

C.A.S.H. 28TH ANNUAL CONFERENCE ON SCHOOL FACILITIES

IN TUNE, INFORMED & INVOLVED: INSIDE CALIFORNIA SCHOOL FACILITIES

Wednesday, February 28, 2007
2:30 p.m. - 4:00 p.m.
Sacramento Convention Center
Room # 307

Workshop # 30

District & Builder Beware! Developer Built Schools

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C.A.S.H. Workshop:
District and Builder Beware!
Developer-Built /
Developer-Funded Schools

District & Builder Beware!

Presented by:

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District

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Philip J. Henderson, Miller Brown & Dannis

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3 Case Studies - Phases of the Process

- **Chino Preserve K8**
 - Developer Built
 - Introductions, Negotiations, Design
- **Windemere Ranch Middle School**
 - Developer Built
 - Further Negotiations, Design, Construction, Acceptance
- **Dougherty Valley High School**
 - Developer Funded, District Built
 - Negotiations, Design, Construction

Preliminary Issues

- **Developer Fees Generally**
 - District may charge a fee against construction within its boundaries – Developer fees
 - In exchange for a waiver or reduction in fees (plus other concessions) developer builds school or pays for District to build school

Preliminary Issues

- **Getting More Than Your Fees (or) Getting the Developer to the Table**
 - School may be less expensive to build if the developer builds it
 - Economies of scale
 - Sharing of overhead
 - Potentially reducing one layer of profit
 - Cost of construction may not be the developer's concern if it is ready to pay the statutory fee and not be involved in constructing the school

Preliminary Issues

- **Getting the Developer to the Table**
 - District provides Developer all if District's state funds
 - Site Acquisition Funds
 - Construction Funds
 - Your local city, town, and county may be very helpful
 - Statutory fees, no matter what the calculation, maybe little more than a relocatable campus which will not help sell homes
 - Busing may be only other answer

Preliminary Issues

- **District Planning / Design:**

- District must still comply with requirements for site acquisition
- Design and plans must still be approved by the DSA and District's Board
- Site committee
- Other interested parties

Preliminary Issues

- **District Oversight**

- Always oversee developer's construction
- Depending on District employee staffing and expertise, potentially hire a construction manager

Preliminary Issues

- **Scope**

- Establish District standards: clear and up-to-date
 - Design of facility
 - Education specification
 - Materials specification
- Developer's Considerations
 - How much will the District standards cost me?

Preliminary Issues

- **Control / Consultant Selection**

- Architect
- Project inspector
- Soils engineer
- Environmental consultant

Preliminary Issues

- **Schedule**

- Know when District will need it to be ready
 - Based on when houses are complete
- Who pays for delays, rain, stop notices, payment bond claims, workers' claims, prevailing wage claims, acceleration

Case Study: Chino Preserve K8 – Developer-Built

- **Developer Built Schools**

- Developers' issues to look at:
 - Their perception by school districts
 - Planning well in advance of need
 - Important marketing tool
 - Getting school when needed

Case Study: Chino Preserve K8 – Developer-Built

- **Developer Built Schools (cont'd)**

- Developers' issues to look at:

- Might be an enhanced school
- Site commitment
- Mitigation Agreement
- Build a “Super Pad”

Case Study: Chino Preserve K8 – Developer-Built

- **Developer Built Schools (cont'd)**

- Developers' issues to look at:

- Look for joint use opportunities
- Study the fee calculation justification closely
- Use the influence of School District wisely
- Don't expect to save money

Case Study: Chino Preserve K8 – Developer-Built

- **Districts' issues to look at:**
 - Develop a sound written agreement with clear definitions and also which anticipates possible pitfalls.
 - Developer built or developer funded, which to do?

Case Study: Chino Preserve K8 – Developer-Built

- **Mitigation agreement key elements:**
 - Site size and school design
 - State reimbursement
 - Full K-12 mitigation
 - Escrow instructions
 - Conveyance of title
 - Construction and acceptance
 - Representations and warranties

Case Study: Chino Preserve K8 – Developer-Built

- **Mitigation agreement key elements (cont'd)**
 - Indemnification
 - Insurance
 - Default and cure
 - Dispute resolution
 - Termination
 - Attendance policy
 - Miscellaneous

Case Study: Chino Preserve K8 – Developer-Built

- **Developers' Perspective**

Case Study: Windemere Ranch MS Developer-Built

- 27 Classrooms
- 751-student capacity, but being expanded by 8 classrooms to a 900-student capacity
- 93,022 square feet
- 20.2 gross acres; 16.8 net usable acres
- Construction: May 2004 – August 2005

Windemere Ranch MS Developer-Built

- San Ramon Valley has agreements with many developers, including:
 - Shapell
 - Windemere, BLC
 - Brookfield
 - Lennar
 - Centex
 - Davidon
 - Braddock & Logan

Windemere Ranch MS Developer-Built

- Background
 - In a master plan development of 11,000 units
 - Developer is a joint venture of Brookfield, Lennar, and Centex
 - CEQA litigation settlement in Dougherty Valley required developers to construct 1 high school, 2 middle schools, and 4 elementary schools, plus daycare facilities
 - District staff and legal counsel negotiated with developers
 - General contractor delivery method

Windemere Ranch MS Developer-Built

- District's role is to oversee developer's construction
 - Ensure that design is fully complied with
 - District "standards"
 - Product substitutions
 - District must monitor and oversee developer's construction
- Remember, District (not developer) should hire a school architect
 - Akol & Yoshi designed school

Windemere Ranch MS Developer-Built

- District attends all construction meetings
- Developer reimburses District's soft costs
- Changes based on district wants
- Developer also paid for
 - Furniture & equipment
 - Library books & other instructional materials

Windemere Ranch MS Developer-Built

- State funding
 - Discuss project with OPSC staff
 - This is still a sufficiently unique process
 - OPSC must sign off on the arrangement or District (and developer) risks not receiving state funding
 - Prevailing Wage? Bonds? Really? Why?
 - Developer should formally, publicly comply with all bidding, bonding, prevailing wage, and insurance requirements

Windemere Ranch MS Developer-Built

- Bidding
 - District requires this and does the bidding
- Protests
 - Do bidders have same rights as they do in standard bidding?
 - Can a developer find a contractor “nonresponsible”?
 - Developer must indemnify and should defend the District (Agreement provision)

Windemere Ranch MS Developer-Built

- Unless District instigates change, Developer must pay for:
 - Cost overruns
 - Delays
 - Change orders

Windemere Ranch MS Developer-Built

- Developer, not the District, enters into all Contractor contracts
- District enters into the architect agreement
- District enters into the project inspector agreement

Windemere Ranch MS Developer-Built

- **Developers' Perspective**

Case Study: Dougherty Valley HS – Developer-Funded, District Built

- 96 Classrooms
- 2,200-student capacity, but expandable and master planned for 2,400 students
- 306,478 square feet;
- 54.13 gross acres; 45.43 net usable acres
- Construction Start:
 - Phase I – May 2005
 - Phase II – February 2006

Case Study: Dougherty Valley HS – Developer-Funded, District Built

- Background
 - Phase I – site improvements, rough grading
 - Phase II – all remaining construction
 - Developers approached District in March 2005 and asked District to construct school that developers had planned to construct
 - Developers are
 - Shapell
 - Windemere BLC, a joint venture of Brookfield, Lennar, and Centex

Case Study: Dougherty Valley HS – Developer-Funded, District Built

- Background
 - District staff and legal counsel negotiated with developers
 - CM/multiple prime delivery method
 - Joint Use
 - City contributed over 6.5% of total construction cost for joint use of pool and theater.
 - District expanded size and changed design of pool and theater to accommodate joint use.

Dougherty Valley HS Developer-Funded

- Developer’s funding of the project is not a “blank check,” but the Developer must commit to pay for all costs
- Developer will retain oversight on project
 - Developer should attend all construction meetings
 - Developer should review all payment applications

Dougherty Valley HS Developer-Funded

- District bids and enters into all Contractor contracts
- District enters into the architect agreement
- District enters into the project inspector agreement
- Developer reimburses District's soft costs

Dougherty Valley HS Developer-Funded

- Insurance and bonds all come from Contractor (Contractors if multi-prime)
- The developer is a valuable part of the community, but it is also partially like a bank financing the project and has the right to:
 - Watch construction
 - Ensure no waste
 - Approve payments

Dougherty Valley HS Developer-Funded

- What if the developer does not or cannot honor its funding obligation? E.g., bankruptcy
 - District should require a letter of credit from the developer
 - Amount is negotiable, but it should be significant
 - District can require a performance bond in lieu of a letter of credit
 - Depending on use and timing of escrow account, ensure a sufficient amount of funds are deposited early enough
 - Remember, District holds contractor contracts and District needs the funding
 - Trade contractor bonding does not protect against developer default

Dougherty Valley HS Developer-Funded

- Funding and Payment Process
 - Escrow
 - State funds and developer funds are put into escrow account
 - Monthly payments are made from escrow account

Dougherty Valley HS Developer-Funded

- State funding
 - Discuss project with OPSC staff
 - This is still a sufficiently unique process, although it is easier for OPSC staff to follow because it is District built
 - OPSC must sign off on the arrangement or District (and developer) risks not receiving state funding
 - All state funds are used to pay for construction