

REQUEST FOR BOARD ACTION

BOARD OF COMMISSIONERS OF HENDERSON COUNTY ACTING AS

CANE CREEK WATER AND SEWER DISTRICT BOARD OF DIRECTORS

MEETING DATE: December 5, 2016

SUBJECT: Proposed Agreement with Fletcher Academy (FAI)
Mud Creek Interceptor Project, Phase 2

PRESENTER: Marcus A. Jones, P.E.

ATTACHMENTS: Yes

1. Proposed Agreement with Fletcher Academy Inc.

SUMMARY OF REQUEST:

On October 3, 2016, the Board directed staff to develop an agreement with Fletcher Academy Inc. ("FAI") based on their second proposal to contribute \$1,025,000 to the District's Mud Creek Interceptor Project, Phase 2 from Riverstone subdivision to Fletcher Academy. The Mud Creek Interceptor Project was first approved by the Board in FY2015 budget.

Staff has developed the attached, proposed agreement within the conditions directed from the Board. In addition, staff has incorporated the condition into the agreement that FAI's contribution will be presented to the District as a guaranteed irrevocable letter of credit at the beginning of the project. The letter of credit will carry the contribution through the time FAI is connected with sewer service. At the time of connection the letter of credit will terminate and the contribution payment will be paid to Cane Creek.

The Fletcher Academy, Inc., Board of Directors has approved this agreement, notifying us of their final approval on November 29. Staff recommends approval of the agreement.

BOARD ACTION REQUESTED:

Approval of the agreement with Fletcher Academy, Inc. regarding their \$1,025,000 contribution to the District's Mud Creek Interceptor Project, Phase 2 from Riverstone subdivision to Fletcher Academy campus.

Suggested Motion:

I move that the Board go into session as the Directors of the Cane Creek Water and Sewer District.

Acting as the Board of Directors of the Cane Creek Water and Sewer District, I move that the Board approves the agreement with Fletcher Academy, Inc. regarding their \$1,025,000 contribution to the District's Mud Creek Interceptor Project, Phase 2 from Riverstone subdivision to Fletcher Academy campus.

Lastly, I move that the Board go out of session as the Directors of the Cane Creek Water and Sewer District.

STATE OF NORTH CAROLINA

COUNTY OF HENDERSON

MEMORANDUM OF AGREEMENT

THIS MEMORANDUM OF AGREEMENT is made the _____ day of _____, 2016, by and between Fletcher Academy, Inc., a North Carolina non-profit corporation (the "Academy"), The Layman Foundation of North Carolina, Inc., a North Carolina non-profit corporation (the "Foundation"), and the County of Henderson, a body corporate and politic of the State of North Carolina (the "County"); the Academy, Foundation, and County being sometimes hereinafter referred to collectively as the "Parties" and singularly as a "Party".

Background of the Agreement

1. The Academy operates various educational and related institutions on that certain parcel of property located within the Hoopers Creek Township, Henderson County, North Carolina (the "Property"), which Property is partially depicted on the Mud Creek Interceptor / Extension rendering attached hereto as Exhibit A (the "Plans"), which Property is owned by the Foundation.

2. The Academy and Foundation currently operate a private sewer system and package plant, and desire to close such plant and to connect to the sanitary sewer system operated by the County.

3. The County, through its Cane Creek Water and Sewer District ("CCWSD"), desires to extend its existing sanitary sewer system to the Property in connection with the Mud Creek Interceptor Project (the "Project") as shown on the Plans in order to provide such sewer system for the benefit of the Property.

4. The parties have agreed that the Academy contribute the sum of One Million Twenty Five Thousand and no/100s dollars (\$1,025,000.00) (the "Private Contribution") to the cost of construction of the Project, subject to the terms and conditions contained herein.

Agreement

Now, therefore, for and in consideration of the premises, the mutual covenants and conditions contained herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereby agree as follows:

1. Obligations of the County:
 - a. The County will construct the Project, including, without limitation obtaining and providing through CCWSD design, permitting, right of way acquisition and construction of the Project substantially as depicted on the Plans, at the cost and expense of CCWSD. The County agrees to use its best efforts to complete the Project to the Point of Connection, such term being defined as the point where the Academy will connect to the new sewer line being constructed as part of the Project, which the Parties agree is the location where the existing private system

operated by the Academy currently discharges into the lagoon on the Property, on or before the 31st -day of December, 2019 (the "Project Completion Date").

- b. The County will use its best efforts to enter into contracts in connection with the construction of the Project not later than the 28th day of February, 2018 (the "Contract Deadline").
- c. The County will use its best efforts to commence construction of the Project not later than the 30th day of April, 2018 (the "Project Commencement Date").
- d. Nothing herein shall be construed to require any expenditure of any County funds other than those of CCWSD, its successors and assigns.
- e. Upon the payment of the Private Contribution to the County the County shall cancel and forfeit the Letter of Credit described below.

2. Obligations of the Foundation:

- a. The Foundation agrees to grant such easements to the County for the construction, maintenance, and repair of the sewer lines and accessories as may be reasonably requested by the County in connection with construction of the Project.
- b. The Foundation agrees to cooperate with the County as reasonably requested in the event the County seeks to obtain grant funding to further defray the cost of construction of the Project.

3. Obligations of Academy:

- a. The Academy shall connect all the structures operated by the Academy to the sewer line constructed by or for the County upon completion of the construction of the Project.
- b. The Academy shall pay when billed not prior to the completion of the construction of the Project all applicable service, connection, availability or other fees lawfully imposed by the County.
- c. The Academy shall pay and deliver, by not later than the date upon which the County executes the contract(s) for the construction of the Project (which date the parties stipulate will not be prior to January 31, 2018), the entire sum of the Private Contribution to Bank of North Carolina, or such other institution as the Parties may mutually agree, as escrow agent (the "Bank"), to hold with obligations as stated below.:
 - i. The Private Contribution shall be placed in a segregated account. Any interest earned on the Private Contribution while maintained in such account shall accrue to the benefit of the Academy, and may be periodically withdrawn by the Academy.
 - ii. Upon the deposit of the Private Contribution, the Bank shall execute a letter of credit in favor of the County and CCWSD (the "Letter of

Credit”), securing payment of the Private Contribution upon completion of the Project as otherwise contemplated herein. The Letter of Credit may contain limitations on the payment of the Private Contribution not inconsistent with this Agreement. Specifically, and without limiting the generality of the foregoing, the Parties agree that the Letter of Credit shall provide that in the event the Project is not commenced by the Project Commencement Date or substantially complete as provided in Paragraph 3(c)(iii) below by the Project Completion Date, time being of the essence with respect to both dates, the Letter of Credit shall be cancelled and the Private Contribution returned to the Academy.

- iii. At such time as the Project is substantially complete, substantial completion being defined as when sanitary sewer service is available to the Point of Connection and ready for connection and utilization by the Academy as reasonably determined and certified to the Parties by the Project engineers, the Private Contribution shall be paid to the County for benefit of CCWSD. In the event the Academy defaults in its payment of the Private Contribution, the County shall have all rights to receive payment directly from the Bank pursuant to the Letter of Credit.
 - d. The Academy agrees to cooperate with the County as reasonably requested in the event the County seeks to obtain grant funding to further defray the cost of construction of the Project.
 - e. The Academy agrees to cooperate with the Foundation in connection with the grant of easements as otherwise contemplated herein.
4. Termination. This Agreement may be terminated by the Academy or the Foundation at any time upon the County's failure to commence or complete construction of the Project as set forth herein, time being of the essence with respect to such dates, upon written notice of termination to the County. Upon such termination, the County shall immediately cancel and forfeit the Letter of Credit and authorize the release of the depository account in which the Private Contribution is held. With the exception of the return of the Private Contribution, upon such termination, the Parties shall have no further obligation to the other pursuant to this Agreement.
5. General.
 - a. Assignment. This Agreement and all of the provisions hereof shall be binding upon and inure to the benefit of the Parties hereto and their respective successors and permitted assigns. No Party shall assign this Agreement without the prior written consent of the other Parties, which will not be unreasonably withheld. Notwithstanding the above, it is contemplated that the CCWSD may be incorporated into the Metropolitan Sewerage District of Buncombe County (“MSD”), and the Parties agree to cooperate as needed to assist with the assignment of the County's obligations to the Foundation and Academy hereunder to MSD.
 - b. Governing Law; Venue. The interpretation and construction of this Agreement, and all matters relating hereto (including, without limitation, the validity or

enforcement of this Agreement), shall be governed by the laws of the State of North Carolina without regard to any conflicts or choice of law provisions of the State of North Carolina that would result in the application of the law of any other jurisdiction. The venue to enforce the Parties rights hereunder shall be the civil superior court for Henderson County, North Carolina.

- c. Notices. Unless otherwise provided herein, any notice, request, instruction or other document to be given hereunder by any party to any other party shall be in writing and shall be deemed to have been given upon personal delivery, if delivered by hand or courier, or upon the date of mailing if sent via certified mail, return receipt requested, or via prepaid overnight courier service, and in each case at the respective addresses or numbers set forth below or such other address or number as such party may have fixed by notice:

Fletcher Academy, Inc.
Attn: President

Fax:
Email:

The Layman Foundation of North Carolina, Inc.
Attn: President

Fax:
Email:

County of Henderson
Attn: Chairman, Board of Commissioners

Fax:
Email:

- d. Entire Agreement. This Agreement, including the other documents referred to herein and the Exhibits hereto which form a part hereof, contains the entire understanding of the Parties hereto with respect to the subject matter contained herein and therein. This Agreement supersedes all prior agreements and understandings between the Parties with respect to such subject matter.
- e. Amendments. This Agreement may not be amended, supplemented or modified orally, but only by an agreement in writing signed by each of the Parties hereto.
- f. Counterparts. This Agreement may be executed in two or more counterparts or by facsimile transmission, or by electronic delivery of pdf signatures, all of which taken together shall constitute one instrument.

IN WITNESS WHEREOF, the Parties have executed this Agreement by and through their duly authorized officers to be effective the day and year first written above.

FLETCHER ACADEMY, INC.

By: _____
President

Attest:

Corporate Secretary

THE LAYMAN FOUNDATION OF NORTH CAROLINA, INC.

By: _____
President

Attest:

Corporate Secretary

COUNTY OF HENDERSON

By: _____
Chairman, Board of Commissioners

Attest:

Clerk to the Board of Commissioners