

## **REQUEST FOR BOARD ACTION**

### **HENDERSON COUNTY BOARD OF COMMISSIONERS**

**MEETING DATE:** December 7, 2009

**SUBJECT:** Resolution Providing for Final Approval of the Terms and Documents for the Qualified School Construction Bonds (QSCBs) School Improvements Financing

**ATTACHMENTS:** Resolution  
Draft Financing Documents

#### **SUMMARY OF REQUEST:**

Attached for the Board's review is a resolution provided by Branch Banking and Trust Company (BB&T) that provides for final Board approval of the terms and documents in substantially final form for the Qualified School Construction Bond (QSCB) installment contract financing. The draft documents, which have been reviewed by the County's Bond Counsel, include an Installment Financing Agreement/Deed of Trust, a Project Fund Agreement and a Project Completion/Agency Agreement.

The amount included in the draft documents to be financed by the County is \$4,270,400 at a not to exceed annual interest rate of 1.87 percent for a term of 10 years. These are the same terms approved by the Board after the close of the public hearing held on November 18, 2009.

#### **BOARD ACTION REQUESTED:**

Request that the Board approve the attached resolution providing for final approval of the terms and documents for the Qualified School Construction Bond (QSCB) school improvements financing and which authorizes the Chairman and Staff to execute the documents to complete the financing with BB&T.

#### **Suggested Motion:**

**I move the approval of the Resolution Providing Final Approval of the Terms and Documents for the Qualified School Construction Bond School Improvements Financing.**

**Resolution Providing Final Approval of Terms and  
Documents for QSCB School Improvements Financing**

**WHEREAS:**

Henderson County, North Carolina (the "County") has previously determined to carry out various school improvements, including construction, repair and renovation projects at (a) Apple Valley Middle School, (b) Balfour Education Center, (c) Dana Elementary School, (d) East Henderson High School, (e) Hendersonville Elementary School, (f) North Henderson High School, (g) Rugby Middle School and (h) West Henderson High School (collectively, the "Project").

The County has also stated an intent to finance project costs by the use of an installment financing, as authorized under Section 160A-20 of the North Carolina General Statutes, that qualifies as a "qualified school construction bond" (a "QSCB").

The Finance Officer has obtained for the County a proposal from Branch Banking and Trust Company ("BB&T") to provide the QSCB installment financing to the County.

The Finance Officer has made available to this Board the draft agreements listed on Exhibit A (the "Agreements"), which relate to the County's carrying out the QSCB financing plan.

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**BE IT THEREFORE RESOLVED** by the Board of Commissioners of Henderson County, North Carolina, as follows:

**1. Determination To Proceed with Financing** – The County confirms its plans to undertake and finance the Project. The County confirms its determination to accept a proposal from BB&T dated November 2, 2009, as modified on November 4, 2009, to provide Project financing. The County elects the 10-year financing option provided for in the proposal.

Under the financing plan, BB&T will make funds available to the County for use on Project costs. The County will repay the amount advanced over time. As part of the financing plan, the Henderson County School Board will convey Hendersonville Elementary School to the County, so that the transferred school can provide collateral for the financing. The County will grant to BB&T a mortgage-type interest in the school to secure the County's repayment obligation.

**2. Approval of Agreements; Direction To Execute Documents** -- The Board approves the forms of the Agreements submitted to this meeting. The Board authorizes and directs the Board's Chairman and the County Manager, or either of them, to execute and deliver the Agreements in their final forms. The Agreements in their respective final

forms must be in substantially the forms presented, with such changes as the Chairman or the County Manager may approve, and with any appropriate modifications to reflect the requirements of the QSCB program. The Agreements in final form, however, must be consistent with the financing plan described in this resolution and must provide (a) for the amount financed by the County not to exceed \$4,270,400, (b) for an annual interest rate not to exceed 1.87% (in the absence of a default or a change in tax status), and (c) for a financing term not to extend beyond December 31, 2019.

In addition, the Board's Chairman and the County Manager, or either of them, are authorized and directed to approve, execute and deliver any further documents and agreements they deem desirable for carrying out the purposes and intents of this resolution. It is the Board's understanding that the financing documents may include (a) a lease agreement, providing for the School Board to continue to use the transferred school property during the term of the financing, and (b) an agreement under which the School Board will carry out the planned school improvements on the County's behalf.

The execution and delivery of any document by an authorized officer will be conclusive evidence of his approval of the final form of such document.

**3. *Authorization to County Manager and Finance Officer To Complete Closing*** – The County Manager, the Finance Officer and all other County officers and employees are authorized and directed to take all proper steps to complete the financing in cooperation with BB&T and in accordance with the terms of this resolution.

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The Board authorizes and directs the Finance Officer to enter into an agreement with BB&T to formalize the County's commitment to complete the financing with BB&T and thereby establish a "sale date" for the transaction for the purpose of determining the tax credit rate to be applicable to the transaction for BB&T.

The Board authorizes and directs the Finance Officer to hold executed copies of all financing documents authorized or permitted by this resolution in escrow on the County's behalf until the conditions for their delivery have been completed to such officer's satisfaction, and thereupon to release the executed copies of such documents for delivery to the appropriate persons or organizations.

Without limiting the generality of the foregoing, the Board specifically authorizes the Finance Officer to approve changes to any Documents, agreements or certifications previously signed by County officers or employees, provided that such changes do not conflict with this resolution or substantially alter the intent from that expressed in the form originally signed. The Finance Officer's authorization of the release of any such document for delivery will constitute conclusive evidence of such officer's approval of any such changes.

4. ***Resolutions As To Tax Matters*** -- The County will not take or omit to take any action the taking or omission of which will cause its obligations to pay principal and interest (the "Obligations") to be "arbitrage bonds," within the meaning of Section 148 of the United States Internal Revenue Code of 1986, as amended, including the applicable Treasury regulations (the "Code").

5. ***Designation as a QSCB*** -- The County designates the Obligations as "qualified school construction bonds" for the purposes of, and within the meaning of, Code Section 54F and related Code provisions. The County and BB&T intend that the financing will qualify as a QSCB.

6. ***Miscellaneous Provisions*** -- All County officers and employees are authorized and directed to take all such further action as they may consider necessary or desirable in furtherance of the purposes of this resolution. All such prior actions of County officers and employees are ratified, approved and confirmed. Upon the absence, unavailability or refusal to act of the County Manager, the Board's Chairman or the Finance Officer, any other of such officers may assume any responsibility or carry out any function assigned in this resolution. All other Board proceedings, or parts thereof, in conflict with this resolution are repealed, to the extent of the conflict. This resolution takes effect immediately.

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I certify that the foregoing resolution (which includes the attached Exhibit A) was duly adopted at a meeting of the Board of Commissioners of Henderson County, North Carolina, duly called and held on December 7, 2009, and that a quorum was present and acting throughout such meeting. Such resolution remains in full effect as of today.

Dated this \_\_\_\_ day of December, 2009.

[SEAL]

\_\_\_\_\_  
Clerk, Board of Commissioners  
Henderson County, North Carolina

### **Exhibit A -- Draft Agreements**

(a) A draft dated November 30, 2009, of a Financing Agreement and Deed of Trust to be dated on or about December 10, 2009 (the "Financing Contract"), from the County for the benefit of BB&T, providing for the advance of funds to the County for the County's undertaking of the Project, documenting the terms and conditions of the County's promise and obligation to repay the amount provided by the bank, and providing for a security interest in the Hendersonville Elementary School property to secure the County's repayment obligation.

(b) A draft dated November 30, 2009, of a Project Fund Agreement to be dated on or about December 10, 2009, between the County and BB&T, providing for the custody of financing proceeds pending their application to Project costs.



Prepared By and Return After Recording To:

Robert M. Jessup Jr.  
Sanford Holshouser LLP  
209 Lloyd St., Suite 350  
Carrboro, NC 27510

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

By: \_\_\_\_\_  
Finance Officer  
Henderson County, North Carolina

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**FINANCING AGREEMENT AND DEED OF TRUST**

STATE OF NORTH CAROLINA	)	COLLATERAL IS OR
	)	INCLUDES FIXTURES
HENDERSON COUNTY	)	

**THIS FINANCING AGREEMENT AND DEED OF TRUST** (this "Agreement") is dated as of December \_\_, 2009, and is granted by **HENDERSON COUNTY, NORTH CAROLINA**, a political subdivision of the State of North Carolina (the "County"), to F. Louis Loyd, III, a citizen and resident of Mecklenburg County, North Carolina (the "Deed of Trust Trustee"), for the benefit of **BRANCH BANKING AND TRUST COMPANY ("BB&T")**.

**RECITALS:**

The County has the power, pursuant to Section 160A-20 of the North Carolina General Statutes, to enter into installment contracts to finance the purchase or improvement of real or personal property, and to secure its obligations under such contracts by security interests in all or a portion of the property purchased or improved. This Agreement provides for BB&T to advance \$4,270,400.00 to the County to enable the County to acquire

and construct the Financed Facilities (as defined below) on and for the Project Sites (as defined below), and provides for securing the County's obligations under this Agreement by creating certain security interests in favor of BB&T.

This Agreement secures current advances of \$4,270,400.00. The current scheduled date for final repayment is on or about December 16, 2019.

**NOW, THEREFORE,**

(1) in consideration of the execution and delivery of this Agreement and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged;

(2) to secure the County's performance of all its covenants under this Agreement, including the repayment of amounts advanced and to be advanced, together with interest on all such advances as provided in this Agreement or any amendments hereto, and all charges and expenses of collection (including court costs and reasonable attorneys' fees and expenses); and

(3) to charge the Mortgaged Property, as defined below, with such payment and performance,

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the County hereby sells, grants and conveys to the Deed of Trust Trustee, his heirs and assigns forever, in trust, with power of sale, the following (collectively, the "Mortgaged Property"):

(a) (i) the property described in Exhibit A, and (ii) all real property hereafter acquired by the County in exchange for, or in consideration of the exchange of, or with the proceeds from any disposition of, all or any part of any property described in this subparagraph, and in all cases together with all easements, rights, liberties, rights-of-way and appurtenances belonging to any such property (collectively, the "Pledged Site");

(b) the improvements described in Exhibit B and all other improvements and fixtures now or hereafter attached or appurtenant to or used in or on those improvements or the Pledged Site, including (i) all renewals and replacements thereof and all additions thereto, (ii) all articles in substitution thereof, (iii) all building materials for construction, improvement, modification or repair of such improvements upon their delivery to the Pledged Site, and (iv) all proceeds of all the foregoing in whatever form resulting from the loss or disposition of the foregoing, including all proceeds of and unearned premiums for any insurance policies covering the Pledged Site and such improvements, proceeds of title insurance and payments related to the exercise of condemnation or eminent domain authority, and all judgments or settlements in lieu of any of the foregoing (collectively, the

"Pledged Facilities"); and

(c) the moneys on deposit from time to time in the Project Fund, as provided in Sections 2.02 and 2.03.

**TO HAVE AND TO HOLD** the Mortgaged Property with all privileges and appurtenances thereunto belonging, to the Deed of Trust Trustee, his heirs and assigns forever, upon the trusts, terms and conditions and for the purposes set out below, in fee simple in trust;

**SUBJECT, HOWEVER,** to the encumbrances described in Exhibit C (the "Existing Encumbrances");

**BUT THIS CONVEYANCE IS MADE UPON THIS SPECIAL TRUST:** if the Required Payments (as defined below) are paid in full in accordance with this Agreement, and the County shall comply with all of the terms, covenants and conditions of this Agreement, this conveyance shall be null and void and shall be canceled of record at the County's request and cost, and title shall revest as provided by law.

**BUT IF, HOWEVER, THERE SHALL OCCUR AN EVENT OF DEFAULT UNDER THIS AGREEMENT,** then BB&T shall have the remedies provided for in this Agreement, including directing the Deed of Trust Trustee to sell the Mortgaged Property under power of sale.

**THE COUNTY COVENANTS AND AGREES** with the Deed of Trust Trustee and BB&T (and their respective heirs, successors and assigns), in consideration of the foregoing, as follows:

## **ARTICLE I**

### **DEFINITIONS; INTERPRETATION**

Unless the context clearly requires otherwise, capitalized terms used in this Agreement and not otherwise defined shall have the following meanings:

"Additional Payments" means any of BB&T's reasonable and customary fees and expenses related to the transactions contemplated by this Agreement, any of BB&T's expenses (including attorneys' fees) in prosecuting or defending any action or proceeding in connection with this Agreement, any required license or permit fees, state and local sales and use or ownership taxes or property taxes which BB&T is required to pay as a result of this Agreement, inspection and re-inspection fees, and any other amounts payable by the County (or paid by BB&T on the County's behalf) as a result of its covenants under this Agreement (together with interest that may accrue on any of the above if the County shall



fail to pay the same, as set forth in this Agreement).

"Amount Advanced" has the meaning assigned in Section 2.02.

"Bond Counsel Opinion" means a written opinion (in form and substance acceptable to BB&T) of an attorney or firm of attorneys acceptable to BB&T.

"Budget Officer" means the County officer from time to time charged with preparing the County's draft budget as initially submitted to the Governing Board for its consideration.

"Business Day" means any day on which banks in the State are not by law authorized or required to remain closed.

"Closing Date" means the date on which this Agreement is first executed and delivered by the parties.

"Code" means the Internal Revenue Code of 1986, as amended, including regulations, rulings and revenue procedures promulgated thereunder or under the Internal Revenue Code of 1954, as amended, as applicable to the County's obligations under this Agreement and all proposed (including temporary) regulations which, if adopted in the form proposed, would apply to such obligations. Reference to any specific Code provision shall be deemed to include any successor provisions thereto.

"Construction Contracts" means any contracts with contractors related to the construction of the Pledged Facilities.

"County" means Henderson County, North Carolina.

"County Representative" means the County Manager, the County's finance officer or such other person or persons at the time designated, by a written certificate furnished to BB&T and signed on the County's behalf by the presiding officer of the County's Governing Board, to act on the County's behalf for any purpose (or any specified purpose) under this Agreement.

"Event of Default" means one or more events of default as defined in Section 8.01.

"Event of Nonappropriation" means any failure by the Governing Board to adopt, by the first day of any Fiscal Year, a budget for the County that includes an appropriation for Required Payments, or the Governing Board's amendment of the annual budget to remove an appropriation for Required Payments, in each case as contemplated by Section 3.05.

"Existing Encumbrances" means the encumbrances described in Exhibit C.

"Financed Facilities" means the Pledged Facilities and all other facilities paid for, in whole or in part, from the Amount Advanced. The Financed Facilities are expected to include construction, repair and renovation projects at (a) Apple Valley Middle School, (b) Balfour Education Center, (c) Dana Elementary School, (d) East Henderson High School, (e) North Henderson High School, (f) Rugby Middle School and (g) West Henderson High School.

"Fiscal Year" means the County's fiscal year beginning July 1, or such other fiscal year as the County may later lawfully establish.

"Governing Board" means the County's governing board as from time to time constituted.

"Installment Payments" means the payments payable by the County pursuant to Section 3.01.

"LGC" means the North Carolina Local Government Commission.

"Mortgaged Property" means the Mortgaged Property, as defined above.

"Net Proceeds," when used with respect to any amounts derived from claims made on account of insurance coverages required under this Agreement, any condemnation award arising out of the condemnation of all or any portion of the Mortgaged Property, payments on any bonds required by Section 5.03, any amounts recovered from any contractor on an action for default or breach, as described in Section 5.03, or any amounts received in lieu or in settlement of any of the foregoing, means the amount remaining after deducting from the gross proceeds thereof all expenses (including attorneys' fees and costs) incurred in the collection of such proceeds, and after reimbursement to the County or BB&T for amount previously expended to remedy the event giving rise to such payment or proceeds.

"Obligations" means the County's obligations to pay the Installment Payments, including the principal and interest components.

"Payment Dates" means the dates indicated in Exhibit D.

"Permitted Encumbrances" means, as of any particular time, (a) the Existing Encumbrances, (b) liens for taxes and assessments not then delinquent, (c) this Agreement, (d) any lease or similar arrangement for the use by the School Board of the Pledged Facilities, as contemplated by Section 6.02(b), and (e) easements, rights-of-way and other such minor defects or restrictions as normally exist with respect to property of the same general character as the Mortgaged Property that will not impair the County's intended use of the Mortgaged Property.

"Plans and Specifications" means all plans and specifications for the Pledged Facilities prepared by architects, engineers and other consultants.

"Pledged Facilities" means the Pledged Facilities, as defined above.

"Pledged Site" means the Pledged Site, as defined above.

"Prime Rate" means the interest rate so denominated and set by BB&T (whether or not BB&T, or any affiliate, is at any time the beneficiary under this Agreement) as its "Prime Rate," as in effect from time to time.

"Project Costs" means all costs of the design, planning, constructing, acquiring, installing and equipping of the Financed Facilities as determined in accordance with generally accepted accounting principles and that will not adversely affect the treatment of the Obligations as Qualified School Construction Bonds, including (a) sums required to reimburse the County or its agents for advances made for any such costs, (b) interest during the construction process and for up to six months thereafter, and (c) all costs related to the financing of the Financed Facilities through this Agreement and all related transactions

"Project Fund" has the meaning assigned in Section 2.02.

"Project Fund Agreement" has the meaning assigned in Section 2.02.

"Project Sites" means the real property upon which the Financed Facilities are or will be located.

"Qualified School Construction Bonds" means Qualified School Construction Bonds within the meaning of Code Section 54F.

"Required Payments" means Installment Payments and Additional Payments.

"School Board" means the Board of Education for the Henderson County School Administrative Unit, or any successor to its functions.

"Section 160A-20" means Section 160A-20 of the North Carolina General Statutes, as amended, or any successor provision of law.

"State" means the State of North Carolina.

"Supplemental Interest Rate" means the annual rate shown as the Supplemental Interest Rate on Exhibit D.

"Tax-Credit Rate" means the annual rate shown as the Tax-Credit Rate on Exhibit

D.

"UCC" means the Uniform Commercial Code or any successor law as in effect from time to time in the State, currently Chapter 25 of the North Carolina General Statutes.

All references in this Agreement to designated "Sections" and other subdivisions are to the designated sections and other subdivisions of this Agreement. The words "hereof" and "hereunder" and other words of similar import refer to this Agreement as a whole and not to any particular Section or other subdivision unless the context indicates otherwise. Words importing the singular number shall include the plural number and vice versa.

## ARTICLE II

### SECURITY PROVIDED BY THIS AGREEMENT; ADVANCE

**2.01. Security for Payment and Performance.** This Agreement secures the County's payment, as and when the same shall become due and payable, of all Required Payments and the County's timely compliance with all terms, covenants and conditions of this Agreement.

**2.02. Advance.** (a) BB&T advances \$4,270,400.00 (the "Amount Advanced") to the County on the Closing Date, and the County hereby accepts the Amount Advanced from BB&T.

(b) BB&T is advancing the Amount Advanced by making a deposit to a Project Fund (the "Project Fund") as provided in a Project Fund Agreement of even date (the "Project Fund Agreement") between the County and BB&T. The amount of this deposit is equal to the Amount Advanced less a loan fee to BB&T of \$23,000.00. The County agrees that BB&T may net this fee against the funding of the Amount Advanced.

All amounts on deposit from time to time in the Project Fund, including the Amount Advanced and all investment earnings, shall be used only for Project Costs until the Project Fund is terminated as provided under the Project Fund Agreement.

**2.03. UCC Security Agreement.** This Agreement is intended as and constitutes a security agreement pursuant to the UCC with respect to all moneys on deposit from time to time in the Project Fund. The County hereby grants to BB&T a security interest in the moneys on deposit from time to time in the Project Fund to secure the Required Payments. The County shall execute, deliver and file, or cause to be filed, in such place or places as may be required by law, financing statements (including any continuation statements required by the UCC or requested by BB&T) in such form as BB&T may reasonably require to perfect and continue the security interest in the moneys on deposit from time to

time in the Project Fund.

**2.04. County's Limited Obligation.** (a) THE PARTIES INTEND THAT THIS TRANSACTION COMPLY WITH SECTION 160A-20. NO PROVISION OF THIS AGREEMENT SHALL BE CONSTRUED OR INTERPRETED AS CREATING A PLEDGE OF THE COUNTY'S FAITH AND CREDIT WITHIN THE MEANING OF ANY CONSTITUTIONAL DEBT LIMITATION. NO PROVISION OF THIS AGREEMENT SHALL BE CONSTRUED OR INTERPRETED AS A DELEGATION OF GOVERNMENTAL POWERS OR AS AN IMPROPER DONATION OR A LENDING OF THE COUNTY'S CREDIT WITHIN THE MEANING OF THE STATE CONSTITUTION. NO DEFICIENCY JUDGMENT MAY BE RENDERED AGAINST THE COUNTY IN VIOLATION OF SECTION 160A-20. No provision of this Agreement shall be construed to pledge or to create a lien on any class or source of the County's moneys (other than the funds held under the Project Fund Agreement or this Agreement), nor shall any provision of this Agreement restrict the future issuance of any of the County's bonds or obligations payable from any class or source of the County's moneys (except to the extent this Agreement restricts the incurrence of additional obligations secured by the Mortgaged Property). To the extent of any conflict between this Section 2.04, any provision of Section 160A-20 and any other provision of this Agreement, this Section shall take priority.

(b) Nothing in this Section is intended to impair or prohibit foreclosure on this Agreement if the Required Payments are not paid when due or otherwise upon the occurrence of an Event of Default under this Agreement or the Project Fund Agreement, and in any such event BB&T may request the Deed of Trust Trustee to foreclose on the Mortgaged Property as provided in this Agreement.

**2.05. County's Continuing Obligations.** The County shall remain liable for full performance of all its covenants under this Agreement (subject to the limitations described in Section 2.04), including payment of all Required Payments, notwithstanding the occurrence of any event or circumstances whatsoever, including any of the following:

- (a) BB&T's waiver of any right granted or remedy available to it;
- (b) The forbearance or extension of time for payment or performance of any obligation under this Agreement, whether granted to the County, a subsequent owner of the Pledged Facilities or any other person;
- (c) The release of all or part of the Mortgaged Property or the release of any party who assumes all or any part of such performance;
- (d) Any act or omission by BB&T (but this provision does not relieve BB&T of any of its obligations under this Agreement or the Project Fund Agreement);

- (e) The sale of all or any part of the Mortgaged Property; or
- (f) Another party's assumption of the County's obligations under this Agreement.

**2.06. Construction Mortgage.** The security interest evidenced hereby is a "construction mortgage" with respect to the Pledged Facilities within the meaning of Section 25-9-334 of the North Carolina General Statutes.

## **ARTICLE III**

### **COUNTY'S PAYMENT OBLIGATION AND RELATED MATTERS**

**3.01. Installment Payments.** The County shall repay the Amount Advanced by making Installment Payments to BB&T at the times and in the amounts set forth in Exhibit D, except as otherwise provided in this Agreement. As indicated in Exhibit D, the Installment Payments reflect the repayment of the Amount Advanced and include designated interest components. All payments are due in lawful money of the United States by wire transfer, or other transfer of immediately available funds, on the payable date to BB&T to such account in the United States as BB&T may from time to time designate to the County.

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**3.02. Additional Payments.** The County shall pay all Additional Payments on a timely basis directly to the person or entity to which such Additional Payments are owed in lawful money of the United States.

**3.03. Prepayment.** (a) The principal component of the Amount Advanced is subject to prepayment, in whole or in part, from any amounts withdrawn by BB&T pursuant to Section 2.3(c) of the Project Fund Agreement, in the manner provided for in the Project Fund Agreement.

(b) The principal component of the Amount Advanced is also subject to prepayment as provided in Section 3.07.

(c) The principal component of the Amount Advanced is not otherwise subject to prepayment.

**3.04. Late Payments.** If the County fails to pay any Additional Payment or Installment Payment when due, the County shall pay additional interest on the unpaid amount (as permitted by law) at an annual rate equal to the Prime Rate from the original due date.

**3.05. Appropriations.** (a) The Budget Officer shall include in the initial proposal for each of the County's annual budgets the amount of all Installment Payments

and estimated Additional Payments coming due during the Fiscal Year to which such budget applies. Notwithstanding that the Budget Officer includes such an appropriation for Required Payments in a proposed budget, the Governing Board may determine not to include such an appropriation in the County's final budget for such Fiscal Year, or may delete an appropriation from an adopted budget.

(b) If within 15 days after the beginning of any Fiscal Year the County has not appropriated an amount equal to the Installment Payments and estimated Additional Payments coming due during such Fiscal Year, or if at any time the County amends the annual budget to reduce the amounts appropriated for Required Payments, then the County must send a notice to such effect to BB&T and to the LGC, to the attention of its Secretary, at 325 North Salisbury St., Raleigh, North Carolina 27603-1385.

(c) The actions required of the County and its officers pursuant to this Section shall be deemed to be and shall be construed to be in fulfillment of ministerial duties. It shall be the duty of each and every County official to take such action and do such things as are required by law in the performance of the official duty of such officials to enable the County to carry out and perform the actions required pursuant to this Section and the remainder of this Agreement to be carried out and performed by the County.

(d) The County reasonably believes that it can obtain funds sufficient to pay all Required Payments when due.

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**3.06. No Abatement.** There shall be no abatement or reduction of the Required Payments for any reason, including, but not limited to, any defense, recoupment, setoff, counterclaim, or any claim (real or imaginary) arising out of or related to the Project Sites or of the Financed Facilities, except as expressly provided in this Agreement. The County assumes and shall bear the entire risk of completion, loss and damage to the Project Sites and the Financed Facilities from any cause whatsoever. The Installment Payments shall be made in all events unless the County's obligation to make Installment Payments is terminated as otherwise provided in this Agreement.

**3.07. Interest Rate and Payment Adjustment; Special Optional Prepayment.**

(a) "Rate Adjustment Event" means any of the following:

(i) any action by the Internal Revenue Service (including the delivery of a deficiency notice) or any other federal court or administrative body determining (A) that the County's Obligations under this Agreement cease to qualify as Qualified School Construction Bonds, or (B) that BB&T otherwise is not entitled to receive the benefits of the federal income tax credits to which it was entitled as of the Closing Date as a result of its ownership of the Obligations, but in either case only as a result of any misrepresentation by the County or as a result of any action the County takes or fails to take.

(ii) the delivery to the County by BB&T of a Bond Counsel Opinion substantially to the effect that the qualification of the Obligations as Qualified School Construction Bonds has been lost as a result of any misrepresentation by the County or as a result of any action the County takes or fails to take.

(b) Upon any Rate Adjustment Event, (i) the unpaid principal portion of the Amount Advanced shall continue to be payable on dates and in amounts as set forth in Exhibit D, but (ii) the interest components of the Installment Payments shall be recalculated, at an interest rate equal to an annualized interest rate equal to the sum of the Tax-Credit Rate and the Supplemental Interest Rate, to the appropriate date (retroactively, if need be) as determined pursuant to the Rate Adjustment Event.

(c) The County has a one-time option to prepay the outstanding principal component of the Amount Advanced upon the occurrence of a Rate Adjustment Event. The County must notify BB&T of its determination to exercise such prepayment right within 30 days after the County has notice of the Rate Adjustment Event. The County must then effect the prepayment within 75 days after the giving of the notice. The prepayment notice may be conditioned upon the County's receipt of funds for prepayment from another source, but such condition must be stated in the notice. Any prepayment pursuant to this subsection requires the County's payment of (i) all Additional Payments then due and payable, (ii) interest accrued and unpaid to the prepayment date, (iii) a sum equal to 102.5% of the outstanding principal component of the Amount Advanced.

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(d) The County shall pay interest at such adjusted rate (subject to credit for interest previously paid) to each affected beneficiary, notwithstanding the fact that any particular beneficiary may not be a beneficiary under this Agreement on the date of a Rate Adjustment Event. The County shall additionally pay to all affected beneficiaries any interest, penalties or other charges assessed against or payable by such beneficiary and attributable to a Rate Adjustment Event notwithstanding the prior repayment of the entire Amount Advanced (including any prepayment pursuant to subsection (c) above) or any transfer to another beneficiary.

## ARTICLE IV

### COUNTY'S COVENANTS, REPRESENTATIONS AND WARRANTIES

**4.01. Warranties of Title.** The County covenants with the Deed of Trust Trustee and BB&T that the County is seized of and has the right to convey the Mortgaged Property in fee simple, that the Mortgaged Property is free and clear of all liens and encumbrances other than the Permitted Encumbrances, that title to the Mortgaged Property is marketable, and that the County will forever warrant and defend title to the Mortgaged Property against the claims of all persons.



**4.02. Indemnification.** To the extent permitted by law, the County shall indemnify, protect and save the Deed of Trust Trustee, BB&T and its officers and directors, and the LGC's members and employees, harmless from all liability, obligations, losses, claims, damages, actions, suits, proceedings, costs and expenses, including attorneys' fees, arising out of, connected with, or resulting directly or indirectly from the Mortgaged Property or the transactions contemplated by this Agreement, including without limitation the possession, condition, construction or use of the Financed Facilities. The indemnification arising under this Section shall survive the Agreement's termination.

**4.03. [Reserved.]**

**4.04. Validity of Organization and Acts.** The County is validly organized and existing under State law, has full power to enter into this Agreement and has duly authorized and has obtained all required approvals and all other necessary acts required prior to the execution and delivery of this Agreement. This Agreement is a valid, legal and binding obligation of the County.

**4.05. Maintenance of Existence.** The County shall maintain its existence, shall continue to be a local governmental unit of the State, validly organized and existing under State law, and shall not consolidate with or merge into another local governmental unit of the State, or permit one or more other local governmental units of the State to consolidate with or merge into it, unless the local governmental unit thereby resulting assumes the County's obligations under this Agreement.

**4.06. Acquisition of Permits and Approvals.** All permits, consents, approvals or authorizations of all governmental entities and regulatory bodies, and all filings and notices required on the County's part to have been obtained or completed as of today in connection with the authorization, execution and delivery of this Agreement, the consummation of the transactions contemplated hereby and the acquisition and construction of the Pledged Facilities have been obtained and are in full force and effect, and there is no reason why any future required permits, consents, approvals, authorizations or orders cannot be obtained as needed.

**4.07. No Breach of Law or Contract.** Neither the execution and delivery of this Agreement nor the consummation of the transactions contemplated hereby, nor the fulfillment of or compliance with the terms and conditions of this Agreement, (a) to the best of the County's knowledge, constitutes a violation of any provision of law governing the County or (b) results in a breach of the terms, conditions or provisions of any contract, agreement or instrument or order, rule or regulation to which the County is a party or by which the County is bound.

**4.08. No Litigation.** There is no litigation or any governmental administrative proceeding to which the County (or any official thereof in an official capacity) is a party

that is pending or, to the best of the County's knowledge after reasonable investigation, threatened with respect to (a) the County's organization or existence, (b) its authority to execute and deliver this Agreement or to comply with the terms of this Agreement, (c) the validity or enforceability of this Agreement or the transactions contemplated hereby, (d) the title to office of any Governing Board member or any other County officer, (e) any authority or proceedings relating to the County's execution or delivery of this Agreement, or (f) the undertaking of the transactions contemplated by this Agreement.

**4.09. No Current Default or Violation.** (a) The County is not in violation of any existing law, rule or regulation applicable to it, (b) the County is not in default under any contract, other agreement, order, judgment, decree or other instrument or restriction of any kind to which the County is a party or by which it is bound or to which any of its assets are subject, including this Agreement, and (c) no event or condition has happened or existed, or is happening or existing, under the provisions of any such instrument, including this Agreement, which constitutes or which, with notice or lapse of time, or both, would constitute an event of default hereunder or thereunder.

**4.10. No Misrepresentation.** No representation, covenant or warranty by the County in this Agreement is false or misleading in any material respect.

**4.11. Environmental Warranties and Indemnification.** (a) The County warrants and represents to BB&T as follows:

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(i) The County has no knowledge of, and after reasonable inquiry no reason to believe (A) that any industrial use has been made of the Mortgaged Property, (B) that the Mortgaged Property has been used for the storage, treatment or disposal of chemicals or any wastes or materials that are classified by federal, State or local laws as hazardous or toxic substances, or (C) that any manufacturing, landfilling or chemical production has occurred on the Mortgaged Property.

(ii) The Mortgaged Property is in compliance with all federal, State and local environmental laws and regulations, including, but not limited to, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), Public Law No. 96-510, 94 Stat. 2767, 42 USC 9601 *et seq.*, and the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Public Law No. 99-499, 100 Stat. 1613.

(iii) The County has fully disclosed to BB&T in writing the existence, extent and nature of any hazardous materials, substances, wastes or other environmentally regulated substances (including without limitation, any materials containing asbestos), which the County is legally authorized and empowered to maintain on, in or under the Mortgaged Property or use in connection therewith, and the County has obtained and will maintain all licenses, permits and approvals required with respect thereto, and is in compliance with all of the terms, conditions and requirements of

such licenses, permits and approvals.

(iv) The County will promptly notify BB&T of any change in the nature or extent of any hazardous materials, substances or wastes maintained on, in or under the Mortgaged Property or used in connection therewith, and will promptly send to BB&T copies of any citations, orders, notices or other material governmental or other communication received with respect to any other hazardous materials, substances, wastes or other environmentally regulated substances affecting the Mortgaged Property.

(b) To the extent permitted by law, the County shall indemnify and hold BB&T and the Deed of Trust Trustee harmless from and against (i) any and all damages, penalties, fines, claims, liens, suits, liabilities, costs (including clean-up costs), judgments and expenses (including attorneys', consultants' or experts' fees and expenses) of every kind and nature suffered by or asserted against the Deed of Trust Trustee or BB&T as a direct or indirect result of any warranty or representation made by the County in subsection (a) above being false or untrue in any material respect, or (ii) any requirement under any law, regulation or ordinance, local, State or federal, which requires the elimination or removal of any hazardous materials, substances, wastes or other environmentally regulated substances related to the Pledged Facilities or the Pledged Site by the Deed of Trust Trustee, BB&T or the County or any transferee or assignee of the Deed of Trust Trustee, BB&T or the County.

(c) The County's obligations under this Section shall continue in full effect notwithstanding full payment of the Required Payments or foreclosure under this Agreement or delivery of a deed in lieu of foreclosure.

**4.12. Further Instruments.** Upon BB&T's request, the County shall execute, acknowledge and deliver such further instruments reasonably necessary or desired by BB&T to carry out more effectively the purposes of this Agreement or any other document related to the transactions contemplated hereby, and to subject to the liens and security interests hereof and thereof all or any part of the Mortgaged Property intended to be given or conveyed hereunder or thereunder, whether now given or conveyed or acquired and conveyed subsequent to the date of this Agreement.

**4.13. BB&T's Advances for Performance of County's Obligations.** If the County fails to perform any of its obligations under this Agreement, BB&T is hereby authorized, but not obligated, to perform such obligation or cause it to be performed. All expenditures incurred by BB&T (including any advancement of funds for payment of taxes, insurance premiums or other costs of maintaining the Mortgaged Property, and any associated legal or other expenses), together with interest thereon at the Prime Rate, shall be secured as Additional Payments under this Agreement. The County promises to pay all such amounts to BB&T immediately upon demand.

**4.14. Financed Facilities Will Be Used and Useful.** The acquisition and

construction of the Financed Facilities is necessary and expedient for the County. The County has an immediate need for, and expects to make immediate use of, all of the Financed Facilities, and does not expect such need or use to diminish in any material respect during the term of the Agreement. The Financed Facilities will not be used in any private business or put to any private business use.

**4.15. Financial Information.** (a) The County shall send to BB&T a copy of the County's audited financial statements for each Fiscal Year within 30 days of the County's acceptance of such statements, but in any event within 180 days of the completion of such Fiscal Year.

(b) The County shall furnish BB&T, at such reasonable times as BB&T shall request, all other financial information (including, without limitation, the County's annual budget as submitted or approved) as BB&T may reasonably request. The County shall permit BB&T or its agents and representatives to inspect the County's books and records and make extracts therefrom.

**4.16. Taxes and Other Governmental Charges.** The County shall pay, as Additional Payments, the full amount of all taxes, assessments and other governmental charges lawfully made by any governmental body during the term of this Agreement. With respect to special assessments or other governmental charges which may be lawfully paid in installments over a period of years, the County shall be obligated to provide for Additional Payments only for such installments as are required to be paid during the Agreement term. The County shall not allow any liens for taxes, assessments or governmental charges with respect to the Mortgaged Property or any portion thereof to become delinquent (including, without limitation, any taxes levied upon the Mortgaged Property or any portion thereof which, if not paid, will become a charge on any interest in the Mortgaged Property, including BB&T's interest, or the rentals and revenues derived therefrom or hereunder).

**4.17. County's Insurance.** (a) The County shall, at its own expense, acquire, carry and maintain broad-form extended coverage property damage insurance with respect to all improvements in or on the Pledged Site or otherwise related to the Pledged Facilities in an amount equal to the estimated replacement cost of such improvements. Such property damage insurance shall include standard mortgagee coverage in favor of BB&T. The County shall provide evidence of such coverage to BB&T promptly upon such substantial completion. Any Net Proceeds of the insurance required by this subsection (a) shall be payable as provided in Section 6.10.

(b) The County shall, at its own expense, acquire, carry and maintain comprehensive general liability insurance in an amount not less than \$2,000,000 for personal injury or death and \$2,000,000 for property damage, and must include BB&T as an additional insured with respect to occurrences related to the Pledged Site and the Pledged Facilities.

(c) The County shall also maintain workers' compensation insurance issued by a responsible carrier authorized under State law to insure the County against liability for compensation under applicable State law as in effect from time to time.

(d) All insurance shall be maintained with generally recognized responsible insurers and may carry reasonable deductible or risk-retention amounts. All such policies shall be deposited with BB&T, provided that in lieu of such policies there may be deposited with BB&T a certificate or certificates of the respective insurers attesting the fact that the insurance required by this Section is in full effect. Prior to the expiration of any such policy, the County shall furnish BB&T evidence satisfactory to BB&T that the policy has been renewed or replaced or is no longer required by this Agreement.

(e) No County agent or employee shall have the power to adjust or settle any property damage loss greater than \$100,000 with respect to the Mortgaged Property, whether or not covered by insurance, without BB&T's prior written consent.

(f) BB&T shall not be responsible for the sufficiency or adequacy of any required insurance and shall be fully protected in accepting payment on account of such insurance or any adjustment, compromise or settlement of any loss agreed to by BB&T.

(g) The County shall deliver to BB&T annually by June 30 of each year a certificate stating that the risk coverages required by this Agreement are in effect, and stating the carriers, policy numbers, coverage limits and deductible or risk-retention amounts for all such coverages.

**4.18. Title Insurance.** The County agrees to obtain, at its own cost and expense, an American Land Title Association policy(s) of title insurance, in form satisfactory to BB&T, effective as of the Closing Date, in an amount not less than the Amount Advanced, naming BB&T as insured mortgagee. Such policy shall insure the County's fee title to the Pledged Site, subject only to Permitted Encumbrances, and shall be issued by a title insurance company qualified to do business in the State of North Carolina and acceptable to BB&T. On or before the Closing Date, the County shall provide BB&T with a copy of the commitment of the issuer of such policy to issue such policy and, within thirty days after the Closing Date, the County shall provide BB&T with a copy of such policy.

**4.19. Representations Related to Tax Matters.** The County warrants, represents and covenants (all such warranties, representations and covenants being continuing) as follows:

(a) The County will not take or permit, or omit to take or cause to be taken, any action that would cause the Obligations to be "arbitrage bonds" within the meaning of the Code. If the County shall take or permit, or take or cause to be taken, any such action, the County shall take (or cause to be taken) all lawful actions within its power reasonably

necessary to rescind or correct such actions or omissions promptly upon having knowledge thereof.

(b) The County has designated the Obligations as Qualified School Construction Bonds.

(c) Throughout the term of the Obligations, the County will comply with all requirements of law related to Qualified School Construction Bonds, including the prevailing wage requirements of the federal Davis-Bacon Act (Subchapter IV, Chapter 31, Title 40, United States Code).

(d) All of the "Available Project Proceeds," as defined below, will be used for the construction, rehabilitation or repair of a public school facility (hereafter, a "Qualified Purpose") within the County's jurisdiction. The County will make no use of the financing proceeds that will cause any of the Obligations to be disqualified as Qualified School Construction Bonds.

"Available Project Proceeds" means all of the Amount Advanced plus earnings on the Amount Advanced, other than such amounts as are used to pay issuance costs (to the extent that such paid costs do not exceed 2% of such proceeds).

(e) No more than 2% of the face amount of this contract (2% of \$4,270,400, or \$85,408) will be used to pay financing costs related to this transaction, including BB&T's fee of \$23,000, legal fees, fees of the LGC, publication costs, and survey and title insurance expenses.

(f) The County reasonably expects to spend all of the Available Project Proceeds for a Qualified Purpose within 3 years, beginning with the Closing Date. The County will enter into a binding commitment with a third party to spend at least 10% of the Available Project Proceeds within six months, beginning with the Closing Date.

(g) All North Carolina and County laws and requirements governing conflicts of interest have been satisfied with respect to this transaction.

(h) The County will provide to BB&T, at such reasonable times as BB&T may request, all information reasonably available to the County concerning the County's compliance with the requirements of this Agreement, and otherwise with the requirements of Code Section 54F and related Treasury Regulations. The County will maintain appropriate records of the use of the proceeds and otherwise to document compliance with such requirements.

(i) The County will take all reasonable and appropriate action as BB&T may request, at any time and from time to time, to cooperate with BB&T and provide for the later separate sale by BB&T of the federal income tax credits related to the Obligations

(and their status as Qualified School Construction Bonds), but only if the requested action is without direct cost to the County.

## ARTICLE V

### TERMS OF CONSTRUCTION

**5.01. Construction; Changes.** (a) The County shall comply with the provisions of Article 8 of Chapter 143 of the North Carolina General Statutes and enter into the Construction Contracts, or in the alternative the County may provide for the School Board to enter in to some or all of the Construction Contracts. The County shall cause the construction to be carried on continuously in accordance with the Plans and Specifications and all applicable State and local laws and regulations. The County shall cause the Pledged Facilities to be constructed on the Pledged Site and shall insure (i) that the Pledged Facilities do not encroach upon nor overhang any easement or right-of-way and (ii) that the Pledged Facilities, when erected, will be wholly within any applicable building restriction lines, however established, and will not violate applicable use or other restrictions contained in prior conveyances or applicable protective covenants or restrictions. The County shall cause all utility lines, septic systems and streets serving the Pledged Site to be completed in accordance with health department standards and other applicable regulations of any governmental agency having jurisdiction.

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(b) The County may approve changes to the Plans and Specifications and the Construction Contracts in its discretion except that the County may not, without BB&T's consent, approve any changes which (i) result in the use of the Pledged Facilities for purposes substantially different from those initially proposed or (ii) which increase total estimated Project Costs beyond amounts previously identified and designated for such purpose.

**5.02. Construction within Funds Available.** The County represents that, based upon its examination of the Pledged Site and of the Plans and Specifications, estimated construction and equipment costs provided by licensed architects and engineers and the anticipated configuration of the Pledged Facilities, the Pledged Facilities can be constructed, acquired and equipped for a total price within the total amount of funds to be available therefore in the Project Fund, income anticipated to be derived from the investment thereof and other funds previously identified and designated for such purposes. If the total amount available for such purposes in the Project Fund shall be insufficient to pay the entire cost of the Project, the County promises to pay any such excess costs, with no resulting reduction or offset in the amounts otherwise payable by the County under this Agreement.

**5.03. Contractors' Performance and Payment Bonds.** The County shall require

each contractor entering into a Construction Contract to furnish a performance bond and a separate labor and material payment bond as required by Article 3, Chapter 44A of the North Carolina General Statutes. The County shall provide copies of all such bonds to BB&T promptly upon the County's receipt of each such bond. Each such bond shall include BB&T as a dual obligee.

Upon any material default by a contractor under any Construction Contract, or upon any material breach of warranty with respect to any materials, workmanship or performance, the County shall promptly proceed, either separately or in conjunction with others, to pursue diligently its remedies against such contractor or against the surety of any bond securing the performance of such Construction Contract.

**5.04. Contractors' General Public Liability and Property Damage Insurance.**

The County shall require each contractor entering into a Construction Contract to procure and maintain standard form (a) comprehensive general public liability and property damage insurance, at such contractor's own cost and expense, during the duration of such contractor's construction contract, in the amount of at least \$2,000,000, and (b) comprehensive automobile liability insurance on owned, hired and non-owned vehicles for not less than \$2,000,000. Such policies shall include BB&T as an additional named insured. The County shall provide to BB&T a certificate of insurance in a form acceptable to BB&T with respect to each contractor. Such insurance shall provide protection from all claims for bodily injury, including death, property damage and contractual liability, products/completed operations, broad form property damage and XCU (explosive, collapse and underground damage), where applicable.

**5.05. Contractors' Builder's Risk Completed Value Insurance.** The County shall require each contractor entering into a Construction Contract to purchase and maintain property insurance (builder's risk) upon all construction, acquisition, installation and equipping of the Pledged Facilities (excluding contractor's tools and equipment) at the site thereof at the full insurable value thereof. This insurance shall include a lender's loss payable endorsement in favor of BB&T, and shall insure against "all risk" subject to standard policy conditions and exclusions. The contractor shall purchase and maintain similar property insurance for portions of the work stored off the Pledged Site or in transit when such portions of the work are to be included in an application for payment. The contractor shall be responsible for the payment of any deductible amounts associated with this insurance.

**5.06. Contractors' Workers' Compensation Insurance.** The County shall require each contractor entering into a Construction Contract to procure and maintain workers' compensation insurance during the term of such Construction Contract, covering his or her employees working thereunder. A certificate of insurance evidencing such coverage, in form acceptable to BB&T, shall be provided to the County with respect to each contractor entering into a Construction Contract. Each Construction Contract shall also provide that each subcontractor of any contractor who is a party to such Construction



Contract shall be required to furnish similar workers' compensation insurance.

**5.07. Disclaimer of Warranties.** The County agrees that BB&T has not designed the Financed Facilities, that BB&T has not supplied any plans or specifications with respect thereto and that BB&T (a) is not a manufacturer of, nor a dealer in, any of the component parts of the Financed Facilities or similar facilities, (b) has not made any recommendation, given any advice nor taken any other action with respect to (i) the choice of any supplier, vendor or designer of, or any other contractor with respect to, the Financed Facilities or any component part thereof or any property or rights relating thereto, or (ii) any action taken or to be taken with respect to the Financed Facilities or any component part thereof or any property or rights relating thereto at any stage of the acquisition, construction and equipping thereof, (c) has not at any time had physical possession of the Financed Facilities or any component part thereof or made any inspection thereof or of any property or rights relating thereto, and (d) has not made any warranty or other representation, express or implied, that the Financed Facilities or any component part thereof or any property or rights relating thereto (i) will not result in or cause injury or damage to persons or property, (ii) has been or will be properly designed, or will accomplish the results which the County intends therefore, or (iii) is safe in any manner or respect.

BB&T MAKES NO EXPRESS OR IMPLIED WARRANTY OR REPRESENTATION OF ANY KIND WHATSOEVER WITH RESPECT TO THE ~~FINANCED FACILITIES OR ANY COMPONENT PART THEREOF, INCLUDING~~ BUT NOT LIMITED TO ANY WARRANTY OR REPRESENTATION WITH RESPECT TO THE MERCHANTABILITY OR THE FITNESS OR SUITABILITY THEREOF FOR ANY PURPOSE, and further including the design or condition thereof; the safety, quality or capacity thereof; compliance thereof with the requirements of any law, rule, specification or contract pertaining thereto; any latent defect; the ability of the Financed Facilities to perform any function; that the Amount Advanced will be sufficient to pay all costs of the acquisition, construction and equipping of the Financed Facilities; or any other characteristic of the Financed Facilities; it being agreed that the County is to bear all risks relating to the Financed Facilities, the completion thereof and the transactions contemplated hereby, and the County hereby waives the benefits of any and all implied warranties and representations of BB&T.

The provisions of this Section shall survive the Agreement's termination.

**5.08. Right of Entry and Inspection.** BB&T and its representatives and agents shall have the right to enter upon the Pledged Site and inspect the Mortgaged Property from time to time during construction and after the completion of construction, and the County shall cause any vendor, contractor or sub-contractor to cooperate with BB&T and its representatives and agents during such inspections.

No right of inspection or approval granted in this Section shall be deemed to impose upon BB&T any duty or obligation whatsoever to undertake any inspection or to make any

approval. No inspection made or approval given by BB&T shall be deemed to impose upon BB&T any duty or obligation whatsoever to identify or correct any defects in the Facilities or to notify any person with respect thereto, and no liability shall be imposed upon BB&T, and no warranties (either express or implied) are made by BB&T as to the quality or fitness of any improvement, any such inspection and approval being made solely for BB&T's benefit.

## ARTICLE VI

### CARE AND USE OF FACILITIES

**6.01. Compliance with Requirements.** (a) The County shall cause the Financed Facilities to be designed and constructed in compliance with all applicable legal requirements, including subdivision, building and zoning regulations. The County shall not initiate or acquiesce in a change in the zoning classification of the Pledged Site, except with respect to any change that may be appropriate to conform the actual zoning to that appropriate for the use of the Pledged Facilities contemplated as of the Closing Date.

(b) The County shall observe and comply promptly with all current and future requirements relating to the Mortgaged Property's use or condition imposed by (i) any judicial, governmental or regulatory body having jurisdiction over the Pledged Facilities or any portion thereof or (ii) any insurance company writing a policy covering the Pledged Facilities or any portion thereof, whether or not any such requirement shall necessitate structural changes or improvements or interfere with the use or enjoyment of the Mortgaged Property.

(c) The County shall obtain and maintain in effect all licenses and permits required for the operation of the Pledged Facilities.

(d) The County shall in no event use the Mortgaged Property or any part thereof, nor allow the same to be used, for any unlawful purpose, or suffer any act to be done or any condition to exist with respect to the Mortgaged Property or any part thereof, nor any article to be brought thereon, which may be dangerous, unless safeguarded as required by law, or which may, in law, constitute a nuisance, public or private, or which may make void or voidable any insurance then in force with respect thereto.

**6.02. Use and Operation of Financed Facilities.** (a) The County will use and operate the Financed Facilities for their intended public purposes, and for no other purpose unless required by law. The County will be solely responsible for the operation of the Facilities, and will not contract with any other person or entity for such operation.

(b) Notwithstanding the provisions of subsection (a), the parties acknowledge that the County intends to lease the Financed Facilities to the School Board, or may

otherwise provide for the School Board's use of the Financed Facilities. In addition, the County and the School Board may agree that the School Board will assume some of the County's responsibilities under this Agreement, including obligations with respect to entering into and monitoring construction contracts related to the Pledged Facilities. Notwithstanding any other provision of this Agreement to the contrary, the parties agree that any such lease or other arrangements between the County and the School Board will not violate any provision of this Agreement. No such lease or other arrangement, however, will in any way reduce the County's responsibilities to BB&T for the Financed Facilities under this Agreement.

**6.03. Maintenance and Repairs; Additions.** (a) The County shall keep the Mortgaged Property in good order and repair (reasonable wear and tear excepted) and in good operating condition, shall not commit or permit any waste or any other thing to occur whereby the value or usefulness of the Mortgaged Property might be impaired, and shall make from time to time all necessary or appropriate repairs, replacements and renewals.

(b) The County may, also at its own expense, make from time to time any additions, modifications or improvements to the Mortgaged Property that it may deem desirable for its governmental or proprietary purposes and that do not materially impair the effective use, nor materially decrease the value or substantially alter the intended use, of the Mortgaged Property. The County shall do, or cause to be done, all such things as may be required by law in order fully to protect the security of and all BB&T's rights under this Agreement.

(c) Any and all additions to or replacements of the Pledged Facilities and all parts thereof shall constitute accessions to the Pledged Facilities and shall be subject to all the terms and conditions of this Agreement and included in the "Pledged Facilities" for the purposes of this Agreement.

(d) Notwithstanding the provisions of subsection (c) above, however, the County may, from time to time in its sole discretion and at its own expense, install machinery, equipment and other tangible property in or on the Pledged Facilities. All such property shall remain the County's sole property in which BB&T shall have no interest; provided, however, that any such property which becomes permanently affixed to the Pledged Facilities shall be subject to the lien and security interest arising under this Agreement if BB&T shall reasonably determine that the Pledged Facilities would be damaged or impaired by the removal of such machinery, equipment or other tangible property.

**6.04. Security.** The County shall take all reasonable steps necessary to safeguard the Pledged Facilities against theft, vandalism and similar acts. The security afforded the Pledged Facilities shall at all times be equal to or better than the security afforded the County's property that is not subject to this Agreement.

**6.05. Utilities.** The County shall pay all charges for utility services furnished to or used on or in connection with the Pledged Site and the Pledged Facilities.

**6.06. Risk of Loss.** The County shall bear all risk of loss to and condemnation of the Pledged Site and the Pledged Facilities.

**6.07. Condemnation.** (a) The County shall immediately notify BB&T if any governmental authority shall institute, or shall notify the County of any intent to institute, any action or proceeding for the taking of, or damages to, all or any part of the Mortgaged Property or any interest therein under the power of eminent domain, or if there shall be any damage to the Mortgaged Property due to governmental action, but not resulting in a taking of any portion of the Mortgaged Property. The County shall file and prosecute its claims for any such awards or payments in good faith and with due diligence and cause the same to be collected and paid over to BB&T, and to the extent permitted by law hereby irrevocably authorizes and empowers BB&T or the Deed of Trust Trustee, in the County's name or otherwise, to collect and receipt for any such award or payment and to file and prosecute such claims. If the County receives any Net Proceeds arising from any such action, the County shall apply such Net Proceeds as provided in Section 6.10.

(b) If any of the real or personal property acquired or improved by the County (in whole or in part) using any portion of the Amount Advanced consists of or is located on any real property acquired by the County through the exercise of the power of eminent domain, or through the threat of the exercise of the power of eminent domain, then during ~~the term of this Agreement the County may not transfer any interest in such real property~~ to any entity other than a local governmental unit without BB&T's prior express written consent.

**6.08. Title.** Title to the Pledged Site and the Pledged Facilities and any and all additions, repairs, replacements or modifications thereto shall at all times be in the County, subject to the lien of this Agreement. Upon the County's payment in full of all Required Payments, BB&T, at the County's expense and request, shall cancel this Agreement.

**6.09. No Encumbrance, Mortgage or Pledge of Pledged Site or Pledged Facilities.** (a) The County shall not directly or indirectly create, incur, assume or suffer to exist any mortgage, pledge, lien (including mechanics' and materialmen's liens), charge, encumbrance or other claim in the nature of a lien on or with respect to the Mortgaged Property, except Permitted Encumbrances. The County shall promptly, at its own expense, take such action as may be duly necessary to discharge any such mortgage, pledge, lien, charge, encumbrance or claim not excepted above which it shall have created, incurred or suffered to exist.

(b) The County shall reimburse BB&T for any expense incurred by BB&T to discharge or remove any such mortgage, pledge, lien, security interest, encumbrance or claim, with interest thereon at the Prime Rate.

**6.10. Damage and Destruction; Use of Net Proceeds.** (a) The County shall

promptly notify BB&T if (i) the Mortgaged Property or any portion thereof is stolen or is destroyed or damaged by fire or other casualty, (ii) a material defect in the construction of the Pledged Facilities shall become apparent, or (iii) title to or the use of all or any portion of the Mortgaged Property shall be lost by reason of a defect in title. Each notice shall describe generally the nature and extent of such damage, destruction or taking.

(b) If the Net Proceeds arising from any single event, or any single substantially related sequence of events, is not more than \$100,000, the County shall retain such Net Proceeds and apply the same to the prompt completion, repair or restoration of the Mortgaged Property, and shall promptly thereafter report to BB&T regarding the use of such Net Proceeds.

(c) If the Net Proceeds arising from any single event, or any single substantially related sequence of events, is more than \$100,000, then the County shall cause such Net Proceeds to be paid to an escrow agent (which shall be a bank, trust company or similar entity exercising fiduciary responsibilities) for deposit in a special escrow fund to be held by such escrow agent. The County shall thereafter provide for the application of all Net Proceeds to the prompt completion, repair or restoration of the Pledged Facilities, as the case may be. The escrow agent shall disburse Net Proceeds for the payment of such costs upon receipt of requisitions in substantially the form of Exhibit A to the Project Fund Agreement. If the Net Proceeds shall be insufficient to pay in full the cost of completion, repair or restoration, the County shall either (i) complete the work and pay any cost in excess of the Net Proceeds, or (ii) not carry out such completion, repair or restoration, and instead apply the Net Proceeds, together with other available funds as may be necessary, to the prepayment of all outstanding Required Payments as the same become due.

(d) Any repair, restoration, modification, improvement or replacement paid for in whole or in part out of Net Proceeds shall be the County's property and shall be part of the Pledged Facilities.

## ARTICLE VII

### THE DEED OF TRUST TRUSTEE

**7.01. Deed of Trust Trustee's Liability.** The Deed of Trust Trustee shall suffer no liability by virtue of his acceptance of this trust except such as may be incurred as a result of the Deed of Trust Trustee's failure to account for the proceeds of any sale under this Agreement.

**7.02. Substitute Trustees.** If the Deed of Trust Trustee, or any successor, shall die, become incapable of acting or renounce his trust, or if for any reason BB&T desires to replace the Deed of Trust Trustee, then BB&T shall have the unqualified right to appoint one or more substitute or successor Deed of Trust Trustees by instruments filed for

registration in the office of the Register of Deeds where this Agreement is recorded. Any such removal or appointment may be made at any time without notice, without specifying any reason therefor and without any court approval. Any such appointee shall become vested with title to the Mortgaged Property and with all rights, powers and duties conferred upon the Deed of Trust Trustee by this Agreement in the same manner and to the same effect as though such Deed of Trust Trustee were named as the original Deed of Trust Trustee.

## **ARTICLE VIII**

### **DEFAULTS AND REMEDIES; FORECLOSURE**

**8.01. Events of Default.** An "Event of Default" is any of the following:

- (a) The County's failing to make any Installment Payment when due.
- (b) The occurrence of an Event of Nonappropriation.
- (c) The County's breaching or failing to perform or observe any term, condition or covenant of this Agreement or of the Project Fund Agreement on its part to be observed or performed, other than as provided in subsections (a) or (b) above, including payment of any Additional Payment, for a period of 15 days after written notice specifying such failure and requesting that it be remedied shall have been given to the County by BB&T, unless BB&T shall agree in writing to an extension of such time prior to its expiration.
- (d) The institution of proceedings under any bankruptcy, insolvency, reorganization or similar law by or against the County as a debtor, or the appointment of a receiver, custodian or similar officer for the County or any of its property, and the failure of such proceedings or appointments to be vacated or fully stayed within 30 days after the institution or occurrence thereof.
- (e) Any warranty, representation or statement made by the County in this Agreement or the Project Fund Agreement is found to be incorrect or misleading in any material respect on the Closing Date (or, if later, on the date made).
- (f) Any lien, charge or encumbrance (other than Permitted Encumbrances) prior to or affecting the validity of this Agreement is found to exist, or proceedings are instituted against the County to enforce any lien, charge or encumbrance against the Mortgaged Property and such lien, charge or encumbrance would be prior to the lien of this Agreement.
- (g) The County's failing to pay when due any principal of or interest on any of its general obligation debt.

**8.02. Remedies on Default.** Upon the continuation of any Event of Default, BB&T may, without any further demand or notice, exercise any one or more of the following remedies:

(a) Declare the unpaid principal components of the Installment Payments immediately due and payable;

(b) Proceed by appropriate court action to enforce the County's performance of the applicable covenants of this Agreement or to recover for the breach thereof;

(c) As provided in the Project Fund Agreement, pay over any balance remaining in the Project Fund to be applied against outstanding Required Payments in any manner BB&T may reasonably deem appropriate; and

(d) Avail itself of all available remedies under this Agreement, including execution and foreclosure as provided in Sections 8.03 and 8.04, and recovery of attorneys' fees and other expenses.

Notwithstanding any other provision of this Agreement, County, the Deed of Trust Trustee and BB&T intend to comply with Section 160A-20. No deficiency judgment may be entered against the County in violation of Section 160A-20.

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**8.03. Execution on Personal Property.** Upon the continuation of any Event of Default and in addition to all other remedies granted in this Agreement, BB&T shall have all the rights and remedies of a secured party under the UCC and may proceed as to the personal property portion of the Mortgaged Property in the same manner as provided in this Agreement for the real property portion, with BB&T having no obligation to proceed against real or personal property in preference to the other.

**8.04. Foreclosure; Sale under Power of Sale.** (a) Right to foreclosure or sale. Upon the occurrence and continuation of an Event of Default, at BB&T's request, the Deed of Trust Trustee shall foreclose Mortgaged Property by judicial proceedings or, at BB&T's option, the Deed of Trust Trustee shall sell (and is hereby empowered to sell) all or any part of the Mortgaged Property (and if in part, any such sale shall in no way adversely affect the lien created hereby against the remainder) at public sale to the last and highest bidder for cash (free of any equity of redemption, homestead, dower, curtesy or other exemption, all of which the County expressly waives to the extent permitted by law) after compliance with applicable State laws relating to foreclosure sales under power of sale. The Deed of Trust Trustee shall, at BB&T's request, execute a proper deed or deeds to the successful purchaser at such sale.

(b) Bank's bid. BB&T may bid and become the purchaser at any sale under this Agreement, and in lieu of paying cash therefor may make settlement for the purchase price by crediting against the Required Payments the proceeds of sale net of sale expenses,

including the Deed of Trust Trustee's commission, and after payment of such taxes and assessments as may be a lien on the Mortgaged Property superior to the lien of this Agreement (unless the Mortgaged Property is sold subject to such liens and assessments, as provided by State law).

(c) County's bid. The County may bid for all or any part of the Mortgaged Property at any foreclosure sale; provided, however, that the price bid by the County may not be less than an amount sufficient to provide for full payment of the Required Payments.

(d) Successful bidder's deposit. At any such sale the Deed of Trust Trustee may, at its option, require any successful bidder (other than BB&T) immediately to deposit with the Deed of Trust Trustee cash or a certified check in an amount equal to all or any part of the successful bid, and notice of any such requirement need not be included in the advertisement of the notice of such sale.

(e) Application of sale proceeds. The proceeds of any foreclosure sale shall be applied in the manner and in the order prescribed by State law, it being agreed that the expenses of any such sale shall include a commission to the Deed of Trust Trustee of five percent of the gross sales price for making such sale and for all services performed under this Agreement. Any proceeds of any such sale remaining after the payment of all Required Payments and the prior application thereof in accordance with State law shall be paid to the County.

---

**8.05 Possession of Mortgaged Property.** During the continuation of an Event of Default, the County shall immediately lose the right to possess, use and enjoy the Mortgaged Property (but may remain in possession of the Mortgaged Property as a tenant at will of BB&T), and thereupon the County (a) shall pay monthly in advance to BB&T a fair and reasonable rental value for the use and occupation of the Mortgaged Property (in an amount BB&T shall determine in its reasonable judgment), and (b) upon BB&T's demand, shall deliver possession of the Mortgaged Property to BB&T or, at BB&T's direction, to the purchaser of the Mortgaged Property at any judicial or foreclosure sale under this Agreement.

In addition, upon the continuation of any Event of Default, BB&T, to the extent permitted by law, is hereby authorized to (i) take possession of the Mortgaged Property, with or without legal action, (ii) lease the Mortgaged Property, (iii) collect all rents and profits therefrom, with or without taking possession of the Mortgaged Property, and (iv) after deducting all costs of collection and administration expenses, apply the net rents and profits first to the payment of necessary maintenance and insurance costs, and then to the County's account and in reduction of the County's corresponding Required Payments in such fashion as BB&T shall reasonably deem appropriate. BB&T shall be liable to account only for rents and profits it actually receives.

**8.06. Due on Sale Provision; Acceleration.** BB&T may, at its option, require the



immediate payment in full of the Required Payments and the Amount Advanced and all other sums secured by this Agreement upon the sale, transfer, conveyance or encumbrance of all or any part of the Mortgaged Property, or any legal or beneficial interest in the Mortgaged Property, without BB&T's prior written consent. This option applies whether the sale, transfer, conveyance or encumbrance is voluntary, involuntary, by operation of law or otherwise, and includes (i) any creation of lien or encumbrance, whether or not subordinate to the lien created pursuant to this Agreement, (ii) the creation of any easement, right-of-way or similar interest other than such as would constitute a Permitted Encumbrance, or (iii) the grant of any leasehold or similar interest or any option to purchase, right of first refusal or similar interest.

**8.07. No Remedy Exclusive; Delay Not Waiver.** All remedies under this Agreement are cumulative and may be exercised concurrently or separately. The exercise of any one remedy shall not be deemed an election of such remedy or preclude the exercise of any other remedy. If any Event of Default shall occur and thereafter be waived by the other parties, such waiver shall be limited to the particular breach so waived and shall not be deemed a waiver of any other breach under this Agreement.

**8.08. Payment of Costs and Attorney's Fees.** If BB&T employs an attorney to assist in the enforcement or collection of Required Payments, or if the Deed of Trust Trustee or BB&T voluntarily or otherwise shall become a party or parties to any suit or legal proceeding (including a proceeding conducted under any state or federal bankruptcy or insolvency statute) to protect the Mortgaged Property, to protect the lien of this Agreement, to enforce collection of the Required Payments or to enforce compliance by the County with any of the provisions of this Agreement, the County agrees to pay reasonable attorneys' fees and all of the costs that may reasonably be incurred (whether or not any suit or proceeding is commenced), and such fees and costs (together with interest at the Prime Rate) shall be secured as Required Payments.

## ARTICLE IX

### MISCELLANEOUS

**9.01. Notices.** (a) Any communication required or permitted by this Agreement must be in writing.

(b) Any communication under this Agreement shall be sufficiently given and deemed given when delivered by hand or on the date shown on a certified mail receipt, or a delivery receipt from a national commercial package delivery service, if addressed as follows:

- (i) if to the County, to the attention of the Finance Officer, Henderson County, Historic Courthouse Annex, 113 North Main Street, Hendersonville,

North Carolina 8792;

(ii) if to the Deed of Trust Trustee, to 5130 Parkway Plaza Boulevard, Building 9, Charlotte, North Carolina 28217; or

(iii) if to BB&T, to 5130 Parkway Plaza Boulevard, Building 9, Charlotte, North Carolina 28217, Attention: Account Administration/Municipal.

(c) Any communication to the Deed of Trust Trustee shall also be sent to BB&T.

(d) Any addressee may designate additional or different addresses for communications by notice given under this Section to each of the others.

**9.02. No Assignments by County.** The County shall not sell or assign any interest in this Agreement.

**9.03. Assignments by BB&T.** BB&T may, at any time and from time to time, assign all or any part of its interest in the Pledged Site, the Pledged Facilities or this Agreement, including, without limitation, BB&T's rights to receive Required Payments. Any assignment made by BB&T or any subsequent assignee shall not purport to convey any greater interest or rights than those held by BB&T pursuant to this Agreement.

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The County agrees that this Agreement may become part of a pool of obligations at BB&T's or its assignee's option. BB&T or its assignees may assign or reassign all or any part of this Agreement, including the assignment or reassignment of any partial interest through the use of certificates evidencing participation interests in this Agreement. Any assignment by BB&T may be only to a bank, insurance company, or similar financial institution or any other entity approved by the LGC. Notwithstanding the foregoing, no assignment or reassignment of BB&T's interest in the Mortgaged Property or this Agreement shall be effective unless and until the County shall receive a duplicate original counterpart of the document by which such assignment or reassignment is made disclosing the name and address of each such assignee.

The County further agrees that BB&T's interest in this Agreement may be assigned in whole or in part upon terms which provide in effect that the assignor or assignee will act as a collection and paying agent for any holders of certificates of participation in this Agreement, provided the County receives a copy of such agency contract and such collection and paying agent covenants and agrees to maintain for the full remaining term of this Agreement a written record of each assignment and reassignment of such certificates of participation.

The County agrees to execute any document reasonably required in connection with any assignment. Any assignor must provide notice of any assignment to the County, and the County shall keep a complete and accurate record of all assignments as required by the

Code. After the giving of any such notice, the County shall thereafter make all payments in accordance with the notice to the assignee named therein and shall, if so requested, acknowledge such assignment in writing, but such acknowledgment shall in no way be deemed necessary to make the assignment effective.

**9.04. Amendments.** No term or provision of this Agreement may be amended, modified or waived without the prior written consent of the County and BB&T.

**9.05. No Marshalling.** The County hereby waives any and all rights to require marshalling of assets in connection with the exercise of any remedies provided in this Agreement or as permitted by law.

**9.06. Governing Law.** The County, BB&T and the Deed of Trust Trustee intend that State law shall govern this Agreement.

**9.07. Liability of Officers and Agents.** No officer, agent or employee of the County shall be subject to any personal liability or accountability by reason of the execution of this Agreement or any other documents related to the transactions contemplated hereby. Such officers or agents shall be deemed to execute such documents in their official capacities only, and not in their individual capacities. This Section shall not relieve an officer, agent or employee of the County from the performance of any official duty provided by law.

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**9.08. Covenants Running with the Land.** All covenants contained in this Agreement shall run with the real estate encumbered by this Agreement.

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

**9.10. Non-Business Days.** If the date for making any payment or the last day for performance of any act or the exercising of any right shall not be a Business Day, such payment shall be made or act performed or right exercised on or before the next preceding Business Day.

**9.11. Entire Agreement.** This Agreement constitutes the County's entire agreement with respect to the general subject matter covered hereby.

**9.12. Binding Effect.** Subject to the specific provisions of this Agreement, and in particular Section 9.03, this Agreement shall be binding upon and inure to the benefit of and be enforceable by the parties and their respective successors and assigns.

*[The remainder of this page has been left blank intentionally.]*

IN WITNESS WHEREOF, the County has caused this instrument to be executed as of the day and year first above written by duly authorized officers.

ATTEST: (SEAL) HENDERSON COUNTY,  
NORTH CAROLINA

By: \_\_\_\_\_

By: \_\_\_\_\_

Printed Name: \_\_\_\_\_  
Clerk, Board of Commissioners

Printed Name: \_\_\_\_\_

Title: \_\_\_\_\_

\* \* \* \* \*

STATE OF NORTH CAROLINA; HENDERSON COUNTY

I, a Notary Public of such County and State, certify that \_\_\_\_\_ and \_\_\_\_\_ personally came before me this day and acknowledged that they are the \_\_\_\_\_ and Clerk, respectively, of the Board of Commissioners of Henderson County, North Carolina, and that by authority duly given and as the act of Henderson County, North Carolina, the foregoing instrument was signed in the County's name by such \_\_\_\_\_, sealed with its corporate seal and attested by such Clerk.

WITNESS my hand and official stamp or seal, this \_\_\_\_ day of December, 2009.

[SEAL]

\_\_\_\_\_  
Notary Public

My commission expires: \_\_\_\_\_

\* \* \* \* \*

This contract has been approved under the provisions of Article 8, Chapter 159 of the General Statutes of North Carolina.

T. Vance Holloman  
Secretary, North Carolina  
Local Government Commission

By \_\_\_\_\_  
[T. Vance Holloman or  
Designated Assistant]

*[Financing Agreement and Deed of Trust for \$4,270,400.00 from Henderson County, North Carolina, for the benefit of Branch Banking and Trust Company]*

**EXHIBIT A -- PLEDGED SITE DESCRIPTION**

[real property description for Hendersonville Elementary School]

**EXHIBIT B -- IMPROVEMENTS DESCRIPTION**

[description of Hendersonville Elementary School]

**EXHIBIT C -- EXISTING ENCUMBRANCES**

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## **EXHIBIT D-- PAYMENT SCHEDULE**

**Payment Schedule to Financing Agreement and Deed of Trust dated as of December \_\_\_, 2009 (the "Financing Agreement"), granted by Henderson County, North Carolina, to F. Louis Loyd, III, Deed of Trust Trustee, for the benefit of Branch Banking and Trust Company**

Contract Number: 003-xxxxxxx-xxx

Tax-Credit rate: 6.05%

Tax credit date: November 4, 2009

Supplemental Interest Rate: 1.87%

The payments required to repay the advance made pursuant to the Financing Agreement call for an amortization period of approximately ten (10) years. Payments are semi-annual in arrears in variable amounts with a fixed principal component of \$427,040.00. A portion of each payment is paid as and represents payment of interest at the Supplemental Interest Rate.

Payments are due beginning on December 16, 2010, and annually thereafter, with a final payment of all outstanding principal and accrued and unpaid interest due on December 16, 2019, all as set forth in the attached amortization schedule.



**SHLF draft of November 30, 2009**

## **PROJECT FUND AGREEMENT**

**THIS PROJECT FUND AGREEMENT** is dated as of December \_\_\_, 2009, and is by and between **HENDERSON COUNTY, NORTH CAROLINA**, a political subdivision of the State of North Carolina (the "County"), and **BRANCH BANKING AND TRUST COMPANY -- GOVERNMENTAL FINANCE ("BB&T")**.

### **RECITALS**

The County is, simultaneously with the execution and delivery of this Project Fund Agreement, executing and delivering a Financing Agreement and Deed of Trust dated as of December \_\_\_, 2009 (the "Financing Agreement"), to a deed of trust trustee for BB&T's benefit. The purpose of the Financing Agreement is to provide for BB&T's advance of \$4,270,400 to the County to finance the County's acquisition and construction of the Financed Facilities, as defined in the Financing Agreement. In partial consideration for BB&T's entering into the Financing Agreement, the County has agreed to provide for financing proceeds to be deposited and disbursed pursuant to this Project Fund Agreement.

---

**NOW, THEREFORE**, the parties agree as follows:

### **SECTION 1.        DEFINITIONS**

All capitalized terms used in this Project Fund Agreement and not otherwise defined will have the meanings assigned thereto in the Financing Agreement.

### **SECTION 2.        PROJECT FUND.**

**2.1.    Project Fund.** On the Closing Date, BB&T will deposit \$4,246,400 into a special account of the County at Branch Banking and Trust Company to be designated "2009-1 Henderson County QSCB Project Fund" (the "Project Fund"). This account will be held separate and apart from all other funds of the County. The Project Fund is the County's property, but the County shall withdraw amounts on deposit in the Project Fund only as provided in the Project Fund Agreement and only for application from time to time to the payment of Project Costs. Pending such application, such amounts shall be subject to a lien and charge in favor of BB&T to secure the County's obligations under the Financing Agreement.

**2.2.    Requisitions from Project Fund.** (a) The County may withdraw funds from the Project Fund only after authorization from BB&T. BB&T will disburse funds

from the Project Fund only to the County and only upon its receipt of one or more written requisitions signed by one of the below listed designated County Representatives substantially in the form of Exhibit A.

\_\_\_\_\_  
J. Carey McLelland, Finance Director

\_\_\_\_\_  
Steven D. Wyatt, County Manager

\_\_\_\_\_  
[to come], Chairman, Board of Commissioners

The County may designate additional representatives to sign requisitions upon written notification to BB&T.

Upon receipt of a requisition from the County, BB&T shall promptly undertake such review of the matters referred to in such requisition as it may deem appropriate, and will then promptly notify the County of its approval of the requisition or the reasons for its disapproval.

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(b) Notwithstanding any other provision of this Project Fund Agreement, BB&T will not be obligated to honor any requisition for disbursements after 30 days from the Closing Date until the County provides to BB&T a final real estate title insurance policy, in form and substance reasonably acceptable to BB&T, insuring the priority of BB&T's lien position under the Financing Agreement.

### **2.3. Disposition of Project Fund Balance.**

(a) ***Upon completion*** -- Promptly after the Facilities have been completed to the point that they are suitable for carrying out substantially all the purposes they are to serve for the County, the County must deliver to BB&T a certificate to such effect signed by a County Representative. BB&T will then withdraw any balance remaining in the Project Fund (and not required to be retained to pay Project Costs incurred but not yet paid) and apply such balance against outstanding Required Payments.

(b) ***Upon default*** -- Upon the occurrence of an Event of Default, BB&T may withdraw any balance remaining in the Project Fund and apply such balance against outstanding Required Payments.

(c) ***After delay or inactivity*** -- If (i) more than two years have elapsed from the Closing Date or (ii) at least six months has passed from BB&T's most recent receipt of a



requisition for Project Costs, then BB&T, upon 30 days' notice from BB&T to the County, may withdraw any balance remaining in the Project Fund and apply such balance against outstanding Required Payments. In any event, BB&T will give such notice and provide for such withdrawal so that all funds on deposit in the Project Fund at the end of 3 years from the Closing Date are applied as provided in (d) below not later than 3 years and 90 days after the Closing Date.

(d) ***Application of Project Fund balance*** -- BB&T will apply any amounts withdrawn pursuant to subsections (a) and (c) above to the outstanding principal of the Amount Advanced, with such amounts applied to the payment of principal in inverse order of maturity, without penalty or prepayment premium. BB&T may apply any amounts withdrawn pursuant to subsection (b) above (i) first against all Additional Payments then due and payable, and (ii) then to interest accrued and unpaid to the Project Fund disposition date, before applying such amounts to the prepayment of principal. Any such prepayment, however, will not affect any other County payment obligation under the Financing Agreement. BB&T will notify the County of any withdrawal from the Project Fund made under this Section 2.3, and in the notice will describe its application of the funds withdrawn.

**2.4. Investment.** (a) The County and BB&T agree that money in the Project Fund will be continuously invested and reinvested in a BB&T public funds money rate savings account.

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(b) From and after the date that is three years from the Closing Date, the County will not purchase or hold any investment which has a "yield," as determined under the Code, in excess of the "yield" on the County's obligations under the Financing Agreement, unless the County has supplied BB&T with a Bond Counsel Opinion to the effect that such investment will not adversely affect the exclusion from gross income for federal income tax purposes to which the interest components of Installment Payments would otherwise be entitled.

(c) Investment obligations acquired with money in the Project Fund will at all times be part of the Project Fund. The interest accruing thereon and any profit or loss realized upon the disposition or maturity of any investment will be credited to or charged against the Project Fund.

(d) All earnings on moneys in the Project Fund must be used for Project Costs.

### **SECTION 3. MISCELLANEOUS.**

**3.1. Notices.** Any notice or other communication required or contemplated by this Project Fund Agreement will be deemed to be delivered if in writing, addressed as

provided below and if (a) actually received by such addressee, or (b) in the case of mailing, when indicated to have been delivered by a signed receipt returned by the United States Postal Service after deposit in the United States mails, postage and registry fees prepaid, and clearly directed to be transmitted as registered or certified mail:

(i) If intended for the County, addressed to it at the following address:  
Henderson County, Attention: Finance Officer, Re: Notice under 20009 QSCB  
Project Fund Agreement, Historic Courthouse Annex, 113 North Main St.,  
Hendersonville, North Carolina 28792.

(ii) If intended for BB&T, addressed to it at the following address:  
BB&T Governmental Finance, Attention: Account Administration/Municipal, Re:  
Henderson County Project Fund Agreement Notice, 5130 Parkway Plaza  
Boulevard, Building 9, Charlotte, North Carolina 28217.

Any party may designate a different or alternate address for notices by notice given under this Project Fund Agreement.

**3.2. Survival of Covenants and Representations.** All covenants, representations and warranties made by the County in this Project Fund Agreement and in any certificates delivered pursuant to this Project Fund Agreement will survive the delivery of this Project Fund Agreement.

**3.3. Choice of Law.** The parties intend that North Carolina law will govern this Project Fund Agreement.

**3.4. Amendments.** This Project Fund Agreement may not be modified or amended unless such amendment is in writing and signed by BB&T and the County.

**3.5. No Third-Party Beneficiaries.** There are no parties intended to be or which shall be deemed to be third-party beneficiaries of this Project Fund Agreement.

**3.6. Successors and Assigns.** All of the covenants and conditions of this Project Fund Agreement will be binding upon and inure to the benefit of the parties to this Project Fund Agreement and their respective successors and assigns.

**3.7. Severability.** If any court of competent jurisdiction holds any provision of this Project Fund Agreement invalid or unenforceable, such holding will not invalidate or render unenforceable any other provision of this Project Fund Agreement.

**3.8. Counterparts.** This Project Fund Agreement may be executed in any number of counterparts, including separate counterparts, each executed counterpart constituting an original but all together only one agreement.

**3.9. Termination.** Except as otherwise provided in this Project Fund Agreement, this Project Fund Agreement will cease and terminate upon payment of all funds (including investment proceeds) from the Project Fund.

*(The remainder of this page has been left blank intentionally.)*

**IN WITNESS WHEREOF**, each of the parties has caused this Project Fund Agreement to be signed and delivered by a duly authorized officer, all as of the date first above written.

<p><b>HENDERSON COUNTY, NORTH CAROLINA</b></p> <p>By: _____ J. Carey McLelland Finance Officer</p>	<p><b>BRANCH BANKING AND TRUST COMPANY – GOVERNMENTAL FINANCE</b></p> <p>By: _____ Printed Name: _____ Title: _____</p>
--	---

*[Project Fund Agreement dated as of December \_\_, 2009]*

**EXHIBIT A**

**PROJECT FUND REQUISITION**

*[To Be Prepared on County's Letterhead for Submission]*

[Date] \_\_\_\_\_

Martha Bisacquino  
Project Specialist  
BB&T Governmental Finance  
5130 Parkway Plaza Boulevard, Building 9  
Charlotte, North Carolina 28217

RE: Request for disbursement of funds from the Project Fund related to Contract No. \_\_\_\_\_ with Henderson County, North Carolina, dated as of December \_\_\_, 2009.

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Dear Ms. Bisacquino,

Pursuant to the terms and conditions of the Project Fund Agreement dated as of December \_\_\_, 2009, Henderson County, North Carolina (the "County"), requests the disbursement of funds from the Project Fund established under the Project Fund Agreement for the following Project Costs:

This is requisition number \_\_\_\_ from the Project Fund.

**Disbursements will be to Henderson County, North Carolina.**

Amount:

Applicable Vendor Invoices:

Project Description:

Location of Equipment/Facilities:

To receive funds via wire transfer please include:

ABA Routing Number:

Account Number:

Physical address of County:

Henderson County makes this requisition pursuant to the following representations:

1. The County has appropriated in its current fiscal year funds sufficient to pay the Installment Payments and estimated Additional Payments due in the current fiscal year.

2. The purpose of this disbursement is for partial payment on the project provided for under the Contract referenced above.

3. The requested disbursement has not been subject to any previous requisition.

4. No notice of any lien, right to lien or attachment upon, or claim affecting the right to receive payment of, any of the moneys payable herein to any of the persons, firms or corporations named herein has been received, or if any notice of any such lien, attachment or claim has been received, such lien, attachment or claim has been released or discharged or will be released or discharged upon payment of this requisition.

5. This requisition contains no items representing payment on account of any percentage entitled to be retained on the date of this requisition.

6. No Event of Default is continuing under the Financing Agreement, and no event or condition is existing which, with notice or lapse of time or both, would become an Event of Default.

7. The County will execute any Uniform Commercial Code financing statements with respect to this portion of the Facilities that BB&T may request to evidence its security interest.

8. The County has in place insurance on this portion of the Facilities that complies with the insurance provisions of the above-referenced Contract.

9. Each amount requested for payment in this requisition either (a) represents reimbursement to the County for a Project Cost expenditure previously made, or (b) will be used by the County within five business days' after the receipt of funds from BB&T to make the payments to third parties described in this requisition.

Attached is evidence that the amounts shown in this requisition are properly payable at this time, such as bills, receipts, invoices, architects' payment certifications or other appropriate documents.

**HENDERSON COUNTY,  
NORTH CAROLINA**

By: \_\_\_\_\_

Title: \_\_\_\_\_



SHLF draft of November 30, 2009

**PROJECT COMPLETION AND AGENCY AGREEMENT**

**THIS PROJECT COMPLETION AND AGENCY AGREEMENT** is dated as of December \_\_, 2009, and is entered into by and between **HENDERSON COUNTY, NORTH CAROLINA**, as principal (the "County"), and **THE HENDERSON COUNTY BOARD OF EDUCATION**, as agent (the "School Board").

**WITNESSETH:**

The County and the School Board have agreed upon a plan to carry out various school improvements, including construction, repair and renovation projects at (a) Apple Valley Middle School, (b) Balfour Education Center, (c) Dana Elementary School, (d) East Henderson High School, (e) Hendersonville Elementary School, (f) North Henderson High School, (g) Rugby Middle School and (h) West Henderson High School (collectively, the "Project").

As part of such plan of financing, the County has executed and delivered a Financing Agreement and Deed of Trust (the "Financing Agreement") for the benefit of Branch Banking and Trust Company (the "Bank"), providing for the financing of the Project. As part of the plan of financing, the School Board has conveyed title to the Hendersonville Elementary School property to the County, and then leased back the property pursuant to a Lease dated as of December 1, 2009 (the "Lease").

The County desires to designate the School Board as its agent to carry out the Project. The School Board is willing to accept such an appointment pursuant to the terms of this Agreement, to act as the County's agent and to carry out the Project.

**NOW, THEREFORE**, for and in consideration of the mutual promises herein contained and for other valuable consideration, the parties agree as follows:

**1. DEFINITIONS.**

Capitalized terms used in this Agreement and not otherwise defined have the meanings assigned in the Financing Agreement. All references to the Bank include the Bank's successors and assigns pursuant to the Financing Agreement and the transactions contemplated by the Financing Agreement.

**2. APPOINTMENT; ACCEPTANCE.**

The County appoints the School Board as its agent to carry out all phases of the Project. The School Board, as the County's agent, assumes all the County's rights, duties and responsibilities regarding such matters, except as limited in this Agreement. The



School Board will appoint no further agent to assume such rights or carry out such duties and responsibilities without the prior written consent of the County and the Bank.

**3. CONTRACTS.**

The School Board, with the County's approval, may enter into any purchase order or contract with respect to the Project in the School Board's name. Alternatively, the County may require that any such purchase orders or contracts be entered into by the County in its own name or be entered into by the County and the School Board jointly.

All contracts must comply with the public procurement laws and any other State laws applicable to either the School Board or the County, as appropriate, with regard to entering into such contracts. The School Board must provide that contractors provide bonds, insurance coverages and contract assignments that comply with the requirements of North Carolina law.

**4. RIGHTS AND RESPONSIBILITIES FOR THE PROJECT.**

The School Board, as the County's agent, will be responsible for carrying out the Project, and the School Board will have all rights to supervise the Project.

~~The County and its representatives and agents will have the right to enter upon the Project sites and inspect the Project work from time to time during construction and after the completion of construction, and the School Board will cause any vendor, contractor or sub-contractor to cooperate with the County and its representatives and agents during such inspections. No right of inspection or approval granted in this Section will be deemed to impose upon the County any duty or obligation whatsoever to undertake any inspection or to make any approval. No inspection made or approval given by the County will be deemed to impose upon the County any duty or obligation whatsoever to identify or correct any defects in the School or to notify any person with respect thereto, and no liability will be imposed upon the County, and no warranties (either express or implied) are made by the County as to the quality or fitness of any improvement, any such inspection and approval being made solely for the County's benefit.~~

**5. SCHOOL BOARD'S RIGHT TO ENFORCE CONTRACTS.**

For so long as the School Board is not in default of any of the provisions of this Agreement and the Lease, the School Board will have the right to enforce in its own name or in the County's name purchase orders or contracts entered in the County's name or the School Board's name for the Project; provided however, that if the School Board is in default of any provisions of this Agreement or the Lease for a period of thirty days after being notified by the County of such default without cure, the County will have the right to terminate this Agreement and assume all the School Board's responsibilities for the Project. In the event of such a termination of this Agreement, the School Board will assign any and all right, title and interest to any and all contracts relating to the Project,

including but not limited to any architect agreements, any and all engineering agreements, any and all construction agreements, and any and all plans, specifications and other drawings or documents prepared or to be prepared for the Project. The School Board agrees to reimburse to the County for any and all costs, expenses, and damages incurred by the County in the assumption of the rights and responsibilities of the School Board due to such event of default without cure, and to indemnify and hold the County harmless for any and all claims for damages by others related to such event of default without cure. Any assignment by the County of any of its rights under the Financing Agreement will not prevent the County from asserting such rights and powers in its own behalf.

**6. DISBURSEMENTS FOR PROJECT COSTS.**

All the proceeds to be made available to the County pursuant to the Financing Agreement are being paid to the County by the Bank as of the date of the initial execution and delivery of the Financing Agreement. The School Board will request funds from the County for the payment of Project Costs, and will provide the County with the necessary information supporting a requisition, such as an architect's payment certification. The County will have the right to obtain such additional evidence as it deems appropriate to determine the accuracy of the representations set forth in the form of requisition and the propriety of payment. The School Board will provide the County with such information in the School Board's possession as the County may request.

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**7. APPLICATION OF CASUALTY INSURANCE PROCEEDS.**

Notwithstanding any provision of this Agreement, the County retains the sole power to control and direct the application and distribution of proceeds of casualty insurance applicable to the High School, as provided in the Financing Agreement.

**8. RESERVATION OF RIGHTS.**

This Agreement is not to be construed in any way as delegating or limiting the County's rights hereunder or under the Financing Agreement, except as expressly provided herein.

**9. CONSIDERATION.**

The County and the School Board are undertaking their mutual obligations under this Agreement in partial consideration for, and in partial fulfillment of, their agreement to carry out the Project.

*[The remainder of this page has been left blank intentionally.]*

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

**HENDERSON COUNTY,  
NORTH CAROLINA**

By: \_\_\_\_\_  
Steven D. Wyatt, County Manager

**THE HENDERSON COUNTY  
BOARD OF EDUCATION**

By: \_\_\_\_\_

Printed name: \_\_\_\_\_

Title: \_\_\_\_\_

<p>This instrument has been preaudited in the manner required by The Local Government Budget and Fiscal Control Act.</p> <p>_____</p> <p>J. Carey McLelland Finance Officer Henderson County, North Carolina</p>	<p>This instrument has been preaudited in the manner required by the School Budget and Fiscal Control Act.</p> <p>_____</p> <p>[name] Finance Officer The Henderson County Board of Education</p>
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[Agency Agreement dated as of December \_\_\_, 2009]

**SHLF draft of November 30, 2009**

*Prepared by and return after recording to:*

Robert M. Jessup Jr.  
Sanford Holshouser LLP  
209 Lloyd St., Suite 350  
Carrboro, NC 27510

<b>STATE OF</b>	)	
<b>NORTH CAROLINA</b>	)	
	)	<b>LEASE</b>
<b>HENDERSON COUNTY</b>	)	

**THIS LEASE** is dated as of December \_\_, 2009, and is entered into by and between **HENDERSON COUNTY, NORTH CAROLINA**, as lessor (the "County"), and **THE HENDERSON COUNTY BOARD OF EDUCATION**, as lessee (the "School Board").

**WITNESSETH:**

The County and the School Board have previously agreed to cooperate in a plan to carry out various school improvements, including construction, repair and renovation projects at (a) Apple Valley Middle School, (b) Balfour Education Center, (c) Dana Elementary School, (d) East Henderson High School, (e) Hendersonville Elementary School, (f) North Henderson High School, (g) Rugby Middle School and (h) West Henderson High School (collectively, the "Project").

To provide financing for the Project, County has entered into a Financing Agreement and Deed of Trust dated as of December \_\_, 2009 (the "Financing Agreement"), for the benefit of Branch Banking and Trust Company (the "Bank"). As part of the overall plan for the Project, the School Board has transferred to the County the Hendersonville Elementary School (the "School") and its associated real property, as described on Exhibit A (the "Site"). The School Board has made this conveyance so that the School and the Site can serve as collateral for the County's obligations under the Financing Agreement. The County is therefore the record owner of the Site.

The County proposes to lease the School and the Site back to the School Board, so that the School Board can continue to operate the School. The School Board has determined to accept such lease.

**NOW THEREFORE**, for and in consideration of the mutual promises contained in this Lease, the parties agree as follows:

## **ARTICLE I**

### **DEFINITIONS; RULES OF CONSTRUCTION**

All capitalized terms used in this Lease and not otherwise defined have the meanings assigned to them in the Financing Agreement, unless the context clearly requires otherwise. All references to the Bank include the Bank's successors and assigns pursuant to the Financing Agreement and the transactions contemplated by the Financing Agreement.

In addition, the following terms have the meanings specified below, unless the context clearly requires otherwise:

"Event of Default" means one or more events of default as defined in Section 11.1.

"Lease" means this Lease, as it may be duly amended.

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"Lease Term" means the term of this Lease as determined pursuant to Article IV.

"Lease Year" means, initially, from the Closing Date through June 30, 2009, and thereafter, means each twelve-month period commencing on July 1 and ending on the next June 30.

"Leased Property" means the Site and all improvements on the Site, including the School.

All references to articles or sections are references to articles or sections of this Lease, unless the context clearly indicates otherwise.

## **ARTICLE II**

### **REPRESENTATIONS, COVENANTS AND WARRANTIES**

The County and the School Board each represents, covenants and warrants for the other's benefit as follows:

(a) Neither the execution and delivery of this Lease, nor the fulfillment of or compliance with its terms and conditions, nor the consummation of the transactions

contemplated by this Lease, results in a breach of the terms, conditions and provisions of any agreement or instrument to which either is now a party or by which either is bound, or constitutes a default under any of the foregoing.

(b) To the knowledge of each party, there is no litigation or other court or administrative proceeding pending or threatened against such party (or against any other person) affecting such party's rights to execute or deliver this Lease or to comply with its obligations under this Lease. Neither such party's execution and delivery of this Lease, nor its compliance with its obligations under this Lease, requires the approval of any regulatory body or any other entity the approval of which has not been obtained.

### ARTICLE III

#### DEMISE; PRIORITY OF FINANCING AGREEMENT

3.1. **Demise.** The County hereby leases the Leased Property to the School Board, and the School Board hereby leases the Leased Property from the County, in accordance with the provisions of this Lease, to have and to hold for the Lease Term, subject to the provisions of Sections 3.2.

3.2. **Priority of Financing Agreement.** Notwithstanding anything in this Lease to the contrary, the School Board's rights to possession of the Leased Property and all its other rights under this Lease are subordinate to the rights of the Bank (and its assigns) as beneficiary under the Financing Agreement. Any judicial sale of, or foreclosure on, the Leased Property pursuant to the Financing Agreement terminates all the School Board's rights under this Lease.

### ARTICLE IV

#### LEASE TERM

4.1. **Commencement.** The Lease Term commences on the date of the initial execution and delivery of this Lease.

4.2. **Termination.** The Lease Term terminates upon the earliest of the following:

(a) Judicial sale of or foreclosure on the Leased Property under the Financing Agreement;

(b) The occurrence of an Event of Default under this Lease and subsequent termination by the County pursuant to Section 11.2; or

(c) The date that is 30 days after December 16, 2019, which is the scheduled date for final payment on the Financing Agreement, except that the Lease Term ends immediately upon the termination of the Financing Agreement if the Financing Agreement is terminated following an event of default by the County under the Financing Agreement.

Termination of the Lease Term terminates all the County's obligations under this Lease, and terminates the School Board's rights of possession under this Lease; but all other provisions of this Lease, including the receipt and disbursement of funds, shall continue until the Financing Agreement is discharged as provided therein.

## ARTICLE V

### QUIET ENJOYMENT; PURCHASE OPTION

**5.1. Quiet Enjoyment.** The County covenants that the School Board will during the Lease Term peaceably and quietly have and hold and enjoy the Leased Property without suit, trouble or hindrance from the County, except as expressly required or permitted by this Lease. The County will not interfere with the School Board's quiet use and enjoyment of the Leased Property during the Lease Term. The County will, at the School Board's request and the County's cost, join and cooperate fully in any legal action in which the School Board asserts its right to such possession and enjoyment, or which involves the imposition of any taxes or other governmental charges on or in connection with the Leased Property. In addition, the School Board may at its own expense join in any legal action affecting its possession and enjoyment of the Leased Property and will be joined (to the extent legally possible, and at the School Board's expense) in any action affecting its liabilities under this Lease.

The provisions of this Article are subject to rights to inspect the Leased Property granted to parties under the Financing Agreement.

## ARTICLE VI

### CONSIDERATION FOR LEASE

**6.1. Use as School; Assumption of Obligations.** In partial consideration for its acquisition of rights to use the Leased Property during the Lease Term, the School Board agrees to use the Leased Property for public education in fulfillment of its obligation, shared by the County, to provide for educational services in the County. In addition, in consideration of its rights under this Lease, the School Board undertakes the obligations imposed on it under this Lease, including those imposed by Section 7.1.

**6.2. Payments.** In partial consideration for its acquisition of rights to use the Leased Property during the Lease Term and its option to purchase the Leased Property, the

School Board hereby agrees to pay to the County total rent for the Lease Term in the amount of Ten Dollars, payable in advance on the Closing Date, receipt of which the County hereby acknowledges.

## **ARTICLE VII**

### **SCHOOL BOARD'S ASSUMPTION OF COUNTY'S OBLIGATIONS**

**7.1 Assumption of Obligations.** (a) The School Board assumes the County's obligations under Financing Agreement Sections 4.11 (regarding compliance with environmental laws), 4.16 (payment of taxes and other governmental charges), 4.17(a) (property damage insurance), 6.01 (compliance with requirements), 6.02 (regarding use and operation), 6.05 (utilities), 6.09 (prevention of liens), and 6.10 (regarding notice of damage, repair or replacement from Net Proceeds). The parties agree that the School Board may fulfill its requirements to maintain insurance through pooled risk and similar programs sponsored by or affiliated with the North Carolina School Boards Association, such as the North Carolina School Boards Association Insurance Trust.

(b) Notwithstanding the foregoing, the County retains its rights under Section 6.10 of the Financing Agreement to direct the use of Net Proceeds. All payments of Net Proceeds will be made to the County.

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**7.2. Transfer of Rights.** In order to allow the School Board to carry out its obligations under Section 7.1, the County transfers its rights under Section 6.03 of the Financing Agreement (regarding repairs and additions of and to the Leased Property). Nothing in this Section, however, may be construed as in any way assigning or delegating to the School Board any of the County's rights or responsibilities to make decisions regarding the School Board's capital and operating budgets.

**7.3. County's Cooperation.** (a) The County will cooperate fully with the School Board in filing any proof of loss or taking any other action under this Lease. Except as and to the extent provided in subsection (b), in no event will the County or the School Board voluntarily settle, or consent to the settlement of, any proceeding arising out of any insurance claim with respect to the Leased Property without the other's written consent.

(b) In the case of a proceeding as to which amounts are to be paid out by the County or the School Board, either party may settle or consent to settlement without the other's consent if the amount of the settlement (i) is less than \$100,000 or (ii) is to be paid entirely by insurance providers or other third parties.

**7.4. Advances; Performance of Obligations.** If the School Board fails to pay any amount required to be paid by it under this Lease, or fails to take any other action required of it under this Lease, the County may (but is under no obligation to) pay such



amounts or perform such other obligations. The School Board agrees to reimburse the County for any such payments or for its costs incurred in connection with performing such other obligations, together with interest thereon at the annual rate of 5.00%.

## ARTICLE VIII

### DISCLAIMER OF WARRANTIES; OTHER COVENANTS

**8.1. Disclaimer of Warranties.** THE COUNTY MAKES NO WARRANTY OR REPRESENTATION, EITHER EXPRESS OR IMPLIED, AS TO THE VALUE, DESIGN, CONDITION, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OR FITNESS FOR A PARTICULAR USE OF THE LEASED PROPERTY OR ANY PART THEREOF OR ANY OTHER REPRESENTATION OR WARRANTY WITH RESPECT TO THE LEASED PROPERTY OR ANY PART THEREOF. In no event will the County be liable for any direct or indirect, incidental, special or consequential damage in connection with or arising out of this Lease or the existence, furnishing, functioning or use by any of them of any item, product or service provided for herein.

The School Board acknowledges that the County has not designed the School or any other improvements on the Site (together, the "Improvements"), that the County has not supplied any plans or specifications with respect thereto and that the County (a) is not a manufacturer of, nor a dealer in, any of the component parts of the Improvements or similar facilities, (b) has not made any recommendation, given any advice nor taken any other action with respect to (1) the choice of any supplier, vendor or designer of, or any other contractor with respect to, the Improvements or any component part thereof or any property or rights relating thereto, or (2) any action taken or to be taken with respect to the Improvements or any component part thereof or any property or rights relating thereto at any stage of the construction thereof, (c) has not at any time had physical possession of the Improvements or any component part thereof or made any inspection thereof or any property or rights relating thereto, and (d) has not made any warranty or other representation, express or implied, that the Improvements or any component part thereof or any property or rights relating thereto (1) will not result in or cause injury or damage to persons or property, (2) have been or will be properly designed, or will accomplish the results which the School Board intends therefor, or (3) are safe in any manner or respect.

**8.2. Further Assurances; Corrective Instruments.** The School Board and the County agree that they will, from time to time, execute, acknowledge and deliver, or cause to be executed, acknowledged and delivered, such supplements hereto and such further instruments as may reasonably be required for correcting any inadequate or incorrect description of the Leased Property hereby leased, or intended so to be, or for otherwise carrying out the intention of this Lease.

**8.3. Covenant against Financing Agreement Defaults.** The School Board covenants not to take or omit to take any action the taking or omission of which would cause the County to be in default, technical or otherwise, under the Financing Agreement. In particular, the School Board covenants not to make any use of the School that would cause the County's obligations to make Installment Payments under the Financing Agreement to be "private activity bonds" within the meaning of the Code, such as entering into any leases of any part of the Leased Property or entering into any contracts for the use, management or operation of any part of the Leased Property without the County's consent. If the School Board takes or omit to take any such action, then, to the extent permitted by law, the School Board will proceed with all due diligence to take such actions as may be necessary to cure such default.

**8.4. Compliance with Requirements.** The School Board and the County must observe and comply promptly with all current and future orders of all courts having jurisdiction over the Leased Property or any portion thereof (or be diligently and in good faith contesting such orders), and all current and future requirements of all insurance companies writing policies covering the Leased Property or any portion thereof.

**8.5. Personal Property Insurance.** The School Board acknowledges that it is solely responsible for insuring the personal property owned by the School Board that at any time or from time to time may be located at the Leased Property.

**8.6. Permits and Other Authorizations.** The School Board covenants and represents to the County that the School Board has obtained all permits, consents, approvals or authorizations of all governmental entities and regulatory bodies required as a condition to the School Board's entering into this Lease. The School Board further covenants and warrants that prior to the use of the School for School purposes, the School Board will obtain, and will thereafter maintain through the duration of this Lease, all further permits, consents, approval or authorizations of all governmental entities and regulatory bodies necessary to operate the School.

## **ARTICLE IX**

### **TITLE TO LEASED PROPERTY**

Except for personal property purchased by the School Board at its own expense, title to the Leased Property and any and all additions and modifications to or replacements of any portion of the Leased Property will be held in the County's name, subject only to Permitted Encumbrances, until foreclosed upon or conveyed as provided in the Financing Agreement or the Financing Agreement, notwithstanding (a) the occurrence of one or more events of default as defined in Financing Agreement Section 8.01; (b) the occurrence of any event of damage, destruction, condemnation or construction or title defect; or (c) the County's violation of any provision of this Lease.

The School Board has no right, title or interest in the Leased Property or any additions and modifications to or replacements of any portion of the Leased Property, except as expressly set forth in this Lease, or the reverter deed by which the School Board conveyed title to the Leased Property to the County.

## ARTICLE X

### SUBLEASING, ASSIGNMENT, AND INDEMNIFICATION

**10.1. School Board's Subleasing and Assignment.** (a) Except as provided in subsection (b), the School Board may not sublease the Leased Property, in whole or in part, enter into other agreements for the use of any part of the Leased Property or assign any of its rights or obligations under this Lease, without the County's prior written consent.

(b) The School Board may enter into agreements for the use of portions of the Leased Property with state and local (but not federal) government entities, and may allow for the occasional use of portions of the Leased Property by non-government entities, in each case without the necessity of obtaining the County's prior consent. The School Board must certify to the County, by September 15 of each year, that the total use of the Leased Property by entities other than the School Board did not exceed 8% of the total use of the Leased Property. The School Board shall provide the County with such additional information as the County may request to document compliance with the County's covenants under the Financing Agreement related to the use of the property and the continuing general exemption from federal income tax of the County's payments of interest under the Financing Agreement.

(c) The School Board's obligations under Section 8.3 take priority over the School Board's rights under this Section 10.1. The School Board's allowing use of the Leased Property pursuant to this Section 10.1 will not constitute a violation of the School Board's obligations under Section 6.1 or otherwise to use the Leased Property for public education purposes.

**10.2. Indemnification.** To the extent permitted by law, the School Board will indemnify and save the County harmless against and from all claims, by or on behalf of any person, firm, corporation or other legal entity, arising from the operation or management of the Leased Property during the Lease Term, including any arising from: (a) any condition of the Leased Property; or (b) any negligent act of the School Board or of any of its agents, contractors or employees or any violation of law by the School Board or breach of any covenant or warranty by the School Board under this Lease. The School Board will, upon notice from the County, defend or pay the cost of defending the County in any action or proceeding brought in connection with any claims arising out of circumstances described in (a) or (b) above.

## ARTICLE XI

### EVENTS OF DEFAULT

**11.1. Events of Default.** The following will be "Events of Default" under this Lease and the term "Default" shall mean, whenever it is used in this Lease, any one or more of the following events:

(a) The School Board's failure to observe and perform any covenant, condition or agreement on its part to be observed or performed for a period of 30 days after written notice specifying such failure and requesting that it be remedied has been given to the School Board by the County or the Bank, unless the County and the Bank agree in writing to an extension of such time prior to its expiration.

(b) The dissolution or liquidation of the School Board or the voluntary initiation by the School Board of any proceeding under any federal or State law relating to bankruptcy, insolvency, arrangement, reorganization, readjustment of debt or any other form of debtor relief, or the initiation against the School Board of any such proceeding which remains undismissed for sixty days, or the entry by the School Board into an agreement of composition with creditors or the School Board's failure generally to pay its debts as they become due.

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**11.2. Remedies on Default.** Whenever any Event of Default is continuing, the County may take one or any combination of the following remedial steps:

(a) Terminate this Lease, evict the School Board from the Leased Property or any portion thereof and re-lease the Leased Property or any portion thereof;

(b) Have reasonable access to and inspect, examine and make copies of the School Board's books and records and accounts during the School Board's regular business hours, if reasonably necessary in the County's opinion; or

(c) Take whatever action at law or in equity may appear necessary or desirable to collect the amounts then due and thereafter to become due, or to enforce performance and observance of any obligation, agreement or covenant of the School Board under this Lease.

**11.3. No Remedy Exclusive.** No remedy herein conferred upon or reserved to the County is intended to be exclusive, and every such remedy will be cumulative and will be in addition to every other remedy given under this Lease and every remedy now or hereafter existing at law or in equity. No delay or omission to exercise any right or power accruing upon any default will impair any such right or power, and any such right and power may be exercised from time to time and as often as may be deemed expedient. In

order to entitle the County to exercise any remedy reserved in this Article XI, it will not be necessary to give any notice, other than such notice as may be required in this Article XI.

**11.4. Waivers.** If either party should breach any agreement contained in this Lease and thereafter the other party waives the breach, such waiver will be limited to the particular breach so waived and will not be deemed to waive any other breach under this Lease. The County, however, shall have no right to waive any Event of Default without the Bank's consent. A waiver of an event of default under the Financing Agreement constitutes a waiver of any corresponding Event of Default under this Lease; provided that no such waiver will extend to or affect any subsequent or other Event of Default under this Lease or otherwise impair any right consequent thereon.

**11.5. Agreement To Pay Attorneys' Fees and Expenses.** If the School Board defaults under any Lease provision and the County or the Bank employs attorneys or incurs other expenses for the collection of any payments due under this Lease, or the enforcement of performance or observance of any obligation or agreement on the part of the defaulting party contained in this Lease, the School Board agrees that, to the extent permitted by law, it will pay on demand therefor to the County or the Bank, as the case may be, the fees of such attorneys and such other expenses so incurred by the non-defaulting party, to the extent that such attorneys' fees and expenses may be determined to be reasonable by a court of competent jurisdiction.

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**11.6. Waiver of Appraisement, Valuation, Stay, Extension, and Redemption Laws.** The School Board and the County agree, to the extent permitted by law, that upon a termination of the Lease Term by reason of an Event of Default, neither the School Board nor the County nor any one claiming through or under either of them will set up, claim or seek to take advantage of any appraisement, valuation, stay, extension or redemption laws now or hereafter in force in order to prevent or hinder the enforcement of the Financing Agreement or of any remedy provided under this Lease or under the Financing Agreement; and the School Board and the County, for themselves and all who may at any time claim through or under either of them, each hereby waives, to the full extent that it may lawfully do so, the benefit of such laws.

## **ARTICLE XII**

### **MISCELLANEOUS**

**12.1. Notices.** All notices, certificates or other communications under this Lease will be sufficiently given and will be deemed given when delivered or mailed by registered mail, postage prepaid, addressed as follows:

- (a) If intended for the County, addressed to it at the following address:  
Henderson County, Attention: Finance Officer, Re: Notice under 2009 School

Financing Lease, Historic Courthouse Annex, 113 North Main St., Hendersonville, North Carolina 28792.

(b) If intended for the School Board, to Superintendent, Henderson County Schools, Attention: Notice under 2009 School Financing Lease,

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A copy of any notice under this Lease must also be sent simultaneously to the Bank at the following address: Branch Banking and Trust Company, Attention: Account Administration/Municipal, Re: Notice under 2009 Henderson County School Financing Lease, 5130 Parkway Plaza Boulevard, Building 9, Charlotte, North Carolina 28217.

**12.2. Binding Effect.** This Lease will inure to the benefit of and shall be binding upon the School Board and the County, and their respective successors and assigns, subject, however, to the limitations contained in Article X.

**12.3. Amendments, Changes and Modifications.** This Lease may not be amended without the Bank's written consent.

**12.4. Net Lease.** This Lease will be deemed and construed to be a "net lease," and the School Board will pay absolutely net during the Lease Term all other payments required under this Lease, free of any deductions, and without abatement or set-off.

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**12.5. Payments Due on Holidays.** If the date for making any payment or the last day for performance of any act or the exercising of any right, as provided in this Lease, shall not be a Business Day, such payment must be made or act performed or right exercised on the next preceding day that is a Business Day.

**12.6. Severability.** If any provision of this Lease, other than the requirement of the County to provide quiet enjoyment of the Leased Property, is held invalid or unenforceable by any court of competent jurisdiction, such holding will not invalidate or render unenforceable any other provision hereof.

**12.7. Execution in Counterparts.** This Lease may be simultaneously executed in several counterparts, each of which will be an original and all of which will constitute but one and the same instrument.

**12.8. Applicable Law.** The parties intend that this Lease will be governed by and construed in accordance with State law.

**12.9. School Board and County Representatives.** Whenever under the provisions hereof the approval of the School Board or the County is required to take some action at the request of the other, unless otherwise provided, such approval or such request must be given (a) for the County by the County Representative, and (b) for the School Board by its Superintendent, its Chairman or anyone designated in writing by such

Chairman or Superintendent to the County Manager to perform any act (or any specified act) under this Lease, and in any such case the School Board and the County will be authorized to act on any such approval or request.

**12.10. Memorandum of Lease.** At the request of either party, the County and the School Board will at any time execute a memorandum of this Lease legally sufficient to comply with the relevant provisions of the North Carolina General Statutes.

**12.11. Third-Party Beneficiary.** The Bank and its successors or assigns as beneficiary under the Financing Agreement are intended by the County and the School Board to be third-party beneficiaries of this Lease.

*[The remainder of this page has been left blank intentionally.]*

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

[SEAL]  
ATTEST:

HENDERSON COUNTY,  
NORTH CAROLINA

\_\_\_\_\_  
[name]  
Clerk, Board of Commissioners

By: \_\_\_\_\_  
[name]  
Chairman, Board of Commissioners

[SEAL]  
ATTEST:

THE HENDERSON COUNTY  
BOARD OF EDUCATION

\_\_\_\_\_  
[name]  
Secretary

By: \_\_\_\_\_  
[name]  
Chairman

This instrument has been preaudited in the manner required by The Local Government Budget and Fiscal Control Act.

\_\_\_\_\_  
J. Carey McLelland  
Finance Officer  
Henderson County, North Carolina

This instrument has been preaudited in the manner required by the School Budget and Fiscal Control Act

\_\_\_\_\_  
[name]  
Finance Officer  
The Henderson County Board of Education

[Lease dated as of December \_\_\_\_, 2009]



**STATE OF NORTH CAROLINA; HENDERSON COUNTY**

I, \_\_\_\_\_, a Notary Public of said State and County, do hereby certify that [name] and [name] personally came before me this day and acknowledged that they are the Clerk and Chairman, respectively, of the Board of Commissioners of Henderson County, North Carolina, and that by authority duly given and as the act of such County, the foregoing instrument was signed in the County's name by such Chairman, sealed with its corporate seal and attested by such Clerk.

Witness my hand and official seal this \_\_\_\_\_ day of December, 2009.

\_\_\_\_\_  
Notary Public

My commission expires: \_\_\_\_\_

**STATE OF NORTH CAROLINA; HENDERSON COUNTY**

I, \_\_\_\_\_, a Notary Public of said State and County, do hereby certify that [name], with whom I am personally acquainted, who, being by me duly sworn, says that he is the Secretary of The Henderson County Board of Education and that [name] is the Chairman of such Board of Education, the Board described in and which executed the foregoing instrument; that he knows the common seal of said Board; that the seal affixed to the foregoing instrument is said common seal, and the name of the Board was subscribed thereto by the said Chairman, and that said Chairman and Secretary subscribed their names thereto, and said common seal was affixed, all by order of the Board and that the said instrument is the act and deed of said Board.

Witness my hand and official seal this \_\_\_\_\_ day of December, 2009.

\_\_\_\_\_  
Notary Public

My commission expires: \_\_\_\_\_

## **EXHIBIT A**

### **SITE DESCRIPTION**

[Hendersonville Elementary School property, to come]

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