

AMENDED AND RESTATED
FACILITIES USE AGREEMENT
BETWEEN
THE CITY OF CLAYTON AND THE
MOUNT DIABLO UNIFIED SCHOOL DISTRICT

This AMENDED AND RESTATED FACILITIES USE AGREEMENT (“Agreement”) is entered into as of the ___ day of _____, 2014 (“Effective Date”) by and between the CITY OF CLAYTON, a California municipal corporation (the “City”), and the MOUNT DIABLO UNIFIED SCHOOL DISTRICT, a regularly organized and existing school district under the laws of the State of California (the “School District”). School District and City shall be referred to collectively as the “Parties” and individually as a “Party” in this Agreement.

RECITALS

A. California Education Code Section 10900 *et seq.* authorizes school districts and cities to jointly organize, promote, and conduct recreational and educational programs and activities and empower school districts to cooperate with public agencies in organizing, promoting, and conducting joint programs of recreation as well as education.

B. The Parties previously executed that Facilities Use Agreement, between the City of Clayton and the Mt Diablo Unified School District dated February 7, 1995 (“Park Agreement”) permitting the School District’s students and staff to use, under certain restrictions, Fields One through Four, the perimeter running trail along two sides of Field One (“Running Trail”), Stairs, Maintenance Access Road and Picnic Areas at Clayton Community Park (“Park”) under the terms and conditions set forth in the Park Agreement. Fields One through Four, the Running Trail, Stairs, Maintenance Access Road and Picnic Areas are more particularly described and identified in Exhibit A, attached hereto and incorporated by this reference.

C. In addition, the Park Agreement permits the City to use meeting rooms, an amphitheater, outdoor courts and parking areas (“School Facilities”) at Diablo View Middle School. The School Facilities are more particularly described and identified in Exhibit B, attached hereto and incorporated by this reference.

D. Under the Park Agreement, the School District is required to pay the City usage fees for its use of the Park and the City is required to pay the School District usage fees for the City’s use of the School Facilities. A dispute has arisen between the School District and City regarding the payment of these fees and their respective obligations under the Park Agreement.

E. The Parties and the Redevelopment Agency for the City of Clayton also previously executed that Agreement between the Redevelopment Agency for the City of Clayton, the City of Clayton and the Mt. Diablo Unified School District for the Construction and Use of a Gymnasium at Diablo View Middle School, dated May 22, 2001 (“Gymnasium Agreement”).

F. In part, the Gymnasium Agreement permits the City to use the gymnasium and parking lot at Diablo View Middle School (“Gymnasium”) during certain non-school hours for City or City-authorized third party use. The Gymnasium is more particularly described and identified in Exhibit C, attached hereto and incorporated by this reference.

G. Under the Gymnasium Agreement, the City is required to pay the School District custodial and utility charges related to the City’s use or third party-permitted use of the Gymnasium. A dispute has arisen between the School District and City regarding the calculation, necessity and payment of these charges and their respective obligations under the Gymnasium Agreement.

H. As used in this Agreement, the Park, School Facilities and Gymnasium shall be referred to as a Joint Facility or collectively as the Joint Facilities.

I. The Parties wish to settle their current disputes under the Park Agreement and Gymnasium Agreement and wish to continue to permit the Parties to use the Joint Facilities as set forth in this Agreement.

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing Recitals, which are incorporated herein by reference and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the City and the School District further agree as follows:

Section 1. GENERAL PROMISES AND WARRANTIES

A. **School District’s Warranties.** As an inducement to the City to enter into this Agreement, the School District represents, warrants, and covenants as follows:

- (i) that it is a regularly organized and existing school district under the laws of the State of California, duly organized, validly existing and in good standing under the laws of the State of California;
- (ii) that it has power and authority to carry on its functions as a school district, to enter into this Agreement, and to consummate the transaction herein contemplated;
- (iii) that all actions required to be taken by or on behalf of the School District to authorize it to make, deliver and carry out the terms of the Agreement have been duly and properly taken prior to the execution of the Agreement; and
- (iv) that this Agreement is a valid and binding obligation of the School District, enforceable in accordance with its terms, except as the same may be affected by bankruptcy, insolvency, moratoria, or similar laws, or by

legal or equitable principles relating to or limiting the rights of contracting parties generally.

B. City's Warranties. As an inducement to the School District to enter into this Agreement, the City represents, warrants, and covenants as follows:

- (i) that it is a municipal corporation, duly organized, validly existing and in good standing under the laws of the State of California;
- (ii) that it has power and authority to carry on its function as a city, to enter into this Agreement and to consummate the transaction herein contemplated;
- (iii) that all actions required to be taken by or on behalf of the City to authorize it to make, deliver and carry out the terms of this Agreement have been duly and properly taken prior to the execution of the Agreement; and
- (iv) that this Agreement is a valid and binding obligation of the City, enforceable in accordance with its terms except as the same may be affected by bankruptcy, insolvency, moratoria or similar laws, or by legal or equitable principles relating to or limiting the rights of contracting parties generally.

Section 2. Use of the Gymnasium, School Facilities, Park, and Associated Parking Lots.

A. General Provisions.

(i) The Parties shall not use, or allow to be used, all or any portion of the Joint Facilities in any manner which violates any applicable law, ordinance, or regulation, whether promulgated by authority of the City, the School District, the County of Contra Costa, the State of California, the United States, or any other governmental entity in the proper exercise of its jurisdiction.

(ii) Each Party agrees to use the Joint Facilities in a manner that does not create a dangerous condition or cause damage to the building or facility or any part thereof.

(iii) Each Party shall be solely responsible for the cost of its own recreation programs and activities, as well as scheduling, invoicing, and collecting fees for the Joint Facility related to that Party's use thereof.

(iv) Each Party shall be solely responsible for providing adequate operational, supervisory and security personnel for a Joint Facility when that Party is using, operating, or otherwise controlling that Joint Facility.

(v) No Party may conduct any improvements or alterations to a Joint Facility

without the express written consent of the owner of that Joint Facility, which consent may be granted or withheld in the owner's sole discretion.

(vi) Except for repairs required under paragraph (viii) below, a Party using a Joint Facility owned by the other Party shall not be required to pay any fees or charges for use and normal maintenance, including utility charges, of that Joint Facility. In the event the City charges third parties to use a Joint Facility owned by the School District, it may retain the full and complete amount of such fees or charges.

(vii) Each Party shall be responsible for ensuring all Joint Facilities owned by that Party are properly and regularly maintained and free from any defects or dangerous conditions, excepting normal wear and tear. School District shall provide water, sewer, gas, electric, custodial and solid waste removal services to the School Facilities and Gymnasium. City shall provide irrigation, water, sewer (sanitary and stormwater), solid waste removal services, and electrical services to the Park. In the event any Party believes that the Party owning that facility has failed to meet its maintenance or similar obligations, it shall provide notice to the Party owning that facility along with a list of the requested corrections.

(viii) In the event any Party damages a Joint Facility owned by another Party, the damaging Party shall be responsible for the reasonable repair cost. The Party owning the Joint Facility shall notify the Party that damaged the Joint Facility of the damage and estimated repair cost. The Party owning that facility may complete or pay for such repairs and invoice the other Party for the amount. The Parties shall work in good faith to address any disputes regarding the existence of any damage and amounts of any repairs. All repairs shall be timely commenced and completed by the Party that owns the damaged Joint Facility.

B. Use of the Gymnasium.

(i) The City shall have the right to use the Gymnasium Monday through Sunday during the following times:

School days	3:30 p.m. through 11:00 p.m.
Non-school days	8:00 a.m. through 11:00 p.m.

The School District's Diablo View Middle School Principal and the City's City Manager may agree to extend hours for special events.

"Gymnasium" shall mean the locker rooms, meeting rooms, office space, and restrooms in the gymnasium building.

"School Days" shall mean those days designated by the School District as school days for Diablo View Middle School, including teacher in-service days, summer school, or any extended school year program. In the event a summer school or an extended

school year program is designated by the School District, City's allowed hours of use shall be as stated above.

(ii) During its hours of use, the City shall be entitled to exclusive use and control of the Gymnasium. Nothing herein prohibits the City from contracting with third parties for use of the Gymnasium during its hours of use. The City shall maintain a master use calendar for its periods of use and all scheduling of events shall be the City's responsibility. A copy of the master use calendar shall be forwarded to the School District. In the event that the City changes the master use calendar, an updated calendar shall be immediately forwarded to the School District.

(iii) The School District shall maintain offices at the Gymnasium. City shall be assigned an office for its use. City may use its office at all times, expressly including during school hours.

(iv) City shall permit the School District to utilize the Gymnasium for a maximum of ten (10) one (1) day events per school year (August through July) during City's hours of use for the School District's benefit. Scheduling of these events shall occur in September of each year.

(v) Nothing in this Agreement prevents either Party from utilizing the Gymnasium during periods of City or School District use as permitted by the other Party. A Party wishing to use the Gymnasium during the other Party's period of use shall provide the other Party with as much advance written notice as possible.

(vi) In the event that the School District intends to dispose of the Gymnasium, the City shall have the right of first refusal to purchase it. The Parties agree that the value of the Gymnasium and underlying land in such event shall be governed by the provisions of Education Code section 17485 *et seq.* This limitation on value shall only apply to the land underlying the Gymnasium and not the remaining land at the Diablo View Middle School site. In the event that the City declines to purchase the Gymnasium, the City shall receive a prorated share of the proceeds of disposition based on the City of Clayton Redevelopment Agency's ("Agency") proceeds, unless the successor in interest to the Agency has a legal right to such proceeds. The City's and/or successor in interest to the Agency's right to receive a share of proceeds pursuant to this paragraph shall survive termination of this Agreement but shall expire on December 31, 2041. In the event this Agreement is terminated prior to December 31, 2041, School District shall execute and record any documentation requested by City to reflect this right.

In the event that the School District closes Diablo View Middle School and retains the school site, this Agreement shall be unaffected and the School District shall be responsible for meeting all use and maintenance obligations. In addition, the City shall be entitled to use the Gymnasium during the vacated school hours.

C. Use of the School Facilities.

(i) "School Facilities" shall mean the meeting rooms, the amphitheater and outdoor courts identified in Exhibit B.

(ii) City may use the School Facilities as permitted by the School District. The City's use of these facilities shall be subject to advance reservation and availability.

D. Use of the Park.

(i) The School District's students and staff shall be permitted to use the Park. Park includes the areas identified below:

Fields One through Four: Fields One through Four will be available for exclusive School District use during class hours of regularly scheduled School Days, as defined in Section 2(B) of this Agreement, excepting teacher in-service days.

Running Trail, Stairs and Maintenance Access Road: The School District may use the Running Trail, Stairs and Maintenance Access Road for student physical education activities. Students shall not be allowed off the Stairs, improved trail or paved roadway or in the restrooms. The School District shall ensure students do not climb on the railings for the Stairs.

Park Picnic Areas and Tot Lots: Except for special events approved in advance by the City, the Picnic Areas and Tot Lots shall not be used by the School District for lunch, physical education or other school uses. The School District may request use of the Picnic Areas for special events subject to advance reservation and availability. It is understood and agreed by the Parties that the general public shall have access to the Park Picnic Areas and Tot Lots during school hours.

(ii) The School District shall not permit a third party to use the Park without the City's express written consent. Moreover, without limiting the School District's obligation under Section 2(A)(iv), the School District shall provide effective and adequate staff and adult supervision of students while using the Park.

(iii) Notwithstanding the foregoing, the School District shall not use Fields One through Four when that field is saturated with moisture from precipitation, irrigation, or irrigation system leaks. During such periods, use of the affected field shall be suspended until the field has drained and dried out sufficiently to allow play without damage. The presence of mud or standing water and/or excessive movement, slippage or depression of either dirt or turf on the fields will be considered evidence of saturation. Adult staff and supervisors from School District shall be responsible for making the initial determination of unsuitability of the fields for use due to excessive moisture. However, the City may make a determination of unsuitability and suspend use of the fields at any time in its sole discretion.

E. Use of Parking Lots

(i) The School District shall be permitted to use the two Park parking lots during any of the timeframes it is allowed to use the Park as specified in Section 2(D) of this Agreement.

(ii) The City shall be permitted to use the three School District parking lots during any of the timeframes it is allowed to use the Gymnasium or School Facilities as specified in Sections 2(B) and C of this Agreement.

Section 3. Term. The initial term of this Agreement shall commence on _____, 2014 (“Effective Date”) and terminate on _____, 2015, unless sooner terminated as herein provided. The Agreement shall automatically renew for successive additional terms of one (1) year each unless otherwise agreed to by the Parties. Any Party may terminate this Agreement without cause with six (6) months written notice to the other Party.

Section 4. Waiver of Past Claims Related to Use Fees.

A. **City’s Release.** The City hereby releases, discharges and holds the School District harmless from any and all claims, liabilities, demands and causes of action, which it may have or claim to have against School District specifically related to fees previously contemplated for the use of the Joint Facilities prior to the date of this Agreement.

B. **School District’s Release.** The School District hereby releases, discharges and holds City harmless from any and all claims, liabilities, demands and causes of action, which it may have or claim to have against City specifically related to fees previously contemplated for the use of the Joint Facilities prior to the date of this Agreement.

Section 5. Insurance, Indemnification and Risk of Loss.

A. The School District and the City shall bear the risk of loss for their own Joint Facility, whether damaged or destroyed by fire, theft, flood, collision, other casualties or the acts of third parties while the other Party is using the Joint Facility; provided, however, that the Parties shall indemnify each other as set forth in this Section for all loss and damages to buildings or facilities, and personal injury resulting from the negligence of the City or the School District while using the other Party’s buildings or facilities.

B. During the term of this Agreement, the School District and the City shall maintain, at their own expense, the following types of insurance for their respective Joint Facilities and adhere to the following provisions:

(i) Workers’ compensation insurance covering all employees as required by California State Law;

(ii) Commercial general liability insurance covering liability in the minimum amount of \$2,000,000 combined single limit per occurrence for bodily injury, and

personal injury, and property damage, and if written with an aggregate, the aggregate shall be twice the required occurrence limit. Defense costs shall be paid in addition to the limits; and

(iii) Commercial auto liability insurance in the minimum amount of \$1,000,000 covering combined single limit per occurrence for bodily injury, personal injury and property damage. Provided, however, that a comparable self-insurance program satisfactory to both the School District and the City shall also constitute compliance with this paragraph.

(iv) Each Party's insurance shall be placed with insurers with a current A.M. Best's rating no less than A:VIII, licensed to do business in California, and satisfactory to the other Party.

(v) The School District and its directors, officials, officers, employees, agents and volunteers shall be named as "additional insureds" to the City's general liability and automobile policies, and the City and its directors, officials, officers, employees, agents and volunteers shall be named as "additional insureds" to the School District's general liability and automobile policies. Each Party shall provide the other Party appropriate evidence of coverage and shall immediately cure or correct any cancellation or suspension of the insurance policy. Should a Party fail to keep the required insurance in full force and effect, the non-defaulting Party may obtain the necessary insurance and pay the premiums, and seek reimbursement from the defaulting Party for the amount of such premiums within fifteen (15) days after the non-defaulting Party submits an invoice for the same to the defaulting Party.

(vi) Each Party's insurance shall not contain any special limitations on the scope of protection afforded to the other Party and its directors, officials, officers, employees, agents and volunteers.

(vii) Each Party shall furnish the other Party with original certificates of insurance and endorsements affecting coverage required by this Agreement on forms satisfactory to the other Party. The certificates and endorsements for each insurance policy shall be signed by a person authorized by that insurer to bind coverage on its behalf, and shall be on forms provided by the other Party, if requested. Each Party reserves the right to require complete, certified copies of all required insurance policies at any time.

C. Notwithstanding Government Code Section 895.2, no Party or any of its officers, agents, volunteers, contractors, or employees shall be responsible for any loss, damage, liability, or injury to persons or property occurring by reason of any acts or omissions on the part of another Party under or in connection with any obligation delegated to the Parties under this Agreement. Further, no Party or any of its officers, agents, volunteers, contractors, or employees shall be responsible for any loss, damage, liability, or injury to persons or property arising from the other Party's use of a facility or building under this Agreement. Pursuant to Government Code Section 895.4, each Party shall indemnify, defend and hold harmless the other party, its

officers, agents, volunteers, contractors, and employees from any and all liability, loss, expense (including, without limitation, all consequential damages, reasonable attorneys' fees and other related costs and expenses), or claims imposed for damages of any nature whatsoever, including but not limited to, claims for discrimination, Title IX related issues, bodily injury, death, personal injury, or property damage occurring by reason of any acts or omissions on the part of the Party's own officers, agents, contractors, or employees under or in connection with any obligation delegated to such Party under this Agreement or arising from the Party's own use of a facility or building under this Agreement. The indemnifying Party shall pay and satisfy any judgment, award or decree that may be rendered against the indemnified Party or its directors, officials, officers, employees, agents or volunteers, in any such suit, action or other legal proceeding. The indemnifying Party shall reimburse the indemnified Party and its directors, officials, officers, employees, agents and/or volunteers, for any and all legal expenses and costs incurred by each of them in connection therewith or in enforcing the indemnity herein provided. The indemnifying Party's obligation to indemnify shall not be restricted to insurance proceeds, if any, received by the indemnified Party, its directors, officials, officers, employees, agents or volunteers. This indemnity shall survive termination of this Agreement.

D. Each Party agrees to require all third-party organizations that it authorizes to use or enter a Joint Facility pursuant to this Agreement, to execute a document stating the following:

[Name of Organization] agrees to hold harmless, defend, and indemnify the Mt. Diablo Unified School District and the City of Clayton, their respective Board or Council members, agents, officers, employees and representatives against all actions, claims, or demands for injury, death, loss or damages, regardless of fault or cause, by anyone whomsoever (except where such injury, death, loss, or damage was solely due to the willful acts or omissions of the Mt. Diablo Unified School District and the City of Clayton, and/or their respective Board or Council members, agents, officers, employees and representatives), whenever such injury, death, loss, damage or claim is a consequence of, or arises out of the use of or access to the [name of building or facility], by [name of organization] or its agents, officers, employees and representatives

Section 6. Party Employees.

A. **School District Employees.** For purposes of this Agreement, all persons employed in the performance of services and functions for the School District shall not be deemed City employees, nor have any City pension, civil service, or other status due to this Agreement.

B. **City Employees.** For purposes of this Agreement, all persons employed in the performance of services and functions for the City shall not be deemed School District employees, nor have any School District pension, civil services, or other status due to this Agreement.

Section 7. Force Majeure. Any prevention, delay or stoppage due to strikes, lockouts, labor disputes, acts of God, inability to obtain labor or materials or reasonable substitutes therefore, governmental action, civil commotion, fire, to other casualty, or other occurrences beyond the reasonable control of the party obligated to perform any term, covenant or condition of this Agreement, shall excuse the performance by such party, for a period equal to any such prevention, delay or stoppage, provided that the obligated party could not have voided such delay through the exercise of due diligence, and provided further that the obligated party notified the other party within a reasonable time after the obligated party becomes aware that such occurrence will or is likely to result in such prevention, delay or stoppage.

Section 8. Miscellaneous.

A. **Notice.** Any notice which is required to be given by any provision of this Agreement may be given by hand delivery, by any overnight courier service providing dated evidence of delivery, or by U.S. certified mail return receipt requested. Each notice shall be addressed as follows:

If to the City:	City of Clayton City Manager 6000 Heritage Trail Clayton, CA 94517
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If to the School District:	Mount Diablo Unified School District Superintendent 1936 Carlotta Drive Concord, CA 94519
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B. **Entire Agreement.** This Agreement is the entire agreement between the parties hereto with respect to the subject matter hereof and supersedes all prior agreements between the parties with respect to the matters contained in this Agreement, including the Park Agreement and Gymnasium Agreement. Any waiver, modification, consent or acquiescence with respect to any provision of the Agreement shall be set forth in writing and duly executed on behalf of the party to be bound thereby. No waiver by any party of any breach hereunder shall be deemed a waiver of any other or subsequent breach.

C. **Cooperation.** The Parties hereby agree to cooperate in coordinating programs and activities conducted on the Joint Facilities identified in the attached exhibits as well as other buildings and facilities that may become subject to this Agreement so as to avoid conflicting or competing uses.

D. **Ownership of Facilities.** Each Party shall retain its existing ownership interest in and to their respective Joint Facilities, including the buildings, facilities, land, and improvements existing thereon covered by this Agreement. No past, present, or future use of any of the Joint Facilities, including the buildings, facilities, land, and improvements existing thereon pursuant to this Agreement shall be interpreted as conveying any ownership or other property

interests in any of the Joint Facilities, including the buildings, facilities, land, or improvements thereon.

E. **Attorney's Fees.** If either Party commences an action against the other Party, either legal, administrative or otherwise, arising out of or in connection with this Agreement, the prevailing party in such litigation shall be entitled to have and recover from the losing party reasonable attorney's fees and all other costs of such action.

F. **Governing Law.** This Agreement shall be governed by the laws of the State of California. Venue shall be in Contra Costa County.

G. **Assignment or Transfer.** This Agreement shall be binding upon and inure to the benefit of each of the Parties hereto and to their respective transferees, successors, and assigns. Neither Party shall assign, hypothecate, or transfer, either directly or by operation of law, this Agreement or any interest herein without the prior written consent of the other Party. Any attempt to do so shall be null and void, and any assignees, hypothecates or transferees shall acquire no right or interest by reason of such attempted assignment, hypothecation or transfer.

H. **Amendments.** No supplement, modification, or amendment of this Agreement shall be binding unless executed in writing and signed by both Parties.

I. **Authorization.** Each individual and entity executing this Agreement represents and warrants that he, she, or it has the capacity set forth on the signature pages hereof with full power and authority to find the party on whose behalf he, she, or it is executing this Agreement and the terms hereof.

J. **Counterparts.** This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but all of which when taken together shall constitute one and the same instrument. The signature page of any counterpart may be detached therefrom without impairing the legal effect of the signature(s) thereon provided such signature page is attached to any other counterpart identical thereto except having additional signature pages executed by other parties to this Agreement attached thereto.

K. **Headings.** Headings at the beginning of each numbered or lettered section of this Agreement are solely for the convenience of the Parties to this Agreement and are not part of this Agreement.

L. **Time of Essence.** Time is of the essence in the performance of and compliance with each of the provisions and conditions of this Agreement.

M. **Construction and Interpretation.** Wherever possible, each provision of this Agreement shall be interpreted in such a manner as to be valid under applicable law, but, if any provision of this Agreement shall be invalid or prohibited thereunder, such invalidity or prohibition shall be construed as if such invalid or prohibited provision had not been inserted herein and shall not affect the remainder of such provision or the remaining provisions of this

Agreement. The language in all parts of this Agreement shall be in all cases construed simply according to the fair meaning and not strictly for or against any of the Parties hereto.

N. **Severability.** If any provision of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remaining provisions will nevertheless continue in full force without being impaired or invalidated in any way.

O. **Nonliability of Officials.** No officer, member, employee, agent, or representative of the Parties shall be personally liable for any amounts due hereunder, and no judgment or execution thereon entered in any action hereon, shall be personally enforced against any such officer, official, member, employee, agent, or representative.

P. **Third Party Beneficiaries.** Nothing in this Agreement shall be construed to confer any rights upon any party not signatory to this Agreement.

IN WITNESS WHEREOF, the Parties have caused their duly authorized representative to execute this Agreement as of the date first written above.

CITY OF CLAYTON

MT. DIABLO UNIFIED SCHOOL DISTRICT

Julie K. Pierce, Mayor

President, Board of Education

ATTEST:

ATTEST:

Laci Jackson, City Clerk

Superintendent

APPROVED AS TO FORM:

APPROVED AS TO FORM:

Malathy Subramanian, City Attorney

Attorney for
Mt. Diablo Unified School District

EXHIBIT A

PARK

EXHIBIT B
SCHOOL FACILITIES

EXHIBIT C
GYMNASIUM

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