

**SAN JOSÉ UNIFIED SCHOOL DISTRICT
INDEPENDENT CONSULTANT AGREEMENT FOR PROFESSIONAL SERVICES**

PREDEVELOPMENT SERVICES For EMPLOYEE HOUSING PROJECT

THIS AGREEMENT is made and entered into on **November 7, 2019** (“**Agreement**”), by and between **Education Housing Partners, Inc.** (“**Consultant**”) and **San José Unified School District** (“**District**”). Consultant and District may be referred to herein individually as a “**Party**” or collectively as the “**Parties.**”

1. **Services.** The District is authorized by Gov. Code § 53060 to contract with and employ any persons for the furnishing of special services and advice in financial, economic, accounting, engineering, legal or administrative matters, if those persons are specially trained and experienced and competent to perform the special services required. The Consultant shall furnish to the District the services as indicated in **Exhibit A** (“**Services**” or “**Work**”). The Consultant warrants that it is specially trained and experienced, and competent to perform the Services required by the District.
2. **Price & Payment.** The Consultant shall furnish the Services to the District for a total price **not to exceed Four Hundred Forty Thousand Dollars (\$440,000)** (“**Agreement Price**”) as further indicated in **Exhibit A**. Payment for the Services shall be made in accordance with the Terms and Conditions attached hereto.
3. **Term.** The Services shall be completed by **Fall of 2020** in accordance with the milestone schedule as further described in **Exhibit B** (“**Term**”).
4. **Insurance:** Consultant shall have and maintain, and shall require its subconsultants to have and maintain, insurance in force during the term of this Agreement with minimum limits identified below. Consultant shall provide to the District certificate(s) of insurance and endorsements satisfactory to the District. The policy(ies) shall not be amended or modified and the coverage amounts shall not be reduced without thirty (30) days written notice to the District prior to modification. Except for worker’s compensation insurance, the District shall be named as an additional insured on all policies. Consultant’s policy(ies) shall be primary; subconsultants’ insurance shall be secondary; any insurance carried by the District shall only be accessed after the primary and secondary insurance is accessed and will only be supplemental as respects to claims arising out of or related to Consultant’s (or subconsultants’) performance of the Services hereunder. Consultant shall not allow any subcontractor, employee, or agent to commence Work on this Agreement or any subcontract until the insurance required of Consultant, subcontractor, or agent has been obtained. If Consultant’s subconsultant(s) carry scope(s) of insurance for specific scope(s) of the Services (e.g., design services) and Consultant’s insurance coverage does not include those scope(s), the Consultant agrees that if the District makes a good faith claim against Consultant for damages resulting from those scope(s) of Services, that Consultant shall bring a Claim against the subconsultant to seek payment from the subconsultant’s insurance for those scope(s) and, if recovered, shall provide all of those funds to the District.

Commercial General Liability	\$1,000,000 per occurrence; \$2,000,000 aggregate
Automobile Liability, Any Auto, combined single limit	\$1,000,000 per occurrence; \$2,000,000 aggregate
Workers Compensation	Statutory limits pursuant to State law
Employers’ Liability	\$1,000,000
Professional Liability (E&O) (claims-made)	\$1,000,000

5. **Notice.** Any notice required or permitted to be given under this Agreement shall be deemed to have been given, served, and received if given in writing and either personally delivered or sent by overnight delivery service, addressed as follows:

District:

San Jose Unified School District
855 Lenzen Avenue
San Jose, CA 95126
ATTN: **Facilities Director**

Consultant:

Education Housing Partners, Inc.
39 Forrest Street, Suite 201
Mill Valley, California 94941
ATTN: **Bruce Dorfman**

Any notice personally given shall be effective upon receipt. Any notice sent by overnight delivery service shall be

effective the business day next following delivery thereof to the overnight delivery service. Each party may change the address for receipt of notices by delivery of a notice in compliance with this Section 5.

ACCEPTED AND AGREED on the date indicated below. By signing this Agreement, Consultant certifies, under penalty of perjury, that all the information provided in the Agreement Documents is true, complete, and correct:

Dated:

Dated: 10/29/2019

San José Unified School District

Education Housing Partners, Inc.

By:

By:

DocuSigned by:
Bruce Dorfman
C7543E2330804CB...

Steve Adamo

Bruce Dorfman

Director

Principal

TERMS & CONDITIONS TO INDEPENDENT CONSULTANT AGREEMENT FOR PROFESSIONAL SERVICES

1. **Expenses.** Except as set forth in this Agreement, District shall not be liable to Consultant for any costs or expenses paid or incurred by Consultant in performing the Work unless approved in advance in writing by District.
2. **Materials.** Consultant shall furnish, at his/her own expense, all labor, materials, equipment, supplies and other items necessary to complete the services to be provided pursuant to this Agreement.
3. **Invoices.** Payment for the Services shall be made for all undisputed amounts in monthly installment payments pursuant to the provisions in **Exhibit A** and within thirty (30) days after the Consultant submits an invoice to the District for Services completed and after the District's written approval of the Services, or the portion of the Services for which payment is to be made.
4. **Independent Contractor.** Consultant, in the performance of this Agreement, shall be and act as an independent contractor. Consultant understands and agrees that he/she and all of his/her employees shall not be considered officers, employees, agents, partner, or joint venture of the District, and are not entitled to benefits of any kind or nature normally provided employees of the District and/or to which District's employees are normally entitled, including, but not limited to, State Unemployment Compensation or Worker's Compensation. Consultant shall assume full responsibility for payment of all federal, state and local taxes or contributions, including unemployment insurance, social security and income taxes with respect to Consultant's employees.
5. **Standard of Care.**
 - 5.1. Consultant represents that Consultant has the qualifications and ability to perform the Services in a professional manner, without the advice, control or supervision of District. Consultant's Services will be performed, findings obtained, reports and recommendations prepared in accordance with generally and currently accepted principles and practices of its profession for services to California school districts. Consultant's Services will be performed with due care and in accordance with applicable law, code, rule, regulation, and/or ordinance.
 - 5.2. Consultant hereby represents that in and/or its subconsultants will possess the necessary professional capabilities, qualifications, licenses, skilled personnel, experience, expertise, and financial resources, and will provide the necessary equipment, materials, tools, and facilities to perform the Services in an efficient, professional, and timely manner in accordance with the terms and conditions of the Agreement.
 - 5.3. Consultant shall be responsible for the professional quality, technical accuracy, completeness, and coordination of the Services, and Consultant

- understands that the District relies upon such professional quality, accuracy, completeness, and coordination by Consultant in performing the Services.
- 5.4. Consultant shall ensure that any individual performing work under the Agreement requiring a California license shall possess the appropriate license required by the State of California. All personnel shall have sufficient skill and experience to perform the work assigned to them.
 6. **Originality of Services / Royalties.** Consultant agrees that all technologies, formulae, procedures, processes, methods, writings, ideas, dialogue, compositions, recordings, teleplays and video productions prepared for, written for, or submitted to the District and/or used in connection with this Agreement, shall be wholly original to Consultant and/or subconsultant(s) and shall not be copied in whole or in part from any other source, except that submitted to Consultant by District as a basis for such services. Consultant's performance of the Services, shall be provided royalty-free.
 7. **Copyright/Trademark/Patent.** Consultant understands and agrees that all work product produced by Consultant under this Agreement shall become the property of District and cannot be used without District's express written permission. District shall have all right, title and interest in said matters, including the right to secure and maintain the copyright, trademark and/or patent of said matter in the name of the District. Consultant consents to use of Consultant's name in conjunction with the sale, use, performance and distribution of the matters, for any purpose and in any medium. With the District's prior written permission and in lieu of the work product becoming the property of the District, the District may, at its discretion, accept instead a grant of an unlimited license to the District for specific items of work product.
 8. **Termination.**
 - 8.1. **Without Cause by District.** District may, at any time, with or without reason, terminate this Agreement and compensate Consultant only for services satisfactorily rendered to the date of termination. Written notice by District shall be sufficient to stop further performance of services by Consultant. Notice shall be deemed given when received by the Consultant or no later than three days after the day of mailing, whichever is sooner.
 - 8.2. **With Cause by District.** District may terminate this Agreement upon giving of written notice of intention to terminate for cause, following five (5) day's prior written notice to Consultant and Consultant's failure to cure the basis for that termination. Cause shall include:
 - 8.2.1. material violation of this Agreement by the Consultant; or
 - 8.2.2. any act by Consultant exposing the District to liability to others for personal injury or property

damage; or

8.2.3. Consultant is adjudged a bankrupt or makes a general assignment for the benefit of creditors or a receiver is appointed on account of Consultant’s insolvency.

Written notice by District shall contain the reasons for such intention to terminate and, unless within three (3) calendar days after that notice the condition or violation shall cease or satisfactory arrangements for the correction thereof be made, this Agreement shall upon the expiration of the three (3) calendar days cease and terminate. In the event of this termination, the District may secure the required Services from another Consultant. If the expense, fees, and/or costs to the District exceeds the cost of providing the Services pursuant to this Agreement, the Consultant shall immediately pay the excess expense, fees, and/or costs to the District upon the receipt of the District’s notice of these expense, fees, and/or costs. The foregoing provisions are in addition to and not a limitation of any other rights or remedies available to District.

8.3. Upon termination, Consultant shall provide the District with all documents produced maintained or collected by Consultant pursuant to this Agreement, whether or not such documents are final or draft documents. In the event the District changes or uses any fully or partially completed work product without the Consultant’s knowledge and participation, the District agrees to release Consultant of responsibility for those changes, and shall indemnify the Consultant harmless from any and all claims on account of any damages or losses to property or persons arising out of that change or use except to the extent the Consultant is found to be liable in a forum of competent jurisdiction. In the event District uses any fully or partially completed work product without the Consultant’s full involvement, the District shall remove all information that might identify the Consultant and its subconsultants.

9. **Indemnification.** To the furthest extent permitted by California law, Consultant shall defend, indemnify, and hold free and harmless the District, its agents, representatives, officers, consultants, employees, trustees, and volunteers (“the indemnified parties”) from any and all claims, demands, causes of action, costs, expenses, liability, loss, damage or injury of any kind, in law or equity, including without limitation the payment of all consequential damages (“Claim”), to the extent arising out of, relating to or in connection with the negligence, recklessness, errors or omissions, or willful misconduct of Consultant, its officials, officers, employees, subcontractors, consultants, or agents directly or indirectly arising out of, connected with, or resulting from the performance of the Services. Notwithstanding the foregoing, if coverage for Consultant’s such defense obligations is not provided

pursuant to insurance maintained or required hereunder to be maintained by Consultant or its subconsultants (i.e., professional liability policies), then Consultant shall reimburse the indemnified parties upon final resolution of the Claim, to the extent of a determination that any portion of that Claim is covered by Consultant’s indemnification obligations hereunder, which determination may be by (a) a writing signed by Consultant or its subconsultant that specifies the extent of Consultant’s (or its subconsultant’s) responsibility, (b) a stipulation made by Consultant or Consultant’s attorney in open court or filed in the records of a court regarding Consultant’s or its subconsultant’s negligence, (c) the judgment of a court, (d) an award by an arbitrator, or (e) Consultant’s agreement to pay all or proportionate share of a settlement of a Claim.

- 10. **Assignment.** The obligations of the Consultant pursuant to this Agreement shall not be assigned by the Consultant; provided, however, nothing herein shall prohibit Consultant from entering into contracts with subconsultants.
- 11. **Compliance with Laws.** Consultant shall observe and comply with all rules and regulations of the governing board of the District and all federal, state, and local laws, ordinances and regulations in Consultant’s performance of the Services. Consultant shall give all notices required by any law, ordinance, rule and regulation bearing on conduct of the Services as indicated or specified. If Consultant observes that any of the Services required by this Agreement is at variance with any such laws, ordinance, rules or regulations, Consultant shall notify the District, in writing, and, at the sole option of the District, any necessary changes to the scope of the Services shall be made and this Agreement shall be appropriately amended in writing, or this Agreement shall be terminated effective upon Consultant’s receipt of a written termination notice from the District.
- 12. **Permits/Licenses.** Consultant and all Consultant’s employees or agents shall secure and maintain in force such permits and licenses as are required by law in connection with the furnishing of services pursuant to this agreement.
- 13. **Safety and Security.** Consultant is responsible for maintaining safety in the performance of this Agreement. Consultant shall be responsible to ascertain from the District the rules and regulations pertaining to safety, security, and driving on school grounds, particularly when children are present.
- 14. **Employment with Public Agency.** Consultant, if an employee of another public agency, agrees that Consultant will not receive salary or remuneration, other than vacation pay, as an employee of another public agency for the actual time in which services are actually being performed pursuant to this Agreement.
- 15. **Labor Code: Consultant and Subconsultant Registration and Compliance.** Consultant acknowledges that, for

purposes of Labor Code section 1725.5, all or some of the Work may be a public work to which Labor Code section 1771 applies and, if so, those services are subject to compliance monitoring and enforcement by the Department of Industrial Relations. Consultant shall comply with Labor Code section 1725.5, including without limitation the registration requirements for itself and its subconsultants. Consultant represents that all of its Subconsultants are or will be registered pursuant to Labor Code section 1725.5. Consultant shall furnish its CPRs to the Labor Commissioner of California and comply with any applicable enforcement by the Department of Industrial Relations.

16. **Anti-Discrimination.** It is the policy of the District that in connection with all work performed under Agreements there be no discrimination against any employee engaged in the work because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status and therefore the Consultant agrees to comply with applicable Federal and California laws including, but not limited to the California Fair Employment and Housing Act beginning with Government Code Section 12900 and Labor Code Section 1735. In addition, the Consultant agrees to require like compliance by all its subcontractor(s).
17. **Fingerprinting of Employees.** The Parties agree that the Services provided by the Consultant and subconsultants will have limited contact with pupils in accordance with Education Code Section 45125.1(d) however, Consultant is responsible for complying with Education Code Section 45125.1 in its entirety throughout the completion of Services and shall notify the District upon any change in Services necessitating compliance with 45125.1(f).
18. **Audit.** Consultant shall establish and maintain books, records, and systems of account, in accordance with generally accepted accounting principles, reflecting all business operations of Consultant transacted under this Agreement. Consultant shall retain these books, records, and systems of account during the Term of this Agreement and for three (3) years thereafter. Consultant shall permit the District, its agent, other representatives, or an independent auditor to audit, examine, and make excerpts, copies, and transcripts from all books and records, and to make audit(s) of all billing statements, invoices, records, and other data related to the Services covered by this Agreement. Audit(s) may be performed at any time, provided that the District shall give reasonable prior notice to Consultant and shall conduct audit(s) during Consultant's normal business hours, unless Consultant otherwise consents.
19. **District's Evaluation of Consultant and Consultant's Employees and/or Subcontractors and Subconsultants.** The District may evaluate the Consultant in any manner which is permissible under the law. The District's evaluation may include, without limitation:
 - 19.1. Requesting that District employee(s) evaluate the Consultant and the Consultant's employees and subcontractors and each of their performance.
 - 19.2. Announced and unannounced observance of Consultant, Consultant's employee(s), and/or subcontractor(s).
 - 19.3. Consultant agrees to remove or re-assign its employees as may be reasonably requested by the District as a result of the District's evaluation. The District shall provide its request in writing, convey the basis for its request and provide reasonable time for Consultant to satisfy the District's request.
20. **Limitation of District Liability.** Other than as provided in this Agreement, District's financial obligations under this Agreement shall be limited to the payment of the compensation provided in this Agreement. Notwithstanding any other provision of this Agreement, in no event, shall District be liable, regardless of whether any claim is based on contract or tort, for any special, consequential, indirect or incidental damages, including, but not limited to, lost profits or revenue, arising out of or in connection with this Agreement for the services performed in connection with this Agreement.
21. **Disputes:** In the event of a dispute between the parties as to performance of Work, Agreement interpretation, or payment, the Parties shall attempt to resolve the dispute by negotiation and/or mediation, if agreed to by the Parties. Pending resolution of the dispute, Consultant shall neither rescind the Agreement nor stop Work.
22. **Confidentiality.** The Consultant and all Consultant's agents, personnel, employee(s), and/or subcontractor(s) shall maintain the confidentiality of all information received in the course of performing the Services. This requirement to maintain confidentiality shall extend beyond the termination of this Agreement and may be waived by prior written approval of the District or to the limited extent required by applicable law including a court of competent jurisdiction's order.
23. **Integration/Entire Agreement of Parties.** This Agreement constitutes the entire agreement between the Parties and supersedes all prior discussions, negotiations, and agreements, whether oral or written. This Agreement may be amended or modified only by a written instrument executed by both Parties.
24. **California Law.** This Agreement shall be governed by and the rights, duties and obligations of the Parties shall be determined and enforced in accordance with the laws of the State of California. The Parties further agree that any action or proceeding brought to enforce the terms and conditions of this Agreement shall be maintained in the California county in which the District's administration offices are located.
25. **Waiver.** The waiver by either party of any breach of any term, covenant, or condition herein contained shall not

be deemed to be a waiver of such term, covenant, condition, or any subsequent breach of the same or any other term, covenant, or condition herein contained.

26. **Severability.** If any term, condition or provision of this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remaining

provisions will nevertheless continue in full force and effect, and shall not be affected, impaired or invalidated in any way.

27. **Incorporation of Recitals and Exhibits.** The Recitals and each exhibit attached hereto are hereby incorporated herein by reference.

Exhibit A
Price, Payment and Services

1. **Schedule of Fees and Budget.** Agreement Price includes a Service Fee which is a total fee billable as Services are completed (i.e., a “lump sum”), and the cost of services provided by subconsultants, which are projected below, but will be finalized (adjusted up or down) during procurement of those subconsultant services (“**Budgeted Services**”). Consultant shall only procure Budgeted Services with District’s approval in writing or via email. District’s approvals will not be unreasonably withheld.

Item	Fee Description	Per Item Fee	Number of Items	Billing Terms
Service Fee	Lump Sum	\$30,000 per site	4 sites Not to exceed \$120,000	\$5,000 per month, per site, for five (5) months. Any remaining portion of the Services fee will be payable upon completion of Deliverables and Services based on percentage complete as may be mutually agreed to by the Parties.
Subconsultants (architect, engineer, environmental etc.)	Budgeted Services	\$75,000 per site	4 sites Not to exceed \$300,000	Costs plus 5% (“Markup”) will be billed on a basis of percentage complete. \$300,000 is inclusive of Markup.
Additional Services Contingency	Amendment Allowance	\$20,000	1 Total Not to exceed \$20,000	Only billable upon execution of an amendment by the Parties for additional services as may be requested by the District. Billable on a percentage completed basis.
Total NTE			\$440,000	

2. **Scope of Services.** Consultant shall perform the following Services which will culminate in the delivery of Final Deliverables and Work Product for each of four (4) potential sites:
- Act as a pre-development and employee housing advisor to the District and its consultants.
 - Provide expertise in the evaluation, design and financial feasibility of four (4) sites for employee housing (“**Sites**”).
 - Attend both regularly scheduled and ad-hoc meetings (not normally exceeding two (2) per month) in order to meet the needs of the District and its consultants, which may include public hearings, community meetings and Board meetings.
 - This includes meetings after the completion and submittal of all deliverables which may be reasonably requested by the District.
 - Select and manage a team consisting of professional services such as civil engineer, architect, geotechnical engineer, traffic engineer, and environmental consultants, etc. to assist in evaluating the Sites.
 - For each Site, commission:
 - Phase I Environmental report
 - Phase II report as necessary (Not currently included within Budgeted Services)
 - Title Report
 - Flood certificate
 - Other studies requested by the District or deemed necessary given Site conditions (Not currently included within Budgeted Services)
 - Address specific Site conditions and/or housing program strategy to evaluate one or more development scenarios for the Sites. This will include a preliminary Site analysis of each Site to include opportunities and constraints including:
 - Traffic
 - Geotechnical, biologic or wetland constraints

- Potential entitlement hurdles
 - Yield potential
 - Zoning and general/specific plan designations
 - Neighborhood density & character
 - Utilities and infrastructure
 - Title issues
 - Site characteristics (e.g. topography, shape, size, etc.)
 - Access to transportation (e.g. transit, highways, bikeways)
 - Access to amenities (public parks, retail, services)
 - Staging for construction activities
 - Easements and rights-of-way
 - Relocation/replacement of existing civil infrastructure
 - Automobile parking
- Develop a housing program including product types, unit mix, types, general outline of specifications, and amenities for targeted resident demographics.
 - Prepare conceptual Site and infrastructure plans, at least one per site and more if there are different program and building options for the site. The conceptual plans will show building types, unit mix and general unit sizes. Net and gross building square footages, and proposed parking ratios will be identified. Ground floor plans with amenity and common spaces will be identified. The plans will include yield studies (including 3-D massing) in conjunction with an initial programming/yield study for each Site, including height, density, and context within the surrounding neighborhood.
 - All conceptual Site and building plans will be reviewed with the District.
 - The conceptual level plan(s) will be detailed enough for preliminary construction cost estimates. The pricing information will then be reviewed with the District. Any value engineering and /or scope alternatives suggested by the District will also be modelled and priced during this stage.
 - After consensus of the conceptual Site and building plans and cost estimates, Consultant will prepare a preliminary financing model (“**Pro Forma**”) for each of the Sites including all anticipated costs and revenues from predevelopment, pre-construction, construction, lease up, operating costs, and stabilized operating costs including maintenance and reserve funds. Consultant will then work with District staff to prepare preliminary recommendations for review by the District’s Board. The Pro Formas shall be prepared on spreadsheets that are editable.
 - Work with District to identify potential sources for pre-development and development grant funds from philanthropic and governmental sources; eligible public subsidies (e.g. AHSC/IIG funding, local sources, etc.); Santa Clara County Measure A funds; or other public or private funds that may be used for pre-development or development costs.
 - Work with the District to detail the prospective tenants in the housing (% teachers, % staff), conduct analysis of employee income levels to determine potential rents, analyze suggested tenure of residents and process for resident selection, and determine applicability of San Jose’s Inclusionary Housing Ordinance (including compliance, monitoring, etc.).
 - Work with the District to develop a community outreach strategy and in planning and programing potential public outreach as needed for each of the Sites.
 - Provide twice monthly overall update reports, in addition to participating in meetings in person, via phone, or via computer.

Exhibit B**Milestone Schedule**

Consultant shall complete the Services according to the milestone schedule shown below. Consultant agrees to provide a more detailed schedule for District's approval not more than 10 (ten) days after full execution of the Agreement ("Consultant's Schedule"). Consultant's Schedule shall provide adequate details to convey an ability to achieve all of the necessary Services in a timely manner consistent with the Agreement, which may include staff and resource allocations. District's approval of Consultant's Schedule shall not be unreasonably denied.

Milestone Schedule	
Task	Completion Date
Begin Services	Not more than five (5) days after full execution of the Agreement including submittal of insurance.
Twice Monthly Reports	Every 15 days.
Final Deliverables and Work Product	Not later than April 30, 2020
Assist with presentation, questions and answers, clarification and refinements of Services.	October 2020