

REQUEST FOR BOARD ACTION

HENDERSON COUNTY

BOARD OF COMMISSIONERS

MEETING DATE: 21 September 2016

SUBJECT: Memorandum of Understanding with Blue Ridge Community College
(Health Sciences Center)

PRESENTER: Charles Russell Burrell

ATTACHMENT(S): Proposed Memorandum of Understanding

SUMMARY OF REQUEST:

Blue Ridge Community College and County staff have had from prior to construction an understanding regarding the operation of the Blue Ridge Community College areas of the Health Sciences Center. The purpose of this item is to bring to the Board a memorandum setting out that understanding, for the Board's approval.

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

BOARD ACTION REQUESTED:

Approval of the Memorandum of Understanding.

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

I move that the Board approve the proposed Memorandum of Understanding with Blue Ridge Community College regarding operation of the BRCC areas of the Health Sciences Center.

**STATE OF NORTH CAROLINA
COUNTY OF HENDERSON**

MEMORANDUM OF UNDERSTANDING

NOW COME the Parties, **THE COUNTY OF HENDERSON** (the “County”) and **THE TRUSTEES OF BLUE RIDGE COMMUNITY COLLEGE** (the “College”) and, pursuant to N.C.G.S. § 160A-461, enter into this **MEMORANDUM OF UNDERSTANDING** (the “Agreement”) on this 1st day of September, 2016.

WHEREAS, the County and the College, together with Wingate University, Henderson County Hospital Corporation, and the City of Henderson, were parties to an agreement” (the “Five-Party Agreement”) dated April 4, 2014; and

WHEREAS, pursuant to its obligations under the Five-Party Agreement, the County has almost completed construction of the Henderson County Health Sciences Education Center (the “Building”), a multi-tenant, three story educational and medical facility located at the northeast corner of the intersection of Sixth Avenue and North Oak Street in Hendersonville; and

WHEREAS, pursuant to its obligations under the Five-Party Agreement, the College is leasing space located in the Building, to be used by the College for all of its allied health education programs (as that term is defined in the Five-Party Agreement); and

WHEREAS, based on the terms contained herein, the County is making available to the College space located in the Building (the “Premises” and more specifically described in Exhibit A attached hereto and incorporated herein) for the College to conduct classes and other educational activities; and

WHEREAS, the Parties desire to enter into this Agreement to formally outline their respective right and responsibilities with respect to the College’s use of the Building and Premises.

NOW, THEREFORE, in the consideration of the terms and conditions contained herein, the Parties mutually agree to the following:

1. DEFINITIONS. Aside from the terms already defined above, the following terms, as used herein, are defined as follows:

A. *Business Day* shall mean Mondays through Fridays exclusive of the normal business holidays of New Year's Day, Martin Luther King Day, Good Friday, Memorial Day, Independence Day, Thanksgiving Day, Christmas Eve and Christmas Day (“Holidays”). The County shall have the right to designate additional Holidays upon the College’s written request.

B. *Common Areas* shall mean those areas located within the Building or on the Property used for corridors, elevator foyers, mail rooms, common restrooms, mechanical rooms, elevator mechanical rooms, property management office, janitorial closets, electrical and telephone closets, vending areas, and lobby areas (whether at ground level or otherwise), entrances, exits, sidewalks, skywalks, tunnels, driveways, parking areas and parking garages and landscaped areas

and other similar facilities provided for the common use or benefit of tenants generally and/or the public.

C. *Normal Operating Hours* for the Building shall mean 7:00 a.m. to 9:30 p.m. Mondays through Saturday exclusive of Holidays. Nothing herein shall be construed to require the College to operate during any particular time period including Normal Operating Hours.

D. *Property* shall mean the Building and the parcel(s) of land on which it is located, other improvements located on such land, adjacent parcels of land that the County operates jointly with the Building and other buildings and improvements located on such adjacent parcels of land.

2. PERMITTED USE. The County hereby grants to the College the use of the Premises in the Building for the College to conduct its educational classes and other educational programs (the "Permitted Use"). The College is prohibited from using the Premises in any other matter unless it receives prior, written consent from the County.

The College represents that, except as is stated in this paragraph, during the period covered by this Memorandum, the Premises will not be used other than for activities substantially related to College's exempt purposes under Section 115 of the Internal Revenue Code. The College does not know of any reason why the Premises will not be so used and operated in the absence of (1) supervening circumstances not now anticipated by the College, (2) adverse circumstances beyond the control of the College, or (3) obsolescence of such insubstantial parts or portions of the Premises as may occur as a result of normal use of the Premises. Notwithstanding the foregoing, the College will not change the use or operation of any portion of the Premises, or permit a third party to use or operate the Premises, during the period covered by this Memorandum without prior written approval from the County. The College acknowledges that it understands that the County has financed or may in the future refinance all or a portion of the Premises using federally tax-exempt debt obligations and that the use and operation of the Premises in a manner other than as described in this Section could jeopardize the tax-exempt status of such obligations, potentially resulting in significant financial and other consequences to the County.

3. ACCESS. The County, or its authorized agent, shall, at any and all reasonable times and upon at least twenty-four (24) hours advance notice to College (except in case of emergency posing imminent threat to life or property), have the right to enter the Premises with a College escort to inspect the same and to perform any repairs required by the County hereunder. Any access by the County or its authorized agents shall be subject to the College's reasonable restrictions relative to security or to the preservation of confidential or proprietary items. The County shall take reasonable measures to avoid entry to the Premises during those time period when students are present at the Premises.

Access control to the Building during other than Normal Operating Hours shall be provided in such form as the County deems appropriate provided, however, that the College shall have access to the Premises 24 hours per day, 7 days per week. The College shall cooperate fully in the County's efforts to maintain access control to the Building and shall follow all regulations promulgated by the County with respect thereto.

4. TERM. The Term of this Agreement shall be for a period of two hundred forty (240) months commencing on the later to occur of: (a) 14 August 2016; or (b) the first day of College's semester following the date upon which the Building has been substantially completed provided, however, that in no event shall the Term begin before the College has had access to the Premises for a period of thirty (30) days for purposes of moving the College's furniture, fixtures and equipment into the Premises.

5. INDEPENDENT CONTRACTOR. The College is an independent contractor and not an employee, partner or agent of the County. Nothing contained herein shall be deemed to create a relationship of employment, association, partnership or joint venture between the College and County. The College shall have no authority hereunder to take any action, create any obligation, make any commitment, incur any indebtedness, or enter into any contract on behalf of the County without the County's express prior written consent.

6. RENT. For purposes of this Agreement, there shall be no rent charged by the County to the College as the County is provided the use of the Premises to the College in accordance with N.C.G.S. § 115D-32.

7. COUNTY RESPONSIBILITIES. The County agrees to furnish the College with the following services, in a manner consistent with such services provided to other first-class educational and/or medical office buildings in the Hendersonville market:

A. Hot and cold water and sewer (and in any Common Areas on the floors on which the Premises is located) 24 hours per day, 7 days per week.

B. Central heat, ventilation and air conditioning in the Premises and Common Areas, in season during Normal Operating Hours, at such temperatures and in such amounts as are considered by the County, in its reasonable judgment, to be standard for buildings of similar class, size, age and location, or as required by governmental authority. In the event that the College requires central heat, ventilation or air conditioning service at times other than Normal Operating Hours, such additional service shall be furnished only upon the written request of the College delivered to the County prior to 3:00 p.m. at least one Business Day in advance of the date for which such usage is requested.

C. Electricity to the Premises and Common Areas 24 hours per day 7 days a week.

D. Normal passenger elevator service (i.e., all passenger elevators are operating) in common with the County and other persons during Normal Operating Hours and normal freight elevator service in common with the County and other persons during Normal Operating Hours. Such normal elevator service, passenger or freight, if furnished at other times, shall be optional with the County and shall never be deemed a continuing obligation. The County, however, shall provide limited passenger elevator service daily (i.e. at least one passenger elevator is operating) at all times when normal passenger elevator service is not provided.

E. The County shall, at its expense, keep and maintain in good repair and working order and make all repairs to and perform necessary maintenance upon: (a) all structural elements of the Building; (b) all mechanical (including HVAC and elevator), electrical, plumbing

and life safety systems (both components of the same that serve solely the Premises and components of the same that serve both the Premises and other portion(s) of the Building in common); (c) the Building facilities common to all tenants including but not limited to, the ceilings, walls and floors in the Common Areas. In addition, the County shall be responsible for all repairs, replacements and alterations in and to the Premises, the shared classrooms and the Common Areas, the need for which arises out of the act, omission, misuse or negligence of the County, its agents, contractors, employees or invitees.

F. Within three (3) months following the expiration of the 5th, 10th and 15th Lease Years, the County shall, at its sole cost and expense, re-paint all walls, trim and doors within the Premises replace all carpeting within the Premises and replace all worn and/or obsolete fixtures within the Premises.

G. The County shall install the College's exterior building signage and monument signage. If College's branding standard changes during the Agreement, the College shall have the right to replace such signage with signage that is consistent with such new branding standard, at the College's cost. In addition, the County will list the College's name in the Building's directory, if any, located in the lobby of the Building.

8. COLLEGE RESPONSIBILITIES. The College shall be responsible for the following:

A. Except to the extent such obligations are imposed upon the County, the College shall, at its sole cost and expense, maintain the Building in good order, condition and repair throughout the Agreement, ordinary wear and tear excepted. The College agrees to keep the areas visible from outside the Building in a neat, clean and attractive condition at all times. The College shall be responsible for all repairs, replacements and alterations in and to the Premises, Building and Property and the facilities and systems thereof, the need for which arises out of: (1) the College's alterations, additions or improvements to the Premises; (2) the installation, removal, use or operation of the College's property; (3) the moving of the College's property into or out of the Building; or (4) the act, omission, misuse or negligence of the College, its agents, contractors, employees or invitees. All such repairs, replacements or alterations shall be performed in accordance with the rules, policies and procedures reasonably enacted by the County from time to time for the performance of work in the Building.

B. The College shall solely use the Premises for the Permitted Use and for no other purpose. The College agrees not to use or permit the use of the Premises for any purpose which is illegal, dangerous to life, limb or property or which, in the County's reasonable judgment, creates a nuisance or which would increase the cost of insurance coverage with respect to the Building. The College will conduct its business and control its agents, servants, employees, customers, licensees, and invitees in such a manner as not to interfere with, annoy or disturb other tenants or the County in the management of the Building and the Property.

C. Comply with all reasonable rules and regulations of the Building adopted and altered by the County from time-to-time and will cause all of its agents, employees, invitees and visitors to do so. All such changes to rules and regulations shall be sent by the County to the College in writing.

D. The College shall make arrangements directly with a telephone or other internet protocol company serving the Building for all telephone and internet service required by the College in the Premises and shall pay for all such service used or consumed in the Premises. Further, the College shall be responsible for keeping the interior non-structural portions of the Premises, and any other portions of the Premises required to be maintained by the College under this Agreement, in good condition and repair.

E. The College shall provide the following:

i. Regular day-to-day maintenance, repair and cleaning of all the Building, with the exception of specific areas of the Building operated by Henderson County Hospital Corporation, which shall be responsible for the maintenance, repair and cleaning of such areas. A listing of such specific areas shall be provided to the College by the County and shall be kept current at all times by the County.

ii. Regular day-to-day janitorial and cleaning service (including without limitation trash removal, recycling, cleaning white boards, vacuum offices and cleaning offices) in and about the Building on Business Days and Saturdays.

iii. Electric lamp, bulb and ballast replacement in the Premises, Common Areas and service areas (stairs, elevator shafts, flues, vents, stacks, pipe shafts and other vertical penetrations (but not including any such area for the exclusive use of a particular tenant)).

iv. Regular, periodic pest control for the Building.

F. The College may, at the College's expense and with non-State capital appropriations, have the right, upon being granted the County's express prior written consent, and which consent may be denied for any or no reason, to remodel, redecorate, and make additions, improvements and replacements of and to all or any part of the Premises from time to time as the College may deem desirable, provided that the same are made in a workmanlike manner and utilizing good quality materials. Any such additions, improvements and replacements of and to all or any part of the Premises shall become and be considered a part of the Premises and shall become the property of County, its successors and/or assigns.

G. The College may, at the College's expense, have the right to place and install personal property, equipment and other temporary installations associated with its Permitted Uses on the Premises. All personal property, equipment, and temporary installations, whether acquired by the College at the commencement of this Agreement or placed or installed in the Premises by the College thereafter, shall remain the College's property free and clear of any claim by the County. The College shall have the right to remove the same at any time during the Agreement, and no later than ten (10) Business Days after the expiration of the Agreement, provided that all damage to the Premises caused by such removal shall be repaired by the College at the College's expense. If any personal property remains in the Premises ten (10) Business Days after the expiration of the Agreement, the County may assess the costs of removing such property to the College.

H. The College shall not use, store, generate or dispose of any Hazardous Substances (as defined below), or knowingly allow its employees, agents or invitees to do so, in, on, above or below any part of the Premises, Building or Property, except only reasonable quantities of

normal and customary office supplies, all used in compliance with applicable laws, which the College shall remove at the end of the Agreement, or earlier if they pose a danger to persons or property. The College shall, only to the extent permitted by applicable law and only to the extent of applicable insurance, indemnify and hold the County harmless from all claims, damages, fines, judgments, penalties, costs, liabilities or losses (including, without limitation, a decrease in the value of the Premises, Building, or Property, due to loss or restriction of rentable or usable space, any damages due to adverse impact on marketing of the space, and any and all sums paid for attorney's fees, consultant and expert fees) arising during or after the Agreement as a result of a breach of this section by the College or as a result of the use, storage, generation or disposal of Hazardous Substances by the College, or the College's employees, agents or invitees in, on, above, or below any part of the Premises, Building or Property, whether permitted under this section or not. The County shall, only to the extent permitted by applicable law and only to the extent of applicable insurance, indemnify and hold the College harmless from all claims, damages, fines, judgments, penalties, costs, liabilities or losses (including, without limitation, any and all sums paid for attorney's fees, consultant and expert fees) arising during or after the Agreement as a result of the use, storage, generation or disposal of Hazardous Substances by the County, or County's employees, agents, contractors, subcontractors or invitees in, on, above, or below any part of the Premises, Building or Property. "Hazardous Substance" means any substance which is toxic, ignitable, reactive, or corrosive and which is regulated by any governmental body having jurisdiction over the same, and includes any and all materials or substances which are defined as "hazardous waste", "extremely hazardous waste" or a "hazardous substance" pursuant to state, federal or local law. "Hazardous Substance" includes, but is not restricted to, asbestos, polychlorobiphenyls ("PCB's") and petroleum.

9. INSURANCE AND INDEMNITY.

A. County's Insurance. During all times during this Agreement, the County shall keep the Building and the Common Areas insured against damage and destruction by fire and such other perils, in the amount of the full replacement value of the same, under a special "all-risk" extended coverage insurance policy. The County shall also maintain general liability insurance with respect to the Building and the Common Areas, covering bodily injury, including death, and property damage in the amount of at least Two Million Dollars (\$2,000,000.00) per occurrence, combined single limit, and annual aggregate limit. The County is not obligated to insure the College's fixtures or other property.

B. College's Insurance. The College shall keep in force, during all times during this Agreement, workers' compensation insurance as required by law and commercial general liability insurance, with respect to the Premises, covering bodily injury, including death and property damage, with such limits as may be reasonably requested by the County, but with minimum limits in the amount of at least Two Million Dollars (\$2,000,000.00) per occurrence, combined single limit, and annual aggregate limit, with a contractual liability endorsement, which liability insurance shall name the County as additional insured and provide that prior to being canceled for any reason, College's insurance company shall endeavor to provide the County with fifteen (15) days' notice of such cancellation. The County agrees not to request an increase in the above minimum limits of liability insurance during the Agreement. The College will also maintain, at its sole expense for the protection of the Parties, primary automobile liability insurance with limits of not less than \$1,000,000 per occurrence covering owned, hired and non-owned vehicles used by the College,

which shall also provide that prior to being canceled for any reason, College's insurance company shall endeavor to provide the County with fifteen (15) days' notice of such cancellation. The College shall deposit with the County satisfactory evidence of the above coverages prior to occupancy of the Premises, and thereafter prior to expiration of any such coverages.

C. Insurance Criteria. Insurance policies required by this Agreement shall be issued by; a) the North Carolina Association of County Commissioners Insurance Pool; (b) insurance companies licensed to do business in the state of North Carolina with general policyholder's ratings of at least A- and the financial rating of at least XI in the most current Best's Insurance Reports available on the Commencement Date or c) self-insuring as approved by the North Carolina Industrial Commission.

D. Indemnification:

i. College's Indemnification. The College agrees, only the extent permitted by law and only to the extent of applicable insurance, to indemnify, and hold harmless the Landlord and the agents and employees of the County from any claims or demands by or on behalf of any person, firm, corporation or other entity or party and any liability, loss, damage or expense, including reasonable attorneys' fees, suffered or incurred by the County, or the County's agents and employees, arising by reason of injury to any person, including death, or damage to property, occurring in, on, or about the Premises, Building or Property, occasioned in whole or in part by any negligent act or omission or willful misconduct on the part of the College or any employee (whether or not acting within the scope of employment), agent, invitee, visitor, contractor, subcontractor, assignee or tenant of the College, or by reason of nonperformance of any covenant in this Agreement on the part of the College, except, however, to the extent that such claims result from the negligent acts or omissions or willful misconduct of the County, or the County's employees, agents, invitees, contractors or subcontractors, or to the extent such claims result from the nonperformance of any covenant in this Agreement on the part of the County. The College agrees to pay for all damage to any part of the Building or Property, caused by the College's misuse or neglect of said Premises, its apparatus or appurtenances. The County shall not be liable to the College for any damage by or from any act or omission of any other tenant or occupant of the Building or by any owner or occupant of adjoining or contiguous property.

ii. The County's Indemnification. The County agrees, only to the extent permitted by law and only to the extent of applicable insurance, to indemnify, and hold harmless the College, and the agents and employees of College, from any claims or demands by or on behalf of any person, firm, corporation or other entity or party and any liability, loss, damage or expense, including reasonable attorneys' fees, suffered or incurred by the College, or the College's agents and employees, arising by reason of injury to any person, including death, or damage to property, occurring in, on, or about the Premises, Building or Property, occasioned in whole or in part by any negligent act or omission or willful misconduct on the part of the County or any employee (whether or not acting within the scope of employment), agent, invitee, contractor, or subcontractor of the County, or by reason of nonperformance of any covenant in this Agreement on the part of the County, except, however, to the extent that such claims result from the negligent acts or omissions or willful misconduct of the College, or College's employees, agents, invitees, visitors, contractors, subcontractors, assignees or tenants, or to the extent such claims result from the nonperformance of any covenant in this Agreement on the part of the College.

10. DEFAULT AND REMEDIES.

A. The College's Default. The College shall be in default under this Agreement if the College fails to perform any of its obligation within a period of sixty (60) days or the additional time, if any, that is reasonably necessary to promptly and diligently cure the failure, after the College receives written notice from the County setting forth in reasonable detail the nature and extent of the failure and identifying the applicable provision herein

B. The County's Remedies. Upon the College's default beyond the notice and cure periods set forth herein, the County shall have all remedies provided in this Agreement, as well as in law or equity, including, without limitation, the right to end this Agreement or the College's right to possession hereunder, in which case the College shall immediately vacate the Premises, with or without process of law, and if necessary, remove the College, with or without having ended the Agreement, and alter locks and other security devices at the Premises, and the College waives any claim for damages by reason of the County's reentry, repossession, or alteration of locks or other security devices and for damages by reason of any legal process.

i. The County's exercise of any of its remedies or its receipt of the College's keys shall not be considered an acceptance of surrender or a surrender of the Premises by the College unless such surrender is agreed to in writing by the County.

ii. Upon the College's default beyond the notice and cure periods set forth herein, the College shall also be liable for that part of the following sums paid by the County due to Tenant's default: (a) the cost of removing and storing the College's property; (b) the cost required to complete any repairs required of the College hereunder; and (c) other necessary and reasonable expenses incurred by the County in enforcing its remedies.

iii. Upon the College's default beyond the notice and cure periods set forth herein, the County may sue and take any other action provided by law to collect the amounts due hereunder at any time, and from time to time, without waiving its rights to sue for and collect further amounts due from the College hereunder.

C. The County's Default. In the event the County shall default in the payment, when due, of any monetary obligations to be paid by the County hereunder (including any interest due hereunder) and fails to cure said default within ten (10) days after receipt of written notice thereof from then College; or if the County shall default in performing any of the covenants, terms or provisions of this Agreement (other than the payment, when due, of any of 's monetary obligations hereunder) and fails to cure such default within thirty (30) days after written notice thereof from the College; provided, however, that the College shall have no remedies for such default if the failure is not reasonably susceptible to cure within thirty (30) days so long as the County promptly commences the cure within such thirty (30) day period and diligently and continuously pursues it to completion as soon as reasonably possible; then, and in any of said events, the College, at its option may pursue any one or more of the following remedies, and any and all other rights accruing to the College by law or otherwise (including College's self-help and set-off rights set forth in this Agreement), without further notice of demand whatsoever:

i. The College may perform the County's obligations hereunder.

ii. If the County's default renders all or part of the Premises unsuitable for the College's use, the College may terminate this Agreement and the College shall have no further obligation or liability under this Agreement.

iii. The College may recover from the County any actual, reasonable damages resulting from the County's default.

D. In addition to the remedies set forth in this Agreement, the Parties shall have the right to pursue any and all other remedies available at law or in equity, provided that in no event shall either party be liable for consequential, punitive or exemplary damages in connection with this Agreement. All rights and remedies of the Parties under this Agreement or existing at law or in equity are cumulative, and the exercise of one or more rights or remedies shall not be taken to exclude or waive the right to the exercise of any other. The Parties shall use commercially reasonable efforts to mitigate any damages incurred by such party in connection with the other party's default under this Agreement.

E. Notwithstanding the notice and cure periods provided for herein, in the event that a party's default under this Agreement poses a threat to life, health, or safety, the non-defaulting party shall have the right, without giving advance notice to the defaulting party or the opportunity to cure (although notice shall be provided to the defaulting party as promptly as is practicable under the circumstances), to perform the defaulting party's obligations under this Agreement, and obtain from the defaulting party reimbursement upon demand for any reasonable costs and expenses incurred.

11. Miscellaneous.

A. Choice of Law and Venue. This Agreement shall be governed by the laws of the State of North Carolina and proper venue for any legal claim hereunder shall be Henderson County, North Carolina.

B. Amendment. Any amendment or modification of this Agreement will only be binding if evidenced in writing signed by each party or an authorized representative of each party.

C. Assignment. The College will not assign this Agreement without the County's prior written consent, not to be unreasonably withheld, conditioned or delayed. Any assignment is subject to the provisions regarding the Use of the Premises contained herein and subject to the rights of the parties under the "Five-Party Agreement" executed by the County, the College, HCHC, Wingate and the City of Hendersonville on April 4, 2014.

D. This Agreement may be executed in counterparts. Facsimile signatures are binding and are considered to be original signatures.

E. This Agreement and the "Five-Party Agreement" constitute the entire agreement between the County and the College with respect to the subject matter hereof. Any prior understanding or representation of any kind preceding the date of this Agreement will not be binding on either party to this Agreement except to the extent incorporated in this Agreement or in the "Five-Party Agreement."

F. Any written notices between the Parties shall be provided as follows:

College: Blue Ridge Community College
180 West Campus Drive
Flat Rock, NC 28731
Attention: Dr. Molly Parkhill

with copy to: Campbell Shatley, PLLC
674 Merrimon Ave., Suite 210
Asheville, NC 28804
Attention: Chad Donnahoo

County: County of Henderson
1 Historic Courthouse Square, Suite 1
Hendersonville, North Carolina 28792
Attn: Steve Wyatt

with copy to: Office of the County Attorney
1 Historic Courthouse Square, Suite 5
Hendersonville, North Carolina 28792
Attn: Charles Russell Burrell

IN WITNESS WHEREOF, the Parties to this Agreement have duly affixed their signatures under hand and seal, or by a duly authorized officer under seal, the date stated above.

COUNTY OF HENDERSON

By: _____
THOMAS H. THOMPSON, Chairman

Board of Commissioners

Witness:

Clerk to the Board of Commissioners

THE TRUSTEES OF BLUE RIDGE COMMUNITY COLLEGE

By:

JOHN C. MCCORMICK, JR. Chairman
Board of Trustees

Witness:

Secretary

EXHIBIT A
PREMISES