



The Village of Bald Head Island

May 3, 2021

VIA Email and U.S. Mail

Sharon G. Edmundson, MPA, CPA
Deputy Treasurer
North Carolina Department of State Treasurer
State and Local Government
Finance Division and the Local Government Commission
3200 Atlantic Avenue
Raleigh, North Carolina 27604
sharon.edmundson@nctreasurer.com

Re: Your Correspondence of April 20, 2021

Dear Ms. Edmundson:

Thank for your correspondence to the Village of Bald Head Island (“**Village**”) of April 20, 2021 requesting responses to the below questions.

Following are our responses:

1. The legal authority under which the Village may acquire, own and operate each specific operation of the Transportation System (in particular the barge operation)?

Response: A municipality may “acquire, construct, establish, enlarge, improve, maintain, own, operate, and contract for the operation of any . . . public enterprise[] . . . to furnish services to the city and its citizens.” G.S. 160A-312(a). The definition of “public enterprise” includes “public transportation systems.” G.S. 160A-311(5). While “public transportation system” is not defined within Article 16, which addresses public enterprises, elsewhere within Chapter 160A the term is broadly defined to mean “without limitation, a combination of real and personal property, structures, improvements, buildings, equipment, vehicle parking or other facilities, and rights-of-way, or any

P.O. Box 3009 BALD HEAD ISLAND, NC 28461 (910) 457-9700 FAX (910) 457-6206
E-MAIL: village@villagebhi.org WEBSITE <http://www.villagebhi.org>

combination thereof, used or useful for the purposes of public transportation.” G.S. 160A-576 (pertaining to Public Transportation Authorities); *see also* G.S. 160A-601 (pertaining to Regional Public Transportation Authority), and 160A-631 (pertaining to Regional Transportation Authority). Further, “public transportation” means the transportation of passengers “by any means of conveyance” without limitation. G.S. 160A-576; *see also* G.S. 160A-601 and 160A-631. Each of the components of the ferry system from the ferry boats to the parking facilities fall within these existing analogous definitions.

The Bald Head Island barge operation is an integral component of the ferry system. Vehicles are loaded onto the barge by their driver. The driver of the vehicle, along with any passengers within the vehicle at the time it is loaded, are then transported to and from the Island on the barge. As such, the barge is a means of conveyance to the Island and, therefore, is a permissible component of a public transportation system.

The Bald Head Island Charter states in Section 1.2., titled “Powers”:

The Village shall have and may exercise all of the powers, duties, rights, privileges, and immunities conferred upon the Village of Bald Head Island specifically by this Charter or upon municipal corporations by general law. The term “general law” is employed herein as defined in G.S. 160A-1.

Under North Carolina law, a municipality’s powers consist of those provided in the North Carolina general statutes (“**General Statutes**”) together with those set forth in its charter. *Shaw v. City of Asheville*, 269 N.C. 90, 96–97, 152 S.E.2d 139, 144 (1967). The General Statutes, Village Charter and case law do not limit the powers of the Village to “acquire, construct, establish, enlarge, improve, maintain, own, operate, and contract for the operation of” a public transportation system.

2. The legal authority under which the Village may acquire, own and operate each asset (real property, fixtures or personal property) of the Transportation System that lies outside the Village corporate limits?

Response: A municipality may “acquire, construct, establish, enlarge, improve, maintain, own, operate, and contract for the operation of any . . . public enterprise[] . . . to furnish services to the city and its citizens.” G.S. § 160A-312(a). All of these activities that a municipality may take relative to public enterprises are also permitted “outside [of] corporate limits, *within reasonable limitations*.” *Id.* (emphasis added); *see also Davidson Cty. v. City of High Point*, 85 N.C. App. 26, 41, 354 S.E.2d 280, 288 (1987) (acknowledging General Assembly “evidenced its intent to give cities and counties comprehensive authority to own and operate public enterprises outside their boundaries with respect to the service of themselves and their citizens”). Here, a mainland marine terminal with parking across the Cape Fear River from the Village and necessary to operate the system would be within “reasonable limitations.” Further, a public enterprise is necessarily composed of real property, fixtures and personal property. No restrictions

are imposed on the nature of property, assets or rights that can be owned or operated by a municipality outside the corporate limits.

3. Whether Session Law 2017-120 allows the Proposed Acquisition, or whether it prohibits the same?

Response: Session Law 2017-120 added a new Article 29 to Chapter 160A of the General Statutes authorizing the creation of a Ferry Transportation Authority. No provision of the law purports to limit the duties or powers of any municipal entity, including the Village. In fact, the reverse is true. The Village has the right to deny the Authority consent to extend its services within Village corporate limits if the Village begins operating “its own public transportation system or franchising the operation of a public transportation system.” G.S. 160A-685. Further, the law contemplates that the Authority can be dissolved at a time when it has no debts. G.S. 160A-689. The General Assembly would not have intended to disenfranchise other municipalities from operating a public transportation system, when it was not certain that the Authority would ever acquire and operate transportation assets or what its period of existence would be.

4. Whether approvals of any governmental body are required prior to the Proposed Acquisition?

Response: Approval of the Local Government Commission pursuant to G.S. 159-153 and other statutes would be required for the Proposed Acquisition. In addition, approval of the North Carolina Utilities Commission (“NCUC”) would be required. Under G.S. 62-111, NCUC approval is required for “any merger or combination affecting any public utility . . . through acquisition or control by stock purchase or otherwise.” Since Bald Head Island Transportation, Inc. is a motor passenger carrier franchised by the NCUC to operate in North Carolina, Section 62-111 would be implicated as part of the Proposed Acquisition. *See also* Right of First Refusal recorded September 10, 1999 in Book 1329, Page 932 of the in Brunswick County Register of Deeds granted by Bald Head Island Transportation, Inc. and Bald Head Island Limited to the Village of Bald Head Island to acquire all the Transportation System assets, **Exhibit A** hereto (“**Right of First Refusal**”) (requiring Village to obtain North Carolina Utility Commission approval for acquisition of Transportation System assets).

5. Whether any legislative action by the N.C. General Assembly is needed to enable the Proposed Acquisition?

Response: Based upon the foregoing, legislative action by the N.C. General Assembly is not needed. Further support for this is that no action by the General Assembly was required in the Right of First Refusal.

The Village reserves the right to supplement or amend these responses.

Please contact me if any additional information is needed.

Sharon G. Edmundson, MPA, CPA

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Respectfully,

/s/ J. Andrew Sayre

Village Mayor

pc: The Honorable Dale Folwell, Treasurer
The Honorable Beth Wood, State Auditor
The Honorable Elaine Marshall, Secretary of State
The Honorable Ronald Penny, Secretary of Revenue
The Honorable Scott Padgett, Mayor, City of Concord
The Honorable Viola Harris, Commissioner, Edgecombe County
Mr. Edward Munn, member, Local Government Commission
Mr. Joshua Bass, member, Local Government Commission
Mr. Mike Philbeck, member, Local Government Commission
Cindy Aiken, Attorney, Department of the State Treasurer
Timothy Romocki, Director, Debt Management
Susan Rabon, Chair, Bald Head Island Transportation Authority
Chad Paul, CEO, Bald Head Island Limited, LLC
Michael Brown, Mayor Pro Tempore, Village of Bald Head Island
Scott Gardner, Councilor, Village of Bald Head Island
Emily Hill, Councilor, Village of Bald Head Island
Peter Quinn, Councilor, Village of Bald Head Island
K. Christopher McCall, Manager, Village of Bald Head Island
Charles S. Baldwin, IV, Attorney, Village of Bald Head Island
(all via email)

Brunswick County--Register of Deeds
Robert J. Robinson
Inst #24941 Book 1329Page 932
09/10/1999 03:06pm Rec# 24275

STATE OF NORTH CAROLINA

COUNTY OF BRUNSWICK

RIGHT OF FIRST REFUSAL

THIS AGREEMENT, made and entered into this the 21 day of August, 1999, by and between **BALD HEAD ISLAND TRANSPORTATION, INC.**, hereinafter referred to as "TRANSPORTATION"; the **VILLAGE OF BALD HEAD ISLAND**, hereinafter referred to as "VILLAGE"; and **BALD HEAD ISLAND LIMITED**, hereinafter referred to as "LIMITED":

WITNESSETH

THAT WHEREAS, the **VILLAGE** was granted certain rights with regard to the Bald Head Island transportation system, hereinafter defined; and

WHEREAS, substantial questions exist with regard to rights and obligations of the parties hereto with regard to such transportation system, and

WHEREAS, rather than engaging in lengthy and costly litigation regarding those issues, the parties hereto desire to resolve all outstanding questions between them by the execution of this agreement;

NOW, THEREFORE, for and in consideration of the sum of TEN DOLLARS (\$10.00) paid to TRANSPORTATION by the VILLAGE, the receipt and sufficiency of which is hereby acknowledged, and further in consideration of the covenants, stipulations and agreements herein contained, the parties hereto do agree, covenant and stipulate as follows:

1. That VILLAGE be and hereby is granted a Right of First Refusal, pursuant to the terms and conditions of this agreement, to purchase the Bald Head Island Transportation System or any portion thereof.

"The Bald Head Island Transportation System" (hereinafter referred to as "Transportation System") shall be defined as those assets, tangible and intangible, directly and integrally used in the transportation of persons and property to and from Bald Head Island and, further, in the transportation of such goods or persons while on Bald Head Island, and any and all substitutions thereof and any and all reasonably related accessories thereto, including but not limited to ferries, boats, tugboats, barges, trams, motor vehicles to pull trams, and any and all other personal property, titled or untitled motor vehicles and all accessories thereto, and any real property owned or leased comprising docking or parking facilities, administrative facilities, or facilities designed to facilitate the transfer of individuals to and from the ferry and ground transportation, including a means of access from such real estate to and from a public right-of-way, including any and all improvements to such real estate. Specifically, this Right of First Refusal shall include those parcels of real estate described as follows:

REC Bill Fairley
TOTAL 10.00 REV. _____ TC# _____
REC# 02 CK AMT 396 CK# 4824
CASH _____ REF. _____ BY CS

(a) Tracts 2, 3 and 4 (consisting of 1.03 acres, 0.2 acres, and 1.19 acres, respectively) as shown on a map entitled "Plat of Survey for Bald Head Island Limited" by Brunswick Surveying, Inc., dated 8/25/99, and recorded in Map Cabinet 21, instrument 500, of the Brunswick County Registry, a copy of which is attached hereto.

(b) That tract or parcel of land lying and being in or near the City of Southport, Smithville Township, Brunswick County, North Carolina, and more particularly described as follows: BEING approximately 76.39 acres, more or less, as described on a plat of survey made by Thomas W. Morgan, R.L.S., of Brunswick Surveying, Inc. and recorded in Map Cabinet 20 at Page 414 of the Brunswick County Registry, to which plat reference is made and which is incorporated herein by reference for greater certainty of description.

This Right of First Refusal shall further include, but not be limited to, the right to assignment by LIMITED of the non-exclusive easement retained by LIMITED for the use of and for ingress, egress and regress over, across and through those properties described by deed recorded in Book 778 at Page 61 of the Brunswick County Registry, and the riparian rights appurtenant thereto, for all purposes deemed appropriate by LIMITED, its successors and assigns, including without limitation the operation of ferries, barges, boats and trams.

This Right of First Refusal shall not apply to sale, conveyance or other transfer of any assets comprising the Transportation System where such assets are sold by TRANSPORTATION in the usual course of business due to obsolescence or other reasons relating to the continued usefulness of such asset to the system. Further, this Right of First Refusal shall not be applicable to a transfer of the system or any assets therein so long as such sale shall be a transfer to any entity owned as a corporation or other entity owned by LIMITED, George Mitchell or any of George Mitchell's children or immediate family so long as such asset remains dedicated to use as an operating portion of the system.

2. The purchase price to be paid by VILLAGE for the Transportation System and the terms of such purchase shall be equal to the price of the assets comprising the Transportation System and the terms of purchase as shall be contained in any *bona fide* offer from a third party dealing at arm's length with TRANSPORTATION or any successor in title to TRANSPORTATION.

3. TRANSPORTATION agrees that it shall notify VILLAGE at such time as TRANSPORTATION begins to contemplate the sale of the Transportation System or any portion thereof, other than such sales as shall be exempt from this Right of First Refusal pursuant to paragraph 1 hereof.

4. Upon receipt by TRANSPORTATION of any acceptable offer to purchase the Transportation System or any portion thereof, TRANSPORTATION shall notify VILLAGE of the existence of an offer acceptable to it for the sale of such asset or assets. Notice shall be delivered in

writing to the Village Manager and shall include notice to the VILLAGE of the existence of an offer to purchase the Transportation System or a portion thereof and shall identify the following.

- (1) The asset or assets which are the subject of such offer;
- (2) The identity of the individual or entity making such offer;
- (3) The proposed purchase price and terms including any conditions on sale; and
- (4) The proposed closing date.

Upon receipt of notice from TRANSPORTATION as to the existence of an offer acceptable to TRANSPORTATION, the VILLAGE shall have a period of sixty (60) days from the date of receipt of such notice to determine whether to match such offer. The VILLAGE shall inform TRANSPORTATION, in writing, of its decision within sixty (60) days of the receipt of notice. In the event that VILLAGE shall fail to respond in writing to TRANSPORTATION within sixty (60) days of the receipt of notice, such failure shall constitute a waiver of the Right of First Refusal herein contained by the VILLAGE. If the VILLAGE elects to exercise its option to match the offer, the VILLAGE shall close upon the purchase of such assets within a period of time equal to one hundred eighty (180) days from the date that VILLAGE exercises its Right of First Refusal or the closing date as set forth in the proposed offer, whichever date shall be later.

The VILLAGE may exercise its Right of First Refusal subject to approval by the Local Government Commission of any financing required to consummate the purchase of the Transportation System and further subject to any other governmental approvals that would be necessary for the VILLAGE to purchase and operate the Transportation System and to finance the purchase price thereof.

5. With regard to the existence of real estate which shall be the subject of this Right of First Refusal, the parties agree to record the original of this Right of First Refusal or a memorandum thereof, together with a description of such real estate, in the office of the Register of Deeds for Brunswick County. In the event that TRANSPORTATION desires to sell any real estate subject hereto, the VILLAGE shall release such real estate from this Right of First Refusal upon (1) designation by TRANSPORTATION of a suitable substitute therefor and (2) upon determination by the VILLAGE that the proposed substitute real estate is substantially equivalent or superior to the released property for the purposes for which the released property has been used in the Transportation System. The parties shall then execute such documents as shall release the original property from this Right of First Refusal and subject the substituted property thereto.

6. The terms and conditions of this agreement supersede any and all other offers, contracts or rights of first refusal of the VILLAGE to purchase any or all of the assets which are the subject of this agreement heretofore existing between the VILLAGE and Bald Head Island Limited. This instrument constitutes the entire agreement between the parties and shall be governed by and interpreted under the laws of the State of North Carolina. The parties stipulate that the venue of any litigation arising herefrom shall be in the Superior Court of Brunswick County.

7. This agreement shall become effective only upon approval by the North Carolina Public Utilities Commission.

8. Any notice required to be given herein shall be sent by certified mail, return receipt requested, to the parties as follows:

TRANSPORTATION: Bald Head Island Transportation, Inc.
P. O. Box 3069
Bald Head Island, NC 28461

ATTENTION: Woody Fulton

VILLAGE: Village of Bald Head Island
P. O. Box 3009
Bald Head Island, NC 28461

ATTENTION: Manager

LIMITED: Bald Head Island Limited
P. O. Box 3069
Bald Head Island, NC 28461

ATTENTION: M. Kent Mitchell

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IN WITNESS WHEREOF, the parties have caused this instrument to be executed in triplicate originals as of the date first above written.

(CORPORATE SEAL)
BALD HEAD ISLAND TRANSPORTATION, INC
BY: [Signature]
Vice President

ATTEST:
B. J. Gorman
Assistant Secretary



Joann A. Camporello
Clerk

VILLAGE OF BALD HEAD ISLAND
BY: [Signature]
Mayor

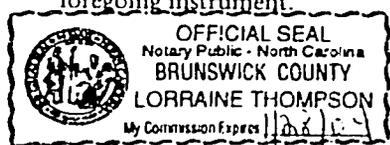
BALD HEAD ISLAND LIMITED (SEAL)
BY: [Signature] (SEAL)
Attorney-in-Fact

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STATE OF NORTH CAROLINA
COUNTY OF BRUNSWICK

I, Lorraine Thompson, a Notary Public, do hereby certify that Kenneth M. Kirkman, Vice President personally appeared before me this 23rd day of August, 1999 and acknowledged the due execution of the foregoing instrument.



Lorraine Thompson
Notary Public

STATE OF NORTH CAROLINA
COUNTY OF BRUNSWICK

I, Josann A Campanello, a Notary Public, do hereby certify that Stephen Henson, Mayor personally appeared before me this 21 day of August, 1999 and acknowledged the due execution of the foregoing instrument.



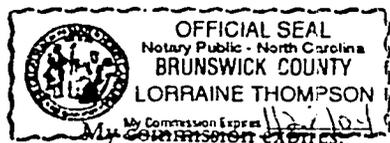
Josann A Campanello
Notary Public

STATE OF NORTH CAROLINA
County of Brunswick

I, Lorraine Thompson, a Notary Public for said County and State, do hereby certify that Kenneth M. Kirkman attorney in fact for Bald Head Island Limited personally appeared before me this day, and being by me duly sworn, says that he executed the foregoing and annexed instrument for and in behalf of the said Bald Head Island Limited, and that his authority to execute and acknowledge said instrument is contained in an instrument duly executed, acknowledged, and recorded in the office of the Register of Deeds in the County of Brunswick, State of North Carolina, in Deed Book 1143 at Page 916, and that this instrument was executed under and by virtue of the authority given by said instrument granting him power of attorney.

I do further certify that the said Kenneth M. Kirkman acknowledged the due execution of the foregoing and annexed instrument for the purposes therein expressed for and in behalf of the said Bald Head Island Limited.

WITNESS my hand and official seal, this the 23rd day of August, 1999



Lorraine Thompson
Notary Public

STATE OF NORTH CAROLINA
COUNTY OF BRUNSWICK

The Foregoing (or annexed) Certificate(s) of LORRAINE THOMPSON JOSANN A CAMPANELLO

Notary(ies) Public is (are) Certified to be Correct.

This Instrument was filed for Registration on this 10th Day of September, 1999
in the Book and Page shown on the First Page hereof.

Robert J. Robinson
ROBERT J. ROBINSON Register of Deeds