



County Manager

MEMORANDUM

To: Board of County Commissioners

From: Lee Worsley, Deputy County Manager

Date: March 6, 2015

Re: Whitted School Public Private Partnership (PPP) Agreement

The Board is presented a revised PPP Agreement for consideration during your March 9 Regular Meeting. This Agreement is a joint agreement by, and between, Durham County, the Durham Public School System and Integral Development. The Agreement lays out the road map for how the formal legal agreements will be developed for this redevelopment deal to move forward. Comments from members of the Board of Commissioners during the March 2, 2015 Worksession were considered and incorporated. Changes in the agreement will be discussed later in this document.

Background

Durham County Government owns the James A. Whitted School property. The property has fallen into significant disrepair and sits as a central part of an area that is undergoing redevelopment through the Southside Redevelopment Project. Back in 2012, the Board of County Commissioners gave direction to staff that they desired to see options to have the school redeveloped. At that time, the following parameters were given as guidance to staff 1) there was no desire to see the building demolished; 2) there was a desire to move the building out of County ownership; 3) there was a desire to control what was going to be developed on the site.

In order to try and balance the parameters given, staff proceeded to develop a Request for Proposals (RFP) so that the market could respond to the County with ideas for how the property could be redeveloped. An RFP process was chosen so that the County could retain as much control as possible. The County could have simply put the property out for public auction or upset bid under State law, but the County's control over the property would not be retained under either of those arrangements. Under State law, it is extremely difficult for a public entity to dispose of public property, while at the same time dictating its desire for use of the property.

Through the RFP process, the County received two proposals. The first was from Traditional Neighborhood Development Partners. Their proposal was to renovate the facility at a cost of \$12 million and to place a charter school and other educational components into the renovated facility.

The second proposal was from the Durham Public School System/Integral Development/FortyAM/Belk Architecture. This proposal was to renovate the facility as well as add an

new building wing, which would house an intergenerational facility including housing for low income seniors and a public, pre-k facility. The initial budget for this project was \$21.7 million.

After staff review and recommendations, the Board of County Commissioners selected the proposal of Durham Public Schools/Integral/FortyAm/Belk Architecture. Since that time, staff has been working with the developer, the City and DPS to move the project forward.

Ownership Structure

The redevelopment deal has financing sources coming from public sources, private sources, low income housing tax credits and federal historic tax credits. Each source and program come with its own set of legal requirements. To complicate the deal, the occupants of the building are a mix of public and private uses. In its most simple terms, several of the income sources (namely the tax credit sources) cannot be used directly on publicly owned uses. Therefore, it is not possible to simply convey the building in fee simple to either the schools or to the developer as part of this deal. If we were to deed the facility to the schools, millions of dollars in tax credit financing could not be used. Deeding the building to the developer is not in the public partners' best interest since significant public dollars are being used and there is a desire to retain control of the use (especially the portion being funded for pre-k). These are the basic reasons why an ownership structure has been required where the County will create a non-profit, which will then create a for profit that will own the facility. This ownership structure is the only way that we can bring in the variety of financing sources into the project, while at the same time, retain control over the building in the public realm.

Alternatives

If the Board chooses not to move forward with this project it is important to highlight the alternatives available to the Board, keeping in mind that the County still will have ownership of the property.

1. The County could choose to have the building demolished. Because of the significant amount of asbestos in the building, an estimate of demolition several years ago was nearly \$1.5 million.
2. The County could renovate the building on its own and use it for a County or public purpose. The County does not have a renovation estimate at this time, but it is reasonable to assume that renovation would be comparable to cost estimates submitted during the 2012 RFP process, which were a minimum of \$12 million. It is likely that those costs have risen since the RFPs are from 2012 and construction prices have risen since that time.
3. The County could dispose of the building as surplus property, through a public auction or an upset bid process, which are options available to the County for disposal of public property. This option would be the least costly for the County, but the County would have no control over what a successful bidder would do with the property. During previous discussions with the Board, a significant desire was expressed to control the ultimate disposition of the property.
4. The County could do another RFP process, but a process was already done in 2012 and resulted in two responses. There is no guarantee that a new process would produce anything at all. A new RFP will once again delay construction, causing more decay to the building. A new RFP could produce a proposal more financially advantageous to the County, but the reverse is equally possible, that a new RFP process could produce proposals less finically to the County or no proposals at all.
5. The County could seek to transfer the property to another entity authorized by North Carolina General Statutes. However, all of the development challenges the facility faces will not go away and the County could lose some control in what ultimately ends up in the building under this scenario. Because of the condition of the facility, it may be hard to get another public entity to agree to assume ownership of the building.

Public Private Partnership Agreement

As discussed at the beginning of this memo, the PPP is attached for the Board's consideration. The document is the result of significant negotiations between the County, Durham Public Schools, Integral and the City of Durham. Following the March 2, 2015 Worksession, County staff went back to the other parties and the following changes were made to the agreement.

1. Revision of language to make it clear that the funds the County is contributing to the partnership are DPS capital outlay dollars.
2. Inserted language that the County and DPS share operational costs equally.
3. Revised language regarding the gym so that it says that DPS is responsible for operation of the gym, and will collaborate with the County regarding use outside of regular school hours.

Staff recommends that the Board adopt the agreement as presented.

PPP AGREEMENT FOR WHITTED SCHOOL

This PPP AGREEMENT FOR WHITTED SCHOOL ("Agreement") is entered into this ____ day of ~~February~~March, 2015, by and among DURHAM COUNTY, NORTH CAROLINA, a political subdivision of the State of North Carolina (the "County"), DURHAM PUBLIC SCHOOLS BOARD OF EDUCATION, a body corporate and politic ("DPS"; the County, DPS and the City (as hereinafter defined) are collectively referred to as the "Public Participants"), and INTEGRAL DEVELOPMENT LLC, a Georgia limited liability company ("Integral").

WITNESSETH:

WHEREAS, the County and DPS are working with Integral to redevelop the historic Whitted School building and site as affordable senior housing and a public preschool (the "Project");

WHEREAS, the Project includes the renovation of the historic Whitted School building and the construction of a new building on the site;

WHEREAS, Integral has formed a single purpose limited liability company known as Whitted School Redevelopment, LLC (the "Owner") to own, renovate and lease the Project;

WHEREAS, the Owner will lease the nonresidential portion of the Project to DPS for use as a public preschool and other community activities;

WHEREAS, it is anticipated that financing for the Project will be provided through a combination of sources, including funds derived from a tax credit equity investor, funds provided by the City of Durham, North Carolina (the "City") (for the senior housing portion only), funds provided by DPS (for the preschool portion only), funds provided by the County (for both portions of the Project), and a conventional loan insured by the Federal Housing Administration ("FHA");

WHEREAS, the parties intend for this Agreement, as supplemented, amended and superseded by subsequent closing documents and plans to be developed pursuant to this Agreement, to govern their relationship, and to set forth the respective roles and obligations of the parties with respect to the Project.

NOW, THEREFORE, in consideration of the mutual covenants and agreements stated herein, the parties do agree as follows:

1. Acquisition and Development of the Site.

a. Conveyance of Project Site. The County and the Owner entered into an Amended and Restated Option to Purchase Real Property dated April 7, 2014, pursuant to which the Owner has the option to purchase the Whitted School site in accordance with the terms thereof. Owner will acquire the Project site at "Closing" as defined herein.

b. Senior Housing Component. The Owner will develop the Project to include 79 units (the "Affordable Housing Units") of low to moderate income senior housing (although one unit may be reserved as a management unit). The Affordable Housing Units will be located in a portion of the Whitted School building and the new building to be constructed on the site. The redevelopment will maintain the historic exterior architectural features of the Whitted School building.

c. Public Preschool Component. The Owner will develop the Project to include preschool classrooms, school offices, a gymnasium and a cafeteria (collectively, the "Public Pre-K"). Once construction is completed and the Project is ready for occupancy, the Public Pre-K space will be leased to DPS on the terms set forth in Section 4 of this Agreement. The Public Pre-K space will include eight classrooms designed to accommodate 144 new students (i.e., additional preschool students rather than students relocated from existing DPS preschool programs). Built-in items such as countertops, casework, sinks, cubbies and storage are part of the Project budget. Also, all standard furnishings will be included in the Project budget and provided under the lease, including items such as desks, chairs, tables, filing cabinets, adult desk and chairs, area rugs and other furniture (but excluding copiers). While scheduling, purchasing and installing furniture is covered by the budget, DPS must provide a designee on site to assist contractors with where and how to set up furnishings. Signage for rooms, directions, and directories are included in the Project budget. Exterior signage will include at least a marquis sign and a monument sign identifying the facility and primary parties to the lease/ownership. Supplies and routine expendable items are NOT part of the budget and must be provided by DPS (including paper materials, ink, arts and crafts, etc.).

d. Plans and Specifications for the Project. Integral will engage architects and engineers as necessary to prepare plans and specifications necessary for the design, development and construction of the Project (the "Construction Plans"). All Construction Plans and any material change order affecting the use and quality of the Project shall be subject to the prior review and approval of the Public Participants, which approval shall not be unreasonable withheld, conditioned or delayed. All Construction Plans submitted must include: (i) design and positioning of all Affordable Housing Units and the Public Pre-K space; (ii) identification of set-backs from lot lines; (iii) grading plans; (iv) drainage plans; and (v) utility locations. The Construction Plans and all revisions and modifications thereto shall be certified by an architect duly registered under the laws of the State of North Carolina. The Construction Plans must comply with all applicable laws and regulations. The architect will incorporate in the design appropriate outlets and power supply as identified by DPS for copiers, appliances and other equipment that may require special circuits.

e. Construction of Project. Owner will enter into a contract (the "GC Contract") with a general contractor (the "Contractor") for the construction of the Project that sets either a fixed price or a guaranteed maximum price. During the construction of the Project, the Public Participants or designated representatives thereof will be invited to construction progress meetings every month with Integral, the Contractor and the architect. Following reasonable advance notice and accompanied by a representative of Integral, the Public Participants or a designated representative thereof will have access to the Project site at all reasonable times during construction of the Project to view the Project and the progress thereof. Integral and the Contractor will use commercially reasonable, best efforts to hire Durham residents and companies located in Durham in connection with the development of the Project, and will establish a system for monitoring and enhancing such local participation and jobs for County residents. Any funds remaining in the development budget after completion of construction of the Project will be applied first to fund a capital and maintenance reserve (in an amount to be agreed upon), next an operating reserve, and the remainder to be used to repay the City Loan referenced in Section 3(a)(ii) and the County Loan referenced in Section 3(a)(iii) in proportion to the amount of such subordinate loans. The City, the County and DPS are not responsible for any Project cost overruns unless additional funding is expressly agreed upon at the time of the overrun. Cost overruns would need to be handled with a reduction in scope rather than additional funding.

f. Development Fee. Integral will receive from Owner a customary developer fee for serving as the developer and performing development services for Owner. The developer fee will be a line item in the Project budget. The parties acknowledge that the timing and amounts of payments of the developer fee will be set forth in the development agreement based upon negotiations with the Tax Credit Investor (hereinafter defined).

2. Ownership Structure for the Project. The Owner is a Georgia limited liability company authorized the transact business in the State of North Carolina.

a. Managers/Managing Members. The managers of the Owner are Integral Whitted School, LLC and Shelter Investments Development Corporation.

b. Tax Credit Investor. The investor members are anticipated to be the historic tax credit investor ("HTC Investor"), the low income housing tax credit investor (the "LIHTC Investor"), and an affiliate of the County. It is anticipated that the HTC Investor and the LIHTC Investor will be the same entity (collectively, the "Tax Credit Investor"). Following the end of the tax credit compliance period for the Project, the Tax Credit Investor will have the option to either put its membership interest in the Owner to Durham Whitted Corporation for a nominal sum or donate its membership interest in the Owner to Durham Whitted NP. The parties intend for Durham Whitted Corporation to have the right to purchase the membership interest of the Tax Credit Investor for fair market value following the 15 year compliance period if the Tax Credit Investor does not exercise its put right described above.

c. County Investor. The County's interest in the Owner will be structured at the initial closing as follows:

(i) The County will create a North Carolina nonprofit corporation which it controls by controlling its board of directors ("Durham Whitted NP"), the purpose of which includes redevelopment of Whitted School.

(ii) Durham Whitted NP in turn will create a for-profit corporation, whose stock is owned 100% by Durham Whitted NP (the "Durham Whitted Corporation").

(iii) DPS and the County have agreed that the County will reallocate \$5,800,000 in funds that the County had previously designated for DPS capital outlay purposes (consisting of \$2,000,000 to be funded from Article 46 sales tax receipts and \$3,800,000 from the issuance of previously authorized general obligation bonds) (the "County/DPS Contribution") to the redevelopment of Whitted School. The County will appropriate ~~\$5.8 million~~ (the "County/DPS Contribution") to Durham Whitted NP, and Durham Whitted NP will use those funds to capitalize Durham Whitted Corporation. Durham Whitted Corporation will use the County DPS Contribution to acquire a membership interest in the Owner.

(iv) As a member in Owner, Durham Whitted Corporation will have a significant portion (estimated at 85% but in no event less than 75%) of the residual distribution on capital events (e.g., sale or refinancing proceeds) and that portion is anticipated to increase to as much as 99.9% following the exit of the Tax Credit Investor from the Owner as a member.

3. Project Financing Structure.

a. Public Sources of Funding.

(i) As described in Section 2c.(iii) above, Durham Whitted Corporation will make a capital contribution to Owner in the amount of \$5,800,000 to purchase its membership interest in the Owner.

(ii) The City will provide a subordinate cash flow loan/grant in the amount of \$600,000 (the "City Loan").

(iii) The County will provide a subordinate cash flow loan/grant in the amount of \$2,340,000 (the "County Loan"), which may be in the form of a draw down loan.

b. Private Sources of Funding.

(i) Owner intends to obtain an FHA insured loan in the amount of \$2,410,000.

(ii) Owner anticipates that the HTC Investor will make a capital contribution in the amount of \$2,372,284 (initial estimate).

(iii) Owner anticipates that the LIHTC Investor will make a capital contribution representing the purchase of both federal and state low income housing tax credits in the amount of \$5,545,423,678,359 (initial estimate).

(iv) Owner intends to obtain a Federal Home Loan Bank loan with net funds to the Project of \$350,000.

c. Construction Draw Disbursements. The City, DPS, the County and Integral will work together in good faith to negotiate a disbursing agreement to govern the construction draw process. The City and County funds may be deposited with a third-party escrow/disbursing agent to be disbursed each month in connection with the FHA loan construction draws. DPS and the County will be included in the construction review process. The parties recognize that the inclusion of the FHA loan as part of the financing for the Project will result in an FHA prescribed inspection and approval process; the County and DPS may be able to rely upon that process.

d. State historic tax credits: In the event that the North Carolina General Assembly reauthorizes the North Carolina historic tax credit and the Project is deemed to be eligible for such tax credits, to the extent of funds received from the syndication of such credits which remain after completion of the Project and satisfaction of all amounts required under the Project budget, such funds will be used to reimburse the County, DPS and the City for the additional amounts contributed to the Project as a result of the elimination of that program (i.e., in proportion to \$800,000 of additional capital contribution by DPS, the \$800,000 increase in the County Loan and the \$100,000 increase in the City Loan) ~~following completion of the Project and subject to funds remaining from the Project budget.~~

e. Property Tax Grants. The parties will negotiate in good faith the term over which property tax grants from the City and the County totaling up to \$210,000 will be received by the Partnership.

4. Lease and Operation of Preschool Space to DPS.

a. DPS will have a fifteen (15) year lease of the Public Pre-K space in the Project (the "DPS Lease"), and DPS will have exclusive possession of such space and control over its use, subject to reasonable limitations designed to assure compatibility of uses and security of Project residents. The ~~DPS Lease is expected to have nominal amount of~~ paid under the DPS Lease will be nominal; provided that DPS pays all of the direct and allocated costs of operating the Public Pre-K space and an allocated share of common areas and shared structural and systematic aspects of the Project. All spaces will be sub-metered for accurate utility breakdown and coverage. Owner and DPS may agree to structure the rent payments as "gross rent" covering some or all of the operating expenses that are not separately metered. It is anticipated that term of the DPS Lease will begin July 1, 2017. The commencement of the term may be adjusted by the parties to the DPS Lease due to early or late delivery of the space.

b. The maintenance and upkeep of the common and shared aspects of the Project will be prorated between Owner and DPS based on the square footage leased or used by DPS. For example, if the DPS Lease covers 32% of the space in the Project, the roofing replacement costs will be allocated accordingly. Responsibility for maintenance of parking spaces and driveways will be based upon number of assigned parking spaces.

c. DPS will have ~~full~~ control of the use of the gymnasium space. DPS will ~~have the right to sublicense the use of the gymnasium space to the County or others outside of regular school hours, and will~~ collaborate with the County and other community entities about appropriate use of the space outside of regular school hours, which may include programming by the Durham City Parks and Recreation Department or the Triangle YMCA. To the extent practicable, DPS will include the property manager of the Project in such collaborations. ~~In addition, DPS may allow others to use the space/provide programming during regular school hours.~~

d. The Public Pre-K program will be targeted to families living within walking distance of the Project in order to reduce transportation costs.

e. The ~~parties acknowledge the source of funding of the~~ County and DPS agree that the costs of operating ~~costs for the~~ Public Pre-K space ~~are still being evaluated and determined by~~ will be shared equally between the County and DPS.

f. DPS will work with North Carolina Central University to determine any opportunities for NCCU students to work in the Public Pre-K space as a teaching lab, and will consider the possibility of charging fees for Public Pre-K to the extent a family can afford it.

5. **Operation of Senior Housing.** Owner will be solely responsible for the Senior Housing. Owner will contract with a management company experienced in operating affordable senior housing to operate the Senior Housing. None of the Public Participants will have any responsibility whatsoever for the operation of the Senior Housing. All of the Affordable Housing Units will be for seniors whose income is less than 60% of the Durham MSA Area Median Income. ~~The~~At its meeting on January 28, 2015, the Durham Housing Authority ~~has~~ agreed to provide project based rental assistance for ~~at least 45~~50 of the Affordable Housing Units.

6. Miscellaneous.

a. Community Engagement. Integral will develop a plan intended to engage the surrounding community and other appropriate constituencies during and after construction of the Project, including coordination with the Hillside Alumni Association to recognize the history of the building (such plan may include art displays, a room with historic information, etc.). There is also a plan to include an urban garden feature which will be the sole responsibility of the Owner.

b. Notice. All notices, requests, demands, approvals, or other formal communications given hereunder or in connection with this Agreement shall be in writing and shall be deemed given if, and shall not be deemed given unless, dispatched by (1) certified mail, return receipt requested; (2) express delivery service with a delivery receipt; or (3) personal delivery, to the offices of the addressee, at the addresses set forth below.

If to County: Durham County
200 East Main Street
2nd Floor, Old Courthouse
Durham, NC 27701
Attention: Deputy County Manager

With a copy to:

Durham County Attorney
200 East Main Street
2nd Floor, Old Courthouse
Durham, NC 27701

If to DPS: Durham Public Schools Board of Education
511 Cleveland Street
Durham, NC 27702
Attention: Superintendant

With a copy to:

Tharrington Smith LLP

150 Fayetteville Street

Raleigh, NC 27601

Attention: Rod Malone

If to Integral:

Integral Development LLC

191 Peachtree Street NE

Suite 4100

Atlanta, GA 30303

Attn: Vicki Lundy Wilbon,

President

With a copy to:

Arnall Golden Gregory LLP

171 Seventeenth Street, NW

Suite 2100

Atlanta, GA 30363-1031

Attn: Jonathan E. Eady

c. Cooperation and Compliance. The parties hereto agree to cooperate with each other and provide all necessary documentation, certificates and consents and to take all necessary action in order to satisfy the terms and conditions hereof and the applicable laws, regulations and agreements relating thereto.

d. Severability of Provisions. If any provision of this Agreement is held invalid, the remainder of this Agreement shall not be affected thereby if such remainder would then continue to conform to the terms and requirements of applicable law.

e. No Effect After Closing. Notwithstanding anything contained in this Agreement to the contrary, this Agreement shall have no effect on and shall not be applicable to the Project once the Closing has occurred. At the time a Closing occurs, all of the applicable rights, duties and obligations of the parties hereto will be expressly included in the documents executed at such Closing and any provisions not included in the Closing documents shall have no further force or effect with regard to the Project. For purposes hereof, the term "Closing" shall mean the date on which the principal documents regarding financing, construction and operation of the Project are executed and become binding obligations of performance for the parties thereto.

f. Resolution of Problems. DPS, the City, the County and Integral will mutually agree upon a method for resolving problems related to financing, approvals, events, processes and deadlines associated with the redevelopment of the Project.

g. Modifications. No oral modifications or amendments to this Agreement shall be effective, but this Agreement may be modified or amended by written agreement.

h. Governing Law. This Agreement and its terms and conditions shall be governed by the laws of the State of North Carolina, without reference to its choice of law or conflict of law principles.

i. Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original and all of which shall be deemed to constitute one and the same agreement.

j. No Joint Venture Partners. Other than the fact that an affiliate of the County may become a member in Owner, neither this Agreement nor any agreements, instruments, documents or transactions contemplated hereby, including without limitation, any loan documents, shall in any respect be interpreted, deemed or construed as making any Public Participant or an affiliate thereof a partner or joint venturer with Integral, Owner or their affiliates, or as creating a similar relationship or entity.

k. Waiver. No failure on the part of the parties to exercise, and no delay in exercising, any right, and no failure on their part to insist upon strict performance of any term or provision hereof, shall operate a waiver of any of the parties' rights hereunder, nor shall any single or partial exercise by the parties of any right preclude any other or future exercise thereof or the exercise of any other right. No waiver by the parties of any condition or event of default shall constitute a waiver of any subsequent condition or event of default.

[signatures are on following page]

IN WITNESS WHEREOF, the parties, by their duly authorized signatories, hereby enter into this Agreement effective as of the date first set forth above.

DURHAM COUNTY

By: _____

Name: _____

Title: _____

DURHAM PUBLIC SCHOOLS

BOARD OF EDUCATION

By: _____

Name: _____

Title: _____

INTEGRAL DEVELOPMENT LLC

By: _____

Its: _____