]
Chairperson
[Signature]
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.

 3.3.15

FINANCE DIRECTOR

The person responsible for monitoring the contract performance requirements is:

_____ Department Head Initials

**Wake Competition Center
Event Reporting Form**

Report Date _____

ICE FACILITY				
Report Period _____	Year of Op. _____			
Performance Reporting Period	Years of Operation	Est. Number of Planned Event Days (Cumulative) visitors outside 50 miles	Number of Events Held with visitors Outside 50 Miles	Number of Event Days
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4 (Rollover Period)	10, 11 and 12	0		

VOLLEYBALL FACILITY				
Report Period _____	Year of Op. _____			
Performance Reporting Period	Years of Operation	Est. Number of Planned Event Days (Cumulative) visitors outside 50 miles	Number of Events Held with visitors Outside 50 Miles	Number of Event Days
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3	7, 8 and 9	114		
4 (Rollover Period)	10, 11 and 12	0		

GYMNASTICS FACILITY				
Report Period	Year of Op.			
Performance Reporting Period	Years of Operation	Est. Number of Planned Event Days (Cumulative) visitors outside 50 miles	Number of Events Held with visitors Outside 50 Miles	Number of Event Days
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