

NORTH CAROLINA  
JACKSON COUNTY

**ECONOMIC DEVELOPMENT AGREEMENT**

THIS AGREEMENT, made and entered into this \_\_\_\_ day of \_\_\_\_\_, 2017, by and between, THE COUNTY OF JACKSON, a body politic organized and existing under the laws of and a political subdivision of the State of North Carolina, hereinafter referred to as the “County”, and WNC OUTDOOR DEVELOPMENT, LLC, a North Carolina limited liability company hereinafter referred to as the “Company”, KELLY T. CUSTER, individually with all parties being collectively referred to as the “Parties”;

**WITNESSETH:**

WHEREAS, the Company desires to develop a premier outdoor recreation and entertainment complex along the Tuckasegee River in or near Dillsboro, North Carolina, (herein “Project”) which Project is projected to involve the expenditure of over \$1,400,000.00 over a period of five years, and result in the creation of ten qualified jobs within four years; and

WHEREAS, the County owns certain property located in Dillsboro Township, Jackson County, North Carolina, being a portion of that certain tract of land lying and being in Dillsboro Township in Jackson County, North Carolina, containing 17.647 acres as more particularly shown and identified as the property of “Duke Energy Carolinas, LLC” on that certain plat entitled “Project Boundary Survey for Duke Energy Carolinas, LLC” dated October 14, 2013, last revised April 4, 2014, and recorded in Plat Cabinet 20 at Slide 366 in the Jackson County, North Carolina Public Registry (reduction on copy attached hereto as Exhibit A), and being the lands described in and conveyed by North Carolina Non-Warranty Deed from The Town of Dillsboro, a North

Carolina municipal corporation, dated October 7, 2014, and recorded in Book 2051, Page 355 of the Jackson County Public Registry (the “Property”)(copy attached hereto as Exhibit B); and

WHEREAS, the Company has identified a portion of the Property, being 7.0 acres as shown on that certain plat entitled “Boundary Survey for Jackson County” dated January 24, 2017 to be recorded, prior to conveyance of property, in the Jackson County, North Carolina Public Registry (the “Property”) (reduction on copy attached hereto as Exhibit C), as being well-suited for the Project, a portion of the Company’s Master Plan, has prepared preliminary plans for the Project, and has approached the County about locating the Project on the Property; and

WHEREAS, the Company has indicated that assistance in the form of a prepared site, with water and sewer availability, and recognition of tax revenue as consideration for the Property, and other incentives (as allowed under NC law) would induce Company to locate the Project on the Property; and

WHEREAS, pursuant to the Local Development Act of 1925 (as amended), the County has agreed, after holding a public hearing on March 20, 2017, following notice as required by law, to provide certain incentives to the Company as more particularly described in this Agreement as an inducement to the Company to proceed with the Project, and to facilitate the investment and the creation of jobs in connection with the Project; and

WHEREAS, the County has determined, based on data projections provided by Western Carolina University, that the Company’s capital investment on the Property and the operation of the Project will generate significant ad valorem tax revenues for the County, and will result in the creation of a substantial number of jobs in the County that will pay at or above the median average wage in the County, and these benefits constitute a material part of the financial basis for the County entering into this Agreement; and

WHEREAS, the Company acknowledges that the incentives provided herein was one of the key factors in the Company's decision to proceed with the Project, to make the investment, and enter into this Agreement, and that the Company would not have agreed to develop and operate the Project in the County without the valuable incentives provided by the County.

NOW THEREFORE, in consideration of the mutual promises and covenants set forth herein, together with other good and valuable considerations, the sufficiency of which is hereby acknowledged, the County and the Company do hereby agree as follows:

I. EXHIBITS AND DEFINED TERMS

Exhibits

- A. Reduction copy of survey of Duke Energy Survey
- B. County's Deed to Property
- C. Reduction copy of Current Survey of Property
- D. Infrastructure MOU
- E. Development Plan
- F. Illustration of adjustment formula

Defined Terms

- A. "Project" means the outdoor recreation and entertainment complex to be constructed by Company along the Tuckasegee River Jackson County, NC, featuring river and whitewater activities, camping, outdoor recreation, associated lodging and food and beverage retail. The Project is part of a Master Plan that will include improvements on the Property as well as on other properties consistent with Company's master development plan, as it may change from time to time.

- B. "Property" means the tract of land on which the Project is to be built, containing 7 acres, more or less, as well as the 6.33 unusable acres under the River, as shown on a plat dated January 24, 2017 to be recorded, prior to conveyance of the property, in the Jackson County Registry; as shown on Exhibit C.
- C. "Contract Date" means the date on which this Agreement is fully executed by all parties.
- D. "Commencement Date" means the date on which Company records the deed to the Property.
- E. "Site Preparation" means the rough grading of the Property by the County, and the construction of water supply and sewage disposal lines by the County, as described in the Infrastructure MOU.
- F. "Infrastructure MOU" means the "Memorandum of Understanding Regarding Infrastructure" dated \_\_\_\_\_, 2017.
- G. "Development Plan" means the Company's plan for development of the Property, showing phases and anticipated schedules for completion
- H. "Improvements" means those structures and facilities that Company proposes to construct on the Property, according to the Development Plan.
- I. "Qualified Job" means a permanent job paying at or above the median average annual wage for Jackson County, as determined by the NC Department of Commerce for the most recent period for which data is available.

J. “Force Majeure” means a cause or event not reasonably in control of Jackson County or the Company including, but not limited to, (i) acts of God, (ii) strikes, lockouts or other construction-related disturbances, (iii) acts of public enemies, (iv) orders or restraints of any kind of the government of the United States, the State of North Carolina or any department, agency, official or political subdivision thereof, or any civil, judicial or military authority issued without fault on the part of Jackson County, (v) insurrections, (vi) riots, (vii) landslides, (viii) earthquakes, (ix) fires, (x) storms, (xi) droughts, (xii) floods, (xiii) explosions, or (xiv) breakages or accident to machinery or utility lines.

## II. TRANSFER OF PROPERTY and CONDITIONS OF CLOSING

- A. Property Transfer. On or before the Commencement Date, specified below, County shall convey the Property in the Company, pursuant to N.C.G.S. 158-7.1(d), subject to the terms and conditions provided for in this Agreement. Said conveyance shall be by non-warranty deed.
- B. Funding for Site Preparation. As a condition to County’s obligation to convey the Property, County shall have obtained commitments for all grant funding necessary to complete the grading of the Property and complete the installation of water and sewer facilities (herein “Site Preparation”) as described in the Infrastructure MOU attached hereto as Exhibit D, and shall have received budgetary authorization from the Jackson County Board of Commissioners to proceed with the Site Preparation. The County shall have 90 days from the date of full execution of this Agreement (herein “Contract Date”) to satisfy this condition,

and County shall not, without its consent, be required to deliver the deed to the Property before the expiration of this period.

C. Title and Site Conditions Investigation

The Company shall have no obligation to accept title to the Property unless and until (i) the Company is satisfied in all respects with its due diligence investigation of the Property including, without limitation, all title, survey, geotechnical and environmental matters related thereto, (ii) the County is not in default of the performance of any covenant or agreement to be performed as of the date of Closing by the County as set forth in this Agreement, (iii) the Company has confirmed that its use of the Project Site for the Project will not violate any private restrictions, zoning ordinances or governmental regulations then in effect on the date of Closing, (iv) the County has obtained all legally required budgetary and other governmental authorizations to proceed with the Site Preparation, and shall have so advised the Company in writing. The Company shall have 90 days from the Contract Date to complete its due diligence described herein, and shall not, without its consent, be required to close on the Property before the end of this period.

If the Company determines that the conditions set forth in clauses (i) –(iv) preceding have not been satisfied, Company shall notify County within 10 days, and County shall have reasonable opportunity to satisfy said condition. If said condition cannot be satisfied within 90 days of the Contract Date, the parties may agree upon a reasonable extension of said period.

D. Closing and Recording

Once the Company has determined that the conditions set forth in clauses (i) – (iv) preceding have been satisfied (or have been waived in whole or in part by the Company), and the Rough Grading, as defined in the Memorandum of Understanding attached to this Agreement as Exhibit D, has been completed to the point that Company can begin construction of the Improvements (which date shall not be later than 6 months from the Contract Date), the Company shall give notice to the County that it is ready to close on the conveyance of the Property. The County agrees to deliver the non-warranty deed to the Property within fourteen (14) business days, following receipt of notice. Company shall record the deed in the Jackson County Registry on or before the fifth business day following Closing. The date of recording shall be the “Commencement Date” defined above.

- E. Easements and Right of Way. The deed of conveyance shall include reserved easements to the County, its successors or assigns, for water and sewer construction, maintenance and repair as well as for permanent access across the property for future extension of the water and sewer services and for construction, maintenance and repair of the lift and pump station and future water and sewer lines. The deed of conveyance shall also include reserved easements to the County, assigned only with written permission of the Company, for areas for public access input to the Tuckasegee River for swimming, use of kayak, canoe or similar recreational equipment and for fishing. Finally, the deed of conveyance shall include reserved easements to the County, assigned only with written permission of the Company, for greenway and trails to follow a course along all

water and sewer easements and along roads and paths created by the Company on the Property. Company shall allow public access to said greenway and trails on the same basis as public access is allowed to similar adjacent facilities belonging to or operated by Jackson County.

The deed of conveyance shall also include an easement from County to the Company on the County's reserved Tract 4 as shown on Exhibit C for the Company's Proposed River Activity Launch Area" shown on the Development Plan on Exhibit E which is further identified below.

F. Company's Obligations.

1. Improvements to Property. The Company shall construct, or cause to be constructed along with its tenants, lessees, affiliates or agents, certain improvements and facilities on the Property substantially as shown on the Development Plan attached hereto as Exhibit E. The facilities and improvements (herein "Improvements") shall be constructed in phases and within the times set forth in the Development Plan, and shall include (a) a whitewater rafting center, (b) activity or adventure courses, (c) lodging and retail facilities, (d) food and beverage services, (e) and customary incidental facilities. Said improvements and facilities are estimated to have a taxable value of \$1,400,000.00. The deadline for completion for the Improvements is 5 years from the Commencement Date.
2. Job Creation. The Company will create a minimum of ten (10) new permanent jobs (herein "Qualified Jobs") within Jackson County by December 31, 2021, and several part-time and seasonal jobs within Jackson County over the term of



the Development Plan. The Company shall pay a median average hourly wage for the Qualified Jobs at the Project that is above the then-current median average hourly wage paid in Jackson County. The term “median average hourly wage” is defined as the median average hourly wage for all insured industries in the County as determined by the Employment Security Commission (currently determined by the North Carolina Department of Commerce) for the most recent period for which data is available. The Parties acknowledge that the median average hourly wage in Jackson County, according to data provided by the NC Department of Commerce, is currently \$14.08 per hour with an annual average wage of \$29,269.00. The parties further acknowledge that Company’s business is seasonal, and that some of the permanent jobs created may not be year round. The parties agree that a Qualified Job may include jobs that are not year-round, provided that the annual average wage for said jobs will equal or exceed the wage requirements specified above. The deadline for reaching full employment (10 Qualified Jobs) is three (3) years from the Commencement Date.

3. Tax Generation. The Company is expected to generate Sales and Property Tax Revenue, whether directly or indirectly through its affiliates, lessees, licensees, vendors or tenants, from the Project of EIGHT HUNDRED EIGHTY THOUSAND, NINE HUNDRED EIGHTY FOUR DOLLARS (\$880,984) over its first ten years of operations, following the Commencement Date, on the following schedule:

<u>Year</u>	<u>Est. Total Revenue</u>	<u>Est. Sales &amp; Occupancy Tax</u>	<u>Minimum Cumulative Taxes</u>
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1	\$ 71,074	\$ 4,975	\$6,574
2	\$ 264,710	\$ 13,112	\$21,258
3	\$ 649,494	\$ 50,418	\$73,302
4	\$ 974,184	\$ 74,909	\$152,011
5	\$1,207,986	\$ 94,149	\$250,710
6	\$1,381,814	\$108,650	\$365,553
7	\$1,436,325	\$112,824	\$484,792
8	\$1,531,262	\$119,838	\$611,045
9	\$1,617,200	\$126,233	\$743,639
10	\$1,677,944	\$130,876	\$880,984

Total Estimated Projected Sale Revenue: \$10,811,993

**Consideration**

Total Estimated Sales, Property, Occupancy Tax Revenue:	\$ 880,984
Total Revenue from Sale of Property	\$ 50,000
Total Credit for Job Creation (10 Full Time)	\$ 100,000
<b>TOTAL CONSIDERATION</b>	<b>\$ 1,030,984</b>

Total Sales Revenue and Consideration Impact \$ 11,842,977

It is recognized that these are revenue projections, based on current tax rates and tax structure. These projected revenues will be taken into account by the County in determining the amount of consideration that it receives for the conveyance or lease of the Property to the Company, as allowed by N.C.G.S. 158-7.1 (d2).

4. Commencement of Operations. Company shall commence full operation of the Project within four (4) years of the Commencement Date, and shall thereafter for the term of this Agreement maintain said operation.

5. Other.

(a.) *Permits.* The Company shall obtain and maintain all permits and approvals required by federal, state and local law for the construction and operation of the proposed Improvements and the Project.

(b.) *Quarterly Reports.* The Company shall provide the County with copies of all monthly and/or quarterly tax and wage statements, at the time of filing, for the Company and for each tenant or vendor conducting business on the Property or operating as part of the Master Plan. Said statements and other documents may be necessary to allow the County to determine compliance with the Jobs Creation and Tax Revenue benchmarks.

(c.) *Fair Market Value of the Property.* For the purposes of the sale or conveyance contemplated herein, it is acknowledged and agreed by the parties that the current fair market value of the Property with water and sewer, and rough graded to the Company's specifications, if sold, is \$791,000.

4. Extensions. For good cause, including *Force Majeure*, the time for performance of any obligation set forth herein may be extended by the party to whom the performance is due; provided that the aggregate of extensions may not cause the time for completion of the Improvements to extend beyond five years from the Commencement Date.

### III. COUNTY'S REMEDIES FOR COMPANY'S FAILURE TO MEET

OBLIGATIONS. The County and the Company acknowledge that the creation of Qualified Jobs and additional qualified Capital Investment, with corresponding projected increases in economic activity and tax revenue to the County, are of the essence of this Agreement and form the legal basis for the County's participation in it. Pursuant to NCGS 158-7.1(h), the County's remedies for failure by the Company to meet its obligations as set out herein are:

- A. *Failure To Complete Construction and Commence Operations.* If the Company fails to construct and operate the contemplated phases of Improvements within the times set out in this Agreement, then the County may elect to terminate this Agreement under the provisions of paragraph F below.
- B. *Failure to Create Jobs.* If the Company does not reach the number of Qualified Jobs as outlined in paragraph II.F.2. hereof, as shown on the copy of its Quarterly Hour and Wage Statement along with that of its tenants, lessees, affiliates or Agents for the period ending within the times set out in this Agreement, then the County may elect to terminate this Agreement under the provisions of paragraph F below.
- C. *Failure to Maintain Jobs.* For any year in which the Company along with that of its tenants, lessees, affiliates or Agents, fails to *retain* the jobs actually created in prior years under this Agreement, then the County may elect to terminate this Agreement under the provisions of paragraph F below.
- D. *Failure to Maintain Sales and Property Tax Revenue.* Notwithstanding the initial capital investment, if the Company along with that of its tenants, lessees, affiliates or Agents, fails to maintain a total level of sales and property tax revenue within Jackson County at the levels and for the periods of time set forth in paragraph II.F.3., then the County may elect to terminate this Agreement under the provisions of paragraph F below.
- E. *Failure to pay taxes.* Notwithstanding any provision in this Agreement to the contrary, if the Company shall fail to pay its ad valorem taxes when due, then at the option of the County, and in addition to other remedies provided by law, this Agreement may be terminated. For purposes of this paragraph, taxes shall not be

considered delinquent if the Company has withheld the payment of taxes pending the appeal of a tax valuation, assessment or bill, provided that such withholding of payment is allowed by law, and provided further that the Company does not withhold that portion of the tax bill which would be due on the tax value or assessment not contested by the Company.

F. *Termination.* Upon failure of the Company to meet its Obligations as set forth herein, the County may elect to terminate this Agreement in whole or in part. If the County elects to terminate, notice of termination shall be given in the manner set forth in Section IV. Failure of the County to elect termination in whole or in part shall not constitute a waiver of the right of the County to make such election at a later time. Nothing herein shall prohibit the parties from negotiating an alternative remedy for the failure of the Company to meet one or more of its obligations, consistent with North Carolina law.

G. *Re-conveyance or Surrender of Property.*

1. First Five years. If, and only if, the Company fails to construct the improvements as provided in the Development Plan within the times specified therein, and in any event, within five (5) years from the Commencement Date, then the Company shall, within thirty (30) days of receipt of the Notice of Termination specified in G, above, re-convey the Property to the County. Any determination by the County that Company has failed to construct the required improvements shall be made and notice of said failure shall be provided by the County within 120 days following the end of year 5 from the Commencement Date. In such event, the Company shall remove from the Property all personal property and, such fixtures as the County directs, and the Property

shall be free and clear of any encumbrances, liens or obligations of any kind. If reconveyance of the Property is impracticable because Company cannot remove its personal property, or cannot remove encumbrances, liens or other obligations, Company shall have the option of paying ~~At Company's option, Company shall pay~~ ~~Prior to any re-conveyance or surrender of Property, County shall offer Company the~~ ~~option to pay to the~~ County \$791,000.00, the agreed upon fair market value of the Property, less all sales and property tax revenue already received by the County in connection with the Project, in lieu of re-conveyance.

2. Years 6 -10. If County terminates the Agreement any time after 5 years from the Commencement Date (plus the notification period specified above), Company shall, within thirty (30) days of receipt of the Notice of Termination specified in G, above, re-convey the Property to the County. In such event, the Company shall remove from the Property all personal property and, such fixtures as the County directs, and the Property shall be free and clear of any encumbrances, liens or obligations of any kind. In lieu of reconveyance, and at Company's option, Company may pay the County \$791,000.00, the agreed upon fair market value of the Property, less all sales and property tax revenue already received by the County in connection with the Project, in lieu of re-conveyance. County expressly acknowledges that all rights to re-conveyance shall immediately terminate upon the substantial completion of all improvements in the Development Plan for the Property.

3. Value of Property. County and Company recognize that a substantial portion of the appraised value of the Property is due to the availability of water and sewer lines that County has committed to build. Said lines will serve properties other than the Property to be conveyed to Company, and the County affirmatively represents that it would have constructed said water and sewer lines regardless of this Agreement, and that the requirement for reconveyance of the Property will fully reimburse County for expenses incurred by it for installation of the water and sewer lines, to the extent that said expenses are allocable to the Property.

H. *Alternative Remedies for Partial Performance*. To the extent permitted by North Carolina law, Company and County agree that the following remedies or “claw backs” may be applied in the case of partial performance by Company:

- i. In the event of a failure by Company to create or maintain the minimum number of Qualified Jobs, beginning with full employment,, Company shall pay to County an amount equal to the economic impact credit that Company received for job creation in this Agreement. An illustration of the operation of this provision is shown on Exhibit F.1.
- ii. In the event that Company fails to make the Capital Investment of \$1,400,000 or that the Project for any reason fails to generate the projected tax revenue as shown on the table in Sec.II.B.3., then Company shall pay to the County the difference between the projected tax revenue and the actual tax revenue, subject to adjustment pursuant to the “Revenue Catch Up” provision below.

REVENUE CATCH UP. It is recognized by the parties that Company's business is an outdoors, seasonal business, and that weather and climate conditions have a major influence on Company's business activities and income, and that sales and occupancy tax will fluctuate. For any year on which the actual tax revenue from the Project exceeds projected revenue, the difference will be applied to the subsequent year or years (up to two years), as appropriate. For any year in which the actual revenues are less than the projected revenues, Company shall be required to pay County the difference, provided that County may defer said payment for up to two years in order to allow for the recognition of any surplus revenue in subsequent years, unless the deficit occurs in year 10, in which case Company shall pay the County any difference between the total projected tax revenue and the actual tax revenue. An illustration of the operation of this provision is shown in Exhibit F.2.

Nothing herein shall prevent the parties from negotiating other remedies for partial performance, as allowed by North Carolina law.

#### IV. MISCELLANEOUS PROVISIONS

- A. *Reporting and Audit Rights.* Designated County officials charged with carrying out this Agreement and having a need to know will have the right, from time to time on reasonable notice, at reasonable times, and at a reasonable location the Company designates, to examine the Company's records relating to the Project as may be necessary to verify the Company's compliance with Section I.B. of this Agreement



B. *Company Reserved Rights.* The Company at all times maintains its right to dispute the assessed value of the Property or the Improvements thereon with appropriate governmental agencies in the manner prescribed by law.

C. *Termination.* The Company may terminate this Agreement at any time in its sole discretion. Such termination will subject the Company to the requirement for reconveyance of the Property, as set out in Section II, H, above. In addition, the Company shall reimburse the County for any expense made pursuant to the Infrastructure MOU and identified as Project Expenses in said Agreement, reduced by an amount equal to the ad valorem taxes paid by Company for the period of time which the Agreement was in effect prior to termination, pro-rated to the day of termination.

D. *No Pledge of Faith and Credit; Purpose.*

1. No provision of this Agreement will be construed or interpreted as creating a pledge of the faith and credit of the County in the meaning of any constitutional debt limitation. The parties acknowledge that the scope, term and duration of this Agreement are in all events reasonable. No provision of this Agreement will be construed or interpreted as delegating governmental powers or as a donation or a lending of the credit of the County within the meaning of the North Carolina Constitution. No provision of this Agreement will be construed to pledge or to create a lien on any class or source of the County's moneys, nor will any provision of the Agreement restrict to any extent prohibited by law any action or right of action on the part of any future Board of Commissioners

for the County. To the extent of any conflict between this Section V and any other provision of this Agreement, this Section V will take priority.

2. The Company and the County acknowledge that all expenditures made by the County as provided in this Agreement and the Infrastructure MOU, are for a *bona fide* public purpose and are expended in good faith reliance on the Local Development Act. If this Agreement is challenged or threatened to be challenged, (i) the County promptly will notify the Company in writing, (ii) the Company will have the right to participate in the defense of any challenge at its own expense and with counsel of its choosing, and (iii) the County will defend this Agreement from those challenges. The Company will provide such reasonable assistance (excluding financial assistance) as the County requests in connection with any such defense.

E. *Disclaimers.* The Company acknowledges that the County has not designed the Project, that the County has not created any plans or specifications with respect to the Project, and that the County:

1. is not a manufacturer of, or dealer in, any of the component parts of the Project or similar facilities;
2. has not made any recommendation, given any advice or taken any other action with respect to:
  - a. the choice of any contractor, supplier, vendor or designer of, or any other contractor, supplier, vendor or designer of, or any other contractor with respect to, the Project or any component part of the Project or any property or rights relating to the Project; or

- b. any action taken or to be taken with respect to the Project or any component part of the Project or any property or rights relating to the Project at any stage of the construction of the Project.
- 3. has not made any warranty or other representation, express or implied, that the Project or any component part of the Project or any property or rights relating to the Project:
  - a. will not result in or cause injury or damage to persons or property;
  - b. has been or will be properly designed, or will accomplish the results which the Company intends; or
  - c. is safe in any manner or respect.

F. NO UCC WARRANTIES EXCEPT AS OTHERWISE PROVIDED IN ANY OTHER WRITTEN AGREEMENT BETWEEN THE COUNTY AND THE COMPANY OR ITS AFFILIATES, THE COUNTY MAKES NO EXPRESS OR IMPLIED WARRANTY OR REPRESENTATION OF ANY KIND WHATSOEVER WITH RESPECT TO THE PROJECT OR ANY COMPONENT PART OF THE PROJECT, INCLUDING WITH RESPECT TO THE MERCHANTABILITY OR THE FITNESS OR SUITABILITY OF THE PROJECT FOR ANY PURPOSE. THE COMPANY WAIVES THE BENEFITS OF ALL IMPLIED WARRANTIES AND REPRESENTATIONS OF THE COUNTY AS THEY MAY RELATE TO THE FOREGOING.

G. *Representations and Warranties*

- 1. The Company represents and warrants to the County that as of the date of this Agreement:

- (a.) it is a Limited Liability Company duly authorized or possessing a certificate of authority to do business in the State of North Carolina;
- (b.) it has the power and authority to own its properties and assets and to carry on its business as now being conducted, and has the power and authority to execute and perform this Agreement;
- (c.) this Agreement
  - i. is the legal, valid and binding agreement of the Company, enforceable against the Company in accordance with its terms,
  - ii. does not violate any order of any court or other agency of government binding on the Company or the charter documents of the Company, and
  - iii. does not conflict with, result in a breach of, or constitute an event of default under any material indenture, agreement or other instrument to which the Company is a party; and
- (d.) the Company has not received written notice of any action or proceeding that challenges the validity of this Agreement or the Company's right and power to enter into and perform this Agreement.

2. The County represents and warrants to the Company that:

- (a.) the County is a body public and political subdivision operating pursuant to the laws of the State of North Carolina with power and authority to enter into and perform this Agreement;
- (b.) the County has taken all action necessary to authorize the execution, delivery and performance of this Agreement;

(c.) this Agreement is a legal, valid, and binding obligation of the County, enforceable against the County in accordance with its terms; and

(d.) the County has not received written notice of any action or proceeding that challenges the validity of this Agreement or the County's right and power to enter into and perform this Agreement.

3. Kelly T. Custer, individually, represents and warrants to the County that:

(a.) he is the member-manager of WNC Outdoor Development, LLC (herein "WNC Outdoor");

(b.) notwithstanding any provision of law to the contrary, he undertakes to perform the obligations, financial and otherwise, of WNC Outdoor as set out in this Agreement;

(c.) he will provide a personal guaranty, or other similar financial guarantee (in a form and amount satisfactory to the County) of WNC Outdoor's and his own performance under the terms of this Agreement;

(d.) in the event of legal action by the County to enforce the terms of this Agreement, he waives any defenses to include or join him as an individual party to said action, and waives any defense to any legal proceeding to enforce the terms of any judgment obtained against the Company against him individually.

4. DEFAULTS AND REMEDIES. If any warranty or representation of a party in this paragraph shall have knowingly been false or inaccurate in any material respect when made and is not remedied within 30 days following the defaulting party's receiving written notice from the non-defaulting party (or in the

case where it is capable of being remedied, but is incapable of being remedied within a period of 30 days, such further period as is reasonable in the circumstances), then the non-defaulting party will have such rights and remedies as may be available in law.

H. *County and Company Not Business Partners*, Notwithstanding the terms of this Agreement, County is not a business participant with Company in the Project.

I. *Indemnity and Insurance*.

1. Indemnity. Company will indemnify and hold County harmless from any property damage or personal injury (including death) resulting from its activities on the Property, including, construction by Company of the Improvements and operation of the Project.

2. Insurance Coverage. Company will obtain, at its sole expense, a policy of insurance, satisfactory in form and amount to the County's risk manager or insurance advisor, covering personal injury or death, or any property damage arising as a result of Company's operation of the Project, and shall name the County as an additional insured under said policy of insurance. Said policy shall be in effect during the entire term of their Agreement and any extensions thereof, and shall survive the terms of this Agreement to the extent necessary to cover the indemnification, above.

J. *Controlling Law*. This Agreement will be governed by, and construed in accordance with, the laws of the State of North Carolina,. Any action or proceeding relating to this Agreement or its enforcement will be adjudicated in the General Courts of Justice for Jackson County, North Carolina or the United States District

Court for the Western District of North Carolina. The Company and the County consent and submit to the jurisdiction and venue of those courts.

K. *Severability.* Each provision in this Agreement is severable. If any provision of this Agreement is determined to be invalid or unenforceable by a Court of competent jurisdiction, then (a) such determination will not invalidate or render unenforceable any other provision of this Agreement; (b) such provision will be construed as closely as possible to the parties' original intent in order to render such provision valid or enforceable, as applicable; and (c) the remaining terms of this Agreement, together with such reconstructed provision, will constitute the parties' entire agreement.

L. *Confidentiality* The parties expressly acknowledge that the County is an entity covered by N.C.G.S. Chapter 132, the Public Records Act, including N.C.G.S. 132-1.1 regarding "confidential information." Provided Company complies with N.C.G.S. 132-1.1 regarding the designation of confidential or trade secret information, the County will keep confidential and will not disclose or publish any of the Company's confidential information as defined in N.C.G.S. 132-1.2, will keep all records evidencing such trade secrets marked as "confidential trade secrets", and will keep all such records segregated in the County's files. If the County receives a request, subpoena or court order to disclose any information or records the Company or its representatives have provided or will provide in the future relating to this Agreement, or the Project described in this Agreement, the County will give the Company prompt written notice of the request, subpoena or court order and will discuss any proposed disclosure of such information or records

with the Company (and, to the extent possible, give the Company the opportunity to contest any disclosure of information or records the Company believes should not be disclosed) before making any such disclosure. The County will not be liable in damages for the disclosure of any information that is a public record or when such disclosure is pursuant to the order of a court of competent jurisdiction. As required by NCGS 136-1.11, the assumptions and methodologies used by the County in any economic impact analysis for this Agreement shall be a public record.

M. *Notices.* Any notice permitted or required under this Agreement from one party to the other must be in writing and will be effective (a) on the date it was actually delivered to the addressee if delivered personally, or sent by a nationally recognized courier (such as FedEx, or United Parcel Service) or sent by facsimile, or (b) three days after having been deposited in the United States Mail, if sent by certified mail, return receipt request, in each case to the respective address of the Company and the County listed below, or those other addresses of which either party gives the other party written notice:

If the Company, to  
Kelly T. Custer, Managing Member  
WNC Outdoor Development, LLC  
553 West Main Street  
Sylva, NC 28779

If the County, to  
Don Adams, Jackson County Manager  
401 Grindstaff Rd., Ste. A207  
Sylva, NC 28779

With a copy to  
Heather Baker, County Attorney  
401 Grindstaff Rd., Ste. A207  
Sylva, NC 28779



- N. *Binding Effect and Certification.* Subject to the specific provisions of this Agreement, this Agreement will be binding upon, inure to the benefit of, and be enforceable by the parties and their respective successors and assigns, notwithstanding changes in corporate or other governance. This Agreement is conditioned upon it being certified as having been pre-audited in order to comply with the budgetary accounting requirements (if any) that apply under the Local Government Budget and Fiscal Control Act (N.C.G.S. Chapter 159, Art. 3), or otherwise. Such certification is set forth at the end of this Agreement, and the Finance Officer for the County must sign it.
- O. *Liability of Officers and Agents.* No official, officer, agent, or employee of the County or the Company will be subject to any personal liability or accountability by reason of the execution or performance of this Agreement or any other documents related to the transactions contemplated by this Agreement. Such officials, officers, agents, or employees will be deemed to execute such documents in their official capacities only, and not in their individual capacities. This Section XIV will not relieve any such official, officer, agent or employee from the performance of any official duty provided for or authorized by law.
- P. *Publicity.* Except as required by law, and unless otherwise agreed by the County and the Company, the County will make no public announcement of the parties' entering into this Agreement or the terms and conditions of this Agreement without the prior written consent of the Company.
- Q. *Execution, Third Party, Construction, Assignment, Severability.*

1. *Execution in counterparts.* This Agreement may be executed in counterparts, each of which will be deemed an original and all of which, when taken together, will constitute one and the same instrument.
2. *No third party.* Except as expressly provided in this Agreement, there are no third party beneficiaries of this Agreement. All Exhibits attached to this Agreement are incorporated into this Agreement by reference.
3. *Construction of terms.* The terms "include" and "including" in this Agreement will not be construed to be limiting. Sections IV.G and IV.I will survive the termination of this Agreement for any reason. This Agreement may not be amended except by a written amendment that both parties sign. This Agreement is the entire agreement of the parties regarding the subject matter and supersedes all prior and contemporaneous understandings.

*Assignment.* This Agreement may be assigned with prior written notice, to an entity with which Kelly T. Custer is affiliated, provided that the assignee agrees in writing to assume all of the Company's obligations under this Agreement, specifically including, but not limited to, those obligations described in Section IV. G. 3. (b), (c), and (d) regarding performance guarantees. Any other assignment shall require the consent of the County, which shall not be unreasonably withheld.

4. *Severability.* If any provision of this Agreement shall be determined to be unenforceable, that determination shall not affect any other provision of this Agreement.

- R. *E-Verify*. Company shall comply with the requirements of Article 2 of Chapter 64 of the North Carolina General Statutes. Further, if Contractor utilizes a subcontractor, Contractor shall require the subcontractor to comply with the requirements of Article 2 of Chapter 64 of the North Carolina General Statutes.
- S. *Iran Divestment Act Certification*. Company certifies that, as of the date listed below, it is not on the Final Divestment List as created by the State Treasurer pursuant to N.C.G.S. § 143-6A-4. In compliance with the requirements of the Iran Divestment Act and N.C.G.S. § 143C-6A-5(b), Company shall not utilize in the performance of the Agreement and the Development Plan any contractor or subcontractor that is identified on the Final Divestment List.

*(This space is intentionally blank. Signatures of parties are on the following page)*

IN WITNESS WHEREOF, the County and the Company have caused this instrument to be executed by their duly authorized officers this day and year first above written.

**JACKSON COUNTY**

By: \_\_\_\_\_  
Brian Thomas McMahan, Chairman  
Jackson County Board of Commissioners

ATTEST:

\_\_\_\_\_  
Angela M. Winchester, Clerk to the Board  
Jackson County Board of Commissioners

**WNC OUTDOOR DEVELOPMENT, LLC**

By: \_\_\_\_\_  
Kelly T. Custer, Managing Member

By: \_\_\_\_\_  
Kelly T. Custer, in his individual capacity

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

\_\_\_\_\_  
Finance Officer

Approved as to Form:

\_\_\_\_\_  
County Attorney