

BUSINESS ASSOCIATE AGREEMENT

This Agreement is made effective the 12th day of February 2021, by and between WAKE COUNTY, hereinafter referred to as "Covered Entity", and Town of Apex, hereinafter referred to as "Business Associate"; also referred to herein individually as a "Party" and collectively as the "Parties".

WITNESSETH:

WHEREAS, Sections 261 through 264 of the federal Health Insurance Portability and Accountability Act of 1996, Public Law 104-191 directs the Department of Health and Human Services to develop standards to protect the security, confidentiality and integrity of health information; and

WHEREAS, Covered Entity is or may be subject to the requirements of 42 U.S.C. Section 1320(d) *et seq* enacted by the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and regulations promulgated thereunder at 45 CFR Parts 160 and 164 (the "Privacy Regulations" and "Security Regulations"); and

WHEREAS, Covered Entity and Business Associate are or may be subject to the requirements of Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), codified at 45 CFR Part 160 and Part 164, subparts A and C (the "Security Rule"), subparts A and D (the "Breach Notification Rule"), and subparts A and E (the "Privacy Rule") and Subtitle D of the Health Information Technology for Economic and Clinical Health Act of 2009 ("HITECH") (collectively the "HIPAA Rules") which expands the scope of privacy and security protections available under HIPAA to Protected Health Information managed via electronic health records; and

WHEREAS, the Parties wish to enter into or have entered into an arrangement whereby Business Associate will provide certain services to Covered Entity ("Services Agreement"), and, pursuant to such Services Agreement, Business Associate is or may be considered a "Business Associate" of Covered Entity as defined in the HIPAA Rules; and

WHEREAS, Business Associate may have or require access to Protected Health Information as defined in the HIPAA Rules in fulfilling its responsibilities under such Services Agreement;

THEREFORE, in consideration of the Parties' continuing obligations under the Services Agreement, compliance with the HIPAA Rules, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree to the following provisions in order to address the requirements of the HIPAA Rules and to protect the interests of both Parties.

SECTION I

DEFINITIONS

1.1 **Catch-All definition:**

The following terms used in this Agreement shall have the same meaning as those terms in the HIPAA Rules: Breach, Data Aggregation, Designated Record Set, Disclosure, Health Care Operations, Individual, Minimum Necessary, Notice of Privacy Practices, Protected Health Information, Required By Law, Secretary, Security Incident, Subcontractor, Unsecured Protected Health Information, and Use.

1.2 **Specific definitions:**

"*Business Associate*" shall generally have the same meaning as the term "business associate" in 45 CFR §160.103, and in reference to the party to this agreement, shall mean Town of Apex.

"*Covered Entity*" shall generally have the same meaning as the term "covered entity" at 45 CFR §160.103, and in reference to the party to this agreement, shall mean Wake County.

"HIPAA Rules" shall mean the Privacy, Security, Breach Notification, and Enforcement Rules at 45 CFR Part 160 and Part 164 and Subtitle D of the Health Information Technology for Economical and Clinical Health Act which is Title XIII of the American Recovery and Reinvestment Act of 2009.

"HITECH or HITECH Standards" means the privacy, security, and security breach notification provisions applicable to a Business Associate under Subtitle D of the Health Information Technology for Economical and Clinical Health Act which is Title XIII of the American Recovery and Reinvestment Act of 2009.

SECTION II

COORDINATION WITH HIPAA RULES

- 2.1 In the event of an inconsistency between the provisions of this Agreement and mandatory provisions of the HIPAA Rules, as amended, the HIPAA Rules in effect at the time shall control. Where provisions of this Agreement are different than those mandated in the HIPAA Rules, but are nonetheless permitted by the HIPAA Rules, the provisions of this Agreement shall control.
- 2.2 The parties agree that, in the event that any documentation of the Services Agreement pursuant to which Business Associate provides services to Covered Entity contains provisions relating to the use or disclosure of Protected Health Information which are more restrictive than the provisions of this Agreement, the provisions of the more restrictive documentation will control. The provisions of this Agreement are intended to establish the minimum requirements regarding Business Associate's use and disclosure of Protected Health Information.

SECTION III

OBLIGATIONS AND ACTIVITIES OF BUSINESS ASSOCIATE

- 3.1 Business Associate acknowledges and agrees that all Protected Health Information that is created, received, stored or transmitted by the Covered Entity and disclosed or made available in any form, including paper record, oral communication, audio recording, and electronic display by Covered Entity or its operating units to Business Associate or created, received, stored or transmitted by Business Associate on Covered Entity's behalf shall be subject to this Agreement.
- 3.2 Business Associate agrees to not use or further disclose Protected Health Information other than as permitted or required by the Services Agreement or as required by law.
- 3.3 Business Associate agrees to use appropriate safeguards to prevent any use or disclosure of Protected Health Information other than as provided by this Agreement, and to comply with Subpart C of 45 CFR Part 164 and HITECH Standards to prevent use or disclosure of Protected Health Information other than as provided for by this Agreement.
- 3.4 Business Associate agrees to report to Covered Entity any use or disclosure of Protected Health Information not provided for by this Agreement of which it becomes aware, including breaches of Unsecured Protected Health Information as required by at 45 CFR § 164.410, and any Security Incident of which it becomes aware. Business Associate will make this report to the Covered Entity's Privacy Officer and Security Officer within twenty-four (24) hours after discovery. This report will include at least the following information (a) nature of the non-permitted or violating use or disclosure or Security Incident; and (b) the PHI used or disclosed (c) the identification of each individual whose unsecured PHI has been, or is reasonably believed by the Business Associate to have been accessed, acquired, used, or disclosed during the breach (d) any other information requested by Covered Entity that must be included in the notification to the individual pursuant to at 45 CFR § 164.404.

- 3.5 In the event of a potential or actual Breach, Business Associate shall cooperate with the Covered Entity to investigate, perform risk analyses, notify appropriate government, regulatory authorities, media, or individuals as required by law or generate statute and to mitigate any harmful effect that is known to Business Associate and the Covered Entity as a result of a use or disclosure of Protected Health Information by Business Associate in violation of the requirements of this Agreement. The Business Associate shall be responsible for the direct costs of implementing these efforts to the extent that the actual or potential Breach is caused by the willful neglect, material breach or violation of the Agreement by the Business Associate.
- 3.6 In accordance with 45 CFR § 164.502(e)(1)(ii) and 164.308(b)(2), if applicable, Business Associate may disclose protected health information to a downstream business associate that is an agent or subcontractor and may allow the agent or subcontractor to create, receive, maintain, or transmit Protected Health Information on its behalf only if the Business Associate enters and maintains a written agreement with the agent or subcontractor pursuant to which the agent or subcontractor agrees to the same restrictions, conditions, and requirements that apply through this Agreement to Business Associate with respect to such information. This requirement applies to any person or entity who performs functions or activities that involve access to information created, received, maintained, or transmitted by the Business Associate. Nothing in this Section shall be deemed to permit a Business Associate to use an agent or subcontractor not approved by Covered Entity to perform work as may be provided in the Services Agreement.
- 3.7 Business Associate agrees to make available Protected Health Information in a designated record set to the Covered Entity to the extent and in the manner required by 45 CFR § 164.524.
- 3.8 Business Associate agrees to make amendment(s) to Protected Health Information in a designated record set as directed or agreed to by the Covered Entity pursuant to 45 CFR § 164.526; or take other measures as necessary to satisfy Covered Entity's obligations under 45 CFR § 164.526.
- 3.9 Business Associate agrees to maintain and make available the information required to provide an accounting of disclosures to the Covered Entity as necessary to satisfy the Covered Entity's obligations under 45 CFR § 164.528.
- 3.10 Business Associate agrees to make internal practices, books, and records relating to the use and disclosure of Protected Health Information created, received, maintained, or transmitted by Business Associate on behalf of, Covered Entity available to the Covered Entity, or at the request of the Covered Entity to the Secretary of Health and Human Services.
- 3.11 Business Associate agrees to document any disclosures of and make Protected Health Information available for purposes of accounting of disclosures, as required under 45 CFR § 164.528.

SECTION IV

PERMITTED USES AND DISCLOSURES BY BUSINESS ASSOCIATE

- 4.1 Except as otherwise limited in this Agreement, Business Associate may use or disclose Protected Health Information to perform functions, activities, or services for, or on behalf of, Covered Entity as specified in the Services Agreement, provided that such use or disclosure would not violate the HIPAA Rules and/or HITECH Section 13405(a) if done by Covered Entity.
- 4.2 Business Associate may use or disclose Protected Health Information as required by law.
- 4.3 Business Associate agrees to make and use reasonable efforts to limit disclosures and requests for Protected Health Information to the minimum necessary to accomplish the intended purpose of the use, disclosure, or request consistent with 45 CFR § 164.502(b).

SECTION V

TERM AND TERMINATION

- 5.1 **Term.** The term of this agreement shall be effective as of the date first written above, and shall terminate upon the last to occur of 1) termination of the Services Agreement 2) when all of the Protected Health Information or Electronic Protected Health Information provided by Covered Entity to Business Associate, or created, received, stored or transmitted by Business Associate on behalf of Covered Entity, is destroyed or returned to Covered Entity; or, if it is infeasible to return or destroy Protected Health Information or Electronic Protected Health Information, until protections are extended to such information, in accordance with the termination provisions in this Section.
- 5.2 **Termination for Cause.** Upon Covered Entity's knowledge of a material breach of this Agreement by Business Associate, Covered Entity shall have the right to immediately terminate this Agreement and the Services Agreement.
- 5.3 **Obligations of Business Associate upon Termination.**
- a. Upon termination of this Agreement for any reason, or upon request of Covered Entity, whichever occurs first, Business Associate shall return or destroy all Protected Health Information received from Covered Entity, or created, received, stored or transmitted by Business Associate on behalf of Covered Entity that the Business Associate still maintains in any form. This provision shall apply to Protected Health Information that is in the possession of subcontractors or agents of Business Associate. Business Associate, their subcontractors, or agents shall retain no copies of the Protected Health Information.
 - b. In the event that Business Associate determines that returning or destroying the Protected Health Information is infeasible, Business Associate shall provide to Covered Entity notification of the conditions that make return or destruction infeasible. Upon mutual agreement of the Parties that return or destruction of Protected Health Information is infeasible, Business Associate shall extend the protections of this Agreement to such Protected Health Information and limit further uses and disclosures of such Protected Health Information to those purposes that make the return or destruction infeasible, for so long as Business Associate maintains such Protected Health Information. Business Associate shall return to Covered Entity, or if agreed to by Covered Entity, destroy the Protected Health Information retained by Business Associate, its agents, or subcontractors when the conditions that make return or destruction infeasible no longer exist.

SECTION VI

MISCELLANEOUS

- 6.1 **No Rights in Third Parties.** Except as expressly stated herein or the HIPAA Rules, the Parties to this Agreement do not intend to create any rights in any third parties.
- 6.2 **Survival.** The obligations of Business Associate under this Section shall survive the expiration, termination, or cancellation of this Agreement, the Services Agreement and/or the business relationship of the parties, and shall continue to bind Business Associate, its agents, employees, contractors, successors, and assigns as set forth herein.
- 6.3 **Amendment.** This Agreement may be amended or modified only in a writing signed by the Parties. The Parties agree that this Agreement will be automatically amended to conform to any changes in the HIPAA Rules as is necessary for a Covered Entity to comply with.
- 6.4 **Assignment.** No Party may assign its respective rights and obligations under this Agreement without the prior written consent of the other Party.

- 6.5 **Independent Contractor.** None of the provisions of this Agreement are intended to create, nor will they be deemed to create any relationship between the Parties other than that of independent parties contracting with each other solely for the purposes of effecting the provisions of this Agreement and any other agreements between the Parties evidencing their business relationship.
- 6.6 **Governing Law.** This Agreement will be governed by the laws of the State of North Carolina.
- 6.7 **No Waiver.** No change, waiver or discharge of any liability or obligation hereunder on any one or more occasions shall be deemed a waiver of performance of any continuing or other obligation, or shall prohibit enforcement of any obligation, on any other occasion.
- 6.8 **Interpretation.** Any ambiguity of this Agreement shall be resolved in favor of a meaning that permits Covered Entity to comply with the HIPAA Rules.
- 6.9 **Severability.** In the event that any provision of this Agreement is held by a court of competent jurisdiction to be invalid or unenforceable, the remainder of the provisions of this Agreement will remain in full force and effect.
- 6.10 **Notice.** Any notification required in this Agreement shall be made in writing to the representative of the other Party who signed this Agreement or the person currently serving in that representative's position with the other Party.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the day and year written above.

BUSINESS ASSOCIATE:

TOWN OF APEX

By: _____

Name: Ralph Clark (Interim Town Manager)
Title: Town Manager

Dated: _____

COVERED ENTITY:

WAKE COUNTY

By: _____

Name: David Ellis
Title: County Manager

Dated: _____