



CITY OF HENDERSONVILLE
CITY COUNCIL SPECIAL MEETING
Whitmire Activity Center, 310 Lily Pond Drive, Hendersonville, NC 28739
Thursday, December 14, 2023 – 11:00 AM

AGENDA

1. **CALL TO ORDER**
2. **CONSIDERATION OF AGENDA**
3. **UNFINISHED BUSINESS**
 - A. 7th Avenue Streetscape Guaranteed Maximum Price (GMP) – *Brendan Shanahan, City Engineer*
 - B. Approval of Tenant In Common Agreement with Hendersonville Connections Center, Inc. – *Angie Beeker, City Attorney*
4. **ADJOURN**

The City of Hendersonville is committed to providing accessible facilities, programs and services for all people in compliance with the Americans with Disabilities Act (ADA). Should you need assistance or an accommodation for this meeting please contact the City Clerk no later than 24 hours prior to the meeting at 697-3005.

Resolution #R-XXXXX

RESOLUTION BY THE CITY OF HENDERSONVILLE CITY COUNCIL AUTHORIZING THE CITY MANAGER TO EXECUTE A CONTRACT AMENDMENT WITH HARPER GENERAL CONTRACTORS FOR A GUARANTEED MAXIMUM PRICE (GMP) NOT TO EXCEED \$_____ AND AUTHORIZE THE CITY MANAGER TO MAKE CHANGE ORDERS FOR THE 7TH AVENUE STREETScape PROJECT (#16030)

WHEREAS, the North Carolina General Assembly allows for construction management at risk contracts under G.S. 143-64.31; and

WHEREAS, the City of Hendersonville entered into a contract with Harper General Contractors. For construction manager at risk services for the 7th Avenue Streetscape Project (#16030); and

WHEREAS, Harper General Contractors have proposed a contract amendment to establish the guaranteed maximum price (GMP) for the project; and

WHEREAS, subsequent change orders made to the project after award of the GMP are not subject to competitive bidding requirements as the original contract GMP was competitively bid and there is no limitation on the dollar amount of change order work under G.S. 143-129(e)(4); and

NOW THEREFORE, BE IT RESOLVED by the City Council of the City of Hendersonville, North Carolina that

1. The City Manager is authorized to execute the guaranteed maximum price contract amendment for the 7th Avenue Streetscape Project (#16030) in an amount not to exceed \$_____
2. The City Manager is authorized to approve any changes orders that include deductive changes, and any change orders that do not require a project budget ordinance amendment.

Adopted by the City Council of the City of Hendersonville, North Carolina on this 7th day of December, 2023.

Attest:

Barbara G. Volk, Mayor, City of Hendersonville

Jill Murray, City Clerk

Approved as to form:

Angela S. Beeker, City Attorney



CITY OF HENDERSONVILLE AGENDA ITEM SUMMARY

SUBMITTER: John Connet, City Manager **MEETING DATE:** 12/14/2023
AGENDA SECTION: UNFINISHED BUSINESS **DEPARTMENT:** Legal
TITLE OF ITEM: Approval of Tenant In Common Agreement with Hendersonville Connections Center, Inc. – Angie Beeker, *City Attorney*

SUGGESTED MOTION(S):

I move that City Council adopt the resolution approving the Tenant In Common Agreement with Hendersonville Connections Center, Inc. for the purchase of the Opportunity House.

SUMMARY:

City staff has been working with the Hendersonville Connection Center to purchase The Opportunity House. Staff recommends loaning the Connection Center \$680,000 to purchase the property and move forward with the development of design drawings, business plan and capital campaign.

BUDGET IMPACT: \$680,000

Is this expenditure approved in the current fiscal year budget? Yes

If no, describe how it will be funded. EnterTextHere

ATTACHMENTS:

Propose Resolution

Tenant In Common Agreement

Resolution # __-____

RESOLUTION BY THE CITY OF HENDERSONVILLE CITY COUNCIL TO APPROVE TENANT IN COMMON AGREEMENT WITH HENDERSONVILLE CONNECTIONS CENTER, INC.

WHEREAS, Hendersonville Connections Center, Inc., has identified real property to house a crisis and day center in the City of Hendersonville, said property being the former Opportunity House property, located at 1411 Asheville Highway, Hendersonville, NC, and is more particularly described in that deed recorded in Deed Book 619 at Page 53 of the Henderson County Registry, also identified as Tax PIN 956952448; and

WHEREAS, the City of Hendersonville is desirous of contracting with the Hendersonville Connections Center, Inc., for the purpose of purchasing an ownership interest in the real property that will house a crisis and day center in the City of Hendersonville; and

WHEREAS, a crisis and day center will help to meet the immediate and short term needs of residents of the City of Hendersonville and the greater Hendersonville area who are in crisis through partnership with onsite community partners that can provide needed services to the clients of the center, with an eye towards permanent, safe and stable long term housing, health care, mental health care, and other health and human services care as needed;

NOW THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF HENDERSONVILLE, NORTH CAROLINA that:

1. The Tenant-in-Common Agreement (“Agreement”) between the City of Hendersonville and Hendersonville Connections Center, Inc., a North Carolina nonprofit corporation, is approved as presented.
2. The City Manager is authorized to execute the Agreement with such changes as he deems appropriate to carry out the intent of the Agreement, in consultation with the City Attorney.
3. The City Manager, City Finance Director, and City Attorney are authorized to take such further actions as may be needed to carry out the terms of the Agreement, including closing on the purchase of the City’s interest in the real property.

Adopted by the City Council of the City of Hendersonville, North Carolina on this _____ day of _____, 20_____.

Attest:

Barbara G. Volk, Mayor, City of Hendersonville

Jill Murray, City Clerk

Approved As to Form: _____, **Angela Beeker, City Attorney**

STATE OF NORTH CAROLINA

TENANT-IN-COMMON AGREEMENT

COUNTY OF HENDERSON

THIS TENANT-IN-COMMON AGREEMENT (“Agreement”) made and entered into this the ___ day of December, 2023, by and between HENDERSONVILLE CONNECTIONS CENTER, INC. (“HCC”), a North Carolina nonprofit corporation with 501(c)(3) status, and THE CITY OF HENDERSONVILLE (“City”), a municipal government organized and existing under the laws of the State of North Carolina;

WITNESSETH:

WHEREAS, Opportunity House, Inc. f/k/a The Opportunity Group (“OG”) is a North Carolina nonprofit corporation subject to a dissolution and receivership action pending in file number 22 CVS 1146, Henderson County Superior Court (“Receivership”), with John Noor serving as the Court appointed Receiver therein;

WHEREAS, OG’s primary asset is the 2.01 acre parcel of real property (“Property”), containing a 19,900 square foot commercial building (“Building”), located at 1411 Asheville Highway in Hendersonville, North Carolina as described in the deed recorded in Book 619 at Page 53, Henderson County Registry, and also identified as Tax PIN 9569525448;

WHEREAS, the parties hereto desire to acquire title to the Property as tenants in common under this Agreement, and enter into certain agreements with each other concerning the acquisition and subsequent joint ownership of the Property;

WHEREAS, the Property is in poor condition and subject to being sold by court order to make assets to pay creditors’ claims in the Receivership, though it is otherwise subject to being distributed as an asset of the Receivership under a plan of distribution (“Plan”) pursuant to NCGS § 55A-14-03, and as approved by the Court with jurisdiction over the Receivership;

WHEREAS, the parties agree that HCC is a qualified and appropriate charitable organization to receive the equity in the Property under a Plan, and that the City has the ability to provide the funds necessary to the Receivership to enable the Property to be conveyed free of any creditors’ claims, and the funds necessary to upfit and should the Court approve a Plan;

WHEREAS, HCC and the City through this Agreement desire to facilitate the distribution and conveyance of the equity in the Property to HCC from the Receivership in a manner that resolves the outstanding creditors’ claims; secures to the City an ownership in the Property proportionate to the financial contributions made to enable the distribution and a lienholder interest; and provides such other terms as are necessary to govern the relations of the parties as to the acquisition, ownership, maintenance, management, and any disposition of the Property;

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein HCC and the City agree as follows:

1. RECITALS: The parties agree to and adopt the recitals set forth above.
2. ACQUISITION OF THE PROPERTY. The parties shall jointly acquire the Property as follows:
 - a. The City shall pay to the Receiver an amount sufficient to cover the creditors' claims, the expenses of the Receivership, and any other costs as determined by the Receiver to relieve the Property from all liens presently encumbering the Property, together with all sums required by the Court to be paid with respect to the Property.
 - b. The parties shall take title to the Property as: "HENDERSONVILLE CONNECTIONS CENTER, a North Carolina nonprofit corporation and the CITY OF HENDERSONVILLE, as Tenants-in-Common with each other," each tenant in common's proportionate share to be determined as follows:
 - i. The City's initial ownership interest percentage shall be determined as follows:

 (Total amount paid to the Receiver) + (Total amount ordered by the Court to be paid, if any, associated with the termination of the Receivership and transfer of title to the Property)/Fair Market Value of the Property.

 The fair market value of the property is: \$1,890,000.

 $(\$505,000)/(\$1,890,000) = 27\%$ interest to be purchased by the City.
 - ii. Immediately following closing on the conveyance of the 27% interest to the City, the City shall purchase an additional 9% percentage interest for \$175,000.
 - iii. HCC's interest shall be determined as follows:

 100% minus the City's total ownership interest percentage (calculated pursuant to subparagraph 2.b.i. and 2.b.ii. above).
3. PLEDGE OF HCC INTEREST. HCC hereby pledges all of its ownership interest in the Property ("HCC Interest") to the City as a guaranty of HCC's obligations under this Agreement. For all intents and purposes, this Tenants in Common Agreement shall serve as a security agreement, outlining all of HCC's obligations secured by a deed of trust pledging the HCC Interest ("DOT") as security. Said DOT shall also secure future advances, including construction loan advances, evidenced by one or more promissory notes, up to a maximum amount of _____. Said DOT shall be recorded at the time of conveyance of title from OG to HCC and the City.
4. Use and Occupancy. HCC shall operate a connections center on the Property to provide support services to the unhoused population and other persons in crisis within the City of

Hendersonville and Henderson County. HCC shall have the right to occupy 100% of the Property for the purpose of operating the connections center, and for no other purpose. In performing its obligation to operate a connections center on the Property, HCC shall have the right to lease such portions of the Property as HCC deems appropriate to tenants so long as such tenants are (1) nonprofit corporations organized as 501(c)(3) entities under the Internal Revenue Code; and (2) providing services at the connection center exclusively to clients of, and in direct support of, the connections center. Any other occupation or use of the Property shall require the consent of the City. Any leasing of the property shall require a written lease with the tenant. Joinder by the City in the lease shall not be required; however, HCC shall provide a copy of all leases and any amendments thereto to the City within thirty (30) days of their being signed by both parties thereto.

5. Rent. A fair market value rent shall be determined for each tenant occupying the Property. The City and HCC shall be entitled to receive such fair market value rent from each tenant in the same proportions as their respective ownership interests. Notwithstanding the right to receive such rents, the City and/or HCC may elect to waive (in whole or in part) their respective proportionate share of the rent in favor of any or all tenants.

6. Management and Maintenance of the Property. HCC shall have the obligation to repair and maintain the Property, including all improvements located thereon. HCC shall establish a property maintenance and repair fund for the Property from and after its occupancy of the Property. To the extent not waived by the City and HCC, the City and HCC shall direct their proportionate shares of the rents paid by tenants into the property maintenance and repair fund. HCC shall employ a third-party property manager to manage the leasing of the Property to tenants and the routine maintenance and repairs of the Property for the occupants and tenants of the Building including than HCC. The expense of the of the third-party manager shall be paid from the property maintenance and repair fund. HCC shall also be permitted to use the property maintenance fund to pay the costs of such routine maintenance and repairs of the Property. For any maintenance or repairs that are not routine, or otherwise in excess of \$10,000, HCC shall request approval for the expense from the City, which approval shall not be unreasonably withheld. The City shall be entitled to view, audit and copy all contracts, receipts, accounting records and books, and all other documentation associated with the property maintenance and repair fund at any time. In addition, HCC shall annually, within 30 days following the anniversary date of this Agreement, provide an accounting of the expenditures and uses of funds from the property maintenance and repair fund to the City.

7. Modifications to and Improvements of the Property. HCC shall have the right to modify and improve the Property at its own expense, provided however that any modification or improvement, other than upfits or modifications to tenant spaces or HCC offices within the Property, shall require the approval and consent of the City, such approval and consent to not be unreasonably withheld. HCC shall indemnify and hold the City from any and all claims, costs, and expenses whatsoever, including any attorneys' fees or litigation expenses incurred, associated in any manner with such modifications or improvements. Except as otherwise agreed to by the parties in writing and evidenced in a duly recorded deed of conveyance, any improvement or modification of the Property shall not affect the ownership interests of the parties hereto, but shall be deemed to benefit each tenant in common in direct proportion to their ownership interest.

8. Insurance. HCC shall at all times maintain a standard property owners' policy of insurance with a minimum liability coverage of \$2,000,000, and providing fire and hazard insurance coverages in an amount equal to the replacement value of the building and other improvements on the Property, now or hereafter existing, as such may be modified or improved. Such policy shall name both HCC and the City as insureds under the policy. The proceeds of the fire and hazard coverages under the policy shall first be used to repair or rebuild the improvements on the property or, at the election of the City, to repay to the City any amounts owed to the City for funds advanced to HCC and secured by the DOT. Additionally, HCC shall at all times maintain a general liability insurance policy covering its own operations and actions in an amount of at least \$2,000,000, which shall name the City as an additional insured.

9. Indemnification. HCC shall defend, indemnify, and hold harmless the City and the City's respective officers, employees, and agents, from and against any and all liability, loss, damage, cost, or expenses (including, without limitation attorneys' fees), incurred, arising out of or relating to any allegations, proceedings, actions, claims, disputes, or otherwise asserted by a third party with respect to, arising out of, or in connection with HCC's use and/or occupancy of the Property.

10. Other Encumbrances. Except for the tenant leases permitted by this Agreement and the DOT, neither HCC nor the City shall create any encumbrances or liens on the Property, except that statutory mechanics liens by third party contractors hired by HCC to perform its obligation to maintain the Property or otherwise modify and improve the Property as allowed by this Agreement, are expressly permitted. Neither HCC nor the City shall pledge their interest as security for any other obligations or loans without the express written consent of the other.

11. Expiration. This Agreement continue in place for so long as HCC and the City are tenants in common with respect to the Property.

12. Amendment and Termination. This Agreement shall be amended or terminated only by written agreement signed by both parties with the same formality of this Agreement. In the event the Agreement is terminated, a Notice of Termination signed and acknowledged by each party shall be recorded in the Office of the Register of Deeds for Henderson County, North Carolina.

13. Sale of Property. Sale of the Property in its entirety shall require the consent of both the City and HCC. In the event that the HCC and the City agree to sell the Property in whole, the proceeds from the sale of the Property shall be divided by HCC and the City according to their respective ownership interests in the Property. In the event HCC or the City wishes to sell or convey their individual interests in the Property in whole or in part, the selling party shall first offer to sell such interest to the other tenant in common at fair market value, less any sums owed to such other tenant in common by the selling party under this Agreement and under any promissory note secured by the DOT (if HCC is the selling party). In the event of the sale of the Property in whole, any funds remaining in the property maintenance and repair fund shall be first used to pay any costs of selling the Property, and the remainder divided by HCC and the City in such proportionate amounts as their ownership interests.

14. Default.

- a. The happening of one or more of the following events (“Event of Default”) shall constitute a breach of this Agreement:
 - i. HCC abandons or vacates the Property;
 - ii. Either HCC or the City fails to comply with any obligation imposed under this Agreement within thirty (30) days after written notice of such breach;
 - iii. Either HCC or the City is adjudicated bankruptcy;
 - iv. Either HCC or the City, either voluntarily or involuntarily, takes advantage of any debt or relief proceedings under any present or future law; or
 - v. Either HCC or the City makes an assignment for benefit of creditors.
- b. Upon the occurrence of an Event of Default, the non-defaulting party shall provide written notice to the defaulting party setting forth the basis for the default, and providing a reasonable time for the defaulting party to cure.
- c. In the event the HCC fails to perform its obligations under this Agreement, the City shall have the right to foreclose the Deed of Trust securing its obligations under this Agreement, in addition to any other remedies provided at law or in equity.

15. Partition. To the fullest extent permitted by law, HCC and the City waive the right to partition of the Property for so long as this Agreement is in effect. Subsequent to any termination or expiration of this Agreement, in the event of partition, the parties agree that a partition sale is necessary and the parties are entitled to receive from a partition sale proceeds in proportions to the their title interest irrespective of any claims for credits owed to either party for carrying costs, improvements, or betterments. Nothing herein shall preclude either the City or HCC from purchasing the Property or the other’s interest in and to the Property at such partition sale. This provision shall survive the termination of this Agreement.

16. No Partnership, Joint Venture or Agency. The City and HCC shall each hold their respective interests in and to the Property as tenants in common. Nothing contained herein, nor any of the acts of the parties hereto, shall be construed to create a partnership or joint venture between HCC and the City. Neither the City nor HCC is authorized to act as agent for, to act on behalf of, or to do any act that will bind the other, or to incur any obligations with respect to the Property, except to the extent expressly and specifically stated in this Agreement.

17. Income and Liabilities. Except as otherwise stated in this Agreement, the City and HCC shall each be entitled to and be bound by all benefits and obligations of ownership of the Property.

18. Third Party Beneficiaries. There shall be no intended nor incidental third party beneficiaries to this Agreement.

19. Memorandum of Agreement. A memorandum of this Agreement shall be executed by the parties and shall be recorded in the Office of the Register of Deeds for Henderson County, North Carolina at the same time the Property is conveyed to the parties.

20. Governing Law. This Agreement shall be governed and construed exclusively in accordance with the laws of the State of North Carolina. Any action related to this Agreement shall be commenced and prosecuted exclusively in the courts of Henderson County, North Carolina.

21. Severability. If any of the provisions of this Agreement is determined to be illegal, invalid, or unenforceable, the validity, legality, and enforceability of the remaining provisions of this Agreement shall not be affected or impaired thereby.

22. Successors and Assigns. For so long as this Agreement is in effect, the provisions herein shall be deemed covenants, restrictions and obligations that run with the land, and which shall be binding upon and inure to the benefit of the parties and their respective successors and assigns. Provided, no party will assign its rights or delegate its responsibilities under this Agreement without the express prior written consent of the other party.

23. Waiver. Failure of any party hereto to enforce, or to insist upon the strict performance of, the terms of this Agreement shall be deemed a waiver of any obligation hereunder of the other party, unless expressly waived in a writing signed by the waiving party.

24. Notice. Notice a party under this Agreement shall be effective only if such notice is in writing, addressed to the City Manager (for the City) or the Executive Director (for HCC), and delivered in person, by mail (regular or certified), or by commercial carrier. Such notice shall be effective upon receipt if delivery is in person, or upon delivery to the primary business address of the receiving party if by mail or by commercial carrier.

25. Attorneys' Fees. In the event that either party must utilize legal representation to enforce their rights or obligations under this Agreement, the prevailing party shall recover reasonable attorneys' fees, and expenses related thereto, from the non-prevailing party.

26. Entire Agreement. This Agreement, including any agreements referenced herein, contains the entire and final understanding among the parties with respect to all matters contained herein and there are no agreements (either oral or written), understandings, warranties, or representations hereunder among the parties except as set forth in this Agreement.

IN TESTIMONY WHEREOF, the parties hereto have caused this Release to be executed this the day and year first set forth above.

HCC: HENDERSONVILLE CONNECTIONS CENTER

By: _____

CITY: CITY OF HENDERSONVILLE

By: _____

This Agreement has been pre-audited in that manner required by the North Carolina Local Budget and Fiscal Control Act.

John Buchanan, Finance Director

DRAFT