

**SECOND AMENDED AND RESTATED AGREEMENT  
BETWEEN THE CITY OF BURLINGAME AND  
SAN MATEO UNION HIGH SCHOOL DISTRICT FOR THE USE, OPERATION AND  
MAINTENANCE OF THE BURLINGAME HIGH SCHOOL AQUATIC CENTER**

This SECOND AMENDED AND RESTATED AGREEMENT BETWEEN THE CITY OF BURLINGAME AND SAN MATEO UNION HIGH SCHOOL DISTRICT FOR THE USE, OPERATION AND MAINTENANCE OF THE BURLINGAME HIGH SCHOOL AQUATIC CENTER (this "Agreement") is dated August 22, 2019 and is by and between the City of Burlingame (the "City"), a municipal corporation, and the San Mateo Union High School District (the "District"), a public school district, each a "Party," together the "Parties."

**WITNESSETH**

WHEREAS, Chapter 10 of Part 7 of the California Education Code—The Community Recreation Act ("Act"), codified in Sections 10900 et seq. of the California Education Code, authorizes public authorities (e.g., cities and school districts) to organize, promote and conduct programs of community recreation, establish systems of playgrounds and recreation and acquire, construct, improve, maintain and operate recreation centers within or without the territorial limits of such public authorities;

WHEREAS, Section 10905 of the California Education Code authorizes public authorities to enter into agreements with each other for the use, operation and maintenance of community recreation Centers;

WHEREAS, Section 10910 of the California Education Code provides that the governing body of any school district may use or grant the use of any grounds of the school district to any other public authority for the organizing, promoting and conducting community recreation under the direct control of the public authority whenever such use will not interfere with the use of those facilities for any other purpose of the public school system;

WHEREAS, on November 19, 1997 the Parties entered into an agreement ("Original Agreement") to jointly fund the initial construction and ongoing use, repair, improvements, operations and maintenance of the Center (as defined below);

WHEREAS, in 1999, the Parties entered into a First Amendment to the Original Agreement (the "First Amendment") to amend various provisions in the Original Agreement to reflect the expansion of the Center's swimming pool from 25 yards to 50 meters through financing provided through a combination of private charitable and City funding for the purpose of allowing the City to sponsor and provide greater community recreation at the Center;

WHEREAS, under the provisions of the Original Agreement, as amended by the First Amendment, (together the "1999 Agreement") the City sponsors and provides community recreation at the Center through the City Parks & Recreation Department ("Parks & Rec.");

WHEREAS, beginning on or about September 12, 2011, the City, through Parks & Rec., has transitioned the programming, coordination and staffing of the City's community recreation programs at the Center to the Burlingame Aquatic Club, Inc., ("Club") a California non-profit, public benefit corporation;

WHEREAS, the Parties entered into an Amended and Restated Agreement to the 1999 Agreement dated as of June 1, 2016 (the "First Amended and Restated Agreement") in order to provide for, among other things, the collaborative and cooperative use of the Center for community recreation to the fullest extent allowed under the Act and to schedule authorized Capital Expenditures for the Center as defined in the First Amended and Restated Agreement;

WHEREAS, further to the First Amended and Restated Agreement, the District and the City agreed to re-plaster and replace the Center pool deck (the "Replacement Work"), and in June 2018 the District entered into a contract with Waterworks Industries, Inc. ("Waterworks") to perform the Replacement Work;

WHEREAS, during the course of the Replacement Work, significant previously unknown structural defects in the Center pool shell were discovered and the District determined it was in the best interest of the District to terminate the construction contract with Waterworks for the Replacement Work and issue a Request for Proposal ("RFP") for the following work at the Center: demolition and replacement of the existing pool shells for the competition and warm up pools, demolition and installation of the pool deck and associated underground utilities, demolition and construction of the equipment room and renovations to the mechanical room (collectively the "Shell Replacement Work");

WHEREAS, as of the date the District terminated the Waterworks contract for the Replacement Work, the City had paid \$466,696.31 toward the cost of the Replacement Work;

WHEREAS, further to the RFP, the District awarded the Shell Replacement Work to Waterworks on February 21, 2019 and it is anticipated the Shell Replacement Work will be completed in late October 2019 or early November 2019;

WHEREAS, the Shell Replacement Work, together with all design, testing, inspection and all other "soft costs," (the "Shell Replacement Project") has a budget of \$5,450,000 and the City has paid \$139,103.68 toward the Shell Replacement Project;

WHEREAS, the First Amended and Restated Agreement is scheduled to expire on January 1, 2026 and the Parties desire to amend and restate the First Amended and Restated Agreement pursuant to the terms and conditions in this Agreement in order to provide for, among other things, an extension of the Term, modification of the City Share, and the City's contribution toward the cost of the Shell Replacement Project; and

WHEREAS, the foregoing recitals constitute a substantive part of this Agreement;

**NOW, THEREFORE**, for valuable consideration, the adequacy and sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. **Definitions.** All capitalized terms not otherwise defined in this Agreement shall have the meanings set forth below:

1.a. "Act" shall mean the Community Recreation Act, codified in Education Code Sections 10900, et seq.

**1.b.** "Capital Asset" shall mean any physical portion of the Center, or any major Center equipment, intended for an extended useful life of not less than one year, and also includes, but is not limited to, the following described items located at the Center:

- 1) Center fixtures (plumbing fixtures, permanently affixed furniture (if any), all lighting and wiring, office equipment, HVAC, water heater, lockers, pool covers and reels, lifeguard stands, pool lane dividers, drinking fountain, etc.);
- 2) Center heating equipment (pool heaters, piping, electronics and related systems, etc.);
- 3) Center pool pumps (pumps, piping, generator, valves, related electronics, etc.);
- 4) Center filtration system;
- 5) Center sanitization system;
- 6) Center chlorine and pH control and pumps;
- 7) Center pool tanks (tanks, plaster, tile, gunite, reinforcing steel, piping, drains, ladders, railings, fixtures, etc.); and
- 8) Center pool deck (concrete, reinforcing steel, fixtures, drains, electrical conduit, pool lights, etc.).

**1.c.** "Capital Expenditures" shall mean any mutually agreed costs or expenditures for the purchase, repair, improvement or restoration of a Capital Asset that extends the life cycle of a Capital Asset beyond one year.

**1.d.** The "City Share of Capital Expenditures" shall mean 50% of the total costs of the Capital Expenditure as determined by District in consultation with the City and as a result of public bidding and paid invoices for design, permitting and inspection related services.

**1.e.** The "City Share", as described in Exhibit C, shall mean the portion of the Maintenance and Operation Expense payable by the City to the District.

**1.f.** "Center" shall mean the Burlingame High School Aquatic Center comprised of the Burlingame High School competition swimming pool 50-meters by 50-yards, a second warm-up swimming pool 50-feet by 20-feet, swim pool tank, pool deck, swim pool water and the mechanical room located in the Pool House. The Center shall not include the Pool House, except for the mechanical room.

**1.g.** "Club" shall mean the Burlingame Aquatic Club, Inc., as defined in the Recitals to this Agreement, or its successor as designated by the City in compliance with the Act and all other applicable laws and regulations.

**1.h.** "Community Recreation" and "Public Recreation" shall mean recreation as may be engaged in under the direct control of a public authority as defined in Section 10901(d) of the Act.

1.i. "Competition Pool" shall mean the competition pool that is a component of the Center.

1.j. "Effective Date" shall mean the last day each of the following conditions has occurred: (i) this Agreement is duly authorized by each of the government bodies of the Parties and (ii) this Agreement is signed by a duly authorized representative of each Party.

1.k. "Expiration Date" shall mean January 1, 2040, unless extended by Parties as provided herein.

1.l. "Maintenance and Operation Expense" shall mean frequent and routine costs and expenses for the purchase of goods and/or services customarily required for the on-going maintenance and operation of the Center or for the maintenance and operation of a Capital Asset during its expected life cycle as described in Exhibit A, attached hereto and incorporated herein by this reference. Maintenance and Operation Expense shall also include unanticipated repairs that are ordinary, customary and routinely required in less than a 12 month period.

1.m. "Pool House" shall mean the area of the Center containing the mechanical room, break room, City locker rooms, City restrooms, City office, and Center lobby/entrance.

1.n. "Public Authority" or "Public Authorities" shall mean any city of any class, city and county, county of any class, public corporation or District having power to provide recreation, or school district in the State of California as defined in Section 10901(a) of the Act.

1.o. "Warm-Up Pool" shall mean the warm-up pool that is a component of the Center.

## 2. Term

The term of this Agreement shall begin on the Effective Date and end on the Expiration Date (the "Term"). Upon expiration of the Term on the Expiration Date, the City shall have no further rights or interests in the Center. The Term may be extended only by a written amendment to this Agreement signed by the duly authorized representatives of the Parties after official action by the governing bodies of the City and the District. On or after January 1, 2035, but no later than January 1, 2039, either Party may give the other Party notice that it does not intend to negotiate an extension of the Term. If the District gives such notice (the "District Non-Extension Notice"), the District shall reimburse the City for the City's unamortized contribution to the Shell Replacement Project as set forth in Section 4.f., below.

## 3. Responsibility for the Center.

### 3.a. Maintenance and Operations of the Center.

3.a.1. The District shall be responsible for maintaining and operating the Center, including the removal of garbage, refuse, rubbish, litter and other solid waste pursuant to its normal maintenance and operating procedures as provided in Exhibit A. Except as expressly provided below, the District shall maintain and operate the Center in accordance with current State, County, and District laws and standards for operation and maintenance of public

swimming facilities. District shall maintain detailed records of all Maintenance and Operation Expense.

3.a.2. In performing its maintenance and operation obligations, District will use its best efforts to minimize interference with the City's scheduled use of the Center.

3.b. Pool House. The City shall be responsible for the operation and supervision of the Pool House, excepting the mechanical room. The City, at its sole cost and expense, shall provide custodial services for the Pool House as described in Exhibit B, attached hereto and incorporated herein by this reference, and the District shall be responsible for all other maintenance of the Pool House. The City's share of the District's maintenance costs for the Pool House shall be 50%.

**4. Reimbursement for Maintenance and Operation Expenses; Emergencies; Capital Expenditures; Shell Replacement Project Costs.**

4.a. City Share. The City Share of Maintenance and Operation Expense shall be 50% beginning the week after the date the Notice of Completion is filed and ending twelve (12) months thereafter (the "One-Year Period"). After this One-Year Period, the City Share of Maintenance and Operation Expense for the remainder of the Term of this Agreement shall be equitably adjusted based on a formula using the hours each Party uses the Competition Pool, the hours of shared uses, and the hours of unused time, as set forth in Exhibit C, attached hereto and incorporated herein by this reference.

4.b. Maintenance and Operation Expense. The City shall reimburse the District for the costs incurred and paid by the District for the Maintenance and Operation Expense based on the City Share. The City shall make reimbursement to the District when presented with an itemized invoice from the District. The District shall present such an invoice no less than once every quarter, and City shall make payment as promptly as feasible, but in no event later than sixty (60) days from the date of presentation.

4.c. Emergencies. In the event of an emergency or an imminent safety hazard, including, without limitation, earthquakes, fires, flooding, or other similar events, the District may perform non-scheduled repair or maintenance work at the Center without prior notification to the City. The District shall notify the City of such emergency work within a reasonable time. Verified expenses paid for such work shall be paid or reimbursed by City under Section 4.b., above. Work undertaken as a result of an emergency under this section that would otherwise be classified as a Capital Expenditure shall be reimbursed by the City at the 50% rate for Capital Expenditures as provided in Section 4.e., below.

4.d. Communication Regarding Maintenance and Capital Expenditures. With the exception of emergency safety concerns, the District and the City shall meet annually in February of each year to discuss maintenance and operation expenses and projected Capital Expenditures projects anticipated for the year (the "Annual Budget Discussion").

4.e. Approved Capital Expenditures; City Share of Capital Expenditures; Emergency Capital Expenditures.

4.e.1. Provided the District and the City have complied with the Annual Budget Discussion requirement in Section 4.d, the District and City agree that the District may

elect to incur Capital Expenditures by giving the City ninety (90) days prior written notice of the commencement of the Capital Expenditures project. The City agrees to reimburse the District for Capital Expenditures incurred and paid by the District in an amount equal to the City Share of Capital Expenditures. The City shall pay the City Share of Capital Expenditures as soon as feasible, but in no event later than sixty (60) days from the date of receipt of an itemized invoice for the cost of the Capital Expenditure project from the District; provided, however, the City Share of Capital Expenditures shall not include the unamortized portion of Capital Expenditures based on a 10-year amortization schedule. As an example, if the cost of the Capital Expenditures project is \$100,000 and the remaining Term of this Agreement is two (2) years at the time payment of the City Share of Capital Expenditures is due, the City Share of Capital Expenditures payment is \$10,000, i.e., 20% of \$50,000.

4.e.2. In the event the District determines in good faith to undertake a capital expenditure project that was not discussed during the Annual Budget Discussion in order to address emergency safety concerns, prior to undertaking such emergency capital expenditure project, the District shall give the City as much notice as feasible and shall "meet and confer" to discuss the emergency capital expenditure project. Notwithstanding anything to the contrary above, the City shall not be in breach of its payment obligations under this Section 4.e for emergency capital expenditures that are not in the City's current fiscal year budget; provided the City shall act with reasonable due diligence and in good faith to obtain an appropriation for payment of the emergency capital expenditures through a mid-fiscal year budget adjustment, or in the next fiscal year budget if a mid-year budget adjustment is unavailable.

4.e.3. The District at its sole cost and expense shall initiate an audit of the Burlingame Aquatic Center Facility no later than the first quarter of 2020. The City shall have the opportunity to review and approve the selection of the auditor. Once the audit is completed, the City and the District will meet and negotiate in good faith to determine which projects, if any, should be included on the list of Approved Capital Expenditures under Section 4.e of this Agreement based on such audit. If the City and District are able to reach agreement on the list of Approved Capital Expenditures, the City and District will amend this Agreement to include a list of Approved Capital Expenditures in Exhibit D, which shall be attached to and made a part of this Agreement.

4.f. City Contribution to Shell Replacement Project Costs. Upon completion of the Shell Replacement Project as evidenced by the filing of the Notice of Completion, the City shall contribute \$2,700,000 toward the Shell Replacement Project (the "City Shell Replacement Project Contribution"), payable in two installments as follows: (i) the first installment shall be in the amount of \$1,269,203 (less a credit of \$605,799.99 for the City's prior payment toward the Replacement Work and Shell Replacement Project), which shall be payable within sixty (60) days of receipt of an invoice from the District, and (ii) the second installment shall be in the amount of \$1,430,797 and payable within sixty (60) days of the City's issuance of a Certificate of Occupancy for the Community Center, but in no event later than June 1, 2023. The City Shell Replacement Project Contribution shall be allocated as follows: (x) \$1,000,000 toward the cost of the pool deck work, (y) \$250,000 toward the cost of the mechanical room work, and (z) \$1,450,000 toward the new pool shell work. In the event the District delivers the District Non-Extension Notice as set forth in Section 2, above, the District shall reimburse the City for the City's unamortized Shell Replacement Project Contribution based on the following lifecycle periods: mechanical room 16 years, pool deck 27.5 years and pool shell 50 years. As an example, if the City's payment of the pool shell work

is made on January 1, 2020, and the Expiration Date is not extended beyond January 1, 2040, the District will reimburse City for the unamortized portion of the City's payment of the pool shell work in the amount of \$870,000, i.e., 60% of \$1,450,000 based on the pool shell work's remaining 30 year life cycle. The District shall pay such reimbursement to the City within thirty (30) days of delivery of the District Non-Extension Notice.

**5. Annual Maintenance Closure; City Use of District Pools.**

**5.a. Closure Period and Annual Discussions.** The District may close the Center for annual maintenance and necessary repairs for the periods November 15<sup>th</sup> to December 15<sup>th</sup>, January 15<sup>th</sup> to January 31<sup>st</sup>, and during the District's Spring Break each school year (the "Closure Period"). The District and the City shall meet annually in September of each year to discuss the Closure Period for the following twelve (12) month period (the "Annual Closure Period Discussion"). During the Annual Closure Period Discussion, the District and the City will discuss best practices to minimize the Closure Period and, if feasible, minimize the closure of all or any portion of the Center, including the Competition Pool. The District will give the City ninety (90) days prior written notice of the Closure Period, except in the case of emergency repairs (the "Closure Notice"). The District shall promptly notify the City when the annual maintenance and repairs undertaken during the Closure Period are completed. During the Closure Period, neither Party may use the Center except as agreed during the Annual Closure Period Discussion. The Closure Periods shall be limited to one or two per year, with the exception of emergency repairs or as otherwise agreed upon in writing between the Parties.

**5.b. Use of District Pools During Closure Period.** During the Closure Period and if feasible, District will make available a minimum of eight (8) swimming lanes and locker rooms at Capuchino High School and Mills High School and full use of the pool facilities at San Mateo High School (each an "Alternate Pool") for the City's use during the Closure Period if the Closure Period is longer than one (1) week. The City agrees to pay to the District the actual labor costs incurred by the District to make the Alternate Pool available to the City and 50% of the standard facility usage fees (non-profit rate) imposed by the District for users of the Alternate Pool. District shall state in the Closure Notice the Alternate Pool available for City use during the Closure Period, whether such use includes the locker rooms and the total costs for the City's use of the Alternate Pool. The City shall remit payment of the costs prior to use of the Alternate Pool. The City will not be invoiced for any expenses at the Center during the Closure Period except for expenses associated with projects performed by the District during the Closure Period.

**6. City and District Usage of Facilities; Community Recreation.** The Parties have set forth below the initial schedule for joint use of the Center that does not interfere with the District's ability to meet its public school purpose. Usage allocation shall be discussed annually at the February Annual Budget Discussion meeting between the Parties as set forth in Section 4.d., above.

**6.a. District Use.** The District shall have use of the Center as follows.

- 6.a.1. Monday to Friday, 5:30 a.m. to 7:30 a.m. and 3:30 p.m. to 7:30 p.m.: up to 10 adjoining swimming lanes (no buffer lane)
- 6.a.2. Monday to Friday, 7:30 a.m. to 3:30 p.m. as needed: up to 10 adjoining lanes (no buffer lane). Entire pool up to three times per year for special

school events, e.g., Senior Day. Full-day use will begin no earlier than 8 a.m.

- 6.a.3. PE Units require exclusive use of pool; times to be determined and discussed with the City (the District to provide a minimum of ninety (90) days prior written notice to the City if feasible)
- 6.a.4. Saturday, 9:00 a.m. to 1:00 p.m. during water polo season: up to 10 adjoining lanes (no buffer lane)
- 6.a.5. Saturday, 9:00 a.m. to 11:00 a.m. during swimming season: up to 10 adjoining lanes (no buffer lane)
- 6.a.6. Interscholastic competition scheduling as needed. Exclusive use of pool for duration of contest is required. District shall provide notice of competitions as soon as feasible

**6.b. City Use.** The City shall have use of the Center as follows:

- 6.b.1. Monday to Friday, 5:30 a.m. to 7:30 a.m. and 3:30 p.m. to 7:30 p.m.: up to 10 adjoining lanes (no buffer lane)
- 6.b.2. Monday to Friday, 7:30 a.m. to 3:30 p.m.: all lanes unless District requests entire use (see 6a.2 and 6a.3 above); if District requests use, then up to 10 adjoining lanes (no buffer lane)
- 6.b.3. Monday to Friday, 7:30 p.m. to 10:00 p.m.: all lanes
- 6.b.4. Saturday, 5:30 a.m. to 9:00 a.m.: all lanes
- 6.b.5. Saturday, 9:00 a.m. to 11:00 a.m. during swimming season and 9:00 a.m. to 1:00 p.m. during water polo season: up to 10 adjoining lanes (no buffer lane)
- 6.b.6. Saturday, 1:00 p.m. to 10:00 p.m.: all lanes
- 6.b.7. Sunday, 5:30 a.m. to 10:00 p.m.: all lanes
- 6.b.8. BAC swim meets and water polo tournaments outside the three traditional events in February, June, and October must be mutually agreed upon by City and District

**6.c. Warm-up Pool Use.** The City shall have exclusive use of the Warm-Up Pool at no additional cost or expense.

**6.d. Non-Use Maintenance Periods.** Neither Party shall use the Center during the following periods:

- 6.d.1. Weekday maintenance twice per week, (Tuesday and Thursday, 8:00 a.m. to 11:00 a.m., or as agreed by the Parties)



6.d.2. Annual Pool Closure maintenance

6.e. Pool House Use. The City shall arrange for custodial services for the interior of the Pool House (excluding the mechanical room) as set forth in Exhibit B, attached hereto. The City and its authorized agent under Section 11, above shall not use or access District internet or wireless communication systems except as related to the City's use of the Center under this Agreement. The City and its authorized agent may use the District's telephone lines. District shall notify City when such telephone lines are scheduled to be unavailable for use.

6.f. District Reserved Rights. Notwithstanding anything to the contrary above, the District reserves the right to have first priority for use of the Center if necessary to meet its public school purpose as set forth in the Act. If feasible, the District will give the City a minimum of thirty (30) days prior written notice of any alteration of the District's use schedule set forth above. The City understands and supports the educational purpose of the Center. However, City access to the Center is an integral and indispensable part of its incentive for entering into this Agreement. Should District's invocation of reserved rights under this Section interfere with the City's access to the Center on the terms reflected in this Agreement for more than one week, the Parties shall meet and confer as to adjustment of payments owed under this Agreement, and the City shall have the right to terminate its participation under this Agreement without penalty after the meet and confer process by giving the District a minimum of fifteen (15) days prior written notice of the effective date of the termination. In the event the City elects to terminate this Agreement, the District shall reimburse the City for the unamortized Capital Expenditures and City Share of Shell Replacement Project Contribution as set forth in this Agreement.

7. Modifications to Center and/or Intended Use; Pool House. The City shall not make any physical changes to the Center without the prior written consent of the District. The District shall have the right to make physical changes to the Center in the best interest of the District; provided, however, such changes do not reduce the City's hours of use of the Center and the District has given the City as much notice as feasible. Notwithstanding anything to the contrary above, the City, at its sole cost and expense, may make physical changes to the Pool House, subject to the prior written consent of the District, which consent will not be unreasonably withheld. This Section 7 is not intended to apply to Capital Expenditures, which are governed by Section 4.d.

Supervision. The District and the City agree that at all times when the District or the City is using the Center for its programs, adequate supervision of the swimming pools, the deck areas and building areas will be provided by the respective responsible agency. Whenever the swimming pools are in use, the responsible agency shall ensure that an appropriate number of persons certified in water safety are present and responsible for the use activity. The District and the City shall provide supervision during periods of exclusive and concurrent use. The District and the City agree to promptly establish pertinent claims procedures under the California Claims Act (Government Code Sections 810 *et seq.*) governing injuries at the Center sustained by participants of City or District programs, as applicable.

8. Insurance. The District and the City at each Party's own cost and expense, shall carry the following insurance: Commercial General Liability Insurance written on an "occurrence" form covering the use and occupancy of the Center with a minimum limit of \$2,000,000 per occurrence for Bodily Injury and Property Damage and umbrella or excess liability insurance to be excess over the Commercial General Liability written on an "occurrence" form with a minimum limit of liability of Five Million Dollars (\$5,000,000.00). The City shall submit to the District certificates of insurance

evidencing all such insurance required under this Section 9 upon request. All insurance policies required hereunder shall be specifically endorsed to state that coverages afforded under the policies will not be cancelled or allowed to expire for any reason until at least thirty (30) days' prior written notice has been mailed to the District (or ten (10) days prior written notice for non-payment of premium) and/or the policy cancellation provisions must be provided with the certificate of insurance. The City's insurance policies shall be endorsed to provide as additional insured the District and its Board members, officers, employees and agents. All insurance policies, if feasible, shall provide for the insurer to waive all right to recover by way of subrogation in connection with any loss covered thereby. The District and the City intend to insure against claims and loss arising from their respective obligations under this Agreement; i.e., each Party is primarily liable for claims and loss arising from its use of the Center and acts and omission under this this Agreement.

**9. Scheduling of Center Public Use; City and District Meetings.**

**9.a. Scheduling.** The District shall have the responsibility for maintaining the master schedule related to District and City use of the Center under this Agreement.

**9.b. Scheduling Meetings.** Ninety (90) days prior to each anniversary of the Effective Date, the District's Capital Facilities Manager and the City Director of Parks & Recreation shall meet to discuss the scheduling for the Center. Any modification to the Center use provisions in Section 6, above shall be memorialized in a revised written schedule signed by each Parties' duly authorized representative within thirty (30) days prior to each anniversary date.

**9.c. Quarterly Compliance Meetings.** The District's Capital Facilities Manager, or designee, and City's Director of Parks & Recreation, or designee, shall meet no less often than quarterly to ensure best practices are being followed with regard to the Parties' duties and obligations under this Agreement.

**10. Limited Delegation of City Use; Prohibited City Use.** The Parties acknowledge that the City, to the fullest extent allowed by the Act, has delegated the performance of its maintenance, administration and operation duties and obligations under this Agreement to the Club. Any other use of the Center by the Club (or any other authorized agent of the City) shall be prohibited unless approved by the District under the District's facility usage and rental fee requirements then in place.

**11. Indemnification and Hold Harmless Agreement.**

**11.a. City Indemnification.** It is agreed that the City shall defend, hold harmless and indemnify the District, its officers and/or employees from any and all claims for injuries or damage to persons and/or property which arise out of the acts and omissions of the City, its officers, employees, designees, agents, and consultants under this Agreement. The City's indemnity obligations under this Section 11.a shall include the acts and omissions of the Club and its officers, employees, designees, agents and consultants arising from or related to the subject matter of this Agreement, but shall not include claims arising out of the willful misconduct or sole negligence of the District, its officers and/or employees. The indemnification requirement established by this Section shall survive the expiration or termination of this Agreement.

**12.b District Indemnification.** It is further agreed that District shall defend, hold harmless and indemnify the City, its officers, authorized agents, volunteers and/or employees from any and all claims for injuries or damage to persons and/or property which arise out of the acts or omissions of the District, its officers, employees designees, agents and consultants under this Agreement, but shall not include claims arising out of the willful misconduct or sole negligence of the City, its officers, authorized agents, volunteers and/or employees. The indemnification requirement established by this Section shall survive the expiration or termination of this Agreement.

**12. Dispute Resolution.** If from time-to-time disputes relative to this Agreement arise which are not resolved through the efforts of the District and City representatives, then either Party may declare an impasse has been reached. Within thirty (30) days of the impasse, the Parties shall mediate the dispute through the American Arbitration Association ("AAA") under its rules and procedures, as amended. If the dispute is not resolved by mediation, either Party may submit the dispute, with supporting documents, for binding arbitration through AAA under its rules and procedures, as amended. The decision of the arbitrator is final and binding solely with regard to disputes related to the payment of Maintenance and Operation Expense. The Parties reserve the right to pursue legal action, with the right of appeal, as to all other disputes arising under this Agreement.

**13. Entire Agreement; Amendments.** This Agreement constitutes the entire agreement and understanding between the District and the City with respect to the subject matter hereof and supersedes all prior agreements relating to the subject matter hereof, including but not limited to the Original Agreement, as amended by the First Amendment, which are of no further force or effect. This Agreement may be amended or modified only by written agreement signed by both Parties.

**14. Non-Waiver.** Failure on the part of either Party to enforce any provisions of this Agreement shall not be construed as a waiver of the right to compel enforcement of such provision or provisions.

**15. Not a Joint Powers Agency.** Nothing contained in this Agreement shall be construed as intended to nor shall it be a joint powers agency of any kind.

**16. Relationship of the Parties.** It is understood that District pool and building maintenance workers, supervisors, teachers, coaches, lifeguards, other staff and contractors are employees and contractors of the District and the City does not provide liability or workers compensation insurance or benefits for any such employees and contractors.

It is understood that City building maintenance workers, supervisors, instructors, coaches, lifeguards, volunteers and contractors are employees or agents of the City and the District does not provide liability or workers compensation insurance or benefits for any such employees and contractors.

**17. No Ownership Interest Intended.** Nothing contained herein is intended to create in the City any ownership interest whatsoever by the City in the Center.

**18. Notices.** All notices shall be in writing and delivered in person or transmitted by certified mail, return receipt requested, postage paid:

Notices required to be given to District shall be addressed:

Debbie Arobio  
Capital Facilities Manager  
San Mateo Union High School District  
650 North Delaware Street  
San Mateo, CA 94401-1795

with copy to

Sean Absher  
Stradling Yocca Carlson & Rauth  
44 Montgomery Street, Suite 4200  
San Francisco, CA 94104-4803

Notices required to be given to City shall be addressed:

Margaret Glomstad  
Director of Parks & Recreation  
City of Burlingame  
850 Burlingame Avenue  
Burlingame, CA 94010

with copy to

Kathleen Kane  
City Attorney  
City of Burlingame  
501 Primrose Road  
Burlingame, CA 94010-3997

Said persons shall be representatives of District and City for all purposes of this Agreement; provided, however, either Party may change its designated representative for the purpose of receiving notices and demand as herein required by written notice given in the manner provided above to the other Party.

**19. Section Headings.** All section headings contained herein are for convenience of reference only and are not intended to define or limit the scope of any provision of this Agreement.

**20. Governing Law.** This Agreement is made pursuant to and shall be construed in accordance with the laws of the State of California.


**21. Venue.** The applicable law for any legal disputes arising out of this Agreement shall be the law of the State of California, and the forum and venue for such disputes shall be the appropriate Superior Court in and for San Mateo County.


*[SIGNATURES ON NEXT PAGE]*

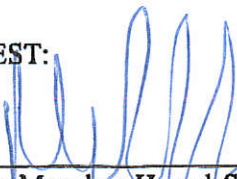
IN WITNESS WHEREOF, the Parties hereto have executed this agreement on the day and year first above written.

CITY OF BURLINGAME  
A Municipal Corporation


APPROVED AS TO FORM:


By:   
Name: Lisa K. Goldman  
Its: City Manager

By:   
Name: Kathleen Kane  
Its: City Attorney

ATTEST:  
  
By: \_\_\_\_\_  
Name: Meaghan Hassel-Shearer  
Its: City Clerk

SAN MATEO UNION HIGH SCHOOL  
DISTRICT

By:   
Name: Kevin Skelly, Ph.D.  
Its: Superintendent

By:   
Name: Sean Absher  
Its: District Special Counsel

ATTEST:  
By:   
Name: Robert H. Contin  
Clerk Board of Trustees

## **EXHIBIT A**

(Maintenance and Operation Expense and Schedule)

### **Duties performed on a regular basis as follows:**

#### **Monday-Friday**

Verify that all 12 pool covers are placed on the pool nightly.

Inspect pool cover tabs (after BAC or HS put covers on) and report missing tabs.

Check pool gutters for debris/trash

Dump swimsuit water bucket (dump water down deck drain, rinse bucket with clean water).

Wipe down swimsuit spinner machine.

Disinfect outside shower floor, walls, and shower unit.

Clean/disinfect drinking fountains.

Clean/disinfect snack bar sills.

Pick up all trash/debris under bleachers.

Check and spot clean bleachers.

Clean skimmer baskets and housing unit.

Sweep up leaves & debris around entire perimeter of pool deck and handicapped ramp.

Sweep between equipment cage and shed.

Clean square deck drains grates.

Clean trash/debris underneath lost & found basket

Pool deck to be left clean, and free of trash, debris, or personal equipment.

Put pool vacuum into pool nightly, unless directed not to do so by authorized District staff.

Clean small pool tile w/cleanser & scrub pad.

Clean out cement drains.

Hose down pool deck – ONE section per shift. This task may be altered under drought-related water restrictions.

Brush large pool tiles/walls. Clean one section/shift.

Clean exterior snack bar windows, glass doors & pool house windows.

Clean/disinfect lifeguard stands/seats

Dust off exterior of all vent covers to pool house building. Maintenance of interior vent covers is not included as a District task.

Dust off all light covers.

Dust off all vented exterior doors.

Hose/clean out pool deck trash cans.

Clean trash from behind 4 cement electrical walls.

If you are the last person on deck, check all pool deck gates to insure they are closed/locked.

### **Monthly**

Clean/polish stainless steel (poles, clocks, starting blocks, pool ladder handles, etc.)

Power wash metal bleachers.

Power wash outside shower wall & suit spinner wall

Knock down all cobwebs on fences, gates, deck shed and eaves on pool house.

Pull weeds growing in cement cracks.

Sweep/Clean storage cage (BAC staff to move/replace equipment on designated cleaning day).

High dust all can lights above snack bar.

### **Quarterly**

Power wash eaves.



## **EXHIBIT B**

(Pool House Janitorial Schedule)

### **Nightly (7 Days per Week)**

Clean Restrooms (Sinks and Toilets)

Clean Locker Area

Clean and Disinfect Showers, Wash top to bottom

Remove and Rinse Floor Mats (per inspector)

Mop locker room floors (per inspector)

Empty all trash cans in pool house and on pool deck. Take garbage to BHS compactor.

### **Monthly**

Deep scrub all hard surfaces

Dust Interior Vent Panels

Dust Tops of Lockers

### **Quarterly**

Steam clean rubber mats

### **For Large Events**

Secure dumpster for large events

## EXHIBIT C

### City Share Formula

The City share formula equation is based on a 351-day year since the pool is anticipated to be closed for maintenance 14 days each year. The formula, which can be recalculated as necessary to account for longer closure periods, takes into account the daily hours that the facility is open and in use, including routine maintenance time, and the daily hours that the facility is closed. The formula shall be calculated based on the prior year's actual usage and shall reset on January 1 of each year.

1. To calculate the formula, take the number of days in the calendar year multiplied by usable time (5:30 a.m. – 10:00 p.m.) in a day to determine the total number of available hours per calendar year:  $351 \text{ days} \times 16.5 \text{ hours} = 5,791.5 \text{ hours per calendar year}$ .
2. Divide the total hours each agency uses the pool per calendar year by the total usable hours (5,791.5) to get the percentage that each agency uses the pool.
3. When the City and the District are sharing the usable hours of pool time (i.e., the times when the agreement allocates up to 10 lanes each to the City and the District at the same time), the City and the District shall share operating expenses 50/50.
4. When the City and the District are sharing the usable hours of pool space as described in 3 above, the two agencies shall also share operating expenses for the unused hours on a 50/50 basis.
5. When only one agency is using the pool during operating hours, the unused hours will be allocated according to the formula described in 2 above.

**EXHIBIT D**

**(Approved Capital Expenditures Based on District Audit)**

**Reserved**

