

**FACILITIES USE AGREEMENT
BETWEEN THE
BERKELEY UNIFIED SCHOOL DISTRICT
AND THE CITY OF BERKELEY**

THIS USE AGREEMENT (“Agreement”), effective on the 1st day of October, 2018 (**“Effective Date”**), is entered into by and between the City of Berkeley, a California municipal corporation (**“City”**) and the Berkeley Unified School District (**“District”**), a public school district existing under the laws of the State of California, County of Alameda (**“County”**). The District and the City shall be referred to individually as **“Party”** and collectively as **“Parties.”**

I.

RECITALS

WHEREAS, the District owns and operates the West Campus property generally bordered by University Avenue, Bonar Street, Addison Street, Browning Street and Curtis (formerly Bruce) Street in Berkeley California, as indicated on the Site Map attached hereto as Attachment A (the **“Property”**);

WHEREAS, the Property includes various facilities (as further defined below, the **“Facilities”**); and

WHEREAS, City seeks to have access to and use of the Facilities (i) to hold City-sponsored meetings, including without limitation regular, special, or emergency meetings of the Zoning Adjustments Board, the Rent Stabilization Board, and the City Council, and any other meeting where the City Council as a whole sits as another legislative body such as the Successor Agency to the Berkeley Redevelopment Agency and the Joint Powers Financing Authority, (ii) for overflow attendance at City-sponsored meetings, and (iii) for on-Property parking for those meetings (collectively, **“Activities”**); and

WHEREAS, the District also use the Property and Facilities.

WHEREAS, other licensees and permittees of the District, (**“District Users”**), may also use the Property and Facilities.

WHEREAS, the District is willing and able to permit the City to use and access the Facilities to conduct the Activities in accordance with the terms and conditions of this Agreement.

NOW, THEREFORE, in consideration of the mutual promises, covenants and conditions herein contained, the Parties hereby agree as follows:

II.

TERM OF AGREEMENT

- 2.1 Term. The term of this Agreement (“**Term**”) shall commence on October 1, 2018 and shall remain in effect unless and until terminated by District or City pursuant to Section VI below.

III.

FACILITIES DESCRIPTION

- 3.1 Facilities. The “**Facilities**” include the following, as described below, and as depicted in Attachment A, the Site Map:
- (a) The “**Board Room**” (Building D) at 1231 Addison Street, including without limitation Board Room, (including restrooms, kitchen, conference room, storage areas), and support facilities, including but not limited to (i) Audio-Visual infrastructure, (ii) broadcast facilities, (iii) television broadcast service, and (iv) WiFi (“**Board Room Support Facilities**”);
 - (b) The adjoining outside courtyard area (“**Courtyard**”);
 - (c) The breezeway enclosure from University Avenue to the Courtyard area (“**Breezeway**”).
 - (d) The “**Boys Gymnasium**” (Building H) when available (see Section 3.3 below);
 - (e) The District parking lot located on Browning Street (“**Parking Lot**”).
 - (f) Each Facility also includes all associated fixtures, furnishings and equipment. (For example, the Board Room includes without limitation all desks, tables and chairs, and the Parking Lot includes without limitation all bollards and lighting facilities.)
- 3.2 Other Facilities. If requested in writing by the City, other indoor or outdoor spaces on the Property may be added to the Facilities with the District’s written consent.
- 3.3 Breezeway and Boys Gymnasium. During the renovation project at the Boys Gymnasium, and thereafter, the Breezeway will be available for use by the City as an indoor overflow area. The Parties anticipate the Boys Gymnasium also becoming available for City use as an indoor overflow area in approximately April, 2019. Alternate indoor overflow area space may be designated by mutual agreement of the Parties.

IV.

USE OF THE FACILITIES

- 4.1 General. The District will make the Facilities available for the City to conduct the Activities, on an exclusive or non-exclusive basis as otherwise provided in this Agreement. In all circumstances where the City's use of a Facility is exclusive, without the City's written consent, the District shall not use or schedule any other use of the Facility, nor permit any other District User to use or schedule any other use of the Facility. Unless otherwise indicated in a written communication from the City's City Manager (or his or her designee) to the District's Superintendent (or his or her designee), all City use rights shall commence at the respective time(s) indicated in this Agreement (or later time requested in writing by the City), and end not later than one hour after the Activity is finished.
- 4.2 Tuesdays. On each Tuesday during the term of this Agreement, beginning at 3:00 pm, City will have exclusive rights to use the Facilities, except the Breezeway, which is to be non-exclusive. The City may, in its sole discretion, on any particular Tuesday, by written communication from the City Manager to the Superintendent (or their respective designees), waive its rights to use some or all of the Facilities or its exclusive rights to use the Boys Gymnasium.
- 4.3 Thursdays. On each Thursday during the term of this Agreement, beginning at 3:00 pm, City will have exclusive rights to use the Facilities, except the Breezeway, which is to be non-exclusive. The City may, in its sole discretion, on any particular Thursday, by written communication from the City Manager to the Superintendent (or their respective designees), waive its rights to use some or all of the Facilities or its exclusive rights to use the Boys Gymnasium. During the Term of this Agreement, City will provide the District with a monthly schedule for the City's scheduled Thursday Activities at least one week prior to the 1st of the month, including the times from which the City's use rights are to commence (to be not earlier than 3:00 p.m. without the District's consent).
- 4.4 Reserved.
- 4.5 Additional Activities. Any City use of the Facilities for Activities beyond Tuesdays and Thursdays is subject to mutual agreement of the Parties. Mutual collaboration and consultation shall, at a minimum, involve direct discussions between individuals designated by the City Manager and Superintendent and, if the designees are unable to resolve the issue, direct discussions between the City Manager and Superintendent. However, nothing in this Agreement shall be deemed a delegation of authority for any person to bind either Party beyond that person's regular authority without regard to this Agreement.
- 4.6 Keys and Access Codes. District will provide City with keys and access codes to the Facilities, including the exterior gate from Addison Street to the Courtyard, and the gates (person gate and auto gate) fronting Addison Street between 1231 Addison and 2020

Bonar, in order to provide for independent access to the Facilities on Tuesdays, Thursdays and other approved dates. City will retain the keys and access codes securely.

- 4.7 City Storage Area. District will provide City with a secure storage area of adequate size in the Board Room building to keep and maintain supplies for the duration of the Term.
- 4.8 Outside Noise. City shall take reasonable measures to monitor and mitigate outdoor noise related to the Activities.
- 4.9 Entrance Signage, etc. To prevent Activities from interrupting student activities in the resident school, the District will design and install to the specifications of the District (at City's cost as part of the Improvements described below) a designated entrance, signage, and posting board on Addison Street at the 1231 Addison Street entrance. The gate at the Addison Street entrance will be the City's primary access point to the Board Room and Courtyard.
- 4.10 Compliance with District Policies. During the times of its use and subject to all City rights under this Agreement, City agrees to comply with District policies and/or practices regarding the operations of the Facilities, including all fixtures, furnishings, and equipment.
- 4.11 Utilities. District shall provide all utilities to the Facilities, including but not limited to, electricity, gas, heat, air conditioning, telephone, broadcast, basic cable television, sewer use, water, refuse collection, recycling bins and collection, janitorial service, restroom supplies, and Wi-Fi service, without charge to City.
- 4.12 Health and Safety Issues and Incident Resolution. In the event of Health and safety issues, and/or any incidents on District property related to the City's use of the Facilities, the Parties shall first meet informally to attempt to reach a resolution of the dispute through direct communication between City Manager and Superintendent and/or their designees. Formal non-legal discussion and resolution of such concerns and incidents may be discussed by the 2x2 Committee of the City and the District. Incidents may also be discussed subject to the liability, indemnification, and other terms of this Agreement.
- 4.13 Dispute Resolution Through Mediation. If a resolution cannot be reached by the methods set forth in Paragraph 4.12, either party can request a mediation. This shall be accomplished by either party submitting the issue to a neutral third party for mediation. The neutral third party must be approved by both Parties and the cost for mediation shall be split equally between the District and the City.
- 4.14 District Representations and Covenants. The District is not currently a party to any agreement or arrangement, and has no obligations to any other party, which would in any way conflict with, interfere with or disturb any of the City's rights under this Agreement ("**Conflicting Obligation**"), including without limitation any rights following exercise of the City's extension option in Section 2.2 above ("**City Rights**"). During the Term, the District shall not voluntarily consent to any Conflicting Obligation, and shall promptly notify City if any court or governmental authority with jurisdiction attempts to impose any Conflicting Obligation.

V.

TERMS OF PAYMENT AND ADDITIONAL DISTRICT OBLIGATIONS

- 5.1 City Lump Sum Payment. The City will pay the District a one-time, lump sum payment of \$600,000 upon approval of this Agreement, to cover a share of the District's construction costs related to the Board Room project. No additional lump sum payment shall be paid by the City during the total Term of this Agreement.
- 5.2 City Per-Meeting Charges. City will pay District \$1,200 for each official City-sponsored meeting in the Board Room; provided that City will only need to pay one charge for each meeting day, regardless of the number of meetings (or number of City entities holding meetings) on any meeting day (e.g. closed session meeting before a regular meeting).
- 5.2.1 Effective as of each anniversary of the Effective Date during the Term, the per meeting charge for the next 12-month period (each, an “**Agreement Year**”) will be adjusted upward by the official Consumer Price Index for the San Francisco-Oakland-San Jose Area with the increase capped at 3% in any single Agreement Year. In the event of a negative CPI, the per meeting charge will remain unchanged for that Agreement Year.
- 5.2.2 District will invoice City quarterly for actual meetings held in the preceding calendar quarter. Each invoice will be due sixty (60) days after received.
- 5.3 Facility Improvements. The District (or mutually agreed contractor engaged by the District) shall perform the initial Facility improvements listed in Attachment B (“Improvements”) which Improvements must be designed and constructed in accordance with all state and local laws applicable to the construction of school district facilities. City shall approve all design, scope of work, and prices (or estimates/quotes) prior to the commencement of work and such approval shall not be unreasonably withheld. The City shall review and inspect completed Improvements, and following approval of the work performed provide the District with written approval which shall not be unreasonably withheld. District shall invoice the City within 30 days after the written approval is received by the District. Payment will be made by the City within 60 days from receipt of the invoice.

VI.

TERMINATION OF AGREEMENT

- 6.1 District Termination for Cause. During the Agreement Years one through ten, District may terminate this Agreement only for cause, i.e. a material breach of this Agreement by the City. District will give City 30-day's written notice of the breach and a reasonable opportunity to cure the breach, including additional time so long as the City is proceeding diligently to cure.
- 6.2 District Termination for Convenience. Starting in Agreement Year 11 of the Agreement, District may terminate this Agreement for convenience, with 5-year's written notice to City. During that 5-year period, the Parties may renegotiate any or all of the terms hereof.

- 6.3 City Termination for Convenience. City may terminate this Agreement at any time for convenience with 30-day's written notice to the District.

VII.

ASSIGNMENT

- 7.1 Assignments. This Agreement is personal to City, and not a transferable interest, or any interest in the Facilities. The City shall not assign its interests in this Agreement. Any assignment, encumbrance, or sublease of the Facilities without District's consent shall be voidable and, at the District's election, shall constitute an immediate default. No consent to any assignment, encumbrance, or sublease shall constitute a waiver of the provisions of this section.

VIII.

INSURANCE

- 8.1 City Insurance. The City agrees to maintain and keep in force during the Term of this Agreement comprehensive, broad form, general public liability insurance (or self-insurance or joint self-insurance) against all claims and liabilities for personal injury, death, or property damage arising out of its performance or non-performance of this Agreement and/or the City's access to and use of the Facilities, including the following policies/coverage:
- (i) Commercial General Liability Insurance and/or self-insurance, which shall include coverage for: bodily injury, third-party property damage, personal injury with combined single limits of not less than \$2,000,000 per occurrence. Additionally, Excess Liability coverage shall be procured in the amount of up to \$5,000,000 per occurrence. The District will be named an additional insured on the City's CGL policy (or comparable self-insurance).
 - (ii) Worker's Compensation Insurance and/or self-insurance, as required by applicable law, with not less than statutory limits.
 - (iii) Business Personal Property insurance and/or self-insurance, to protect on a Broad Form, named peril basis, for all City furniture, equipment and supplies located on or in the Facilities.
- 8.2 District Insurance. The District agrees to maintain and keep in force during the Term of this Agreement insurance and/or self-insurance to cover personal injury, death, or damage to City property on or about the Property and Facilities for which the District is responsible under this Agreement, damage arising out of its performance or non-performance of this Agreement, and property damage insurance on all of the District's real and personal property subject to this Agreement. Minimum coverage limits are \$2,000,000 occurrence for third-party personal injury, death, and third-party property damage, and 100% of replacement cost thereof for all District property. The City will be named an additional insured on the District's liability policy (or comparable self-insurance).

8.3 Mutual Waivers of Subrogation. Without affecting any other rights or remedies, City and District each hereby releases and relieves the other, and waives its entire right to recover damages against the other and the agents, contractors and employees of the other, for loss of, or damage to, its property arising out of, or incident to, the perils insured or required to be insured against herein. The Parties agree to have their respective property damage insurance carriers waive any right to subrogation that such companies may have against City or District, as the case may be, so long as the insurance is not invalidated thereby. To the fullest extent permitted by law, each of City and District, on its own behalf and on behalf of its insurers, waives all right of recovery against the other (and any officers, elected officials, employees, agents, and representatives of the other) for, and agrees to release the other (and any officers, elected officials, employees, agents, and representatives of the other) from liability for, loss or damage to the extent such loss or damage is covered by valid and collectible insurance in effect at the time of such loss or damage. If the release of either party, as set forth above, should contravene any law with respect to exculpatory agreements, the liability of the party in question shall be deemed not released but shall be secondary to the liability of the other's insurer. City and District shall each cause to be included in its insurance policies covering the Property and Facilities a waiver by the insurer of all right of subrogation against the other in connection with any loss or damage thereby insured against.

IX.

INDEMNIFICATION AND OTHER MATTERS

- 9.1 City Indemnification. City shall defend, indemnify and hold harmless District, its Board members, officers, contractors, employees, students and District Users (together, "**District Parties**"), for any loss, expense, actions, claims, damages, penalties, obligations or liabilities, including without limitation reasonable attorney's fees and costs ("**claims**") by reason of any damage or injury to person or property, or both, arising out of the acts, omissions, and/or negligence of City, its council and board members, officers, contractors or employees (together "**City Parties**"), or resulting from City Parties' activities at the Facilities or any other use or operations at the Facilities by City, but excluding such claims arising from the negligence or willful misconduct of District Parties. City further agrees to indemnify, defend and hold harmless District Parties and each of them from any claim arising out of or related to any personal property of City Parties stored at the Facilities.
- 9.2 District Indemnification. District shall defend, indemnify and hold harmless City Parties, for any loss, expense, actions, claims, damages, penalties, obligations or liabilities, including without limitation reasonable attorney's fees and costs ("**claims**") by reason of any damage or injury to person or property, or both, arising out of the acts, omissions, and/or negligence of District Parties, or resulting from District Parties' activities at the Facilities or any other use or operations at the Facilities by District but excluding such claims arising from the negligence or willful misconduct of City Parties.
- 9.3 Survival. The provisions of 9.1 and 9.2 shall survive the termination or expiration of this Agreement.

- 9.4 Supervision and Security. City shall provide customary supervision and security while using the Facilities. To the extent and at such times as City has exclusive use of any Facility, City shall maintain the security of the Facility by the proper use of all security systems and devices provided by District.
- 9.5 Parking. Parking in the parking lot shall not be reserved and shall be limited to standard-sized automobiles. Subject to mutual collaboration and consultations, City shall not allow any City Parties to bring large trucks or other large vehicles onto the Parking Lot or to park overnight. All vehicles shall be parked only in marked parking areas and not in driveways, loading areas, or other areas not specifically designated for parking.
- 9.6 Access. Subject to Article X, City shall permit District, its agents, representatives or employees, to enter upon the Facilities during periods of City use for the purpose of inspecting same or to make repairs, alterations, or additions to any portion of the Facilities.
- 9.7 Environmental Matters. District represents that, to its knowledge, neither the Facilities nor any other portion of the Property has been used for the generation, storage, treatment or disposal of Hazardous Materials, as defined below. Subject to the indemnification language in this Agreement, District acknowledges that, to its knowledge, City did not cause or allow for the generation, storage, treatment or disposal of any Hazardous Materials on the Facilities or any other portion of the Property prior to City's use of the Facilities. Similarly, City represents that, to its knowledge, City did not cause or allow for the generation, storage, treatment or disposal of any Hazardous Materials on the Facilities or any other portion of the Property prior to City's use of the Facilities. In addition, District represents that to its knowledge no Hazardous Materials or underground storage tanks are located on or near the Property.
- (i) Hazardous Materials. The term "Hazardous Materials" means any hazardous, toxic or dangerous substance, waste, containment, pollutant, gas or material, including, without limitation, gasoline, waste oil and other petroleum products and constituents thereof, which are now or may become regulated under any federal, state or local statute, regulation, ordinance or other law now or hereafter in effect, including, without limitation, any substance, waste or material which is now or hereafter (i) designated as a "Hazardous substance" under the Federal Water Pollution Control Act and/or the Comprehensive Environmental Response, Compensation and Liability Act, (ii) designated as a hazardous waste or regulated substance pursuant to the Resource Conservation and Recovery Act, (iii) designated or listed as a hazardous material under the Hazardous Material Transportation Act, or (iv) is in any way regulated under the laws of the State of California.

X.

MAINTENANCE AND REPAIR OF FACILITIES

- 10.1 General. The District shall, at its sole cost and expense (except as otherwise provided in this Article) maintain the Facilities, including all grounds, structures, furniture, fixtures and

equipment, in a good, safe and clean condition for use by the City under this Agreement as required by laws applicable to the operation and maintenance of such Facilities and/or the activities to be conducted on the Facilities. The District shall repair all damage to the Facilities (except as provided in 10.2), and replace or upgrade (as applicable) all worn out or obsolete Board Room Support Systems and other furniture, fixtures and equipment. In no event shall the standards exercised by the District under this Article be less than those the District applies to other similar property.

- 10.2 City Reimbursement of Certain Costs. The City will reimburse the District's reasonable and actual costs for one time repairs or replacements (excluding normal wear and tear) required due to specific and intentional acts of damage in connection with an Activity, which either (i) are caused by the City or City Party, or (ii) occur in the Board Room during such time as the City has exclusive use thereof. The City shall reimburse the District within sixty (60) days of receiving a District invoice accompanied by reasonable evidence (invoices, etc.) to support the amounts requested.
- 10.3 Non-Interference with City Use. District shall use reasonable efforts to conduct all activities under this Article at times and in manners which do not conflict with, interfere with or disturb any City Activity. Except in the event of emergency or imminent threat to health or safety of occupants, District shall give City reasonable advance notice of any such matter, and the Parties shall attempt to resolve it via mutual collaboration and consultation.

XI.

GENERAL TERMS AND CONDITIONS

- 11.1 Severability. The unenforceability, invalidity or illegality of any provision of this Agreement shall not render any other provision unenforceable, invalid or illegal.
- 11.2 Governing Law. This Agreement shall be construed in accordance with and governed by the laws and decisions of the State of California.
- 11.3 Modifications. All modifications of or extensions to this Agreement shall be in writing, signed by both Parties.
- 11.4 Time. Time is hereby expressly declared to be of essence in this Agreement.
- 11.5 Notices. Any notices desired or required to be given under this Agreement shall be in writing and shall be delivered personally upon the other, or sent by prepaid registered or certified mail addressed to the respective parties as follows:

District: Berkeley Unified School District
2020 Bonar Street
Berkeley, CA 94702
Attn: Office of the Superintendent

City: City of Berkeley
2180 Milvia Street, 5th Floor

Berkeley, CA 94704
Attn: City Manager

With copy to: City of Berkeley
2180 Milvia Street, 4th Floor
Berkeley, CA 94704
Attn: City Attorney

Either Party may change its address or contact person by giving written notice to the other Party.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed by their duly authorized officers as follows:

DISTRICT:

CITY

Dr. Donald Evans, Superintendent
Berkeley Unified School District

Dee Williams-Ridley
City Manager, City of Berkeley

Approved as to Form:

By: _____
_____, City Attorney

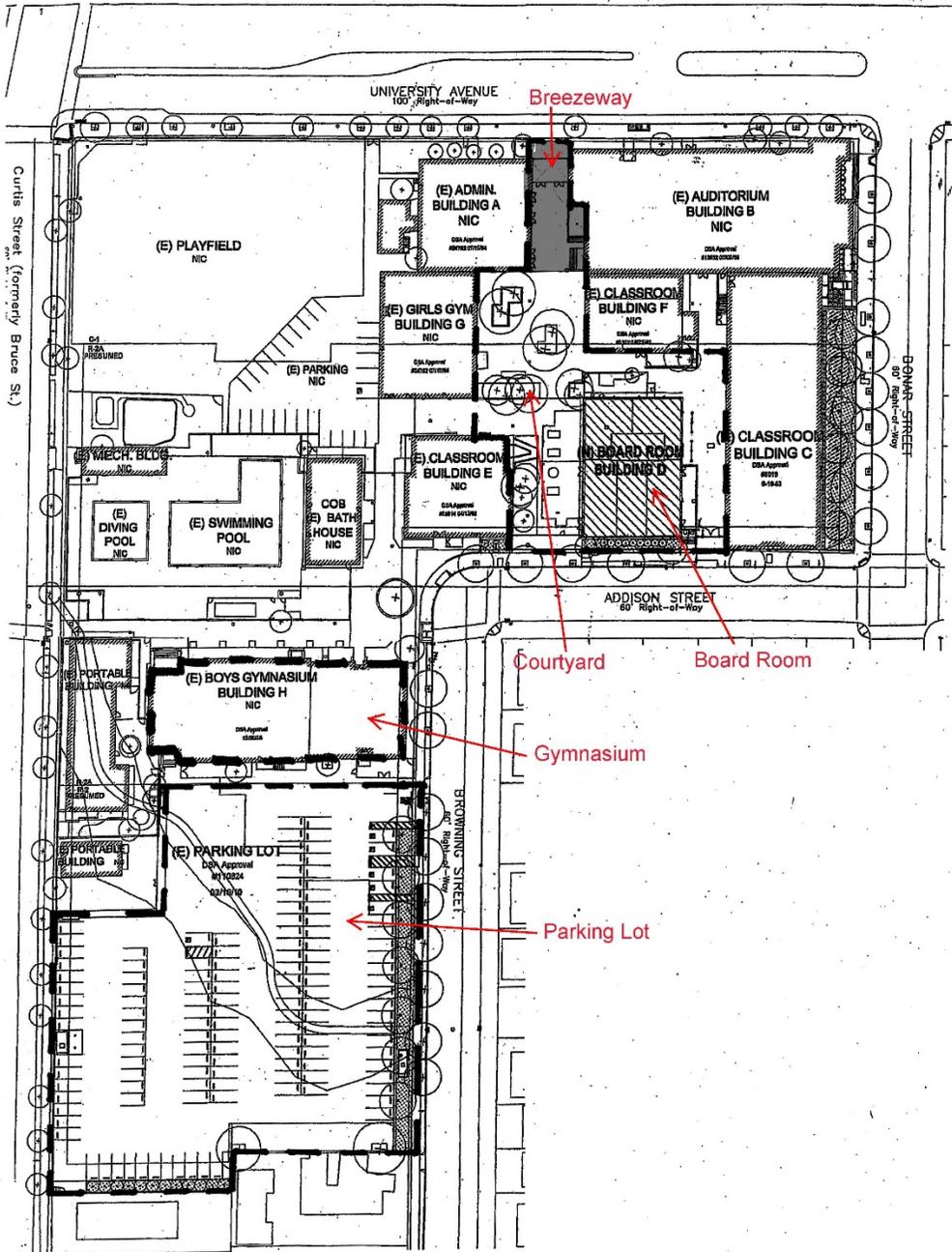
Countersigned by:

By: _____
_____, City Auditor

Attest:

By: _____
_____, City Clerk

SITE MAP



INITIAL FACILITY IMPROVEMENTS

Improvements to be completed no later than 12/1/2018

1. Rubber bumpers on West wall exterior doors to reduce noise.

Improvements to be completed no later than 12/31/2018:

1. Install posting board for City Council agendas adjacent to entrance at 1231 Addison Street.
2. Install permanent City of Berkeley signage to building exterior at 1231 Addison Street entrance.
3. Install permanent City of Berkeley signage on wall behind dais.

Improvements to be completed no later than 6/30/2019:

1. Repair sidewalk at parking lot entry.
2. Repair driveway and curb cut to meet standards.
3. Install additional lighting on Browning Street and Addison Street (shielded from neighborhood) - mounted on BUSD property.
4. Install additional lighting in parking lot.
5. Install additional lighting in courtyard.
6. Mount TV to wall in Gymnasium and connect to Comcast feed.

Cable Broadcast Service.

No later than November 1, 2018 the District will arrange for the installation of cable broadcast service to the Facilities (Breezeway, Berkeley Community Media control room, Conference Room, Board Room, and Board Room monitors). No later than May 1, 2019, cable broadcast service shall be provided in the Boys Gymnasium. The District shall not be responsible for paying the cost of equipment used exclusively for the television broadcast of City meetings.