

STATE OF NORTH CAROLINA

COUNTY OF WAKE

FIRST AMENDMENT TO USE AGREEMENT

This **FIRST AMENDMENT TO USE AGREEMENT** is made and entered into this ____ day of _____, 2020, by and between Wake County, a body politic and corporate (“County”) and North Carolina State University, a constituent institution of the University of North Carolina (“NCSU”). Both County and NCSU are also referred to as a “Party” or collectively as the “Parties” as the context requires. All capitalized terms not otherwise defined in this Amendment shall have the meanings given to them in the Use Agreement.

RECITALS:

WHEREAS, the County and the State of North Carolina entered into a Ground Lease as of April 2, 2001 whereby the State of North Carolina leases to County and County leases from the State of North Carolina certain Land for use as Yates Mill County Park and for the duration of the Ground Lease owns a Building for use as a teaching and research facility known as the A.E. Finley Education and Research Center, formerly known as the Yates Mill County Park Center and University Teaching and Research Facility, and entered a first Amendment to Lease April 24, 2002 (collectively, “Ground Lease Agreement”); and

WHEREAS the County and NCSU entered a Use Agreement on April 2, 2001 to establish the terms and conditions governing the programming, scheduling, use, maintenance, repair and control of the Building including the Common Areas and NCSU Space (“Use Agreement”); and

WHEREAS, the Use Agreement is incorporated into the Ground Lease Agreement as Exhibit F to the Ground Lease Agreement and made a part thereof by reference; and

WHEREAS, County and NCSU desire to amend the Use Agreement to provide for the construction, maintenance, use, and operation of a new aquatic species propagation facility constructed as part of NCDOT’s mitigation requirements associated with the future I-540

corridor to be constructed in Wake County (“Yates Mill Aquatic Species Propagation Facility” or “Aquatic Propagation Facility”).

WHEREAS, except as hereinafter set out, it is understood that the terms and provisions of the original Use Agreement shall remain unchanged and continue in full force and effect as written.

WHEREAS, the original Use Agreement and this First Amendment to Use Agreement shall be collectively referred to as “Use Agreement”.

NOW, THEREFORE, for and in consideration of the mutual covenants and promises contained herein, and for other good and valuable consideration, the receipt of which is hereby acknowledged, the County and NCSU agree as follows:

1. GENERAL.

- a. The recitals above are incorporated herein and made part of this Agreement.
- b. The parties each warrant and covenant to the other that it has full right and authority to execute this First Amendment to Use Agreement upon the terms and conditions set forth herein.
- c. The terms set forth herein apply specifically to the Aquatic Propagation Facility, and are in addition to, and not replacement of the terms and conditions in the original Use Agreement.

2. Page 1, ARTICLE I BUILDING OCCUPANCY, paragraph 1 is replaced by:

NC State shall have the exclusive right to occupy and use the entire NC State Space, being the area shown in red and depicted “NCSU SF” in the legend as shown in the map attached hereto and incorporated herein as Exhibit “B”.

3. Page 1, ARTICLE I BUILDING OCCUPANCY, is amended by adding the following numbered provisions:

2. The Aquatic Propagation Facility shall be a renovation located entirely within the “NC State Space”. The Aquatic Propagation Facility is further described and identified by the plans entitled “Aquatic Propagation Facility at Yates Mill County Park” prepared by Huffman Architects, maintained in entirety by the respective

parties, and incorporated herein by reference rather than attachment due to the volume of the plans.

3. Subject to receipt of funds pursuant to the Reimbursable Agreement entered by and between County and NCDOT on or about January 5, 2018 and consistent with the MOU entered by and between County and NCSU on or about January 16, 2018, County shall be responsible for the design, permitting, and construction of the Aquatic Propagation Facility and all associated building modification, components and improvements.
4. Page 2, ARTICLE II COMMON AND SHARED AREAS, paragraph 3 is replaced by the following numbered provision:
 3. The two classrooms in the Building shall be scheduled by County with NCSU having priority to reserve one classroom in accordance with the terms of the letter from NCSU to Wake County dated March 7, 2011 and attached hereto and incorporated herein as “Exhibit C”.
5. Page 2, ARTICLE III OPERATING AND MAINTENANCE EXPENSES, paragraph 1 is replaced by the following numbered provision:
 1. Responsibility for the operation and maintenance of the Aquatic Propagation Facility (“APF”) wing will be as specified in “Equipment Responsibility Spreadsheet” attached hereto and incorporated herein as “Exhibit D. In the event that the parties desire to change the allocation of operation and maintenance responsibilities, then the parties may execute a letter or updated “Equipment Responsibility Sheet”. The revised responsibilities shall become effective upon approval in writing by NCSU (Vice Chancellor for Finance and Administration) and County (GSA and PROS departments). NCSU shall be responsible for any operating and maintenance expenses attributable solely to the APF. The parties shall follow the revised duties from the effective date of approval by both parties without the need for an Amendment to this Use Agreement. Responsibility for the operation and maintenance of the remainder of the building and common areas and payment

responsibility shall be as outlined in the original Use Agreement except as changed by this 1st Amendment and Exhibit “D”. For the purpose of determining ownership and maintenance responsibilities, any equipment changes, additions, or substitutions made to Exhibit “D” prior to or during construction must be agreed upon by both parties at the completion of construction. No equipment shall be changed, added, or substituted after the completion of construction without the approval of Wake County GSA.

6. Page 2, ARTICLE III OPERATING AND MAINTENANCE EXPENSES, paragraph 2 is replaced by the following numbered provision:

2. NCSU’s proportionate share of utilities (i.e. electricity, gas, water, and sewer) shall be based upon an allocation formula of the cost of the utilities times a fraction consisting of the actual square footage of the NCSU SF (excluding sub-metered portion) over the total Building SF as each are shown on Exhibit “B” “Building Floor Plan”). In addition, NCSU shall be responsible for paying 100% of the cost of utilities attributable to the submetered portion of the Aquatic Propagation Facility based on the new utility metering system being installed as part of the Aquatic Propagation Facility project. All submetered amounts or pro-rated amounts shall be paid by NCSU to the County pursuant to existing p.4, paragraph 1, Article VI PAYMENT of the original Use Agreement. NCSU shall inform County of how invoice for utilities shall be structured and sent to NCSU. The County shall be responsible for the balance of utility expenses for the Building in accordance with Article VI, 6.6 “Utilities” as stated in the Lease Agreement].

7. Page 2, ARTICLE III OPERATING AND MAINTENANCE EXPENSES [No changes except as noted in Exh “D”]

8. Page 3, ARTICLE III OPERATING AND MAINTENANCE EXPENSES [No changes except as noted to Exh “D”]

9. Page 3, ARTICLE III OPERATING AND MAINTENANCE EXPENSES, paragraph 5 is amended by adding the following sentence: Wake County shall be responsible for the janitorial services related to the office and restroom in the NCSU SF and NCSU shall be responsible for janitorial services related to the remainder of the NCSU SF. [No other changes except as noted in Exh “D”]

10. Page 3, ARTICLE IV BUILDING CONTROL AND SECURITY [No changes]

11. Page 4, ARTICLE V TERM, is amended by adding:

2. The Term of this Amendment shall run and terminate concurrently with the Ground Lease, unless amended by agreement of the parties.
3. If the Use Agreement is terminated by mutual agreement prior to the expiration of the Lease Agreement, NCSU shall remove any NCSU equipment, NCSU fixtures, or other NCSU personal property from the Premises within a reasonable time at its own expense. The remainder of the Aquatic Propagation Facility, including fixtures, shall become part of the real property and all ownership rights and interest in the Project shall remain with the County, subject to Lease Agreement rights, with no additional payment due from County to NCSU.

12. Page 4, ARTICLE VI PAYMENT. [No changes]

13. Page 4, ARTICLE VII NOTICES is replaced by:

All notices and official correspondence regarding the matters set forth in this Agreement shall be made in writing and deposited in the United States mail, postage prepaid, and addressed as follows:

North Carolina State University
University Real Estate & Development
Campus Box 7408
Raleigh, North Carolina 27695-7408

With a copy to:
North Carolina State University
Dean's Office - CALS
Dean - Agriculture & Life Sciences
Campus Box 7601
Raleigh, North Carolina 27695-7601

Wake County
Attn: Wake County Manager
P.O. Box 550
Raleigh, N.C. 27602
David.Ellis@wakegov.com

With a copy to:
Wake County
Attn: County Attorney
P.O. Box 550
Raleigh, N.C. 27602
swarren@wakegov.com

With a copy to:
Wake County
Attn: Director Parks, Recreation & Open Space
PO Box 550
Raleigh, N.C. 27602
csnow@wakegov.com

With a copy to:
Wake County
Attn: Director, General Services Administration
PO Box 550
Raleigh, NC 27602
kbraunbach@wakegov.com

With a copy to:
Wake County
Attn: Director, Facilities Design & Construction
P. O. Box 550
Raleigh, NC 27602
mforestieri@wakegov.com

A contemporaneous electronic copy shall also be provided to each Addressee. The parties shall be responsible for providing updated Notice information.

14. Page 5, ARTICLE VIII MISCELLANEOUS, paragraph 1 is replaced by:

1. The Use Agreement (inclusive of Use Agreement dated April 2, 2001 and this First Amendment to Use Agreement), together with the Ground Lease Agreement (as amended), and Memorandum of Understanding dated January 16, 2018 constitute the entire agreement between the parties and supersedes all prior oral and written agreements with respect hereto. The Reimbursable Agreement between County and NCDOT are relevant to this Use Agreement and made a part thereof to the extent that this Agreement relates to the duties of the parties hereunder.

15. Page 5, ARTICLE VIII MISCELLANEOUS is amended by adding:

8. To the extent permitted by N.C. law and as limited by the 2003 Resolution Regarding Limited Waiver of Sovereign Immunity attached hereto as Exhibit "E" and incorporated herein by reference, Wake County shall be responsible for the acts and omissions of Wake County and its employees during the design and construction phases of the Project. However, the foregoing responsibility shall not apply to bodily injury, death, or property damage caused by NCSU's sole negligence or willful misconduct. Wake County shall require its contractors and consultants to maintain insurance coverage in types and limits appropriate for this Project in the sole discretion of Wake County.
9. To the extent permitted by law and as limited by the North Carolina Tort Claims Act, NCSU shall be responsible for the acts and omissions of NCSU and its employees during the occupancy and operation of the Project, including any damage to the Building or surrounding Land and improvements located thereon as a result of the operation of the Propagation Facility. However, the foregoing responsibility shall not apply to bodily injury, death, or property damage caused by County's sole negligence or willful misconduct.

10. NCSU shall not cause or permit the use, generation, release, manufacture, refining, production, processing, storage or disposal of any hazardous substances on, under or about the Aquatic Species Propagation Facility, except as necessary and appropriate for the Project, in which case the use, storage or disposal of such hazardous substances shall be performed in compliance with the Environmental Laws and the highest standards prevailing in the industry. NCSU shall be responsible for direct payment of any costs or responsibilities of County under Article VIII of the Lease Agreement incurred by County in connection with any breach by NCSU of its obligations under this Section. However, the foregoing responsibility shall not apply to expense related to hazardous substances present on, under or about the Aquatic Species Propagation Facility prior to NCSU's occupancy and use of the Facility. The covenants and obligations under this paragraph shall survive the expiration or earlier termination of the Use Agreement.

12. A Schedule of Exhibits is attached hereto and incorporated herein by reference.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorized officers, all as of the date first above written.

WAKE COUNTY

Gregory D. Ford, Chairman
Wake County Board of Commissioners

Date: _____

NORTH CAROLINA STATE UNIVERSITY

Charles A. Maimone, Vice Chancellor
Finance and Administration

Date: _____

SCHEDULE OF EXHIBITS

EXHIBIT “A”	[Intentionally omitted]
EXHIBIT “B”	Map of amended NC State Space
EXHIBIT “C”	Letter from NCSU to Wake County dated March 7, 2011
EXHIBIT “D”	Equipment Responsibility Sheet
EXHIBIT “E”	2003 Resolution Regarding Limited Waiver of Sovereign Immunity