

AGREEMENT BETWEEN CITY OF CUPERTINO, CUPERTINO UNION SCHOOL DISTRICT PERTAINING TO MAINTENANCE AND IMPROVEMENT OF CERTAIN OPEN SPACE AREAS WITHIN CERTAIN SCHOOL SITES

THIS AGREEMENT, made and entered into by and between CITY OF CUPERTINO, a municipal corporation of the State of California, herein called “CITY” and the CUPERTINO UNION SCHOOL DISTRICT OF SANTA CLARA COUNTY herein called “DISTRICT”;

RECITALS:

WHEREAS, section 10900 et seq. of the Education Code authorizes cities and school districts to organize, promote and conduct programs of community recreation for the promotion and attainment of general educational and recreational objectives, and to construct, maintain and operate recreation centers, including playgrounds and outdoor playing FIELDS; and

WHEREAS, section 10905 of the California Education Code authorizes public authorities to enter into agreements with each other for the maintenance of recreation centers; and

WHEREAS, section 10910 of the Education Code provides that the governing body of any school district may use or grant the use of grounds of the school district to any other public authority for the purposes of such Act, whenever such use does not interfere with schools uses; and

WHEREAS, the Parties have jointly kept open for school student and general public use in the City certain open space areas at the elementary and middle schools, and they desire to continue arrangements for their common use; and

WHEREAS, it is the policy of CITY and DISTRICT to maintain recreational facilities within their respective jurisdictions in order to maximize recreational opportunities for both the students of DISTRICT and the residents of CITY, and in order to reduce capital and operational costs to both CITY and DISTRICT; and

WHEREAS, CITY and DISTRICT desire to provide for continued maintenance of nine (9) open space areas of certain existing school sites of DISTRICT on a long-term basis; and

WHEREAS, the Parties are interested in continuing a long-term, joint funding arrangement under which the CITY will continue to undertake the maintenance of certain open space areas at eight (8) elementary schools and one (1) middle school locations to enhance their usability by school students and the general public,

WHEREAS, it is the intent of CITY and DISTRICT that the land which is the subject of this Agreement continue to be used for open space and recreational purposes, be improved to enhance such use, without interfering with the instructional programs at the sites, as provided herein;

NOW, THEREFORE, in consideration of the covenants and conditions hereinafter set forth, and pursuant to the provisions of the Education Code hereinafter referred to, it is agreed as follows:

1. DEFINITIONS

The terms used in this Agreement will have the meanings set forth below, unless context clearly indicates otherwise.

- a. "BUSINESS MANAGER" means the Chief Business Official of the DISTRICT, including any authorized representative.
- b. "CAPITAL IMPROVEMENT" (collectively, the "CAPITAL IMPROVEMENTS") means any improvement which has a stand alone cost exceeding \$20,000, or which has a useful life of, or whose useful life can be extended, at least five to seven years, or which has a useful life of at least five to seven years after it is capable of providing a functional use.

- c. “CAPITAL IMPROVEMENT ZONE” (collectively, the “CAPITAL IMPROVEMENT ZONES”) means areas of the open space as noted in Attachment 1 that the DISTRICT may construct CAPITAL IMPROVEMENTS without the CITY’s approval. Attachment 1 and its Exhibits are incorporated by reference herein.
- d. “CITY” means the City of Cupertino
- e. “CITY MANAGER” means the City Manager of the CITY, including any authorized representative.
- f. “DIRECTOR” means the Director of Public Works of the CITY, including any authorized representative or designee.
- g. “RECREATION DIRECTOR” means the Director of Parks & Recreation of the CITY, including any authorized representative or designee.
- h. “DISTRICT” means the Board of Education.
- i. “FIELD” (collectively, the “FIELDS”) means any one of the athletic field areas referred to in the description of “OPEN SPACE AREAS”.
- j. “IMPROVEMENT” (collectively, the “IMPROVEMENTS”) means any physical addition, alteration, or betterment of the OPEN SPACE AREAS.
- k. “LAW” (collectively, the “LAWS”) means any code, statute, constitution, ordinance, resolution, regulation, rule, judicial decision, administrative order, or other requirement of and municipal, county, state, federal, or other governmental agency or authority having jurisdiction over the parties or the Schools, in effect at the time of execution of the Agreement or at any time during the term hereof, including without limitation, any regulation or order of an official entity or body.

1. “MAINTENANCE” means the care and servicing on an ongoing and repeating basis by personnel for the purpose of maintaining OPEN SPACE AREAS in proper condition, proper working order, sound upkeep, safe condition, in good repair, by providing for systematic inspection, detection, and correction of incipient failures either before they occur or before they develop in to major defects. It includes the inspection, replenishment, preservation, adjustments, and replacement of unserviceable parts and components, including, but not limited to irrigation and drainage systems. It includes mowing, edging and other hardscape care similar to those conducted at CITY park locations.
- m. “OPEN SPACE AREAS” means the open space areas including athletic FIELDS and related amenities, the dimensions of which for reference purposes are outlined below limits of which are shown in Attachment 1. Site plans included in this agreement are presented as Exhibits A through I of Attachment 1. Each Exhibit consists of site diagrams and site profiles of real property encompassing an OPEN SPACE AREA within real property consisting of a school site of DISTRICT. For purposes of this Agreement, whenever reference is made to school OPEN SPACE AREA, such reference shall be construed to pertain to the areas described below:

OPEN SPACE AREAS MAINTAINED BY CITY	AREA	EXHIBIT	PROFILE
Collins Elementary School open space site	2.51	A	A.1
Eaton Elementary School open space site	4.58	B	B.1
Faria Elementary School open space site	4.18	C	C.1
Garden Gate Elementary School open space site	2.97	D	D.1
Lincoln Elementary School open space site	3.10	E	E.1
Regnart Elementary School open space site	4.12	F	F.1
Stevens Creek Elementary School open space site	3.14	G	G.1
Hyde Middle School open space site	7.87	H	H.1
Kennedy Middle School open space site	13.35	I	I.1

- n. “PROVISION” (collectively, the “PROVISIONS”) means any agreement, clause, condition, covenant, qualification, recital, restriction, reservation, term, or other stipulation in this Agreement that defines or otherwise controls, establishes, or limits the performance required or permitted by any party to this Agreement. All PROVISIONS, whether covenants or conditions, which are applicable to the DISTRICT, will be deemed to be both the covenants and conditions.
- o. “SITE PLAN” designates the limit of the OPEN SPACE AREAS at each and every location and as shown in Attachment 1. Note that Exhibits A through Exhibit I reflect current conditions with no changes proposed by the City.
- p. “SCHOOL” (collectively, the “SCHOOLS”) means any one of the following elementary or middle schools: Collins Elementary School, Eaton Elementary School, Faria Elementary School, Garden Gate Elementary School, Lincoln Elementary School, Regnart Elementary School, Stevens Creek Elementary School, Hyde Middle School, and Kennedy Middle School.
- q. “SUPERINTENDENT” means the Superintendent of schools for the DISTRICT, including any authorized representative or designee.
- r. “2019 CLEAN WATER AND STORM PROTECTION FEE” means the Clean Water and Storm Protection fee established in 2019 by Ordinance 19-2183.

2. CITY MAINTENANCE OBLIGATION FOR SCHOOL OPEN SPACE AREAS

- a. Commencing on January 1, 2017, the CITY, at its cost and expense, will mow, trim, fertilize and perform other MAINTENANCE work of a general nature at the OPEN SPACE AREAS, in accordance with the CITY's quality standards for parks and at a level that is equivalent with other park locations maintained by the CITY. The CITY will directly pay for the cost of water associated with OPEN SPACE AREAS maintained by the City and will be reimbursed for the cost of water per Paragraph 6 "Consideration Between the Parties". Any or all services required to maintain and renovate the OPEN SPACE AREAS maintained by the City may be performed by licensed contractors hired and managed by the CITY.
- b. In performing MAINTENANCE at designated OPEN SPACE AREAS as noted in Attachment 1, the CITY will use its best efforts to prevent interference with the DISTRICT's use of the OPEN SPACE AREAS during regular school hours and priority shall be given to CITY personnel and equipment between the hours of 6:00 a.m. to noon or as needed with notification to the DISTRICT. CITY may access OPEN SPACE AREAS at any time for routine and emergency MAINTENANCE purposes and will provide the DISTRICT with a mowing schedule for OPEN SPACE AREAS annually. For the purpose of providing MAINTENANCE, up to four times during the school year, with three (3) weeks advance notice, the CITY may require DISTRICT to curtail all use of those areas of the OPEN SPACE AREAS needed for MAINTENANCE. The CITY will do so only if necessary, and for a maximum of one day at a time.
- c. All gates providing access to all OPEN SPACE AREAS shall be locked with both CITY

and DISTRICT locks in a manner that provides dual access. In the case where only a single lock can be used, the DISTRICT shall supply the lock and provide the CITY with two (2) keys for each lock used.

- d. For the purpose of preventing or abating hazardous conditions, the CITY may require that DISTRICT curtail use of OPEN SPACE AREAS at OPEN SPACE AREAS maintained by the City as noted in Attachment 1 at any time and without prior notification, until the hazardous conditions are remedied. In such cases the CITY will minimize the DISTRICT's lack of access to the OPEN SPACE AREA. FIELDS may be closed to public use by the CITY from December through February; however DISTRICT may continue to use FIELDS at their discretion and only if conditions are safe and use will not damage FIELD to the extent that non-routine MAINTENANCE is required to repair damage or unless otherwise notified by the CITY. shall not use FIELDS maintained by the CITY if the CITY has notified the DISTRICT specifically to not use the FIELDS and the FIELDS and are fenced off and signed as closed.
- e. The CITY may apply pesticides to OPEN SPACE AREAS maintained by the City only on days when school is not in session and students will not be using the OPEN SPACE AREAS. A minimum of one (1) week's advance notification will be provided by the CITY to the DISTRICT for every occasion a pesticide is applied to any OPEN SPACE AREA. CITY shall post notification signs for outdoor pesticide applications as required by State law.
- f. CITY will provide advance notification when a contractor managed by the CITY will access OPEN SPACE AREAS maintained by the City. Contractor personnel must be in their company's standard uniform at all times they are maintaining OPEN SPACE AREAS and

directly supervised by CITY personnel.

- g. Any and all concerns or issues of the DISTRICT governing the MAINTENANCE or use of OPEN SPACE AREAS maintained by the CITY shall be communicated within twenty four (24) hours to the CITY by the Superintendent or Designee and shall be directed to the DIRECTOR.
- h. Prior to the beginning of the academic school year, the DIRECTOR and SUPERINTENDENT or Designee will meet to discuss the use and MAINTENANCE of all OPEN SPACE AREAS.
- i. The MAINTENANCE on sites applies only to those OPEN SPACE AREAS primarily designed, intended and used for recreational activity, including, but not limited to athletic FIELDS, baseball diamonds, soccer FIELDS and/or approved equipment (including but not limited to storage of City permitted equipment).
- j. The MAINTENANCE obligations undertaken by CITY only include the areas within the boundaries of the Attachment 1, Exhibit A through Exhibit I site diagrams. Such MAINTENANCE shall be at the cost and expense of CITY.

3. WATER CONSERVATION

The CITY may implement and impose all water conservations measures at the OPEN SPACE AREAS noted in Attachment 1, Exhibit A through Exhibit I as set forth in the Cupertino Municipal Code Section 15.32.050.

4. CAPITAL IMPROVEMENTS

- a. The DISTRICT may, at its sole cost and expense, make temporary or permanent

capital improvements in those areas of the Facilities identified as Capital Improvement Zones on the Facilities Site Plans without approval by CITY. DISTRICT shall provide a minimum of six (6) months' notice to CITY of all capital improvements. The DISTRICT, at its sole cost and expense, will maintain and repair any capital improvements.

- b. The DISTRICT may, at its sole cost and expense, make temporary or permanent capital improvements in those areas of the Facilities not identified as Capital Improvement Zones on the Facilities Site Plans only with approval by CITY. DISTRICT shall provide a minimum of six (6) months' notice to CITY of all capital improvements. The DISTRICT, at its sole cost and expense, will maintain and repair any capital improvements.
- c. The CITY may, at its sole cost and expense, make temporary or permanent capital improvements in all areas of the Facilities only with approval by Council and Board of Education. CITY shall provide a minimum of six (6) months' notice to DISTRICT of all capital improvements. The CITY, at its sole cost and expense, will maintain and repair any capital improvements.
- d. If either party during the term of this Agreement seeks the installation of substantial IMPROVEMENTS not included in SITE PLANS (Attachment 1) to one or more OPEN SPACE AREAS in this Agreement, this Agreement shall be amended. The cost and expense of preparation of such amendment shall be borne by the party proposing it, or shall be borne jointly if CITY and DISTRICT jointly proposed it. No such amendment shall be effective unless and until it shall have been approved by the governing boards of CITY and DISTRICT.

5. USAGE OF FACILITIES

- a. The DISTRICT will have use priority of all OPEN SPACE AREAS between the hours of 7:00am and 4:00pm on scheduled school days, through the regular academic school year with the exception of Hyde Middle School and Kennedy Middle School, where the DISTRICT shall have use priority from 7:00 am to 5:00 pm Mondays through Thursdays and from 7:00 am to :00 pm Fridays.. When proper notice is provided by the DISTRICT, the CITY will make every attempt to accommodate DISTRICT activities taking place after 4:00pm; however if the CITY has a previously scheduled permit in conflict of the DISTRICT request, the CITY permit will have priority. Approved DISTRICT activities that extend beyond 4:00pm shall be permitted through the CITY at no cost to the DISTRICT. For these properly scheduled events, the DISTRICT has sole responsibility to restrict public access to any OPEN SPACE AREAS during those times. A Facility Use Permit requesting interscholastic events taking place after 4:00pm on all OPEN SPACE AREA(s) including dates, times and duration are to be submitted by the DISTRICT to the CITY at least one month prior to the beginning of each school year and at least one month prior to any change or additional request being anticipated. Any changes or additional requests will be submitted in the form of a new Facility Use Permit. The CITY shall provide the DISTRICT a list of approved permits for OPEN SPACE AREAS. The DISTRICT and CITY shall meet quarterly to review all approved permits for OPEN SPACE AREAS and any DISTRICT after hour usage requests.
- b. The CITY will have use priority of the elementary and middle school facilities at all OPEN SPACE AREAS after 4:00pm on scheduled school days and at all other times, including weekends, holidays, and summer vacation periods similar to public parks. Exceptions to

this use priority schedule may be agreed upon, in writing, by RECREATION DIRECTOR and BUSINESS MANAGER. The CITY will cooperate with the DISTRICT in a manner which will afford the DISTRICT an adequate opportunity to use the OPEN SPACE AREAS for its activities, programs and other needs.

- c. The CITY, at its sole cost and expense, will administer public exclusive use permits of all OPEN SPACE AREAS in accordance with the CITY's permit policies. All permit holders will be notified of DISTRICT rules concerning use of any OPEN SPACE AREAS. The CITY will solely be responsible for determining the parameters of the use priority system and schedule, as well as permit or user fees to be charged to members of the general public, including individuals and organized groups, for the use of any OPEN SPACE AREAS during such times as the CITY may exercise use priority. Such fees will conform to the Laws governing school grounds and those which are applicable to the CITY's property. The CITY will retain all fees collected for the use of any OPEN SPACE AREAS covered by the Agreement. Any person or group permitting OPEN SPACE AREAS shall have equal access to parking on school property on a first-come, first-served basis and according to any use restrictions posted by DISTRICT.
- d. The CITY shall monitor and enforce the use of any OPEN SPACE AREAS to determine whether such uses comply with conditions of the permits and DISTRICT rules concerning use of any OPEN SPACE AREAS. If such use of any OPEN SPACE AREA does not comply with the conditions of the particular permit or other applicable LAWS, the CITY shall terminate the further use of an OPEN SPACE AREA by the user.
- e. Any person or group who leases a building of the DISTRICT may use any OPEN SPACE AREAS, including FIELDS, on a casual or drop-in basis and shall share them with

members of the public also using them on a casual or drop-in basis. Any person or group will be required to secure a permit for an OPEN SPACE AREAS from the CITY if they desire to have exclusive use and shall respect the exclusive use of any OPEN SPACE AREAS by any person or group that has obtained a permit from the CITY for such use.

- f. CITY and DISTRICT may modify usage upon mutual written agreement of the RECREATION DIRECTOR and the BUSINESS MANAGER or their designees.

6. CONSIDERATION BETWEEN THE PARTIES

- a. The consideration from CITY to DISTRICT under this Agreement consists of said undertaking by CITY of obligations to maintain OPEN SPACE AREAS owned by the DISTRICT and as further detailed in Attachment 1, Exhibit A through Exhibit I.
- b. The consideration from DISTRICT to CITY under this Agreement consists of the Authorization by DISTRICT of CITY to utilize all OPEN SPACE AREAS for recreational purposes.
- c. The DISTRICT will reimburse the CITY annually in March of each year for the prior calendar year for water cost according to the following amount:

2017 base year amount will be \$135,000

Annual adjustment to the base year will be calculated using the effective Schedule 1 General Meter Service rates as authorized by California Public Utilities Commission and published by San Jose Water Company for the All Other Customer rate charge provided for water provided per 100 cubic feet (CCF).

The base rate for 2017 is \$5.10/CCF (rate charge).

Annual adjustment calculation for the duration of this agreement shall be as follows:

Prior Year Water Reimbursement Amount x (Rate Charge Effective in December of the Prior Year / Last Effective Rate Charge)

Example reimbursement amount for water used in 2018 assuming quantity rate charge of \$5.25/CCF effective in December 2017.

$$\$135,000 \times (\$5.25/\$5.10) = \$135,000 \times 1.0294 = \$138,970$$

- d. This payment is due and payable for the prior calendar year based on the formula detailed above. The last payment to be received will be by March 30, 2033 for the time period of January 2032 through June 30, 2032.
- e. The CITY will reimburse DISTRICT annually for the cost of Clean Water and Storm Protection Fees for OPEN SPACE AREAS maintained by the CITY. Reimbursement will occur no later than thirty (30) days upon receipt of DISTRICT's full annual payment.

OPEN SPACE AREAS MAINTAINED BY CITY	AREA	2019* Reimbursement
Collins Elementary School open space site	2.51	\$476.90
Eaton Elementary School open space site	4.58	\$870.20
Faria Elementary School open space site	4.18	\$794.20
Garden Gate Elementary School open space site	2.97	\$564.30
Lincoln Elementary School open space site	3.10	\$589.00
Regnart Elementary School open space site	4.12	\$782.80
Stevens Creek Elementary School open space site	3.14	\$596.60
Hyde Middle School open space site	7.87	\$1,495.30
Kennedy Middle School open space site	13.35	\$2,536.50

* The 2019 reimbursement is calculated at the FY 19/20 fee of \$190/Acre. The Clean Water and Storm Protection Fees may increase by a maximum of 3% per year. Future reimbursements will be calculated at the applicable fiscal year Clean Water and Storm Protection fee for school sites.

7. DISTRICT SELLING OF DESIGNATED SCHOOL OPEN SPACE AREAS

DISTRICT shall notify CITY a minimum of three hundred sixty-five (365) days in advance of any OPEN SPACE AREA that will be sold, conveyed or otherwise disposed which are the subject of this Agreement at schools with OPEN SPACE AREAS prior to June 30, 2032.

8. ASSIGNMENT – SUBCONTRACTORS AND EMPLOYEES

- a. The Parties shall give their personal attention to the faithful performance of this Agreement and shall not assign, transfer, convey, or otherwise dispose of this Agreement or any right, title or interest in or to the same or any part thereof without the prior written consent of the other Party, and then only subject to such terms and conditions as the other Party may require. The consent to one assignment shall not be deemed to be consent to any subsequent assignment. Any assignment without such approval shall be void and, at the option of the other Party, shall terminate this Agreement and any license or privilege granted herein.
- b. This Agreement and any interest herein shall not be assignable by operation of LAW without the prior written consent of the other party. The DISTRICT shall be responsible for employing or engaging all persons necessary to perform the services of the DISTRICT hereunder. The CITY shall be responsible for employing or engaging all persons necessary to perform the services of the CITY hereunder.

9. DUTY OF PARTIES TO DEFEND, INDEMNIFY AND HOLD HARMLESS

- a. Each Party shall defend, indemnify and hold harmless the other Party (including its officers, employees and agents) against any claim, loss or liability arising out of the performance of this Agreement by such Party. Nothing contained herein shall be construed as a waiver of any immunities or defenses that a Party may have under applicable

provisions of the law, including the provisions of the California Tort Claims Act (Government Code Section 801 et seq.). This mutual indemnification agreement is adopted pursuant to Government Code Section 895.4 and in lieu of and notwithstanding the pro rata risk allocation which might otherwise be imposed between the parties pursuant to Government Code Section 895.6. This provision shall survive expiration or termination of this Agreement.

- b. At all times during the term of this Agreement, the CITY and DISTRICT will within twenty four (24) hours notify one another of any condition of the OPEN SPACE AREAS, of which it has knowledge, which may constitute or present a danger or threat to person or property. The tender of such notice shall not compromise any Provision of indemnification as set forth in this Paragraph.

10. TIME IS OF THE ESSENCE

Time is of the essence of this Agreement.

11. FORCE MAJEURE

If, due to act of God, fire, flood, storm, inclement weather, earthquake, drought, acute restrictions or limitations on acquisition and/or consumption of water, epidemic, riot, war or insurrection, plant or animal infestation or disease, sudden and severe energy shortage, striker, work stoppage, work slowdown, or other concerted job action, or other condition of emergency or disaster beyond the control of CITY which makes performance of its construction and/or MAINTENANCE obligations under this Agreement impossible or extremely impracticable, such obligations shall be suspended during such time as any such condition or conditions exist.

12. DISCRIMINATION PROHIBITED

Neither CITY nor DISTRICT shall discriminate in the employment or persons engaged in the performance of this Agreement on account of race, color, national origin, ancestry, religion, sex, physical handicap, or medical condition, in violation of State or Federal LAW, or on any basis otherwise prohibited by State or Federal LAW.

13. NOTICES

All notices hereunder shall be given in writing and mailed, postage prepaid, by certified mail, addressed as follows:

To CITY: City of Cupertino
 Director of Public Works
 10300 Torre Avenue
 Cupertino, CA 95014

To DISTRICT: Cupertino Union School District
 Office of the Superintendent
 10301 Vista Drive
 Cupertino, CA 95014

14. EFFECT OF WAIVER OF BREACH OR VIOLATION

The waiver by either party of any breach or violation of any term, covenant, or condition of this Agreement or of any provision or law shall not be deemed to be a waiver of any other term, covenant, condition or LAW, or of any subsequent breach or violation of the same or any other term, covenant, or condition of LAW. The subsequent acceptance by either party of any money which may become due hereunder shall not be deemed a waiver of any preceding breach of violation by the other party of any term or condition of this Agreement, or of any applicable LAW.

15. LEGAL ACTIONS

Any disputes regarding this Agreement shall be resolved according to the LAWS of the State of California. Any legal proceedings shall be initiated in the courts of the State of California and the County of Santa Clara, irrespective of any other possible jurisdictional conditions.

16. TERM OF AGREEMENT

- a. This Agreement shall become effective upon the execution thereof by all parties. This Agreement may be terminated by either party upon three hundred sixty-five (365) days' notice.
- b. The obligations set forth in Paragraph 6 of this Agreement shall continue to be in force notwithstanding the amendment of other provisions of this Agreement pursuant to Paragraph 4.
- c. Unless the CITY and the DISTRICT mutually agree in writing to extend this Agreement one time for an additional five (5) years, this Agreement shall terminate on June 30, 2032. Any extension must be subject to the terms and provisions of this Agreement unless superseded by a jointly executed amendment or agreement.
- d. Non-Appropriation

This Agreement is subject to the fiscal provisions of the Cupertino Municipal Code and the DISTRICT Board Policies, and Agreement will terminate without any penalty:

- 1) At the end of any fiscal year in the event that funds are not appropriated for the following fiscal year, or
- 2) At any time within a fiscal year in the event that funds are only appropriated for a portion of the fiscal year and funds for this Agreement are no longer available. This Paragraph

shall take precedence in the event of a conflict with any other covenant, term, condition, or provision of this Agreement.

17. INTEGRATED AGREEMENT

This document represents the entire and integrated Agreement between CITY and DISTRICT and supersedes all prior negotiations, representations or agreements, either written or oral, including the November 16, 2016 Agreement between the Parties regarding the same subject matter. This document may be amended only by written instrument, signed by both CITY and DISTRICT. All provisions of this Agreement are expressly made conditions.

IN WITNESS WHEREOF, CITY and DISTRICT have executed this Agreement on the ___ day of _____, 2019.

Attest:
City Clerk

City of Cupertino

By _____

Mayor

Approved as to form:

Cupertino Unified School District

City Attorney