

STATE OF NORTH CAROLINA

INFRASTRUCTURE REIMBURSEMENT AGREEMENT

COUNTY OF WAKE

**THIS INFRASTRUCTURE REIMBURSEMENT AGREEMENT** ("Agreement"), entered into as of this \_\_\_\_\_ day of \_\_\_\_\_, 2021 ("Effective Date"), by and between the **TOWN OF APEX**, a North Carolina municipal corporation (the "Town"), and Triad Math and Science Academy Company, a North Carolina nonprofit corporation (the "School") with its principal office located at 700 Creek Ridge Rd., Greensboro, NC 27406. The Town and School may be individually referred to as a "Party" and collectively referred to as the "Parties."

**STATEMENT OF PURPOSE**

**WHEREAS**, the School is a facility engaged in the educational instruction of children from 6<sup>th</sup> through 12<sup>th</sup> grade, focusing on science, technology, engineering, and math at which attendance satisfies the compulsory attendance law; and

**WHEREAS**, pursuant to N.C. Gen. Stat. § 160A-307.1, the Town is required to reimburse a school for municipal street improvements required by the Town that are physically connected to a driveway on the school site and are required for safe ingress and egress to the Town's municipal street system; and

**WHEREAS**, the School will be constructing certain right of way improvements in connection with the construction of the Triad Math and Science Academy to be located at 400 New Hill Rd. Apex, NC 27502 (the "Development Project"); and

**WHEREAS**, the Town has identified certain street improvements that will be required, consisting of approximately 1,900 linear feet of concrete curb and gutter and 525 square yards of 5 foot wide concrete sidewalk, and other associated facilities (collectively the "Street Improvements"), as shown on Exhibit A, attached and incorporated herein by reference; and

**WHEREAS**, the School has prepared plans and specifications suitable for construction, and is willing to obtain requisite encroachment agreements, rights of entry, and/or easements from any and all affected property owners to construct the Street Improvements; and

**WHEREAS**, the Town agrees that the Street Improvements are for a public purpose and that following construction of the Street Improvements and final acceptance by the Town, the Town shall be responsible for the maintenance of the Street Improvements; and

**WHEREAS**, the Parties desire to memorialize the terms of their agreement with regard to the design, construction and payment for the Street Improvements so that the work on the Development Project may proceed as planned.

**NOW, THEREFORE**, in consideration of the mutual covenants and agreements set forth herein, the Parties agree as follows:

**ARTICLE I  
PROJECT SCOPE AND FINANCING**

1.1. Recitals. The recitals to this Agreement are incorporated into this Agreement.

1.2. Street Improvements. The scope of work for the Street Improvements is as set out in Exhibit A (hereafter the "Scope of Work" or "Work") attached and incorporated herein by reference. The Street Improvements include the installation of sidewalk and curb and gutter.

1.3. Town Reimbursement. In accordance with Exhibit B, "Engineer's Opinion of Probable Cost", dated August 30, 2021, and prepared by Kimley-Horn & Associates, Inc., the estimated actual cost of the Street Improvements including services such as labor, supervision, management, materials, engineering/design costs, permitting, rights-of-way and easement acquisition, management and construction of the Street Improvements and the amount to be reimbursed by the Town to the School for actual costs incurred is an amount not to exceed \$50,000.00. Such actual cost amounts have been arrived at and approved by the Parties. The Town is not a party to any proposed contract entered into between the School and its contractor(s) for the work necessary to complete the Street Improvements. The School shall consult with the Town regarding the Street Improvements. Reimbursement of all costs associated with the Town's required Street Improvements shall be assessed for value consistent with the Town's transportation improvement projects of the same type and size. In order to receive reimbursement, School shall comply with all of the following:

- (a) The School shall be open for the general or specialized instruction (focusing on science, technology, engineering, and math), administration, or student services and support of children in any combination of grades, from the 6th through the 12th grade;
- (b) The School shall provide paid itemized invoices from the contractor of the Work completed for which the School is requesting reimbursement;
- (c) Reimbursement requests that exceed 10 percent (10%) of the estimated costs of the Street Improvements as provided in Exhibit B shall first require written justification from the School for the increased cost before being eligible for reimbursement;
- (d) The Town shall only provide reimbursement for those improvements required by the Town located in a Town-maintained right of way. The School may install improvements that exceed those required by the Town. However, the School shall be responsible for the costs of those additional improvements. Nothing herein requires the School to agree to make any improvements beyond those that are required by the Town.
- (e) The following costs are not reimbursable:
  - (i) Improvements that exceed the Town's requirements;
  - (ii) Any connection that is not on the Town's right-of-way but instead on the School's property;
  - (iii) Any on-campus transportation improvements required to manage traffic flow, parking, and routing within the property's limits of the school drop-off and pick-up queuing, student and teacher parking, and loading dock expansions or relocations;
  - (iv) New utilities required for the selected school site that are not directly associated with and impacting its access points to the Town's street system. The school shall coordinate with the Town prior to the placement of any utilities in the Town's right-of-way. If the school chooses to place a new utility at the school site that must be moved for transportation improvements, the Town shall not reimburse for the movement of those utilities. The

Town shall only provide reimbursements for existing utilities that require relocation for the Street Improvements.

- (v) Any improvements to the Town's street system that are part of a mixed-use development site that also include a school where such improvements would be required if a school were not part of the development. The Town shall first analyze the site without considering the school facilities and then analyze the site with the school facilities included. Any improvements that are not necessitated by traffic from the school facilities shall not be reimbursable.
- (vi) Improvements made to the Town's street system for developments planned for purposes other than a school. Any additional improvement to the Town's street system required by the conversion of property to a school and in accordance with N.C. Gen. Stat. § 160A-307.1 shall be eligible; however, an additional school study may be required if the Town has previously been approached and analyzed the site according to a non-school or non-educational land use.

## ARTICLE II SCHOOL RIGHTS AND RESPONSIBILITIES

2.1. School Liability. The Parties understand and agree that the School, its successors and permitted assigns, is a nonprofit corporation contracting with the Town and is referred to as the School. To the extent that more than one entity executes this Agreement as the School(s), the liability of each such entity to perform all obligations hereunder shall be deemed to be joint and several, and all notices, payments and agreements given or made by, with or to any of such entities shall be deemed to have been given or made by, with or to all of them.

2.2. Design and Engineering Services. The Parties agree that based on the fact that the public street runs through the intended construction site and any Street Improvements are part of the overall design contemplated by the School's site plan, there are no additional professional services and engineering services necessary to plan, design, or permit the Street Improvements or that are otherwise attributable to the Street Improvements and therefore will not be reimbursable as part of this Agreement. The School's engineer has prepared plans and construction specifications necessary for the site plan that also included pricing for the construction of the Street Improvements as identified in Exhibit B.

2.3. Applicable Design Standards for Street Improvements. The School warrants that in addition to the standards set out in Section 2.2, the plans for the Street Improvements prepared for the site plan are in accordance with applicable design standards that are contained in local, state, and federal standards, specifications, requirements and laws including but not limited to: Town of Apex Standard Specifications and Standard Details; North Carolina Department of Transportation ("NCDOT") 2018 Standard Specifications for Roads and Structures; NCDOT 2018 Roadway Standard Drawings; and US DOT Manual on Uniform Traffic Control Devices, including any NC Supplement. For the purposes of this Agreement the following modifications are hereby made to the NCDOT Standard Specifications for Roads and Structures:

"Engineer" or "Resident Engineer" as referenced in the NCDOT Standard Specifications shall be defined as the Town Engineer, or their duly authorized representative(s);

"Contractor" as referenced in the NCDOT Standard Specifications shall be defined as the School, or its duly authorized representative;

“State” or “Department” as referenced in the NCDOT Standard Specifications shall be defined as the Town of Apex.

2.4. Easements and Right-of-Way. Prior to commencement of any construction, the School shall acquire, dedicate and/or donate or cause to be acquired, dedicated and/or donated to the Town all rights-of-way and easements, both temporary and permanent, as agreed to by the Parties and required to construct the Street Improvements and to perform future maintenance. The School shall be responsible for recording the requisite easements with the Register of Deeds of Wake County, or filing record plat drawings to show dedicated rights-of-way and/or easements, and provide the Town with written confirmation of rights-of-way and/or easements obtained from each property owner who will be affected by the Work associated with the Street Improvements.

2.5. Rights of Access. The Parties understand and agree that driveway locations and dimensions **not shown or included** in the Street Improvements and exhibits to this Agreement are subject to approval by NCDOT. The School agrees that issuance of permits for the School’s driveways will be in accordance with and administered through the applicable approval process. The School further agrees that it is responsible for all design costs and work associated with the permitting process and all costs associated with the construction of the School’s driveways in order to connect to the Street Improvements.

2.6. Ownership and Use of the School’s Work Product. Upon termination of this Agreement or upon acceptance by the Town of the Street Improvements as provided herein, School shall take all necessary measures and at the request of the Town shall provide to the Town, any portion of the construction plans which directly relate and pertain to the Street Improvements and make available all associated documents, reports, specifications, designs, developments, computations, permits and other materials prepared, obtained or delivered by the engineer (collectively the “Deliverables”) as necessary and suitable for public bidding in order to allow the Town to construct the Street Improvements in lieu of the School; and in such event the Town shall waive and release the School for any liability or loss related to all such Deliverables.

In the event of termination or assignment under this Agreement and upon receipt of written notice from the Town, the School further agrees to execute and deliver such assignments and other documents as the Town may later require to perfect, maintain, and enforce the Town’s rights as owner of the portion of the plans which include the Street Improvements within thirty (30) days of such notice from the Town.

2.7. Schedule. The School agrees to prosecute or cause its contractor(s) to prosecute the Work associated with the Street Improvements diligently and without material interruption to completion in a good and workmanlike manner and to cause the Street Improvements to be substantially completed on or prior to December 31, 2023 (the “Work Completion Date”), subject to force majeure events described in Section 4.11 below. The School agrees to notify the Town if the scheduled completion is or will be delayed.

2.8. Administration. The School shall provide (a) contract administration and (b) routine engineering inspection and payment verification services with respect to the design and construction elements of the Street Improvements in the same manner as it will provide such services in connection with the design and construction elements of the Development Project.

2.9. School Project Manager. The School shall identify one or more of its employees to serve as the project manager (the "School Project Manager") to (i) act as the School's representative, (ii) coordinate the Street Improvements, and (iii) facilitate communication with the Town and others concerning the Street Improvements. To the extent the School designates more than one employee to serve as the School's Project Manager, the names and addresses of each School Project Manager shall be provided to the Town prior to the commencement of construction of the Street Improvements.

2.10. Payment Responsibilities for Design and Construction Services. The Parties understand and agree that the Town is not a party to any contract entered into between the School and any design consultant(s) or sub-consultant(s) for the work necessary to complete the design or any contractors or subcontractors for construction of the Street Improvements. Except as otherwise provided herein and subject to the obligation of the Town to reimburse for costs of the Street Improvements in accordance with this Agreement, the School shall be responsible for making all payments to any and all consultants and sub-consultants for design services and any contractors and subcontractors for construction of the Street Improvements.

2.11. Warranties. The School shall cause the contract(s) with the contractor(s) to warrant that the Work associated with the Street Improvements be undertaken by such contractor(s) in accordance with the Approved Plans (as defined in this Agreement), and any modifications thereto as provided for in this Agreement, for the period of one year from the date of acceptance of the Street Improvements by the Town (the "Warranty Period"). The Town shall be named as a beneficiary on any and all such warranties obtained by the School affecting the Street Improvements. During the Warranty Period, the School shall cause the contractor(s) to repair, replace or remedy all defects in materials, equipment or workmanship and replace any property damaged as a result thereof, upon receipt of written notice from either the School or the Town of the discovery of any defects during that period.

2.12. Utility Relocation. The Town shall only provide reimbursements for relocation of existing water mains and other existing public and private utilities required by the Street Improvements as provided in Section 1.2 and as identified on Exhibit B. The School shall be responsible for any and all costs that may be incurred for all other relocation of water mains and other public and private utilities. The Town shall not be responsible for any delay costs associated with any third-party utility installations or relocations.

2.13. Insurance. The School shall purchase and maintain the following insurance during the life of this Agreement with a company authorized to do business in the State of North Carolina:

- **Automobile Liability Insurance**: Bodily injury and property damage liability covering all owned, non-owned and hired automobiles for limits of not less than \$1,000,000 bodily injury each person, each accident and \$1,000,000 property damage, or \$1,000,000 combined single limit each occurrence/aggregate.
- **Comprehensive General Liability**: Bodily injury and property damage liability as shall protect the School and any subcontractor performing Work under this Agreement from claims of bodily injury or property damage which arise from operation of this Agreement whether such operations are performed by the School, any subcontractor or any person directly or indirectly employed by either. The amounts of such insurance shall not be less than \$1,000,000 bodily injury each occurrence/aggregate and \$1,000,000 property damage each occurrence/aggregate or \$1,000,000 bodily injury and property damage combined single limits each occurrence/aggregate. This insurance shall include coverage for

products/completed operation, personal injury and contractual liability assumed under the indemnity provision of this Agreement.

- **Worker's Compensation:** In conformance with State law, with Employers' Liability limits of at least \$100,000 per accident limit, \$300,000 disease per policy limit, \$1,000,000 disease each employee limit.

The Town shall be exempt from, and in no way liable for, any sums of money that may represent a deductible in any insurance policy. The payment of such deductible shall be the sole responsibility of the School and/or subcontractor providing such insurance.

The Town shall be named as an additional insured under the Comprehensive General Liability and Automobile Liability Insurance policies required by this Agreement. At the time of execution of the Agreement, certificates of all required insurance shall be furnished to the Town and shall contain the provision that the Town will be given thirty (30) days written notice of any intent to amend or terminate by either the insured or the insuring company.

The School is advised that if any part of the Work under this Agreement is sublet, the subcontractor(s) shall carry insurance as required above. However, this will in no way relieve the School from providing full insurance coverage on all phases of the Work as required above, including any that is sublet.

### **ARTICLE III TOWN RIGHTS AND RESPONSIBILITIES**

3.1. **Review of Design Services.** The Town shall have the right to review and approve the School's design plans that include the Street Improvements, including conceptual design plans, preliminary design plans, right-of-way plans, final design plans, and shop drawings (collectively, the "Approved Plans"). The Town shall have a maximum of two (2) weeks to coordinate the review and comments from Town staff for each submittal, unless the Parties agree to modify the time period. Staff review will be performed by representatives of each Town Department that is responsible for design and construction of material aspects of the Street Improvements. Work shall not begin until the Town has provided approval, such approval not to be unreasonably withheld or delayed by the Town.

3.2. **Town Project Manager.** The Town shall identify one or more of its employees to serve as the project manager (the "Town Project Manager") to (a) act as the Town's representative; (b) make periodic inspections on behalf of the Town to determine compliance with the Approved Plans; (c) serve as liaison between the Town and the School; and (d) approve requests from the School for payment from the Town. To the extent the Town designates more than one employee to serve as the Town's Project Manager, the names and addresses of each Town Project Manager shall be provided to the School prior to the commencement of construction of the Street Improvements. Notwithstanding any such designation, the Town Project Manager shall bear primary responsibility for coordination of the Town staff reviews in an effort to promote efficient interaction with the School and the School's contractor(s) and subcontractor(s).

3.3. **Town's Construction Inspection.** The Town shall have a right to access and to make regular and periodic inspections of the Street Improvements as construction progresses to verify that Work is performed in accordance with the Approved Plans, and School shall not interfere with such access or inspection by the Town or its designated representative(s). If the Town determines that the Street Improvements have not been completed in accordance with the Approved Plans, promptly upon

completion of the applicable inspection, the Town shall provide the School with written notice of such deficiencies and defects; in such event, the School shall then correct or cause to be corrected the deficiencies and defects within a reasonable period of time for further inspection by the Town, unless the School contests the Town's notice of deficiencies and defects in which event the Parties shall work in good faith to promptly resolve such contest.

Approval and acceptance of the Work pursuant to this Section shall not constitute acceptance of public rights-of-way or water mains for maintenance by either the Town or any of its departments.

The School shall be responsible for all testing required for the Street Improvements under this Agreement and shall follow all applicable standards and protocols for materials and testing. The School shall provide the Town with copies of all reports generated from such testing. In the event said testing indicates or identifies areas of noncompliance, School agrees to make the changes necessary, including repair or replacement of defective materials and/or Work, at no cost to the Town until construction testing indicates compliance with applicable standards.

3.4. Quality of Work and Inspections. All trades shall be performed by skilled craftsmen with appropriate licenses. The School shall be responsible for and shall cause its contractor(s) and subcontractor(s) to include this provision in its contracts ensuring that all materials, equipment, and workmanship incorporated into the Work are of the specified quality and fully conform to all requirements of this Agreement. The School shall carry out a quality control program for this purpose. Prior to commencement of any construction, the School shall provide a written copy of its quality control / quality assurance plan to the Town.

All Work (which term includes but is not restricted to materials, and workmanship, of components) shall be subject to inspection and testing by the Town at all reasonable times and at all reasonable places prior to acceptance, but the Town shall have no obligation to make any such inspection or testing. Any such inspection or testing is for the sole benefit of the Town and shall not relieve the School of the responsibility of providing quality control measures to ensure that the Work strictly complies with the requirements of this Agreement. Except to the extent specified by the Town or as otherwise set forth in this Agreement, no inspection or testing by the Town shall be construed as constituting or implying acceptance. Inspection or testing shall not relieve the School of responsibility for damage to or loss of the material prior to acceptance, or in any way affect the continuing rights of the Town after acceptance of the completed Work.

Any condition or situation deemed by the Town to be unsatisfactory pursuant to the Design Standards and any other express provisions of this Agreement, including Section 2.3, shall be remedied by the School as soon as reasonably possible, but not later than fifteen (15) business days after receipt of written notice from the Town, excluding any emergency or public safety conditions in which event the Town reserves all rights to make all necessary repairs. The School shall, without charge, replace any material or correct any Work found by the Town to not conform to the requirements of this Agreement, unless the Town consents in writing to accept such material or workmanship or unless the School contests the Town's determination that the Work does not conform to the requirements of this Agreement in which event the Parties shall work in good faith to promptly resolve such contest. Subject to the foregoing, the School shall promptly remove rejected material from the premises.

Subject to the foregoing, if the School does not promptly replace rejected material or correct rejected Work, the Town may:

- (a) By contract or otherwise, replace such material or correct such workmanship, or remove unauthorized work, and charge the cost thereof to the School, or

- (b) Terminate the School's right to proceed in accordance with this Agreement but subject to force majeure events and the notice and cure rights of Section 4.3.

3.5. Construction Reimbursement/Time and Manner of Town Reimbursement.

3.5.1. Final Inspection. When the Work has been completed, the Town will make all final inspections and tests it deems appropriate for the purpose of ascertaining that the Work has been completed in accordance with the Approved Plans and requirements of this Agreement. If the Town determines that the Street Improvements have not been completed in accordance with the Approved Plans or this Agreement, the Town shall provide the School with written notice of such deficiencies and defects; in such event, the School shall then correct or cause to be corrected the deficiencies and defects within a reasonable period of time for further inspection by the Town, unless the School contests the Town's notice of deficiencies and defects in which event the Parties shall work in good faith to promptly resolve such contest.

When the Town has determined that all deficiencies have been corrected or any contest regarding such deficiencies has been resolved and that the Work has been completed in all respects in accordance with this Agreement, the Town shall accept the Work and shall thereafter be responsible for maintenance and repair of the Street Improvements (subject to the warranties set forth in Section 2.11). Thereafter no further performance of the Work shall be required, except as regards to latent defects, fraud, or such gross mistakes as may amount to fraud, or as regards the Town's rights under any warranty or guaranty under this Agreement. When the Town takes possession of the Work, it shall provide prompt notice of the same to School, and the School will be relieved of the duty of maintaining and protecting the Work, and of the risk of loss thereof or damage thereto, except to the extent of its duties and obligations described in this Section.

3.5.2. Total Town Reimbursement. Upon the School's satisfactory completion of the Street Improvements and the Town's acceptance of the same, the Town shall reimburse the School an amount not to exceed \$50,000.00 (Total Town Reimbursement) for the actual costs to construct the Street Improvements. The Total Town Reimbursement amount, as itemized and set forth in Exhibit B attached hereto, includes all labor, supervision, management, materials, and engineering/design costs incurred by School. In the event the actual costs to construct the Street Improvements exceed this amount, School agrees it will be solely responsible for those additional costs and shall have no further recourse against the Town for compensation or contribution. The Town is not a party to any proposed contract entered into between School and its contractor(s) for the work necessary to complete the Street Improvements.

Upon the Town's acceptance of the Street Improvements, the School shall invoice the Town for the actual expenses incurred for the construction of the Street Improvements. The Town agrees to make the payment described above to the School within ninety (90) days of receipt of a complete and accurate pay request based on the agreed lump sum and unit prices for the actual quantities used in the Work. The Town's payment is further conditioned upon the Street Improvements being completed and accepted on or before December 31, 2023.

- 3.6. Warranty of Materials and Workmanship. In accordance with the terms of this Agreement, specifically including Section 2.11, the warranties of the School's contractor(s) and



subcontractor(s) shall collectively cover all Work and as to each applicable portion of the Work associated with the Street Improvements, shall comply with the provisions of Section 2.11 for a period of one (1) year from the date of final acceptance by the Town. All materials and equipment provided shall be listed and labeled for the purpose intended and must be in good working order. All Work shall have a one (1) year warranty from the date of final acceptance of the final Work against any latent defects, design, materials, workmanship and installation.

3.7. Changes in Design or Construction. Changes in the scope of the Street Improvements may be made by mutual written agreement of the Town and the School.

3.8. Town Not Liable for Delays. The Town shall not be liable to the School, its agents or representatives, or any consultants, sub-consultants, contractors or subcontractors, for or on account of any stoppages or delay in the performance of any obligations of the Town or any other third party hereunder, or other legal or equitable proceedings or on account of any other delay for any cause beyond the Town's reasonable control. Notwithstanding this, neither party shall be liable to the other under any circumstances for lost profits or any other consequential, special or indirect damages.

#### **ARTICLE IV MISCELLANEOUS**

4.1. Term and Completion. This Agreement shall commence upon the effective date and shall continue in full force and effect until the obligations contained herein have been completed unless sooner terminated or extended in accordance with the terms in the Agreement.

4.2. Assignment. This Agreement shall not be assignable without the consent of the Town. Any assignment attempted without the written consent of the Town shall be void.

4.3. Remedies for Breach of the Agreement. In the event of the breach of any term, provision or condition of this Agreement by any Party hereto, subject to the notice and cure rights and the provisions of Section 4.3.5 below, the non-breaching Party shall be entitled, in addition to the rights and remedies described below, to such rights and remedies as shall be available at law and in equity, excluding the remedy of specific performance, including termination of this Agreement upon written notice to the other Party. Unless both Parties agree by mutual consent to a different time period, prior to the exercise of such rights and remedies, the defaulting Party shall be entitled to receive from the other Party written notice of such breach, and (i) the defaulting Party shall have a period of ten (10) business days to cure such breach related to the payment of money, and (ii) the defaulting Party shall have a period of thirty (30) days to cure such breach not related to payment of money unless such non-monetary default by its nature cannot reasonably be cured within such thirty (30) day period in which case the defaulting Party shall have a reasonable amount of time, not to exceed ninety (90) days, to cure such non-monetary default.

4.4. Termination.

4.4.1. Termination for Convenience. The Town may terminate Work under this Agreement, in whole or in part, at any time without cause by giving written notice to the School. The Town shall pay the School all properly incurred actual costs for Work properly completed by the School and accepted by the Town as of the date of termination.

4.4.2. Termination for Default. Without limiting any other termination rights set forth in this Agreement, either party may terminate this Agreement by written notice to the other for default if the other party fails to cure a material breach within the time period for cure of such breach specified in Section 4.3. The Town may terminate this Contract for default without a cure period if the School:

- (a) Fails to obtain, maintain, or provide proof of the insurance policies and endorsements as required by this Agreement; or
- (b) Ceases or fails to do business as a school, makes an assignment for the benefit of creditors, admits in writing its inability to pay debts as they become due, files a petition in bankruptcy or has an involuntary bankruptcy petition filed against it (except in connection with a reorganization under which the School's function is continued and performance of all its obligations under this Agreement shall continue), or if a receiver, trustee or liquidator is appointed for it or any substantial part of the School's assets or properties; or
- (c) Acts or fails to act in a way that creates a risk to safety or is likely to cause the Town to incur property damage, fines, or penalties; or
- (d) Ceases to operate as a facility engaged in the educational instruction of children in any grade or combination of grades from 6th through the 12th grade at which attendance satisfies the compulsory attendance law.

4.4.3. Town Right to Cover. If, subject to force majeure as further defined in this Agreement and the written notice and cure rights described in Section 4.3 above, (i) the School fails to meet the completion date or resolution time set forth in this Agreement (including the Exhibits), the Town may take any of the following actions with or without terminating this Agreement, and in addition to and without limiting any other remedies it may have:

- (a) Employ such means as it may deem advisable and appropriate to perform itself or obtain services from a third party to perform the Work until the matter is resolved and the School is again able to resume performance under this Agreement; and
- (b) Deduct any and all expenses incurred by the Town in obtaining or performing the Work from any money then due or to become due to the School.

4.4.4. Town Right to Withhold Payment. If the School breaches any provision of this Agreement beyond the passage of the notice and cure periods described above and subject to force majeure events, as defined hereafter, upon delivery of the Town's written notice of such breach to the School, the Town shall have a right to withhold all payments due to the School until such breach has been fully cured or a dispute over such breach has been resolved.

4.4.5. Authority to Terminate. Authority to terminate this Agreement on behalf of the Town rests with the Town Manager or designee.

4.4.6. Remedies Cumulative. Upon breach of this Agreement, each party may seek all legal and equitable remedies to which it may be entitled. The remedies set forth

herein shall be deemed cumulative and not exclusive and may be exercised successively or concurrently, in addition to any other available remedy.

4.5. Notice. Whenever written notice is required under the terms of this Agreement, all notices, requests for payment, requests to modify the Street Improvements, and any other questions concerning this Agreement should be addressed as follows:

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|-------------------|---|
| If to the Town:   | Town of Apex<br>Attn: Russell Dalton<br>PO Box 250<br>Apex, NC 27502<br>russell.dalton@apexnc.org<br>919-249-3358                           |
| If to the School: | TMSA Central Office<br>Attn: Ben Karaduman<br>104 Towerview Court<br>Cary, NC 27513<br>EMAIL: bkaraduman@tmsapcs.org<br>PHONE: 919-650-2270 |

Notice shall be effective upon the date of receipt by the intended recipient, provided that any notice that is sent by telefax or electronic mail shall also be simultaneously sent by mail deposited with the U.S. Postal Service or by overnight courier. Each party may change its address for notification purposes by giving the other party written notice of the new address and the date upon which it shall become effective.

4.6. Indemnification. To the fullest extent permitted by law, the School shall indemnify, defend and hold harmless the Town and its agents and employees from and against all claims, damages, losses, expenses, including but not limited to attorney's fees, arising out of or resulting from the School's or any of the School's contractor(s) or subcontractor(s) work in connection with the Street Improvements, provided that any such claim, damage, loss or expense (1) is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible or intangible property including the loss of use resulting therefrom, and (2) is caused in whole or in part by any negligent act or omission of the School, any of the School's contractor(s) or subcontractor(s), anyone directly or indirectly employed by any of them or any one for whose acts any of them may be liable.

This Section shall remain in force despite termination of this Agreement (whether by expiration of the term or otherwise).

4.7. Americans with Disabilities Act. In constructing the Street Improvements the School agrees to comply with all applicable requirements of the Americans with Disabilities Act of 1990 (ADA), as amended, 42 USC §§ 12101 *et seq.*; Section 504 of the Rehabilitation Act of 1973, as amended, 29 USC § 794; and the following regulations and any amendments thereto:

- (a) Department of Justice (DOJ) regulations, "Nondiscrimination on the Basis of Disability in State and Local Government Services," 28 CFR Part 35;

- (b) General Services Administration regulations, "Accommodations for the Physically Handicapped," 41 CFR Subpart 101-19;
- (c) Equal Employment Opportunity Commission, "Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act," 29 CFR Part 1630;

In addition to constructing the Street Improvements in compliance with the above requirements, the School shall perform all construction activities in such a manner that ensures ADA compliance throughout the construction phase. The School shall employ Best Practices to maintain accessibility for all temporary elements including, curb ramps, sidewalks, signage, etc.

Failure of the School to comply with these requirements shall constitute a material breach of this Agreement and shall be grounds for termination of this Agreement by the Town as set forth in Section 4.4, above.

The School agrees to include the above requirements in each subcontract, modified only if necessary, to identify the affected parties.

4.8. Compliance with Laws. The School shall comply with all applicable federal, state, and local laws and regulations and shall obtain all applicable permits and licenses in connection with its obligations under this Agreement.

4.9. No Third-Party Rights. This Agreement is entered into by and between the parties hereto for their exclusive benefit. The parties do not intend to create or establish by this Agreement any third-party beneficiary status or rights, and no such third-party shall be entitled to enforce any right of obligation or enjoy any benefit created or established by this Agreement.

4.10. Binding Effect. This Agreement shall be binding upon, inure to the benefit of and be enforceable by the Parties hereto and their respective successors and assigns.

4.11. Applicable Law. This Agreement shall be enforced, interpreted and construed by and under the laws of the State of North Carolina.

4.12. Entire Agreement. This Agreement is the entire agreement between the Parties with respect to its subject matter and there are no other representations, understandings or agreements between the Parties relative to such subject matter. This Agreement supersedes all prior agreements, negotiations, representations and proposals ("Prior Agreements"), written or oral.

4.13. Amendment. No amendment or modification to this Agreement shall be valid unless in writing and signed by all Parties to this Agreement.

4.14. Severability. The invalidity of one or more of the phrases, sentences, clauses or sections contained in this Agreement shall not affect the validity of the remaining portion of the Agreement so long as the material purposes of the Agreement can be determined and effectuated. If any provision of this Agreement is held to be unenforceable, then both parties shall be relieved of all obligations arising under such provision, but only to the extent that such provision is unenforceable, and this Agreement shall be deemed amended by modifying such provision to the extent necessary to make it enforceable while preserving its intent.

4.15. Jurisdiction and Venue. Any and all legal actions or proceedings relating to this Agreement shall be brought in a state or federal court sitting in Wake County, North Carolina. By the execution of this Agreement, the parties submit to the jurisdiction of said courts and hereby irrevocably waive any and all objections that they may have with respect to venue in any court sitting in Wake County, North Carolina. This Section shall not apply to subsequent actions to enforce a judgment entered in actions heard pursuant to this Section.

**ARTICLE V  
REQUIRED TOWN AGREEMENT TERMS**

5.1. Non-Discrimination Policy. Pursuant to Section 3-2 of the Town of Apex Code of Ordinances, School hereby warrants and agrees that School will not discriminate against a protected class in employment, subcontracting practices, or the solicitation or hiring of vendors, suppliers, or commercial customers in connection with this Agreement. For the purposes of this Agreement “protected class” includes age, race, religious belief or non-belief, ethnicity, color, national origin, creed, sex, sexual orientation, gender identity, marital status, natural hair style, genetic information, pregnancy, familial status, disability, veteran or military status, or disabled veteran status.

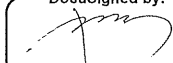
5.2. E-Verify. The School shall comply with the requirements of Article 2 of Chapter 64 of the North Carolina General Statutes and shall require each of the subcontractors to do so as well.

5.3. NC Prohibition on Contracts with Companies that Invest in Iran or Boycott Israel. The School certifies that: (i) it is not identified on the Final Divestment List or any other list of prohibited investments created by the NC State Treasurer pursuant to N.C.G.S. §147-86.58 (collectively, the “Treasurer’s IDA List”); (ii) it has not been designated by the NC State Treasurer pursuant to N.C.G.S. §147-86.81 as a company engaged in the boycott of Israel (such designation being referred to as the “Treasurer’s IB List”); and (iii) it will not take any action causing it to appear on the Treasurer’s IDA List or the Treasurer’s IB List during the term of this Contract. In signing this Agreement, the School further agrees, as an independent obligation, separate and apart from this Agreement, to reimburse the Town for any and all damages, costs and attorneys’ fees incurred by the Town in connection with any claim that this Agreement or any part thereof is void due to School appearing on the Treasurer’s IDA List or the Treasurer’s IB List at any time before or during the term of this Agreement.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

IN WITNESS THEREOF, the contracting parties, by their authorized agents, affix their signatures and seals this \_\_\_\_\_ day of \_\_\_\_\_, 2021.

Triad Math and Science Academy Company

DocuSigned by:  
  
C4F197CC943F478...

By: \_\_\_\_\_

Signature

Ben Karaduman

\_\_\_\_\_  
Print Name

Superintendent

\_\_\_\_\_  
Title

11/8/2021

\_\_\_\_\_  
Date

Town of Apex

\_\_\_\_\_  
Catherine Crosby, Town Manager

Attest:

\_\_\_\_\_  
Donna Hosch, Town Clerk

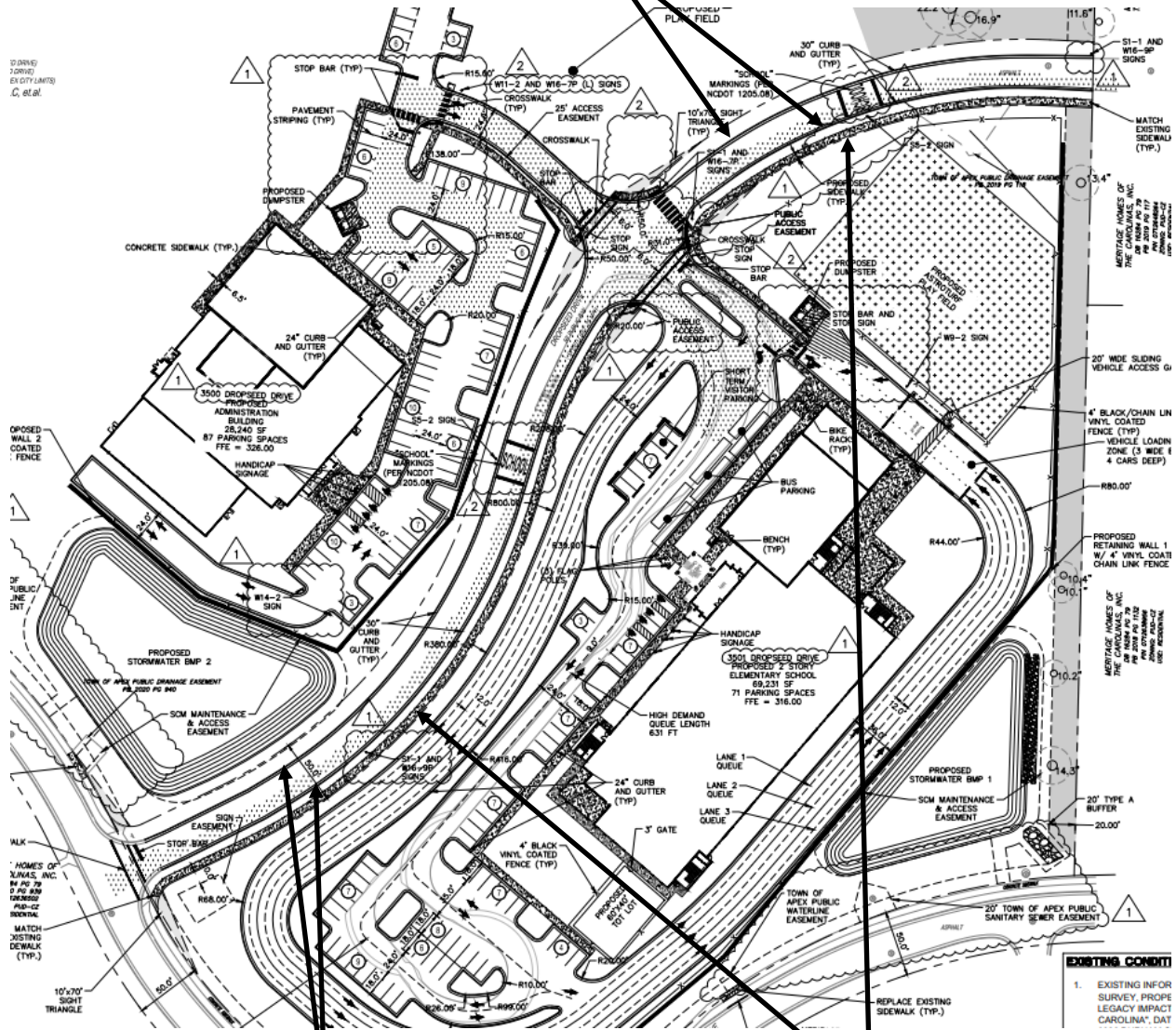
*This instrument has been preaudited in the manner required by the Local Government Budget and Fiscal Control Act.*

\_\_\_\_\_  
Vance Holloman, Finance Director

# Exhibit A

## Street Improvements

Add 2.5' curb & gutter on east and west sides of Dropseed Drive



Add 2.5' curb & gutter on east and west sides of Dropseed Drive

Add 5' sidewalk along east side of Dropseed Drive

Exhibit B

Cost of Construction

**KIMLEY-HORN & ASSOCIATES, INC.**

421 Fayetteville Street, Suite 600

Raleigh, North Carolina 27601

TEL: (919) 677-2000 FAX: (919) 677-2050

**ENGINEER'S OPINION OF PROBABLE COST**

**PROJECT: TMSA - Dropseed Drive**

**PREPARED BY: Katie Judd**

**CHECKED BY: Chris Bostic**

**JOB NUMBER: 013804000**

**DATE: 8/30/2021**

**DATE: 8/30/2021**

| ITEM         | DESCRIPTION              | QUANTITY | UNIT | UNIT BID | TOTAL           |
|--------------|--------------------------|----------|------|----------|-----------------|
|              |                          | Estimate |      | Estimate | Estimate        |
| 1            | Concrete Curb and Gutter | 1900     | LF   | \$14.00  | \$26,600.00     |
| 2            | 5' Concrete Sidewalk     | 525      | SY   | \$45.00  | \$23,625.00     |
| <b>TOTAL</b> |                          |          |      |          | <b>\$50,000</b> |

**Notes:**

1. Cost opinion is based on the Minor Site Plan for TMSA dated August 13, 2021.
2. Cost opinion does not include costs for unsuitable soils or general conditions.

The Engineer has no control over the cost of labor, materials, or equipment, or over the Contractor's methods of determining prices or over competitive bidding or market conditions. Opinions of probable costs, as provided here, are made on the basis of the Engineer's experience and qualifications and represent the Engineer's judgement as a design professional familiar with the construction industry. The Engineer cannot and does not guarantee that proposals, bids, or actual construction costs will not vary from opinions of probable cost prepared for the Owner.

