

MINUTES

STATE OF NORTH CAROLINA
COUNTY OF HENDERSON

BOARD OF COMMISSIONERS
WEDNESDAY, SEPTEMBER 21, 2016

The Henderson County Board of Commissioners met for a regularly scheduled meeting at 9:00 a.m. in the Commissioners' Meeting Room of the Historic Courthouse on Main Street, Hendersonville.

Those present were: Chairman Tommy Thompson, Vice-Chairman Charlie Messer, Commissioner Grady Hawkins, Commissioner Mike Edney, Commissioner William Lapsley, County Manager Steve Wyatt, Assistant County Manager Amy Brantley, Attorney Russ Burrell and Clerk to the Board Teresa Wilson.

Also present were: Management Assistant Megan Powell, Director of Business and County Development John Mitchell, Engineer Marcus Jones, Finance Director J. Carey McLelland, Facility Services Manager Jerry Tucker, Central Services and Construction Manager David Berry, Central Services Project Manager Thad Ninnemann, Captain Jim Player, Environmental Programs Coordinator Rachel Kipar and PIO Kathy Finotti – videotaping, Deputy Carlos Montoya as security.

CALL TO ORDER/WELCOME

Chairman Thompson called the meeting to order, welcomed all in attendance.

INVOCATION

The invocation was provided by Richard Rhodes.

PLEDGE OF ALLEGIANCE

The Pledge of Allegiance to the American Flag was led by Commissioner Messer.

PROCLAMATION – Mickey Marvin Day

County Manager Steve Wyatt stated the Henderson County Board of Commissioners are requested to proclaim October 3, 2016 as Mickey Marvin Day in Henderson County. Mr. Wyatt met Mickey Marvin 10 years ago and found Mr. Marvin to be very impressionable and this brought back memories.

Richard Rhode stated three (3) months ago eight (8) citizens got together to establish five (5) scholarships in honor of Mickey Marvin. By means of a golf tournament, scheduled for October 3rd at 11:20 a.m., they have raised funds for four (4) scholarships. Mickey Marvin will be present at the golf tournament which is being held at the Hendersonville Country Club.

County Manager Steve Wyatt read the proclamation aloud, and ask the news reporters in the audience to keep this out of the papers since it is going to be a surprise for Mr. Marvin.

Commissioner Messer made the motion that the Board adopts the Proclamation designating October 3, 2016 as Mickey Marvin Day in Henderson County. All voted in favor and the motion carried.

The Board shared memories about Mickey Marvin and noted him as well respected member of the community.

Chairman Thompson recommended that as many commissioners as possible attend the golf tournament.

PROCLAMATION – Education Foundation Day

K. Paul Knott, Executive Director, Henderson County Education Foundation, Inc. had requested that the Board of Commissioners proclaim October 13th, 2016 as Education Foundation Day in Henderson County to recognize the significant contributions of the Henderson County Education Foundation on the anniversary of its founding.

Commissioner Lapsley read the Proclamation and aloud.

DATE APPROVED: October 3, 2016

Commissioner Lapsley made the motion that the Board adopts the Proclamation designating October 13th, 2016 as Education Foundation day in Henderson County. All voted in favor and the motion carried.

RESOLUTION – In Support of I-26 Widening Project

Chairman Thompson stated at the September 6, 2016 meeting, the Board heard presentations from representatives of both Land-of-Sky and the North Carolina Department of Transportation with regards to the I-26 Widening Process, also known as TIP Project No. I-4400-I-4700. Following those presentations Board consensus was approval of the project, and an offer to provide additional necessary support.

Commissioner Edney read the Resolution aloud.

Commissioner Edney made the motion to adopt the Resolution in Support of the I-26 Widening Project, TIP Project #I-4400/I-4700. All voted in favor and the motion carried.

PUBLIC HEARING

Public Hearing to Consider Proposed Solid Waste Ordinance revisions

Commissioner Hawkins made the motion to go into public hearing to consider proposed Solid Waste Ordinance revisions. All voted in favor and the motion carried.

A public hearing has been scheduled for 9:00 o'clock a.m. on 21 September 2016 in the above matter. The proposed revisions would require waste collectors and haulers serving property in the unincorporated area of the County to deliver all applicable waste collected to the waste transfer station operated by the County. The Board, in its notice of this hearing, and on its web page, requested input from the public in advance of this public hearing.

At the conclusion of the public hearing, the Board may choose to take action, delay action to a subsequent meeting, or take no action.

Public Input:

1. Josh Speer – Mr. Speer spoke on behalf of Wilson Art. They are against the Flow Control Ordinance. They feel the Ordinance will increase their operating cost and possibly further reduce employees. Their disposal fee will be much higher.
2. William Vine – Mr. Vine is against the Flow Control Ordinance and feels this is an attempt to control a deficit in the Enterprise Fund. It will only make a bad situation worse by bringing in more waste, which in turn will cost more. He asked the Board to stop excessive spending.
3. James Owen – Mr. Owen is with Easy Roll-Off Containers. They are against the Flow Control Ordinance and feels it will only increase revenue. The Enterprise then becomes a monopoly. The wait in line at the scales is already bad and will get worse. This Ordinance removes people's rights.
4. Gray Jernigan – Mr. Jernigan is the Director of Mountain True. They are in favor of the Flow Control Ordinance and feel it would be a great program for the County. He doesn't feel it would be a hardship for the carriers.

Commissioner Hawkins made the motion to go out of public hearing. All voted in favor and the motion carried.

Discussion/Adjustment of Consent Agenda

Commissioner Messer made the motion to approve Consent Agenda with the new RBA for the Contractor Selection –Detention Center Roof as presented. All voted in favor and the motion carried.

CONSENT AGENDA consisted of the following:

Minutes

Draft minutes were presented for board review and approval of the following meeting(s):
September 6, 2016 - Regularly Scheduled Meeting

Tax Collector's Report

Collections Specialist Luke Small had presented the Tax Collector's Report to the Commissioners dated September 8, 2016 for information only. No action was required.

Contractor Selection – Detention Center Roof

On June 6, 2016, the Board approved the funding for the Detention Center Roof Replacement, initiating the project to begin. Staff has worked with Roof Engineering, Inc. (REI) on the engineering aspects and design documents for the project. The Request for Proposals was released on August 25, 2016, and the bids were opened at 10:00 a.m. on September 15, 2016. Two bidders submitted proposals, with Davco Roofing and Sheet Metal submitting the lowest total bid including alternatives 1, 2, 4 and 5. Staff recommends the Detention Center project be awarded to Davco Roofing and Sheet Metal in the amount of \$337,950.

Contractor	Davco Roofing	Benton Roofing
Base Bid	\$309,000	\$335,950
Alternate 1	\$3,500	\$16,550
Alternate 2	\$24,000	\$53,325
Alternate 4	\$650	\$650
Alternate 5	\$800	\$650
TOTAL	\$337,950	\$407,125

Motion:

I move that the Board accepts Davco Roofing and Sheet Metal as the contractor for the Detention Center Roof, and authorize staff to execute the required documents.

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

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.

Motion:

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.

Digital public records retention policy

A proposed digital public records retention policy, which insures that the County's retention of electronic records is in compliance with the regulations promulgated by the Division of State of Archives of the Department of Natural and Cultural Resources of North Carolina was provided. Staff arrived at this proposal after a great deal of colloquy with the Division representative. It is intended to make sure that all County electronic public records are maintained and disposed of in accordance with the schedules for retention set out by the Division.

Motion:

I move that the Board adopt the proposed Digital Public Records Retention policy.

2017 Holiday Schedule

The proposed 2017 Holiday Schedule for Henderson County Local Government agencies was presented for approval.

Motion:

I move that the Board approves the 2017 Holiday Schedule as presented.

HOLIDAY	DATE(S)	WEEKDAY(S)
New Year's Day	January 2, 2017	Monday
ML King, Jr.'s Birthday	January 16, 2017	Monday
Good Friday	April 14, 2017	Friday
Memorial Day	May 29, 2017	Monday
Independence Day	July 4, 2015	Tuesday
Labor Day	September 4, 2017	Monday
Veteran's Day	November 10, 2017	Friday
Thanksgiving	November 23 & 24, 2017	Thursday & Friday
Christmas	December 25 & 26, 2017	Monday & Tuesday

2017 Solid Waste Closing Schedule

The proposed 2017 Solid Waste Closing Schedule is presented for Board approval:

HOLIDAY	DATE(S)	WEEKDAY(S)
New Year's Day	January 2, 2017	Monday
ML King's Birthday	January 16, 2017	Monday
Good Friday	April 14, 2017	Friday
Memorial Day	May 29, 2017	Monday
Independence Day	July 4, 2017	Tuesday
Labor Day	September 4, 2017	Monday
Veteran's Day	November 10, 2017	Friday
Thanksgiving Day	November 23, 2017	Thursday
Christmas	December 23 & 25, 2017	Saturday & Monday

Motion:

I move the Board approves the 2017 Solid Waste Closing Schedule as proposed by staff.

2017 Animal Services Center (Shelter) Closing Schedule

The proposed 2017 Animal Services Center (Shelter) Closing Schedule is presented for Board approval.

HOLIDAY	DATE(s)	WEEKDAY(s)
New Year's Day	January 2, 2017	Monday
ML King Jr's Birthday	January 16, 2017	Monday
Good Friday	April 14 & 15, 2017	Friday & Saturday
Memorial Day	May 29, 2017	Monday
Independence Day	July 4, 2017	Tuesday
Labor Day	September 4, 2017	Monday
Veteran's Day	November 10 & 11, 2017	Friday & Saturday
Thanksgiving	November 23, 24 & 25, 2017	Thursday, Friday & Saturday
Christmas	December 25 & 26, 2017	Monday & Tuesday

Note: The shelter is open six days a week. The above schedule is for shelter hours of operation; Animal Services staff will receive the same number of approved paid Holidays as other County employees.

Motion:

I move the Board approves the 2017 Animal Services Center (Shelter) Closing Schedule as proposed by staff.

2017 Library Schedule

The proposed 2017 Library Schedule is presented for Board approval:

PROPOSED LIBRARY SCHEDULE 2017

Holiday	Date(s)	
New Year	Monday, January 2, 2017	Closed
ML King, Jr.'s Birthday	Monday, January 16, 2017	Closed
Good Friday	Thursday, April 13, 2017	All Branches close @ 5:00 PM
	Friday, April 14, 2017	Closed
Memorial Day	Monday, May 29, 2017	Closed
Independence Day	Tuesday, July 4, 2017	Closed
Labor Day	Monday, September 4, 2017	Closed
Veterans Day	Friday, November 10, 2017	Closed
	Wednesday, November 22, 2017	All Branches close @ 5:00 PM
Thanksgiving	Thursday, November 23, 2017	Closed
	Friday, November 24, 2017	Closed
Christmas	Monday, December 25, 2017	Closed
	Tuesday, December 26, 2017	Closed

Motion:

I move the Board approves the 2017 Library Schedule as proposed by staff.

DISCUSSION/ADJUSTMENT OF DISCUSSION AGENDA

Commissioner Lapsley made the motion to adopt the discussion agenda as presented. All voted in favor and the motion carried.

NOMINATIONS

Notification of Vacancies

1. Equalization and Review, Henderson County Board of – 1 vac.
2. Henderson County Transportation Advisory Committee – 1 vac.
3. Nursing/Adult Care Home Community Advisory Committee – 1 vac.

Nominations

1. Equalization and Review, Henderson County Board of – 1 vac.
There were no nominations at this time and this item was rolled to the next meeting.

2. Juvenile Crime Prevention Council – 3 vac.
There were no nominations at this time and this item was rolled to the next meeting.

3. Library Board of Trustees – 1 vac.
There were no nominations at this time and this item was rolled to the next meeting.

4. Nursing/Adult Care Home Community Advisory Committee – 7 vac.
Chairman Thompson nominated Heidi Sue Davis for position #8. *Chairman Thompson made the motion to accept the reappointment of Heidi Sue Davis to position #8 by acclamation. All voted in favor and the motion carried.*

5. Senior Volunteer Services Advisory Council – 1 vac.
There were no nominations at this time and this item was rolled to the next meeting.

SOLID WASTE ORDINANCE REVISIONS

Attorney Russ Burrell stated that after today’s public hearing, the Board may wish to consider the proposed revisions to the County’s Solid Waste Ordinance. By law, the Board cannot give up certain functions currently housed within its Solid Waste program. These include the costs of the closed landfill, and the costs of the

recycling program. For those parts of the program, there will always be costs involved; the only portion of the program capable of making a profit to cancel out the losses of the other portions is the Transfer Station. As an enterprise fund, the Solid Waste program can only by law break even.

The proposed Flow Control Ordinance requires haulers to deliver to a particular processing center for the unincorporated areas. Staff developed the proposal in response to Board direction from October of 2015, as the least market-disruptive alternative consistent with making the Solid Waste program self-sustaining. In contrast, a more market-disruptive alternative would be the Buncombe County approach, allowing only one hauler a franchise within the county.

If the Board does approve the ordinance revisions, Attorney Russ Burrell requested an effective date of January 2017, to be consistent with the ending date of existing hauler permits, and in order to allow the new system dealing with trucks at the transfer station to complete implementation.

Chairman Thompson stated an opportunity was given to citizens, prior to the public hearing, to contact the Commissioners with opinions on the Solid Waste Ordinance revisions. Letters and emails were received and are attached hereto and incorporated as a part of these minutes.

Commissioner Edney, referring to the letter from the Town of Laurel Park, asked they are being penalized.

Mr. Burrell stated they are being treated the same as the other municipality that contracts for solid waste disposal, Fletcher. If Laurel Park's contracted hauler is picking up just in the incorporated area, they would not be affected. Commissioner Edney wondered if that would lead to multiple subsidiaries of haulers being created, to avoid the ordinance. Mr. Burrell said that was a real possibility, but the enforcement aspect of figuring out which garbage came from which house (inside a municipality or outside) made it impractical to draft the ordinance otherwise.

County Manager Steve Wyatt stated this topic has been on the radar since May 2015, with five to six public sessions that were televised and in the press, providing facts for examination.

Mr. Burrell stated the responsibility for many of the costs for the Solid Waste are mandated by Federal and State. Closed landfills must be monitored forever for water and air contamination. The Recycling Program is mandated by Federal and State as to what can and cannot be put in the landfill. Recycling items can be sold, but as a whole, recycling is not profitable for the County.

Mr. Wyatt noted that even if Henderson County went out of the disposal business, the citizens would still be responsible for the landfill costs. Financing of Solid Waste operations requires an Enterprise using fees, taxes, or the General Fund outside of the Enterprise.

Mr. Wyatt stated that Waste Management feels it will be necessary for a substantial increase to their customer's cost.

Engineer Marcus Jones responded that Waste Management has stated their customers will see a cost increase of 26% with the Flow Control Ordinance adoption. He had challenged Waste Management about the 26% increase and proved it was incorrect. No letter was sent out to Waste Management customers clarifying that the cost was misleading. Other haulers do not foresee a cost increase.

Commissioner Messer continues to believe that the tonnage rate needs to be decreased comparable to the surrounding counties.

Commissioner Hawkins does not feel an ordinance revision is necessary at this time. He is against the Flow Control Ordinance.

Commissioner Hawkins made the motion that the Board not adopt the proposed revisions to the County's Solid Waste Ordinance.

Commissioner Lapsley has not changed his position for 18 months with regards to the Flow Control Ordinance.

He does not support it. He agrees with Commissioner Messer that the tipping fee should be more in-line with neighboring counties. Much of the expense is the Recycling Program which does not support itself.

Commissioner Lapsley called to question. All voted in favor and the motion carried.

Commissioner Edney made the motion to put discussion of tipping fees on the November 7th agenda. All voted in favor and the motion carried.

County Manager Steve Wyatt noted there are many unseen numbers in the Solid Waste Enterprise Fund that are being transferred out and not seen here. Staff will provide a spreadsheet to the Board.

COUNTY MANAGER'S REPORT

Steve Wyatt informed the Board of the upcoming Groundbreaking, to be held at Blue Ridge Community College at the site of the Innovative College on September 28th at 10:00 a.m.

CLOSED SESSION

The Board is requested to go into closed session pursuant to N.C. Gen. Stat. §143-318.11(a)(4) for the following reason(s):

1. Pursuant to N.C. Gen. Stat. §143-318.11(a)(4), to discuss matters relating to the location or expansion of industries or other businesses in Henderson County, including agreement on a tentative list of economic development incentives that may be offered by the Board in negotiations.

Commissioner Edney made the motion that the Board go into closed session pursuant to N.C. Gen. Stat. §143-318.11(a)(4) to discuss matters relating to the location or expansion of industries or other businesses in Henderson County, including agreement on a tentative list of economic development incentives that may be offered by the Board in negotiations. All voted in favor and the motion carried.

ADJOURN

Commissioner Messer made the motion to go out of closed session and adjourn at 10:40 a.m. All voted in favor and the motion carried.

Attest:

Teresa L. Wilson, Clerk to the Board

Thomas H. Thompson, Chairman

HENDERSON COUNTY BOARD OF COMMISSIONERS

1 Historic Courthouse Square, Suite #1
Hendersonville, NC 28792
Phone (828) 697-4808 • Fax (828) 692-9855
www.hendersoncountync.org

THOMAS THOMPSON
Chairman
CHARLIE MESSER
Vice-Chairman

MICHAEL EDNEY
GRADY HAWKINS
WILLIAM LAPSLEY

PROCLAMATION MICKEY MARVIN DAY

October 3, 2016

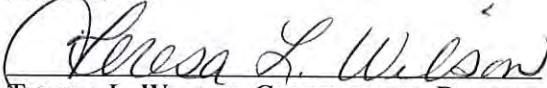
- WHEREAS,** Mickey Marvin is a Hendersonville native who played high school football at West Henderson High School and Brevard High School; and
- WHEREAS,** Mickey Marvin attended the University of Tennessee, and played in the National Football League for 11 seasons, from 1977 through 1987; and
- WHEREAS,** Mickey Marvin's Oakland Raiders were the Super Bowl XV Champions in 1981; and
- WHEREAS,** Mickey Marvin's Los Angeles Raiders were the Super Bowl XVIII Champions in 1984; and
- WHEREAS,** Henderson County salutes the achievements Mickey Marvin on the football field; and
- WHEREAS,** Henderson County further recognizes Mickey Marvin's achievements off the football field, as a positive influence on all who cross his path; and
- WHEREAS,** Mickey Marvin continues to give back to the community through the Mickey Marvin Scholarship Fund, which will provide four scholarships annually to someone on the football team at each of the County's four high schools; and
- WHEREAS,** Mickey Marvin is a champion for all of us in Henderson County;
- NOW, THEREFORE, BE IT PROCLAIMED,** that we, the Henderson County Board of Commissioners, do hereby declare Monday, October 3, 2016 as Mickey Marvin Day in Henderson County.

Adopted this the 21st day of September, 2016.



THOMAS THOMPSON, CHAIRMAN
HENDERSON COUNTY BOARD OF COMMISSIONERS

ATTEST:



FERESA L. WILSON, CLERK TO THE BOARD

HENDERSON COUNTY BOARD OF COMMISSIONERS

1 Historic Courthouse Square, Suite #1
Hendersonville, NC 28792

Phone (828) 697-4808 • Fax (828) 692-9855

www.hendersoncountync.org

THOMAS THOMPSON
Chairman
CHARLIE MESSER
Vice-Chairman

MICHAEL EDNEY
GRADY HAWKINS
WILLIAM LAPSLEY

PROCLAMATION EDUCATION FOUNDATION DAY

October 13, 2016

WHEREAS, The Henderson County Education Foundation was established on October 13, 1986 to "...benefit the public school children of Henderson County and for the benefit of the Henderson County Public Schools"; and

WHEREAS, The Henderson County Education Foundation has provided substantial ongoing and exemplary support and coordination with the Henderson County Public Schools; and

WHEREAS, The Henderson County Education Foundation, through its generous donors, has provided millions of dollars in program, grant and scholarship funding to the County's children and public schools; and

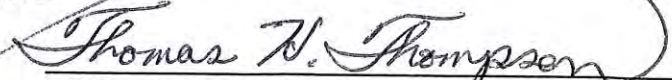
WHEREAS, The Henderson County Education Foundation, through these funds has facilitated student achievement and skill development, recognized and encouraged staff excellence, and expanded community involvement from individuals, businesses, and civic organizations; and

WHEREAS, The Henderson County Education Foundation, provides another example of dedicated Henderson County citizens working tirelessly for the betterment of our community; and

WHEREAS, The Henderson County Education Foundation, is dedicated to providing continuing support for a bright future for all of our children through educational excellence in our Public Schools,

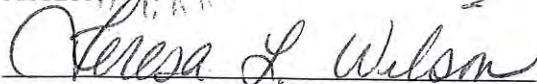
NOW, THEREFORE, BE IT PROCLAIMED, that we, the Henderson County Board of Commissioners, do hereby designate the day of October 13, 2016 as Education Foundation Day in Henderson County.

Adopted this the 21st day of September, 2016.



THOMAS THOMPSON, CHAIRMAN
HENDERSON COUNTY BOARD OF COMMISSIONERS

ATTEST:



TERESA L. WILSON, CLERK TO THE BOARD

HENDERSON COUNTY BOARD OF COMMISSIONERS

1 Historic Courthouse Square, Suite #1
Hendersonville, NC 28792
Phone (828) 697-4808 • Fax (828) 692-9855
www.hendersoncountync.org

THOMAS THOMPSON
Chairman
CHARLIE MESSER
Vice-Chairman

MICHAEL EDNEY
GRADY HAWKINS
WILLIAM LAPSLEY

RESOLUTION OF SUPPORT FOR THE I-26 WIDENING PROJECT I-4400/I-4700

WHEREAS, pursuant to N.C. General Statute §153, Article 18, the Henderson County Board of Commissioners exercises regulations relating to development within the County's jurisdiction; and

WHEREAS, the I-26 widening project is included in the approved State Transportation Improvement Plan (STIP); and

WHEREAS, the Board is a member of the French Broad River Metropolitan Planning Organization (MPO), and supports a transportation planning process in the urbanized area that is comprehensive, cooperative, and continuing, and addresses public safety and local and regional economic needs; and

WHEREAS, the North Carolina Department of Transportation (NCDOT) is responsible for designing and implementing projects in the STIP; and

WHEREAS, the I-26 widening has been long delayed by design and planning discussions;

NOW THEREFORE, BE IT RESOLVED by the Henderson County Board of Commissioners as follows:

1. That the Board reviewed the proposed I-26 widening project I-4400/I-4700 and finds that it is reasonable, in the public interest and it is consistent with the principles and goals of County Comprehensive Plan and the Growth Management Strategy located therein; and
2. That the Board determines that the proposed I-26 widening project is needed as the current and projected capacities are operating at unacceptable Level of Service.
3. That the Board determines that the proposed I-26 widening project provides for the sound transport of goods and people while balancing property rights and promoting reasonable growth within the County;

Adopted this the 21st day of September, 2016.



THOMAS THOMPSON, CHAIRMAN
HENDERSON COUNTY BOARD OF COMMISSIONERS

ATTEST:



TERESA L. WILSON, CLERK TO THE BOARD

Office of the Henderson County Tax Collector

200 NORTH GROVE STREET, SUITE 66

HENDERSONVILLE, NC 28792

PH: (828) 697-5595 | FAX: (828) 698-6153

Henderson County Board of Commissioners

1 Historic Courthouse Square, Suite 1

Hendersonville, NC 28792

Thursday, September 08, 2016

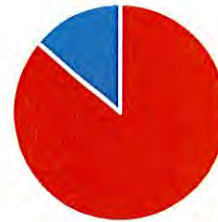
Re: Tax Collector's Report to Commissioners - Meeting Date September 21, 2016

Please find outlined below collections information through September 7, 2016 for the 2016 real and personal property bills scheduled to be mailed out on August 8, 2016. Vehicles taxes are billed monthly by NC DMV.

Henderson County Annual Bills (Real and Personal Property):

2016 Beginning Charge:	\$68,479,090.86
Discoveries & Imm. Irreg.:	\$266,092.49
Releases & Refunds:	(\$79,491.37)
<u>Net Charge:</u>	<u>\$68,665,691.98</u>
Unpaid Taxes:	\$59,090,637.00
Amount Collected:	\$9,575,054.98

Paid
13.94%



Unpaid
86.06%

Henderson County Registered Motor Vehicles (As Collected by NC DMV):

Net Charge:	\$1,152,261.34
Unpaid Taxes:	\$8,269.45
Amount Collected:	\$1,143,991.89

99.28%

Henderson County FY17 Budget Analysis:

	<u>Budget Ordinance</u>	<u>Revenue Collected</u>
Ad Valorem:	\$71,500,676.00	Ad Valorem: \$10,719,046.87
Prior Years:	\$1,575,000.00	Prior Years: \$337,653.19
Budget Total:	\$73,075,676.00	YTD Revenue: \$11,056,700.06



Respectfully Submitted,

Luke Small
Deputy Tax Collector

Darlene Burgess
Tax Administrator

**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 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 to 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

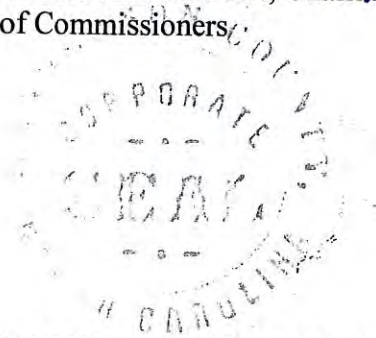
IN WITNESS WHEREOF, the Parties to this Agreement have duly affixed their signatures under hand and seal, or by a duly authorized officer under seal, the date stated above.

COUNTY OF HENDERSON

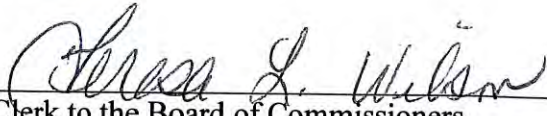
By:



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

Before the
Board of Commissioners
Of Henderson County

**A POLICY REGARDING
PUBLIC DIGITAL RECORDS RETENTION**

Dated September 21, 2016

This policy covers all of the government of the County of Henderson, including all departments, constituent and appointed boards and other subdivisions or units thereof under the authority of the Board of Commissioners of Henderson County.



County of Henderson
1 Historic Courthouse Square
Hendersonville, North Carolina 28792

Table of Contents

Purpose	2
Responsible Parties and Their Responsibilities	2
Availability of System and Records for Outside Inspection	4
Maintenance of Trustworthy Electronic Records	4
Components of Information Technology System	6
Documentation of Information Technology System	6
Digital Imaging Program Documentation and Procedures	7
Request for Disposal of Original Records Duplicated by Electronic Means	9
Other Electronic Records Management Practices	9
Compliance and Electronic Records Self-Warranty	11

Purpose

The records covered by this policy are in the custody of the County of Henderson, a body corporate and politic of the State of North Carolina ("the County"), and are maintained for the benefit of the County's use in delivering services and in documenting operations. This electronic records policy reflects guidelines set in the North Carolina Department of Cultural Resources publication, *Guidelines for Managing Trustworthy Digital Public Records*.

All public records as defined by North Carolina Gen. Stat. § 132-1 *et seq.* are covered by this policy. This includes permanent and non-permanent records, and confidential and non-confidential records. These classifications may warrant different treatments when processing the records. This policy serves as basic documentation of the procedures followed by the department in imaging, indexing, auditing, backing up, and purging electronic records in accordance with the disposition schedule, and in handling the original paper record, if applicable.

This policy also serves to protect those records digitized by the County's imaging systems, which reduces required storage space for original documents as the County transitions to a "paperless" digital system, and provides instant and simultaneous access to documents as needed.

The form provided in Section 8 of this document, Request for Disposal of Original Records Duplicated by Electronic Means, is to be completed and submitted to the Department of Natural and Cultural Resources whenever the County wishes to dispose of a new series of paper records that have been digitized.

This policy will supersede any electronic records system policy previously adopted. This policy will be reevaluated at a minimum of every five years, or upon the implementation of a new information technology system, and will be updated as required. A copy of this policy will remain on file at the Department of Natural and Cultural Resources.

Responsible Parties and Their Responsibilities

The parties with responsibilities under this policy include:

- Department Directors
- Henderson County Information Technology Department ("IT")
- Records Creators

Department Directors: For the purpose of this policy, department directors include the chairs of committees appointed by the Board of Commissioners, all department directors of County government, and the County Manager, the Assessor and the County Attorney.

The responsibilities of department directors include:

1. Determining access rights to the system
2. Approving system as configured by IT
3. Performing quality assurance checks by sampling the department's imaged records before the original documents are destroyed.

IT Department: The responsibilities of the Henderson County Information Technology Department include:

1. Installing and maintaining equipment and software
2. Configuring the system according to department needs, including creating and testing applications and indexes
3. Controlling access rights to the system
4. Maintaining documentation of system hardware and software
5. Establishing audit trails that document actions taken on records stored by the information technology system
6. Providing backups for system records, and recovering deleted imaged records when necessary
7. Completing disaster recovery backup at least once every two years
8. Establishing and providing training on equipment and software, documenting such training, and providing remedial training as needed. [Such training includes, but is not limited to, training on the imaging system.]
9. Creating and updating detailed procedural manuals describing the imaging process and equipment

Records Creators: The responsibilities of creators of public records include:

1. Attending and signing off on training conducted by IT staff or by the Department of Natural and Cultural Resources
2. Creating passwords for computers that are long, complex, and frequently changed
3. Creating and managing electronic records in their purview in accordance with these policies and other guidance issued by the Department of Natural and Cultural Resources, and complying with all IT security policies
4. Reviewing the system records annually and purging records in accordance with the retention schedule
5. Carrying out day-to-day processes associated with the County's imaging program, including:
 - Designating records to be entered into the imaging system
 - Noting confidential information or otherwise protected records and fields
 - Removing transient records
 - Completing indexing guide form for each record being scanned
 - Reviewing images and indexing for quality assurance
 - Naming and storing the scanned images in designated folders
 - Once approved, destroying or otherwise disposing of original records in accordance with guidance issued by the Department of Natural and Cultural Resources.
 - Conducting any necessary batch conversions or batch renaming of imaged records
6. Any employees who have been approved to telecommute or use mobile computing devices must:
 - Comply with all information technology security policies, including the County and statewide acceptable use policies, as well as all statutes and policies governing public records
 - Back up information stored on the mobile device daily to ensure proper recovery and restoration of data files
 - Keep the backup medium separate from the mobile computer when a mobile computer is outside a secure area

Availability of System and Records for Outside Inspection

The County recognizes that the judicial system may request pretrial discovery of the information technology system used to produce records and related materials. The County's personnel will honor lawful requests for outside inspection of the system and testing of data by opposing parties, the court, and other government representatives. Records must be available for inspection and audit by a government representative for the full period required by law and approved records retention schedules, regardless of the life expectancy of the media on which the records are stored. Records must continue to exist when litigation, government investigation, or audit is pending, imminent, or if a court order may prohibit specified records from being destroyed or otherwise rendered unavailable.

In order to lay a proper foundation for the purposes of admitting the County's electronic records into evidence, the County will be able to provide up-to-date, detailed documentation that describes the procedural controls employed in producing records; procedures for input control including tests used to assure accuracy and reliability; and evidence of the records' chain of custody. In addition to this policy, such documentation includes:

- Procedural manuals
- System documentation
- Training documentation
- Audit documentation
- Audit trails

The County will also honor inspection and copy requests made pursuant to the terms and provisions of Chapter 132 of the North Carolina General Statutes, subject to any exclusions of information or records required by law. The County should where practicable produce the records in the order they were created and used in the course of business, and in the format in which they were created. However, the County may produce the records in any format it is capable of producing if asked by the requesting party, subject to the provisions of N.C. Gen. Stat. §132-6.2.

Maintenance of Trustworthy Electronic Records

The County's electronic records should be:

- Produced by Methods that Ensure Accuracy
- Maintained in a Secure Environment
- Associated and Linked with Appropriate Metadata
- Stored on Media that are Regularly Assessed and Refreshed

All platforms used by the County to create and manage electronic records, including email clients, social media platforms, and cloud computing platforms, should conform with all North Carolina Department of Natural and Cultural Resources' ("DNCR") policies and all applicable security policies.

Where shortened or abbreviated names are required, or where document management systems are not employed, electronic files should be named generally in accordance with the *Best Practices for File-Naming* published by the DCR.

Electronic files are saved in formats that comply with DCR's *File Format Guidelines for Management and Long-Term Retention of Electronic Records*, which may presently be found on the internet at (http://archives.ncdcr.gov/Portals/3/PDF/guidelines/file_formats_in-house_preservation.pdf). File formats used by the state are adopted as standard by the County.

Security to the records system and to the records it holds should be maintained in the following ways:

- Access rights are managed by the IT department, and are determined by a supervising authority to prevent unauthorized viewing of documents.
- The information technology system is able to separate confidential from nonconfidential information, or data creators organize and name file systems to reflect confidentiality of documents stored within.
- Confidential information is stored on off-network storage systems, and folders with confidential information are restricted.
- Physical access to computers, disks, and external hard drives is restricted.
- Duplicate copies of digital media and system backup copies are stored in offsite facilities in order to be retrieved after a natural or human-made disaster.
- Confidential material is redacted prior to publication of records.
- All system password and operating procedure manuals are kept in secure off-site storage (e.g. a bank safety deposit box).

Metadata is maintained alongside the record. At a minimum, metadata retained should include file creator, date created, title (stored as the file name), and when appropriate, cell formulae and email header information. Employees are not instructed to create metadata other than metadata that is essential for a file's current use and/or retention.

Data should be converted to new usable file types as old ones become obsolete or otherwise deteriorate. The following steps should be taken to ensure the continued accessibility of records kept in electronic formats:

- Data is audited and assessed yearly
- Media is refreshed every three to five years. The County documents when and how records are transferred from one storage medium to another.
- Records are periodically converted to new file types, particularly when a new information technology system requires that they be migrated forward in order to properly render the file
- Metadata is maintained during migration
- Records are periodically verified through hash algorithms. This is done before and after migration to new media to ensure that the record did not change during conversion.
- Storage media is maintained in a manner and in an environment that promotes bit-level preservation. Humidity does not exceed 50% and should not fall below 30%. Room temperature is set between 65° F to 75° F. The County should adhere to the media manufacturer's recommendations for specific environmental conditions in which the media should be stored.
- Whatever media is used to store imaged data is clearly labeled with enough information that its contents can be determined.

Components of the Information Technology System

The County Information Technology System includes the following:

- Training Programs
- Audit Trails
- Audits

Training Programs

The IT department will conduct training for system use and electronic records management, using material published by the Department of Natural and Cultural Resources when appropriate. All employees will be made aware of system procedures and policies, trained on them, and confirm by initialization or signature acknowledging that they are aware of the policies and have received training on them. When appropriate, employees will also attend trainings offered by the Department of Natural and Cultural Resources on the maintenance of electronic records. Documentation will be maintained for the distribution of written procedures, attendance of individuals at training sessions and refresher training programs and other relevant information.

System Audit Trails

A log of activities on the system is maintained, which show who accessed the system, how and by whom records were created and modified, and whether standard procedures were followed.

Quality Audits

Audits are designed to evaluate the process or system's accuracy, timeliness, adequacy of procedures, training provided, and the existence of audit trails. Internal audits are conducted regularly by the County's IT staff.

Documentation of the Information Technology System

The County's Information Technology System will have adequate documentation.

The County will maintain system documentation that describes system procedures and actual practices, as well as system software and hardware, and the system environment in terms of the organizational structure, functions and responsibilities, and system processes. It explains how the system operates from a functional user and data processing point of view. Documentation is reviewed and updated regularly or upon implementation of a new information technology system by IT staff. Such documentation maintained by the County includes:

- Procedural manuals
- System documentation
- Security backup and disaster recovery procedures as a part of the Continuity of Operations Plan
- System-level agreements for contracted information technology services

One set of all system documentation will be maintained during the period for which the records produced by the process or system could likely be subject to court review, and until all data created by every system instance has been destroyed or transferred to new operating environment. All such documentation is listed in the County's records retention schedules.

Digital Imaging Program Documentation and Procedures

Digital Imaging within the County's operations includes the following:

- System and Procedural Documentation
- Training
- Indexing and Metadata
- Auditing and Audit Trails
- Retention of Original and Duplicate Records

The IT department is responsible for preparing and updating detailed procedures that describe the process followed to create and recreate electronic records. This documentation should include a description of the system hardware and software. A current procedural manual should be maintained to assure the most current steps are followed.

Each workstation designated as a scanning station will have, at a minimum, the following hardware and software, unless the scanner is collocated by means of a network interface:

- Document/image scanner authorized by IT (as approved by IT)
- Driver software for scanner
- Imaging software (as approved by IT)
- Instructions manual, maintained by IT staff, describing in detail the steps required to get from the beginning to the end of the process. This manual will also define:
 - The resolution of scanned images, as well as any compression standard used
 - The file formats of scanned images
 - The file naming conventions used for scanned images
 - If batch conversion or batch file re-naming will be necessary, and what tool is used for such conversions
 - How the scanned images will be stored in the file system
 - Any image enhancement techniques conducted after imaging

Only designated staff that have been formally trained by IT staff and signed off on training documentation on the use of the imaging software and equipment will be allowed to enter records into the content management system. Covered records will be scanned and filed as part of an ongoing regularly conducted activity. Components of the training will include basic techniques for image capture, indexing, quality control, security configuration, auditing, use of equipment, and general system maintenance. Rights to image and index records will not be assigned until the user has been trained. If a user improperly indexes or scans a document, an auditor will address this occurrence with the operator and remedial training will be performed as necessary.

All imaged records must be indexed in order to facilitate efficient retrieval, ease of use, and up-to-date information about the images stored in the system. This index should capture the content, structure, and context of the imaged records, and will be developed by IT staff prior to the implementation of any imaging system. It should also be indexed according to guidelines set by the Department of Natural and Cultural Resources (see this policy, **Other Electronic Records Management Practices**, for more information on database indexing).

The imaging staff will conduct a quality control audit following the imaging of a record to ensure that the following features of the imaged record are legible:

- Individual letters, numbers, and symbols

- Combinations of letters, numbers, and symbols forming words or sentences
- Graphics such as signatures, logos, and pictures
- Other features of records such as color, shape, texture, etc., that relate to the content of the information

Managerial staff for the various units of the County will also periodically audit imaged records for accuracy, readability, and reproduction capabilities. A written audit report will be prepared indicating the sampling of records produced and what remedial procedures were followed if the expected level of accuracy was not achieved.

Audit trails built into the imaging system will automatically document who creates, duplicates, modifies, or otherwise prepares records, and what procedures were taken. Audit trails include the success or failure, date, time, and user of the following events:

- Add/Edit electronic document
- Assign index template
- Copy document
- Copy pages
- Create document/folder
- Delete entry
- Delete pages
- Delete volume
- Edit image
- Email document
- Export document
- Index creation/deletion/modification
- Insert page
- Log in/out
- Move document
- Move pages
- Print document

To obtain permission to destroy original records following imaging, the County will complete the *Request for Disposal of Original Records Duplicated by Electronic Means*. For each new records series to be scanned, the Department of Natural and Cultural Resources must approve the destruction of the original records. Permanent records may be imaged for ease of access, but the original documents may not be destroyed unless an analog copy exists prior to the records' destruction.

Destruction of original records is allowed only after quality assurance has been conducted on the imaged records, necessary corrections have been made, auditing procedures have been conducted, and the destruction is approved. Prior to destruction of the original record, managerial staff will audit a sample of those records to verify the accurate reproduction of those records.

Digital images of scanned records are maintained for the specified retention periods according to the records retention and disposition schedule. The retention period is considered to have begun when the original document was created, not when the electronic reproduction was created.

Electronic and digital images of scanned records in a document management system will be considered the "official" record. Any hard copy generated from the imaged records will be considered the County's duplicate "working" record.

Request for Disposal of Original Records Duplicated by Electronic Means

The attached form, *Request for Disposal of Original Documents Duplicated by Electronic Means*, is used to request approval from the Department of Natural and Cultural Resources to dispose of non-permanent paper records which have been scanned, entered into databases, or otherwise duplicated through digital imaging or other conversion to a digital environment. This form does not apply to records which have been microfilmed or photocopied, or to records with a permanent retention.

Other Electronic Records Management Practices

The County's other electronic records management practices include:

- System Planning
- Electronic Records Management
- Database Indexing
- Security and Disaster Backup and Restoration

The County should use traditional paper media, electronic systems, or microfilm, based on what format best serves the records retention requirements of unique records groups, given reasonable budgetary forecasting.

System documentation, system access records, digitization and scanning records, metadata, and information maintained by that system is listed in an approved records retention and disposition schedule prior to their destruction or other disposition.

County records are retained for the period of time required by local records retention schedules regardless of format. Any permanent records maintained in electronic form also exist as a paper or microfilm preservation duplicate copy in compliance with the Department of Cultural Resources' Human-Readable Preservation Duplicates policy.

N.C. Gen. Stat. §132-6.1 requires that databases be indexed with the Department of Natural and Cultural Resources. The County's database indexes contain the following data fields:

- Description of the format or record layout
- Frequency with which the database is updated
- List of any data fields to which public access is restricted
- Description of each form in which the database can be copied or reproduced using the agency's computer facilities
- Schedule of fees for the production of copies in each available form

The County has a disaster recovery plan for its electronic data in place, which includes contact information for data recovery vendors and information about back-ups of all data. Security back-ups to protect against data loss are generated for all but the most transitory of files. Routine back-ups are conducted regularly, and stored in secure off-site storage as documented in the County's I.T. disaster recovery plan.

Contracting

Department Heads shall insure that all agreements with vendors hosting applications offsite (ASP or SaaS) are reviewed by the Information Technology Department and the County Attorney prior to execution. All such agreements must include documentation that the vendor has implemented

information security policies, including policies for access control, application and system development, operational, network and physical security to ensure the security of Henderson County data. Each vendor shall be contractually obligated to comply with card association security standards if credit card transactions are part of the contract. Finally, each vendor must be contractually obligated to provide free access to the County's data, in a mutually agreed form, at the termination of any such contract.

Compliance and Electronic Records Self-Warranty

The completion of this form attests that all County employees will adhere to the rules set forth in this policy.

Records Custodian: The records custodian is the person responsible in each County department or office for creating records or managing the staff who creates records.

Each records custodian certifies that:

_____ The records created or duplicated by electronic means in this office are prepared in accordance with these guidelines as indicated by the following statements:

- The records are of high quality - legible, accurate, and complete.
- The records are produced or reproduced as part of a regularly conducted activity.
- The records conform to DNCR guidance regarding file formats, file naming, and if applicable digital preservation guidance produced by DNCR.
- Detailed, documented procedures are in place and followed when the records are created, copied, modified, or duplicated.
- The person(s) who creates, copies, modifies, or duplicates the records receives formal training on detailed system procedures prior to records preparation.
- Details of the training received are adequately documented through written policies and procedures.
- Training records are signed by employee after receiving training.

_____ This agency will comply with the best practices and standards established by the DNCR as published on its website.

_____ This agency will submit to the DNCR pursuant to this policy, **Request for Disposal of Original Records Duplicated by Electronic Means**, documentation seeking approval for the destruction of original records that have been converted from paper to electronic record.

Approved by:

Date: September 21, 2016

Title: Chairman Henderson County Board of Commissioners

Signature: 

Information Technology Department Self-Warranty on behalf of Henderson County::

The IT Department is responsible for providing technical support to the records custodians and is involved in infrastructure and system maintenance.

The IT Department Head hereby certifies that:

✓ Audit trails document the identity of the individual(s) who creates, duplicates, modifies, or otherwise prepares the records, what actions are taken by the individual during the course of the process, when these actions are taken, and what the results of these actions are.

✓ Audits:

- are performed periodically to confirm that the process or system produces accurate results.
- confirm that procedures actually followed are in accordance with procedure stated in the system's documentation.
- are performed routinely on documents to ensure no information has been lost.
- are performed by an independent source (i.e., persons other than those who create the records or persons without an interest in the content of the records. Acceptable source may include different department or authorized auditing authority).
- are adequately documented.

✓ The process or system hardware and software are adequately documented

✓ Permanent records conform generally to all file format, file naming, and digital preservation guidance produced by the DNCR.

✓ Back up procedures are in place and comply with best practices, as established by the DCR.

✓ Successful disaster recovery back up is completed at least once every two years.

Approved by:

Date: 09-21-16

Title: IT Director

Bach Smyth
Department Head

McGuireWoods LLP
434 Fayetteville Street
Suite 2600
P.O. Box 27507 (27611)
Raleigh, NC 27601
Tel 919.755.6600
Fax 919.755.6699
www.mcguirewoods.com

Charles D. Case
Direct: 919.755.6698

McGUIREWOODS

ccase@mcguirewoods.com
Fax: 919.755.6675

August 12, 2016

Via US Mail

Thomas H. Thompson, Chairman
Henderson County Board of Commissioners
1 Historic Courthouse Square, Suite 1
Hendersonville, NC 28792

Re: Henderson County's Proposed Flow Control Ordinance

Dear Chairman Thompson:

Pursuant to the attached Notice of Hearing, which is attached as Exhibit A, we submit these comments and objections to the "Modifications of the Henderson County Solid Waste Ordinance to provide for 'Flow Control' measures regarding Solid Waste from the Un-incorporated areas of the County" (the "proposed Flow Control Ordinance"). These comments are submitted on behalf of the North Carolina Chapter of the National Waste & Recycling Association (NWRA). NWRA is an association of privately-owned solid waste management companies that provide solid waste collection, recycling, disposal, and engineering services throughout the United States. The North Carolina Chapter is comprised of our members who operate within the State and in Henderson County. NWRA's members play a critical role in providing the infrastructure to assure adequate waste and recycling services exist to protect the State's environment.

Both NWRA and one or more of its member companies have previously communicated with you and your County's attorney, Mr. Burrell, expressing opposition to the proposed Flow Control Ordinance. Mr. Huff, Manager of the Sunbelt Region of NWRA, wrote a letter to you, dated May 27, 2016, on behalf of NWRA and its member companies ("NWRA Letter"). A copy of that NWRA Letter is attached as Exhibit B. Prior to that NWRA Letter, my partner, Mr. Justin Howard, had communications with Mr. Burrell on behalf of one of NWRA's member companies, Waste Management, Inc. ("WM") regarding the likely illegality of the PFCO – these include Mr. Howard's May 5 letter to Mr. Burrell and his May 6 letter in response, and Mr. Howard's May 17 letter back to Mr. Burrell providing some of the prior case law that has held flow control ordinances such as the proposed Flow Control Ordinance to be unconstitutional which are attached as Exhibits C, D, and E, respectively (the "WM Letters"). The attached NWRA Letter and WM Letters (collectively the "Letters") are incorporated by reference into these comments for inclusion in the record. As such, I will try to avoid repeating the substance

Thomas H. Thompson, Chairman
Henderson County Board of Commissioners
August 12, 2016
Page 2

of what is contained in those Letters, although I would note that they were written without the benefit of the proposed text of the proposed Flow Control Ordinance, which we now have seen.

A review of the text of the proposed Flow Control Ordinance confirms the various bases for the objections and comments contained in the prior Letters. As shown in the cases cited in Mr. Howard's prior letter, as well as others that we have since considered, the proposed Flow Control Ordinance violates the Dormant Commerce Clause of the U.S. Constitution, Art. I, Sec. 8, cl. 3, in that it discriminates or burdens the interstate flow of solid waste as an item of commerce, and that it does so facially, in its practical effect and in its purpose, given that there is no valid factor unrelated to economic protectionism justifying the proposed Flow Control Ordinance and that there are other nondiscriminatory alternatives to preserve the local interests at stake. As such, the relevant cases deem ordinances like the proposed Flow Control Ordinance as being subject to a virtual *per se* rule of invalidity. Even if this was not the case, because the proposed Flow Control Ordinance fails to regulate evenhandedly and also directly affects interstate commerce, it would impose unreasonable burdens on interstate waste that are excessive in relation to the putative local benefits.

As noted in Mr. Howard's May 17th letter, recent decisions have reaffirmed the long-established principal that a discriminatory flow control ordinance violates the dormant Commerce Clause. Recent decisions by the U.S. Supreme Court and the Fourth Circuit that have upheld flow control ordinances did so based on terms, intents and/or effects that are different from those in the proposed Flow Control Ordinance and, indeed, their discussions make clear that an ordinance like the proposed ordinance that the Henderson County Board of Commissioners now has before it will violate the dormant Commerce Clause. It may also run afoul of the Constitution's Contract Clause. A challenge in federal court to an ordinance on the basis of its unconstitutionality is brought under 42 U.S.C. 1983. Such an action could also contain pendant claims under North Carolina law that the County does not have sufficient specific statutory authority to adopt the ordinance and collect the fees required under it, either under the citations to Chapters 153A and 130A contained in the proposed Flow Control Ordinance, or in any other provisions of state law that we are aware of. See, e.g., *Smith Chapel Baptist Church, et al. v. City of Durham*, 350 N.C. 805, 815, 517 S.E.2d 874, 881 (1999). A prevailing plaintiff in such an action is entitled to request its attorney's fees for the effort.

NWRA and its member companies have noted the harms that would be created by the proposed Flow Control Ordinance and the additional burdens it would impose on its membership, but also on the citizens and businesses of Henderson County. Because of the harms that flow control ordinances impose on the proper handling of solid waste and those who manage it, NWRA is strongly opposed to the proposed Flow Control Ordinance.

Thomas H. Thompson, Chairman
Henderson County Board of Commissioners
August 12, 2016
Page 3

NWRA would be happy to discuss further its objections to the proposed Flow Control Ordinance, and representatives of my firm would be willing to meet with Mr. Burrell and/or your retained counsel to discuss further the legal bases for challenge that are referred to in this letter.

Sincerely yours,

McGUIREWOODS LLP



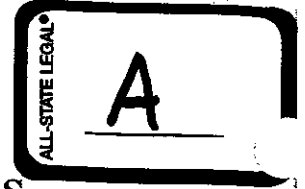
Charles D. Case
Justin D. Howard

Enc.:

- Exhibit A – Notice of Hearing
- Exhibit B – May 27th NWRA Letter
- Exhibit C – May 5th Letter
- Exhibit D – May 6th Letter
- Exhibit E – May 17th Letter

Cc (w/enc.):

Charles Russell Burrell, Esq., Henderson County Attorney
NWRA – North Carolina Chapter



HENDERSON COUNTY BOARD OF COMMISSIONERS

1 Historic Courthouse Square, Suite 1
Hendersonville, North Carolina 28792
Phone: 828-697-4808 • Fax: 828-692-9855
www.hendersoncountync.org

THOMAS H. THOMPSON
Chairman
CHARLES D. MESSER
Vice-Chairman

J. MICHAEL EDNEY
GRADY H. HAWKINS
WILLIAM G. LAPSLEY

NOTICE

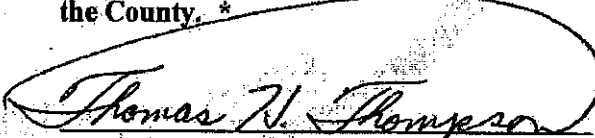
*PUBLIC HEARING

DATE: Wednesday, August 17, 2016

TIME: 9:00 a.m.

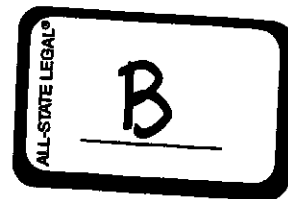
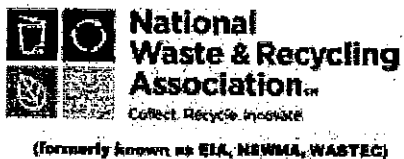
PLACE:
Commissioners' Meeting Room
1 Historic Courthouse Square, Hendersonville

SUBJECTS TO BE CONSIDERED: Public Hearing regarding the Modification of the Henderson County Solid Waste Ordinance to provide for "Flow Control" measures regarding Solid Waste from the Un-incorporated areas of the County. *


Thomas H. Thompson, Chairman

*In addition to the foregoing, any person wishing to comment in writing on these proposed changes should submit the same prior to the date of the hearing noticed hereto to the undersigned, at 1 Historic Courthouse Square, Suite 1, Hendersonville, NC 28792.

- = Action may be taken with respect to any of the items to be discussed at this meeting.



May 27, 2016

Thomas H. Thompson
Chairman
Henderson County Board of Commissioners
Historic Courthouse Square, Suite 1
Hendersonville, NC 28792

Dear Chairman Thompson:

I am writing on behalf of the North Carolina Chapter of the National Waste & Recycling Association (NWRA). NWRA is an association of privately-owned solid waste management companies that provide solid waste collection, recycling, disposal, and engineering services throughout the United States. The North Carolina Chapter is comprised of our members who operate within the State and in Henderson County. Our members play a critical role in providing the infrastructure to assure adequate waste and recycling services exist to protect the State's environment.

I am writing about an issue of grave concern with our operators in Henderson County, as well as private operators throughout the state. Our members have recently learned the Henderson County Board of Commissioners is considering passing an ordinance requiring all waste generated within Henderson County to be disposed at a County-owned facility.

We believe this flow control ordinance will have a negative impact on your residents and businesses. The implementation of flow control amounts to a hidden tax on local businesses and citizens who ultimately will pay a higher price for solid waste services. It achieves nothing but the creation of a monopoly that is detrimental to the well-being of your community and its residents. Further, the message this ordinance sends is that free enterprise is not welcome in Henderson County.

Flow control guarantees that County operations are not judged by their efficiency and quality, but by the jurisdiction's use of its police powers. Competition and free enterprise are the cornerstones of American business, yet Henderson County is considering the creation of a monopoly rather than address budget issues with its operations. Efficient operations, cost controls, competitive pricing, and customer service are the key to success, not flow control.

We respectfully request that Henderson County abandon the adoption of this ill-conceived ordinance. The County instead should require its solid waste operations to compete on its ability to provide the best service and the best price. In other words, the department should earn its business, as opposed to having it handed to them to the detriment of all rate payers in the County. Thank you for your consideration of this request.

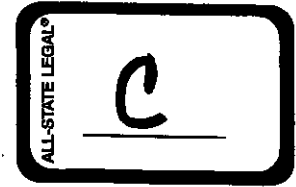
Sincerely,

Mike Huff
Manager

- c. Charlie Messer, Vice-Chairman
William Lapsley, Commissioner
Grady Hawkins, Commissioner
Michael Edney, Commissioner

McGuireWoods LLP
434 Fayetteville Street
Suite 2600
PO Box 27507 (27611)
Raleigh, NC 27601
Phone: 919.755.6600
Fax: 919.755.6699
www.mcguirewoods.com
Justin D. Howard
Direct: 919.755.6685

McGUIREWOODS



jhoward@mcguirewoods.com
Fax: 919.755.6699

May 5, 2016

Via FedEx

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

Re: Henderson County's proposed flow control ordinance
McGuireWoods File No. 0945293-0274

Dear Mr. Burrell:

I am writing on behalf of my client, Waste Management ("WM"), to express its opposition to the flow control ordinance that is being considered by the Henderson County Board of Commissioners. WM understands and appreciates the budget challenges that Henderson County faces and has followed the flow control debate, remaining hopeful that the County will explore other means of raising revenue. WM recently learned, however, that the Commissioners could vote on the proposed flow control ordinance as early as May 18, 2016, and therefore believes it is important to communicate its position directly to the Henderson County Commissioners at this time. WM strongly opposes the proposed ordinance on grounds that it is unconstitutional and would have a number of adverse effects on Henderson County's businesses and residents. WM encourages the Board of Commissioners not to implement flow control, and it is prepared to take legal action to challenge any such ordinance passed by the Board.

Background

Waste Management is the largest provider of solid waste collection, recycling, disposal, and resource recovery services in North America. In Henderson County, WM has been providing comprehensive solid waste solutions for more than twenty years and currently provides daily service to over 200 county businesses. Currently, over 25,000 tons of Henderson County waste is transported and disposed of outside the County at lawfully permitted and competitively priced disposal facilities.

In its October 5, 2015, meeting, the Henderson County Board of Commissioners considered a number of "funding options" to generate revenue for the County government's budget, including an amendment to its solid waste ordinance that would require all solid waste generated within Henderson County to be transported to the transfer station on Stoney Mountain

Road and then transported and disposed of exclusively by Republic Services, a private waste removal company that is a competitor of the other haulers currently serving customers in the County. If this proposed flow control amendment is implemented, it will have the immediate and far reaching effect of eliminating free market competition for solid waste disposal solutions in Henderson County, increasing costs to area businesses and certainly inviting expensive and burdensome legal challenges by WM and others.

Currently, approximately seventeen permitted commercial haulers transport the solid waste generated in the County to the most competitive, efficient, and practically located processing and disposal facilities. Under the current free market structure, Henderson County residents and businesses receive the best possible value from waste service companies. In contrast, if the proposed flow control ordinance is adopted, competition among disposal facilities will be eliminated, and the County will transform Republic Services into a solid waste disposal monopoly. The ability of hauling companies to efficiently route their collection vehicles will be eliminated. Businesses will lose their right to negotiate prices and obtain the best waste services at the best price for their needs. Now is not the time for more government regulation and intrusion into business operations, especially in this case, where it is unnecessary and will not achieve the County's budget goals.

The Proposed Flow Control Ordinance Will Not Survive Legal Challenges

Waste Management and approximately sixteen other waste removal and recycling companies serving Henderson County have spent decades and invested millions of dollars developing the necessary infrastructure in the region to offer competitive, dependable, and innovative solid waste and recycling solutions to the Henderson County community. These infrastructure investments are supported by numerous individual service contracts currently in effect between the permitted haulers and Henderson County business owners. If the proposed flow control were adopted, the affected waste service companies would have no choice but to pursue every legal avenue available to defend their businesses, their investments, their rights under existing agreements, and to protect themselves from the associated lost revenues that would necessarily result. It makes little sense for a County already facing budget challenges to subject itself to the unnecessary burden and expense of litigation on an issue where our federal courts have made salient that flow control ordinances like the one currently under consideration are impermissible and violate the dormant Commerce Clause of the U.S. Constitution. This is particularly true when the County has the opportunity to develop and pursue other, appropriate means of generating revenue.

Flow Control Will Increase Costs to Henderson County

Under a flow control scheme, overall waste collection and disposal costs to Henderson County businesses will increase. The commercial haulers currently providing collection service in the County will be forced to redirect an additional annual volume of approximately 26,000 tons of waste to the transfer station on Stoney Mountain Road, which charges substantially higher tipping fees than all other transfer stations in the region. This additional volume at the transfer station will result in higher maintenance and operating costs for the County. Ultimately,

Mr. Charles Russell Burrell
May 5, 2016
Page 3

these increased costs will have to be passed along to Henderson County businesses and taxpayers.

Traffic Safety

The proposed flow control ordinance also will place an increased burden on residents living near the transfer station. It will significantly increase refuse truck traffic at the entrance and exit to the Stoney Mountain Road transfer station, a location that the County has acknowledged presents a significant safety concern at its current traffic levels. This concern prompted the County to request the North Carolina Department of Transportation to reduce the road's posted speed limit from 45 to 35 mph. The proposed flow control ordinance would exacerbate this problem regardless of whether or not the County's request to the DOT is granted. Numerous refuse trucks that were previously leaving the County would be redirected and concentrated on Stoney Mountain Road. The resulting increase of truck traffic in and out of the County's transfer station would result in congestion and traffic safety issues, not to mention the increased repair and replacement costs of the effected County roadways.

Summary

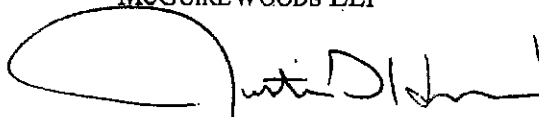
Simply put, flow control is not a solution to Henderson County's budget challenges. WM respectfully requests that the Board of Commissioners reject the proposed ordinance and abandon flow control as a potential revenue source. If it does not, WM is fully prepared to challenge the ordinance in court, but we remain hopeful that that will not be necessary.

Thank you for your attention to this matter. Please give me a call should you have any questions.

With kind regards, I am

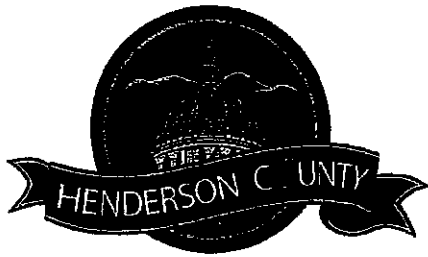
Sincerely yours,

McGUIREWOODS LLP

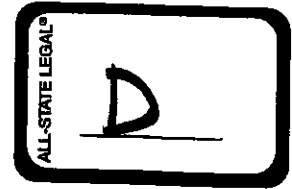


Justin D. Howard

JDH/jm



Charles Russell Burrell
County Attorney



OFFICE OF THE COUNTY ATTORNEY
Henderson County, North Carolina

May 6, 2016

Mr. Justin D. Howard
McGuire Woods LLP
Post Office Box 27507
Raleigh, NC 27611

RE: Flow Control Ordinance

Dear Mr. Howard:

Thank you for your letter of May 5. Since your letter appears to me to be primarily an attempt to persuade the Board of Commissioners on this subject, I have forwarded a copy of your letter to them.

I did note the paragraph headed "The Proposed Flow Control Ordinance Will Not Survive Legal Challenges" on the second page of your letter, and noted with particular interest your statement that "federal courts have made salient that flow control ordinances like the one currently under consideration are impermissible and violate the dormant Commerce Clause of the U.S. Constitution." This is to request that you provide me with citations to the case law to which you refer.

Again, thank you for your letter.

Sincerely,

Charles Russell Burrell

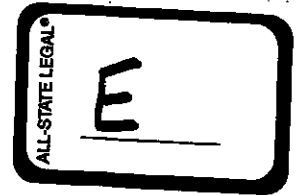
CRB

1 Historic Courthouse Square, Suite 5
Hendersonville, North Carolina 28792
Telephone (828) 697-4719 — Facsimile (828) 697-4536

McGuireWoods LLP
434 Fayetteville Street
Suite 2600
P.O. Box 27507 (27611)
Raleigh, NC 27601
Tel 919.755.6600
Fax 919.755.6699
www.mcguirewoods.com

Justin D. Howard
Direct: 919.755.6685

McGUIREWOODS



jhoward@mcguirewoods.com
Fax: 919.755.6699

May 17, 2016

Via Facsimile and US Mail

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

Re: Henderson County's proposed flow control ordinance
McGuireWoods File No. 0945293-0274

Dear Mr. Burrell:

Thank you for your letter dated May 6, 2016. As you requested, I am writing to provide you with information concerning the impermissibility of flow control ordinances like the one Henderson County has proposed. As I mentioned in my previous letter, our federal courts have consistently held that such flow control ordinances are in violation of the dormant Commerce Clause of the U.S. Constitution.

The U.S. Supreme Court addressed the constitutionality of flow control ordinances in *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383 (1994). In *Clarkstown*, a New York town adopted a flow control ordinance requiring that all nonhazardous solid waste brought into the town either be (1) generated in the town; or (2) processed at a designated transfer station, pursuant to the terms of a contract between the town and a private waste management company. *Clarkstown*, 511 U.S. at 386-88. The contract terms also permitted the private company to charge waste haulers a tipping fee that exceeded the disposal cost of unsorted solid waste on the private market. *Id.* at 387-88.

In reversing the opinion of New York State's highest court, the U.S. Supreme Court held that such an ordinance (1) regulates interstate commerce; and (2) violates the dormant Commerce Clause of the U.S. Constitution. *Id.* at 389-90. Because the ordinance deprived out-of-state businesses of access to the local waste processing market, the Court held that its economic effects were interstate in reach. *Id.* at 389. Additionally, the ordinance was discriminatory in nature because it permitted only a single operator to process waste at its facility, thereby eliminating market competition. *Id.* at 389-92. The Court in *Clarkstown* emphasized the possibility of nondiscriminatory alternatives to a flow control ordinance, stating that the legitimate local interest of environmental safety can be accomplished by instituting uniform safety regulations for waste processing. *Id.* at 392-95.

May 17, 2016
Page 2

Thirteen years later, the Court reaffirmed its position that a flow control ordinance favoring a private waste management company violates the dormant Commerce Clause. *Cf. United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 334 (2007) (distinguishing between flow control ordinances involving public benefit corporations and those involving private waste management companies).

The circuit courts nationwide have repeatedly relied on *Clarkstown* when presented with issues concerning flow control ordinances. *See Huish Detergents, Inc. v. Warren County*, 214 F.3d 707, 714 (6th Cir. Ky. 2000) (holding that *Clarkstown* “teaches us that a State cannot ‘hoard’ solid waste by prohibiting or restricting the flow of waste to an out-of-state disposal facility.”); *U & I Sanitation v. City of Columbus*, 205 F.3d 1063, 1072 (8th Cir. Neb. 2000) (holding that an ordinance requiring all garbage collected within city limits be processed at a city-owned transfer station – save for garbage to be disposed of out-of-state – violated the dormant Commerce Clause because the restriction was “clearly excessive” relative to its local benefits); *Houlton Citizens' Coalition v. Town of Houlton*, 175 F.3d 178, 184 (1st Cir. Me. 1999) (“*Clarkstown* is both the most recent and most relevant” of the Supreme Court cases involving “the application of the dormant Commerce Clause to a municipal waste management scheme.”); *Atlantic Coast Demolition & Recycling v. Board of Chosen Freeholders*, 112 F.3d 652, 655 (3d Cir. N.J. 1997) (following *Clarkstown* in holding that flow control statutes requiring management districts to contract with designated facilities for local waste disposal violated the dormant Commerce Clause); *SSC Corp. v. Town of Smithtown*, 66 F.3d 502, 514 (2d Cir. N.Y. 1995) (relying on the *Clarkstown* analysis in holding that a town’s flow control ordinance violated the dormant Commerce Clause).

Here, the flow control ordinance proposed by Henderson County will not survive legal challenges because it entails an exclusive waste transportation and disposal contract between the County and a private waste removal company, Republic Services. Pursuant to precedent that the U.S. Supreme Court and federal circuit courts have firmly established, Henderson County’s proposed ordinance violates the dormant Commerce Clause. Therefore, WM respectfully requests that the Board of Commissioners reject the proposed ordinance and abandon flow control as a potential revenue source.

WM hopes to avoid litigation in this matter. It is prepared, however, to take legal action to protect its business, investments, and rights under existing agreements, as it has done successfully in other parts of the country. *Cf. Nat'l Solid Wastes Mgmt. Ass'n v. City of Dallas*, 903 F. Supp. 2d 446 (N.D. Tex. 2012) (permanently enjoining the City of Dallas from implementing a control flow ordinance).

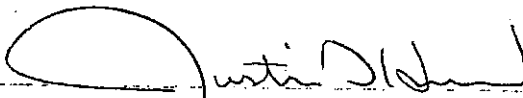
Thank you for your attention to this matter. Please give me a call should you have any questions.

With kind regards, I am

May 17, 2016
Page 3

Sincerely yours,

McGUIREWOODS LLP

A handwritten signature in black ink, appearing to read "Justin D. Howard", written over a horizontal dashed line.

Justin D. Howard

JDH/jm

Town of Laurel Park

J. CAREY O'CAIN, Mayor
ROBERT O. VICKERY, Commissioner
and Mayor Pro Tem
DONA M. MENNELLA, Commissioner
A. PAUL HANSEN, Commissioner
GEORGE W. BANTA, Commissioner

ALISON L. MELNIKOVA, Town Manager
KIMBERLY B. HENSLEY, CMC, Town Clerk
BOBBIE K. TROTTER, Chief of Police
ANDREW D. GRIFFIN, Public Works Superintendent
MONICA GILLET-STALLINGS, Town Attorney

July 26, 2016

Commissioner Grady Hawkins
Henderson County Board of Commissioners
1 Historic Courthouse Square
Suite 1
Hendersonville, NC 28792

Dear Commissioner Hawkins,

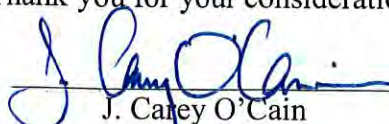
The Town of Laurel Park is negatively affected by the proposed flow control ordinance. Laurel Park contracts for residential only garbage service with a Buncombe County-based provider, and would fall under the definition of "Collector" within the proposed ordinance, including on the days when they are collecting Laurel Park residential garbage. By applying the "Collector" definition to the services provided within the corporate limits of Laurel Park, you are asking the Town, and thus our residents, to pay the County approximately \$8,600 annually in increased tipping fees versus the rate our contracted collector is currently able to secure for the Town.

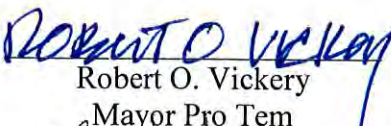
The other two municipalities which provide residential garbage collection, Hendersonville and Fletcher, are purposefully excluded from the "Collector" definition because they use Town employees for residential garbage collection, and as a result are allowed the flexibility of disposing of waste at a facility of their choice. The Town of Laurel Park has determined that it is most cost-effective for our operations to contract for this service rather than use Town employees. This choice should not be used to penalize the Town and its residents.

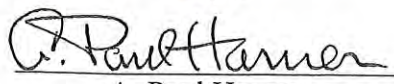
Please note the Town's contracted garbage collector dedicates two trash trucks and one recycling truck to Laurel Park residents one day a week – no outside Laurel Park waste is included with the Town's garbage.

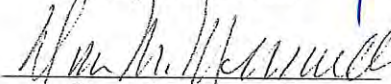
We understand that our garbage collector, Republic Services, also provides garbage collection services to businesses within Henderson County, and must be permitted by the County as provided in the new section 95-28(c). As a result, we request the second clause of the proposed new sentence in the *Collector* definition in 95-12(4) be removed so a municipality may continue to contract for garbage collection, and include within the contract the disposal of waste at the most cost effective facility available to the collector for the municipal waste.

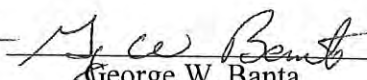
Thank you for your consideration,


J. Carey O' Cain
Mayor


Robert O. Vickery
Mayor Pro Tem


A. Paul Hansen
Commissioner


Dona M. Mennella
Commissioner


George W. Banta
Commissioner



cc: BAC
Steve
Amy
Russ
Terry

Waste Management
24 Pond Road
Asheville, North Carolina 28806

August 2, 2016

Dear Henderson County Commissioners,

As you are aware from prior communications, Waste Management (WM) opposes the flow control ordinance being considered by the Henderson County Board of Commissioners. WM understands and appreciates the budget challenges that Henderson County faces and has followed the flow control debate, remaining hopeful that the County will explore other means of raising revenue.

In Henderson County, WM has been providing comprehensive solid waste solutions for the past 20 years and currently provides daily service to over 200 county businesses. Henderson County has been supportive of business growth during our involvement in the community. However, if this proposed flow control amendment is implemented, it will have the immediate and far reaching effect of eliminating free market competition for solid waste disposal solutions in Henderson County, increasing costs to area businesses.

Under the current free market structure, Henderson County residents and businesses receive the best possible value from waste service companies. In contrast, if the proposed flow control ordinance is adopted, competition among disposal facilities will be eliminated, and the solid waste disposal industry will be transformed into a monopoly controlled by the County. The ability of hauling companies to efficiently route their collection vehicles will be eliminated. Businesses will lose their right to negotiate prices and obtain the best waste services at the best price for their needs.

WM strongly opposes the proposed flow control ordinance on grounds that it is unconstitutional and would have a number of adverse effects on Henderson County's businesses and residents. WM encourages the Board of Commissioners not to implement flow control.

If you have any questions about this issue or service concerns, please contact me via email, afairley@wm.com, or phone, 910-445-1094.

Sincerely,

A handwritten signature in blue ink that reads "Amanda Fairley". The signature is written in a cursive, flowing style.

Amanda Fairley
Sustainability Manager of the South Atlantic Area

Terry Wilson

From: Will <willvn100@gmail.com>
Date: Tuesday, September 13, 2016 9:05 AM
To: Terry Wilson
Subject: comments on transfer station

DATE: 9-13-16
TO: County Commissioners
RE: Transfer Station Regulations

The monopolization of the transfer station seems a desperate attempt to continue operation of an inefficient facility. The rationalization for this change is that the transfer station has an operational deficit of about \$500,000. The claim is that forcing haulers to use the station would eliminate the deficit by adding 20,000 tons of waste for processing at a fee of \$60/ton to produce about \$1,200,000 of additional revenue.

The station faces about a 10% deficit while charging 25% more than adjacent counties, both indicators of inefficient operation. The proposal is a classic example of government overreach, making a bad situation worse by failure to understand how enterprise works. Moreover, the County ignores the negatives of the plan in its zeal to increase revenue and its political power via monopolization and control of an essential service. What are the negatives not mentioned in public statements by County representatives?

- 1) First and foremost is the failure to control costs at the transfer station. Have any efforts been made to control costs? A private business operating at a deficit would immediately institute cost controls because continued deficits mean business failure.
- 2) The transfer station runs at a deficit even though its fees are more than 25% (Times News 7-19-16) higher than those of Polk and Buncombe Counties. Why is there about a 10% deficit (Times News 7-19-16) when the fees are 25% higher? Thus, there seems substantial room for improvement.
- 3) What are the additional costs for processing an additional 20000 tons? How much of the revenue increase of \$1,200,000 would add to the bottom line or would the additional work only increase the deficit at the inefficient facility.
- 4) What will prevent the County from raising fees above the current \$60/ton since it has a monopoly?
- 5) What will prevent haulers from passing any fee increase to residents of the County? Some haulers say their fees will increase, others say not at \$60/ton. But what happens if this inefficient monopoly decides to raise fees further?
- 6) Will the increased fees force some haulers out of business?
- 7) If the County cannot operate the facility efficiently, perhaps it should be sold to a private enterprise. Has this option been discussed?

I moved to Henderson County about five years ago because of the affordable high quality of life. My plan seemed wise until this year when the County Commissioners set in motion multiple increases in taxes and fees to support extravagant spending. A nefarious case in point is the monopolization of waste processing in the County through the County's transfer station.



September 13, 2016

Thomas H. Thompson, Chairman
Henderson County Board of Supervisors
1 Historic Courthouse Square, Suite 1
Hendersonville, NC 28792

Dear Chairman Thompson:

I am writing on behalf of the Solid Waste Association of North America (SWANA) in connection with the proposed revisions to the Henderson County solid waste ordinance, which include provisions directing waste materials generated within the county to certain disposal facilities (i.e., flow control). SWANA is the largest professional association for the waste sector in the world, with more than 8,500 members, and has a large and active chapter in North Carolina.

SWANA recognizes flow control as an effective and legitimate instrument of integrated municipal solid waste management (Technical Policy 5.2). To the extent it is permitted under applicable law, and after public discussion, including the consideration of economic, environmental and social impacts, and input from residents, businesses, and other interested parties, SWANA supports communities such as Henderson County implementing and enforcing flow control requirements without unduly interfering with the free movement of municipal solid waste and recyclables across jurisdictional boundaries.

If you have any questions, please do not hesitate to contact me at 240-494-2254 or dbiderman@swana.org

Sincerely,

David Biderman
Executive Director and CEO

Cc: Michael Stahl, SWANA NC President
Michael Brinczek, SWANA NC Board Representative
Marcus Jones, Henderson County

