TOWN OF BLACK MOUNTAIN BOARD OF ALDERMEN
SPECIAL CALL WATER AGREEMENT WORKSHOP MINUTES
April 23, 2018

THE BLACK MOUNTAIN BOARD OF ALDERMEN held a water agreement workshop meeting on Monday, April 23, 2018 at 4:30 p.m. in the board room of Town Hall, 160 Midland Avenue, Black Mountain, NC. The purpose of the meeting was to discuss the agreement for transfer of water distribution system and second amendment to the wholesale water purchase agreement between the City of Asheville and the Town of Black Mountain.

1. CALL TO ORDER

Mayor Collins called the meeting to order at 4:30 p.m. *with the following members present*:

Mayor Don Collins
Vice Mayor Maggie Tuttle
Alderman Larry Harris
Alderman Jeremie Konegni
Alderman Carlos Showers
Alderman Ryan Stone

The following staff members were present:

Matt Settlemyer, Town Manager
Dean Luebbe, Assistant Town Manager/Financial Services Director
Angela L. Reece, Town Clerk
Ronald E. Sneed, Attorney
Shawn Freeman, Police Chief
John Wilson, Deputy Fire Chief
Jessica Trotman, Planning Director
Jamey Matthews, Public Services Director

David Melton, Interim Director of Water Resources, City of Asheville

Mayor Don Collins called the meeting to order and opened the floor for discussion.

Town Manager Settlemyer began the discussion and stated the Town currently produces 550,000 gallons of water per day and has an agreement with the City of Asheville to purchase up to 200,000 gallons of water per day. Manager Settlemyer recalled receiving economic development grant funding for the Avadim project in the Black Mountain Commerce Park which will be utilized to construct a high capacity water pumping station on Highway 70 in order to service the Commerce Park as well as additional water customers. Manager Settlemyer stated the Commerce Park will utilize approximately 225,000 gallons of water per day initially and more when it is fully occupied by other industries that support the Commerce Park.

Manager Settlemyer referenced the water line transfer map which is made part of and included in these minutes. He stated the agreement has two phases with the first phase transferring water lines on Highway 70 and Blue Ridge Road and Access Road with the second phase transferring lines on Allen Mountain and the Golf Course. Manager Settlemyer stated there will be approximately 600 water customers who will be transferred into the Black Mountain water system. Manager Settlemyer stated he anticipated usage of 650,000 gallons per day for residential customers and said the Town of Black Mountain charges $2 less per customer than the City of Asheville.

Manager Settlemyer stated the underlying issue is having control of water lines that are in the Town of Black Mountain so we may maintain the lines and serve our customers better. Approximately 13 miles of the City of Asheville's water distribution system, which it currently owns and maintains, is located within the corporate limits of Black Mountain and serves approximately 600 customers.

Manager Settlemyer referred to the Second Amendment to the City of Asheville's Wholesale Water Purchase draft Agreement with the Town of Black Mountain which is made part of and include in these minutes and stated he is concerned with the City's available capacity and would like to see language in the draft purchase agreement regarding fixed volume amount amended to guarantee available capacity to the Town of Black Mountain in future years.

David Melton, City of Asheville Water Resources Interim Director stated the City of Asheville's water system is averaging approximately 20M gallons per day and has a capacity of 43M between all three plants. Mr. Melton stated there are protections built in by state law to ensure available capacity. He said once the system reaches 80% of capacity then the State requires mandatory plant expansion and if they get to 90% then they are mandated to begin construction. Mr. Melton stated the demographic served is not irrigation driven like other systems and would have to grow half again before capacity is an issue. He said the new pumping station is being designed to accommodate 750,000 gallons per day.

Attorney Ron Sneed discussed the agreements with the Board. The recommended changes appear in red in the attached document. Mr. Melton stated he cannot speak for his legal department but said if the Town wishes to lock it 750,000 gallons per day capacity then they will have to pay for it. Mr. Melton cited the fair rate structure in the Sullivan Acts and discussed legal issues surrounding wholesale purchasing of water from the City.

Attorney Sneed stated he will craft a new proposal with a tiered system for purchasing up to 750,000 gallons per day which is subject to the other limitations of the agreement. Attorney Sneed stated we are looking 20-30 years down the road at some assurance for our water system and said it is foreseeable that the commerce park could host an industry that could use a lot of water in the future. The Board agreed they would like to see an agreement with commitment from the City to provide additional capacity when it is needed.

STATE OF NORTH CAROLINA
COUNTY OF BUNCOMBE

AGREEMENT FOR TRANSFER OF WATER DISTRIBUTION SYSTEM FROM CITY OF ASHEVILLE TO THE TOWN OF BLACK MOUNTAIN

THIS AGREEMENT (herein the "Agreement") made and entered into this _____ day of _____, 2018, by and between the City of Asheville, a municipal corporation existing under the laws of the State of North Carolina (herein the "City"), and the Town of Black Mountain, a municipal corporation existing under the laws of the State of North Carolina (herein "Black Mountain") (collectively the "Parties").

W I T N E S S E T H:

WHEREAS, N.C. Gen. Stat. §§ 160A-312(a) and 311(2) authorize municipalities to acquire, construct, establish, enlarge, improve, maintain, own, operate and contract for the operation of a public enterprise, which includes a water supply and distribution system, to furnish services both inside and outside its corporate limits; and

WHEREAS, N.C. Gen. Stat. § 160A-274, authorizes governmental units to exchange with, lease to, lease from, sell to, or purchase from any other governmental unit any interest in real or personal property, with or without consideration; and

WHEREAS, N.C. Gen. Stat. § 160A-461 authorizes units of local government to enter into contracts or agreements with each other in order to execute any undertaking, which is defined by N.C. Gen. Stat. § 160A-460(1) as the contractual exercise by one unit for one or more other units, of any power, function, public enterprise, right, privilege, or immunity of local government; and

WHEREAS, the City owns and operates a water supply and distribution system which provides water for the residents and businesses within and outside the corporate limits of the City of Asheville; and

WHEREAS, approximately thirteen (13) miles of the City's water distribution system which it currently owns and maintains is located within the corporate limits of Black Mountain and serves approximately 600 customers and;

WHEREAS, Black Mountain owns and maintains its own water distribution system and in many areas within the corporate limits of Black Mountain, the two water distribution systems run parallel to each other and are redundant; and

WHEREAS, the water distribution system owned by the City located in the corporate limits of Black Mountain is aging and in need of repair and/or replacement; and

WHEREAS, Black Mountain and the City desire and agree that the City will transfer the City's water distribution system to Black Mountain for full ownership and maintenance, as more specifically identified on the City of Asheville/Town of Black Mountain Water System Interconnections map, which is attached hereto and incorporated herein as Exhibit A.

WHEREAS, the Asheville City Council adopted Resolution No. _____ allowing for the transfer of the City's water distribution system identified on Exhibit A to Black Mountain for full ownership and maintenance.

WHEREAS, the Black Mountain Town Council adopted Resolution No. R-18-06 accepting the transfer of the City's water distribution system identified on Exhibit A to Black Mountain for full ownership and maintenance.

NOW, THEREFORE, in consideration of the foregoing recitals and benefits to be derived from the mutual covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereby agree to the following terms and conditions:

1. **Property to be Transferred.**

   The City shall transfer to Black Mountain and Black Mountain shall receive and accept from the City the following (collectively referred to as the "Water Distribution System"):

   a. All pipes, water lines, hydrants, pump stations, force mains, mains, meters, meter boxes, water tanks, pump stations presently in use by the City related to the Water Distribution System as identified on Exhibit A.

   b. All of the City's rights, titles and interests in land, easements and encroachment agreements necessary to own and operate the Water Distribution system as identified on Exhibit A.

2. **Transfer Phases and Dates.** The transfer of the Water Distribution System shall occur as follows:

   a. **Phase One Transfer Date.** The transfer of the Water Distribution System from the City to Black Mountain indicated by the green lines on Exhibit A will occur on or before _____, 2018.

   b. **Phase Two Transfer Date.** The transfer of the Water Distribution System from the City to Black Mountain indicated by the red lines on Exhibit A will occur one (1) year after the Phase One Transfer Date.

3. **Water Distribution System Transfer**

On the Date(s) of Transfer, Black Mountain shall assume immediate and sole duty, responsibility, and liability for financing, operating, maintaining, improving and expanding the Water Distribution System as identified on Exhibit A. Black Mountain shall have the sole responsibility and authority to appoint or otherwise employ the personnel necessary for the implementation of this Agreement and future operation of the Water Distribution System.

On the Date(s) of Transfer, the City's rights, title and interest in the real property related to the Water Distribution System shall be conveyed by the City to Black Mountain by an appropriate instrument suitable for recording in the Office of the Register of Deeds for Buncombe County, North Carolina. Any easements or encroachments that have not been obtained by the City but are required to be obtained as part of the operational and maintenance needs of the Water Distribution System shall be the sole responsibility of Black Mountain.

Subsequent to the Date(s) of Transfer, the Parties agree to execute all such further instruments of conveyance, documents, or transfers required or necessary to carry out the intent and purpose of this Agreement if and as that may become necessary in the future.

4. **Customer Transfer**

On the Date(s) of Transfer, the City shall transfer to Black Mountain the approximately 600 customer accounts that are served by the Water Distribution System. All customers and users of the Water Distribution System shall become subject to all the rules, regulations and ordinances of Black Mountain as the same apply to all users and customers of the water system of Black Mountain.

Subsequent to the Date(s) of Transfer, all future requests for new service connections and/or extensions to the Water Distribution System will be made to Black Mountain and is the responsibility of Black Mountain. Black Mountain shall be entitled to the receipt of all revenues from the Water Distribution System and any extensions thereof.

5. **Records Transfer**

On the Date(s) of Transfer, and as allowable by law, the City shall transfer to Black Mountain all available reproducible and electronic copies of any and all records, data, and information that are in the City's possession, related to the Water Distribution System, which include, but are not limited to, the following:

a. Construction contracts, drawings, maps and all other related documents;
b. Billing collection and payment records of all present customers;
c. A listing of all actual service locations;
d. Pending applications for water service;
e. Contracts or agreements to provide water service currently in effect;

f. Repair and maintenance records; and
g. Copies of all recorded easements and encroachment agreements.

6. **Cost.** Any engineering or construction costs incurred as a result of the transfer of the Water Distribution System from the City to Black Mountain shall be borne by Black Mountain.

7. **Term.** This Agreement shall be perpetual. The parties hereby agree that such perpetual duration is reasonable and necessary in light of the purposes of this Agreement.

8. **No Representations or Warranties.** No representations or warranties, express, implied, legal, conventional or otherwise, are made by the City with respect to the ownership, title to, value, repair, condition (including physical and environmental condition), quality or design, of the Water Distribution System or any real property related thereto, it being the express intention of the City that the Water Distribution System is hereby conveyed, transferred and/or assigned to Black Mountain in its present condition and state, on an "as is" and "where is" basis, with all faults and without any representation or warranty of any kind. Black Mountain accepts the transfer of the Water Distribution System on an "as is" and "where is" basis.

9. **Release of Liability.**

To the extent allowed by law, Black Mountain hereby releases, acquits, and forever discharges the City and its predecessors, successors, affiliates, subsidiaries and assigns, and any person or entity acting for, or on the City's behalf, including, in their capacities as such, without limitation, their respective past, present, and future officers, directors, employees, attorneys, agents, administrators, representatives, successors and assigns from any and all past, present or future actions, causes of action, claims, demands, obligations, rights, costs, damages, fines, penalties and expenses of any kind, known or unknown, absolute or contingent, whether at law or in equity, arising out of or relating to, directly or indirectly, the ownership, construction, operation and/or maintenance of the Water Distribution System, the transfer of the Water Distribution System and/or any term or condition of this Agreement, EXCEPT for any claims for personal injury or property damage arising from actions or events occurring prior to the transfer of the system to Black Mountain.

10. Relationship to Wholesale Water Transfer Agreement

The Parties agree that this Agreement does not change or modify any of the parties' obligations contained in the Wholesale Water Purchase Agreement with the Town of Black Mountain executed by the parties on February 14, 2006, and any amendments thereto, which shall remain in full force and effect in accordance with its terms until further amended by the parties, it being anticipated and understood that the City shall

continue to sell water to Black Mountain pursuant to such agreement or any future amended agreement or replacement agreement.

11. Representations and Warranties of the Parties

The Parties represent as follows:

a. The Parties are duly organized, validly existing municipal corporations. The Parties have all requisite power and authority and have taken all requisite action necessary to (i) enter into this Agreement, and (ii) perform all of the terms and conditions of this Agreement;

b. The governing bodies of the Parties have approved the Parties entering into this Agreement; and

c. This Agreement constitutes, when executed and delivered, valid and binding obligations of the Parties, enforceable in accordance with their terms.

12. General Terms and Conditions

a. Joint Agency. No joint agency is established by this Agreement.

b. Governing Law. This Agreement is entered into in North Carolina and shall be construed under the statutes and laws of North Carolina.

c. Assignability. This Agreement is not assignable by either Party without the prior written consent of the other Party.

d. Entire Agreement. This Agreement constitutes the entire Agreement between the Parties with respect to the specific matters contained herein and supersedes all previous discussions, understandings and agreements. Any amendments to or waivers of the provisions contained herein shall be made in writing and consented to by both Parties.

e. Severability. If any sentence, phrase, paragraph, provision or portion of this Agreement is for any reason held to be invalid or unconstitutional by a court of competent jurisdiction, such portion shall be deemed an independent provision and such holding shall not affect the validity of the remaining portions hereto.

f. Notices. Any notice to be given or any documents to be delivered by any party to any other herein shall be delivered in person or mailed by certified post and addressed to the City or Town Manager of the respective party.

IN WITNESS WHEREOF, each Party has caused this agreement to be duly executed on the day and year first above written by their duly authorized representative.

Attest:

THE CITY OF ASHEVILLE

By: _____

_____
Magdalen Burleson, City Clerk
(official seal)

Gary W. Jackson, City Manager

STATE OF NORTH CAROLINA
COUNTY OF BUNCOMBE

I, _____Notary Public of the County and State aforesaid do hereby certify that Magdalen Burleson, personally came before me this day and acknowledged that she is the City Clerk of the City of Asheville, a municipal corporation, and that by authority duly given and as the act of the corporation, the foregoing instrument was signed in its name by its City Manager and attested by herself as its City Clerk.

Witness my hand and notarial seal this ____ day of _____, 2017.

_____
Notary Public
Print or type name _____
My Commission expires _____

THE TOWN OF BLACK MOUNTAIN

Attest:

By: _____

_____
Town Clerk
(official seal)

Matt Settlemyer, Town Manager

STATE OF NORTH CAROLINA
COUNTY OF _____

I, _____, a Notary Public for said County and State aforesaid do hereby certify that _____, personally came before me this day and acknowledged that she is the Town Clerk of the Town of Black Mountain, a municipal corporation, and that by authority duly given and as the act of the corporation, the foregoing instrument was signed in its name by its Town Manager and attested by him/herself as its Town Clerk.

Witness my hand and notarial seal this _____ day of _____, 2017.

_____
Notary Public
Print or type name: _____
My Commission Expires: _____

STATE OF NORTH CAROLINA
COUNTY OF BUNCOMBE

DRAFT

SECOND AMENDMENT TO CITY OF ASHEVILLE'S WHOLESALE WATER PURCHASE AGREEMENT WITH THE TOWN OF BLACK MOUNTAIN

This Second Amendment to the Wholesale Water Purchase Agreement (the "Agreement") made and entered into this ___ day of _____, 2018 by and between the City of Asheville, a municipal corporation existing under the laws of North Carolina (herein the "City") and the Town of Black Mountain, a municipal corporation existing under the laws of the State of North Carolina (herein "Black Mountain") (collectively the "Parties").

WHEREAS, the Parties hereto entered into the Agreement on February 14, 2006 for the wholesale purchase of a portion of the City's water supply by Black Mountain; and

WHEREAS, the Agreement automatically renews on a year-to-year basis beginning on April 30, 2007 unless either party gives 30 (thirty) days written notice; and

WHEREAS, pursuant to authority given by the Asheville City Council ("City Council") in Resolution No. 09-191, the parties executed Amendment 1 to the Agreement allowing Black Mountain to request a reduction of capacity commitment one year after an approved capacity increase; and

WHEREAS, Black Mountain is requesting an increase in water capacity commitment of the City from 200,000 gallons per day to 300,000 gallons per day and the City agrees to provide such increase;

WHEREAS, and the Parties agree to amend the Agreement and both governing boards approved the modification to the Agreement; and

NOW THEREFORE, the Parties agree as follows:

1. Section B. 1 of the Agreement shall be revised to read:

   The City will commit to deliver treated water to Black Mountain from the City's water system not to exceed 300,000 gallons per day.

2. Section B.4 of the Agreement shall be revised to read:

   Black Mountain intends to expand the fixed volume amount received in Section B.1 by the City to 750,000 gallons per day over approximately the next twenty (20) years. Black Mountain may renegotiate the fixed volume amount upward with the City anytime during term of this Agreement upon a thirty (30) day written notice to the Director. If the requested amount is available and the City can provide the additional quantity without affecting the City's commitment to its other customers regarding quantity, pressure, or quality, as determined in the sole discretion of the City, the Director shall negotiate in

good faith within thirty (30) days of receiving the request for a new fixed volume monthly amount.

3. Except as herein amended, all remaining provisions of the Agreement and Amendment 1 to the Agreement shall remain in effect.

This the ___ day of _____, 2018.

Attest:

THE CITY OF ASHEVILLE

_____
Magdalen Burleson, City Clerk
(official seal)

_____
Mayor

Attest:

TOWN OF BLACK MOUNTAIN

_____
Town Clerk
(official seal)

_____
Mayor

DRAFT

Mr. Melton said he is comfortable with presenting options to his council and legal team. Mr. Melton proposed proceeding with the transfer of assets and pay for capacity at an agreed upon rate in May then revisiting the long term agreement in 90 days. The Board was open to this suggestion and will continue discussions at their regular scheduled meeting on May 14, 2018.

There being no further business, Mayor Collins adjourned the meeting at 5:47 p.m.

ATTEST:

Angela L. Reece, Town Clerk

Don Collins, Mayor

Matt Settlemyer, Town Manager