

**COUNTY OF WAKE**

**STATE OF NORTH CAROLINA**

**INTERLOCAL AGREEMENT FOR PROVISION OF WATER SERVICES TO  
APEX TO SERVE FARM POND ROAD PROPERTY**

This Interlocal Agreement, dated the \_\_ day of \_\_\_\_\_, 2021 (“Agreement”) between the Town of Cary (“Cary”) and the Town of Apex (“Apex”), both North Carolina municipal corporations. Cary and Apex are sometimes referred to individually as “Party” and jointly as “Parties.”

**RECITALS**

WHEREAS, Cary and Apex jointly own and Cary as Lead Agency operates the Cary/Apex Water Treatment Facility pursuant to 2017 Cary/Apex Water Treatment Facility Agreement dated July 1, 2017 (“CAWTF Agreement”); and

WHEREAS, the property owner of 5921 Farmpond Road (“Property Owner”) desires to petition for annexation of the approximately 1.14 acre parcel at 5921 Farmpond Road (the “Property”) into Apex municipal limits for the purpose of connecting to municipal water service; and

WHEREAS, as of the date this Agreement is executed, Apex water infrastructure has not been extended to the area to permit Apex to provide water service to Property, but Cary water infrastructure has been installed adjacent to Property; and

WHEREAS, the Parties agree that the cooperative endeavor described herein will be beneficial to Apex and the Property Owner, and Cary is agreeable, upon the terms and conditions hereinafter set forth, to provide potable water service only to Apex to serve Property, subject to limitations described herein. Cary will not provide wastewater (sewer); and

WHEREAS, CAWTF Agreement provides in Section 3.4 a process for one party to use surplus capacity of the other party (“Surplus Capacity Process”); and

WHEREAS, in lieu of Surplus Capacity Process, the Parties desire to enter into this Agreement; and

WHEREAS, the governing bodies of Cary and Apex have reviewed this Agreement and agree to its terms as fair and equitable; and

WHEREAS, this Agreement is authorized by NCGS §160A-20.1, NCGS §160A-322, and NCGS §160A-460 *et seq.*

**NOW THEREFORE**, for and in consideration of the recitals and the mutual promises and covenants contained in this Agreement, the Parties agree as follows:

1. **Incorporation of Recitals and Purpose.** The Recitals are true and are incorporated into this Agreement. The purpose of this Agreement is to enable Cary to provide water services to Apex, such that Apex may supply water to Property.
  
2. **Effective Date; Duration and Term.** This Agreement is conditioned upon and shall become effective (“Effective Date”) upon the date it is properly authorized and executed by the last of Cary and Apex, which date shall be inserted into the first line of this Agreement.. The initial term of this Agreement shall be for twenty-five (25) years from the “Effective Date.”. This Agreement shall thereafter automatically renew for up to five (5) additional one-year terms unless Apex gives notice of termination at least ninety (90) days before the end of the then current term. Upon the termination of this Agreement for any reason, Cary’s provision of water service shall cease and Apex shall itself be responsible for providing potable water service to the Property. The Parties may extend the term of this Agreement to the extent lawfully permitted by a separate written instrument executed by both Parties.

### 3. **Roles and Responsibilities of Each Party**

#### A. **Cary’s Role and Responsibility**

- i. **Potable Water Service.** Subject to the conditions herein, Cary agrees to provide potable water service to Apex for Apex to use to serve the Property (“Water Service”). Cary will not provide wastewater (sewer) service.
  
- ii. **Installation of Service Connection.** Cary will make the connection to the existing water main and provide a service and meter upon payment of development fees and connection fees by Apex.
  
- iii. **Limits on Water Service.** Cary’s provision of Water Service is contingent upon the Property remaining used as “Residential,” containing one single-family dwelling and appurtenances, and being an Apex water service customer. Provision of Water Service shall be under the same terms, conditions, and limitations as imposed on other Cary residential water service customers, including the need for compliance with Town of Cary ordinances. For example, and without limitation, such ordinances include Town Code Sections 36-80 (“Water Service Provided by Town Includes Only Alternate Outdoor Irrigation”), 36-81 (“Water Shortage Response”), and 36-83 (“Water Waste”), as hereafter may be amended from time to time and such new and additional ordinances as may come into effect from time to time.

#### B. **Apex’s Role and Responsibility**

- i. Upon payment by Apex to Cary for all development and connection fees and the subsequent setting of the Cary service and meter box, Apex shall install, or cause to be installed, all equipment necessary to provide a connection from Cary's meter box to a separate meter at Property (the "Property Meter") in accordance with standards, specifications, and regulatory requirements of Apex.
- ii. The Property Owner will be established as a customer of Apex and will pay to Apex the customary development fees and connection fees established by Apex for connection of water service. Apex shall pay to Cary the customary development fees and connection fees established by Cary for connection of water service.
- iii. Apex shall be responsible for timely payment to Cary of Water Service costs in accordance with Paragraph 4.
- iv. Apex shall administer Property Owner's Water Service account including invoicing in a manner consistent with its other residential customers, including penalties for late payment or non-payment of Water Service charges. Apex will notify Cary if Water Service is suspended or terminated, or when Apex is aware the Property is no longer used as a single-family residence.
- v. If reasonably requested by Cary, Apex shall execute a Letter of Agreement ("LOA") pursuant to Section 3.4 of CAWTF Agreement, suitable in form to Cary, which LOA shall supersede and terminate this Agreement. If Cary presents an LOA to Apex, and Apex fails to execute the LOA within ninety (90) days of receipt, Apex shall be considered in breach of this Agreement and Cary may terminate Agreement.

#### **4. Payment for Water Service.**

- A. Cary shall bill Apex on a monthly basis for Water Service for the volume of water delivered through Cary Meter in accordance with Cary's published Government rate. Apex shall pay Cary all correct billed amounts by the date specified on the bill.
- B. Apex shall be responsible for billing Property in accordance with Apex laws, rules, and regulations.

#### **5. Termination.**

- A. This Agreement and the Water Service provided hereunder may be terminated by the mutual agreement of Cary and Apex. This Agreement may be terminated by Apex as provided in Paragraph 2. This Agreement may be terminated by Cary as provided in Paragraph 3 upon Apex's failure to execute a Letter of Agreement suitable in form to Cary.
- B. All obligations that have accrued pursuant to this Agreement prior to the time of a termination shall survive termination.

C. Upon termination of this Agreement for any reason, including termination for breach, Cary shall properly close and abandon the potable water service connection to Apex at the Cary Meter.

6. **Termination for Breach.** Either Cary or Apex may terminate this Agreement by notice to the other Party at any time during the Term or any extension term as follows: if the other Party is in breach of any material obligation hereunder, by causes and reasons within its control, and has not cured such breach within sixty (60) days after notice requesting cure of the breach, provided, however, that if the breach is not capable of being cured within sixty (60) days of such written notice, the Agreement may not be terminated so long as the breaching party commences and is taking commercially reasonable actions to cure such breach as promptly as practicable.
7. **Notices.** Unless otherwise provided, all notices provided for herein shall be in writing and shall be sent properly addressed by first class mail and electronic mail to the parties at the addresses shown below:

Town of Cary  
PO Box 8005  
Cary, North Carolina 27512-8005  
Attention: Town Manager

With a copy to the Utilities Director

Town of Apex  
PO Box 250  
Apex, North Carolina 27502-0250  
Attention: Town Manager

With a copy to the Water Resources Director

All notices shall be effective three (3) days after having been deposited, properly addressed and postage prepaid, in the US Postal Service. Any party hereto may change the person to whom or the address to which notices should be provided by giving written notice to the other parties of the change.

8. **Entire Agreement/Amendments.** This Agreement constitutes the entire agreement between the Parties with respect to its general subject matter. This Agreement may not be changed except in writing signed by all the parties.
9. **No Joint Agency and No Personnel.** No joint agency is established by this Agreement. This Agreement authorizes Cary to provide Water Service to Apex on the terms provided herein, but does not create a partnership, joint venture, other joint endeavor, joint ownership, joint operations or personnel sharing of any kind between the Parties. No joint personnel are needed by the Parties to carry out this Agreement.

**10. Representations and Warranties.** The Parties each represent, covenant, and warrant for the other's benefit as follows:

- A. Each Party has all necessary power and authority to enter into this Agreement and to carry out the transactions contemplated by this Agreement, and this Agreement has been authorized by Resolution spread upon the minutes of each Party's governing body. This Agreement is a valid and binding obligation of each Party.
- B. Neither the execution and delivery of this Agreement, nor the fulfillment of or compliance with its terms and conditions, nor the consummation of the transactions contemplated by this Agreement, results in a breach of the terms, conditions and provisions of any agreement or instrument to which either Party is now a party or by which either is bound, or constitutes a default under any of the foregoing.
- C. To the knowledge of each Party, there is no litigation or other court or administrative proceeding pending or threatened against such Party (or against any other person) affecting such Party's rights to execute or deliver this Agreement or to comply with its obligations under this Agreement. Neither such Party's execution and delivery of this Agreement, nor its compliance with its obligations under this Agreement, requires the approval of any regulatory body or any other entity the approval of which has not been obtained.

**11. Dispute Resolution.** In the event of conflict or default that might arise for matters associated with this Agreement, the Parties agree to informally communicate to resolve the conflict. If any such dispute cannot be informally resolved, then such dispute, or any other matter arising under this Agreement, shall be subject to resolution in a court of competent jurisdiction. Such disputes, or any other claims, disputes or other controversies arising out of, and between the Parties shall be subject to and decided exclusively by the appropriate general court of justice of Wake County, North Carolina.

**12. No Waiver of Non-Compliance with Agreement.** No provision of this Agreement shall be deemed to have been waived by any party hereto unless such waiver shall be in writing and executed by the same formality as this Agreement. The failure of any party hereto at any time to require strict performance by the other of any provision hereof shall in no way affect the right of the other party to thereafter enforce the same. In addition, no waiver or acquiescence by a party hereto of any breach of any provision hereof by another party shall be taken to be a waiver of any succeeding breach of such provision or as a waiver of the provision itself.

**13. Governing Law.** The Parties intend that this Agreement be governed by the law of the State of North Carolina. Proper venue for any action shall solely be Wake County.

- 14. Assignment.** Neither Party may sell or assign any interest in or obligation under this Agreement without the prior written consent of the other Party.
- 15. Liability of Officers and Agents.** No officer, agent or employee of a Party will be subject to any personal liability or accountability by reason of the execution of this Agreement or any other documents related to the transactions contemplated hereby. Such officers, agents or employees will be deemed to execute such documents in their official capacities only, and not in their individual capacities. This section will not relieve any such officer, agent or employee from the performance of any official duty provided by law.
- 16. Execution in Counterparts/Electronic Version of Agreement.** This Agreement may be executed in any number of counterparts, each of which shall be an original and all of which shall constitute but one and the same instrument. Either Party may convert a signed original of the Agreement to an electronic record pursuant to a North Carolina Department of Natural and Cultural Resources approved procedure and process for converting paper records to electronic records for record retention purposes. Such electronic record of the Agreement shall be deemed for all purposes to be an original signed Agreement.
- 17. Compliance with Laws.** The Parties, and all subcontractors, shall comply with Article 2, Chapter 64 and Article 10A, Chapter 14 of the North Carolina General Statutes.
- 18. Electronic Signatures.** Both Parties acknowledge and agree that the electronic signature application DocuSign may be used to execute this Agreement and any associated documents. By selecting "I Agree," "I Accept," or other similar item, button, or icon via use of a keypad, mouse, or other device, as part of the DocuSign application, the Parties consent to be legally bound by the terms and conditions of this Agreement and that such act constitutes the Party's signature as if actually signed by both Towns in writing. The Parties also agree that no certification authority or other third-party verification is necessary to validate its electronic signature and that the lack of such certification or third-party verification will not in any way affect the enforceability of its electronic signature. The Parties acknowledge and agree that delivery of a copy of this Agreement or any other document contemplated hereby, through the DocuSign application, will have the same effect as physical delivery of the paper document bearing an original written signature.

**IN TESTIMONY WHEREOF**, the Town of Cary and the Town of Apex, both pursuant to resolutions of their respective governing boards spread upon their minutes, have caused this Agreement to be executed and attested by their duly authorized officers and their official seals affixed, the day and year first written above.

[SIGNATURES APPEAR ON THE NEXT TWO PAGES]

[SEAL]

TOWN OF APEX, NORTH CAROLINA

By: \_\_\_\_\_  
Jacques K. Gilbert, Mayor

Date: \_\_\_\_\_

Attest:

\_\_\_\_\_  
Donna B. Hosch, Town Clerk, CMC

This instrument has been pre-audited in the manner required by the Local Government Budget and Fiscal Control Act.

\_\_\_\_\_  
T. Vance Holloman, Finance Director

**ACKNOWLEDGEMENT**

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

This \_\_\_\_ day of \_\_\_\_\_, 2021, personally came before me, a Notary Public in and for the said County and State, Donna B. Hosch, who, being by me duly sworn, says that she is the Town Clerk of the Town of Apex, North Carolina, a municipal corporation duly organized and validly existing under the laws of the State of North Carolina and acting through its Town Council, and by authority duly given and as the act of said Town, the foregoing instrument was signed in its name by Jacques K. Gilbert, as Mayor of said Town, sealed with its seal, and attested by herself as the Town Clerk.

Witness my hand and official stamp or seal, this \_\_\_\_ day \_\_\_\_\_, 2021.

\_\_\_\_\_  
[Signature of Notary Public]

My Commission Expires: \_\_\_\_\_

**TOWN OF CARY, NORTH CAROLINA**

By: \_\_\_\_\_  
Russ Overton, Deputy Town Manager

Date: \_\_\_\_\_

Attest:

\_\_\_\_\_  
Virginia H. Johnson, Town Clerk

This instrument has been pre-audited in the manner required by the Local Budget and Fiscal Control Act.

By: \_\_\_\_\_  
Deputy Finance Officer  
Town of Cary