

REQUEST FOR BOARD ACTION
HENDERSON COUNTY
BOARD OF COMMISSIONERS

MEETING DATE: 6 February 2017
SUBJECT: Approval of option agreement
PRESENTER: Chairman Edney; Charles Russell Burrell
ATTACHMENT(S): Proposed agreement

SUMMARY OF REQUEST:

The Board of Commissioners, acting in closed session pursuant to N.C. Gen. Stat. §143-318.11(a)(5)(i), provided instruction to the Board's agent regarding "the price and other material terms of a contract or proposed contract for the acquisition of real property by purchase, option, exchange, or lease". Today, a proposed option agreement is brought before the Board for final approval.

County staff will be present and prepared if requested to give further information on this matter.

BOARD ACTION REQUESTED:

Approval of the proposed agreement.

If the Board is so inclined, the following motion is suggested:

I move that the Board approve the proposed option agreement.

STATE OF NORTH CAROLINA

COUNTY OF HENDERSON

OFFER TO PURCHASE & OPTION AGREEMENT

This Offer to Purchase & Option Agreement is between the County of Henderson, North Carolina, a body corporate and politic ("the County"), and Hunting Creek Associates LLC, a North Carolina LLC ("HCA"). This agreement is contingent only upon the approval of the Board of Commissioners of Henderson County.

Background Facts:

- A. HCA is the owner in fee simple of real property located at 1008 Fleming Street, within the City of Hendersonville, Henderson County, North Carolina, and is Henderson County REID 112899 ("the Property").
- B. The County is considering acquisition of the Property, and wishes to insure that the Property is not conveyed to a third party prior to the conclusion of its consideration.
- C. The Property is listed for sale at a price of \$800,000.00, and the parties specify that \$800,000.00 is the property's fair market value. Notwithstanding the foregoing, HCA wishes to offer the County and the County desires an option for a period of six (6) months should the County desire to obtain title to the property at a cash sales price of \$500,000.00 and is willing to make a gift to the County of the remaining \$300,000.00 of the value of the Property.
- D. The parties have agreed to the terms stated below, subject only to the approval by the Board of Commissioners of Henderson County.

Terms of Option and Agreement:

1. HCA hereby grants to the County the option, if exercised by the County in its sole discretion within six (6) months from the date of approval hereof by the Board of Commissioners of Henderson County, to purchase the Property, and HCA will convey the property to the County if this option is so exercised, in exchange for the total sum of \$805,000.00, to be paid as follows:
 - a. \$5,000.00 upon approval of this Option by the Board of Commissioners of Henderson County.
 - b. \$500,000.00 in cash upon the "date of final closing" (defined below).
 - c. A gift from HCA to the County of a thirty-seven and fifty one-hundredths percent (37.50%) undivided interest in the Property, which the parties stipulate is worth, according to the terms of the stipulation of value referenced above, \$300,000.00. This gift will occur on the "date of final closing" defined below.
2. The "date of final closing" will be set by written notice given to HCA by the County. It will be at least thirty and no more than sixty days after the date of the exercise by the County of the option granted hereby by HCA. If no such written notice is given, then the "date of final closing" shall be the day which is sixty (60) days after the exercise by the County of the option granted herein.

3. At the date of final closing, HCA will execute a North Carolina General Warranty Deed for the Property, in a form substantially similar to the North Carolina Bar Association's Real Property Section General Warranty Deed, in favor of the County.
4. The County will cooperate with HCA in HCA's attempt to obtain an income tax deduction for the amount of donation referenced in paragraph 1.c, above. However, the County cannot and does not insure that such contribution will in fact be treated as deductible against income by the Internal Revenue Service. In the event such contribution is determined to be not deductible against HCA's income, it will be unaffected, and the County will have no liability to HCA as a result.
5. The following provisions, all taken in substance from NC Bar Form 13, shall apply:
 - a. **Evidence of Title:** HCA agrees to convey fee simple marketable and insurable title to the Property free and clear of all liens, encumbrances and defects of title other than: (a) zoning ordinances affecting the Property, (b) matters of record existing at the approval date that are not objected to by the County prior to the expiration of the examination period ("Permitted Exceptions"); provided that HCA shall be required to satisfy, at or prior to Closing, any encumbrances that may be satisfied by the payment of a fixed sum of money, such as deeds of trust, mortgages or statutory liens. HCA shall not enter into or record any instrument that affects the Property after the approval date without the prior written consent of the County, which consent shall not be unreasonably withheld, conditioned or delayed and (c) easements of rights of way of record and city and county *ad valorem* taxes for the year of final closing for such portion thereof after the date of final closing.
 - b. **Title Examination:** After the exercise of the option by the County, the County shall, at the County's expense, cause a title examination to be made of the Property prior to the date of final closing. In the event that such title examination shall show that HCA's title is not fee simple marketable and insurable, subject only to Permitted Exceptions, then the County shall notify HCA in writing of all such title defects and exceptions prior to the end of the examination period. HCA shall have until the date upon which HCA gives the County notice of the date of final closing (said date being ninety (90) days prior to the date of prior closing, pursuant to Paragraph 2 hereof) to cure said noticed defects. If HCA does not cure the noticed defects or objections by the date which is ninety (90) days prior to the date of final closing as stated in Paragraph 2, above, then the County may terminate this Agreement and receive a return of all money paid into Escrow pursuant to Paragraph 1.a, above, including accumulated interest. It is specifically not a condition precedent to the County's obligation to perform that HCA cure any title defects and exceptions which are not reported prior to the expiration of the examination period.
 - c. **Inspections:** During the examination period, the County, its agents or representatives, at the County's expense and at reasonable times during normal business hours, shall have the right to enter upon the Property for the purpose of inspecting, examining, performing soil boring and other testing, and surveying the Property. The County shall conduct all such on-site inspections, examinations, soil boring and other testing, and surveying of the Property in a good and workmanlike manner, shall repair any damage to the Property caused by the County's entry and on-site inspections and shall conduct same in a manner that does not unreasonably interfere with HCA's or any tenant's use and enjoyment of the Property. In that respect, the County shall make reasonable efforts to undertake on-site inspections outside of the hours any tenant's business is open to the public and shall give prior notice to any tenants of any entry onto any tenant's portion of the Property for the purpose of conducting inspections. Upon HCA's request, the County shall provide to HCA evidence of general liability insurance. The County shall also have a right to review and inspect all contracts or other agreements affecting or related directly to

the Property (not the business operated thereon) and shall be entitled to review such books and records of HCA that relate directly to the operation and maintenance of the Property (excluding financial records of the business operated thereon), provided, however, that the County shall not disclose any information regarding this Property (or any tenant therein) unless required by law and the same shall be regarded as confidential, to any person, except to its attorneys, accountants, lenders and other professional advisors, in which case the County shall obtain their agreement to maintain such confidentiality. The County assumes all responsibility for the acts of itself, its agents or representatives in exercising its rights under this Section 6(e) and agrees to indemnify and hold HCA harmless from any damages resulting there from. This indemnification obligation of the County shall survive the Closing or earlier termination of this Agreement. The County shall, at the County's expense, promptly repair any damage to the Property caused by the County's entry and on-site inspections.

- d. **Environmental:** HCA represents and warrants that it has no actual knowledge of the presence or disposal, except as in accordance with applicable law, within the buildings or on the Property of hazardous or toxic waste or substances, which are defined as those substances, materials, and wastes, including, but not limited to, those substances, materials and wastes listed in the United States Department of Transportation Hazardous Materials Table (49 CFR Part 172.101) or by the Environmental Protection Agency as hazardous substances (40 CFR Part 302.4) and amendments thereto, or such substances, materials and wastes, which are or become regulated under any applicable local, state or federal law, including, without limitation, any material, waste or substance which is (i) petroleum, (ii) asbestos, (iii) polychlorinated biphenyls, (iv) designated as a Hazardous Substance pursuant to Section 311 of the Clean Water Act of 1977 (33 U.S.C. §1321) or listed pursuant to Section 307 of the Clean Water Act of 1977 (33 U.S.C. §1317), (v) defined as a hazardous waste pursuant to Section 1004 of the Resource Conservation and Recovery Act of 1976 (42 U.S.C. §6903) or (vi) defined as a hazardous substance pursuant to Section 101 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. §9601). HCA has no actual knowledge of any contamination of the Property from such substances as may have been disposed of or stored on neighboring tracts. Should the results of the testing of the Property by the County pursuant to Paragraph 5.c, above, indicate the presence of hazardous or toxic waste or substances, the County shall, prior to the end of the examination period, report the same to HCA in writing of the contents of the report. HCA shall have until the date upon which HCA gives the County notice of the date of final closing (said date being ninety (90) days prior to the date of prior closing, pursuant to Paragraph 2 hereof) to cure only the presence of such hazardous or toxic waste or substances which are reported in writing prior to the expiration of the examination period. If HCA does not cure presence reported as required by this subparagraph by the date which is ninety (90) days prior to the date of final closing as stated in Paragraph 2, above, then the County may terminate this Agreement and receive a return of all money paid into Escrow pursuant to Paragraph 1.a, above, including accumulated interest. It is specifically not a condition precedent to the County's obligation to perform that HCA cure such presence which is not reported prior to the expiration of the examination period.
- e. **Risk of Loss/Damage/Repair:** Until Closing, the risk of loss or damage to the Property, except as otherwise provided herein, shall be borne by HCA. Except as to maintaining the Property in its same condition, HCA shall have no responsibility for the repair of the Property, including any improvements, unless the parties hereto agree in writing.
- f. **Notices:** Unless otherwise provided herein, all notices and other communications which may be or are required to be given or made by any party to the other in connection herewith shall be in writing and shall be deemed to have been properly given and received on the date delivered in

person or deposited in the United States mail, registered or certified, return receipt requested, addressed to:

i. For HCA:

Mr. Charles M. Fulenwider
Post Office Box 821
Morganton, NC 28655

ii. For the County:

Mr. Steve Wyatt
Henderson County Manager's Office
1 Historic Courthouse Square, Suite 2
Hendersonville, NC 28792

With copy to:

Mr. Charles Russell Burrell
Office of the County Attorney
1 Historic Courthouse Square, Suite 5
Hendersonville, NC 28792

- g. **Entire Agreement:** This Agreement constitutes the sole and entire agreement among the parties hereto and no modification of this Agreement shall be binding unless in writing and signed by all parties hereto.
- h. **Enforceability:** This Agreement shall become a contract when a signed by both Buyer and Seller and such signing is communicated to both parties; it being expressly agreed that the notice described in paragraph 5.f, above, is not required for effective communication for the purposes of this paragraph. This Agreement shall be binding upon and inure to the benefit of the parties, their heirs, successors and assigns and their personal representatives.
- i. **HCA Knowledge:** HCA has no actual knowledge of (i) condemnation(s) affecting or contemplated with respect to the Property; (ii) actions, suits or proceedings pending or threatened against the Property; (iii) changes contemplated in any applicable laws, ordinances or restrictions affecting the Property; or (iv) governmental special assessments, either pending or confirmed, for sidewalk, paving, water, sewer, or other improvements on or adjoining the Property, and no pending or confirmed owners' association special assessments.
- j. **Compliance:** To HCA's actual knowledge, (i) HCA has complied with all applicable laws, ordinances, regulations, statutes, rules and restrictions pertaining to or affecting the Property; (ii) performance of the Agreement will not result in the breach of, constitute any default under or result in the imposition of any lien or encumbrance upon the Property under any agreement or other instrument to which HCA is a party or by which HCA or the Property is bound; and (iii) there are no legal actions, suits or other legal or administrative proceedings pending or threatened against the Property, and HCA is not aware of any facts which might result in any such action, suit or other proceeding.
- k. **Survival of Representations and Warranties:** All representations, warranties, covenants and agreements made by the parties hereto shall survive the Closing and delivery of the deed. HCA shall, at or within six (6) months after the Closing, and without further consideration, execute, acknowledge and deliver to the County such other documents and instruments, and take such

other action as Buyer may reasonably request or as may be necessary to more effectively transfer to County the Property described herein in accordance with this Agreement.

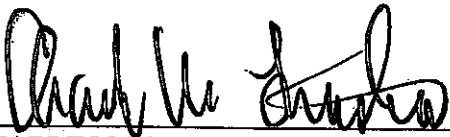
1. **Tax-Deferred Exchange:** In the event HCA desires to effect a tax-deferred exchange in connection with the conveyance of the Property, the County agrees to cooperate in effecting such exchange; provided, however, that HCA party shall be responsible for all additional costs associated with such exchange, and provided further, that the County shall not assume any additional liability with respect to such tax-deferred exchange. The parties shall execute such additional documents, at no cost to the County, as shall be required to give effect to this provision.
- m. **Brokers:** Except as expressly provided herein, the parties agree to indemnify and hold each other harmless from any and all claims of brokers, consultants or real estate agents by, through or under the indemnifying party for fees or commissions arising out of the sale of the Property to the County. The parties represent and warrant to each other that they have not employed nor engaged any brokers, consultants or real estate agents to be involved in this transaction.
- n. **Entire Agreement; No Third Party Beneficiaries:** This Agreement is the entire agreement between the Parties concerning its subject matter, supersedes all prior agreements and understandings, whether or not written, and is not intended to confer upon any person other than the Parties any rights or remedies hereunder.
- o. **County Representations:** With the execution hereof and the approval of the Agreement by the Board of Commissioners the County represents and warrants that it has complied with the North Carolina Budget and Fiscal Control Act, the North Carolina Open Meetings Law, and the North Carolina Public Records law in considering and approving this Agreement.
- p. **Interpretation:** No provision of this agreement shall be interpreted for or against any party because that party or that party's agent or legal representative drafted the agreement or a particular provision, and the parties hereby unconditionally waive such defense or claim regarding this agreement. This stipulation may be used in court regarding any claims or defenses based on this agreement.
- q. **Representation by the Signors hereof:** All persons executing this Agreement represent that each has been duly authorized to sign this Agreement in the capacity indicated, and that this Agreement shall be final and binding once approved by the Board of Commissioners.

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Signed, this the _____ day of February, 2011.

Seller:

HUNTING CREEK ASSOCIATES, LLC

By: 
CHARLES M. FULENWIDER, Member/Manager

Buyer:

COUNTY OF HENDERSON

By: 
Chairman of the Board of Commissioners

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APPROVAL BY BOARD OF COMMISSIONERS

This is to certify that the foregoing Agreement has been approved, adopted and ratified by the Board of Commissioners of Henderson County, the date and year shown below.

This the _____ day of _____, 2017.

HENDERSON COUNTY BOARD OF COMMISSIONERS

By: _____
J. MICHAEL EDNEY, Chairman

Attest:

TERESA L. WILSON, Clerk to the Board