

**USAGE AND OPERATING AGREEMENT BETWEEN THE COUNTY OF BUNCOMBE
AND ENKA YOUTH SPORTS ORGANIZATION, INC.**

THIS USAGE AND OPERATING AGREEMENT is made and entered into this ____ day of March, 2019 by and between the County of Buncombe, a body politic and corporate of the State of North Carolina (the "County") and the Enka Youth Sports Organization, a North Carolina non-profits corporation (herein sometimes EYSO").

WITNESSETH

WHEREAS, on or about September 2, 2014, Fletcher Partners, Inc. presented, via part owner and board member Martin Lewis, plans to the County, acting by and through its duly elected Board of Commissioners, for a proposed sports complex and a greenway on a portion of the old American Enka plant site and the Board of Commissioners agreed to make \$1.3M in funding available to Enka Youth Sports Organization ("EYSO") upon the following stipulations:

- The sports park be open for recreation and/or public purpose and adequate public access;
- EYSO to receive the approximately 90 acre site donation from Fletcher Partners;
- EYSO to secure \$2.4M from TDA;
- EYSO to secure \$1M from private donors;
- EYSO commits to complete greenways as depicted in the 90 acre portion of Master Plan; and
- EYSO to provide docs of environmental due diligence.

WHEREAS, the TDA has made grants to EYSO, and EYSO has secured private funding; the County has distributed the \$1.3M to or for the benefit of EYSO; Fletcher Partners, and the other owner of the said 90 acre site, Enka Partners of Asheville, Inc., have conveyed almost 55 acres to EYSO; and considerable environmental due diligence has been conducted.

WHEREAS, no binding agreement has been entered into regarding public purpose and adequate public access.

WHEREAS, EYSO acquired title to approximately 54.82 acres of land located at the Enka Sports Complex in Buncombe County, North Carolina, by deeds recorded in Book 5499, Page 1811 and Book 5499, Page 1815 Buncombe County Registry (hereinafter referred to as the "Property") and as same is shown on plat recorded in Plat Book 168, Page 119 in said registry.

WHEREAS, EYSO has constructed a set of baseball and softball fields on the Property known as Bob Lewis Fields (the "Facility").

WHEREAS, since the said hearing before the Board of Commissioners the County has invested in Enka Center development through direct infrastructure, the \$1.3M for EYSO Facility due diligence and development, and incentive grants to industrial tenants of Enka Center an amount in excess of \$9M.

WHEREAS, pursuant to N.C. Gen. Stat. §153A-11, the County has the authority to enter into agreements with other entities, and pursuant to N.C. Gen. Stat. §153A-449 a county may contract with

and appropriate money to any person, association, or corporation, in order to carry out any public purpose that the county is authorized by law to engage in.

NOW THEREFORE, the parties hereto, for and in consideration of the promises and covenants contained in this Usage and Operating Agreement, the County and EYSO agree as follows:

Section 1. The Recitals set forth above, along with the definitions of certain terms, are incorporated herein by reference as if fully restated.

Section 2. EYSO shall receive first priority in scheduling its uses of the Facility.

Section 3. Buncombe County Parks & Recreation ("BCP&R") shall have access to and use of up to three (3) fields up to two (2) nights per week beginning April 1, 2019. Access and use fees charged to County and community groups or the public accessing the Facility through BCP&R programming will be consistent with such fees charged to third party users by EYSO. In the event BCP&R recognizes that it does not have a programmed need for some or all of the reserved fields then BCP&R shall give EYSO or its agents notice at least seven (7) days in advance in order that EYSO might fill the vacancies.

Section 4. BCP&R may request to use fields on unscheduled days, but must provide written notice 14 days in advance. EYSO is not obligated to accept the request, but will make good faith efforts to accommodate.

Section 5. EYSO, with input from BCP&R, will develop operating guidelines for the fields. The guidelines will define acceptable and prohibited use, operating hours, staffing requirements during usage periods, maintenance requirements, etc. The guidelines must be published and effective no later than the first scheduled use of the fields.

Section 6. in order to fill any programming needs of BCP&R, EYSO shall grant BCP&R non-exclusive rights of access to the Facility at any and all times as reasonably necessary to inspect the Facility.

Section 7. The parties seek to maximize the use of the Facility by community groups, local leagues, and the general public within operational and maintenance needs. EYSO shall create a master schedule for its primary use of the Facility that allows and encourages use by EYSO, community groups, local leagues and the general public. By September 1, 2019, the parties shall meet to review the programmed uses of the Facility for the calendar year to date to determine appropriate programming for the upcoming year, and to develop a schedule for any specific events. After September 1, 2019 and on an annual basis thereafter the parties will meet to review the past year's operations and programming and determine appropriate programming capacity for the upcoming year, and to develop a schedule for any specific events.

Section 8. EYSO in coordination with BCP&R should seek community input on field usage on a regular basis in order to ensure community needs are considered and community impacts/concerns are addressed. Community input should be gathered from local organizations including local youth sports organizations, Buncombe County Schools, and adjacent neighborhood associations.

Section 9. BCP&R and groups using the Facility by and through its scheduling requests shall be charged the same fees as any groups using the Facility through EYSO or its agents.

Section 10. EYSO will provide BCP&R with quarterly reports regarding Facility usage for both athletics and community programming, maintenance issues relative to any downtimes, revenues and user trends. This reporting must meet the requirements identified by the TDA as part of its grant process.

Section 11. Neither BC nor BCP&R shall be required to pay any expense or cost associated with operations, programming, maintenance or any other debt or obligation of EYSO. Notwithstanding the foregoing, BC will be responsible for making any repairs for damages caused by its negligent acts or omissions.

Section 12. BC will comply with the terms and conditions of the Grant Agreement funded by the Buncombe County Tourism Development Authority as same relates to the installation of lights for the Bob Lewis Ballpark. This obligation is limited to lighting for the ballfields for nighttime play. In so doing, County will advance the costs of the installation of such field lights for Bob Lewis Ballfields consistent with the TDA grant documents and the attached Musco Lighting letter, and work with TDA for reimbursement of these expenses.

Section 13. EYSO shall cause copies of all environmental due diligence conducted on the Property and Facility to be delivered to County.

Section 14. Should EYSO determine that it is in its best interest to convey the Facility to any third party then such third party and its successors and/or assigns shall be required to retain the then existing programming and operational structure of BCP&R for continued community and public uses at usage rates so as not to inhibit public use. Additionally, the third party must continue to work with BCP&R and community members to develop an annual usage schedule.

Section 15. EYSO shall, at its sole expense, obtain and maintain the following commercial insurances:

- Workers' compensation coverage at the statutory limits in compliance with applicable state and federal laws. EYSO shall ensure that any subcontractors also have workers compensation coverage at the statutory limits.
- Commercial general liability insurance covering all operations performed by EYSO with minimum policy limits of \$1,000,000 per occurrence and \$2,000,000 aggregate;
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Section 16. The County of Buncombe is hereby self-insured for tort claims. County agrees that it will indemnify EYSO and hold EYSO harmless from all liability, loss, costs, claims, damages, expenses, attorney fees, judgments and awards arising or claimed to have arisen, from any injury caused by, or allegedly caused by, either in whole or in part, its reasonable uses of said Facility as described herein or as agreed to in the future. Nothing herein shall be construed as a waiver on the part of the County to any defense of any claim, including, but not limited to the defense of governmental immunity.

And that the County's obligations under this paragraph shall be limited to the extent and manner of recovery pursuant to County's self-insured claim policies and North Carolina law.

Section 17. Hold Harmless / Indemnity: EYSO shall indemnify, defend and hold harmless the County and its subsidiaries, divisions, officers, directors and employees from all liability, loss, costs, claims, damages, expenses, attorney fees, judgments and awards arising or claimed to have arisen, from any injury caused by, or allegedly caused by, either in whole or in part, any act or omission of EYSO or any employee, agent or assign of EYSO in connection with the operations and maintenance of the Facility or its appurtenances. EYSO shall indemnify the County in all instances except where the County is primarily negligent through an act or omission. Nothing herein shall be construed as a waiver on the part of the County to any defense of any claim, including, but not limited to the defense of governmental immunity. And that the County's obligations under this paragraph shall be limited to the extent and manner of recovery pursuant to County's self-insured claim policies and North Carolina law.

Section 18. Unless otherwise agreed upon by the Parties, the County shall not be responsible for providing its own personnel to operate or manage the Facility.

Section 19. This agreement is effective immediately and may only be modified by the written consent of the Parties.

Section 20. EYSO must must comply with all federal, state, local laws, and ordinances.

Section 21. This Agreement constitutes the entire and complete agreement between the parties hereto and supersedes any prior oral or written agreements between the parties with respect to the Property. It is expressly agreed that there are no verbal understandings or agreements which in any way change the terms, covenants and conditions herein set forth, and that no modification of this Agreement and no waiver of any of its terms or conditions shall be effective unless made in writing and duly executed by both parties.

Section 22. The individual signatories below have the expressed and implied authority on behalf of their respective Boards to execute this Agreement. The Parties may execute this Agreement in separate counterparts and the execution of a copy shall have the same effect as the execution of an original. Such execution may be by facsimile or PDF attachment to an email.

{Signature Page Follows}

IN WITNESS WHEREOF, the Parties hereto have executed this instrument as of the day and year written below.

Enka Youth Sports Organization

By: _____

Date: _____

Attest:

Date: _____

County of Buncombe

By: _____

Date: _____

Brownie Newman, Chair

Attest:

Date: _____

Lamar Joyner, Clerk to the Board