

REQUEST FOR BOARD ACTION
HENDERSON COUNTY
BOARD OF COMMISSIONERS

MEETING DATE: July 17, 2024

SUBJECT: Purchase of assets of Etowah Sewer Company

PRESENTER: Charles Russell Burrell

ATTACHMENT(S): Draft asset purchase agreement

SUMMARY OF REQUEST:

Attached is a draft asset purchase agreement, under which the County would acquire all the assets of the Etowah Sewer Company, at a cost of \$400,000.00.

County staff will present further information on this matter.

BOARD ACTION REQUESTED:

Approval of the agreement

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

I move that the Board approve the agreement for the purchase of the assets of Etowah Sewer Company.

ASSET PURCHASE AGREEMENT

THIS ASSET PURCHASE AGREEMENT (the "Agreement") made and entered into this ____ day of July, 2024 (the "Execution Date"), between Etowah Sewer Company, Inc., a North Carolina corporation (the "Seller"), and the County of Henderson, a body corporate and politic of the State of North Carolina (the "Purchaser").

BACKGROUND

A. The Seller is a North Carolina corporation which carries on the business of Utility Company (sanitary sewer) in the Etowah community of Henderson County, North Carolina.

B. The Seller owns and desires to sell certain assets of its business defined herein (the "Assets") to the Purchaser, subject to any exclusions set out in this Agreement and the Purchaser desires to buy the Assets, all on the terms contained herein.

IN CONSIDERATION of the provisions contained in this Agreement and for other good and valuable consideration, the receipt and sufficiency of which consideration is acknowledged, the Parties agree as follows:

1. **Definitions:** The following definitions apply in this Agreement:
 - a. The "Assets" to be included in this Agreement include all assets of the Seller. The Assets consist of the following:
 - i. all real estate and equipment used in carrying on the business of the Seller;
 - ii. all inventory and packaging;
 - iii. all books, records and files, relevant to carrying on the Seller; and
 - iv. any and all rights (including collection and discharge permits) required for lawful operation of a sanitary sewer system, easements, records, equipment, and customer accounts.
 - v. accounts payable to the Seller from the operation of its sanitary sewer system, but not including any accounts payable to the Seller owed, received or contemplated on account of any Excluded Assets.

and do not include any Excluded Assets. All assets are to be conveyed free and clear from all liens, encumbrances or other indebtedness.

b. "Closing" means the completion of the purchase and sale of the Assets as described in this Agreement by the payment of agreed consideration, and the transfer of title to the Assets.

c. "Environmental Law" means any and all statutes, regulations, common laws or any other directives having force of law pertaining to protection of the environment including but not limited to all laws affecting the production, manufacture, storage, transport and disposal of Hazardous Materials.

d. "Hazardous Material" means any material or substance of any description that could reasonably be expected to cause harm or damage to the health of man or any other living organism.

e. "Parties" means both the Seller and the Purchaser and "Party" means any one of them.

f. "Excluded Assets" means Seller's cash, including funds in Seller's bank accounts, and any contractual rights (and duties) for development of any parcel or parcels.

2. **Sale:** Subject to the terms and conditions of this Agreement, and in reliance on the representations, warranties, and conditions set out in this Agreement, the Seller agrees to sell the Assets to the Purchaser and the Purchaser agrees to purchase the Assets from the Seller.

3. **Purchase Price:** The Purchase Price for the Assets shall be \$400,000.00.

4. **Closing:** The Closing of the purchase and sale of the Assets will take place on August 15, 2024 ("Closing Date"), at the offices of the Purchaser.

5. At Closing and upon the Purchaser paying the Purchase Price in full to the Seller, the Seller will deliver the Assets to the Purchaser. The Seller will deliver to the Purchaser possession of the Assets, in the same condition as on the Execution Date, and free and clear of any liens, charges, rights of third parties, or any other encumbrances, except those attached as a result of the Purchaser's actions.

6. At Closing and upon the Purchaser paying the Purchase Price in full to the Seller, the Seller will provide the Purchaser with duly executed forms and documents evidencing transfer of the Assets, where required including, but not limited to, bills of sale, assignments, assurances, and consents. The Seller will also co-operate with the Purchaser as needed in order to effect the required registration, recording, and filing with public authorities of the transfer of ownership of the Assets to the Purchaser.

7. **Payment:** The Purchase Price for the Assets will be paid by the Purchaser in one lump sum payment to the Seller in the form of a certified check, a teller's check or an

electronic money or funds transfer. In the case of an electronic money or funds transfer, the Seller will give notice to the Purchaser of the bank account particulars at least 5 business days prior to the Closing Date.

8. The Purchaser is responsible for paying all applicable taxes, including federal sales tax, state sales tax, duties, and any other taxes or charges payable pursuant to the transfer of the Assets from the Seller to the Purchaser.

9. **Seller's Representations and Warranties:** The Seller represents and warrants to the Purchaser that:

a. the Seller has full legal authority to enter into and exercise its obligations under this Agreement;

b. the Seller is a corporation duly incorporated or continued, validly existing, and in good standing and has all requisite authority to carry on business as currently conducted;

c. the corporate Seller, Etowah Sewer Company, Inc. has all necessary corporate power, authority and capacity to enter into this Agreement and to carry out its obligations. The execution and delivery of this Agreement, and this transaction has been duly authorized by all necessary corporate action on the part of the Seller;

d. the Seller is the absolute beneficial owner of the Assets, with good and marketable title, free and clear of any liens, charges, encumbrances or rights of others. The Seller is exclusively entitled to possess and dispose of the Assets;

e. to the best knowledge of the officers of the Seller there is no pending or anticipated claim against the Assets or against the Seller's ownership or title in the Assets or against the Seller's right to dispose of the Assets;

f. no third-party contract is outstanding that could result in a claim against or affecting the Assets in whole or in part either now or in the future;

g. the Seller does not have any outstanding contracts, agreements, or commitments of any kind, written or oral, with any third party regarding the Assets, except for any material contracts described in, and/or attached to this Agreement. The Seller represents and warrants that no material default or breach exists with regard to any presently outstanding material contract;

h. execution of this Agreement will not hinder or unfairly disadvantage any pre-existing creditor;

i. except as otherwise provided in this Agreement, there has been no act or omission by the Seller that would give rise to any valid claim relating to a brokerage commission, finder's fee or other similar payment;

j. the Seller is a resident of the United States for the purposes of the Internal Revenue Code;

k. the Seller has withheld all amounts required to be withheld under income tax legislation and has paid all amounts owing to the proper authorities;

l. the Seller is not bound by any written or oral pension plan or collective bargaining agreement or obligated to make any contributions under any retirement income plan, deferred profit-sharing plan or similar plan;

m. the Seller will not dismiss any current employees or hire any new employees, or substantially change the role or title of any existing employees, provide unscheduled or irregular increases in salary or benefits to employees, or institute any significant changes to the terms of any employee's employment, after signing this Agreement, unless the Purchaser provides written consent;

n. the Seller will cooperate with the Purchaser to assist in the existing operations contract for the sanitary sewer facilities;

o. there are no claims threatened or pending against the Seller by any current or past employee relating to any matter arising from or relating to the employment of the employee;

p. the Assets, while owned by the Seller, have been maintained at all times in accordance with standard industry practice. The Seller further warrants that all tangible assets are in good working order;

q. the Seller is operating in accordance with all applicable laws, rules, and regulations of the jurisdictions in which it is carried on. In compliance with such laws, the Seller has duly licensed, registered, or qualified the Seller with the appropriate authorities and agencies;

r. the Seller has not produced, manufactured, stored, transported or disposed of any Hazardous Materials of any kind and to the best knowledge of the Seller, no discharge, leakage or release of Hazardous Materials, whether accidental or otherwise, has occurred for which the Purchaser could ultimately become liable. There are no ongoing, pending, threatened or anticipated civil or criminal actions, enquiries or investigations with regard to the breach of any applicable Environmental Laws;

s. the Seller maintains insurance policies on the Assets and such policies are in full force and effect and of an adequate value as would be reasonable in its

industry. The Seller has neither defaulted under these insurance policies, whether as a result of failure to pay premiums or due to any other cause, nor has the Seller failed to give notice or make a claim under these insurance policies in a timely manner;

t. to the best knowledge of the officers of the Seller, the conduct of the Seller does not infringe on the patents, trademarks, trade names, or copyrights, whether domestic or foreign, of any other person, firm or corporation;

u. the Seller owns or is licensed to use all necessary software and it can continue to use any and all computerized records, files and programs after the Closing Date in the same manner as before the Closing Date;

v. the Seller has filed all tax reports and returns required in the operation of its business and has paid all taxes owed to all taxing authorities, including foreign taxing authorities, except amounts that are being properly contested by the Seller, the details of this contest having been provided to the Purchaser;

w. this Agreement has been duly executed and delivered by the Seller and constitutes a legal and binding obligation of the Seller, enforceable in accordance with its terms, except as enforcement may be limited by bankruptcy and insolvency, by other laws affecting the rights of creditors generally, and by equitable remedies granted by a court of competent jurisdiction; and

x. the Seller's sanitary sewer system is in compliance with all provisions of all North Carolina issued permits for the system's operation.

y. the conveyance of all real property hereunder will be by general warranty deed.

10. The representations and warranties given in this Agreement are the only representations and warranties. No other representation or warranty, either expressed or implied, has been given by the Seller to the Purchaser, including, without limitation, any representations or warranties regarding the merchantability of the Assets or their fitness for a particular purpose.

11. The Seller warrants to the Purchaser that each of the representations and warranties made by it is accurate and not misleading at the Closing Date. The Seller acknowledges that the Purchaser is entering into this Agreement in reliance on each representation and warranty.

12. The Seller's representations and warranties will survive the Closing Date of this Agreement.

13. Where the Purchaser has a claim against the Seller relating to one or more representations or warranties made by the Seller, the Seller will have no liability to the

Purchaser unless the Purchaser provides notice in writing to the Seller containing full details of the claim on or before the third anniversary of the Closing Date.

14. Where the Purchaser has a claim against the Seller relating to one or more representations or warranties made by the Seller, and the Purchaser is entitled to recover damages from a third party then the amount of the claim against the Seller will be reduced by the recovered or recoverable amount less all reasonable costs incurred by the Purchaser in recovering the amount from the third party.

15. **Purchaser's Representations and Warranties:** The Purchaser represents and warrants to the Seller the following:

a. the Purchaser has full legal authority to enter into and exercise its obligations under this Agreement;

b. the corporate Purchaser has all necessary corporate power, authority and capacity to enter into this Agreement and to carry out its obligations under this Agreement. The execution and delivery of this Agreement, and this transaction has been duly authorized by all necessary corporate action on the part of the corporate Purchaser;

c. the Purchaser has funds available to pay the full Purchase Price and any expenses accumulated by the Purchaser in connection with this Agreement and the Purchaser has not incurred any obligation, commitment, restriction, or liability of any kind, absolute or contingent, present or future, which would adversely affect its ability to perform its obligations under this Agreement;

d. the Purchaser has not committed any act or omission that would give rise to any valid claim relating to a brokerage commission, finder's fee, or other similar payment;

f. this Agreement has been duly executed by the Purchaser and constitutes a legal and binding obligation of the Purchaser, enforceable in accordance with its terms, except as enforcement may be limited by bankruptcy and insolvency, by other laws affecting the rights of creditors generally, and by equitable remedies granted by a court of competent jurisdiction; and

g. the Purchaser has no knowledge that any representation or warranty given by the Seller in this Agreement is inaccurate or false.

16. The representations and warranties given in this Agreement are the only representations and warranties. The Purchaser has given no other representation or warranty, either expressed or implied, to the Seller.

17. The Purchaser warrants to the Seller that each of the representations and warranties made by it is accurate and not misleading at the date of Closing. The Purchaser

acknowledges that the Seller is entering into this Agreement in reliance on each representation and warranty.

18. The Purchaser's representations and warranties will survive the Closing Date of this Agreement.

19. Where the Seller has a claim against the Purchaser relating to one or more representations and warranties made by the Purchaser, the Purchaser will have no liability to the Seller unless the Seller provides notice in writing to the Purchaser containing full details of the claim on or before the third anniversary of the Closing Date.

20. Where the Seller has a claim against the Purchaser relating to one or more representations or warranties made by the Purchaser, and the Seller is entitled to recover damages from a third party then the amount of the claim against the Purchaser will be reduced by the recovered or recoverable amount less all reasonable costs incurred by the Seller in recovering the amount from the third party.

21. **Conditions Precedent to be performed by Seller:** The obligation of the Purchaser to complete the purchase of the Assets under this Agreement is subject to the satisfaction of the following conditions precedent by the Seller, on or before the Closing Date, each of which is acknowledged to be for the exclusive benefit of the Purchaser and may be waived by the Purchaser entirely or in part:

a. all of the representations and warranties made by the Seller in this Agreement will be true and accurate in all material respects on the Closing Date;

b. the Seller will obtain and complete any and all forms, documents, consents, approvals, registrations, declarations, orders, and authorizations from any person or governmental or public body that are required of the Seller for the proper execution of this Agreement and transfer of the Assets to the Purchaser;

c. no substantial damage to or alteration of the Assets that would adversely affect their value will occur between the date this Agreement is signed and the Closing Date;

d. the Seller will have obtained any necessary consents for assigning any leases to the Purchaser as well as providing estoppel certificates from such owners or landlords showing that there are no arrears of rent, no breaches under such leases and the amount of the security deposits held by such third parties;

e. the Seller will execute and deliver bills of sale for the Assets in favor of the Purchaser;

f. the Seller will provide the Purchaser with complete information concerning the operation of the Seller, in order to put the Purchaser in a position to carry on in the place of the Seller; and

g. the parties will have obtained permission for conveyance of all North Carolina issued permits for operation of a sanitary sewer system from the Seller to the County of Henderson, or for the granting of new permits for the ownership and operation of the sanitary sewer system, the assets of which are conveyed hereunder, by the County of Henderson.

22. **Conditions Precedent not satisfied:** If either Party fails to satisfy any of its conditions precedent as set out in this Agreement on or before the Closing Date and that condition precedent was not waived, then this Agreement will be null and void and there will be no further liability as between the Parties.

23. **Disclosure:** Upon the reasonable request of the Purchaser, the Seller will, from time to time, allow the Purchaser and its agents, advisors, accountants, employees, or other representatives to have reasonable access to the premises of the Seller and to all of the books, records, documents, and accounts of the Seller, during normal business hours, between the date of this Agreement and the Closing Date, in order for the Purchaser to confirm the representations and warranties given by the Seller in this Agreement.

24. **Employees:** Other than the operator contract, the Purchaser will not be offering employment to any existing officer or employee of the Seller (the "Employees"). All individuals who are officers or employees of the Seller up to and including the Closing Date will remain the full responsibility of the Seller. Any individual hired by the Seller after the Closing Date will be the sole responsibility of the Seller.

25. The Seller will deliver to the Purchaser prior to the Closing Date, resignations of all Employees of the Seller, each such resignation will be effective on the Closing Date. The Seller will pay all Employee compensation incurred by it up to and including the Closing Date including all salaries, benefits, bonuses including share bonuses and share options and any other compensation owing to the Employees up to and including the Closing Date. The Seller will be responsible for all severance benefits, vacation days, sick days, personal days and other compensated time off accrued by all Employees up to and including the Closing Date.

26. The Seller is in compliance with all applicable foreign and domestic statutory rules and regulations respecting employment and employment practices and has withheld and reported all amounts required by law with respect to wages and salaries and the Seller is not liable for any accrued taxes or penalties and is not liable or in arrears to any government pension, social security or unemployment insurance authority. The Seller indemnifies the Purchaser for any future liabilities relating to employment and employment practices where the subject of the liability occurred prior to or on the Closing Date.

27. **Non-Assumption of Liabilities:** It is understood and agreed between the Parties that the Purchaser is not assuming and will not be liable for any of the liabilities, debts or obligations of the Seller arising out of the ownership or operation of the Seller prior to and including the Closing Date. Notwithstanding any other provision in this Agreement,

it is expressly understood and agreed that there is no conveyance by the Seller or assumption by the Purchaser of any rights, duties or obligations of the Seller arising from any agreement the Seller may have with any current or future owners or developers of property now or formerly used as the Etowah Valley Golf & Resort.

28. The Seller will indemnify and save harmless the Purchaser, its officers, directors, employees, agents, and shareholders from and against all costs, expenses, losses, claims, and liabilities, including reasonable legal fees and disbursements, or demands for income, sales, excise or other taxes, suffered or incurred by the Purchaser or any of the above mentioned persons arising out of the ownership or operation of the Seller prior to and including the Closing Date.

29. **Transfer of Third-Party Contracts:** This Agreement is not to be construed as an assignment of any third party contract from the Seller to the Purchaser if the assignment would be a breach of that third party contract. Further, no third party contract of the Seller will be assumed by the Purchaser except in a separate written document executed by the Purchaser.

30. The Purchaser will be solely responsible for acquiring new contracts with third parties where the existing contracts are not legally assignable from the Seller to the Purchaser.

31. Notwithstanding any other provision in this Agreement to the contrary, the Seller will not be liable for any losses, costs or damages of any kind including loss of revenue or decrease in value of the Seller resulting from the failure of the Purchaser to acquire any third party contracts.

32. **Notices:** Any notices or deliveries required in the performance of this Agreement will be deemed completed when hand-delivered, delivered by agent, or 7 days after being placed in the post, postage prepaid, to the Parties at the addresses contained in this Agreement or as the Parties may later designate in writing.

33. The Parties agree to pay all their own costs and expenses in connection with this Agreement.

34. The Parties acknowledge that this Agreement is reasonable, valid, and enforceable; however, if any part of this Agreement is held by a court of competent jurisdiction to be invalid, it is the intent of the Parties that such provision be reduced in scope only to the extent deemed necessary to render the provision reasonable and enforceable and the remainder of the provisions of this Agreement will in no way be affected or invalidated as a result.

35. Where any provision in this Agreement is found to be unenforceable, the Purchaser and the Seller will then make reasonable efforts to replace the invalid or unenforceable provision with a valid and enforceable substitute provision, the effect of

which is as close as possible to the intended effect of the original invalid or unenforceable provision.

36. This Agreement will be governed by and construed in accordance with the laws of the State of North Carolina.

37. The courts of the State of North Carolina will have jurisdiction to settle any dispute arising out of or in connection with this Agreement.

38. This Agreement contains all terms and conditions agreed to by the Parties. Statements or representations which may have been made by any Party to this Agreement in the negotiation stages of this Agreement may in some way be inconsistent with this final written Agreement. All such statements are declared to be of no value to either Party. Only the written terms of this Agreement will bind the Parties.

39. This Agreement may only be amended or modified by a written instrument executed by all of the Parties.

40. A waiver by one Party of any right or benefit provided in this Agreement does not infer or permit a further waiver of that right or benefit, nor does it infer or permit a waiver of any other right or benefit provided in this Agreement.

41. This Agreement will not be assigned either in whole or in part by any Party without the written consent of the other Party.

42. This Agreement will pass to the benefit of and be binding upon the Parties' respective heirs, executors, administrators, successors, and permitted assigns.

43. The clauses, paragraphs, and subparagraphs contained in this Agreement are intended to be read and construed independently of each other. If any part of this Agreement is held to be invalid, this invalidity will not affect the operation of any other part of this Agreement.

44. All of the rights, remedies and benefits provided in this Agreement will be cumulative and will not be exclusive of any other such rights, remedies and benefits allowed by law or equity.

45. Time is of the essence in this Agreement.

46. This Agreement may be executed in two (2) counterparts.

47. "Due Diligence": The Purchaser shall have the right to review and all any contracts of the Seller, and further investigate the same, and further to examine (during reasonable times) the Assets. During the period specified in this paragraph, the Purchaser shall have the right to terminate this Agreement for any reason or no reason. The time by which the Purchaser must exercise this right to terminate is 5:00 p.m. on June 4, 2024.

Purchaser and Seller each expressly waive any right that they may have to deny the right to conduct this Due Diligence provisions or to assert any defense as to the enforceability of this Contract based on the absence or alleged insufficiency of any Due Diligence fee, it being the intent of the parties to create a legally binding contract for the purchase and sale of the Assets.

48. **Condition Precedent to Purchaser's Obligation:** It shall be an express condition precedent that the Purchaser's Board of Commissioners ratify this Agreement on an open meeting at the Board's meeting on July 17, 2024.

IN WITNESS WHEREOF the Parties have executed the same under seal, the date and year stated above.

ETOWAH SEWER COMPANY, INC.

By: _____
President

Attest:

Corporate Secretary

[Corporate Seal]

COUNTY OF HENDERSON

By: _____
Chair, Henderson County Board of Commissioners

Attest:

Clerk to the Board of Commissioners

[County Seal]