

FORSYTH COUNTY

BOARD OF COMMISSIONERS

MEETING DATE: August 22, 2016

AGENDA ITEM NUMBER: 5

SUBJECT: RESOLUTION RATIFYING AND AUTHORIZING EXECUTION OF A LEASE OF FORSYTH COUNTY AND GUILFORD COUNTY-OWNED REAL PROPERTY TO WAKE FOREST UNIVERSITY OF THE TRIAD PARK ROPES COURSE PREMISES (PARKS & RECREATION DEPARTMENT)

COUNTY MANAGER'S RECOMMENDATION OR COMMENTS: Recommend Approval

SUMMARY OF INFORMATION:

This item seeks authority to execute a lease agreement between Forsyth and Guilford Counties and Wake Forest University as tenant of the Ropes Course at Triad Park. The proposed lease is for a three-year term, renewable for three and one half years.

There is a \$75 per month lease payment for the facility. Additionally, there are a maximum four (4) annual events available to the general public and private groups on a fee basis. Forsyth and Guilford Counties will not need the leased premises during the term of the proposed lease.

This lease also requires Guilford County's approval since Triad Park is owned jointly by Forsyth and Guilford Counties.

ATTACHMENTS: YES NO

SIGNATURE: *J. Dudley Watts, Jr. cdh* DATE: August 17, 2016
COUNTYMANAGER

RESOLUTION RATIFYING AND AUTHORIZING EXECUTION OF A LEASE OF FORSYTH COUNTY AND GUILFORD COUNTY-OWNED REAL PROPERTY TO WAKE FOREST UNIVERSITY OF THE TRIAD PARK ROPES COURSE PREMISES (PARKS & RECREATION DEPARTMENT)

BE IT RESOLVED that the Forsyth County Board of Commissioners, pursuant to the authority provided in N.C.G.S. 160A-272 and upon thirty (30) days' public notice, hereby authorizes execution, on behalf of Forsyth County, of a three-year lease by Wake Forest University as tenant of County owned real property consisting of approximately three (3) acres in Triad Park pursuant to the terms and provisions contained in the attached Lease Agreement, which space will not be needed by Forsyth County and Guilford County during the term of the said lease.

BE IT FURTHER RESOLVED that the Forsyth County Manager and Clerk to the Board are hereby authorized to execute, on behalf of Forsyth County, the attached Lease Agreement, subject to approval as to form and legality by the County Attorney and a pre-audit certificate thereon by the County Chief Financial Officer, if applicable.

Adopted this the 22nd day of August 2016.

LEASE AND AGREEMENT

THIS LEASE (“Lease”) and AGREEMENT (“Agreement”), effective as of the ___ day of _____, 2016, (the “Effective Date”) is made by and between **FORSYTH COUNTY and GUILFORD COUNTY**, hereinafter referred to collectively as Landlord, and **WAKE FOREST UNIVERSITY**, hereinafter referred to as Tenant.

WITNESSETH:

WHEREAS, Forsyth County and Guilford County (collectively the “Counties”) own adjoining tracts totaling some 400+ acres upon which Landlord operates, a public park known as Triad Park; and

WHEREAS, Triad Park’s amenities include a ropes course area (referred to as the “Premises”, the “Ropes Course”, and/or “the Triad Park Ropes Course” herein) which Premises are shown on **Exhibit A** attached hereto and incorporated herein by reference; and

WHEREAS, the Ropes Course had been previously operated for the Counties by a third party operator pursuant to an agreement with such operator, which agreement has expired; and

WHEREAS, the Counties desire to contract with Tenant for the operation of the Ropes Course and Tenant is willing to undertake such operation, for the term and upon the conditions set forth herein;

NOW, THEREFORE, in consideration of the agreements and covenants of the parties hereinafter mentioned and expressed, and of the rent to be paid by Tenant to Landlord, the parties hereto agree as follows:

1. Lease of Premises. Landlord hereby leases the Premises to Tenant, and Tenant hereby leases the Premises from Landlord, for the Tenant’s operation of Landlord’s Ropes Course for and during the term of this Lease. Tenant and its employees, agents, and invitees shall have access to the Premises over the internal roads and pathways of Triad Park at all times when Triad Park is open to the public, and at such other times as agreed upon in advance by the Landlord.

2. Term. This Lease shall commence on July 1, 2016 (the “Commencement Date”) and shall expire on June 30, 2019, unless sooner terminated pursuant to this Agreement (the “Term”). The term set out above may be extended for a single term of three (3) years and six (6) months. Tenant shall notify the Landlord in writing at least ninety (90) days in advance of June 30, 2019 of its desire to exercise this option. If the Landlord agrees in writing to extend the Lease, the Agreement shall terminate on December 31, 2022, unless sooner terminated as provided herein.

3. Rent. Tenant shall pay to Landlord, without demand, deduction or setoff, a monthly rental for the Premises of \$75.00. Tenant shall make all payments of rent on or before the 10th day of each month. Notwithstanding the foregoing, Tenant may prepay rent, in whole or in part, at any time. Rent shall be paid to "Forsyth County", and remitted to the following address: Forsyth County Parks and Recreation, 201 N. Chestnut Street, Winston-Salem, NC 27101.

4. Utilities. There are no utilities at the Premises, and Landlord shall have no obligation to provide any. Tenant's operation of the Ropes Course is, therefore, restricted to daylight hours.

5. Insurance and Taxes. Tenant shall obtain and keep in force at all times during the Term hereof general liability insurance in the amount of One Million Dollars (\$1,000,000.00) combined single limit for bodily injury and property damage and a Two Million Dollar (\$2,000,000.00) umbrella liability policy, which policy insures against all liability of Tenant arising out of or in connection with Tenant's operation of the Ropes Course on the Premises or its use by Tenant's invitees, agents, or employees. Tenant shall provide Landlord with a certificate evidencing such insurance prior to the Commencement Date, and upon request by Landlord. Forsyth County, Guilford County, their officials, officers, and employees shall be listed as additional insureds.

6. Use of the Premises by Tenant.

(a) Landlord covenants and agrees that Tenant, during the term of this Lease, shall have full control and use of the Premises for recreational, educational, and charitable purposes. Tenant shall not use or allow the Premises or any part thereof to be used or occupied for any other use or for any unlawful purpose. Tenant, functioning as an independent contractor, shall have the exclusive right and obligation during the Term to operate the Ropes Course at Triad Park. Tenant shall organize, direct, and publicize the Ropes Course and shall offer Ropes Course services including private lessons, clinics, camps, and other activities associated with the operation of the Triad Park Ropes Course in accordance with a program of activities developed by Tenant and approved by Landlord. Tenant shall provide updated schedules well in advance of activities taking place at Triad Park to the Forsyth County Parks and Recreation Department. Tenant will obtain the prior authorization of the Parks and Recreation Director to hold special events in order to coordinate the Ropes Course events with other Triad Park events.

(b) Complex Management

(1) Operational hours, schedules and Ropes Course event fees shall be mutually agreed upon by Landlord and Tenant with annual review of these elements. Hours shall comply with normal Triad Park operating hours unless advance prior arrangements are made. In the event that Triad Park is closed for any reason, Tenant will be given a minimum of 24 hours' notice to plan accordingly.

(2) Landlord will provide a website link to Tenant for the posting of Ropes Course scheduling on the Landlord's website. Tenant will provide a web link to the Triad Park web page.

(3) All fees charged in connection with Triad Park Ropes Course activities shall be collected by Tenant.

(4) Tenant shall provide a minimum of one (1) and not more than four (4) annual event(s) during which the Triad Park Ropes Course is available to the general public for usage. Such event(s) shall be publicized by both parties and set well in advance so as not to conflict with any other park usage.

(5) Tenant shall make the Triad Park Ropes Course accessible to public and private school groups, businesses, and other private groups on a fee basis. The fee and schedule for this usage will be mutually agreed upon by both parties.

(6) Tenant shall provide an approved sign at the entrance to the Triad Park Ropes Course area with Tenant's name and contact information on signage. All signage must be approved by Landlord prior to installation.

(7) Tenant shall provide all contact information to Landlord for Tenant personnel responsible for the operation of the Triad Park Ropes Course.

(8) Tenant shall maintain the Triad Parks Ropes Course to the standards of the Association for Challenge Course Technology ("ACCT"). The course must be annually certified to ACCT standards by a certified ACCT independent inspector. The Triad Park Ropes Course must be inspected by the Tenant on a monthly basis as required by ACCT standards. Copies of all inspections and certifications will be provided by Tenant to Landlord upon completion. All required inspections and certifications shall be done at Tenant's expense.

(9) Tenant will be responsible for maintenance of the operational equipment and apparatus that are part of the programming of the Triad Park Ropes Course, including all harnesses, helmets, climbing devices, ropes, cables, and apparatus of the Ropes Course. Landlord will be responsible for maintenance of all structural elements of the Ropes Course including tree removal, fencing, building repairs, Ropes Course poles, and other elements not directly related to the daily operation of the Ropes Course. Tenant shall be responsible for purchasing all of the personal equipment, including but not limited to harnesses and helmets required by the ACCT for use by participants in Ropes Course activities.

(10) Tenant shall notify Landlord immediately of any needed structural repairs to the Ropes Course and the usage of the Ropes Course shall be restricted until the necessary repairs are made by Landlord. Tenant is responsible for closing the Ropes Course if at any point it is deemed unsafe until necessary repairs can be made to either structural or operational elements of the Triad Park Ropes Course.

(11) Tenant shall provide proper training and certification for all instructors and staff as required by the ACCT requirements. No staff or instructors shall be permitted to operate the Ropes Course without the proper training and certification.

(12) Tenant shall staff the Ropes Course at all times during which it is operating and will establish all procedures for the professional operation of the Ropes Course.

(13) Equipment shall be stored, covered, cleaned and secured in the Triad Park Ropes Course building when not in use. No equipment or tools may be left outside when the Ropes Course is not in use. The building and Ropes Course must be secured at all times when not in use by the Tenant.

(14) Tenant shall provide the Landlord a quarterly report detailing financial and usage information for the Ropes Course.

7. Responsibilities of Parties.

(a) Except where caused by Landlord's intentional or negligent acts, (including the negligent or intentional acts of Landlord's employees, agents, contractors, servants or invitees), Landlord shall not be liable for any personal injury to Tenant, or any officer, trustee, agent, employee, contractor, servant, invitee, student, or guest of Tenant, or for any damage to any property of Tenant, or any officer, trustee, agent, employee, contractor, servant, invitee, or guest of Tenant.

(b) Tenant shall indemnify and hold Landlord harmless from and against any and all claims, damages, losses, liabilities, lawsuits, costs and expenses (including reasonable attorneys' fees at all tribunal levels) (any of the foregoing, "Claims") arising out of or related to (i) Tenant's operation of the Ropes Course on the Premises, or (ii) any breach or default by Tenant in the performance of any of its obligations under this Lease and Agreement, or (iii) any act or neglect of Tenant, or any officer, agent, or employee of Tenant. The above language notwithstanding, Landlord shall remain liable for intentional acts and/or acts of negligence on its part or on the part of its agents or employees, and shall indemnify and hold harmless Tenant from and against any and all Claims arising out of or related to the negligent or willful misconduct of Landlord.

8. Condition of Premises, Alterations.

(a) Tenant accepts the Premises in its present condition and as suited for the Tenant's operation of the Triad Park Ropes Course. Tenant shall throughout the term of this Lease, and any extension or renewal thereof, at its expense maintain the operational aspects, as spelled out in section 6 of this agreement, of the Triad Parks Ropes Course in good order and repair. Tenant agrees to return the Premises to Landlord at the expiration or prior termination of this Lease in as good operational condition and repair as when first received, natural wear and tear and exposure to the elements excepted. Tenant, Tenant's employees, agents, contractors, or subcontractors shall take no action which may void any manufacturers' or installers' warranty with relation to the Premises.

(b) Tenant shall not make any alterations, additions, or improvements to the Premises without the Landlord's prior written consent. Tenant shall promptly remove any alterations, additions, or improvements constructed in violation of this paragraph upon the Landlord's written request. All approved alterations, additions, and improvements will be accomplished in a good and workmanlike manner, in conformity with all applicable laws and regulations, and by a contractor approved by Landlord, free of any liens or encumbrances. Landlord may require Tenant to remove any alterations, additions or improvements, whether or not made with Landlord's consent, at the termination of this Lease and Agreement and to restore the Premises to its prior condition. All alterations, additions, and improvements which Landlord has not required the Tenant to remove shall become Landlord's property and shall be surrendered to Landlord upon the termination of this Lease and Agreement, except that Tenant may remove any of Tenant's equipment and personal property which can be removed without material damage to the Premises. Tenant shall repair, at Tenant's expense, any damage to the Premises caused by the removal of any such equipment and personal property. All repairs, modifications, and Ropes Course alterations shall meet ACCT standards and requirements.

9. Damage or Destruction. If at any time during the Term the Premises are damaged by a fire or other casualty, either party may elect to terminate this Lease upon notice to the other party. If Landlord elects to restore the Premises and Tenant does not terminate this Lease, then, (i) Landlord shall promptly restore the Premises, excluding improvements installed by Tenant, (ii) Tenant at Tenant's expense shall promptly perform all repairs or restoration not required to be done by Landlord and shall promptly re-enter the Premises and commence doing business in accordance with this Lease, and (iii) rent shall be abated for the period of repair and restoration in the proportion which the area of the Premises, if any, which is not usable by Tenant bears to the total area of the Premises.

10. Assignment or Subletting.

(a) Provided that at the time of any such assignment or subletting Tenant is not then in default of this Lease and Agreement, Tenant may assign this Lease or sublet the Premises, for the uses and purposes permitted under this Lease and Agreement, as follows:

(i) Tenant obtains the prior consent of Landlord, which consent shall be at the sole discretion of Landlord;

(ii) Notwithstanding Section 10(a)(i) above, Tenant may assign this Lease and Agreement, without the written consent of Landlord, to any subsidiary or affiliated entity of Tenant, so long as such entity remains a subsidiary or affiliate of Tenant;

(iii) Upon any assignment or subletting by Tenant, Tenant shall remain jointly and severally liable for rents and other obligations due under this Lease and Agreement upon any default by the assignee or the subtenant.

(b) For avoidance of doubt, Landlord shall have the right assign this Lease and Agreement in its sole discretion.

11. Reimbursement of Expenses. In case suit shall be brought for recovery of possession of the Premises, for the recovery of rent or any other amount due under the provisions of this Lease, or because of the breach by one party of any other covenant, term or provision herein contained, the other party shall be entitled to recover all expenses incurred in connection therewith, including reasonable attorneys' fees and costs.

12. Waivers and Integration Clause.

(a) The waiver of either party of any breach of any term, covenant, or condition herein contained, shall not be deemed to be a waiver of such term, covenant, or condition, or any subsequent breach of the same, or any other term, covenant, or condition therein contained. The subsequent acceptance by Landlord of payment by Tenant for rent hereunder shall not be deemed to be a waiver of any preceding breach by the other party of any term, covenant, or condition of this Lease, other than the failure of Tenant to pay the particular rental so accepted regardless of Landlord's knowledge of such preceding breach at the time of the acceptance of such rent.

(b) No payment by Tenant or receipt by Landlord of a lesser amount than the rent herein stipulated shall be deemed to be other than on account of the earliest stipulated rent, nor shall any endorsement or statement on any check or any letter accompanying any check or payment as rent be deemed an accord and satisfaction and Landlord may accept such check or payment without prejudice to Landlord's right to recover the balance of such rent or pursue any other remedy as provided in this Lease.

(c) This Lease contains the entire agreement between the parties, and any executory agreement hereafter made shall be ineffective to change, modify, discharge, or effect an abandonment of it, in whole or in part, unless such executory agreement is in writing and signed by the party against whom enforcement of the change, modification, discharge or abandonment is sought.

13. Hold Over And Surrender. Any holding over after the expiration of the term of this Lease, with the consent of Landlord, shall be construed to be a tenancy from month

to month at a monthly rental equal to 150% of the rent herein specified and shall otherwise be on the terms and conditions herein specified, so far as applicable.

14. Termination.

(a) Tenant may terminate this Lease and Agreement upon 120 days' prior written notice to Landlord.

(b) Landlord may terminate this Lease and Agreement upon 30 days' prior written notice to Tenant upon any of the following circumstances:

- i. Landlord determines that the Premises is in such disrepair or poor condition that it is unsuitable or unsafe for use; or
- ii. Tenant fails to or refuses to repair, maintain, or present the Premises in a clean and professional manner, as determined by Landlord; or
- iii. Tenant breaches this Lease and Agreement or violates a local, state, or federal law, unless termination is based on a provision below; or
- iv. Tenant fails to pay the rent and such payment is more than seven (7) days past due. Rent is due the 10th day of each month.

(c) Landlord may terminate this Lease and Agreement immediately upon the following circumstances:

- i. An officer, manager, employee, student, invitee, or agent of Tenant consumes alcohol or any other illegal controlled substance at the Ropes Course, or
- ii. An officer, manager, employee, or agent of Tenant knowingly allows or acquiesces in the use or possession of any other illegal controlled substance by any participant in a Tenant activity or event at the Ropes Course; or
- iii. Lessee fails to maintain in full force and effect the insurance required hereinabove.

(d) Landlord may close the Premises from public usage if it determines that the Premises are in such disrepair or poor condition that it is unsuitable or unsafe for use, until such conditions have been corrected. Notwithstanding anything to the contrary herein, Landlord shall have no duty to Tenant or any third party to inspect or monitor the Premises.

15. Removal of Liens by Tenant Landlord's Right on Default to Contest.

(a) Landlord shall not be liable for any labor or materials furnished or to be furnished to Tenant upon credit, and no mechanics' or other lien for any such labor or materials shall attach to the estate or interest of Landlord in and to the Premises. Whenever any mechanics' or materialmen's lien shall have been filed against the Premises, based upon any act or interest of Tenant or of anyone claiming through Tenant, Tenant shall immediately take such action by bonding, deposit or payment as will remove the lien.

(b) If Tenant has not removed the lien within thirty (30) days after notice to Tenant, Landlord may pay the amount of such lien or security agreement, or discharge the same by deposit, and the amount so paid or deposited, with interest thereon, shall be deemed additional rent reserved under this Lease.

(c) The above language notwithstanding, Tenant shall have the right to contest the validity of any lien or claim if Tenant shall first have posted a bond to ensure that upon final determination of the validity of such lien or claim, Tenant shall immediately pay any judgment rendered against it, with all proper costs and charges, and shall have such lien released without cost to Landlord.

16. Notices And Time. All notices, demands, requests, consents, approvals or other communications (the "Notices") required or permitted to be given hereunder shall be in writing and shall be either (i) personally delivered, (ii) sent by Federal Express or other regularly scheduled overnight courier, or (iii) sent by United States mail, registered or certified with return receipt requested, properly addressed and with the full postage prepaid. Said Notices shall be deemed received and effective upon the earlier of: (i) in the case of personal delivery, when delivered in fact against a written receipt of delivery, (ii) in the case of Federal Express or other regularly scheduled overnight courier, the next business day after deposit with such overnight courier, or (iii) three (3) business days after being placed in the United States mail as aforesaid. Notice on behalf of either Landlord or Tenant may be given by their respective counsel. Notices shall be sent to the parties at the following addresses, unless otherwise notified in writing:

If to Landlord: Michael Anderson
Forsyth County Parks and Recreation Department
Forsyth County Government Center
201 North Chestnut Street
Winston-Salem, NC 27101

If to Tenant: Joe Cassidy
Executive Director of Campus Fitness and Recreation
Wake Forest University
1834 Wake Forest Road
Room 214 Reynolds Gymnasium
Winston-Salem, NC 27106

The addresses of either party may be changed, from time to time, by either party serving notice as provided above.

17. Successors and Assigns. All covenants, agreements, stipulations, provisions, conditions and obligations herein expressed and set forth shall extend to, bind and inure to the benefit of, as the case may require, the heirs, executors, administrators, successors and assigns of Landlord and Tenant, respectively, or their successors in interest, as fully as if such words were written wherever reference to Landlord and Tenant occurs in this Lease and Agreement.

18. Force Majeure Clause. In the event that either party hereto shall be delayed or hindered in or prevented from the performance of any act required hereunder by reason of strikes, lock-outs, labor troubles, inability to procure materials, failure of power, restrictive governmental laws or regulations, riots, insurrection, war, or other reason of a like nature not the fault of the party delayed in performing work or doing acts required under the terms of this Lease and Agreement, then performance of such acts shall be excused for the period of the delay and the period equivalent to the period of such delay. It is understood, however, that this provision shall not operate to excuse Tenant from the prompt payment of rental or any other payments required by the terms of this Lease and Agreement.

19. Waiver of Subrogation. The parties release each other, and their respective authorized representatives, to the extent of the releasing parties insurance coverage, from any and all liability for any loss or damage to any person or to the Premises and to the fixtures, personal property, Tenant's improvements, and alterations of either Landlord or Tenant in or on the Premises that are caused by or result from risks insured against under any insurance policies carried by the parties and in force at the time of any such damage.

Each party shall cause each insurance policy obtained by it to provide that the insurance company waives all right of recovery by way of subrogation against either party in connection with any damage covered by any policy. Neither party shall be liable to the other for any damage caused by fire or any of the risks insured against under any insurance policy required by this Lease and Agreement.

20. Miscellaneous. The necessary grammatical changes required to make the provisions of this Lease apply in the plural sense where there is more than one Landlord and to a corporation, association, partnership, or individuals, male or female, shall in all instances be assumed as though in each case fully expressed. The laws of the State of North Carolina shall govern the validity, performance, and enforcement of this Lease and Agreement, except that provisions regarding conflict of laws shall not apply. The captions of the several paragraphs contained herein are for convenience only and do not define, limit, describe, or construe the contents of such paragraphs. A determination by a court of competent jurisdiction that any provision of this Lease and Agreement is unenforceable shall not invalidate the remainder of this Lease and Agreement. The liability of Landlord to Tenant under the terms of this Lease and Agreement shall be

limited to the equity of Landlord in the Premises and Tenant agrees to look solely to Landlord's equity in the Premises for recovery of any judgment against Landlord. The individuals executing this Lease and Agreement on behalf of Landlord and Tenant represent and warrant that they are duly authorized to execute and deliver this Lease and Agreement on behalf of Landlord or Tenant, as applicable. Tenant shall use the Premises and operate its program in compliance with all applicable federal, state, local, laws, ordinances, rules, and regulations. This Agreement is intended to set forth the entire understanding between the parties, and it supersedes and cancels any prior agreement, representation, or communication, whether verbal or written, between the parties hereto relating to the transaction herein contemplated. Tenant shall not be treated as an employee of the Landlord with respect to the services performed hereunder for federal or state tax, unemployment or worker's compensation purposes. Tenant understands that neither federal, nor state, nor payroll tax of any kind shall be withheld or paid by the Landlord on behalf of Tenant or the employees of Tenant. Tenant further understands and agrees that Tenant is fully responsible for the payment of any and all taxes arising from payment of monies by Ropes Course users under this Agreement. Tenant shall not be treated as an employee of the Landlord with respect to the services performed hereunder for purpose of eligibility for, or participation in any employee pension, health, or other fringe benefit plan of the Landlord. The Landlord shall not be liable to Tenant for any expenses paid or incurred by Tenant unless otherwise agreed in writing. Either party has no authority to enter into contracts or agreements on behalf of the either party. Tenant declares that it has complied with all federal, state, and local laws regarding business permits, certificates, and licenses that may be required to carry out the services to be performed under this Agreement. Tenant hereby certifies that it is not on the North Carolina State Treasurer's list of persons engaging in business activities in Iran, pursuant to NCGS §147-86.58, nor will Tenant utilize any subcontractor on such list.

IN TESTIMONY WHEREOF, Landlord and Tenant have caused this Lease and Agreement to be executed as of the Effective Date.

WITNESS:

LANDLORD:

FORSYTH COUNTY
GUILFORD COUNTY

By: _____

By: _____

WITNESS:

TENANT: WAKE FOREST UNIVERSITY

By: _____

By: _____

Name: B. Hofler Milam
Title: Executive Vice President

Name: Joe Cassidy
Title: Executive Director of Campus Fitness
and Recreation

EXHIBIT A

Premises

