

**EVERETT SCHOOL DISTRICT NO. 2**

**RESOLUTION NO. 1058**

**Surplus Property and Incidental Use Agreement**

A Resolution of the Board of Directors (the "Board") of Everett School District No. 2 (the "School District") declaring a portion of real property located at 1304 80th Street SW and 1220 80th Street SW, both in the City of Everett, County of Snohomish, Washington 98204, which is legally described on Exhibit A hereto and depicted on Exhibit B hereto (the "Property"), as temporarily surplus during periods not needed for use in connection with School District purposes, and authorizing the Superintendent or his designee to execute an incidental use agreement permitting Durham School Services, L.P. ("Durham")'s use of the Property.

**WHEREAS**, the Board is authorized by RCW 28A.335.040 to permit the rental, lease, or occasional use of all or any portion of surplus School District real property to any person, corporation, or governmental entity for profit or nonprofit, commercial or noncommercial purposes, subject to certain limitations and requirements; and

**WHEREAS**, the Board is authorized by RCW 28A.335.060 to permit school district property to be jointly used by a school district for school purposes and by any combination of persons, corporations or government entities for purposes other than common school purposes, subject to certain limitations and requirements; and

**WHEREAS**, the School District has previously adopted Policy No. 6112 regarding the rental, lease, or occasional use of surplus real property; and

**WHEREAS**, the Board has determined that during certain periods for the duration of the School District's contract with Durham for student transportation services (the "Contract"), a portion of the Property (the "Premises") are not currently needed for school purposes; and

**WHEREAS**, Durham's use of the Premises under the Contract precludes the safe and proper use of the Property by parties other than Durham during such periods; and

**WHEREAS**, Durham desires to use the Premises for purposes other than common school purposes; and

**WHEREAS**, the Property otherwise will continue to be used for school purposes; and

**WHEREAS**, Durham's use of the Premises is to be for a lawful purpose, in compliance with existing local zoning ordinances applicable to the Premises, and undertaken so as not to interfere with the School District's continued use for school purposes or of other portions of the Property or the Premises during periods other than the periods of Durham's use with the School District's educational program and related activities; and

**WHEREAS**, representatives of Durham and the School District have negotiated an Incidental Use Agreement, attached hereto as Exhibit C (the "Agreement") setting forth proposed terms and conditions under which the School District would allow incidental use of the Premises by Durham for the duration of Durham's contract with the School District for student transportation services; and

**WHEREAS**, the Board has concluded that it is in the School District's best interest to permit Durham to so use the Premises for non-school use;

NOW, THEREFORE, be it resolved that:

(a) the Board declare, and hereby declares, that to the extent not otherwise needed for Durham to satisfy its contractual obligations to the School District under the Contract, and only for the duration of the Contract, the portion of the Premises not so needed is temporarily surplus during periods not needed by the School District for school purposes; and

(b) the Board declare, and declares, that competing proposals shall not be requested or considered because Durham's use of the Premises under the Contract precludes the safe and proper use of the Property by parties other than Durham during such periods; and

(c) the Board authorize and direct, and hereby authorizes and directs, the Superintendent of the School District (or his designee) to:

(i) execute the Agreement on behalf of the School District so as to permit the incidental use of the Premises in accordance with Chapter 28A.335 RCW and Policy No. 6112, and other applicable laws or School District policies;

(ii) deposit compensation collected from Durham for Durham's use of the Premises into the appropriate School District account(s);

(iii) collect any appropriate leasehold excise taxes and remit them to the Department of Revenue; and

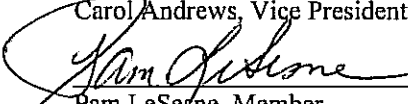
(iv) execute, acknowledge and deliver all necessary documents, and do any and all other things necessary and advisable to be done to accomplish the foregoing incidental use of the Premises, all in accordance with Chapter 28A.335 RCW, Policy No. 6112, and other applicable laws or School District policies.

**ADOPTED** this 22 day of June, 2013, and authenticated by the signatures affixed below:


**BOARD OF DIRECTORS:**

  
Jeff Russell, President

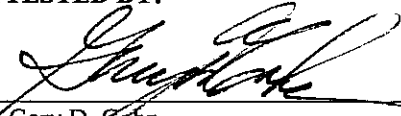
  
Carol Andrews, Vice President

  
Pam LeSesne, Member

Jessica Olson, Member

  
Ed Petersen, Member

**ATTESTED BY:**

  
Dr. Gary D. Cohn  
Superintendent & Secretary to the Board of Directors  
Everett School District No. 2

**EXHIBIT A**  
**Description of Premises**

That portion of Lot 19, Beverly Berry Tracts, Division No.2, according to the plat thereof recorded in Volume 10 of Plats, page 20, records of Snohomish County, Washington; lying Northerly of State Highway SR 526; AND EXCEPT the North 30 feet thereof as condemned by the State of Washington under Snohomish County Superior Court Cause No. 92881, AND;

the following described real estate in the County of Snohomish, State of Washington, together with all after acquired title of the grantor(s) therein:

**PARCEL A:**

Lot 18, Beverly Berry Tracts, Division No.2, according to the plat thereof recorded in Volume 10 of Plats, page 20, records of the Auditor of the County of Snohomish, State of Washington.

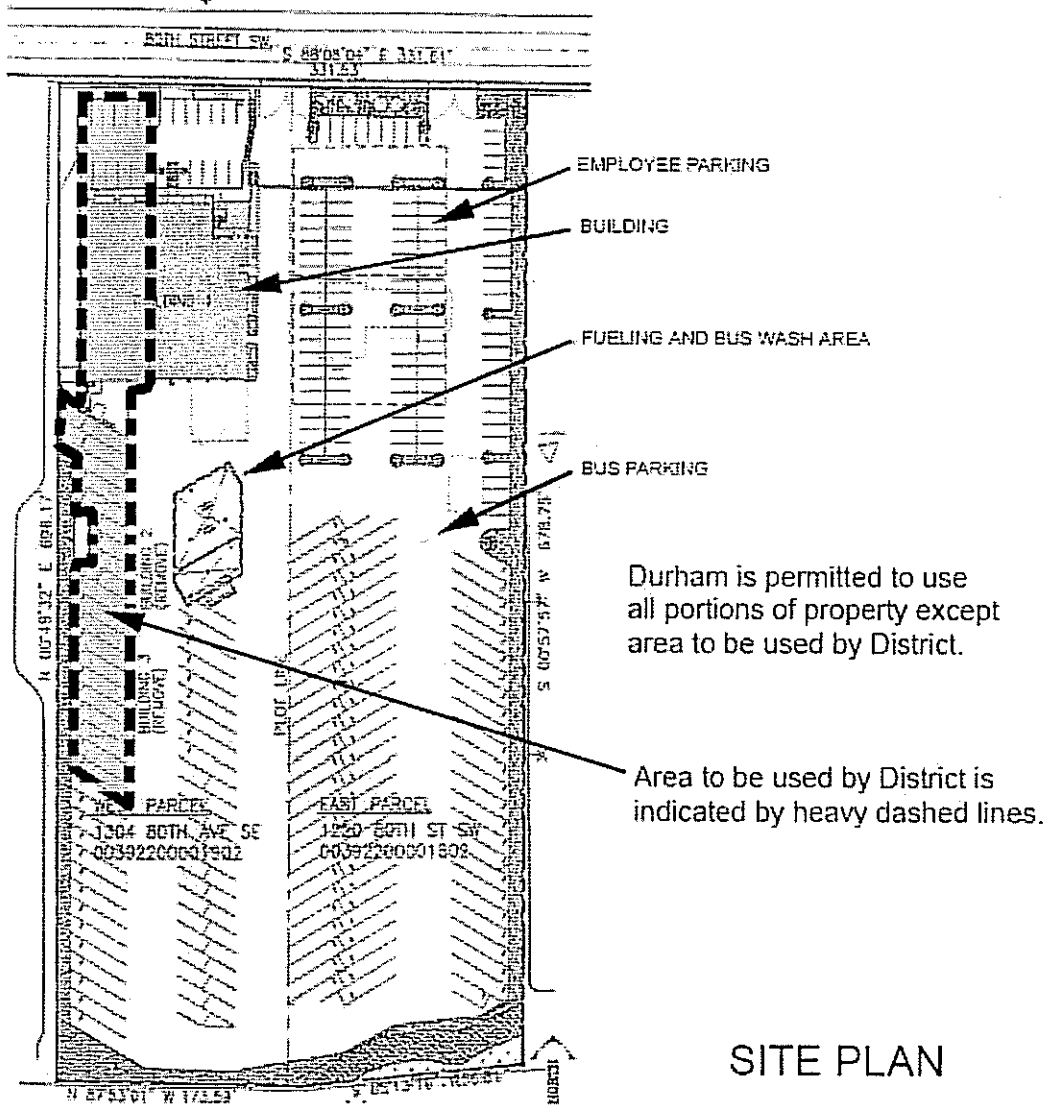
EXCEPT the south 630 Feet thereof.

AND EXCEPT that portion deeded to the State of Washington under Auditor's File No. 2008793.

**PARCEL B:**

That portion, if any, of the South 630 feet of Lot 18, Beverly Berry Tracts, Division No. 2, according to the plat there of recorded in Volume 10 of Plats, page 20, records of the Auditor of the County of Snohomish, State of Washington, lying North of State Route SR526, as conveyed under Auditor's File No. 2008793.

**EXHIBIT B**  
**Transportation Facility**  
**(Portion of District's Facility to be Used by Durham)**



## EXHIBIT C

### Board of Directors

Jeff Russell  
*President*

Carol Andrews  
*Vice-President*

Pam LeSesne  
*Legislative Representative*

Jessica Olson

Ed Petersen



Dr. Gary Cohn  
*Superintendent*

Mr. Terry Edwards  
*Associate Superintendent*

Dr. Molly Ringo  
*Assistant Superintendent*

Dr. Peter Scott  
*Assistant Superintendent*

Dr. Joyce Stewart  
*Assistant Superintendent*

\_\_\_\_\_, 2013

Mr. Chuck Moore  
Vice President of Operations  
Durham School Services, West Area  
4300 Weaver Parkway  
Warrenville, Illinois 60555

**Re: Permission for Limited, Incidental, Non-school Use of School District Property**

Dear Mr. Moore:

This letter confirms our understanding regarding the incidental use of certain facilities of Everett School District No. 2 (the "District") by Durham School Services, L.P. ("Durham") for certain non-school purposes. If this letter correctly sets forth our agreement with respect to such use, please execute where indicated, and return one original to the undersigned.

Durham and the District are currently parties to a Transportation Agreement (as amended, renewed, or replaced, the "Transportation Agreement"), which commenced on August 1, 2012 and will expire on July 31, 2017, whereby Durham has agreed, among other things, to provide certain pupil transportation services to the District. The terms of this letter do not modify the Transportation Agreement, and in the event of any inconsistency, the terms of the Transportation agreement shall control.

Pursuant to the Transportation Agreement, Durham uses a portion of the District's storage and transportation facility located at 1304 & 1220 - 80<sup>th</sup> Street SW, Everett, Washington, 98203, more particularly described in Exhibit A, attached hereto (the "District's Facility"). The portion used by Durham is depicted on Exhibit B, attached hereto (the "Transportation Facility"; Durham acknowledges that the Transportation Facility does not include the area shaded in pink color on the Site Plan attached to this letter as Exhibit B).

In addition to Durham's uses of the Transportation Facility in connection with Durham's services under the Transportation Agreement, Durham desires and the District is willing to

permit Durham to use the Transportation Facility from time to time for non-school purposes that are outside the scope of the services contemplated under the Transportation Agreement (each an "Incidental Use").

The District has concluded that, as of the date of this letter, the property rights represented by this letter for Incidental Use of the Transportation Facility by Durham (but only such property rights, which are a smaller subset of the District's rights with respect to the District's Facility) are surplus to the District's needs. The District has also concluded that it is in the District's best interest to permit Durham to use the Transportation Facility for Incidental Use because such use will help Durham provide year-around employment opportunities for its workers, which should improve retention and foster a more consistent, experienced workforce providing services under the Transportation Agreement. In accordance with RCW 28A.335.050, and subject to the terms and conditions contained in this letter, the District is willing to permit the Incidental Use of the Transportation Facility by Durham, subject to and in accordance with the following terms and conditions:

1. **Grant of Permit.** Subject to the terms and conditions of this letter, effective the first day of the effective date of the Transportation Agreement, the District grants permission to Durham, without warranty, to use the Transportation Facility during the term of the Transportation Agreement, or if earlier, the date of termination of this letter, for Incidental Use when such use of the Transportation Facility is not needed to meet Durham's obligations to the District. Durham's use of the Transportation Facility for Incidental use is further subject to the following conditions (a) the use will in no way impair or interfere with Durham's obligations under the Transportation Agreement; (b) no Incidental Use will impair or interfere with the District's use of the Transportation Facility, as and when needed; and (c) the District may revoke Durham's right to use the Transportation Facility in the event the District, in its sole discretion, no longer deems the Transportation Facility to be surplus property as described in this letter. In the event the District concludes that Durham's use of the Transportation Facility for Incidental Use is impairing or interfering with Durham's obligations under the Transportation Agreement, in addition to the District's other rights under this letter, the District may require Durham, by written notice to Durham effective upon delivery, to reduce Durham's use of the Transportation Facility for Incidental Use to the extent necessary to permit Durham to fully perform its obligations under the Transportation Agreement without impairment or interference.
2. **Term.** Unless otherwise terminated pursuant to the terms hereof, the term of this letter shall run concurrently with the term of the Transportation Agreement, and this letter shall terminate upon the expiration or earlier termination of the Transportation Agreement.
3. **Rent; Leasehold Excise Tax; Records.**
  - (a) **Rent.** Durham shall pay to the District:
    - (i) For the first twelve (12) months of the permit, the sum of Six Hundred Thirty Four and no/100 Dollars (\$634.00) per month for the right to use the Transportation Facility for Incidental Use, plus any applicable leasehold excise tax; and

- (ii) Thereafter, for each consecutive twelve (12) months, Durham's rent, exclusive of any applicable leasehold excise tax shall be One Hundred Three percent (103%) of the amount due for the preceding twelve (12) months (all of the foregoing collectively referred to as the "Use Payments"). If the permit is effective for any partial twelve-month period, the sums payable shall be prorated appropriately. The rent amount is subject to renegotiation on a yearly basis if Durham's revenue for Incidental Use, as defined in Section 1 above, falls below \$100,000 for the preceding year.
- (b) **Additional Rent.** If, for any twelve (12) month period under Subsection 3(a) above (the "Applicable Period"), Durham's gross receipts for Incidental Use exceeds three percent (3.0%) of their gross receipts under the Transportation Agreement for such Applicable Period, Durham shall pay to the District, as additional rent under this letter, Two Hundred Fifty and no/100 Dollars (\$250.00) per month multiplied by one hundred three percent (103%) multiplied by the number of prior years the Incidental Use has occurred pursuant to this letter, plus any applicable leasehold excise tax for each additional whole or partial percentage point exceeding three percent (3.0%) for the Applicable Period. The additional rent amount is subject to renegotiation on a yearly basis if Durham's gross receipts under the Transportation Agreement decline from the previous year.
- (c) **Leasehold Excise Tax.** Durham shall have the right, at its sole cost and expense and by appropriate legal proceeding, to contest the validity of any leasehold excise tax Durham is required to pay with the applicable State taxing authority. In the event Durham elects to contest the validity of any leasehold excise tax, Durham shall make the tax payment to the District as required under letter, and Durham shall then seek reimbursement for such payment directly from the State taxing authority. In the event it is determined that Durham was not required to pay, or overpaid for, the leasehold excise tax, Durham shall look solely to the State taxing authority for reimbursement and the District shall have no liability for repayment of such taxes to Durham. In the event any leasehold excise tax payment is not made or collected at the time of the payment of the Use Payments, Durham shall be responsible for any fees or penalties incurred as a result of such nonpayment or noncollection.
- (d) **Payment.** Rent payment plus leasehold excise tax shall be due and payable annually within 30 days of receipt by Durham of an invoice from the District, which will be sent by the District on or about August 1<sup>st</sup> of each year, except the invoice for the period from August 1, 2012 through July 31, 2013 will be sent by the District as soon as practical after execution of this letter by Durham.
- (e) **Records.** During the term of this letter and for a period of two (2) years thereafter, Durham will keep all usual and proper records related to each Incidental Use under this letter. The District may, upon prior notice, inspect and audit any and all such records relating to any Incidental Use.

4. **Limitations on Use.** The Transportation Facility is school property of the District and the District may use the same for any purpose as fully as if the permit had not been given. Durham shall not erect any building or structures of any kind at the Transportation Facility, or use the Transportation Facility for any purpose other than as specified in paragraph 1 above. Durham shall comply with all laws and ordinances applicable to the Transportation Facility and Durham's use thereof, shall comply with the District's rules and regulations relating to the use of the Transportation Facility by Durham, and shall keep the Transportation Facility free from any and all liens which might arise as a result of Durham's use and/or occupancy of the Transportation Facility. Upon completion of each of Durham's uses of the Transportation Facility, Durham shall restore the Transportation Facility to the condition it existed prior to Durham's use.
5. **No Warranties.** Durham acknowledges that the District makes or gives no warranties or representations with respect to the Transportation Facility (including, but not limited to, the condition of or conditions upon the Transportation Facility) and, in all respects, Durham acknowledges that any and all actions it takes in furtherance of the rights, benefits and privileges granted to Durham under this letter are taken at Durham's sole risk and expense.
6. **Indemnity.** In consideration of the covenants, terms, and conditions contained in this letter, Durham hereby agrees that the District shall not be liable for any damage or injury suffered by Durham at the Transportation Facility or for any damage or injury to other property upon the Transportation Facility. Durham shall indemnify, save, and hold the District harmless from and against any and all claims, liabilities, costs, and expenses (including reasonable attorneys' fees) arising out of or relating to the use of the Transportation Facility by Durham or its employees, agents, contractors, or invitees or the exercise of Durham's rights under the permit. Notwithstanding the foregoing, Durham shall not be liable for any damage or injury suffered by the District at the Transportation Facility or for any damage or injury to other property of the District upon the Transportation Facility to the extent caused by or resulting from the negligence or other fault of the District or its agents, and the District waives, and shall hold Durham harmless from and against any and all such claims, liabilities, costs, and expenses (including reasonable attorneys' fees) to the extent caused by or resulting from the negligence or other fault of the District or its agents.
7. **Assignment.** Durham may not assign or otherwise transfer its right or obligations under this letter without the prior written approval of the District, which approval the District may withhold in its sole discretion.
8. **Termination.** The permit hereunder may be terminated by the District effective immediately upon written notice to Durham, delivered in person or by mail, if the District determines, in its reasonable discretion, that Durham's use of the Transportation Facility is in violation of any term of this letter.
9. **Right to Counsel.** Durham understands the terms of this letter and has been afforded the opportunity to discuss this letter with Durham's own attorney.



10. **No Partnership.** Nothing contained in this letter shall be deemed or construed by the parties hereto or by any third person to create the relationship of principal and agent, or of partnership, or of joint venture, or of any other association between the District and Durham.

11. **No Property Interest.** No interest in the Transportation Facility is conveyed or conferred to Durham by this letter, it being specifically understood that this letter does not create nor vest any interest in or title to the Transportation Facility in Durham.

Should you have any questions, please feel free to contact us.

Very truly yours,

Everett Public Schools

AGREED TO:

Durham School Services, L.P.  
By: Durham Holding II, L.L.C.,  
Its general partner

---

By:  
Its:

---

By:  
Its:

## **EXHIBIT A**

### **Legal Description of District's Facility**

That portion of Lot 19, Beverly Berry Tracts, Division No.2, according to the plat thereof recorded in Volume 10 of Plats, page 20, records of Snohomish County, Washington; lying Northerly of State Highway SR 526; AND EXCEPT the North 30 feet thereof as condemned by the State of Washington under Snohomish County Superior Court Cause No. 92881, AND;

the following described real estate in the County of Snohomish, State of Washington, together with all after acquired title of the grantor(s) therein:

**PARCEL A:**

Lot 18, Beverly Berry Tracts, Division No.2, according to the plat thereof recorded in Volume 10 of Plats, page 20, records of the Auditor of the County of Snohomish, State of Washington.

EXCEPT the south 630 Feet thereof.

AND EXCEPT that portion deeded to the State of Washington under Auditor's File No. 2008793.

**PARCEL B:**

That portion, if any, of the South 630 feet of Lot 18, Beverly Berry Tracts, Division No. 2, according to the plat there of recorded in Volume 10 of Plats, page 20, records of the Auditor of the County of Snohomish, State of Washington, lying North of State Route SR526, as conveyed under Auditor's File No. 2008793.

