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**OAKLAND UNIFIED  
SCHOOL DISTRICT**

Community Schools. Thriving Students

August 12, 2015

To: Board of Education

From: Antwan Wilson, Superintendent and Secretary, Board of Education  
By: Hitesh Haria, Chief Operations Officer  
Lance Jackson, Interim Deputy Chief, Facilities Planning and Management

Subject: **Approval of an Amendment to Facilities Lease under the June 10, 2015 Lease Leaseback Agreement with Cahill/Focon, Joint Venture for the Expansion (Greenleaf) New Classroom Building Project located at 6328 East 17th Street Oakland, CA**

### **ACTION REQUESTED**

Approval of an Amendment to Facilities Lease under the June 10, 2015 Lease Leaseback Agreement with Cahill/Focon, Joint Venture for the Expansion (Greenleaf) New Classroom Building Project

Approval by the Board of Education of an amendment to the Facilities Lease under the June 10, 2015 Lease Leaseback Agreement ("Agreement") with Cahill/Focon, Joint Venture (also referred to as the "Developer") for the Whittier Expansion Project at Greenleaf Elementary School, located at 6328 East 17<sup>th</sup> Street Oakland, CA 94621. This amendment: 1) increases the Guaranteed Project Cost to pay for additional Tenant Improvements under Phase Two and Phase Three of the Project; 2) revises the Lease Payment Schedule in Exhibit C of the Facilities Lease to change the lease term to one year; 3) converts 15% of Tenant Improvement payments made by the District for the Project into Lease Payments to be paid upon occupancy and after completion of each Phase and; 4) at the end of the first six months term under the Lease, provides for an option for the District to prepay the remaining term without penalty. All other provisions of the June 10, 2015 Agreement remain unchanged.

### **BACKGROUND/DISCUSSION**

On June 10, 2015 the Board of Education approved a contract with Cahill/Focon, Joint Venture for the construction of the Expansion (Greenleaf) New Classroom Building Project using the Lease Leaseback construction delivery method permitted under California Education Code section 17406. The Guaranteed Project Cost of \$6,223,778 approved by the Board was for the construction of Tenant Improvements under Phase One of the Project and included the following scope of work: Removal of non-accessible Temporary Portables; construction of an accessible entry plaza; Demolition of the Multipurpose Building; Installation of Temporary Portables, and; the installation of 2 Kindergarten Wing Project Frog Modular Buildings. The work under Phase One is now complete and the District expects to take occupancy on or before August 21, 2015, in time for the start of the 2015-16 school year.

In the meantime, Tenant Improvements for Phase Two of the Project are ready to commence and include the following scopes of work: Construction of a new multipurpose building -including a new kitchen and flex classroom space; Construction of a new 2 Story Classroom building including new administration space, a library and Family Resource Area. Following the August 2016 completion of the Phase Two Tenant Improvements, Phase Three of the Project's Tenant Improvements will commence and includes:

**AMENDMENT TO LEASE LEASEBACK AGREEMENT FOR  
WHITTIER EXPANSION PROJECT AT GREENLEAF ELEMENTARY SCHOOL,  
LOCATED AT 6328 EAST 17<sup>TH</sup> STREET OAKLAND, CA 94621**

THIS AMENDMENT to the Facilities Lease under the June 10, 2015 approved Lease Leaseback Agreement ("Amendment") is made this 13<sup>th</sup> day of August, 2015 ("Effective Date"), by and between **Oakland Unified School District**, a California public school district ("District"), and **Cahill / Focon Joint Venture**, a California company duly organized and licensed, License # 970231, and existing under the laws of the State of California ("Developer"). District and Developer may be individually referred to herein as "Party" or collectively referred to herein as "Parties."

**RECITALS**

**WHEREAS**, District and Developer entered into a Lease Leaseback Agreement, consisting of those certain Site Lease Agreement, Facilities Lease Agreement, and related construction documents (collectively "Lease Leaseback Agreement"), dated June 10, 2015, for the lease-leaseback delivery of the Whittier Expansion Project at Greenleaf Elementary School, and located at 6328 East 17<sup>th</sup> Street, Oakland, CA 94621 ("Project").

**WHEREAS**, District desires to add, as tenant improvements to the Project, Phase 2 consisting without limitation of new construction of a multi-purpose building, including a new kitchen and flex classroom, and a two-story classroom building, including new administration space, library, and Family Resource Area (collectively "Phase 2"), and Phase 3 consisting without limitation of the removal of temporary portables, site work, new artificial turf, renovation of an existing three-level building, including conversion of administration space into classrooms and the basement level into counseling space (collectively "Phase 3").

**WHEREAS**, the Parties accordingly desire to:

- (1) Increase the Guarantee Project Cost to pay for additional tenant improvements under Phase 2 and Phase 3 of the Project;
- (2) Revise the Lease Payment Schedule in Exhibit C to the Facilities Lease and increase the term therein from six (6) months to twelve (12) months;
- (3) Provide for an option to prepay the Facilities Lease after one hundred eighty (180) days after the Commencement Date of the Facilities Lease, which is the date the District takes beneficial occupancy, without penalty; and
- (4) Designate fifteen percent (15%) of each Phase of the Tenant Improvement Payments made by the District as Lease Payments under the Facilities Lease, at terms mutually agreed upon by the Parties.

**WHEREAS**, the Parties now mutually amend the terms of the Facilities Lease to the Lease Leaseback Agreement to effectuate the intentions of the Parties set forth herein this Amendment.

**NOW THEREFORE**, for valuable consideration, receipt of which is hereby acknowledged, District and Developer agree as follows:

1. **ADDITION OF PHASE 2 AND PHASE 3 TENANT IMPROVEMENT WORK TO THE PROJECT.** The Parties hereby acknowledge and agree that the additional tenant improvements under Phase 2 and Phase 3 of the Project are hereby added to the Facilities Lease.

Accordingly, **Exhibit A** - Description of the School Site, **Exhibit F** -Construction Schedule, and **Exhibit G**- Schedule of Values, all to the Facilities Lease, are hereby deleted and replaced in their entirety with the Exhibits A, F, and G attached hereto and incorporated herein by this reference as **Attachment "1"**.

Section 11.2.2, Contract Time / Construction Schedule, of the Facilities Lease is hereby deleted and replaced in its entirety with the following:

- 11.2.2. **Contract Time / Construction Schedule.** It hereby understood and agreed that District and Developer shall also approve additional changes in the Construction Schedule to reflect the durations of Phase 2 and Phase 3.

**Phase 1:** District shall have beneficial occupancy of Phase 1 on or before August 21, 2015;

**Phase 2:** District shall have beneficial occupancy of Phase 2 August 21, 2016;

**Phase 3:** It is expected that District shall have beneficial occupancy of Phase 3 and Project Completion shall be on or before August 21, 2017.

The time period between the Phase 1 Notice to Proceed and final Project Completion shall be the total Contract time ("Contract Time"). The Tenant Improvements shall be performed pursuant to the construction schedule, attached hereto as **Exhibit F** ("Construction Schedule"). The Construction Schedule must be approved by the District prior to execution of this Facilities Lease.

2. **EXTENSION OF TERM OF FACILITIES LEASE.** The Parties hereby acknowledge and agree that the Term of the Facilities Lease, under each Phase, is hereby extended from six (6) months to twelve (12) months.

Accordingly, Section 4.1 of the Facilities Lease is hereby deleted and replaced in its entirety with the following:

**4.1. Facilities Lease is Legally Binding.** This Facilities Lease is legally binding on the Parties upon execution by the Parties and the District Board's approval of this Facilities Lease. The **Term** of this Facilities Lease for the purposes of District's obligation to make Lease Payments ("Commencement Date") shall commence on the date the District takes beneficial occupancy of each Phase of the Project and shall terminate **twelve (12) months** after the Commencement Date (the "Term");

3. **PAYMENT OF GUARANTEED PROJECT COST; FINANCED PORTION OF LEASE.** The Parties hereby acknowledge and agree that the Guaranteed Project Cost shall be increased to pay for the additional tenant improvements under Phase 2 and Phase 3 of the Project, and the provisions of the Tenant Improvement Payments and Lease Payments shall be accordingly revised.

Additionally, pursuant to Section 3.2.6, Financed Portion of Lease, of Exhibit C of the Facilities Lease, the Parties hereby acknowledge and agree to designate fifteen percent (15%) of the Tenant Improvement Payments under each Phase of the Project into Lease Payments and revise the Lease Payment schedule accordingly. District and Developer negotiated in good faith regarding the amount of that financing, and the terms of that financing, which are hereby memorialized in this Amendment and approved by the Parties.

Accordingly, Section 2.1 of Exhibit C of the Facilities Lease is hereby deleted and replaced in its entirety with the following:

- 2.1. Pursuant to the Facilities Lease, Developer will cause the Project to be constructed for the following amounts ("Guaranteed Project Cost"): **\$34,655,528.**

Sections 2.2 and 2.3 of Exhibit C of the Facilities Lease are hereby deleted and replaced in their entirety with the following:

- 2.2. **The Guaranteed Project Cost is: Thirty Four Million Six Hundred Fifty Five Thousand Five Hundred Twenty Eight Dollars (\$34,655,528),** which consists of the amounts identified in **Attachment 2** to this Exhibit C. Developer will not seek additional compensation from District in excess of the Guaranteed Project Cost except for those amounts and modifications approved by District via Change Order, as set forth in Exhibit D to this Facilities Lease. District shall pay the **actual project cost** of the work not to exceed the Guaranteed Project Cost to Developer in the form of Tenant Improvement Payments and Lease Payments as indicated herein.

- 2.3. Intentionally blank.

Section 3, Payment of Guaranteed Project Cost, of Exhibit C of the Facilities Lease is hereby deleted and replaced in its entirety with the following:

3. **Payment of Guaranteed Project Cost.** District shall pay the Guaranteed Project Cost to Developer in the form of Tenant Improvement Payments and Lease Payments as indicated herein.

- 3.1. **Tenant Improvement Payments.** The total amount of Tenant Improvement payments the District shall pay to the Developer under the Facilities Lease shall be **Twenty Nine Million Four Hundred Fifty Seven Thousand one Hundred Ninety Eight Dollars and Eighty Cents (\$29,457,198.80)** ("Tenant Improvement Payment(s)"), and is based on the amount of Work satisfactorily performed and approved by the District less the total amount to be paid as Lease Payments, according to the Developer's Schedule of Values (**Exhibit G** to the Facilities Lease) and pursuant to the provisions for Tenant Improvement payments, including Final Payment, set forth in **Exhibit D** to the Facilities Lease. Upon occupancy and completion of each Phase, Eighty-Five percent (85%) of the cost of the work for that Phase shall be paid to the Developer as Tenant Improvement Payments. The remaining Fifteen percent (15%) of the work for that Phase shall be paid to the Developer as Lease Payments, as set forth in Section 3.2.5 below. In no event shall the aggregate total of Tenant Improvement Payments for Phase One, Phase Two and Phase Three exceed **\$29,457,198.80.**

3.2. **Lease Payments.** According to the occupancy and completion date of each Phase, the Parties shall execute the Memorandum of Commencement, , attached to the Facilities Lease as **Exhibit E**. The total aggregate principal amount of Lease Payments the District shall pay to the Developer for all Phases under the Facilities Lease shall be **Five Million One Hundred Ninety Eight Thousand Three Hundred Twenty Nine Dollars and Twenty Cents (\$5,198,329.20)** ("Lease Payment(s)"), as indicated below. Each individual Phase shall have its own Lease Commencement and Payment Schedule, based upon the date the District takes occupancy and the Parties execute the Memorandum of Commencement. However, in no event shall the aggregate principal total of Lease Payments for Phase One, Phase Two and Phase Three exceed **\$5,198,329.20**.

3.2.1. The Lease Payments shall be consideration for the District's rental, use, and occupancy of the Project and the Project Site and shall be made in equal monthly installments for the duration of the Term.

3.2.2. The District represents that the total annual Lease Payment obligation does not surpass the District's annual budget and will not require the District to increase or impose additional taxes or obligations on the public that did not exist prior to the execution of the Facilities Lease.

3.2.3. **Fair Rental Value.** District and Developer have agreed and determined that the total Lease Payments constitute adequate consideration for the Facilities Lease and are reasonably equivalent to the fair rental value of the Project. In making such determination, consideration has been given to the obligations of the Parties under the Facilities Lease and Site Lease, the uses and purposes which may be served by the Project and the benefits therefrom which will accrue to the District and the general public.

3.2.4. **Each Payment Constitutes a Current Expense of the District.**

3.2.4.1. The District and Developer understand and intend that the obligation of the District to pay Lease Payments and other payments hereunder constitutes a current expense of the District and shall not in any way be construed to be a debt of the District in contravention of any applicable constitutional or statutory limitation or requirement concerning the creation of indebtedness by the District, nor shall anything contained herein constitute a pledge of the general tax revenues, funds or moneys of the District.

3.2.4.2. Lease Payments due hereunder shall be payable only from current funds which are budgeted and appropriated or otherwise made legally available for this purpose. This Facilities Lease shall not create an immediate indebtedness for any aggregate payments that may become due hereunder.

3.2.4.3. The District covenants to take all necessary actions to include the estimated Lease Payments in each of its final approved annual budgets.

3.2.4.4. The District further covenants to make all necessary appropriations (including any supplemental appropriations) from any source of legally available funds of the District for the actual amount of Lease Payments that come due and payable during the period covered by each such budget. Developer acknowledges that the District has not pledged the full faith and credit of the District, State of California or any state agency or state department to the payment of Lease Payments or any other payments due hereunder. The covenants on the part of District contained in this Facilities Lease constitute duties imposed by law and it shall be the duty of each and every public official of the District to take such action and do such things as are required by law in the performance of the official duty of such officials to enable the District to carry out and perform the covenants and agreements in this Facilities Lease agreed to be carried out and performed by the District.

3.2.4.5. The Developer cannot, under any circumstances, accelerate the District's payments under the Facilities Lease.

3.2.5. The Lease Payment Amount shall be paid on the 1<sup>st</sup> day of each calendar month as described herein and the annual interest rate shall be 2.5%

3.3. In no event shall the cumulative total of the Tenant Improvement Payments and the Lease Payments, **interest on Lease Payments excepted**, ever exceed the Guaranteed Project Price as defined herein, unless modified pursuant to Exhibit D to the Facilities Lease, .

4. **DISTRICT'S PURCHASE OPTION.** The Parties hereby acknowledge and agree that District's Purchase Option, pursuant to Section 4 of Exhibit C of the Facilities Lease, shall be without penalty and available to District at the end of the 6<sup>th</sup> month after the Commencement Date of the Facilities Lease. Accordingly, Section 4.1 of Exhibit C of the Facilities Lease is hereby deleted and replaced in its entirety with the following:

4.1. If the District is not then in uncured Default hereunder, the District shall have the option, without penalty and exercisable one hundred eighty (180) days after the Commencement Date of this Facilities Lease, to purchase not less than all of the Project in its "as-is, where-is" condition and terminate this Facilities Lease and Site Lease by paying the total remaining unpaid Lease Payments as of the date the option is exercised ("Option Price").

5. **NO WITHHOLD FROM TENENAT IMPROVEMENT PAYMENTS.** Section 19.3.5.2 of Exhibit "D" to the Facilities Lease is hereby deleted in its entirety, and replaced with the following:

**19.3.5.2** In consideration for Developer agreeing to finance 15% of the cost of the Tenant Improvement work until termination of the Lease, there shall no withhold on the value of the Work performed during construction of the Tenant Improvements. In no event shall Developer withhold any amount in retention from its subcontractors on the value of the Work performed during construction of the Tenant Improvements.

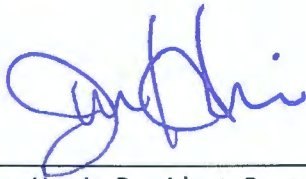


## 6. GENERAL PROVISIONS.

- 6.1. This Amendment may be executed in any number of counterparts all of which when taken together shall constitute one and the same document. **Except as expressly modified by this Amendment, all other terms and provisions of the Lease Leaseback Agreement are and remain in full force and effect.** This Amendment shall be governed by and construed in accordance with the laws of the State of California.
- 6.2. In the event any proceeding or action at law or in equity is brought on account of any breach of this Amendment, or to enforce or interpret any of the covenants, terms or provisions hereof, the prevailing party in that action shall be entitled to recover from the other Party its actual attorney fees.
- 6.3. This Amendment contains the entire agreement between the Parties hereto with respect to the Parties' agreement to amend the Lease Leaseback Agreement as provided for herein, and supersedes all prior agreements, written or oral, between the Parties with respect to this particular matter.
- 6.4. This Amendment shall be deemed to be drafted jointly by the Parties and shall not be construed against the Party that drafted this Amendment
- 6.5. If the validity of the Agreement to perform work and receive payments under this Agreement is challenged in court, either Party shall have the right to suspend the work until such time that the challenge is fully resolved or terminate the Project for convenience. In the event of a suspension, the District will compensate Cahill /Focon, JV for any demobilization and any remobilization costs. In the event of termination for convenience, the District will compensate Cahill /Focon, JV for any demobilization costs. In the event of suspension or termination, the District will pay Cahil/Focon, JV in full, the fair value of any work performed through the date of the termination or suspension. In the event of suspension, the project schedule will be extended the amount of time of the suspension, any time needed to remobilize, and any additional time required to perform the remainder of the work because of the time of year the suspended work recommences (e.g., adverse weather issues). Other than the costs associated with remobilization, the extended schedule duration shall be non-compensable. If, as result of the challenge of the validity of the Agreement and there is a determination that the Agreement is void, voidable, or unenforceable, the District will indemnify and hold Cahill/ Focon, JV harmless only against any claims or orders by the court relating to disgorgement of the funds paid under the Agreement. If any portion of this Amendment, or the Agreement in whole, is found to be invalid, this clause shall survive and shall be enforceable against the District.
- 5.6 Each Party executing this Amendment represents and warrants that he or she has the express authority to sign for and bind that Party.

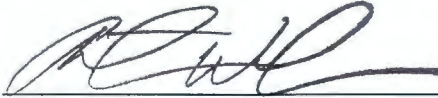
**ACCEPTED AND AGREED** on the date indicated below:

**OAKLAND UNIFIED SCHOOL DISTRICT**



James Harris, President, Board of Education

8/14/15  
Date



Antwan Wilson, Superintendent

8/14/15  
Date

CAHILL / FOCON, JV

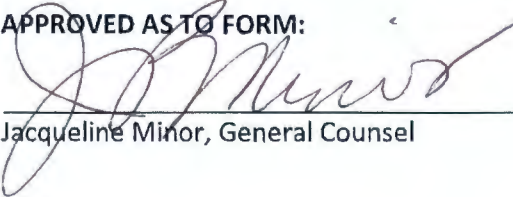


By: BLAIR ALLISON

Its: VICE PRESIDENT

8.12.15  
Date

APPROVED AS TO FORM:



Jacqueline Minor, General Counsel

8-11-15  
Date

File ID Number: 15-1587  
Introduction Date: 8/12/15  
Enactment Number: 15-1296  
Enactment Date: 8/12/15  
By: or



## **Attachment “1”**

### **Facilities Lease:**

- Exhibit A, Description of the School Site;
- Exhibit F, Construction Schedule; and
- Exhibit G, Schedule of Values.