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TO: Board of Education

FROM: Dale Ellis

DATE: January 9, 2017

SUBJ: ACTION ITEM – MOU for the New High School Project

Attached is the Memorandum of Understanding for the New High School Project between Montgomery County Board of Education, Montgomery Community College Trustees and the Montgomery County Commissioners.

I recommend approval of the MOU and will be available to answer any questions you may have.

**COOPERATIVE AGREEMENT REGARDING SCHOOL DESIGN, ACQUISITION
AND CONSTRUCTION**

This COOPERATIVE AGREEMENT REGARDING SCHOOL SITE ACQUISITION AND CONSTRUCTION SERVICES, dated as of _____ __, 201__ (**the “Agreement”**), between the COUNTY OF MONTGOMERY, NORTH CAROLINA, a body politic and corporate and a political subdivision existing under the laws of the State of North Carolina (**the “County”**), the MONTGOMERY COUNTY BOARD OF EDUCATION, a body politic and corporate existing under the laws of the State of North Carolina (**the “Board of Education”**) and THE TRUSTEES OF MONTGOMERY COUNTY COMMUNITY COLLEGE, a body corporate existing under the laws of the State of North Carolina (**the "Community College"**).

WITNESSETH:

WHEREAS, the County is a political subdivision existing under the laws of the State of North Carolina vested with the powers and authority conferred upon counties by the laws of the State of North Carolina, acting through its Board of Commissioners;

WHEREAS, the Board of Education is a body politic and corporate existing under the laws of the State of North Carolina and is the governing board of the Montgomery County local school administrative unit of the public school system of the State of North Carolina, vested with the powers and authority conferred upon boards of education by the laws of the State of North Carolina;

WHEREAS, the Community College is a body corporate existing under the laws of the State of North Carolina, vested with the powers and authority conferred upon boards of trustees of community colleges by the laws of the State of North Carolina;

WHEREAS, the parties hereto enter into this Agreement to promote the excellence and viability of the Montgomery County Public School System and Montgomery County Community College⁷; and

WHEREAS, the County appropriates funding to the Board of Education and to the Community College for their respective capital improvement purposes; and

WHEREAS, collaboration between County staff, Board of Education staff and Community College staff benefits the taxpayers of Montgomery County by ensuring that public funds are utilized in an optimal fashion to provide such capital improvements in a timely fashion and within budget and so as to facilitate the implementation of an orderly and effective building plan; and

WHEREAS, pursuant to N.C.G.S. § 115C- 521 the Board of Education has a duty to provide classroom facilities adequate to provide adequate school buildings equipped with suitable school furniture and apparatus and in accordance with requirements of the State of North Carolina; and

WHEREAS, pursuant to N.C.G.S. § 153A- 158.1 (a), upon the request of the Board of Education, and after a public hearing the County is authorized to acquire real and personal property for the use by the Board of Education, and the County may construct, equip, expand, improve, and renovate property for use by the Board of Education; and

WHEREAS, pursuant to N.C.G.S. § 115D-20, the Community College may, subject to the approval of the State Board of Community Colleges, collaborate with the Board of Education to offer courses through cooperative innovative high school programs and career technical education programs and provide instructional services by contracting with public or private organizations in accordance with regulations and standards adopted by the State Board of Community Colleges; and

WHEREAS, the County, the Board of Education and the Community College desire site acquisition, design, construction and equipping of a proposed new high school and related facilities for the County (**the "School Project"**) on certain parcels of real property (**together, the "Site"**) to be completed in a cost-effective manner within available funding that maximizes instructional opportunities for students, and have agreed to work together for the completion of the School Project; and

WHEREAS, the County and the Board of Education are authorized to enter into agreements for the contractual exercise by the County for the Board of Education of any power, function, public enterprise, right, privilege, or immunity of local government pursuant to N.C.G.S. § 160A-460 et seq. and the Community College is authorized to enter into agreements and exercise such other rights and privileges as may be necessary for the management and administration of the Community College in accordance with the provisions and purposes of N.C.G.S. § 115D-14 et seq.;

WHEREAS, pursuant to Section 160A-460 et seq. of the NCGS the County may exercise any power, function, public enterprise, right privilege, or immunity for and on behalf of the Board of Education as set forth in a written agreement between the parties;

WHEREAS, the County, the Board of Education and the Community College have previously entered into an agreement setting forth a process for the selection of a project manager, architect and construction delivery method for the School Project;

WHEREAS, it is contemplated that (a) the County will finance the costs of the School Project pursuant to Section 160A-20 of the NCGS, under which the County will enter into a financing agreement and deed of trust arrangement (**the "Financing Agreement"**) with one or more financing sources which may include a corporate trustee (**together, the "Financing Sources"**), which Financing Sources will advance or cause the advancement to the County of funds which, together with other amounts to be contributed by the County from legally available funds, are expected to be sufficient to pay the costs of the School Project, and (b) the County will agree to repay such advancement, with interest, in installments (**the "Installment Payments"**) in accordance with Section 160A-20 of the NCGS;

WHEREAS, the County may be entitled to refunds from the State of North Carolina pursuant to Section 105-164.14 of the NCGS and other applicable laws for sales taxes paid to the

State for tangible person property directly purchased by the County and indirectly incurred for building materials, supplies, fixtures and equipment that become part of or annexed to any building or structure that is owned by the County that is being erected, altered or repaired for use by the County on behalf of the Board of Education or the Community College;

WHEREAS, the County, as lessor, and the Board of Education, as lessee, will enter into a Lease Agreement (**the “Lease”**), pursuant to which the County will lease the Site and all buildings, improvements and fixtures located and to be located thereon to the Board of Education upon completion of construction of the School Project;

NOW THEREFORE, in consideration of the premises and of the mutual agreements and covenants contained herein and for other valuable consideration, the sufficiency of which is hereby acknowledged, the parties hereto do hereby agree as follows:

ARTICLE I

PURPOSE

1.01 Purpose. The purpose of this Agreement is to set forth a procedure for the parties to collaborate in the process of site acquisition, design, construction and equipping of the School Project, specifically the duties and responsibilities of the parties hereto to achieve a cooperative working relationship between the County, the Board of Education and the Community College, with the goal of completing the School Project in a timely and cost effective manner.

ARTICLE II

COLLABORATION BETWEEN THE PARTIES

2.01 Core Committee. A School Facilities Core Committee ("**Core Committee**") is hereby established.

a. Purpose. The purpose of the Core Committee is to establish regular, informed, and interactive communications between Montgomery County, the Board of Education and the Community College concerning research, investigation and evaluation of the process for site acquisition, design, construction and equipping of the School Project, in accordance with the statutory duties of the parties hereto.

b. Membership. Each party shall appoint members to the Core Committee, minimum composition to be as follows, subject to the right of each party to substitute personnel if necessary:

From Montgomery County –

From the Board of Education –

From the Community College –

c. Meetings. The Core Committee shall meet at least monthly at a mutually determined location.

d. Collaboration Process.

e. Scope. The Core Committee will implement the collaboration process.

ARTICLE III

PROJECT DESIGN AND CONSTRUCTION

3.01 Supervision of the School Project. The parties hereto agree and covenant that the supervisory powers (“**Supervisory Powers**”) in connection with the design, acquisition, construction and equipping of the School Project shall be exercised as set forth in this Agreement. The Board of Education shall supervise the design and equipping of the School Project in accordance with Exhibit A attached to this Agreement, which Exhibit A is incorporated by reference as if fully stated herein, subject to approval by the County of plans and specifications for the School Project. In supervising the design and equipping of the School Project, the Board of Education shall work with architects, engineers and other professionals as appropriate. The County and any Funding Source, including but not limited to the United States Department of Agriculture, shall be involved in such design and equipping of the School Project on an ongoing basis, including but not limited to review of all documents related to cost projections, through regular consultation and opportunity to comment. The County shall approve such plans and specifications if they are in compliance with the requirements of this Agreement. Such plans and specifications shall be in accordance with all applicable educational facility specification and design guideline requirements and any other applicable requirements of governmental authorities and law. The Board of Education shall supervise the acquisition, construction and improvement of the School Project in accordance with the requirements of this Agreement and the approved plans and specifications as determined under this Agreement,

provided that the County shall be involved in such acquisition, construction and improvement, including any construction project change orders, through regular consultation and opportunity to comment. The County shall oversee the funding of and disbursement of funds for the design, acquisition, construction, equipping and improvement of the School Project.

This Agreement is intended to fulfill the responsibilities of the Board of Education under Section 115C-521 of the NCGS and other applicable law related to exercise of the Supervisory Powers. In undertaking and exercising the Supervisory Powers, any requirements of North Carolina law applicable to the acquisition and improvement of school property (including but not limited to North Carolina General Statutes Chapter 115C shall apply to all parties. Supervisory Powers shall be exercised by all parties in a cooperative manner with any differences of opinion resolved after consultation with architects, engineers and contractors, as appropriate.

3.02. Covenants as to the Completion of the School Project. In consideration of the grant of Supervisory Powers herein, the parties hereto agree as follows in connection with the design, acquisition, construction and equipping of the School Project:

(a) The County shall comply with the provisions of law, including all applicable laws relating to the procurement of construction and equipment, and enter into one or more contracts or purchase orders providing for the design, construction and equipping of the School Project. The parties to this Agreement shall cooperate to obtain all orders, permits or similar governmental approvals and for the County to enter into such contracts as may be necessary for the design, construction and equipping of the School Project. The parties to this Agreement shall cause the design, construction and equipping of the School Project to be carried on expeditiously in accordance with the plans and specifications therefor, all applicable ordinances and statutes, and in accordance with the requirements of all regularly constituted authorities having jurisdiction over same. The parties hereto shall cause the School Project to be located on the Site subject to the lien of the Financing Agreement, will not violate applicable use or other restrictions contained in prior conveyances or applicable protective covenants or restrictions and shall each comply with and take actions necessary to fulfill all requirements of the Financing Sources relating to the design, acquisition, construction, equipping and use of the School Project.

(b) The Financing Sources and their respective representatives and agents shall have the right to enter upon and inspect the Site and the School Project (and portions thereof) from time to time, during and after construction, and the parties agree to cause any contractor or subcontractor to cooperate with the Financing Sources and their respective representatives and agents during such inspections.

(c) Payment of the School Project costs shall be made from the moneys advanced to the County for such purpose in accordance with the Financing Agreement and other legally available County funds. The proceeds advanced to the County pursuant to the Financing Agreement shall be used solely for the purpose of payment of the School Project costs in accordance with the Financing Agreement and applicable law.

(d) Each party to this Agreement shall use its best efforts to cause the construction of the School Project to be completed. In the event that the amount of funds advanced under the

Financing Agreement, together with any other funds to be provided by the County, is not sufficient to complete the School Project the County may choose to cause the plans and specifications for the School Project to be revised to the end that the School Project will have a cost not in excess of such amount.

ARTICLE IV

MISCELANNEOUS

4.01. No Third Party Beneficiaries. This Agreement is not intended for the benefit of any third party. The rights and obligations contained herein belong exclusively to the parties hereto, and shall not confer any rights or remedies upon any person or entity other than the parties hereto

4.02. Purpose of Agreement, Financing, Costs and Revenues; Sales Tax Refunds. The purpose of this Agreement shall be to cause the completion of the School Project as provided for herein. The financing of the School Project shall be pursuant to the Financing Agreement, the costs of which shall be borne by the County. The School Project is not expected to generate revenues. The County may submit refund claims to the State of North Carolina under Section 105-164.14 of the NCGS and other applicable law for sales taxes paid to the State by the County for the construction and improvement of the School Project and the acquisition of personal property associated with and to be used in connection with such improvements.

4.03. Ownership and Disposition of Property. In accordance with Section 160A-20 of the NCGS, the Site and related facilities shall be owned by the County during the term of the Financing Agreement. Upon payment in full of all amounts due under and satisfaction of all other County obligations under the Financing Agreement, the Board of Education may exercise the option to purchase the Site and all related facilities as set forth in the Lease.

4.04. Administration and Execution of Undertaking. The County Manager, the School Superintendent and the Community College President are authorized to administer this Agreement on behalf of the County, the Board of Education and the Community College, respectively, as necessary.

In the event of default of any contractor or subcontractor under any contract for the School Project, the County and the Board of Education, as appropriate, will promptly proceed, either separately or in conjunction with others, to exhaust the remedies of the Board of Education or the County, as appropriate, against the contractor or subcontractor so in default and against each surety for the performance of such contractor. Unless some other disposition is approved by the County, amounts recovered by way of damages, refunds, adjustments or otherwise in connection with the foregoing will be applied to pay the cost of the School Project, or, if recovered after completion of the School Project, will be paid to the County.

In the event the County or the Board of Education determines that any contractor or supplier is in default or has breached any representation, warranty or service agreement, the County (or the Board of Education) at its own expense, may proceed, either separately or in conjunction with others, to exhaust all available claims, actions and remedies against such

contractor or supplier and against any surety for the performance of any contracts or the representation, warranty or service agreement and the recovery of damages arising out of such default. The County (or the Board of Education) may prosecute or defend any such action or proceeding or take any other appropriate action which the County deems necessary or desirable in its own name. The County makes no express or implied warranty or representation of any kind whatsoever with respect to the School Project or any component part thereof to the Board of Education or the Community College or any other circumstance whatsoever with respect thereto, including, but not limited to, any warranty or representation with respect to the merchantability or the fitness or suitability thereof for any purpose; the design or condition thereof the safety, workmanship, quality or capacity thereof; compliance thereof with the requirements of any law, rule, specification or agreement pertaining thereto; any latent defect; the ability thereof to perform any function; that the funds advanced pursuant to the Financing Agreement will be sufficient (together with other available funds of the County) to pay the costs of the School Project; or any other characteristic of the School Project; and the benefits of any and all implied warranties and representations of the County are hereby waived by the Board of Education.

4.05. Indemnification. To the extent permitted by law, the Board of Education shall indemnify and save the County harmless against and from all claims by or on behalf of any person, firm, corporation or other legal entity arising from the acquisition, renovation, construction and equipping of the School Project; provided, however, that the Board of Education shall not be obligated to pay the Installment Payments pursuant to the Financing Agreement or to indemnify (a) any party to the Financing Agreement for any third-party claims asserted against any such party relating to the payment of such Installment Payments or (b) the County for any liability arising from any act of negligence or willful misconduct on the part of the County or any of its agents, officers or employees. The Board of Education shall be notified promptly by the County of any action or proceeding brought in connection with any such claims arising from the acquisition, construction and equipping of the School Project.

As between the Board of Education and the County, the covenant of the Board of Education in this Section, except to the extent permitted by law, is unconditional and absolute. As between the Board of Education and any third-party, the Board of Education, to the extent permitted by law, hereby reserves the right and defense of sovereign immunity.

4.06. Amendments and Further Instruments. The parties hereto shall, from time to time, execute and deliver such amendments to this Agreement and such further instruments as may be required or desired for carrying out the expressed intention of this Agreement.

4.07 Severability; Expectations; No Pledge of Faith and Credit. In the event any provision of this Agreement shall be held invalid or unenforceable by a court of competent jurisdiction, such holding shall not invalidate or render unenforceable any other provision hereof. Although this Agreement sets forth the expectations of the parties, no provision of this Agreement shall be construed or interpreted as creating a pledge of the faith and credit of the County within the meaning of any constitutional debt limitation, or directly, indirectly or contingently obligate the County enter into the Financing Agreement or to make any payment beyond that appropriated in the discretion of the County for any fiscal year.

4.08. Termination of Agreement. This Agreement shall terminate when the County has conveyed fee simple title to the Site to the Board of Education.

IN WITNESS WHEREOF, the parties hereto have executed and attested this Agreement by their duly authorized representatives as of the day and year first written above.

COUNTY OF MONTGOMERY, NORTH
CAROLINA

By: _____
Chairman of the Board of Commissioners

MONTGOMERY COUNTY BOARD OF
EDUCATION

By: _____
Chairman

THE TRUSTEES OF MONTGOMERY COUNTY
COMMUNITY COLLEGE

By: _____

Exhibit A to Cooperative Agreement Regarding School Design, Acquisition and Construction

This Exhibit A is an addendum to the COOPERATIVE AGREEMENT REGARDING SCHOOL DESIGN, ACQUISITION AND CONSTRUCTION, dated as of _____, 201__ (the “**Agreement**”), between the COUNTY OF MONTGOMERY, NORTH CAROLINA (the “**County**”), the MONTGOMERY COUNTY BOARD OF EDUCATION (the “**Board of Education**”) and THE TRUSTEES OF MONTGOMERY COUNTY COMMUNITY COLLEGE (the “**Community College**”), and is incorporated into and constitutes a part of the Agreement. Capitalized terms used herein and not otherwise defined shall have the meanings given such terms in the main body of the Agreement.

1. The parties expect that the County will contract with Morris-Berg Architects as the primary architect for design of the School Project and will contract for acquisition, construction and equipping of the School Project under a design-bid-build procedure.
2. The parties agree that they will work together in a cooperative effort to complete the School Project. In furtherance of such cooperation, the Board of Education shall include designated representatives of the County and Community College in all design meetings with the School Project architects, all meetings with the construction manager and all meetings with the contractor and equipment suppliers. Representatives of the County and Community College are not required to attend such meetings and the absence of any such representative shall not be a reason to postpone a meeting provided that the meeting has been scheduled during normal business hours and reasonable notice and opportunity to attend such meeting has been provided.
3. The School Project shall include career and technical education (“**CTE**”) facilities to be located on property currently owned by the Board of Education (the “**CTE Facilities**”). The Board of Education and Community College shall prioritize CTE programs to be carried out in the CTE Facilities by order of importance. Such priorities shall be established based on programs designed to produce job ready skills in current job markets in the United States and anticipated (based on current trends) future job markets in the United States, with the following CTE programs having the highest priority: [Robotics (engineering), CNC/Machining, Welding, HVAC, Electrical/Electronics, Industrial Maintenance and Construction Technologies.] CTE Facilities for CTE programs not specifically identified as priorities in the previous sentence shall be designed and built as allowable within budgetary confines and should be constructed as convertible spaces to allow for future program changes. The identification of the programs listed is based on a perpetual desire to teach skill sets relevant to current and projected industry demands. The intention of the parties is for the shared CTE Facilities to always remain a state-of-the-art and job-skill relevant partnership between the Board of Education and the Community College. The Board of Education and the Community College may exercise their collaborative authorities in the future to adapt or replace programs as industry demands dictate. The parties understand and agree that funding for CTE programs shall

take such prioritization into account, and that funding may not be available for all identified CTE programs

4. The Board of Education and Community College shall cooperate and collaborate with each other in establishing (a) the preliminary estimated size (as measured by usable square feet) of the CTE Facilities and (b) the design of the CTE Facilities, and in doing so shall take into account the priorities described in Section 3 above.
5. The Board of Education and Community College shall designate, based on reasonable expectations, a number of high school students to be attendees of Early College programs at existing Community College facilities ("**Early College Attendees**") and the Board of Education shall then estimate, taking into account the number of Early College Attendees, the reasonably expected number of students that will need to be accommodated at the School Project (**the "School Project Population"**). The design of the School Project, including the size, number of and types of facilities, shall be based on the School Project Population, including any reasonably expected population growth.
6. The parties agree that the size, scope, characteristics and complexity of the School Project may be limited by the amount of funds received from the Funding Sources. The Board of Education shall prioritize School Project programs and facilities in order to prepare for potential enlargement or augmentation of, or for potential restrictions on or reductions to, the size, scope, characteristics, complexity and/or cost of the School Project, due to limited funds to pay for the School Project. The Board of Education and the School Project architect shall prepare a "value engineering list in this regard. The parties agree that following School Project design considerations and priorities are to be taken into account when preparing such a list: (a) main core of School Project to be two-story facility; (b) extensive use of exterior glass and natural light sources; (c) use of block construction and/or steel construction based on cost, adaptability and durability based on recommendations from architect and engineer; (d) common areas to be aesthetically pleasing and designed to reflect need for collaborative learning and social interaction by students as well as potential use of common areas for community events; (e) common area space, lab space and arts space to have significant priority in terms of funding choices, media center/library space to have less priority in terms of size and funding choices; (f) auditorium to be appropriately sized; (g) priority shall be given to ample lab space, collaborative teacher work areas, carpet in classrooms and polished concrete in hallways; (h) utilization of cost saving measures for athletic facilities, including design for multi-purpose use where appropriate; (i) mechanical systems designed for energy efficiency, favorable "return on investment" and use of life-cycle cost analyses and for maintenance by properly trained school staff; and (j) window coverings and drapes shall have a low priority when not directly related to use of the affected space.
7. Each party to the Agreement will give prompt and reasonable consideration to any request by any other party for an action contemplated by the Agreement or otherwise intended to carry out the purposes of the Agreement.