

DESIGN AND CONSTRUCTION AGREEMENT
by and between

BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA

And

TOWN OF VIENNA

For the Redevelopment of

PATRICK HENRY LIBRARY

TAX MAP 38-4 ((2)) 142

Dated as of , 2020

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DESIGN AND CONSTRUCTION AGREEMENT

THIS DESIGN AND CONSTRUCTION AGREEMENT (this “Agreement”) is made and entered into as of this ____ day of _____, 2020 (the “Agreement Date”), by and among the **BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA**, a political subdivision of the Commonwealth of Virginia, acting in its proprietary capacity and not in its governmental or regulatory capacity (the “County”); and Town of Vienna (the “Town”). The County and the Town may each be referred to in this Agreement as a “Party,” and collectively as the “Parties.”

RECITALS

R-1 The County owns approximately 1.43 acres of land at 101 Maple Ave. E, Vienna, Virginia 22180 (the “Property”) on which is located the Patrick Henry Library (the “Library”). The Property is further described on the attached Exhibit A.

R-2 The County intends to redevelop the Library and has considered different design alternatives to address the Library’s future space needs.

R-3 The Town is seeking additional public parking and is working with the County to develop a proposed design that includes public parking in addition to Library parking.

R-4 The Parties desire to enter into this Agreement to outline each of their respective responsibilities for the design and construction of the Property to include the redesign of the Library with public parking in addition to parking needed by the Library (the “Project”).

In consideration of the mutual promises in this Agreement, and other valuable consideration, the receipt and legal sufficiency of which are acknowledged by the Parties, the Parties agree to the following:

Article I

Design and Construction Schedule; **Preliminary Budget**

Section 1.1 Design and Construction Schedule. The Parties have prepared a preliminary design and construction schedule (the “Development Schedule”), which is attached as Exhibit B. The dates set forth on Exhibit B are best estimates as of the date of this Agreement and the Parties acknowledge that the dates are subject to change throughout the Project.

Section 1.2 Budget

- (a) Budget. Attached as Exhibit C is a preliminary budget for the Project (the “Preliminary Budget”) setting forth the estimated costs, as of the Agreement Date, for each phase of the design and construction of the Project. For those line items that are to be a shared responsibility of the County and the Town, the Preliminary Budget shows the percentage for which each Party is responsible.

- (b) Budget Modifications. After the Agreement Date, the County will provide updates to the Preliminary Budget, as necessary, for each phase of the Project. These updates will be in the form of construction cost estimates.

Section 1.3 Funding. The funding of the Project will be divided into (i) funding for the costs associated with the design phase and (ii) funding for the construction costs. The Town's contributions for the design and construction are described in Articles II and III below.

Article II **Design Phase**

Section 2.1 Preliminary Design Phase Termination. This Agreement may be terminated by either Party prior to the County awarding the design contract for the Project. If the Agreement is terminated under this Section 2.1, the Parties will be relieved from any and all further obligations under this Agreement, and the Town will not owe any payment under this Agreement.

Section 2.2 Design Funding. If this Agreement is not terminated under Section 2.1 above, the Town will make a lump sum payment for the design phase (the "Town Design Payment") upon the award of the design contract. The total cost of the design phase will be determined during the negotiation of the design contract. The Town Design Payment will be the lesser of ~~35~~30% of the total design cost or \$~~850,000~~1,000,000.

Section 2.3 Additional Termination Rights.

- (a) Concept Design Phase. For a period of approximately 6 months from the date the design contract is awarded, the Parties will work with the architect to select a Project design. The Town may elect to terminate this Agreement prior to the selection of a Project concept design. If the Agreement is terminated under this Section 2.3(a), the Town will be relieved from any and all further obligations under this Agreement, and the County will return to the Town 85% of the Town Design Payment.
- (b) Design Development Phase. For a period of approximately 6 months after selection of a Project design, the architect will prepare the schematic design of the Project and finalize the construction budget (the "Design Development Phase"). The Town may elect to terminate this Agreement within 5 days of the completion of the Design Development Phase. If the Agreement is terminated under this Section 2.3(b), the Town will be relieved from any and all further obligations under this Agreement, and the County will return to the Town 50% of the Town Design Payment.
- (c) Zoning Approvals. If the Project does not receive all necessary zoning approvals, then the County may elect to terminate this Agreement upon any such denial. If the Agreement is terminated under this Section 2.3(c), the Town will be relieved from any and all further obligations under this Agreement, and the County will return to the Town 50% of the Town Design Payment.

Section 2.4 A termination of this Agreement by the Town under Sections 2.1, 2.3(a), or 2.3(b) does not preclude the County from redeveloping the Property without the inclusion of additional public parking and funding for such additional parking by the Town.

Article III **Construction Document Phase**

Section 3.1 Construction Funding. The Town will pay its portion of the construction costs (the “Town Construction Payment”), as described in this Section 3.1. The total cost of construction will be determined during the negotiation of the construction documents. ~~If the design chosen is two structured levels of parking, then the~~ The Town Construction Payment will be the lesser of ~~2519%~~ of the total cost of construction or ~~\$4,200,000~~ ~~4,500,000~~. ~~If both Parties agree to choose a design that is three structured levels of parking, then the Town Construction Payment will be the lesser of 40% of the total cost of construction or \$9,000,000.~~ The Town’s maximum contribution of ~~\$4,200,000~~ ~~4,500,000~~ or ~~\$9,000,000~~ as described in this Section 3.1 will be referred to in this Agreement as the “Maximum Town Construction Payment.” The Town Construction Payment will be paid by the Town in three equal installments at the following times:

- (1) Completion of 50% construction documents phase
- (2) Award of construction contract
- (3) One year after award of construction contract

Section 3.2 Construction Document Phase Termination. If, during the construction document phase, the updated construction estimate results in the Town’s percentage exceeding the Maximum Town Construction Payment, then the County may elect to terminate the Agreement. Upon such termination, any portion of the Town Construction Payment that has been paid will be returned by the County to the Town.

Article IV **Covenants, Duties, and Obligations of the Parties**

Section 4.1 Obligations of the County.

- (a) Supervision. The County will supervise, direct, and coordinate the design and construction of the Project. The Town acknowledges that the County or the County’s agents, contractors, and subcontractors will be responsible for all construction methods, techniques, and procedures employed in connection with the construction of the Project.
- (b) Architect/Engineer, Construction Contractor; Major Subcontractors; Approval of Project Contracts. The County will be responsible for the evaluation and recommendation of, and coordination, administration, monitoring and management of, an architect and a construction contractor for the Project, major subcontractors, and any other contractors engaged to perform services in connection with the design and construction of the Project. The Town, at its option, will have a voting member on the County’s selection advisory committee (SAC) for the Request for Qualifications for the Project’s architect selection.
- (c) Compliance with Laws. The County will cause the Project to be designed and constructed in compliance with all Applicable Laws and with all Development Approvals.
- (d) Licensing. All architects, engineers, contractors and subcontractors retained by the County to work on any aspect of the Project will be licensed in the Commonwealth of Virginia (to the extent required by Applicable Laws) and properly insured.

Section 4.2 Updates. The County will prepare and deliver updates to the Town upon completion of each Project phase. The updates will describe the progress of the County's efforts to complete the design and construction of the Project in accordance with this Agreement, the Construction Documents, the Development Schedule and the Budget, including any deviations from or proposed changes to any of the foregoing. The Town acknowledges that the updates may contain and be based upon information provided by third parties, such as the County's architect and contractor(s).

Section 4.3 True Up. After completion of construction but no later than one year after substantial completion, the County will determine the final actual construction costs, and will refund to the Town any overpayment of the Town Construction Payment.

Section 4.4 Cooperation Among the Parties. During the term of this Agreement, the Parties covenant and agree to cooperate with each other in good faith to review documents and materials which require approvals necessary to commence and complete the Project. Such cooperation will include good faith efforts by the Parties to respond to one another in an expeditious manner and within any time periods specifically set forth in this Agreement regarding requests for information or required approvals. If any materials or documents requiring approval are not approved as initially submitted, then the Parties will communicate as reasonably necessary under the circumstances to resolve the issues resulting in such disapproval. A spirit of good faith and a mutual desire to meet the dates and budgets set forth in the Exhibits B and C will govern the Parties' relationship under this Agreement.

Section 4.5 Use and Maintenance of the Project. Provided this Agreement is not terminated prior to completion of the Project, the parties will enter into an Operations and Maintenance Agreement (the "O&M Agreement") for the shared use of the parking garage. The Parties anticipate that O&M Agreement will address the terms set forth on Exhibit D.

Section 4.6 Other Considerations. The Parties acknowledge that the land value of the Property was not taken into consideration in determining the Town's share of the Project costs.

Article V

Force Majeure

Section 5.1 Force Majeure. "Force Majeure Delays" means delays in either Party's performance of its obligations under this Agreement due to acts of God or of a public enemy; acts of terrorism; unusual or extraordinary governmental delays beyond those typically anticipated for any approval or permitting process (and in such event, only such unusual or extraordinary additional time shall constitute a Force Majeure Delay), provided that in each case the responsible Party proceeds with all reasonable due diligence to afford the government the opportunity to process approvals and permits in a timely and efficient manner; freight embargoes; inability to obtain supplies or materials or reasonably acceptable substitute supplies or materials (other than due to price) despite reasonable diligence; unusually severe weather; archeological finds on the Property or any portion thereof; unforeseen soil or environmental conditions on the Property or any portion thereof; governmental restriction; moratoria; enemy action; civil commotion; casualty; condemnation; sabotage; or events similar or related to the above which are not within the reasonable control of the Party asserting a delay or inability to perform (other than the failure to perform of a third party with whom the Party seeking the benefits of this provision has contracted). Except as may otherwise be provided in this

Section, neither Party will be considered in breach of or default in any obligation under this Agreement in the event of Force Majeure Delays. Neither Party may claim a Force Majeure Delay unless it has used all reasonable and diligent efforts to minimize the delay or perform the obligation being hindered by such Force Majeure Delay. Force Majeure Delays shall not include situations caused the gross negligence or willful misconduct of a Party. Upon the termination of any Force Majeure Delays, the Parties agree that, upon the request of either Party, they will enter into a memorandum agreement showing the effect of the Force Majeure Delays upon the Development Schedule.

Article VI **Defaults and Remedies**

Section 6.1 Default. Either Party will be in default of this Agreement if such Party fails to perform any material obligation or requirement under this Agreement or fails to comply with any material term or provision of this Agreement and such default remains uncured for 30 days after receipt of written notice of such failure from the non-defaulting Party. If the defaulting Party fails to timely cure any default, and the Parties have attempted to resolve the issue under Section 6.3 below, the non-defaulting Party will have the following remedies:

- (a) Cure the defaulting Party's default, at the defaulting Party's sole cost and expense. The defaulting Party will reimburse the non-defaulting Party its actual out-of-pocket costs for such cure within 30 days after written demand therefor with reasonable supporting documentation.
- (b) Terminate this Agreement.

Section 6.2 Legal Actions. Any legal actions under this Agreement must be instituted in the Circuit Court of Fairfax County and any other appropriate court in Fairfax County or, if appropriate, in the United States District Court for the Eastern District of Virginia.

Section 6.3 Dispute Resolution. In the event of a dispute between the County and the Town regarding any matters arising under this Agreement, the County and the Town agree to engage in good faith negotiations with the other in an attempt to promptly resolve such dispute.

Article VII **Miscellaneous**

Section 7.1 Recitals. The recitals to this Agreement are true and correct and are incorporated herein by reference.

Section 7.2 Final Agreement. This Agreement and its Exhibits embody the final agreement between the Parties, and to the extent that this Agreement and its Exhibits conflict or are inconsistent with prior agreements between the Parties regarding the Project, this Agreement and its Exhibits supersede and control over all such prior agreements. The terms of this Agreement may be amended or otherwise modified only by a written instrument duly executed by the Parties.

Section 7.3 Notices.

- (a) All notices, demands or other communications between the Parties (“Notice”) must be in writing. Any election to terminate this Agreement requires written notice to the other Party within the time frames described. Notices must be given by (i) personal delivery or (ii) a nationally-recognized, next-day courier service, addressed as follows:
- (1) If to the County, to: Carey Needham,
Fairfax County Director of Building Design and
Construction Division, DPWES
Attn: Allison Terzigni
12000 Government Center Parkway, Suite 449
Fairfax, VA 22035
- with a copy to: Fairfax County
Office of the County Attorney
12000 Government Center Parkway, Suite 549
Fairfax, VA 22035-0064
Attention: County Attorney
- (2) If to the Town, to: Mercury T. Payton, Town Manager
127 Center Street, South
Vienna, VA 22180
- with a copy to: Steven D. Briglia, Town Attorney
127 Center Street, South
Vienna, VA 22180
- (b) A Notice given in accordance with this Agreement will be effective upon receipt or refusal by the Party to which it is given.
- (c) For convenience, Notices may be sent via email; however, such email Notice will not be considered effective until the original Notice is received by the Party to which it is given pursuant to one of the delivery methods described in subsection (a) above.
- (d) Either Party may change its Notice address from time to time by informing the other Party in writing of such new address.

Section 7.4 Points of Contact. The County and the Town will each designate a primary point of contact for day-to-day communications. The initial points of contact for the parties are:

Fairfax County: Allison Terzigni

Town of Vienna: Michael D’Orazio

If the designated point of contact resigns or is removed, then the Party will designate a new primary contact within 15 business days thereafter.

Section 7.5 Governing Law; Venue. This Agreement and any dispute, controversy or proceeding arising out of or relating to this Agreement (whether in contract, tort, common or statutory law, equity or otherwise) will be governed by Virginia law, without regard to conflict of law principles of Virginia or of any other jurisdiction that would result in the application of laws of any jurisdiction other than those of Virginia. All claims and litigation arising out of or related to this Agreement must be brought and resolved in the courts of the Commonwealth of Virginia located in the County of Fairfax, Virginia or U.S. District Court for the Eastern District of Virginia, Alexandria Division.

Section 7.6 Waivers. Each Party has the right by notice in writing to the other Party to waive any of the provisions of this Agreement that are for the sole benefit of the waiving Party. Any failure of a Party to insist upon strict compliance with any of the terms and conditions of this Agreement will not be construed as a waiver of such terms and conditions or of the right of such Party to insist at any time thereafter upon such strict compliance.

Section 7.7 Counterparts. This Agreement may be executed and delivered in any number of counterparts, in the original or by electronic transmission, each of which so executed and delivered will be deemed to be an original and all of which will constitute one and the same instrument.

Section 7.8 Severability. If any provision of this Agreement or its application to any party or circumstances is determined by any court of competent jurisdiction to be invalid or unenforceable to any extent, the remainder of this Agreement or the application of such provision to such party or circumstances, other than those as to which it is so determined invalid or unenforceable, will not be affected, and each provision of this Agreement will be valid and will be enforced to the fullest extent permitted by law.

Section 7.9 Dates for Performance. If the expiration of any time period set forth in this Agreement shall fall on a Saturday, Sunday or legal holiday in the Commonwealth of Virginia, such period shall be automatically extended to the next business day. All dates for performance (including cure) shall expire at 5:00 p.m. on the performance or cure date.'

Section 7.10 Headings. The headings of this Agreement are for reference only and do not describe the intent of this Agreement or otherwise alter the terms of this Agreement.

Section 7.11 Transfer of Title. This Agreement shall not be construed or considered to transfer any title to the Property, legal or equitable.

Section 7.12 Rights, Easements and Licenses. No rights, easements, or licenses are acquired by the Town under this Agreement by implication or otherwise except as and unless expressly set forth in this Agreement.

Section 7.13 Rules of Construction.

- (a) When a reference is made in this Agreement to an Article, a Section, or an Exhibit, such reference is to an Article of, a Section of, or an Exhibit to this Agreement unless otherwise indicated.
- (b) Whenever the words “include,” “includes,” or “including” are used in this Agreement, they shall be deemed to be followed by the words “without limitation.”
- (c) The definitions contained in this Agreement are applicable to the singular as well as to the plural forms of such terms and to the masculine, feminine, and neuter genders and non-genders of such terms. Whenever the context requires, any pronouns used in this Agreement include the corresponding masculine, feminine, or non-gender forms.

Section 7.14 Recordation. This Agreement may not be recorded by either Party at any time.

Section 7.15 Litigation and Attorney’s Fees. If either Party is required to resort to litigation to enforce its rights hereunder, the Parties agree that any judgment awarded to the prevailing Party shall include all litigation expenses, including reasonable attorney’s fees and court costs.

Section 7.16 Third Parties. No person shall be deemed to be a third-party beneficiary of this Agreement or any portion hereof.

Section 7.17 No Partnership. Nothing contained in this Agreement will be construed to create a partnership or joint venture between the Parties or their successors or permitted assigns.

Section 7.18 Jury Trial. The County and the Town each waives all rights to a trial by jury in any claim, action, proceeding, or counterclaim arising out of or in any way connected with this Agreement.

Section 7.19 Funding Contingency. The Parties acknowledge and agree that the County’s financial obligations hereunder are subject to appropriations by the Fairfax County Board of Supervisors. To the extent this Agreement is construed to impose any financial obligations upon the County, any such financial obligations shall be binding to the extent of appropriations by the Fairfax County Board of Supervisors.

Section 7.20 Definition of the County. Whenever the term, the “County,” is used in this Agreement, unless the term is followed by, “in its governmental capacity,” “in its regulatory capacity,” or words of similar import, the term means, “the County, in its proprietary capacity.”

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed by their duly authorized representatives as of the day and year first above-written.

[Signatures on the following pages]

COUNTY:

**BOARD OF SUPERVISORS OF FAIRFAX
COUNTY, VIRGINIA**, a political subdivision of
the Commonwealth of Virginia, in its proprietary
capacity

By: _____
Bryan J. Hill
County Executive

TOWN:

TOWN OF VIENNA, VIRGINIA

By: _____
Mercury T. Payton
Town Manager

Exhibit A

Legal Description of the Property

Exhibit B

Design and Construction Schedule

Exhibit C

Preliminary Budget

Exhibit D

Major Terms of Operations and Maintenance Agreement