

SUBLEASE

by and between

THE BUNCOMBE COUNTY BOARD OF EDUCATION

as Sublessor

and

ENKA-CANDLER FIRE & RESCUE DEPARTMENT, INC.

as Sublessee

Dated as of September 1, 2018

SUBLEASE

THIS SUBLEASE, dated as of July __, 2018, and entered into by and between the **BUNCOMBE COUNTY BOARD OF EDUCATION**, a body politic and corporate and local educational agency of the State of North Carolina, as sublessor (the "*Board of Education*"), and **ENKA-CANDLER FIRE & RESCUE DEPARTMENT, INC.**, a nonprofit corporation organized under the laws of the State of North Carolina for the purpose of providing fire protection and other emergency services pursuant to Chapter 69 of the North Carolina General Statutes, (the "*Department*").

WITNESSETH:

WHEREAS, the Board of Education and the County of Buncombe (the "*County*") cooperated in a plan to finance and carry out the construction of the Enka Intermediate School (the "*Property*"), which Property is shown on that plat recorded in Plat Book 142, page 86, and which is described in that deed in the Office of the Register of Deeds for Buncombe County;

WHEREAS, as required to finance the project, the County holds fee simple title to the Property, subject to the Board of Education's leasehold interest in the same, a memorandum of which lease is recorded in Deed Book 5300 at page 591 in Officer of the Register of Deeds for Buncombe County (the "*Lease*"); and

WHEREAS, the Department desires to sublease a portion of the Property, as shown on Exhibit A attached hereto (the "*Subleased Property*") from the Board of Education, and the Board of Education is willing to sublease the Subleased Property to the Department, subject to the terms of the Lease and this Sublease;

NOW, THEREFORE, for and in consideration of the mutual promises and covenants herein contained, the parties hereto agree as follows:

ARTICLE I DEFINITIONS; RULE OF CONSTRUCTION

All capitalized terms used in this Sublease have the meanings specified below, unless the context clearly requires otherwise:

"*Board Representative*" means the Chairman of the Board of Education, the Superintendent of the Buncombe County Schools or any other person at the time designated, by a written certificate furnished to the Department and signed on the Board of Education's behalf by its Chairman, to act on the Board of Education's behalf for the purpose of performing any act under this Sublease.

"*Conveyance Date*" means the date that this Sublease is fully executed by the parties.

"*Department Representative*" means the Department's President, or any person at the time designated, by a written certificate furnished to the Board of Education and signed on the Department's behalf by the Chairman of its Board of Directors, to act on the Department's behalf for the purpose of performing any act under this Sublease.

"*Event of Default*" means one or more events of default as defined in Section 12.1.

“*Project*” means the construction by and at the sole expense of the Department of a fire department substation to be constructed on the Subleased Property, substantially as shown on Exhibit B attached hereto, and as further defined in Article 7 of this Sublease.

“*Sublease*” means this Sublease, as it may be duly amended.

“*Sublease Term*” means the term of this Sublease as determined under Article IV.

“*Sublease Year*” means, initially, from the commencement of this Sublease through the succeeding June 30, and, thereafter, means the twelve-month period of each year commencing on July 1 and ending on the next June 30.

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

ARTICLE II REPRESENTATIONS, COVENANTS AND WARRANTIES

The Board of Education and the Department each represent, covenant and warrant for the other’s benefit as follows:

(a) Neither the execution and delivery of this Sublease, nor the fulfillment of or compliance with its terms and conditions, nor the consummation of the transactions contemplated hereby, results or will result in a breach of the terms, conditions and provisions of any agreement or instrument to which either is now a party or by which either is bound, or constitutes a default under any of the foregoing.

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

ARTICLE III DEMISING CLAUSE

The Board of Education hereby subleases the Subleased Property to the Department and the Department hereby subleases the Subleased Property from the Board of Education, in accordance with the provisions of this Sublease, to have and to hold for the Sublease Term.

ARTICLE IV SUBLEASE TERM

Section 4.1. *Commencement.* The Sublease Term commences on the Conveyance Date.

Section 4.2 *Termination.* The Sublease Term terminates on the earlier of the following dates or events:

- (a) the expiration of fifty (50) Sublease Years at midnight Eastern Daylight Time on June 30, 2068; or
- (b) an Event of Default and termination of this Sublease under Article XII.

**ARTICLE V
QUIET ENJOYMENT; TRANSFER**

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

The provisions of this Section 5.1 are subject to rights to inspect the Subleased Property granted to parties under a contract for financing, in effect and applicable to the Property from time to time, to the right hereby reserved to the County to inspect the Property at any reasonable time pursuant to the Lease, and to the right of the Board of Education to inspect the Subleased Property at any reasonable time.

Section 5.2 *Subordination and Attornment.* Pursuant to the Lease, the Board of Education's interest in the Property is subordinate to the security interest granted by the County for purposes of financing; the Department's interest in the Subleased Property is and shall be similarly subordinated to such liens. The Department shall not unreasonably withhold its consent to execute agreements of subordination and attornment as required to perfect the County's security interest existing at the time of this Sublease, or subsequently entered into by the County.

**ARTICLE VI
CONSIDERATION FOR SUBLEASE**

Section 6.1 *Use of Subleased Property; Assumption of Obligations.* The Department hereby agrees to use the Subleased Property in furtherance of fire prevention and other emergency services rendered to the public, in fulfillment of its obligations and purposes. In addition, in consideration of its rights under this Sublease, the Department undertakes the obligations imposed on it hereunder, including those imposed by Section 8.1.

**ARTICLE VII
CONSTRUCTION AND OTHER ACCOMPLISHMENT OF THE
PROJECT AND CERTAIN RELATED COVENANTS**

Section 7.1 *Construction and Other Accomplishment of the Project.* The Department shall construct the Project upon the Subleased Property at its sole expense and risk. The Project shall be constructed so as to be harmonious with the Enka Intermediate School building and the surrounding area, substantially as shown in Exhibit B. The Department shall inform the Board of Education of material changes in the planned appearance of the Project such as the quality or color of exterior finishes, which

the Board of Education shall in good faith review and approve, its approval not to be unreasonably withheld. As displayed on Exhibit B, the Project may overlap the area of a 70-foot-wide right-of-way easement for a transmission line, now or formerly belonging to Progress Energy, recorded in Deed Book 858, page 81 in the Buncombe County Public Registry. The Department shall be solely responsible for ensuring that the Project can be constructed without interfering with the said easement.

Section 7.2 Construction Process and Insurance. The Department shall cause the general contractor and the subcontractors selected for the construction of the Project to carry the Project out in a safe and expeditious manner, with observance of and compliance with all applicable federal, state, and local safety laws and regulations, and in such a manner and at such times as the construction of the Project will not interfere in any way with the Board of Education's use of the Property. In addition to such other insurance policies as the Department shall determine in its sole discretion are required or advisable, the Department shall require the general contractor to carry in force at all times during the construction of the Project a builder's risk insurance policy naming the Department as principle insured. In the event that the Department abandons or otherwise fails to complete the Project within the time periods set out in section 12.1(c), then and either such event, the Board of Education may in its sole discretion 1) require the Department at its sole expense to remove all improvements to the Property and restore it to its original condition, 2) cause such improvements to be removed and the Property restored to its original condition, at the sole expense of the Department, or 3) cause the Project to be completed, at the sole expense of the Department.

Section 7.3 Jessica Lunsford Act Compliance. The Board of Education requires that all contractors whose personnel may have direct interaction with students to conduct an annual check of such employees on the N.C. Sex Offender and Public Protection Registration Program, the N.C. Sexually Violent Predator Registration Program, and the National Sex Offender Registry. As a term of this Sublease, the Department agrees to require any contractors and/or subcontractors working on the Project to perform such annual checks on their employees and report the results of the same to the Superintendent of Schools or his designee. The Board of Education prohibits any personnel listed on such registries from being on any property owned or operated by the Board of Education and from having direct interaction with students.

Section 7.4 Commencement and Completion of the Project. The Department agrees to commence the Project within a reasonable amount of time after the Commencement Date of this Sublease, and thereafter to diligently pursue the completion of the Project within a reasonable amount of time. Failure to either commence or complete the Project may be an event of default pursuant to Article XII of this Sublease.

Section 7.5 Financing the Project; No Pledge of Subleased Property. The Department is not authorized to and shall not encumber, pledge, hypothecate, suffer or permit liens to attach to, or in any other way grant or convey any security interest in the Subleased Property, whether for purposes of financing the Project or for any reason thereafter. Any lien resulting from the Project or any other of the Department's use of the Property, including without limitation mechanic's or materialman's liens, shall be promptly paid and settled by the Department, unless and except in the event that the Department has a good faith legal basis to deny or dispute the claim of lien, in which event the Department shall supply the Board of Education with an opinion of counsel in the same manner as described in section 7.5(c). The Department shall reimburse the Board of Education for any expense incurred by the Board of Education in order to discharge or remove any such mortgage, pledge, lien, charge, encumbrance or claim. The Department has executed an acknowledgment of its understanding and acceptance of this provision, which is attached hereto and made a part hereof as Exhibit C.

Section 7.6 Maintenance, Repair, Taxes and Assessments.

(a) *Maintenance; Repair.* The Department shall use, or cause to be used, the Subleased Property in a careful and proper manner, in compliance with all applicable laws and regulations, and, at its sole expense, shall service, repair, maintain and insure, or cause to be serviced, repaired, maintained and insured, the Subleased Property so as to keep the Subleased Property in good condition, repair, appearance and working order for the purposes intended, ordinary wear and tear excepted.

(b) *Taxes and Assessments.* The Department shall also pay, or cause to be paid, all taxes and assessments, as applicable, including, but not limited to, utility charges, of any type or nature levied, assessed or charged against any portion of the Subleased Property, provided that with respect to special assessments or other governmental charges that may lawfully be paid in installments over a period of years, the Department shall be obligated to pay only such installments as are required to be paid as and when the same become due.

(c) *Contests.* The Department may, at its sole expense and in its name, in good faith contest any such taxes, assessments, utility and other charges, as applicable, and, if any such contest occurs, may permit the taxes, assessments or other charges so contested to remain unpaid during the period of such contest and any appeal therefrom, but before such nonpayment it shall consult with the Board of Education and, if the Board of Education requires, furnish the Board of Education with the opinion of a counsel acceptable to the Board of Education, to the effect that, by nonpayment of any such items, the interests of the County and Board of Education in the Leased Property will not be materially endangered and that the Leased Property will not be subject to loss or forfeiture. The Board of Education will cooperate fully in such contest on the request and at the expense of the Department.

Section 7.7 *Modification of Subleased Property, Liens.*

(a) *Additions, Modifications and Improvements.* Except for the Project and accessory structures thereof, the Department shall not make modifications to the Subleased Property without the prior written consent of the Board of Education, which consent shall not be unreasonably withheld. Any additions, modifications, or improvements so authorized shall be made at the Department's sole expense, and shall thereafter comprise part of the Subleased Property and be subject to the provisions of this Sublease. Such additions, modifications and improvements shall not in any way damage any portion of the Subleased Property or cause it to be used for purposes other than those authorized under the provisions of this Sublease, or State and federal law or in any way which would cause the interest components of the Installment Payments made by the County pursuant to its financing arrangements to be includable in gross income for purposes of federal income taxation under Section 103 of the Internal Revenue Code of 1986, as amended.

ARTICLE VIII ADDITIONAL OBLIGATIONS

Section 8.1 *General Liability and Casualty.* The Department agrees to maintain general liability and casualty insurance with respect to the Subleased Property.

Section 8.2 *Department's General Covenant.* The Department further undertakes not to take or omit to take any action the taking or omission of which would cause the County to be in default in any manner under applicable financing contracts, including as applicable making any use of the Subleased Property that would cause the County's obligations to make installment payments under such contracts to be "*private activity bonds*" within the meaning of the Internal Revenue Code of 1986, as

amended. If the Department takes or omits to take any such action, then the Department shall proceed with all due diligence to take such action as may be necessary to cure such default.

Section 8.3 *Board of Education's Cooperation.* The Board of Education shall cooperate fully with the Department in filing any proof of loss or taking any other action under this Sublease. The Department shall not voluntarily settle, without first obtaining consent to the settlement from the County and the Board of Education, any proceeding arising out of any insurance claim with respect to the Subleased Property without the other's written consent.

Section 8.4 *Advances; Performance of Obligations.* If the Department fails to pay any amount required to be paid by it under this Sublease, or fails to take any other action required of it under this Sublease, then the Board of Education may (but is under no obligation to) pay such amount or perform such other obligation. The Department agrees to reimburse the Board of Education for any such payment or for its costs incurred in connection with performing such other obligation.

ARTICLE IX DISCLAIMER OF WARRANTIES; OTHER COVENANTS

Section 9.1 *Disclaimer of Warranties.* THE BOARD OF EDUCATION MAKES NO WARRANTY OR REPRESENTATION, EITHER EXPRESS OR IMPLIED, AS TO THE VALUE, DESIGN, CONDITION, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OR FITNESS FOR A PARTICULAR USE OF THE SUBLEASED PROPERTY OR ANY PART THEREOF OR ANY OTHER REPRESENTATION OR WARRANTY WITH RESPECT TO THE SUBLEASED PROPERTY OR ANY PART THEREOF. The Board of Education is not liable for any direct or indirect, incidental, special or consequential damage in connection with or arising out of this Sublease or the existence, furnishing, functioning or use by anyone of any item, product or service provided for herein.

Section 9.2 *Further Assurances; Corrective Instruments.* The Board of Education and the Department agree that they will, from time to time, execute, acknowledge and deliver, or cause to be executed, acknowledged and delivered, such supplements hereto and such further instruments as may reasonably be required for correcting any inadequate or incorrect description of the Subleased Property hereby leased or intended so to be, or for otherwise carrying out the intention hereof.

Section 9.3 *Board of Education and Department Representatives.* Whenever under the provisions hereof the approval of the Board of Education or the Department is required to take some action at the request of the other, unless otherwise provided, such approval or such request is to be given for the Board of Education by the Board Representative and for the Department by the Department Representative, and the Board of Education and the Department are authorized to act on any such approval or request of such representative of the other.

Section 9.4 *Compliance with Requirements.* During the Sublease Term, the Board of Education and the Department shall observe and comply promptly with all current and future orders of all courts having jurisdiction over the Subleased Property or any portion thereof (or be diligently and in good faith contesting such orders), and all current and future requirements of all insurance companies' written policies covering the Subleased Property or any portion thereof.

ARTICLE X TITLE TO SUBLEASED PROPERTY; LIMITATIONS ON ENCUMBRANCES

The Department has no right, title or interest in the Subleased Property or any additions and modifications to or replacements of any portion of the Subleased Property, except as expressly set forth in this Sublease.

**ARTICLE XI
SUBLEASING AND INDEMNIFICATION**

Section 11.1 *Subleasing.* The Department may not assign or further sublease the Subleased Property, in whole or in part.

Section 11.2 *Indemnification.* The Department agrees to indemnify and save the Board of Education and the County, their respective officers, employees and agents harmless against and from all claims by or on behalf of any person, firm, corporation or other legal entity arising from the operation or management of the Subleased Property by the Department during the Sublease Term, including any claims arising from: (a) any condition of the Subleased Property, (b) any act of negligence of the Department or of any of its volunteers, agents, contractors or employees or any violation of law by the Department or breach of any covenant or warranty by the Department hereunder; or (c) the incurrence of any cost or expense in connection with the construction and other accomplishment of the Project. The Department shall be notified promptly of any action or proceeding brought in connection with any claims arising out of circumstances described in (a), (b) or (c) above.

**ARTICLE XII
EVENTS OF DEFAULT**

Section 12.1 *Events of Default.* Each of the following is an “*Event of Default*” under this Sublease and the term “*Default*” means, whenever it is used in this Sublease, any one or more of the following events:

(a) The Department’s or the Board of Education’s failure to observe and perform any covenant, condition or agreement on its part to be observed or performed for a period of 30 days after written notice specifying such failure and requesting that it be remedied has been given to the defaulting party by the non-defaulting party, unless the non-defaulting party agrees in writing to an extension of such time before its expiration; but if the failure stated in such notice cannot be corrected within the applicable period, the non-defaulting party shall not unreasonably withhold its consent to an extension of such time if corrective action is instituted by the defaulting party within the applicable period and diligently pursued until such failure is corrected and, further, if by reason of any event or occurrence constituting force majeure the defaulting party is unable in whole or in part to carry out any of its agreements contained herein (other than its obligations contained in Section 6.2 or 8.1 hereof), the defaulting party shall not be deemed in default during the continuance of such event or occurrence.

(b) The dissolution or liquidation of the Department or the Board of Education, or the voluntary initiation by the Department or the Board of Education of any proceeding under any federal or state law relating to bankruptcy, insolvency, arrangement, reorganization, readjustment of debt or any other form of debtor relief, or the initiation against the Department or the Board of Education of any such proceeding which shall remain undismissed for 60 days, or the entry by the Department or the Board of Education into an agreement of composition with creditors or the Department or the Board of Education’s failure generally to pay its debts as they become due.

(c) The failure of the Department to diligently pursue construction of the Project, which construction shall commence within one (1) year of the Conveyance Date, and which shall be completed within two (2) years thereafter.

Section 12.2 Remedies on Default. Whenever any Event of Default has happened and is continuing, the non-defaulting party may terminate this Sublease or take whatever action at law or in equity may appear necessary or desirable, including the appointment of a receiver, to collect the amounts then due, or to enforce performance and observance of any obligation, agreement or covenants under this Sublease.

Section 12.3 No Remedy Exclusive. No remedy herein conferred on or reserved is intended to be exclusive, and every such remedy is cumulative and in addition to every other remedy given hereunder and every remedy now or hereafter existing at law or in equity. No delay or omission to exercise any right or power accruing on any default impairs any such right or power, and any such right and power may be exercised from time to time as may be deemed expedient. It is not necessary to give any notice in order to be entitled to exercise any remedy reserved in this Article XII, other than such notice as may be required in this Article XII.

Section 12.4 Waivers. If any agreement contained herein is breached by either party and thereafter waived by the other party, such waiver is limited to the particular breach so waived and will not be deemed to waive any other breach hereunder.

Section 12.5 Waiver of Appraisement, Valuation, Stay, Extension and Redemption Laws. The Department and the Board of Education agree, to the extent permitted by law, that in the case of a termination of the Sublease Term by reason of an Event of Default, neither the Department nor the Board of Education nor any one claiming through or under either of them shall or will set up, claim or seek to take advantage of any appraisement, valuation, stay, extension or redemption laws now or hereafter in force in order to prevent or hinder the enforcement of any remedy provided hereunder; and the Department and the Board of Education, for themselves and all who may at any time claim through or under either of them, each hereby waives, to the full extent that it may lawfully do so, the benefit of such laws.

ARTICLE XIII MISCELLANEOUS

Section 13.1 Notices. All notices, certificates or other communications hereunder are sufficiently given if given by United States mail in certified form, postage prepaid, and will be deemed to have been received five business days after deposit in the United States mail in certified form, postage prepaid, as follows:

(a) If intended for the Board of Education, addressed to it at the following address:

Buncombe County Board of Education
175 Bingham Road
Asheville, NC 28806
Attention: Superintendent

(b) If intended for the Department, addressed to it at the following address:

Enka-Candler Fire & Rescue Department, Inc.
PO Box 340

Candler, NC 28715
Attention: President

Section 13.2 *Binding Effect.* This Sublease is binding on and inures to the benefit of the Department and the Board of Education, subject, however, to the limitations contained in Article XI.

Section 13.3 *Net Lease.* This Sublease is a “*net lease,*” and the Department shall pay absolutely net during the Sublease Term all other payments required hereunder, free of any deductions, and without abatement or setoff.

Section 13.4 *Payments Due on Non-Business Days.* If the date for making any payment or the last day for performance of any act or the exercising of any right, as provided in this Sublease, is not a business day, such payment may be made or act performed or right exercised on the next succeeding day that is a business day with the same force and effect as if done on the nominal date provided in this Sublease.

Section 13.5 *Severability.* If any provision of this Sublease, other than the requirement of the Board of Education to provide quiet enjoyment of the Subleased Property, is held invalid or unenforceable by any court of competent jurisdiction, such holding shall not invalidate or render unenforceable any other provision hereof.

Section 13.6 *Execution in Counterparts.* This Sublease may be simultaneously executed in several counterparts, each of which is an original and all of which constitute but one and the same instrument.

Section 13.7 *Applicable Law.* This Sublease is governed by and to be construed in accordance with the laws of the State of North Carolina.

Section 13.8 *Captions.* The captions or headings herein are for convenience only and in no way define, limit or describe the scope or intent of any provisions or sections of this Sublease.

Section 13.9. *Amendments and Further Instruments.* The Board of Education and the Department may, from time to time, execute and deliver such amendments to this Sublease and such further instruments as may be required or desired for carrying out the expressed intention of this Sublease, to the extent such amendments are in compliance with contracts pertaining to use of the Subleased Property for financing purposes, if any.

Section 13.10. *Memorandum of Sublease.* The Board of Education and the Department shall, on or before the Conveyance Date, file this Sublease or a memorandum of this Sublease legally sufficient to comply with the relevant provisions of the North Carolina General Statutes with the Buncombe County Register of Deeds.

Section 13.11 *Effective Date.* This Sublease is effective as of the Conveyance Date.

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

EXHIBIT A

LEGAL DESCRIPTION OF THE SITE

BEING and consisting of that 2.43 acre portion of the Enka Intermediate School Property conveyed by the City of Asheville to the County of Buncombe by that deed dated July 8, 2014, recorded in Deed Book 5223, pages 1255-1256 in the Office of the Register of Deeds for Buncombe County, to which reference is hereby made for a more complete and accurate description.

The above described parcel is shown on that survey plat entitled "Recombination Survey for Buncombe County Board of Education," recorded in Plat Book 142, page 86 in the Office of the Register of Deeds for Buncombe County.

Together with and subject to nonexclusive easements for the use of Asheville Commerce Parkway and Jacob Holm Way for ingress, egress and regress to and from Sand Hill Road, as the said roadways are currently constructed.

Subject to easements of record for road rights-of-way easements, sidewalks, and public utilities.