

JOINT USE AGREEMENT

(Milpitas Unified School District/City of Milpitas)

THIS AGREEMENT ("**Joint Use Agreement**") is effective July 1, 2016 by and between the City of Milpitas, a municipal corporation, ("**City**") and the Milpitas Unified School District, a public school district organized and existing under the laws of the State of California, ("**District**"). District and City may be referred to in this Joint Use Agreement individually as a "**Party**," and collectively as the "**Parties**."

RECITALS

A. City currently owns approximately 10.9 acres of unimproved real property located at the corner of McCandless Drive and Penitencia Creek East Channel, City of Milpitas, County of Santa Clara, commonly known as the "**McCandless Property**."

B. District is purchasing approximately 6.7 acres of the McCandless Property from City under that Purchase and Sale Agreement between City and District effective October 21, 2014, as amended ("**Purchase Agreement**").

C. Upon the close of escrow, District will own the 6.7 acre portion of the McCandless Property legally described on Exhibit A-1 – Legal Description of District Property ("**District Property**"), to be used for construction and operation of a new elementary school.

D. Upon the close of escrow, City will continue to own the remaining approximately 4.2 acre portion of the McCandless Property adjacent to the District Property, legally described on Exhibit A-2 – Legal Description of City Property ("**City Property**"), to be used as a municipal park. District Property and City Property are depicted on Exhibit B. Exhibits A-1, A-2 and B are attached hereto and by this reference made a part of this Joint Use Agreement.

E. Under this Joint Use Agreement, District and City will share the use of portions of their adjacent properties as delineated on Exhibit B, collectively the "**Joint Use Property**."

F. Sections 10900 *et. seq.* of the Education Code ("**Community Recreation Act**") authorizes cities and school districts to maintain and operate joint use facilities such as basketball courts and outdoor playing fields in order to reduce capital and operational costs to both governmental jurisdictions and provide recreational areas for the community as a whole.

G. 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 joint use, whenever such use does not interfere with school uses.

H. It is to the mutual benefit of City and District to contribute jointly to the establishment, operation and maintenance of recreational facilities and shared parking facilities which can serve the needs of both the general public and District.

NOW THEREFORE, for good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the Parties agree as follows.

1. **Joint Use Property.** The Joint Use Property consists of the following:

1.1 **Field.** The 1.2 acre portion of City Property adjacent to the District Property depicted on Exhibit B, along with the 1.2 acre portion of District Property adjacent to City Property on Exhibit B, together totaling 2.4 acres ("**Field**").

1.2 **Basketball Courts.** The 0.25 acre portion of District Property adjacent to the Field depicted on Exhibit B ("**Basketball Courts**").

1.3 **Parking Area.** The marked parking spaces along the western border of the McCandless Property ("**West Parking Lot**" or "**Parking**") consisting of 1.17 acres, as designated on Exhibit B. The Field, Basketball Courts and West Parking Lot may be referred to individually as the Field, Basketball Courts or Parking, or collectively as the "**Joint Use Property**," as depicted in its entirety on Exhibit B.

1.4 **Access to Joint Use Property.** Each Party shall have access to the Joint Use Property according to the terms and conditions of this Joint Use Agreement.

2. **Purchase Price Adjustment.** If the Parties mutually agree to adjust the purchase price of the District Property based on the percentage of District Property subject to this Joint Use Agreement, the Parties will amend the Purchase Agreement to reflect the adjustment prior to the close of escrow.

3. **Term.**

3.1 **Term Commencement Date.** This Joint Use Agreement shall become effective upon approval by the governing bodies of both Parties and full execution of the Joint Use Agreement ("**Effective Date**"). The term of the Joint Use Agreement shall commence on the completion of construction of the District's elementary school and the City's proposed park and both Parties acceptance of all construction improvements ("**Commencement Date**"). Within thirty (30) days after the Commencement Date, the Parties agree to memorialize the Term Commencement Date and the Expiration Date and attach it to this Joint Use Agreement.

3.2 **Term Expiration Date.** The initial term of this Joint Use Agreement shall be forty (40) years beginning from the Commencement Date ("**Initial Term**") and ending after forty years, consistent with the forty year time period set forth in Exhibit B of the Purchase Agreement for expiration of the Power of Termination (Civil Code 885.010 et seq.), unless extended by mutual written agreement of the Parties. **On or before the Expiration Date the Parties shall meet to determine whether or not to extend the Initial Term and make any other modifications to the Joint Use Agreement. If the Parties fail to extend this Joint Use Agreement in writing by the Expiration Date, the Parties shall continue to operate under the terms of this Joint Use Agreement until such time that the Parties mutually agree in writing to terminate. In the event one Party seeks to terminate and the other does not, the Parties shall be required to exhaust the Remedies provided for in Section 11.7 of this Agreement.**

4. Use. The Joint Use Property shall be used by the Parties exclusively for public education, recreation and parking as described below.

5. District and City Use.

5.1 District.

5.1.1. Field. District shall have exclusive use of the Field Monday through Friday, during the time period which begins ninety (90) minutes before the start of the school day and ends ninety (90) minutes after the close of the school day (estimated to be 4:15 p.m.) on every day that school is in session during the school year and summer school. District shall also have exclusive use of the Field for special events scheduled at the meetings described below.

5.1.2. Basketball Courts. District shall have exclusive use of the Basketball Courts Monday through Friday, during the time period which begins ninety (90) minutes before the start of the school day and ends ninety (90) minutes after the close of the school day (estimated to be 4:15 p.m.) on every day that school is in session during the school year and summer school. District shall also have exclusive use of the Basketball Courts for special events scheduled at the meetings described below.

5.1.3. Parking. The West Parking Lot shall be available for use by both the District and City at all times.

5.2 City.

5.2.1. Field. City shall have use of the Field for community use at all times the Field is not reserved for District's exclusive use or for previously scheduled District special events. City shall provide to District a schedule for its community use and special events at the meetings described below.

5.2.2. Basketball Courts. City shall have use of the Basketball Courts for community use at all times the Basketball Courts are not reserved for District's exclusive use or for previously scheduled District special events. City shall provide to District a schedule for its community use and special events at the meetings described below.

5.2.3. Parking. City shall have use of the West Parking Lot for community use at all times.

5.3 Exclusions. Restrooms and community rooms on District Property, the marked parking spaces along the southern border of the District Property, and the 0.54 acre portion of District Property adjacent to the Basketball Courts containing an outdoor play area are not included in this Joint Use Agreement.

5.4 Fitness Course. In the event the City constructs a Fitness Course ("**Fitness Course**") on a portion of City Property, District students shall have access to the Fitness Course under terms and condition mutually agreed upon by the Parties upon completion of the Fitness Course construction.

5.5 Alterations to Joint Use Property. Neither Party may alter the Joint Use Property in a manner that impacts the other Party's use of the Joint Use Property or impacts the other Party's costs associated with the Joint Use Property without the other Party's prior written consent, which may be granted in such Party's reasonable judgment. Should a Party provide written consent, both Parties shall execute an amendment to this Joint Use Agreement to ensure compliance with the Education Code and Community Recreation Act and ensure that the Parties contribute jointly to the establishment, operation and maintenance of the Joint Use Property.

6. Special Events. City and District shall meet annually (at a minimum) prior to the beginning of each school year to schedule use of the Joint Use Property. **The Parties shall also meet as needed for special events and changes to the schedule only if those special events and changes to the schedule could not have been included in the Master Schedules (defined in Section 7.2) despite reasonable and good faith efforts.**

7. Meetings and Schedules.

7.1 Operations Committee. City and District shall each designate an equal number of representatives to meet as an operations committee ("**Operations Committee**") to establish a written schedule for District and City exclusive and special event use of the Joint Use Property ("**Joint Use Schedule**"), coordinate the preparation and execution of a mutually satisfactory Operations and Maintenance Agreement (defined in Section 9.1), establish an annual maintenance schedule to be included in the Annual Operating Agreement (defined in Section 7.3), and discuss any issue related to the Joint Use Property.

7.1.1 Meetings. The Operations Committee shall meet annually (at a minimum), prior to the beginning of each school year and more often as needed.

7.1.2 Authority. Except where such actions would contradict a term of this Joint Use Agreement or the Operations and Maintenance Agreement (defined in Section 9.1), the Operations Committee shall have the authority to make decisions regarding the day-to-day operations of the Joint Use Property, including scheduling Special Events. Following each Operations Committee Meeting, a summary of actions shall be submitted to the governing boards of each Party.

7.2 Scheduling.

7.2.1 At least thirty days prior to each Operations Committee Meeting, City shall provide to District a copy of its master schedule for City scheduled activities for the coming year ("**City Master Schedule**").

7.2.2 At least thirty days prior to each Operations Committee Meeting, District shall provide to City a copy of its master schedule, including school calendar, bell schedule and school events for the coming year ("**District Master Schedule**").

7.2.3 After each Operations Committee Meeting, a "**Joint Use Schedule**" including applicable information from District Master Schedule and City Master Schedule shall be published. District and City shall distribute copies of the most current Joint Use Schedules to the Parties listed in the notice section of this Joint Use Agreement and, if there

are significant updates in between meetings, District and City shall distribute updates throughout the year as necessary. The Joint Use Schedules shall also be available at the District's administration office and Milpitas City Hall.

7.3 Maintenance Discussions. At the Operations Committee Meetings, the Parties will (i) coordinate and develop a maintenance schedule in compliance with the Operations and Maintenance Agreement (defined in Section 9.1); and (ii) do a joint walk-through of the Joint Use Property to review routine maintenance and determine what adjustments need to be made to the maintenance schedule. The maintenance schedule and any other operational decisions made at the annual Joint Use Meeting shall be recorded in an annual operating agreement that shall be consistent with the Operations and Maintenance Agreement ("Operating Agreement for Year ____") and copies maintained by each Party.

7.4 Additional Meetings. During the school year, either Party may request an additional Operations Committee Meeting if there are modifications required for the Joint Use Schedule or Operating Agreement and the Parties shall cooperate to satisfy those requests.

8. Supervision and Compliance With Law. Each Party is responsible for supervision of the Joint Use Property during the time of its use. Each Party shall comply with, and shall secure compliance by persons within its control and authority of all state and federal laws and regulations now in force, or which may be in force in the future, pertaining to the Joint Use Property. City and District shall each comply with the other Party's rules and regulations during the time of its use of that portion of the Joint Use Property owned by that Party.

9. Maintenance and Repair.

9.1 Operations and Maintenance Agreement. The Operations Committee shall coordinate the preparation and execution of a mutually satisfactory agreement for the maintenance of the Joint Use Property ("**Operations and Maintenance Agreement**"). The Operations and Maintenance Agreement shall define each Party's maintenance obligations for the Field, Basketball Courts, and Parking, and shall provide that the costs of such maintenance shall be equally split between the Parties, except when such costs are otherwise allocated in this Joint Use Agreement.

9.2 Routine Clean-up of Joint Use Property During Exclusive Use. District and City shall each be responsible for the routine clean-up of the Joint Use Property during the time of that Party's use. Such routine clean-up includes maintaining the areas in good order and condition and free of litter ("**Routine Clean-Up**").

9.3 Annual Monitoring of Soil Contamination. The Department of Toxic Substances Control ("**DTSC**") requires, as a condition of its approval, that the District perform annual monitoring of soil contamination on portions of the McCandless Property, including the Joint Use Property. The Parties shall cooperate to allow such monitoring activities to be conducted on the locations specified prior to commencement ("**DTSC Monitoring**").

9.4 Improvements and Replacement of Equipment.

9.4.1. After construction of the Joint Use Property, no additional improvements shall be installed until costs, plans and specifications for the improvements are reviewed and approved by both Parties.

9.4.2. The Parties shall mutually agree upon replacement of equipment or improvements to the Field and Basketball Courts. The Parties shall share the cost of the improvements or replacements equally unless the other Party caused damage to the equipment, in which case the Party causing the damage shall pay the total replacement cost.

10. Utilities.

10.1 Water. City intends to extend recycled water piping to the Joint Use Field. Should City extend recycled water to the Joint Use Field, the Parties shall split the costs of extending recycled water piping to the Joint Use Field equally along with the cost of using such recycled water to maintain the Joint Use Field equally. If City does not extend recycled water to the Joint Use Field, the Parties shall endeavor to split the water costs associated with maintaining the Joint Use Field equally. In all other events each Party shall pay for its own water usage related to the Joint Use Property.

10.2 Electricity, Sewer and Other Utilities. After operation of the Joint Use Property commences, the Operations Committee shall review costs of shared utilities and determine cost allocation. For purposes of this paragraph 10.2 commencement of operation shall mean when construction of both City Property and District Property is complete and the Joint Use Property is available for use.

11. General Terms and Conditions.

11.1 Indemnity. During the term of this Joint Use Agreement, the indemnification requirements in this paragraph 11.1 and the insurance requirements in paragraph 11.2 may be satisfied by a program of self-insurance or commercial insurance. City agrees to defend, indemnify and save District, its agents and employees harmless from any and all liability, claims, damages, or injuries to any person caused by the independent acts of City, its agents, licensees, invitees and employees in connection with the performance of this Joint Use Agreement and the use or maintenance of the Joint Use Property. District agrees to defend, indemnify and save City, its agents, licensees, invitees and employees harmless from any and all liability, claims, damages, or injuries to any person caused by the independent acts of District, its agents, licensees, invitees and employees in connection with the performance of this Joint Use Agreement and the use or maintenance of the Joint Use Property.

11.2 Insurance. Each Party shall maintain the following programs of insurance coverage:

11.2.1. General Liability insurance with limits of not less than the following, and naming the other Party as an additional insured:

General Aggregate:	\$2 million
Personal Injury:	\$1 million

Each Occurrence:

\$1 million

11.2.2. Workers' Compensation and Employers Liability insurance providing workers' compensation benefits, as required by the State of California.

11.2.3. The insurance coverage requirements in this paragraph 11 shall be subject to review and adjustment to reflect coverage recommended by the Parties' insurance advisors over the term of this Joint Use Agreement. Any such adjustment shall be set forth in a written amendment to the Joint Use Agreement signed by both Parties.

11.3 Entry and Inspection. Each Party reserves, and shall always have the right, to enter upon the Joint Use Property at reasonable times for the purpose of viewing and ascertaining the condition of the property.

11.4 Waiver. The waiver by either Party of any breach or of any term, covenant, or condition herein contained shall not be deemed to be a waiver of any other breach, term, covenant, or condition of this Joint Use Agreement.

11.5 Notices. Any notice required or permitted under this Joint Use Agreement shall be in writing, delivered to the Party at the address set forth below, and shall be deemed effectively delivered upon (i) personal delivery or electronic delivery, (ii) one day after deposit for overnight delivery by Federal Express or a comparable national express courier, (iii) two days after deposit in the United States mail, by first-class mail, postage prepaid, or (iv) receipt via facsimile or electronic mail. A Party may designate another address for notice purposes upon written notice pursuant to the provisions of this paragraph. The Parties shall provide each other after-hours emergency contact phone numbers of appropriate supervisory staff, which shall be periodically updated.

DISTRICT

Milpitas Unified School District
Attn: Superintendent
1331 East Calaveras Blvd.
Milpitas, CA 95035
Phone: (408) 635-2600
Fax: (408) 635-2616
Email: cjordan@musd.org

With a copy to:

Fagen Friedman & Fulfrost, LLP
Attn: Kelley Owens, Esq.
1525 Faraday Avenue Suite 300
Carlsbad, CA 92008
Phone: (760) 304-6000
Fax: (760) 304-6011
Email: kowens@f3law.com

CITY

City of Milpitas
Attn: City Manager
455 East Calaveras Blvd., 3rd Floor
Milpitas, CA 95035
Phone: (408) 586-3050
Email: twilliams@ci.milpitas.ca.gov

With a copy to:
City of Milpitas
Attn: City Attorney
455 East Calaveras Blvd.
Milpitas, CA 95035
Phone: (408) 586-3040
Email: cdiaz@ci.milpitas.ca.gov

11.6 Defaults. Should either Party fail to perform any covenant, condition or agreement contained in this Joint Use Agreement, including but not limited to those listed below, and the default is not cured within thirty (30) days after written notice is served on the defaulting Party by the non-defaulting Party, then the defaulting Party shall be in default under this Joint Use Agreement; provided however, to the extent that more than thirty (30) days are reasonably required to cure any default, the defaulting Party shall not be in default so long as it commences such cure within the thirty (30)-day period and thereafter diligently pursues such cure to completion.

11.6.1. Failure to Pay. The failure of either Party to pay when due any expenses, monies or charges required by this Joint Use Agreement to be paid.

11.6.2. Failure to Act. The failure of either Party to do any act, other than the payment of expenses, monies or charges required by this Joint Use Agreement to be done.

11.6.3. Prohibited Act. Either Party causing, permitting or suffering to be done any act (i) required by this Joint Use Agreement to have prior written consent or mutual consent, unless such consent is so obtained, or (ii) prohibited by this Joint Use Agreement.

11.7 Remedies. In the event of a default under this Joint Use Agreement, the Parties shall follow the dispute resolution procedures below.

11.7.1. Informal Negotiation. The Parties shall negotiate in good faith and attempt to resolve any dispute, controversy or claim arising out of or relating to this Joint Use Agreement ("**Dispute**") within 30 days after the date that one Party gives written notice of such Dispute to the other Party.

11.7.2. Non-binding Mediation. If, after informal negotiation, the Dispute remains unresolved, either Party may require that a non-binding mediation take place. In such mediation, representatives of the Parties with the authority to resolve the Dispute shall meet with a mutually agreed upon mediator. If the Parties are unable to agree upon a mediator, then either

Party may request the American Arbitration Association to appoint a mediator. The mediator's fee and expenses shall be paid one-half by each Party.

11.7.3. Binding Arbitration. If, after non-binding mediation, the Dispute remains unresolved, the Parties agree to submit to binding arbitration pursuant to California Code of Civil Procedure section 1280 *et seq.* The non-prevailing Party shall pay the arbitrator's fee, but in all other respects each Party shall bear its own costs and attorneys' fees.

11.8 Governing Law. The Parties agree that the laws of the State of California shall be used in interpreting this Joint Use Agreement, shall govern all disputes under this Joint Use Agreement and will determine all rights thereunder.

11.9 Complete Agreement. This Joint Use Agreement contains the complete expression of the whole agreement between the Parties and there are no promises, representations, agreements, warranties, or inducements either expressed verbally or implied except as are fully set forth herein. This Joint Use Agreement cannot be amended, enlarged, modified, or changed in any respect except by written agreement between the Parties.

11.10 Nondiscrimination. District, City, and all others who from time to time may use the property and recreational facilities described in this Joint Use Agreement with the permission and on the terms and conditions specified by both Parties shall not discriminate in any manner against any person or persons on account of race, color, gender, creed, national origin, age or mental or physical disability.

11.11 Exhibits.

Exhibit A-1 Legal Description of District Property

Exhibit A-2 Legal Description of City Property

Exhibit B Depiction of Joint Use Property

[Signatures on following pages]

Signature Page
for

JOINT USE AGREEMENT

IN WITNESS WHEREOF, this Joint Use Agreement is executed by the City of Milpitas, acting by and through its City Council that has authorized the Mayor to execute, and by the Milpitas Unified School District, acting by and through its Board of Education that has authorized the superintendent or his designee to execute.

CITY OF MILPITAS

By: _____

Name: JOSE S. ESTEVES

Title: MAYOR

Date: 6/28/2016

MILPITAS UNIFIED SCHOOL DISTRICT

By: _____

Name: GUNAWAN ALI-SANTOSA

Title: PRESIDENT, BOARD OF TRUSTEES

Date: 07/06/2016

APPROVED AS TO FORM

By: _____

Name: CHRISTOPHER DOW

Title: CITY ATTORNEY

Date: 6/28/2016

APPROVED AS TO FORM

By: _____

Name: KATHLEEN J MCKEE

Title: ATTORNEY FOR DISTRICT

Date: 6-30-16

EXHIBIT A-1
DISTRICT PROPERTY (ELEMENTARY SCHOOL)

ALL THAT CERTAIN REAL PROPERTY SITUATED IN THE CITY OF MILPITAS, COUNTY OF SANTA CLARA, STATE OF CALIFORNIA, DESCRIBED AS FOLLOWS:

BEING ALL OF PARCEL 2 AND A PORTION OF PARCEL 3, AS SAID PARCELS ARE SHOWN ON THE PARCEL MAP OF "MC CANDLESS TECHNOLOGY", FILED FOR RECORD ON DECEMBER 5, 1984, IN BOOK 536 OF MAPS AT PAGES 41-43, SANTA CLARA COUNTY RECORDS, TOGETHER WITH A PORTION OF HOURET DRIVE AS SAID PORTION IS SHOWN AND DEDICATED ON SAID PARCEL MAP OF "MC CANDLESS TECHNOLOGY", BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT THE SOUTHEAST CORNER OF SAID PARCEL 2;

THENCE ALONG THE GENERAL EASTERLY LINES OF PARCEL 2 AND 3, THE FOLLOWING SEVEN (7) COURSES:

- 1.) NORTH 0°08'26" EAST, 546.62 FEET;
- 2.) NORTH 68°44'33" WEST, 26.61 FEET THE BEGINNING OF A TANGENT CURVE TO THE LEFT;
- 3.) ALONG SAID CURVE HAVING A RADIUS OF 20.00 FEET, THROUGH A CENTRAL ANGLE OF 35°05'48", AN ARC LENGTH OF 12.25 FEET TO THE BEGINNING OF A REVERSE CURVE TO THE RIGHT, TO WHICH BEGINNING A RADIAL LINE BEARS SOUTH 13°50'22" EAST;
- 4.) ALONG SAID CURVE HAVING A RADIUS OF 46.00 FEET, THROUGH A CENTRAL ANGLE OF 250°11'37", AN ARC LENGTH OF 200.87 FEET TO THE BEGINNING OF A REVERSE CURVE TO THE LEFT, TO WHICH BEGINNING A RADIAL LINE BEARS SOUTH 56°21'15" WEST;
- 5.) ALONG SAID CURVE HAVING A RADIUS OF 20.00 FEET, THROUGH A CENTRAL ANGLE OF 35°05'48", AN ARC LENGTH OF 12.25 FEET;
- 6.) SOUTH 68°44'33" EAST, 0.35 FEET;
- 7.) NORTH 0°08'26" EAST, 53.88 FEET;

THENCE LEAVING THE EAST LINE OF SAID PARCEL 3, NORTH 89°51'34" WEST, 544.46 FEET TO THE WEST LINE OF SAID PARCEL 3 AND THE BEGINNING OF A NON-TANGENT CURVE TO THE LEFT, TO WHICH BEGINNING A RADIAL LINE BEARS SOUTH 81°35'01" WEST;

THENCE SOUTHEASTERLY ALONG THE WESTERLY LINES OF SAID PARCEL 3 AND 2, THE FOLLOWING THREE (3) COURSES:

- 1) ALONG SAID CURVE HAVING A RADIUS OF 1,762.00 FEET, THROUGH A CENTRAL ANGLE OF 17°12'47", AN ARC LENGTH OF 529.35 FEET TO THE BEGINNING OF A COMPOUND CURVE TO THE LEFT, TO WHICH BEGINNING A RADIAL LINE BEARS SOUTH 64°22'14" WEST;
- 2) ALONG SAID CURVE HAVING A RADIUS OF 682.00 FEET, THROUGH A CENTRAL ANGLE OF 11°38'05", AN ARC LENGTH OF 138.49 FEET TO THE BEGINNING OF A COMPOUND CURVE TO THE LEFT, TO WHICH BEGINNING A RADIAL LINE BEARS SOUTH 52°44'09" WEST;
- 3) ALONG SAID CURVE HAVING A RADIUS OF 400.00 FEET, THROUGH A CENTRAL ANGLE OF 10°03'25", AN ARC LENGTH OF 70.21 FEET TO THE SOUTHWEST CORNER OF SAID PARCEL 2;

THENCE ALONG THE SOUTH LINE OF SAID PARCEL 2, SOUTH 89°51'34" EAST, 269.11 FEET TO THE POINT OF BEGINNING.

CONTAINING 291,853 SQUARE FEET OR 6.70 ACRES, MORE OR LESS.

EXHIBIT B **DEPICTION OF JOINT USE AREAS**

