

**AMENDMENT TO THE  
PUBLIC PRIVATE PARTNERSHIP AGREEMENT  
BETWEEN THE CITY OF WINSTON-SALEM  
AND THE WPDA, INC. EXECUTED ON OCTOBER 27, 2016**

This Amendment to the Public Private Partnership Agreement entered into the City and WPDA on October 27, 2016 (“P3 Agreement”) is hereby entered into and made effective as of \_\_\_\_\_, day August, 2018 (“Amendment”) by and between WPDA, Inc., a North Carolina Nonprofit Corporation with its principal office located at 1080 West Fourth Street, Winston-Salem, N.C. 27101 (hereinafter the “Developer”), and the City of Winston-Salem, a North Carolina Municipal Corporation (hereinafter the “City”) with respect to the 120 acre site known as Whitaker Park (“Project Site”).

**WITNESSETH:**

**WHEREAS**, the City of Winston-Salem, pursuant to a duly adopted resolution, determined that there is a critical need to encourage and promote economic development and job creation on the north side of Winston-Salem while simultaneously addressing the City’s critical infrastructure needs (water, sewer and public roads) for sustainable growth and development in the area of the Project Site; and

**WHEREAS**, the City, following its determination that there is a critical need for public infrastructure and the Whitaker Park Development Project (collectively referred to hereinafter as the “Project”), published its Notice of Request for Qualifications in a newspaper of general circulation in accordance with G.S. 143-128.1C and posted the Notice of Request for Qualifications on its website; and

**WHEREAS**, Developer submitted a response to said Request for Qualifications which response City staff evaluated; and

**WHEREAS**, City Staff prepared a P3 Agreement in accordance with: (i) the Resolution adopted by the Mayor and Winston-Salem City Council on March 28<sup>th</sup> which resolution is attached and incorporated herein as Exhibit A, (ii) the Notice of Request for Qualifications (“Notice”) published on April 14, 2016, which Notice is attached and incorporated herein as Exhibit B; (iii) the Developer’s response to the Notice which staff recommended for acceptance and which response is attached and incorporated herein as Exhibit C; (iv) the Resolution adopted by the Mayor and Winston-Salem City Council on June 20, 2016 designating WDPDA as the successful/best qualified developer, which resolution is attached and incorporated herein as Exhibit D and (v) the Resolution of the Mayor and Winston-Salem City Council adopted on August 15, 2016, following a public hearing, approving the P3 Agreement, which resolution is attached and incorporated herein as Exhibit E; and

**WHEREAS**, following the public hearing, the Mayor and City Council approved the execution of the P3 Agreement with Developer and the same was signed on October 27, 2016, attached as Exhibit F;

**WHEREAS**, the parties wish to amend said P3 Agreement to include an amount not to exceed \$1.25 million to assist with the extension of Akron Drive through Whitaker Park to connect with Shorefair Drive and additional utility (sewer and water) installations (hereinafter “Additional Project” or “Public Infrastructure” to be used interchangeably) following a public hearing and the adoption of a resolution, attached as Exhibit G.

NOW, THEREFORE, in consideration of the mutual covenants and agreements stated herein, the parties do agree that the P3 Agreement is hereby amended to include the Additional Project and the terms thereof as follows:

1. **The Additional Project.**

a. Plans and Specifications for the Additional Project. Developer will engage architects and engineers as necessary to prepare plans and specifications necessary for the design, development and construction of the Additional Project (the "Construction Plans"). All Construction Plans and any material change orders affecting the use and quality of the Additional Project where City funds are used shall be subject to the prior review and approval of the Office of the City Manager, which approval shall not be unreasonable withheld, conditioned or delayed. All Construction Plans submitted must include: (i) design and positioning of all buildings and the Public Infrastructure for which City funds were used; (ii) identification of set-backs from lot lines; (iii) grading plans; (iv) drainage plans; and (v) utility, green space and road locations. The Construction Plans and all revisions and modifications thereto shall be certified by an architect duly registered under the laws of the State of North Carolina. The Construction Plans must comply with all applicable laws and regulations. All construction permits and licenses shall be acquired in accordance with the applicable federal, state, and local codes, rules and regulations.

b. Construction of Additional Project. Developer will enter into or amend its existing contract (the "GC Contract Amendment") with the original general contractor (the "Contractor") for the construction of the Additional Project that sets either a fixed price or a guaranteed maximum price. Said General Contractor shall be responsible for the construction of both the Public Infrastructure and the non-public portions of the Additional Project. During the construction of the Additional Project, City representatives shall be invited to construction progress meetings every month with the Developer, the Contractor and the architect. Following reasonable advance notice and accompanied by a representative of Developer, City representatives shall have access to the Project Site where City funds are being expended at all reasonable times during construction of the Additional Project to view the Additional Project and the progress thereof.

In general, the Contractor will conduct and oversee all of the work related to the Public Infrastructure and the non-public portion of the Additional Project. The City shall not be responsible for any Additional Project cost overruns unless additional funding is expressly agreed to by the Winston-Salem City Council in compliance with G.S 143-128.1C.

c. Purchase of materials and equipment. The Developer shall be responsible for the purchase of all materials and equipment at a reasonable cost.

d. Completion of the Project and Additional Project. It is anticipated that the Project and the additional Project will be completed by January 1, 2020. In the event the Project and Additional Project are not completed by said date, the Developer agrees to make a non-confidential written report to the City at least thirty (30) days in advance of the projected January 1, 2020 completion date to explain the delay and the revised construction schedule. Upon satisfactory completion of the Additional Project, as determined by the City, the Developer shall deed said Public Infrastructure to the City, at no additional cost to the City, if the same is not already owned by the City. In terms of the road, the interest to be conveyed shall be in fee simple and in terms of the utility installations the interest that should be conveyed shall be permanent easements necessary to conveyance shall be in the form

2. **Ownership Structure for the Project and Additional Project** Developer is a 501 (c)(3) economic development not-for-profit entity located in Winston-Salem, North Carolina and established in 2011 to receive the donation of the Whitaker Park property and to work on the re-development of said property. Developer was founded by Wake Forest University (WFU), the Winston-Salem Alliance (the Alliance) and Winston-Salem Business Inc. (WSBI) and has an eleven (11) member board of directors that includes members from WFU, the Alliance, WSBI, the City and Forsyth County. Except as otherwise provided herein, the Developer shall own the Project.

3. **Project Financing Structure and Disbursement of City Funds.**

a. Public Sources of Funding.

The City will provide an amount not to exceed \$1.25 million for the installation of the Public Infrastructure which shall be disbursed in a manner agreed upon, in advance, by the parties. The funds will be disbursed on a reimbursement basis in a manner agreed to by the City Manager's Office and Developer.

b. Other Sources of Funding.

In exchange for the City's commitment, WPDA will commit and infuse at least \$1.25 million from other public, including the state, and private sources in cash and other assets towards the Additional Project.

4. **HUB Participation.**

Developer and the Contractor will use commercially reasonable, best efforts to hire Winston-Salem/Forsyth County residents and companies located in Winston-Salem/Forsyth County in connection with the design and construction of the Additional Project, and will establish a system for monitoring and enhancing such local participation and jobs for City residents.

Developer and the Contractor shall make a good-faith effort to comply with G.S. 143-128.2, G.S. 143-128.4 and to recruit and select small business entities.

5. **Developer Responsibilities.**

- a. Before starting construction of the Additional Project, the Developer shall:
  - (i) Provide or update, if already provided, the name of the Contractor and subcontractors, if known at that time and licensed design professions that the Developer proposes to use for the Additional Project design and construction.
  - (ii) Include the total anticipated amount of the construction contract(s) and shall certify the amount as being a good faith projection of its total costs for designing and constructing the Additional Project.
  - (iii) Provide a payment bond in the amount of one hundred percent (100%) of the total anticipated amount of the construction contracts to be entered into between the private developer and the contractors to design or construct the improvements required by the development contract. The payment bond will be conditioned upon the prompt payment for all labor and materials for which the developer or one or more of its contractors or those contractor's subcontractors are liable. The payment bond shall be solely for the protection of the persons furnishing materials or performing labor or services for which the developer or its contractors or subcontractors are liable. The payment bond must be executed by one or more surety companies legally authorized to do business in the State of North Carolina and shall become effective upon the awarding of the development contract. The payment bond shall be in the form required by G.S. 143-128.1C and shall not include any provisions prohibited by said statute. Where the City is facilitating the hire of the General Contractor for the work on the public infrastructure (water, sewer and roads), the City shall make sure the General Contractor has the requisite payment and performance bonds in place for said work.
- b. The Developer shall:
  - (i) Maintain Commercial General Liability to protect the Developer against any and all claims, demands expenses, costs and liabilities to the extent proximately caused by the negligent acts or omissions of the Developer, and its agents or employees, in the performance of the P3 Agreement and this Amendment. The insurance shall also include, coverage for explosion, collapse, and underground hazards, where required. This insurance shall provide bodily injury and property damage limits of not less than \$1,000,000 for each occurrence, respectively. The Developer shall require the General Contractor to maintain Commercial General Liability insurance

in an amount acceptable to cover potential risks, demands, costs and liabilities associated with carrying out the construction contract(s) entered into pursuant to the P3 Agreement and this Amendment.

- (ii) Maintain Owned, non-owned, and hired Automobile Liability insurance, including property damage insurance, covering all owned, non-owned, borrowed, leased, or rented vehicles operated by the Developer in furtherance of these services. In addition, all mobile equipment used by the Developer in connection with the P3 Agreement and this Amendment, will be insured under either a standard Automobile Liability policy, or a Commercial General Liability policy. This insurance shall provide bodily injury and property damages limits of not less than \$1,000,000 combined single limit/each accident, and shall provide at least \$5,000 in Medical Expenses (Med Pay) coverage. The Developer shall require the General Contractor to maintain Automobile Liability insurance in an amount consistent with this paragraph as well.
  - (iii) Maintain Workers' Compensation and Employer Liability insurance if required by North Carolina law. The Developer shall require the General Contractor to maintain Workers' Compensation and Employer Liability insurance if required by North Carolina law.
  - (iv) Make a good faith effort to complete the Project and Additional Project on time.
- c. Should any portion of the Project or Additional Project result in the creation of residential units on the Project Site, Developer agrees to make a good faith effort to require the owner or developer of such units to set aside 10% of the total residential units to be leased to households whose incomes are either 50% to 80% of area median income or 80% to 120% of the area median income, in any proportion. Additionally, the Developer agrees to make a good faith effort to require the owner or developer of such units to hire, where possible, individuals that live in the City's Neighborhood Revitalization and Strategy Area ("NRSA").

**6. City Responsibilities.**

- a. Provided all of the conditions set forth in this Amendment have been met, the City shall provide the funding as set forth in paragraph 3.
- b. The City shall monitor the Developer's and Contractor's progress on the Project and Additional Project.

**7. Other Provisions.**

- a. Additional funds—Except as provided in the P3 Agreement and this Amendment, the City is not obligated to provide incentives to the Developer related to the Project, the Additional Project or Project Site.
- b. Adverse Change — In the event that a court of competent jurisdiction holds that a provision or requirement of the P3 Agreement and this Amendment violates any applicable law, each such provision or requirement shall be replaced with a revision which accomplishes the purposes outlined herein and shall be enforced only to the extent it is not in violation of law or is not otherwise unenforceable and all other provisions and requirements of the P3 Agreement and this Amendment, not contingent thereon, shall remain in full force and effect.
- c. Annual Report—The Developer shall furnish to the City a copy of its annual audit report performed by a certified public accountant as soon as it becomes available to the Developer, but no later than six months following the Developer’s fiscal year end until 2030.
- d. Applicable Law; Construction —The P3 Agreement and this Amendment shall be governed by and construed in accordance with the laws of the State of North Carolina, without regard to any construction arising from the application of conflicts or choice of law principles, and without regard to any construction arising by virtue of the negotiation or the persons who drafted the P3 Agreement and Amendment. References to the City shall refer to, bind and include its representatives, elected body and members of such, and the successors and assigns of each of them, in each case in their official capacities.
- e. Assignment —The Developer shall not assign the P3 Agreement, this Amendment or any portion thereof without the written consent of the City, nor shall the Developer assign any funds due or to become due to it hereunder without the prior written consent of the City. However, in the event of such assignment, the Developer will remain ultimately responsible and liable for the performance of the Developer’s obligations hereunder.
- f. Audit Right —The Developer will certify the investment of private funds and city funds in the Public Infrastructure on a quarterly basis until the work has been completed. If the City decides to undertake an audit regarding the use of city funds, such audit will be at the City’s sole expense. To the extent that Developer is able to compile such, the Developer shall deliver to the City appropriate written documentation of the capital investment in the Public Infrastructure, which the City will be entitled to retain for so long as it chooses, and to use for such purposes in connection with the P3 Agreement and the Amendment as it deems necessary. The Developer likewise acknowledges that it is Developer’s obligation to provide City with evidence sufficient to the City that the desired capital investment has been made in the Public Infrastructure.

The City reserves the right to require a certified audit or may perform the audit through the use of its staff pertaining to the Developer's compliance with the P3 Agreement and this Amendment.

- g. Binding Obligation-The City and Developer and their respective successors, assigns, and legal representatives accept full legal responsibility hereunder for compliance with all covenants, agreements and obligations of the P3 Agreement and this Amendment.
- h. Compliance with Law –
  - (i) It is the expectation of the City that the Developer will comply, and the Developer agrees to comply, with all applicable federal immigration laws in its hiring and contracting practices relating to services covered by the P3 Agreement and this Amendment.
  - (ii) The Developer shall comply with all applicable federal, state, and local laws that may be required to carry out their respective obligations to be performed under the P3 Agreement and this Amendment.
  - (iii) The Developer shall comply with all applicable employment laws, including but not limited to the Americans with Disabilities Act (ADA), as may be amended from time to time, the State of North Carolina Occupational/Safety and Health Act (OSHA), and the State and Federal Equal Opportunity laws, as well as the regulations promulgated thereunder.
- i. Counterparts; Jurisdiction — This Amendment may be executed in any number of counterparts, each of which when so executed and delivered shall be deemed an original. The parties submit to the exclusive jurisdiction of the State courts sitting in the County.
- j. Notice of Default/Right to Cure- City - If the City defaults on any of its obligations under this Amendment, then it shall have ninety (90) calendar days after delivery of a written notice by Company of such default to the appropriate City representatives, as the case may be, and the right to cure said default. The City, where appropriate, may respond in writing to said notice of default.
- k. Notice of Default/Right to Cure-Developer. Developer, after receipt of a notice of default (“Default Notice”), shall cure the default set forth in said Default Notice within the cure period, which is ninety (90) calendar days for non-monetary defaults and thirty (30) calendar days for monetary defaults. Depending upon the nature of the default, the City shall declare a breach and issue the appropriate Default Notice for the Developer's failure to comply with any term or condition set forth herein. Should the Developer fail to cure a monetary default before the expiration of the cure period, as the City in its reasonable discretion may determine, the City shall have the right to declare, immediately due and payable, the loan amount. Should

the Developer fail to cure a non-monetary default, the City, in its reasonable discretion, may suspend its obligations under this Amendment until the non-monetary default has been cured.

- i. Entire Agreement; Amendment; Authority — The P3 Agreement and this Amendment constitute entire agreement between these parties as to the subject matter referenced herein, without regard to any prior agreements, understandings or undertakings (whether oral, written, electronic or otherwise), and no amendment may be made to this Amendment except with the prior written consent of all parties. The parties, and each person executing this Amendment on behalf thereof, represent and warrant that they have the full right and authority to enter into this Amendment, which is binding, and to sign on behalf of the party indicated, and are acting on behalf of themselves, their constituent members and the successors and assigns of each of them.
- m. Exhibits – Exhibits A through H are attached hereto and incorporated herein by reference.
- n. Further Action —The parties acknowledge that the terms of the Project, Additional Project and the Local Incentives and other assistance described in the P3 Agreement and this Amendment are subject to further actions legally necessary under North Carolina law to implement the P3 Agreement and this Amendment in a lawful manner. The parties agree that if the P3 Agreement or the Amendment are challenged in a court of law, they shall cooperate in defense of the P3 Agreement and this Amendment.
- o. Hiring Practices - The Developer is committed to hiring, where possible, local contractors, including minority and women contractors, and for employment purposes local residents from the Winston-Salem and Forsyth County area. The Developer shall post job vacancies related to the Additional Project with the North Carolina Employment Security Commission, the Piedmont Triad Regional Council of Governments, and the Winston-Salem Urban League until February 17, 2018 or longer if otherwise required by law. The Developer will utilize the State of North Carolina Office for Historically Underutilized Business database (<https://www.ips.state.nc.us/IPS/vendor/SearchVendor.aspx?hobtain>) or other local resources such as the City of Winston-Salem M/WBE Program to identify Winston-Salem/Forsyth County based subcontractors and share the same with the general contractor selected for the Additional Project and establish a reasonable level of participation for Winston-Salem/Forsyth County based subcontractors including minority and women-owned businesses. The Developer must require the general contractor to demonstrate good faith efforts to utilize Winston-Salem/Forsyth County based subcontractors and achieve the level of participation identified by the Developer. The Developer will provide to the Development Director quarterly reports using the form attached as Exhibit H on all contracting activity. A Winston-Salem/Forsyth County based subcontractor is a person or entity legally authorized to engage in the sale or provision of goods, services



construction or repair work procured in the state of North Carolina and who certifies to the City that it has maintained a physical place of business in the Winston-Salem/Forsyth County area since July 1, 2015, as determined in the sole discretion of the City with at least one employee for whom the subcontractor has paid payroll taxes in North Carolina.

p. Hold Harmless - The Developer and City shall operate as independent contractors, and the City shall not be responsible for any acts or omissions of the Developer or its General Contractor, subcontractors, agents or the employees of the Developer or General Contractor. The Developer agrees to hold the City harmless from and against any claims, expenses (including attorney’s fees), costs or liability for acts or omissions of the Developer, General Contractor, subcontractors, agents, employees and officers of the Developer and General Contractor.

q. Notice:

Notices hereunder shall be deemed to be given if in writing and when (a) personally delivered with written acknowledgement of delivery from the person receiving such notice; or (b) one business day after being deposited with an overnight commercial courier (such as, but not limited to, Federal Express with signature release required), at the following addresses:

For notice to the CITY:

Lee Garrity  
City Manager, City of Winston-Salem  
101 N. Main Street  
Winston-Salem, NC 27101  
Tel. No. 336. 734-1301

WITH COPY TO:

Angela I. Carmon  
City Attorney  
101 N. Main Street, Suite 132  
Winston-Salem, NC 27101  
Tel. No. 336. 747-7404

For notice to DEVELOPER:

Robert Leak  
WPDA, Inc.  
1080 West Fourth Street,  
Winston-Salem, N.C. 27101

WITH COPY TO:

Steve Berlin, Esq.

Kilpatrick Townsend & Stockton LLP  
1001 West Fourth Street  
Winston-Salem, NC 27101-2400

- r. Relationship of Entities — Nothing contained herein will be construed as establishing an employment relationship, partnership, joint venture, or agency agreement among the Parties.
- s. Severability — If any court of competent jurisdiction holds any provision of this Amendment invalid or unenforceable, then (a) such holding shall not invalidate or render unenforceable any other provision of this Amendment, unless such provision is contingent on the invalidated provision; and (b) the remaining terms hereof shall, in such event, constitute the parties' entire agreement.
- t. Statutory Authority. - N.C.G.S. 143-128.1C authorizes the execution of this Amendment by the City upon approval of the City Council following a public hearing. The resolution of the City Council is attached hereto and incorporated herein as Exhibit \_\_\_\_\_.
- u. Termination - Termination of the P3 Agreement and Amendment by the City may occur for reasons described herein or in the attachments hereto. The P3 Agreement and Amendment shall also terminate January 1, 2030.
- v. Waiver of Default - Failure of a party to this Amendment to exercise any right, remedy, power or privilege hereunder shall not operate as a waiver of any current or future default. Further, a waiver of one provision of this Amendment is not a waiver of all or future provisions of the P3 Agreement or this Amendment.
- w. Suspension and Debarment. Developer hereby certifies that neither it, nor its General Contractor, agents or subcontractors: (1) are presently debarred, suspended, proposed for suspension or debarment from contracting by any Federal or State Department or Agency, or (2) have been declared ineligible or voluntarily excluded from contracting by or with any Federal or State Department or Agency. Any contract entered into with a contractor or subcontractor that has been debarred or suspended, declared ineligible or voluntarily excluded from contracting with or by any Federal or State Department or Agency may be terminated at the sole discretion of the City.
- x. E-Verify. Developer shall comply with the requirements of Article 2 of Chapter 64 of the North Carolina General Statutes. Further, if the Developer uses a General Contractor and said general contractor uses a subcontractor(s), the Developer shall require the General Contractor and the subcontractor(s) to comply with the requirements of Article 2 of Chapter 64 of the North Carolina General Statutes.
- y. Iran Divestment Act. Developer hereby certifies that it is not on the North Carolina State Treasurer's list of persons engaging in business activities in Iran, prepared

pursuant to NCGS §147-86.58, nor will Developer utilize on the P3 Agreement or this Amendment any general contractor or subcontractor on such list.

- z. Public Records and Confidential Information. All non-confidential information and documents provided by the Developer to the City shall be treated as a public record under N.C.G.S. 132-1 et. seq. All information or documents provided by the Developer to the City and marked as “confidential” or with a similar designation under N.C.G.S. 132-1.2 will be treated by the City as confidential and will not be disclosed to any person without the prior written consent of the Company, if it meets the criteria outlined in N.C.G.S. 132-1.2 (1)(a through d). The Company agrees to indemnify and hold harmless the City, its officers, employees, elected officials and agents from all costs, damages, and expenses incurred in connection with refusing to disclose any material that the Developer has designated as confidential pursuant to N.C.G.S. 132-1.2.
- aa. Divestment from Companies that Boycott Israel. Developer hereby certifies that it is not on the North Carolina State Treasurer’s list of companies engaged in a boycott of Israel in violation of NCGS 147-86.80 et. seq. and that it will not utilize on the P3 Agreement or this Amendment any subcontractor on said list.
- bb. Ethics Policy. The Contractor hereby acknowledges that he has reviewed and agrees to abide by the City’s Ethics Policy located on the City’s website – [www.cityofws.org](http://www.cityofws.org) – and whose specific address is: <http://wshome.cityofws.org/Portals/1/pdf/HR/Ethics%20Policy%20Revised%20May%2019%202014-Whistleblower%20revision.pdf> (right click on the link).
- cc. Except as amended herein, the original P3 Agreement remains in full force at effect.

IN WITNESS WHEREOF, the parties have caused this Amendment to be executed effective as of the date first written above.

WPDA, INC.

ATTEST:

\_\_\_\_\_  
Secretary (SEAL)

By: \_\_\_\_\_ (SEAL)  
President

CITY OF WINSTON-SALEM

ATTEST:

\_\_\_\_\_  
Secretary (SEAL)

By: \_\_\_\_\_ (SEAL)  
City Manager

Approved as to form and legality.

This the \_\_\_\_\_ day of \_\_\_\_\_,  
2018

This instrument has been preaudited in the  
Manner required by the Local Government  
Budget and Fiscal Control Act.

This the \_\_\_\_\_ day of \_\_\_\_\_, 2018.

\_\_\_\_\_  
Angela I. Carmon, City Attorney

\_\_\_\_\_  
Lisa Saunders, Chief Financial Officer

DRAFT

**EXHIBIT A-  
MARCH 28, 2016 RESOLUTION**

DRAFT

**EXHIBIT B**  
**COPY OF NOTICE OF REQUEST FOR QUALIFICATIONS**

DRAFT

**EXHIBIT C  
COPY OF DEVELOPER'S RESPONSE**

DRAFT

**EXHIBIT D**  
**June 20, 2016 RESOLUTION**

DRAFT



**EXHIBIT E**  
**WINSTON-SALEM CITY COUNCIL AUGUST 15, 2016**  
**P3 RESOLUTION**

DRAFT

**EXHIBIT F**  
**P3 AGREEMENT EXECUTED OCTOBER 27, 2016**

DRAFT

**EXHIBIT G**  
**AUGUST\_20, 2018 RESOLUTION**

DRAFT

**EXHIBIT H  
QUARTERLY REPORT FORM**

DRAFT