

OGC Contract # _____

Approved by the School Board by
Resolution No. _____ Approved on: _____, 2018

PRE-DEVELOPMENT SERVICES AND FEASIBILITY AGREEMENT

THIS PRE-DEVELOPMENT SERVICES AND FEASIBILITY AGREEMENT (the "Agreement") is entered into by and between THE SCHOOL DISTRICT OF PHILADELPHIA, a political subdivision of the Commonwealth of Pennsylvania, with a principal place of business at 440 North Broad Street, Philadelphia, PA 19130-4015 (the "District") and _____, a _____ ("Developer"), effective as of the _____ day of _____, 2018. For purposes of this Agreement, the School District and the Developer are sometimes referred to herein collectively as the "Parties" and individually as a "Party".

W I T N E S S E T H:

WHEREAS, the School District issued a Request for Proposals ("RFP"), dated February _____, 2018, soliciting proposals for a possible project consisting of the construction of a new K-8 school and related facilities (the "Project") to be developed on property located on either or both of the parcels of land currently owned by the School District and generally described or depicted on Exhibit A attached hereto (the "Site"), such Site to be conveyed to a developer specifically for the Project and to be purchased back by the School District after the Project has been completed;

WHEREAS, the Developer has been selected to provide certain pre-development services which will determine the feasibility of the Project, and if the School District concludes, in its sole discretion, that the Project is feasible and determines to undertake the Project, to enter into certain agreements with Developer setting forth their respective responsibilities and obligations with respect to the Project (the "Project Agreements"), including an Agreement of Sale (the "Agreement of Sale");

NOW, THEREFORE, in consideration of the premises and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties, intending to be legally bound, hereby agree as follows:

1. Pre-Development Activities.

(a) The School District desires for the Project to be available for occupancy in August 2020, for the opening of the 2020-2021 school year, and the Developer agrees to undertake to perform services pursuant to this Agreement in order to make the Project available by such applicable date. Such schedule requires that the following pre-development activities (collectively, the "Pre-Development Activities") be performed by the Developer and/or certain third parties engaged by Developer, and be concluded by not later than _____, 2018: (i) visits to the Site and attendance at meetings with representatives of the School District, (ii) in

consultation with the School District, the selection of design, engineering, and other professionals and consultants necessary for the planning, design, engineering, development, and financing of the Project and entering into contracts with any such professionals and consultants for the performance of such planning, design, engineering, development, or financing, (iii) in consultation with the School District, the preparation of preliminary drawings, conceptual designs (“Conceptual Designs”), schematic designs and preliminary specifications for the Project (the foregoing drawings, design, specifications and documents are referred to collectively herein as the “Plans”) and cost estimates, (iv) detailed assessment of the Site, including feasibility study, boundary/topographical surveys, soil borings and geotechnical testing, landscape drawings, water analysis, Phase II study if required and remediation plans if required (v) in consultation with the School District, further refinement of the Plans based upon any budget constraints (vi) arrangements for the preparation of the final and complete Plans (including final and complete construction plan and specifications) for the Project, (vii) in consultation with the School District, preparation of a detailed development schedule, (viii) ongoing construction pricing based upon actual Site conditions, refined Plans, and the development schedule for the Project, (ix) applying for and securing lot line relocation for the portion of the Site where the Project is to be constructed, (x) identifying all necessary governmental approvals and permits for the development and construction of the Project, and (xi) the preparation of a final development budget for the Project.

(b) The Developer shall keep the School District informed as to progress of all Pre-Development Activities. The Developer and the School District agree to reasonably and timely cooperate with one another in good faith in connection with the Project, the performance of the Pre-Development Activities and the granting of any required approvals in connection therewith. Following preparation of the Conceptual Designs, Developer will submit same to the School District for approval.

(c) The Developer is prohibited from using any portion of the Site as security for the Developer’s financing of the project and shall ensure that no liens, mortgages or other instruments or restrictions are recorded against the Site other than those imposed by the School District.. The Developer shall keep the School District informed as to the Developer’s financing plans for the Project.

2. Entry Upon Site.

(a) The School District hereby grants the Developer, its agents and employees, and third parties engaged by the Developer to provide Pre-Development Services during the term of this Agreement, the right to enter upon the Site for the purpose of conducting Pre-Development Activities. Developer recognizes that the Site is in close proximity to two School District schools, Lincoln High School (“Lincoln”) and Meehan Middle School (“Meehan”), and Developer will conduct all Pre-Development Activities with as little disruption as possible. If Developer deems it necessary to perform testing, excavation or other work requiring the use of equipment or tools, Developer shall obtain the prior written consent of the School District which may involve a School District form right of entry agreement and evidence of satisfactory insurance certificates from Developer’s consultants or contractors. Developer will

coordinate all such activities with School District personnel, including the Lincoln and Meehan principals.

(b) Prior to any entry by the Developer upon the Site, the Developer shall provide to the School District satisfactory certificates and policy endorsements evidencing the existence of the insurance required as set forth in Exhibit B, which shall be made a part hereof and incorporated herein, to remain in full force and effect during the Term of this Agreement, or shall furnish a self-insurance letter satisfactory to the School District's Office of Risk Management. The obligation to insure is separate and apart from any obligation by Developer to indemnify, defend and hold School District harmless pursuant to Paragraph 6.

3. Determination of Feasibility/Agreement of Sale.

(a) Developer understands and acknowledges that the School District is engaging Developer to perform the Pre-Development Activities to assess the feasibility of the Project and that at any time during or after the performance of the Pre-Development Activities, the School District may elect not to undertake the Project, in which case the School District shall have no further obligation to Developer other than as expressly set forth in this Agreement.

(b) At the conclusion of the Pre-Development Activities, Developer will furnish to the School District (i) the Plans and all other the materials produced by the Developer during the Pre-Development Activities, and (ii) a fixed price amount for constructing the Project in accordance with the Agreement of Sale. Within 60 days after obtaining such fixed price amount, the School District shall either (i) notify the Developer that the School District elects not to proceed with the Project, in which case the Parties shall have no further obligation to one another except as specifically provided in this Agreement, or (ii) execute the Agreement of Sale for the fixed price accepted by the School District.

4. Work Product.

(a) The Plans, professional third party reports commissioned by the Developer (such as environmental, geotechnical, survey and market study), and other work product prepared by or on behalf of the Developer (such as budgets, proformas and market studies) in connection with the Pre-Development Activities (collectively, the "Work Product") shall be the property of the School District, provided that if this Agreement is terminated or the School District elects not to proceed with the Project, the School District will reimburse the Developer for the Pre-Development Reimbursables, as set forth in this Section, in which case the Developer shall deliver to the School District all originals of written documents or electronic information in Developer's possession constituting the Work Product (other than any such information which is proprietary to the Developer or its affiliates) and assign to the School District all of Developer's right, title and interest in and to such Work Product. If the School District finds the Work Product unsatisfactory and cannot utilize the Work Product prepared by or on behalf of the Developer for future design or development of the Project, then the School District may return such Work Product with no obligation to reimburse the Developer. All third party reports

commissioned by the Developer shall include a statement that the report was created for the use of the Developer and the School District and may be relied on by both the Developer and the School District.

(b) The Parties agree that the Pre-Development Activities shall be performed directly by the Developer or by third parties engaged by the Developer and that all actual third-party costs and expenses (including without limitation travel, meals and lodging) paid or incurred by the Developer or third parties engaged by Developer in connection with the Pre-Development Activities (collectively, the “Pre-Development Reimbursables”) shall be initially funded by the Developer.

(c) If the School District and Developer enter into the Agreement of Sale, the Pre-Development Reimbursables shall be included in the price set forth in the Agreement of Sale. If the School District elects not to proceed with the Project, the School District will pay the Developer the lesser of (i) the actual Pre-Development Reimbursables or (ii) \$_____.

(d) Upon request by the School District, Developer will advise the School District as to the amounts, from time to time, of Pre-Development Reimbursables paid or incurred to date and Pre-Development Reimbursables projected to be paid or incurred in the future.

5. Indemnification.

(a) The Developer for itself and on behalf of its contractors, subcontractors, employees, agents, and invitees, shall, at their sole cost and expense, release, indemnify, defend, and satisfy all judgments and hold harmless the School District, the School Reform Commission, the Board of Education and their respective officers, agents, representatives, and employees from and against all claims, demands, suits, actions, judgments, costs, penalties, liabilities, damages, delays, losses and expenses (including attorneys' fees, defense costs, court costs and costs of suit), for or on account of death, injury, damage or loss to persons and/or property (including but not limited to employees of such Developer or any of its contractors, subcontractors, employees, agents, or invitees), or economic loss, damage or expense, in any way arising out of or resulting from the Pre-Development Activities under this Agreement, or through the negligence of the Developer or caused, in whole or in part, by any acts or omissions of the Developer or any of its contractors, subcontractors, employees, agents, or invitees, or by anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable (including Sub-subcontractors and material suppliers), regardless of whether or not it is caused in part by a party indemnified hereunder, or from the use of facilities or equipment furnished to the Developer and/or any of its Subcontractors in connection with the performance of such work of such Developer, and/or its contractors, subcontractors, employees, agents, or invitees (including but not limited to all claims arising out of the operation of any law imposing liability out of the use of scaffolds, hoists, cranes, stays, ladders, supports or other mechanical contrivances, or any site conditions or site use).

(b) In any and all claims against the School District, the School Reform Commission or the Board of Education, the Developer, its contractors, subcontractors, employees, agents, or invitees, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, the indemnification obligation under this Paragraph shall not be limited in any way by any limitation on the amount or types of damages, compensation, or benefits payable by or for the Developer, its contractors, subcontractors, employees, agents, or invitees under workers' or workmen's compensation acts, disability benefit acts, or other employee benefit acts. This indemnity provision is intended, inter alia., to protect the School District, the School Reform Commission, the Board of Education, their officers, agents, representatives and employees from all claims of employees or workers of the Developer, its contractors, subcontractors, employees, agents, or invitees who are injured on School District real property or as a result of School District personal property, from the commencement to the completion of this Agreement, whether the death, injury, damage or loss to persons and/or property, or the economic loss, damage or expense, is due to School District negligence, in whole or in part, and is not limited to death, injury, damage or loss to persons or property, or economic loss, damage or expense, which occur in actual performance of this Agreement, nor is this indemnity provision limited by the Pennsylvania Worker's Compensation Act.

(c) No provision of this Paragraph shall give rise to any duties on the part of the School District, or any of their agents, representatives, or employees.

(d) Obligations of the Developer, its contractors, subcontractors, employees, agents, or invitees arising under this Paragraph shall survive termination or expiration of this Agreement.

(e) This indemnity provision is independent of whether or not the Developer, its contractors, subcontractors, employees, agents, or invitees has (have) insurance. This indemnity provision shall apply, particularly but not exclusively, to the claims of the Developer and all of its contractors, subcontractors, employees, agents, or invitees, and all of their respective officers, agents, representatives and employees, against the School District and all its officers, agents, representatives and employees. Any violation of any of the provisions of this Paragraph by the Developer and/or any of its contractors, subcontractors, employees, agents, or invitees shall be deemed a material breach of this Agreement. The Developer and all of its contractors, subcontractors, employees, agents, or invitees and all their respective officers, agents, representatives and employees, shall have no claim against the School District, its officers, agents, representatives and employees for the acts, failures to act or negligence of the School District, directly or indirectly, or its officers and employees; and should this exculpatory clause be declared invalid by law, such invalidity shall in no manner affect or invalidate any or all other foregoing provisions in this Paragraph.

6. Term. This Agreement shall terminate (a) upon the mutual execution by the Parties of the Agreement of Sale or (b) when terminated by the School District during or after the Pre-Construction Activities. If the School District has not elected to proceed with the Project

within sixty (60) days after the expiration of the Pre-Construction Activities, this Agreement will terminate automatically, unless the Parties agree in writing before the conclusion of such 60-day period to extend the term. Upon termination of this Agreement, all obligations and liabilities of the Parties by reason of this Agreement shall cease, except that any obligations or liabilities under Sections 4, 5, 6, and 9 hereof shall survive any termination or expiration of this Agreement.

7. Assignment. Neither party may assign this Agreement without the written consent of the other Party.

8. Representations and Warranties.

(a) The Developer hereby represents and warrants to the School District as follows:

(i) The Developer has all requisite power and authority to enter into this Agreement and consummate the transaction herein contemplated, and by proper action has duly authorized the execution and delivery of this Agreement and the consummation of the transaction herein contemplated and no permission, approval or consent by third parties or governmental authorities is required in order for the Developer to enter into and consummate this Agreement;

(ii) This Agreement is a valid obligation of the Developer and is binding upon and enforceable against the Developer in accordance with its terms; and

(iii) The consummation by the Developer of the transaction contemplated hereby does not, and will not, constitute a violation of any order, rule or regulation of any court or of any federal or state or municipal regulatory body or administrative agency or other governmental body having jurisdiction over the Developer.

(b) The School District hereby represents and warrants to the Developer as follows:

(i) The School District has all requisite power and authority to enter into this Agreement and consummate the transaction herein contemplated, and by proper action has duly authorized the execution and delivery of this Agreement and the consummation of the transaction herein contemplated and no permission, approval or consent by third parties or governmental authorities is required in order for the School District to enter into and consummate this Agreement;

(ii) This Agreement is a valid obligation of the School District and is binding upon and enforceable against the School District in accordance with its terms;

(iii) The consummation by the School District of the transaction contemplated hereby does not, and will not, constitute a violation of any order, rule or regulation of any court or of any federal or state or municipal regulatory body or administrative agency or other governmental body having jurisdiction over the School District; and

(iv) The School District is not a party to, nor bound by, any indenture, mortgage, deed of trust, loan agreement, restriction, restrictive covenant, or any order or decree of any court or governmental agency, which might adversely affect the Project or any portion of the Site.

9. Miscellaneous.

(a) This Agreement may be executed in one or more counterparts, each of which shall be deemed an original. This Agreement shall be binding upon and shall inure to the benefit of the School District and the Developer and their respective permitted successors and assigns. This Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Pennsylvania.

(b) Any notice, request or other communication given or made hereunder (“Notice”) shall be in writing and sent by any of the Parties or their respective attorneys by any of the following means: (i) by registered or certified mail, return receipt requested, postage prepaid, (ii) by personal delivery, (iii) by recognized overnight delivery service or (iv) by facsimile. Any such Notice shall be addressed to each of the other Parties at the addresses or facsimile numbers set forth below, or to such other address or addresses or facsimile number or numbers for each Party as each Party shall hereafter designate by Notice given to the other Parties pursuant to this Section 10(b):

To Developer:

With a Copy to:

To School District:

Office of Capital Programs
The School District of Philadelphia
440 North Broad Street, 3rd Floor
Philadelphia, PA 19130
Attention: Director, Capital Programs

Telephone: _____
Facsimile: _____]

With a copy to:

Office of General Counsel
The School District of Philadelphia
440 North Broad Street – Suite 313
Philadelphia PA 19130
Attn: General Counsel
Telephone: _____
Facsimile: _____]

Any Notice given or made by any of the means provided in this Section 12(c) shall be deemed given as follows: (i) if by registered or certified mail, the third business day following the date of mailing, (ii) if by personal delivery, the date delivered, (iii) if by recognized overnight delivery service, the business day after deposit for overnight delivery with such recognized overnight delivery service and (iv) if by facsimile, on receipt by the sending Party of electronic confirmation of receipt.

(c) No officer, official, employee, agent or representative of the School District shall be personally liable to the Developer or any successor in interest, in the event of any default or breach by the School District for any amount which may become due to the Developer or any successor in interest, or on any obligation incurred under the terms of this Agreement. No officer, official, employee, agent, member or representative of the Developer shall be personally liable to the School District or any successor in interest, in the event of any default or breach by the Developer for any amount which may become due to the School District or any successor in interest, or on any obligation incurred under the terms of this Agreement

(d) This Agreement constitutes the entire understanding between the Parties and the Parties shall not be bound to any agreements, understandings or conditions respecting the Project other than those expressly set forth and stipulated in this Agreement.

(e) This Agreement may not be changed in any way except by written agreement of the Parties.

(f) If any portion of this Agreement is held invalid, such invalidity shall not affect the validity of the remaining portions of the Agreement, and the parties will substitute for any such invalid portion hereof a provision which best approximates the effect and intent of the invalid provision and is valid.

[REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK]

IN WITNESS WHEREOF, each of the Parties hereto has executed this Agreement, either individually or by an authorized representative, effective as of the day and year first set forth above.

DEVELOPER:

By: _____

Name: _____

Title: _____

Date: _____

SCHOOL DISTRICT:

THE SCHOOL DISTRICT OF PHILADELPHIA

By: _____

Name: _____

Title: _____

Date: _____

Approved as to form:

Assistant General Counsel

Exhibit A

Site

Exhibit B

Insurance Requirements

INSURANCE REQUIREMENTS: The Developer shall, at its own expense, procure and maintain the types and minimum limits of insurance specified below covering the performance of the work and activities at the Subject Properties. All insurance shall be procured from reputable insurers who are financially responsible and authorized to do business on an admitted basis in the Commonwealth of Pennsylvania or otherwise acceptable to the School District's Office of Risk Management. All insurance must be afforded by an insurance carrier with at least an A- (Excellent) rating from a reputable agency (e.g., A.M. Best). All insurance herein shall be written on an "occurrence" basis and not a "claims made" basis. In no event shall work be performed until the required evidence of insurance has been provided. The insurance shall provide for at least thirty (30) days prior written notice to be given to the School District in the event coverage is materially changed, cancelled or nonrenewed. In the event the insurance carriers will not issue or endorse their policy(s) to comply with the above, it is the responsibility of the Developer to report any notice of cancellation or non-renewal at least thirty (30) days prior to the effective date of this notice. The School District of Philadelphia and its officers, employees and agents shall be named as additional insureds on the general liability insurance policy, and the policy shall be so endorsed. An endorsement is required stating that the coverage afforded the School District and its officers, employees and agents as additional insureds will be primary to any other coverage available to them and, that no act or omission of the School District or its officers, employees and agents shall invalidate the coverage, other than an act or omission that would constitute willful misconduct or gross negligence.

a. **Workers' Compensation and Employer's Liability.**

- i. Workers' Compensation: Statutory Limits.
- ii. Employers' Liability: \$500,000 Each Accident - Bodily Injury by Accident; \$500,000 Each Employee - Bodily Injury by Disease; and \$500,000 Policy Limit - Bodily Injury by Disease.

b. **General Liability Insurance.**

- i. Limit of Liability: \$1,000,000 per occurrence combined single limit for bodily injury (including death) and Properties damage liability; \$1,000,000 personal and advertising injury;
- ii. \$2,000,000 general aggregate and \$2,000,000 aggregate for products and completed operations.

Coverage: Premises operations; blanket contractual liability; personal injury liability; products and completed operations; independent contractors; employees and volunteers as additional insureds; cross liability; and broad form Properties damage (including completed operations).

- iii. "The carrying of insurance described shall in no way be interpreted as relieving the Developer of any responsibility or liability under the contract."

c. **Automobile Liability Insurance.**

i. Limit of Liability: \$1,000,000 per occurrence combined single limit for bodily injury (including death) and Properties damage liability.

ii. Coverage: Owned, non-owned, and hired vehicles.

d. **Excess Umbrella Liability.**

i. Limit of Liability: at least \$1,000,000.00 combined single limit. and at least \$2,000,000.00 aggregate limit with an additional insured endorsement for the School District on the liability policy.

ii. Coverage: Limits in excess of underlying limits in underlying primary insurance policies and broader coverage than combined scope of underlying primary insurance policies.

e. **Certificates.** Certificates of Insurance evidencing the required coverages must specifically reference the School District contract number set forth on the first page of the Agreement (the contract number can be typed in the 'Description' section of the certificate). The original certificate shall be submitted to the address below:

School District of Philadelphia
Office of Risk Management
Philadelphia Education Center
440 N. Broad Street — 3rd Floor
Philadelphia, Pa 19130

The certificate of insurance must be submitted to the School District at least ten (10) days before any contractual services or renewal term begins. Under no circumstances shall Developer actually begin services (or continue services, in the case of renewal) without providing the evidence of insurance. School District reserves the right to require Developer to provide certified copies of the original policies of all insurance required under this contract at any time upon ten (10) days written notice to the Developer.

f. **Self-Insurance.** The Developer may not self-insure any of the coverages required under this Agreement without the prior written approval of the School District Risk Manager. In the event that the Developer desires to self-insure any of the coverages listed above, it shall submit to the School District's Risk Manager, prior to the commencement of Services hereunder, a certified copy of the Developer's most recent audited financial statement, and such other evidence of its qualifications to act as a self-insurer (e.g., state approval) as may be requested by the School District's Risk Manager. In the event such approval is granted, it is understood and agreed that the School District, its commission members, board directors, officers, employees and agents shall be entitled to receive the same coverages and benefits under the Developer's self insurance program that they would have received had the insurance requirements been satisfied by a reputable insurance carrier authorized to do business in the Commonwealth of Pennsylvania or otherwise acceptable to the School District Risk Manager. If at the time of commencement of the Initial Term of this Agreement, the Developer self-insures its workers' compensation and

employers' liability coverage, the Developer may, in lieu of the foregoing, furnish to the School District Risk Manager and School District a current copy of the State certification form for self-insurance or a current copy of the State Insurance Commissioner's letter of approval, whichever is appropriate. The insurance (including self-insurance) requirements set forth herein are not intended and shall not be construed to modify, limit, or reduce the indemnifications made in this Agreement by the Developer to the School District, or to limit the Developer's liability under this Agreement to the limits of the policies of insurance (or self-insurance) required to be maintained by the Developer hereunder.