

INTERIM AGREEMENT

THIS INTERIM AGREEMENT (“**Agreement**”) dated as of the 5th day of December, 2018 (the “**Effective Date**”) is made by and between THE CITY OF FALLS CHURCH, VIRGINIA, an independent city and political subdivision of the Commonwealth of Virginia, in its proprietary capacity and not in its governmental capacity (the “**City**”), and FCGP DEVELOPMENT LLC, a Delaware limited liability company (the “**Developer**”). Each of the City and Developer may be referred to in this Agreement as a “**Party**,” and collectively, as the “**Parties**,” as the context requires.

RECITALS:

WHEREAS, the City and the Falls Church City School Board (the “**School Board**”) are the fee simple owners of an approximately 10.38 acre tract of land adjacent to the replacement site of the existing George Mason High School, in Falls Church Virginia, being a portion of the land with an address located at 7124 Leesburg Pike, Falls Church, Virginia 22046 and further described as Tax Map ID number 51-221-001 (the “**Property**”).

WHEREAS, the City and the School Board plan to subdivide land that the two of them own and transfer land among them so that the City is the sole owner of the Property.

WHEREAS, the City issued a Request for Conceptual Proposals (“**RFCP**”) and conducted this procurement pursuant to The Public-Private Education Facilities and Infrastructure Act of 2002, Section 56-575.1 *et seq.* of the *Code of Virginia* (“**PPEA**”), as amended.

WHEREAS, the RFCP identified Developer among other qualified teams (“**Other Proposers**”) and solicited project concepts to redevelop and commercialize the Property.

WHEREAS, after responses to the RFCP were received by the City, the City issued RFDP #0822-18-GMHS-WFC (“**RFDP**”) to Developer and certain Other Proposers.

WHEREAS, the City is pursuing the development of the Property in coordination with the School Board, which is constructing a new high school (the “**High School**”) on adjacent property, and the milestones for accomplishing the development and the High School were set forth on page 2 of the RFDP.

WHEREAS, the City requested that respondents to the RFDP include in their responses (the “**Initial Proposal(s)**”) a schedule, which included, *inter alia*, Developer’s proposed timetable to: (a) submit an initial application for a Special Exception Entitlement (the “**SEE**”), as required pursuant to Section 48-488(b) of the Code of Ordinances of the City of Falls Church (the “**Zoning Code**”) and proceed under the Zoning Code to obtain approval for the SEE (“**SEE Approval**”) to redevelop the Property in accordance with such respondent’s Proposal; (b) undertake and complete Developer’s Due Diligence Inspections (defined below) of the Property;

and (c) achieve certain milestones by certain corresponding dates (each, a “Milestone” and collectively “Milestones”), in connection with obtaining SEE Approval, conducting and completing Due Diligence Inspections and entering into a Comprehensive Agreement (defined below) for the Project (defined below).

WHEREAS, after receiving the Initial Proposals, the City held further discussions with, and requested additional information and commitments from, the Developer (together with the Initial Proposal, the additional information and commitments are referred to as the “Proposal”).

WHEREAS, upon review of all the Proposals, the City has determined that Developer’s Proposal was the most responsive to the RFDP and it is in the City’s best interest to negotiate with Developer to enter into a Comprehensive Agreement for Developer to develop the Property in accordance with Developer’s response to the RFDP (the “Project”).

WHEREAS, certain material terms of the Project (the “Material Terms”) that were agreed upon between the Developer and the City, which are identified in Exhibit B to this Interim Agreement, have been specifically relied upon by the City in selecting Developer’s Proposal and the Developer. The Material Terms will become a part of the Comprehensive Agreement, except as otherwise agreed by the Parties in writing after the date of this Agreement.

WHEREAS, Developer wishes to commence its Due Diligence Inspections, and the City wishes to provide Developer access to the Property and certain materials and information related thereto in order for Developer to commence such Due Diligence Inspections, subject to and in accordance with the terms of this Agreement.

WHEREAS, the City and Developer desire to set forth the process to obtain SEE Approval and agree upon a final Comprehensive Agreement on or before the expiration of this Agreement and to set forth Milestones that are required to be met in order to continue under this Agreement, and to further specify the details of the Material Terms that are (or will be) agreed to by the Parties under the Comprehensive Agreement.

NOW, THEREFORE, in consideration of the mutual covenants, promises and undertakings set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the City and Developer agree as follows:

1. Definitions of “City” and City Council”; Term and Termination Date.

a. For purposes of clarity, whenever the capitalized word, “City,” is used in this Agreement, the word means, “the City, in its proprietary capacity (only).” Whenever the capitalized term, “City Council” is used in this Agreement, it means, the City of Falls Church City Council, the responsible body acting on behalf of the City of Falls Church government bodies and regulatory agencies, in its governmental capacity.

b. The term of this Agreement (the “Term”) shall commence on the Effective Date and shall continue until: (i) if prior to the expiration of the Due Diligence Period (defined below), the date Developer, in its sole discretion, for any reason, elects to terminate this Agreement and sends a Termination Notice (as defined in Section 7 below) to the City of such

election, or (ii) if after the expiration of the Due Diligence Period (and this Agreement is not terminated in accordance with clause (i)), the earlier of: (A) such date as Developer and the City enter into a definitive comprehensive agreement (as defined in the PPEA, a “**Comprehensive Agreement**”), or (B) the occurrence of an Unwind Event (defined below) and the City or Developer exercises its right to terminate this Agreement in accordance with Section 7(d) below, or (C) the occurrence of an Event of Default (defined below) occurs and the City exercises its right to terminate this Agreement in accordance with Section 7(e) below (any such date being the “**Termination Date**”); and in all events on or before: (1) May 30, 2019 (subject to Section 4(c)(ii) below); or (2) such later date as may be mutually agreed upon in writing by the Parties ((1) or (2) being the “**Outside Date**”). In the event that Developer and the City or its members enter into a Comprehensive Agreement, the terms and conditions of such Comprehensive Agreement shall supersede the terms and conditions of this Agreement.

2. Security During Interim Agreement. As a material inducement to the City to enter into this Agreement and have Developer undertake the duties and obligations required hereunder, the City has required that Developer provide additional security to secure its payment and performance obligations hereunder. On or before December 6, 2018, Developer shall provide one of the following forms of security for its obligations under this Agreement:

a. Developer shall deposit with the City a cash security deposit (the “**Security Deposit**”) in an amount equal to Five Hundred Thousand and No/100 Dollars (\$500,000.00) (subject to Section 2(c) below). The Security Deposit shall be held by the City as security for the faithful performance of the terms of this Agreement to be performed by Developer. While the City holds the Security Deposit, the City shall have no obligation to invest or pay interest on the same.

b. In lieu of a cash Security Deposit, Developer may post a clean, unconditional and irrevocable letter of credit in a commercially reasonable form, subject to the City Manager’s approval, which approval shall not be unreasonably withheld, conditioned or delayed (the “**Letter of Credit**”), issued by a bank or similar financial institution (the “**Bank**”) reasonably satisfactory to the City, in an amount equal to the Security Deposit. The Letter of Credit shall have an expiration date no earlier than the first anniversary of the date of issuance thereof and it shall be automatically renewed from year-to-year unless terminated by the Bank by notice to the City given not less than sixty (60) days prior to the then expiration date therefor. Developer shall have the right to substitute one Letter of Credit for another, provided that at all times the Letter of Credit shall meet the requirements hereunder. For purposes of clarity, references in this Agreement to “Security Deposit” shall mean the Letter of Credit or cash Security Deposit, as may be applicable.

c. Provided Developer does not terminate this Agreement on or before the end of the Due Diligence Period pursuant to Section 3(l) below, the Security Deposit shall be increased to an amount equal to One Million Five Hundred Thousand and No/100 Dollars (\$1,500,000.00). In the event the amount of the Security Deposit is increased as provided herein, thereafter, the term “Security Deposit” shall mean the amount set forth in this Section 2(c).

d. It is agreed that, in the event Developer has not paid, when due: (i) for any costs for which it is responsible under this Agreement to complete the Due Diligence Inspections, (ii)

for Due Diligence Reports (a copy to which the City is entitled), (iii) costs incurred by Developer to obtain the SEE Approvals, or (iv) for costs incurred by the Developer for Work Product to which the City is entitled if an Event of Default or Unwind Event occurs; the City shall have the right to use the Security Deposit or require the Bank to make payment to the City of so much of the proceeds of the Letter of Credit, as applicable, as shall be necessary to pay any such amounts then due and owing, and for any sum which the City may expend or may be required to expend by reason of Developer's failure to pay such amounts. If the City applies any part of the Security Deposit or proceeds of the Letter of Credit, Developer, upon demand, shall promptly deposit with the City the amount so applied or retained (or increase the amount of the Letter of Credit) so that the City shall have the full amount required hereunder on hand at all times during the Term. In the event of a termination of this Agreement as a result of an Event of Default under Section 7 hereof, the City may, in addition to any other rights and remedies available to City in this Agreement or at law or in equity, retain the Security Deposit (or have the Bank transfer the amount of the Letter of Credit to the City).

e. If Developer elects to terminate this Agreement on or before the expiration of the Due Diligence Period, the Security Deposit or Letter of Credit shall be returned to Developer (less any amounts required to restore the Property in connection with Section 3 below, if any) and the Parties shall be relieved of any further duties or obligations with respect to the Security Deposit or Letter of Credit, except those which expressly survive the termination hereof. If the Parties enter into the Comprehensive Agreement, any Security Deposit will be applied as a credit against amounts due under the Comprehensive Agreement. If the Developer terminates in accordance with Section 1(b) (clause (i)) above, the Parties agree that the delivery of all Due Diligence Reports obtained (or completed but unpaid for) by Developer is a condition precedent to the return of the Security Deposit and the City may use all or any portion of the Security Deposit to pay any third party vendors retained by Developer creating such Due Diligence Reports in accordance with Section 2(d) above.

Failure to deliver the Security Deposit as provided in this Section 2 will be an Event of Default under this Agreement, with no notice or cure period being required hereunder.

3. Access for Due Diligence Inspections. The City grants Developer, and Developer's agents and representatives, a personal, revocable license of access to the Property for the limited purpose of conducting such investigations, inspections, audits, analyses, surveys, tests, examinations, studies, and appraisals of the Property as Developer deems necessary or desirable, at Developer's sole risk, cost and expense, to determine if the Property is suitable for the Project (collectively, "**Due Diligence Inspections**"), subject to the following terms and conditions:

a. Developer may commence Due Diligence Inspections as of the Effective Date and continue until the end of January 10, 2019 (the "**Due Diligence Period**"); after the Due Diligence Period, Developer shall have access to the Property upon prior consent of the City not to be unreasonably withheld.

b. Developer shall not perform any invasive, intrusive or destructive testing or Phase II environmental testing at the Property without the prior written consent of the City, which consent may be withheld in the City's sole but reasonable discretion.

c. Before any entry by Developer on the Property, Developer shall maintain (or cause any of its contractors (or subcontractors of its contractors entering the Property to maintain): (i) commercial general liability and property damage insurance in the amount of One Million per occurrence/Two Million Dollars (\$2,000,000) aggregate; (ii) business automobile liability which shall have minimum limits of One Million Dollars (\$1,000,000.00) per occurrence combined single limit for bodily injury liability and property damage liability; and (iii) worker's compensation insurance in an amount not less than as required by the laws of the Commonwealth of Virginia and applicable federal laws; to insure against any liability of Developer and its contractors (or any subcontractors of its contractors) arising out of any entry or inspections of the Property pursuant to the provisions hereof. Such commercial general liability and property damage insurance shall be obtained from an insurance company licensed to business in the Commonwealth of Virginia and reasonably acceptable to the City naming the City and the School Board as additional insureds. Developer shall provide (or shall cause its contractors/subcontractors to provide) the City with evidence of such insurance coverage upon request by the City.

d. On or before December 6, 2018 (and prior to commencement of any Due Diligence Inspections), Developer shall submit the Security Deposit or post a Letter of Credit in accordance with Section 2 above.

e. All entries upon the Property by Developer shall be at reasonable times and after reasonable prior notice (not less than 24 hours) to the City, who shall have the right to accompany Developer during any activities performed by Developer on the Property.

f. Developer acknowledges that the Property is being used for secondary school purposes and therefore, Developer agrees to provide reasonable (not less than 24 hours) prior notice to the Superintendent of the Falls Church City Public Schools (the "Superintendent") when it plans to enter the Property. Developer further agrees that any activities it performs on the site that may involve significant noise, dust, or safety hazard shall be done only after the prior written approval of the Superintendent has been obtained. In all events, Developer agrees to take reasonable and customary steps to minimize noise and employ safety precautions in a manner that is consistent with activities located near a school with children present.

g. Developer hereby indemnifies and holds harmless the City, the School Board and their respective agents, partners, members, directors, officers, managers, employees, and representatives, and the Property with respect to any liens, claims, or damages suffered or incurred by the City, the School Board, or their agents, partners, members, directors, officers, managers, employees and representatives, to the extent such liens, claims or damages result from, or arise out of, or in connection with, directly or indirectly, the Due Diligence Inspections.

h. Developer will promptly repair any damage to the Property caused by Developer or Developer's agents, contractors or representatives in the conduct of the Due Diligence Inspections and restore the Property to at least the condition that existed prior to the Due Diligence Inspections.

i. Notwithstanding anything set forth herein to the contrary, the obligations of Developer in this Section 3 will survive the termination of this Agreement, subject to the provisions of Section 7 below.

j. Developer shall provide the City with a copy of the results of any tests and inspections made by Developer during its Due Diligence Inspections (“**Due Diligence Reports**”), at no cost to the City, except as otherwise may be expressly set forth herein, without warranty or representation by Developer with respect to such items.

k. In no event shall Developer have access to any “Confidential Materials.” For purposes hereof, “Confidential Materials” means, with respect to the City, books, records or files (whether in a printed or electronic format) that consist of or contain any of the following: appraisals; strategic plans for the Property; internal analyses; information related to the development or financing of the Property from any other RFP that was not otherwise generally made available to the public; attorney and accountant work product; attorney-client privileged documents; and internal correspondence of the City.

l. At the end of the Due Diligence Period, Developer shall either (a) send a Termination Notice (as defined in Section 7(a) below) to the City terminating this Agreement in accordance with Section 1(b)(i) above, and thereafter the Parties hereto shall have no further rights or obligations hereunder, except for any terms which shall expressly survive termination of this Agreement and except as set forth in Section 7(f) below, or (b) increase the Security Deposit pursuant to Section 2(c) above within five (5) business days after the expiration of the Due Diligence Period, in which case this Agreement shall continue in full force and effect. Failure to either send the Termination Notice or to increase the Security Deposit, as provided in the immediately preceding sentence, will be an Event of Default under this Agreement.

4. Agreement Regarding SEE Approval Process.

a. Developer shall (1) consult and coordinate with the City regarding the design of the Project, and (2) provide prior written notice to the City for the City’s consent regarding all submissions to be made in connection with the SEE Approval.

b. Developer hereby acknowledges and agrees that it shall seek Land Use Approval (defined below) for the entire Project. Any and all approvals required to develop and construct the Project that are to be obtained from the City Council (including without limitation, the SEE Approval) or other local, state or federal government agencies or regulatory bodies are referred to in this Agreement as “**Land Use Approval.**”

c. Unless otherwise waived or modified in writing by the City, Developer shall provide the City a copy (in any format desired by the City (i.e. electronic, paper, or physical copies of documents due to size or volume)) of all submissions to be made in connection with the Land Use Approval for the City’s review and approval at least ten (10) business days prior to Developer’s anticipated filing with or submission of the same to the applicable governmental agencies. Any notices and requests required of Developer by this Section 4(c) shall not be subject to the Notice provisions of Section 8 below; instead, all Notices required in this Section 4(c) (including requests for approvals) shall be delivered to Wyatt Shields, as the “City

Manager” (or any successor to such position), and any other person(s) as may be designated by the City and in such format as may be requested. Approval of such submissions shall be in the City’s sole and absolute discretion; *provided, however*, that the City’s approval of any submissions will not be unreasonably withheld in circumstances where the City’s review is the result of a refinement of the scope and substance of prior approved submissions (but excluding when such comments are in response to issues or questions raised by the City Council, as part of the SEE Approval process). If the City (1) notifies Developer in writing of its disapproval, or (2) fails to notify Developer of its approval or disapproval of any such submissions within ten (10) business days after its receipt of Developer’s approval request; the following shall occur:

i. If the City notifies Developer of its disapproval (as set forth in clause (1) of the last sentence of Section 4(c) above), the City shall state the reasons for its disapproval with reasonable detail in order for Developer to have sufficient information to correct, amend or alter any such submissions and resubmit the same to the City in accordance with this Section; or

ii. If the City fails to notify Developer of its approval or disapproval (as set forth in clause (2) of the last sentence of Section 4(c) above), Developer shall send a second notice to the City giving notice to the City of its failure to respond and the City shall respond within five (5) business days (the “**Second Notice Period**”) of receipt of such notice or shall be deemed to have approved the submissions; *provided, however*, (A) that such deemed approval shall only be effective if the transmittal letter accompanying such second request has written the following notice in bold-face capital letters in 14-point font or larger: “**RESPONSE REQUIRED WITHIN FIVE (5) BUSINESS DAYS OF RECEIPT. THIS ENVELOPE CONTAINS A REQUEST FOR APPROVAL WHICH, IN ACCORDANCE WITH THE INTERIM AGREEMENT BETWEEN THE CITY AND DEVELOPER IS SUBJECT TO APPROVAL BY THE CITY, BUT SHALL BE DEEMED APPROVED IF THE CITY DOES NOT DISAPPROVE SAME OR REQUEST ADDITIONAL INFORMATION IN WRITING PRIOR TO THE EXPIRATION OF FIVE (5) BUSINESS DAYS AFTER RECEIPT, and (B) during any Second Notice Period (if any), each Milestone in the Approved Schedule shall be extended on a day-for-day basis for the amount of days after receipt of the second notice by the City until the City responds (or is deemed to have responded hereunder); and**

thereafter, unless otherwise deemed approved in accordance with the previous paragraph, the City and Developer shall make good faith efforts to agree upon any changes to such submissions that are necessary for the City’s consent hereunder. Notwithstanding any of the foregoing, the Parties agree that any approval by the City of submissions by Developer pursuant to this Section 4(c) shall be in the City’s capacity as land owner only, and shall not be construed to imply any action by City Council.

d. On or before February 4, 2019, Developer shall file an application for the SEE with the City Council

e. The City shall reasonably cooperate with Developer to obtain any consents or approvals from the City Council that may be required in connection with the Land Use Approval, and to otherwise reasonably cooperate with Developer in the pursuit of the Land Use Approval.

Notwithstanding the foregoing, Developer acknowledges and agrees that it is Developer's obligation that all submissions to the City Council or other governmental bodies comply with the Zoning Code and all other rules, regulations, ordinances and statutes that govern such submissions.

f. It is further acknowledged and understood that the City may decline to approve Developer's proposed Land Use Approval submission(s) if they do not, in the City's reasonable determination, conform with the Material Terms or are otherwise inconsistent with Developer's Proposal.

g. After the Due Diligence Period, throughout the remainder of the Term, Developer and its agents may access the Property upon reasonable advance notice to the City – including, for purposes of this Section 4(g), notice to any other person(s) who may be designated by the City – in order to conduct such activities as Developer reasonably determines are necessary or appropriate in connection with the Land Use Approval process. Developer shall conduct such activities on the Property in a manner so as to minimize any disturbance to the High School and in accordance with Section 3(c) and Sections 3(e) through (i) above.

h. Developer shall be solely responsible for any and all costs incurred by the Developer that are associated with the SEE and obtaining SEE Approval and any other the Land Use Approval.

i. Within fifteen (15) days prior to the end of the Due Diligence Period, Developer shall prepare a preliminary budget (the "**Preliminary Budget**") for the costs associated with the SEE Approvals. The City shall review and approve or disapprove the Preliminary Budget proposed by Developer, and propose any revisions to the Preliminary Budget, within ten (10) days after receipt thereof (and the City shall specify any objections thereto in writing and in reasonable detail), it being understood that the City's approval shall not be unreasonably withheld or delayed. Upon the City's approval, the Preliminary Budget shall become the "**Approved Budget**," and shall be attached to this Agreement as Exhibit C, and made a part hereof. The development schedule for the Term of this Agreement (that includes all of the agreed upon Milestones between the Parties) (the "**Approved Schedule**"), is attached hereto as Exhibit A, and made a part hereof. The City and Developer acknowledge and agree that the Approved Schedule and the Milestones contained therein, are based upon Developer's Proposal. In the event the Parties fail to agree on the Approved Budget on or before the end of the Due Diligence Period (the "**Approval Milestone**"), such failure will give each of the City and Developer the right to terminate this Agreement as an Unwind Event by sending written notice to non-terminating party and in accordance with Section 7(d) below.

j. Developer agrees that, pursuant to the terms and conditions of this Agreement, Developer shall (subject to any rights of reimbursement of certain costs if an Unwind Event of this Agreement occurs): (i) assign all of its rights and interests (if any) in and to any obtained SEE Approval or other Land Use Approval, and deliver (or cause to be delivered) originals or copies of any and all other documents related to the same to the City, and (ii) assign to the City all of its rights and interests (including all rights of ownership, if any) to, and provide and deliver (or cause to be provided or delivered) to the City any and all work product produced by Developer or its contractors and consultants associated with the Project, together with any

third-party consents necessary therefor (collectively, roman numerals (i) and (ii) in this sentence shall be referred to as the “**Work Product**”). Work Product shall include, without limitation, any and all Due Diligence Reports, surveys, site plans, architectural drawings, plans and specifications, studies, and other information related to the Due Diligence Inspections and any and all submissions related to SEE Approval or other Land Use Approval and the phasing and development of the Project. The foregoing obligations shall survive the termination of this Agreement.

5. Conditions Precedent to Comprehensive Agreement. The City and Developer agree to pursue negotiations, diligently and in good faith, of a Comprehensive Agreement for the design and development, leasing, ownership, maintenance and operation of the Project. The terms of the Comprehensive Agreement shall reflect, at a minimum, the Material Terms listed in Exhibit B. The City and Developer’s obligation to enter into the Comprehensive Agreement are further conditioned upon the City’s approval of the following:

a. a proposed financing plan for the Project (the “**Financing Plan**”), which will set forth the funding sources for the Project in specific detail, as proposed in the Proposal and revised in subsequent discussions between Developer and the City, including whether and to what extent each phase will be financed (i.e. by way of example and not limitation, equity contributions from Developer or its affiliates, traditional bank financing, bond financing, state or federal economic development grants or tax credits, or other funding sources approved by the City). It is the express intent of Developer and the City in this Section 5(a) that the Financing Plan proposed by Developer and approved by the City will provide for the complete development and construction of the Project and other development requirements related thereto in accordance with the final Project Budget (as defined below), with no additional contribution being made by or requested of the City. Developer acknowledges and agrees that the foregoing requirement is a material inducement for the City to enter into a Comprehensive Agreement with Developer for the development of the Project. The Parties acknowledge and agree that the Financing Plan may be revised from time to time based on then existing market conditions, provided that Developer will present any proposed changes to the Financing Plan to the City for its approval and the City will not unreasonably withhold its consent thereto;

b. a schedule for the development and construction of each phase of the Project (the “**Project Schedule**”);

c. a budget for the development and construction of each phase of the Project (the “**Project Budget**”); and

d. an SEE application to be submitted to City Council for a first reading on or before February 4, 2019.

The conditions in subsections (a) through (c) are intended for the benefit of the City and the condition in subsection (d) is intended for the benefit of each of the City and Developer. A condition precedent may be waived, in whole or in part, by the benefited Party, but only by an instrument in writing signed by such Party. In the event all of the conditions set forth in this Section 5 are not satisfied or waived on or before the Outside Date, Section 7 shall govern unless such condition is waived or extended in writing by the benefited Party.

6. Comprehensive Agreement. The City and Developer shall negotiate a full and final Comprehensive Agreement on or before the Outside Date. The Parties further agree that the approval of the Comprehensive Agreement by the City Council and execution of the Comprehensive Agreement, by the Parties will occur concurrently with obtaining the SEE Approvals hereunder. The Comprehensive Agreement will consist of, *inter alia*, a ninety-nine (99) year ground lease for the Project (the "Ground Lease"). The Ground Lease will provide for, *inter alia*:

- a. consideration;
- b. compliance with the Material Terms and any commitments set forth in the Proposal;
- c. normal and customary ground lease provisions for a ground lease similar to the Project, including without limitation, initial construction, maintenance, repair, restoration of the structures, improvements and buildings in the Project (including severing the lease into multiple leases depending on the phasing, ownership and use of the Project), payment of utilities, taxes, assessments and impositions related to the Project, casualty, condemnation and insurance requirements, assignment, default and remedy provisions;
- d. the Project Schedule;
- e. the Project Budget; and
- f. the Financing Plan.

In addition, the Comprehensive Agreement shall provide that parcels being used for residential condominiums shall be conveyed to the Developer in fee simple, subject to the satisfaction of certain terms and conditions. The timing, terms and conditions for that conveyance shall be as set forth in the Comprehensive Agreement.

7. Termination.

a. In the event that: (i) Developer decides to terminate this Agreement before the expiration of the Due Diligence Period; (ii) the Parties are unable to reach agreement upon the terms and conditions of the Approved Budget by the Approval Milestone (unless extended by mutual written agreement of the Parties); (iii) the Parties are unable to reach agreement upon the terms and conditions of the Comprehensive Agreement set forth in Sections 5 and 6 by the Outside Date; or (iv) Developer is unable to satisfy the requirements set forth in Section 5(d) by the Outside Date; this Agreement shall terminate upon delivery of a written notice (a "Termination Notice") by the Party terminating the Agreement to the other Party, and thereafter the Parties hereto shall have no further rights or obligations hereunder, except for any terms which shall expressly survive termination of this Agreement and except as may be provided in this Section 7 hereinbelow.

b. In the event of a failure of Developer to achieve a Milestone, by its corresponding Milestone Date (as set forth on the Approved Schedule in Exhibit A, hereto), subject to Section 4(c)(ii) above, and the City thereafter sends a Termination Notice to Developer prior to

achieving such Milestone, this Agreement shall terminate and thereafter neither Party shall have any obligation to the other hereunder, except for any terms which shall expressly survive termination of this Agreement and except as may be provided in Section 7(e) below; *provided however*, that if the Developer's failure to achieve a Milestone is the result of the City's (or the Virginia Department of Transportation's) failure to meet dates on the Approved Schedule to otherwise meet its obligations hereunder, then the Developer shall not automatically lose its Security Deposit. Instead, the City shall have the option to either agree with the Developer on a revision to the Approved Schedule and the Milestones under which the parties will proceed, or to treat the failure as an Unwind Event as provided for in Section 7(d) below.

c. In the event of any breach of this Agreement by either Party (other than a failure to increase the Security Deposit under Section 3(l) above or a breach under Section 7(a)(iv) or Section 7(b), for which there is no cure period), which breach is not cured by the defaulting Party within ten (10) days after defaulting Party's receipt of written notice of such breach from the non-defaulting Party (or in the event such breach is incapable of being cured within such ten (10) day period, such longer period as is reasonably necessary to cure such default, provided the defaulting Party has commenced such cure within such ten day period and diligently pursues such cure to completion), the non-defaulting Party shall have the right to terminate this Agreement by delivering a Termination Notice to the defaulting Party (and subject to Section 7(e) below, if applicable).

d. To the extent this Agreement is terminated under Section 7(a)(ii), Section 7(a)(iii) or Section 7(c) (by reason of a breach of the City if under Section 7(c)) (any of the foregoing being, an "Unwind Event"), the City shall reimburse Developer for the cost of any Work Product that the City desires to use (and that is delivered pursuant to Section 4(j) above). After an Unwind Event occurs, the City shall reimburse Developer within thirty (30) days after the receipt of a reimbursement request from Developer accompanied by receipts and other documentation reasonably requested by the City to confirm the legitimacy of such reimbursement request. The City shall have the right to request an audit (individually or collectively, an "Audit"), of any and all costs of Work Product for which the City has agreed to pay such costs hereunder. An Audit shall be conducted by an independent third-party auditor and may occur at any time, and may include multiple requests for information, and Developer shall be obligated to provide such reasonably requested information to the City and its auditor as soon as possible. Any out-of-pocket expenses incurred (including the costs of the auditor) with respect to such an Audit shall be paid out of the Security Deposit. Developer agrees to reasonably cooperate with the City or its agents (at no cost to the City) during any Audit. The Security Deposit or Letter of Credit (less any costs related to the Audit) shall be returned to Developer upon delivery of the Work Product to the City as set forth herein.

e. To the extent this Agreement is terminated by reason of a breach by Developer under Section 7(a)(iv), Section 7(b) or Section 7(c) (any of the foregoing being, an "Event of Default"), Developer shall deliver all Work Product to the City obtained prior to the date of termination of this Agreement and thereafter neither Party shall have any obligation to the other hereunder, except for any terms which shall expressly survive termination of this Agreement. The Parties agree that, if this Agreement is terminated as the result of an Event of Default, Developer shall deliver the Work Product to the City. The Parties agree that, upon a termination of this Agreement resulting from an Event of Default, Developer shall forfeit the Security

Deposit to the City. Developer and the City acknowledge and agree that actual damages would be difficult if not impossible to determine and that liquidated damages in the amount of the Security Deposit is a reasonable estimation of the damages that the City will sustain as a result of such Event of Default. The City thereafter waives and releases Developer from all other claims for damages and other remedies against Developer for non-performance under this Agreement (excluding any damages related to the Due Diligence Inspections for which Developer indemnifies the City pursuant to Section 3(g) above and costs related to delivery of the Due Diligence Reports to the City pursuant to Section 3(j) above). Notwithstanding anything to the contrary set forth herein, upon Developer's delivery of Work Product in accordance with the terms of this Section 7(e), the City shall return One Hundred Thousand and No/100 Dollars (\$100,000.00) of the Security Deposit (or such lesser portion thereof if any of the Security Deposit is used to cure a breach of Developer of this Agreement) to Developer within fifteen (15) business days after such delivery of Work Product and previously undelivered Due Diligence Reports to the City.

f. In the event that this Agreement is terminated by Developer prior to the end of the Due Diligence Period, the City shall return the Security Deposit within forty-five (45) days after the expiration of the Due Diligence Period (less any amount necessary to restore the Property (if necessary) or to pay for Due Diligence Reports in accordance with Section 3(h) and Section 3(i) above).

The provisions of all of this Section 7 shall survive the termination of this Agreement.

8. Notice. Any notices required or permitted to be given hereunder shall be deemed to have been properly given when received or refused if sent by United States certified or registered mail, return receipt requested; national overnight courier service; by electronic transmission; or delivered in hand; in each case as follows (unless changed by similar notice in writing given by the particular person whose address is to be changed):

If to the City:

City Manager for the City of Falls Church
300 Park Avenue
Falls Church, VA, 22046
Attn: F. Wyatt Shields
e-mail: city-manager@fallschurchva.gov

with a copy to:

Arent Fox LLP
1717 K Street, NW
Washington, D.C. 20006
Attn: Jeffrey A. Mitchell
e-mail: Jeffrey.Mitchell@arentfox.com

If to Developer:

c/o EYA Development LLC
4800 Hampden Lane
Suite 300
Bethesda, MD 20814
Attn: Frank Connors
e-mail: connors@eya.com

with a copy to:

Venable LLP
600 Massachusetts Avenue, NW
Washington, DC 20004
Attn: Robert Gottlieb
e-mail: Rggottlieb@venable.com

If to the School Board or Superintendent:

800 West Broad Street, Suite 203
Falls Church, VA 22046
Attn: Ms. Kristen Michael – Chief Operating Officer
e-mail: kmichael@fccps.org

Any notice required or permitted to be given hereunder shall be deemed to be given (i) when hand delivered, with receipt acknowledged; (ii) one day following the date delivered prepaid to Federal Express, or similar overnight express service; or (iii) when sent by electronic transmission, addressed as provided below, or to such other address as either party may from time to time designate by giving notice in writing to the other party. Electronic notices to be effective shall be sent between 9:00 a.m. and 5:00 p.m. Eastern time on a business day, and must provide for an electronic receipt of delivery.

9. Miscellaneous Provisions.

a. Appropriations. Any and all of City's financial obligations under this Agreement are subject to appropriations by the City Council to satisfy payment of such obligations.

b. Reserved.

c. Sovereign Immunity. Notwithstanding anything herein to the contrary, nothing in this Agreement shall constitute a waiver of the City's sovereign immunity. This subsection shall survive termination of this Agreement.

d. Attorney's Fees. In the event there arises any disputes under this Agreement and said disputes result in litigation between the Parties, the prevailing Party shall be entitled to recover from the non-prevailing Party all reasonable attorney's fees incurred by the prevailing Party in any such litigation, including the value of legal services, if any, provided by the Office of the City Attorney of the City of Falls Church.

e. **Binding Effect.** This Agreement shall be binding upon and inure to the benefit of the Parties hereto, their successors and permitted assigns. Neither Party hereto may assign its rights or delegate its obligations hereunder.

f. **Counterparts.** If this Agreement shall be executed in two or more counterpart originals, each counterpart original shall be for all purposes considered an original of this Agreement.

g. **Further Assurances.** At the request of either Party, Developer and the City shall promptly execute and deliver such other further instruments and documents as may from time to time be requisite in order to consummate the intent of the Parties provided herein.

h. **Headings.** The section headings are herein used for convenience of reference only and shall not be deemed to vary the content of this Agreement or the covenants, agreements, representations and warranties herein set forth or the scope of any section.

i. **Incorporation.** The Recitals and Exhibits are hereby incorporated into this Agreement as if fully set forth herein.

j. **Governing Law.** This Agreement shall be governed by and construed under the laws of the Commonwealth of Virginia.

k. **Holidays, Business Days, etc.** Whenever the last day for the performance of any act required by either Party under this Agreement shall fall upon a Saturday, Sunday, legal holiday, or day on which national banks doing business in the Northern Virginia/suburban Washington D.C. area are generally closed for business, the date for the performance of any such act shall be extended to the next succeeding business day which is not a Saturday, Sunday, legal holiday, or day on which such bank is closed.

l. **No Third Party Beneficiaries.** No person or entity shall be a third party beneficiary of this Agreement.

m. **Partial Invalidity.** If any provision of this Agreement shall be determined to be void by any court of competent jurisdiction, then such determination shall not affect any other provision hereof, all of which other provisions shall remain in full force and effect; and it is the intention of the Parties that if any provision of this Agreement capable of two constructions, one of which would render the provision void and the other of which would render the provision valid, then the provision shall have the meaning which renders it valid.

n. **Waiver, Modification.** Failure by either Party to insist upon or enforce any of its rights hereto shall not constitute a waiver thereof. This Agreement shall not be modified, amended, or altered except by a written agreement signed by each of the Parties hereto.

o. **Survival.** Except as otherwise specifically provided herein, the provisions of this Agreement shall not survive termination hereunder.

p. Time. With respect to all time periods contained in this Agreement, it is expressly understood that time shall be of the essence.

q. Waiver of Jury Trial. Each Party hereby knowingly waives trial by jury in any action, proceeding, claim or counterclaim brought by either Party in connection with any matter arising out of or in any way connected with this Agreement, the relationship of the Parties hereunder, the Parties' ownership or use of the land subject to this Agreement, and/or any claims of injury or damage.

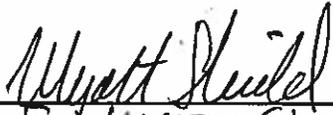
[Signature Page Follows]

IN WITNESS WHEREOF, Developer and the City have executed this Agreement as of the date set forth above.

CITY:

CITY OF FALLS CHURCH, VIRGINIA, an independent city and political subdivision of the Commonwealth of Virginia, in its proprietary capacity and not in its governmental capacity

By:


Name: F. WYATT SHIELDS

Date: 12-6-18

DEVELOPER:

FCGP DEVELOPMENT LLC, a Delaware limited liability company

By:


Name: EVAN Goldman

Date: 12-5-18

E.V.P.

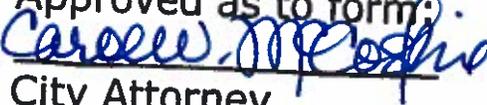
Approved as to form:

City Attorney

EXHIBIT A
APPROVED SCHEDULE

12/6/18
12/5/18
END
PUB

| Interim Agreement Schedule and Public Hearings | | End Date | Days | |
|---|--|-----------------|-------------|----------------|
| Interim Agreement | | 11/19/2018 | | Negotiation |
| Post Deposit of \$500,000 | | 11/26/2018 | 7 | Transaction |
| Due Diligence | | 1/10/2019 | 52 | Entitlement |
| Post deposit, \$1,000,000 | | 1/17/2019 | 7 | Work sessions |
| Pre-Submission (10 days) | | 1/23/2019 | 6 | Hearing/Action |
| Submission 1 | | 2/4/2019 | 12 | |
| City Council 1st reading | | | | |
| Council 1st reading/ B+C referral (TUESDAY) | | 2/25/2019 | 21 | |
| Planning Commission | | | | |
| Final action/recommendation | | 4/1/2019 | 34 | |
| City Council 2nd reading | | | | |
| Applicant submit final revised plans | | 4/29/2019 | 28 | |
| CC final action / 2nd reading (on or before) | | 5/28/2019 | 29 | |
| Comprehensive Agreement Execution | | 5/30/2019 | 2 | |
| Post Payment #1 of Exhibit B | | 5/30/19 | | |
| Developer Milestones | | | | |
| Post Deposit of \$500,000 | | 11/26/2018 | | Negotiation |
| Post deposit, \$1,000,000 | | 1/17/2019 | 52 | Transaction |
| Pre-Submission (10 days) | | 1/23/2019 | 6 | Entitlement |
| Submission 1 | | 2/4/2019 | 12 | |
| Applicant submit final revised plans | | 4/29/2019 | 84 | |
| Comprehensive Agreement Execution | | 5/30/2019 | 31 | |
| Post Payment #1 of Exhibit B | | 5/30/19 | | |

EXHIBIT B

MATERIAL TERMS

The following elements constitute the “Material Terms” (as defined in the Interim Agreement) that are to be included in the Comprehensive Agreement (“CA”), unless otherwise mutually agreed. They are not the only terms from the Proposal that will be included but these Material Terms, have been relied upon specifically by the City in selecting the Developer.¹

GROUND LEASE: The Property, with the exception of the residential condominium parcels, is to be conveyed to the Developer under a 99 year Ground Lease to be executed as part of the CA. The residential condominium parcels are to be conveyed by fee simple sale.

BASE LAND PAYMENTS

Phase 1:

| | | |
|-------------|--------|--|
| Payment #1: | \$6.5M | <i>May, 2019 but no earlier than seven (7) days after receipt of SEE Approvals</i> |
| Payment #2: | \$7.0M | <i>2021 Upon delivery of the Property</i> |
| Payment #3: | \$7.0M | <i>2022-12 months after Payment #2</i> |
| Payment #4: | \$7.0M | <i>2023-12 months after Payment #3</i> |
| Payment #5: | \$7.0M | <i>2024-12 months after Payment #4</i> |

Phase 2: Payment #6: \$10M or appraised value as described below.

BASE LAND PAYMENTS: \$44.5M

ADDITIONAL POTENTIAL LAND PAYMENTS:

Parking Garage Credit: If the City Council and School Board agree to a proposed parking garage generally as shown in the Proposal, an additional amount of \$5.3 Million will be paid in 2023 simultaneously with Payment #4 above.

CDA: If the City agrees to create a Community Development Authority to fund infrastructure as part of the Project, an additional payment of between \$2M to \$3M shall be made to the City simultaneously with Payment #2 above. It is not expected that the City will provide its general or moral obligation to bonds issued by the CDA.

TOTAL ADDITIONAL POTENTIAL LAND PAYMENTS: up to \$8.3M

¹ Payment Terms to be reviewed between the parties and verified during due diligence based upon return expectation as provided in Developer’s financial model submitted to the City.

TOTAL POTENTIAL LAND PAYMENTS: up to \$52.8M (plus possible additional appraised value for Phase 2.)

Capital Event Administrative Fee: For the term of the Ground Lease, an administrative fee will be charged upon disposition of: (i) Developer's or future lessee's direct or indirect economic interest in all or any portion of the Project; or (ii) an individual residential condominium owner's interest in its condominium unit(s) in the Project. Developer, future lessee or condominium purchaser shall pay the City an amount equal to .5% or .25% respectively of the amount of the value on which transfer or recordation taxes are calculated. The revenue from this fee is estimated by the Developer to yield \$2.4 Million per capital event for the leasehold at full build out, with additional revenue from residential condominiums. Further terms for the Capital Event Administrative Fee will be finalized in the Comprehensive Agreement. It is mutually agreed upon between the City and the Developer, that the Developer shall be exempt from paying the Capital Event Administrative Fee under the following circumstances:

- When Developer converts a construction loan to a permanent loan in connection with any refinancing of portions of the Project.
- The initial sale of residential condominium units.
- Transfers that do not generate any transfer or recordation taxes under the Code of Virginia §58.1-811(A), *sub-clauses* (8),(10) or (11).
- If the Capital Event generates proceeds that are less than the outstanding recorded debt secured by the Project.

PROGRAM COMMITMENTS:

The program elements described herein represent basic commitments by the Developer. They may be modified upon agreement of the City as part of the SEE approval and in the Comprehensive Agreement.

PHASE I:

The first phase of the development will include approximately 915,000 Gross Square Feet ("GSF") of enclosed, occupiable space with corresponding parking, to include the elements below:

Commercial:

- A minimum of 125,000 GSF of office use.
- A limited or full-service hotel with a minimum of 80,000 GSF, of which at least 3,000 GSF is meeting/conference space. In addition, the adjacent civic space shall be used to expand the conference capacity for the hotel. During negotiations for the CA, the Developer will provide a list of hotel operators to be agreed upon for inclusion as part of, or as an exhibit to, the CA.

- A minimum of 20,000 GSF of programmable civic space that will be managed by the Developer . This space will include an approximately 8,000 to 12,000 GSF event space including a 4,000 GSF outdoor rooftop terrace. The event space is to be occupied by a music or entertainment venue, acceptable to the City. Additionally, approximately 6,000 GSF shall be occupied by a performing arts or education studio or school acceptable to the City. The Developer acknowledges that such civic uses will require subsidized rent and agrees that providing such subsidy is part of its commitment.
- A grocery use will be included, and is expected to occupy between 25,000 and 45,000 square feet. If the grocer is smaller than 40,000 square feet, a total of at least 40,000 square feet of retail space included in Phase 1 of the development will be occupied by grocer and a retail sales (not service) use with an equivalent or better fiscal impact as compared to grocery use as defined further in the Comprehensive Agreement.
- A minimum of 120,000 GSF of retail including the grocery use, general retail, and civic uses. Included in the Comprehensive Agreement will be a Merchandizing Plan approved by the City (in its reasonable discretion) that will set minimum and maximum ratios on kinds of retail, such as for the grocer, restaurants, retail, and retail services.

Residential:

- Approximately 275,000 GSF of multifamily apartments.
- Approximately 175,000 GSF of senior housing (age 55 plus). Such senior housing may include some assisted living or memory care, but will be predominantly (more than 60%) independent living and/or active adult. The senior housing will include a covenant barring residents under the age of 18.
- Approximately 150,000 to 175,000 GSF of for-sale, residential condominiums, which shall be located on the periphery of the Property, the land for which will be conveyed through fee simple purchase, subject to the satisfaction of certain terms and conditions. The timing, terms and conditions for that conveyance shall be as set forth in the Comprehensive Agreement.
- 6% of the total number of housing units (including senior, multi-family, and condominium) shall be maintained as affordable at 60% of AMI for the term of the ground lease. The distribution of the units among the housing types will be set forth at CA. At the City's option, affordable units may be replaced by a cash contribution pursuant to a formula to be agreed upon at CA, but which shall be cost neutral and based on the cost of each affordable unit, compared to that for a comparable market rate unit.

PHASE II:

Phase 2 as described in the Proposal comprises two development parcels, one planned for a 154,000 square foot residential condominium building (including 6,400 square feet of retail) and one planned for a 265,000 square foot office building.

- The Developer will master plan and entitle all of Phase 2 as part of the development and entitlement of the entire Project.
- The Developer will enter into a ground lease for, (or purchase for the condominium parcel), all of Phase 2 at the earlier of: a) three years after stabilization and/or sellout of Phase 1 or b) May 30, 2029. The total price for Phase 2 will be the higher of: a) \$10,000,000 or b) the appraised value, subject to the Profit Participation provisions below.
- Prior to the expiration of the three-year period above if working together in good faith, the Developer and the City conclude that the office component is not viable or financeable, the Developer may proceed to construct the residential condominium upon payment to the City of the higher of a) \$10,000,000 or b) the appraised value of that parcel, subject to the Profit Participation provisions below. If the Developer elects to construct only the residential condominium, the City shall have the right to recapture the office parcel and market it for an office use to other developers.
- If the City recaptures the Phase 2 office parcel and then decides to convert the parcel to an alternate use, the Developer shall have the right to negotiate with the City in good faith to purchase or ground lease and develop the parcel at its appraised value.

Phase 2 Profit Participation:

- Upon the Developer's notice to the City of its intent to proceed with Phase 2, an independent appraisal shall be conducted to determine the current fair market value of the Phase 2 land. Should the appraised value exceed \$10,000,000 the Developer will make a payment to the City equal to the incremental increase in land value, less any infrastructure costs spent by the Developer in Phase 1 that are attributable to Phase 2. The method for determining the infrastructure credit will be set forth in the CA, and will not include infrastructure funded by the City, the CDA, or another public agency. The Phase 2 development shall be subject to the CDA special tax and the revenues generated from the taxing district shall be used to pay the CDA debt obligation.

SUSTAINABILITY COMMITMENTS:

- LEED Neighborhood Development: Gold
- Office: LEED Gold Core and Shell, or equivalent green building standard.

- Residential and Senior Housing: Gold or equivalent green building standard, secured by bond or letter of credit, not to exceed \$50,000 per building, which can be used by City if the Developer is only able to achieve to LEED Silver.
- The hotel will be constructed to LEED silver, or equivalent green building standard.

EXHIBIT C

APPROVED BUDGET

**[To Be Attached upon Achievement
Of Approval Milestone]**