

**FISCAL AND USE AGREEMENT
BETWEEN SANTA MONICA-MALIBU UNIFIED SCHOOL DISTRICT
AND SANTA MONICA COMMUNITY COLLEGE DISTRICT**

This Fiscal Agreement ("Agreement") is entered into and effective as of this 16th day of May 2019 ("Commencement Date") by and between the Santa Monica-Malibu Unified School District ("District") and Santa Monica Community College District ("College"). The District and the College may be individually referred to herein as "Party" or collectively referred to herein as "Parties."

RECITALS

WHEREAS, the District owns and operates certain real property, commonly known as the John Adams Middle School, located at 2425 16th Street, Santa Monica, California 90405 ("Campus" or "School Site"); and

WHEREAS, the School Site Auditorium has been closed since mid-2014 when the District learned of significant structural damage including to the existing roof trusses; and

WHEREAS, because of the proximity of the College campus to the School Site, the District and College have been able to assist each other in many ways, including the College's use of the School Site Auditorium prior to its closing, and the absence of the School Site Auditorium has had a negative impact on the College, the District and the community at large; and

WHEREAS, in November 2016, the voters overwhelmingly approved Measure V, the Santa Monica College Classroom Repair, Career Training, Higher Education Access Measure, a \$345 Million Dollar Bond Measure that aims to improve local access to affordable higher education for high school graduates/adults/veterans by, among other things, developing a joint-use auditorium/performing arts center at the School Site to replace the closed Auditorium, repairing, upgrading, constructing and modernizing classrooms at the College, providing a joint-use athletic field at the City of Santa Monica's Memorial Park, and enhancing the College's instructional presence in the City of Malibu; and

WHEREAS, in November 2012, the voters overwhelmingly approved Measure ES, the Local School Modernization, Academic Improvement and Earthquake and Fire Safety Bond, a \$385 Million Dollar Bond Measure that aims to improve academic instruction and school safety by modernizing high school classrooms and campuses, repairing aging elementary schools, ensuring every school meets current earthquake and fire safety standards to protect students, and constructing, acquiring, modernizing, and/or repairing classrooms, sites, facilities and equipment, computers, and learning technology to raise student achievement; and

WHEREAS, the joint-use auditorium/performing arts center project, known as the John Adams Middle School Auditorium Replacement Project, involves replacing and augmenting the existing performing arts buildings at the School Site, construction of a new performing arts center at the site of the existing auditorium and music building, addressing the existing structural safety concerns at the existing auditorium and expanding the performing arts space available on the School Site to meet existing school needs ("Project" and once completed "Facility"), and is within the scope of projects covered under Measures V and ES; and

WHEREAS, it is the intent of the Parties to work cooperatively and in partnership with one another to develop the Project for joint and community use using Measure V and Measure ES bond funds; and

WHEREAS, the construction of the Project is planned to occur over the course of several phases, the first of which would involve removing the existing auditorium, reconstructing a new auditorium and renovating the existing music building. The second phase would involve constructing a rehearsal building, and the third phase would involve replacing the music building; and

WHEREAS, on March 17, 2018 the District’s Board of Education approved the Project under the California Environmental Quality Act (“CEQA”); and

WHEREAS, on March 2, 2017 the District entered into an Architect Agreement by and between the District and HGA Architects (the “Architect Agreement”) for development of the Project design, which is 90% complete and will be submitted to the Division of the State Architect (“DSA”) for approval upon completion; and

WHEREAS, Education Code section 10900 authorizes public school districts to cooperate with one another for the purpose of authorizing, promoting and conducting programs of community recreation that will contribute to general recreational and educational objectives for children and adults of this State; and

WHEREAS, under Education Code section 10905, two or more public authorities may cooperate with each other to carry out the purposes set forth in section 10900, and to that end may enter into agreements with each other and may do any and all things necessary and convenient to aid and cooperate in carrying out said purposes; and

WHEREAS, the District and College are authorized to operate recreation facilities including auditoriums and performing arts centers and, by virtue of that authority, do operate and maintain such recreation facilities; and

WHEREAS, District intends to pay all costs associated with the design and environmental/CEQA approval of the Project from Measure ES Bond Funds; and

WHEREAS, District and College intend to jointly contribute financially to the construction of the Project; and

WHEREAS, to commence construction of the Project, the District shall advance funds to the construction of the Project and the District shall seek reimbursement from the College for all eligible expenditures; and

WHEREAS, once the Project is completed, College will be entitled to jointly use the Facility as set forth in this Agreement; and

WHEREAS, the District, pursuant to Education Code section 10910, is authorized to “grant the use of any building, grounds or equipment of the district to any other public authority...whenever the use of the buildings, grounds or equipment for community recreational purposes will not interfere with use of the buildings, grounds, and equipment for any other purpose of the public school system;” and

WHEREAS, the District has determined, by approving this Agreement, that allowing use of the District Premises by the College will not interfere with use of the District Premises for any other purpose of the District; and

WHEREAS, the District and College seek to memorialize the terms and conditions related to the funding and reimbursement structure of Project expenditures in connection with the Project and in connection with the College’s use of the Facility.

AGREEMENT

NOW, THEREFORE, it is mutually agreed by and between the Parties as follows:

1. **Purpose of Agreement.** The purpose of this Agreement is to provide the terms and conditions related to the funding and reimbursement of Project expenditures for the Project and for the use of the Facility once completed.
2. **Term.** This Agreement shall remain in force so long as the Facility remains under the District’s ownership and control and the building is used as an auditorium by the District.

3. **Project Budget.** The Project Budget, including for design, environmental review, management and construction and close-out, is estimated to be approximately \$32 Million Dollars (“Project Budget”).
 - 3.1 **College’s Contribution.** College plans to contribute \$20 million from Measure V tax-exempt bond funds toward Construction Costs (as defined below).
 - 3.2 **District’s Contribution.** District is estimated to contribute \$12 million from Measure ES tax-exempt bond funds to Non-Construction and Construction Costs (as defined below). Non-Construction Costs include but are not limited to: Project Planning, Conceptual and Preliminary Design, Detailed Design and Construction Documents and Obtaining the required Permits and Entitlements for the Project.
 - 3.3 Notwithstanding any other provisions herein to the contrary, any additional funds that may be required to complete the Project shall be paid by District.
 - 3.4 Any modification to the District’s and College’s respective contributions requires written approval from the District and College.
4. **Project Schedule.** The Project Schedule is attached hereto and incorporated herein as Exhibit A. The Project is scheduled to begin in the first quarter of 2019 and be completed in phases as set forth in the attached Exhibit A.
5. **Reimbursement Structure.** The District shall be responsible for seeking reimbursements from the College for Construction Costs not to exceed \$20 Million Dollars pursuant to the following reimbursement structure:
 - 5.1 **Eligible Costs for Reimbursement.** Only Construction Costs incurred during the Project construction phase of the Project will be eligible for reimbursement by the District (“Eligible Costs”). Construction Costs include but are not limited to: Site Preparation and Demolition, Grading/Earthwork, General Construction, and Site Furnishings (fence, seating, etc.).
 - 5.2 **Submission to College for Reimbursements.** Notwithstanding anything to the contrary in this Agreement, District shall invoice College and College shall reimburse District for Eligible Costs incurred by District (“Reimbursements”) in three installments as follows: (a) of \$5,000,000 upon completion of 25% of the construction; (b) of \$10,000,000 upon completion of 75% of the construction; and (c) of \$5,000,000 upon completion of construction of Phase 1, the auditorium, rehearsal room and courtyard, as evidenced by occupancy of the theatre.
 - 5.3 **Reimbursement Documentation.** District’s invoices shall be accompanied by written documentation, itemized with sufficient detail to support the invoiced amounts. The invoice shall be accompanied by all relevant pay applications and proof of payment. The invoices shall be paid no later than sixty (60) calendar days following the date the applicable invoice is received by the College.
 - 5.4 **Disapproved Reimbursements.** If the College disapproves Reimbursements, the College shall notify the District in writing within three (3) calendar days and provide the grounds for such disapproval. If the District, in its sole discretion, determines that the reimbursements were wrongly disapproved by the College, the District shall reasonably dispute said disapproval by meeting and conferring with the College.

- 5.5 **Change Orders.** Project Scope Changes: District shall pay the cost of Change Orders, including whether said Change Orders are due to an unforeseen condition at the Project site or if initiated by the District. College agrees not to initiate Change Orders or change in Project scope.
6. **Retention and Contingency Amounts.** The Parties acknowledge that pursuant to the construction agreement, ten percent (10%) of the construction contract amount will be held back by the District and issued as final payment to contractor upon Project completion. A contingency amount may also be reserved.
7. **CEQA and Entitlements.** Notwithstanding any other provision herein, before Project construction commences, District shall obtain all necessary permits, approvals, and other entitlements from all applicable local and state agencies.
8. **Use of Facility by Parties.** The terms governing use of the Project facilities by the District and College are set forth below:
- 8.1 The College shall have the right to use the Facility on at least 36 days each school year, including the dates established by the College for (a) Graduation; (b) VIP Welcome Day; (c) Fall Opening Day Flex Day; and (d) Spring Institutional Flex Day (collectively “College Special Events”). Prior to the start of each academic school year for District and College, the Parties shall agree upon a two-year calendar of blackout days for the College’s use. During the blackout days, the College’s use shall take precedence and priority over the District’s use or any other person or entity’s use for College programs and activities.
- 8.2 Except in connection with the blackout days reserved by the College and College Special Events, the District’s use of the Facility for any purpose shall take precedence and priority over the College’s use or any other person or entity’s use.
- 8.3 If College desires to use the Facility, it shall follow the permit process established by District’s Facilities Use Department and subject to the District Use Rules, which can be found here: http://www.smmusd.org/facility_permits/index.html. College use may only displace third party user from an activity previously permitted through the Facilities Use Department if said activity is for College programs and activities only and can be relocated in a reasonable time prior to the occurrence of the activity. College shall provide the District’s Facilities Use Department at least two weeks’ written notice requesting the relocation of other users.
- 8.4 No facility use fee as established by Education Code sections 38130, et. seq. and the District’s Facilities Use Department for use of District facilities shall be charged for the College’s use of the Facility and equipment when the activity is for a College use/program only.
- 8.5 College shall have non-exclusive use of the parking lots located on the School Site as depicted and identified in the attached Exhibit B, (collectively, “Facility Parking Lots”) when school is not in session. College shall abide by District’s policies concerning the use of the Facility Parking Lots, which will be provided to College at or before the Commencement Date. College’s use of the Facility Parking Lots shall be on a first come, first served basis. College shall coordinate with the District’s Facilities Use Department for ongoing direction related to this Section and may instruct its visitors, invitees and guests to park only at the Facility Parking Lots designated by the Facilities Use Department.
- 8.6 In the event that a Facility Parking Lot charges a fee for parking, College shall not be charged. However, both Parties agree that the visitors, guests, and patrons of College using the Facility

Parking Lot may be charged the regular parking rate for the Facility Parking Lot. District shall keep the parking proceeds.

- 8.7 College is not required to pay District for utilities in connection with its use of the Facility.
- 8.8 The District shall, at no cost to the District, supply the minimum staff to support the College event and to maintain safe facilities, at the District's sole discretion. The "minimum staff" may include, but shall not be limited to, Custodians, Security Officers, Theater Technicians, and other personnel. College, at its sole cost and expense, shall provide and supplement staffing beyond that provided by the District.
- 8.9 The Parties recognize that College's use of the Facility depending on existing staff schedules, may create the need for the District to pay employees, which may include, but shall not be limited to, Custodians, Security Officers, Theater Technicians, and other personnel, additional wages and/or overtime wages. Notwithstanding anything to the contrary in this Agreement, in the event that there is a need for the District to pay employees additional wages and/or overtime wages, District shall charge the cost of such additional wages and/or overtime wages, as required, to College.
- 8.10 College is responsible for determining its appropriate staffing needs. College shall be permitted to supplement the minimum number of District staff with staff employed by College, where necessary. If College anticipates that there will be insufficient staffing at the Facility at any time during College's use of the Facility, upon written request by College, District may, but is not obligated to, make staff available, at cost, to the College.
- 8.11 College or District shall not be required to make or construct any alterations including structural changes, additions or improvements to the Facility after the completion of the Project. By College's entry and use of the Facility pursuant to this Agreement, College accepts the Premises in "AS IS" condition.
- 8.12 The College shall repair, at its sole expense, any and all parts of the Facility that have been damaged by its use.
- 8.13 The Facility and associated areas ("Premises") may be monitored by a safety system or protocol implemented, maintained and operated by the District ("Safety Measures"). However, the Parties specifically acknowledge, understand, and agree that the Parties are neither responsible for nor have the obligation to supply, provide, establish, maintain, or operate Safety Measures for the Premises. The Parties further expressly acknowledge and agree that the Parties shall not be liable for and are hereby released from any and all responsibility for any damage, loss, or injury to the other Party or its personal property resulting or arising out of any criminal activity (including, but not limited to, any damage, loss, or injury resulting from intrusions, petty theft, vandalism, or other similar acts) that may occur on or near the Premises, regardless of whether a Party was able to, actually did, or failed to provide notice to the other Party of a safety incident or situation occurring on the Premises which led to the damage, loss, or injury. The Parties make no warranties or representations as to the safety or security of the Premises, or Safety Measures. The Parties shall be responsible, at their sole cost, for supplying, providing, establishing, maintaining, and operating their own safety measures, protocols, personnel, or systems to encourage and ensure the security of the Party, its agents, officers, employees, licensees and invitees, and the Premises ("Party's Safety Measures").
- 8.14 The College shall submit written accident/incident reports to the District as soon as practicable but not more than twenty-four (24) hours after the occurrence of or College's receipt of information or notice regarding any accident or incident that occurs at the Facility including related claims,

arrest or criminal charges associated with College's use of the Facility or College's staff working at the Facility. Submission of written accident/incident reports shall be made pursuant to the section entitled "Notices."

9. **Accounting Requirements and Record Retention.** District shall be responsible for maintaining an accounting system of all Project-related costs, expenditures, and transactions. District shall retain Project records for a period of not less than three (3) years, including all books, papers, accounts, documents, source documents, evidence of payment, or other records as they relate to the Project.
10. **Termination.** If the Project is terminated for whatever reason, the College shall have no further obligation to make payments under this Agreement and District shall reimburse College for any payments previously paid and not expended by the District.
11. **Indemnification.** To the fullest extent permitted by California law, each Party shall hold harmless, and indemnify the other Party and its board members, representatives, officers, consultants, employees, trustees, volunteers, and invitees against any and all loss, liability, damage, or expense, including any direct, indirect or consequential loss, liability, damage, or expense, for injury or death to persons, including employees of either Party, and damage to property, including property of either Party, arising out of or in connection with intentional, willful, wanton, reckless or negligent conduct resulting from the use, conduct or any activities of a Party related to this Agreement. However, neither Party shall be indemnified hereunder for any loss, liability, damage, or expense resulting from its sole negligence or willful misconduct.
12. **Insurance.** The Parties shall maintain, for the Term, at their own respective costs, their policy or policies of general liability and property insurance. Self-insurance authorized by state law and/or maintained by the Parties in their regular course of business for its other activities shall satisfy this requirement.
13. **Approval.** The Parties agree that the Agreement shall not be binding on the Parties until it has been approved by the District's and College's respective governing boards.
14. **Notices.** Any notice required or permitted to be given under this Agreement shall be deemed to have been given, served and received if given in writing and personally delivered or either deposited in the United States mail, registered or certified mail, postage prepaid, return receipt required, or sent by overnight delivery service, email, or facsimile transmission, addressed as follows:

<u>If to the District:</u>	<u>If to the College:</u>
Santa Monica-Malibu Unified School District 1651 16 th Street Santa Monica CA 90404 Attn: Carey Upton, Chief Operations Officer With a copy to: Orbach Huff Suarez & Henderson LLP 1901 Avenue of the Stars, Suite 575 Los Angeles, California 90067 Attn: Sarine A. Abrahamian, Esq.	Santa Monica Community College District 1900 Pico Boulevard Santa Monica, CA 90405 Attn: Dr. Kathryn E. Jeffery, Superintendent/President With a copy to: Campus Counsel Santa Monica Community College District 1900 Pico Boulevard Santa Monica, CA 90405

Any notice personally given or sent by facsimile transmission shall be effective upon receipt. Any notice sent by overnight delivery service shall be effective the business day next following delivery thereof to the overnight delivery service. Any notice given by certified or registered mail shall be effective three (3) days after deposit in the United States mail.

15. **Amendments to Agreement.** This Agreement may be amended or modified at any time by mutual agreement of the Parties. Any amendment or modification to this Agreement shall be in writing and shall be effective only upon approval by the District's and College's governing Boards.
16. **Independent Entities.** This Agreement is by and between two independent entities and is not intended to and shall not be construed to create the relationship of agent, servant, employee, partnership, joint venture, or association.
17. **Entire Agreement of Parties.** This Agreement constitutes the entire agreement between the Parties on the subject matter herein and supersedes all prior discussions, negotiations and agreements, whether oral or written, on the subject matter herein. This Agreement may be amended or modified only by a written instrument executed by both Parties.
18. **Each Party to Bear Own Costs and Attorneys' Fees.** Except as expressly set out in this Agreement, each Party shall bear its own respective costs, expenses and attorney's fees with respect to the Agreement.
19. **California Law.** This Agreement shall be governed by and the rights, duties and obligations of the Parties shall be determined and enforced in accordance with the internal laws of the State of California. The Parties further agree that any action or proceeding brought to enforce the terms and conditions of this Agreement shall be maintained in the county in which the District's administrative offices are located. The District and College waive their right to remove said action or proceeding to federal court.
20. **Waiver.** The waiver by either Party of any breach of any term, covenant, or condition herein contained shall not be deemed to be a waiver of such term, covenant, condition, or any subsequent breach of the same or any other term, covenant, or condition herein contained.
21. **Successors and Assigns.** This Agreement shall be binding upon and inure to the benefit of the Parties hereto and their respective heirs, legal representatives, successors, and assigns.
22. **Counterparts.** This Agreement and all amendments and supplements to it may be executed in counterparts, and all counterparts together shall be construed as one document. Counterparts hereof that are transmitted by facsimile or electronic transmission shall be given identical legal effect as an original.
23. **Captions.** The captions contained in this Agreement are for convenience only and shall not in any way affect the meaning or interpretation hereof nor serve as evidence of the interpretation hereof, or of the intention of the Parties hereto.
24. **Severability.** Should any provision of this Agreement be determined to be invalid, illegal or unenforceable in any respect, such provision shall be severed, and the remaining provisions shall continue as valid, legal and enforceable.
25. **Amendments to Agreement.** This Agreement may be amended or modified at any time by mutual agreement of the Parties. Any amendment or modification to this Agreement shall be in writing and shall be effective only upon approval by the District's and College's governing Boards.
26. **Incorporation of Recitals and Exhibits.** The Recitals and each Exhibit attached hereto are hereby incorporated herein by reference.
27. **Time Is of the Essence.** Time is of the essence with respect to the Parties' obligations herein.

28. **Further Actions.** Each Party hereto shall execute, acknowledge and deliver such additional documents, and take such further action(s), as may be reasonably required from time to time to carry out each of the provisions, and the intent, of this Agreement.
29. **Neutral Construction.** This Agreement shall not be construed as if prepared by one of the Parties, but according to its fair meaning as a whole, as if both Parties had prepared it.
30. **No Third-Party Beneficiary.** Unless otherwise specified herein, this Agreement shall not confer or be construed to confer any rights or benefits to any person or entity other than the Parties.
31. **Force Majeure.** If either Party is unable, in whole or in part, to perform its obligations under this Agreement, by reason of the occurrence of fire, casualty, unavoidable accident, failure of usual source of supply, strike, labor conditions, lockouts, war, acts of God, the enactment of any Federal, State, or municipal law or ordinance, or the issuance of any executive or judicial order, whether Federal, State, or municipal, or of any other legally constituted authority, or any other cause not within the control of the Party claiming relief notwithstanding the exercise of due diligence, the Party shall give written notice to the other Party as soon as practicable after the occurrence. The obligations of that Party shall be suspended during the continuance of the cause stated in the notice, which the Party shall remedy or remove expeditiously. In such case, the obligations, terms, and conditions of this Agreement shall be extended for the period necessary to compensate for any suspension of performance.
32. **Authorization to Sign Agreement.** Each individual executing this Agreement on behalf of College represents and warrants that he or she is duly authorized to execute and deliver this Agreement on behalf of College in accordance with a duly adopted resolution of College's Board, and that this Agreement is binding upon College in accordance with its terms, and College shall, concurrently with its execution of the Agreement, deliver to District upon its request a certified copy of a resolution of its Board authorizing the execution of this Agreement. Each individual executing this Agreement on behalf of District represents and warrants that he or she is duly authorized to execute and deliver this Agreement on behalf of District and this Agreement is binding upon District in accordance with its terms.

Accepted and agreed on the date indicated below:

Dated: _____, 2019

Santa Monica-Malibu Unified School District

By: _____

Print Name: _____

Print Title: _____

Dated: _____, 2019

Santa Monica Community College District

By: _____

Print Name: _____

Print Title: _____

Exhibit "A"
Project Schedule

March 1, 2019	Begin Preliminary Services Abatement and Demolition of Existing Auditorium Grading
July 1, 2019	Begin Site Construction
November, 21, 2019	<u>Complete Foundations & Construction Structural Elements:</u> Excavation, Rebar and Concrete for foundation. The installation for Structural steel and Concrete Masonry Units [MILESTONE 25%]
April 3, 2020	<u>Complete Building Finishes, Building Weather tight:</u> Plaster, Windows, Framing, Drywall, Paint and flooring. The interior and exterior finishes [MILESTONE 75%]
September 18, 2019	Begin Construction of Rehearsal Building
May 28, 2020	Rehearsal Building Construction completed
November 30, 2020	<u>Building Completion and Occupancy:</u> - Stage, Lighting, Curtains, Seating, Wall and Ceiling Acoustic Panels Site Walkway and Plants. All Building Signage [MILESTONE 100%]
December 22, 2020	Begin Modernization of Existing Music Building
July 1, 2021	Completion and Occupancy of Existing Music Building
August 31, 2021	Final Completion

Exhibit "B"
Facility Parking Lots

JOHN ADAMS PARKING LOTS.

16th Street Parking Lot and 17th Street Parking Lot

