

SAN MARINO UNIFIED SCHOOL DISTRICT

**AGREEMENT FOR USE OF THE SAN MARINO HIGH SCHOOL POOL
WITH THE CITY OF SAN MARINO**

THIS AGREEMENT FOR USE OF THE SAN MARINO HIGH SCHOOL POOL (this “**Agreement**”) is dated as of _____, 2019, but effective as of July 1, 2019 (the “**Effective Date**”) through June 30, 2024, by and between the SAN MARINO UNIFIED SCHOOL DISTRICT, Los Angeles County, California (“**District**”), and the CITY OF SAN MARINO, a California municipal corporation (“**City**”), with respect to the following:

RECITALS:

WHEREAS, City and District are authorized and empowered by California Education Code Section 10900 to cooperate with one another in order to promote and provide adequate community recreation and education programs that contribute to the health and general welfare, and otherwise encourage the development of good citizenship and enhance the quality of life, of the residents of the City;

WHEREAS, District is authorized by California Education Code Section 10910 to permit its buildings, grounds and equipment to be used by City for community recreation and education purposes;

WHEREAS, District has a pool (the “**Pool**”) located at San Marino High School that may be used by City for recreational purposes on an as-requested and available basis;

WHEREAS, District and City were parties to that certain Agreement for Use of the San Marino High School Pool dated as of July 1, 2015, as amended by that certain First Amendment to Agreement for Use of the San Marino High School Pool dated as of June 26, 2018 (collectively, the “**Prior Agreement**”); however, the Prior Agreement expired pursuant to its own terms as of June 30, 2019; and

WHEREAS, City desires to continue to use, upon its request, the Pool and District desires to continue to permit such use if the Pool is available, all upon the terms, provisions and conditions hereinafter set forth.

AGREEMENT:

NOW, THEREFORE, in consideration of the covenants and conditions contained herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by the parties hereto, District and City do hereby agree as follows:

1. POOL.

- 1.1 Availability for Recreation Programs. The Pool shall be available to City on a second priority basis (i.e., the Pool shall be available for use by City if the Pool is not being used by District for school-related events and City holds second priority over sports-based clinics, outside club events, etc. not fully associated with the District) for use in connection with City’s recreation programs, including, without limitation, competitive swim programs, sports camps, youth and adult classes, and other aquatic-related activities (collectively, the

“Recreation Programs”). The Recreation Programs shall be under the jurisdiction and control of the City, such that City shall be responsible for any accident that occurs in connection therewith to the extent that the same occurs within the scope of City’s control over or use of the Pool.

1.2 Operation and Condition. Except as otherwise provided herein, District shall, at its sole cost and expense, operate and maintain the Pool in a good, safe and working condition and carry insurance comparable to the insurance required to be carried by City with respect to the Pool. This Section 1.2 also implies that District will maintain appropriate chemical levels and water temperature conducive to sports and recreational Pool use.

1.3 Maintenance and Repairs. Except as otherwise provided herein, District shall, at its sole cost and expense, maintain, repair and/or replace, as is reasonably necessary (including as a result of ordinary wear and tear), the equipment located at the Pool that is used in connection with the Recreation Programs; provided, however, that City shall, at its sole cost and expense, repair and/or replace any such equipment that is damaged or destroyed in connection with the Recreation Programs or as a result of excessive wear and tear or abuse thereof. District shall ensure that all equipment required in connection with the operation and use of the Pool is in good working order and properly maintained. The City Manager and the Superintendent, or their representatives, shall confer from time to time as is necessary to discuss and/or coordinate the following: (a) City’s proposed schedule for the Recreation Department at the Pool (which schedule, once agreed upon, may not be changed, except with proper mutual consent of both parties), sufficiently in advance of each quarter to provide time to City to print and distribute brochures with respect there to, (b) general rules and regulation for the use of the Pool by City, (c) the security of the Pool and (d) such other matters as are reasonably requested by District or City to further and better effectuate the intent of this Agreement.

1.4 Facilities Use Requests. The District has ten (10) business days from the date of receipt to deny any requests to use the Pool from the City (each, a **“Facilities Use Request”**) submitted in accordance with the District’s timelines, guidelines and schedule, which shall be provided by the District to the City (collectively, as the same may be amended from time to time, the **“Use Guidelines”**). If District administrators do not notify the City’s Recreation Department of the District’s approval or denial within such ten (10) business day period, said Facilities Use Request(s) shall be deemed approved thereafter. Regardless of priority, the terms of Facilities Use Requests “approved” by the District shall not be changed, altered or modified, unless requested by the City and approved by the District or unless there are reasonably unforeseen District needs (including, but not limited to, maintenance or other emergency school needs unanticipated during the application period).

1.5 Contract and full payment. Any summer Pool use by the City is conditional upon final District approval of the summer Facilities Use Request, to be submitted in accordance with the Use Guidelines. The City shall pay the District in accordance with Section 8 hereof.

2. INDEMNIFICATION AND INSURANCE.

- 2.1 Indemnification. City agrees to protect, indemnify, defend and hold District free and harmless (collectively, “**Indemnify**”) from and against any and all claims, causes of action, demands, damages, liens, liabilities, losses, costs and expenses (including reasonable attorneys’ fees) to which District may be exposed or that District may incur in connection with (a) the use of the Pool by City, or its agents, employees and invitees, or (b) the failure of City to comply with the terms of this Agreement (collectively, “**Losses**”). Notwithstanding the foregoing, it is the intent of District and City that City shall be liable to Indemnify District under this Section 2.1 irrespective of the cause of the Losses (i.e., regardless of whether or not caused by any act, omission, willful misconduct or negligent conduct (whether active or passive) of City, or otherwise), except to the extent that the Losses are caused by the failure of District to perform its obligations under this Agreement (including, without limitation, the obligation to maintain the Pool) or otherwise by the gross negligence or willful misconduct of District, or its agents, employees or invitees.
- 2.2 Coverage. City shall obtain and maintain, at its sole cost and expense, through the California Joint Powers Insurance Authority (“**Authority**”), comprehensive public liability and property damage coverage, insuring against claims for injuries to persons and property occurring in, upon or about the Pool that has a limit of liability, per occurrence, of One Million Dollars (\$1,000,000) for injuries to person or persons, and One Million Dollars (\$1,000,000) for property damage; \$2,000,000 aggregate for injuries and property damage. Such coverage shall (a) name District as an additional protected insured party, (b) contain an agreement by Authority that the policy will not be cancelled without at least thirty (30) days prior notice to District, (c) provide that coverage afforded thereby will be primary and that any coverage carried by District shall be noncontributing with respect thereto, and (d) contain a waiver by Authority of any right of subrogation against District that arises, or might arise, by reason of any payment under such policy or by reason of any act or omission of District.
- 2.3 Certificate. Annually on or before July 1st, City shall cause Authority to supply District with a Certificate of Insurance or reasonable equivalent to evidence such insurance and any renewals thereof.
- 2.4 Waiver. City and District waive any and all rights of recovery against the other for loss of, or damage to, such waiving party of its property or the property of others under its control, where such loss or damage is insured against under any insurance policy in force at the time of such loss or damage. City and District shall, upon obtaining any policies of insurance affecting the Pool, give notice to the insurer that the foregoing mutual waiver of subrogation is contained in this Agreement.
3. **INDEPENDENT CONTRACTOR.** In connection with this Agreement, City shall at all times be and remain a wholly independent contractor of District. City shall have no power to incur any debt, obligation or liability on behalf of District or otherwise act on behalf of District as agent of District. City shall not, at any time or in any manner, represent that it or any of its agents or employees are in any manner an agent or employee of the District. Except as expressly provided in this Agreement, neither District nor any of its agents or employees shall have any control over the conduct of City or any of its agents, employees or invitees.

4. **TERM OF AGREEMENT.** This Agreement shall be effective from the Effective Date through June 30, 2024 (the “**Term**”), inclusive.
5. **TERMINATION OF AGREEMENT.** City may terminate this Agreement with or without cause by providing sixty (60) days prior notice to District. District may terminate this Agreement by providing sixty (60) days prior notice to City if City is in breach of the Agreement and fails to cure such breach prior to the expiration of such sixty (60) day period; provided, however, that if the nature of such breach is such that it cannot reasonably be remedied within such sixty (60) day period, then this Agreement shall not terminate upon the expiration of such sixty (60) day period if City commences its remedy thereof within such sixty (60) day period and thereafter diligently prosecutes such remedy to completion.
6. **NONDISCRIMINATION.** District shall not discriminate on the basis of race, color, sex, age, religion, national origin or any other basis prohibited by law in making the Pool available to City pursuant to this Agreement. City shall not discriminate on the basis of race, color, sex, age, religion, national origin or any other basis prohibited by law in operating its Recreation Programs at the Pool.
7. **SCHEDULE.**
 - 7.1 Scheduling. A Facilities Use Request shall be submitted to District in accordance with the Use Guidelines to secure the use of the Pool. The City agrees to notify the District of the City’s Pool use cancellations at least two (2) weeks prior to the beginning of the quarter in which such cancellations apply. District shall promptly notify City if it is necessary to close Pool for the protection of public health or safety, as required, by an applicable law, code, rule or regulation.
8. **FEES AND CHARGES.** City agrees to pay District Twelve Thousand, Eight Hundred Seventy-Five Dollars (\$12,875) a year (representing 16% of the annual maintenance and operation costs for the Pool as of the date hereof), such amount to be adjusted annually by the lesser of the Los Angeles Statistical Area Consumer Price Index or 3%, for the shared maintenance and operation costs of the District’s Pool located at San Marino High School.
 - 8.1 Utilities & Equipment. District shall ensure that all equipment required in connection with the operation and use of the Pool is in good working order and are properly maintained.
 - 8.2 Supervision. The party using the Pool shall be responsible for providing, at its own cost and expense, lifeguards or such other supervisory personnel as it deems necessary.
 - 8.3 Closing. District shall promptly notify City if it is necessary to close the Pool for the protection of public health or safety as required by any applicable law, code, rule or regulation.
 - 8.4 Initial Cost & Usage. District and City agree that the current annual cost of operation and routine maintenance of the Pool is Eighty Thousand, Four Hundred Seventy Dollars (\$80,470), excluding any major maintenance. District and City further agree that sixteen percent (16%) of the usage of the Pool is by the City and its agents, employees or invitees.

8.5 Intentionally Omitted.

8.6 Cost Allocation. District and City desire to provide for a fair and equitable allocation of the cost of operating (except supervision costs) and maintaining (including pool chemicals and supplies) the Pool based upon City's actual use thereof. Therefore, if District or City reasonably determines that the cost or usage numbers provided in Section 8.4 are inaccurate, then District and City shall review the same and make reasonable adjustments thereto as may be required to equitably allocate such cost, and any such adjustments shall be in writing, signed by District and City and shall constitute an amendment to this Agreement; provided, however, that District and City shall only be entitled to request a review of such cost and/or usage numbers twice during any twelve (12) month period.

8.7 Pool Improvements. In the event District determines that Pool improvements are required, City and District shall meet to discuss the proposed Pool improvements. Pool improvements are not a subject of this Agreement, and accordingly, any meeting between District and City to discuss Pool improvements shall not be interpreted as a commitment by City to fund such proposed Pool improvements.

8.8 Other Related Facilities. There shall be no additional charge to City for the City's use of locker rooms, showers, and restrooms in connection with the City's authorized use of the Pool. It is assumed that the City's use of such locker rooms, showers, and restrooms are included in the rates established herein.]

9. **ALTERATIONS.** City shall not alter the Pool without the prior written consent of District.

10. **ASSIGNMENT AND SUBLETTING.** City shall not assign, sublease, license or otherwise allow the use of the Pool by third parties (other than in direct connection with the City's Recreation Programs) without the prior written consent of the District, which consent may not be unreasonably withheld, except that District may require additional payments, additional maintenance or other requirements. Any such assignment or sublease without the prior written consent of the District shall be null and void and shall be cause for District to terminate this Agreement. The foregoing provisions against assignment and subleasing shall be deemed to be continuing conditions and shall apply to City and its successors and assigns. Should District consent to any such assignment or sublease, City shall not be relieved thereby from any of its liabilities and obligations hereunder. Any such approved assignment or sublease shall be in writing and the assignees and subtenants thereunder shall expressly assume and agree to perform all of the terms, covenants and conditions herein on the part of City to be performed.

11. **APPLICABLE LAW.** This Agreement shall be governed by and construed in accordance with the laws of the State of California.

12. **NOTICE.** Any notice, request, direction, instruction, demand, consent, waiver, approval or other communication required or permitted to be given hereunder shall not be effective unless it is given in writing and shall be (1) delivered (a) in person, (b) by certified mail, postage prepaid, return receipt requested, (c) by facsimile, (d) by a commercial overnight courier that guarantees next day delivery and provides a receipt, or (e) by electronic mail, provided, however, an original

of said transmission must be delivered to the addressee by some other method permitted under this Section 12 on the day following transmission, and (2) addressed to the parties at the addresses stated below, or at such other address as either party may hereafter notify the other in writing as aforementioned:

DISTRICT: San Marino Unified School District
1665 West Drive
San Marino, CA 91108
Attention: Superintendent
Phone: (626) 299-7000
Fax: (626) 299-7010
Email: superintendent@smusd.us

CITY: City of San Marino
2200 Huntington Drive
San Marino, CA 91108
Attention: Dr. Marcella Marlowe, City Manager
Phone: (626) 300-0700
Fax: (626) 300-0709
Email: mmarlowe@cityofsanmarino.org

Service of any such notice or other communications so made shall be deemed effective on the day of actual delivery (whether accepted or refused) as evidenced by (i) confirmed answerback if by facsimile (provided that if any notice or other communication to be delivered by facsimile is unable to be transmitted because of a problem affecting the receiving party's facsimile machine, the deadline for receiving such notice or other communication shall be extended through the next business day) or electronic mail, (ii) as shown by the addressee's return receipt if by certified mail, and (iii) as confirmed by the courier service if by the courier; provided, however, that if such actual delivery occurs after 5:00 p.m. (local time where received) or a non-business day, then such notice or demand so made shall be deemed effective on the first business day immediately following the day of actual delivery.

13. **ATTORNEYS' FEES.** In the event that legal action is necessary to enforce the provisions of this Agreement, the parties agree that the prevailing party shall be entitled to recovery of attorney's fees and costs, including without limitation, expert consultant and expert witness fees and costs, from the opposing party in any amount determined by the court or arbitrator, as applicable, to be reasonable.
14. **ENTIRE AGREEMENT.** This Agreement constitutes the entire agreement between District and City with respect to the subject matter hereof and supersedes all prior offers and negotiations, oral and written, including, without limitation, the Prior Agreement. This Agreement may not be amended or modified in any respect whatsoever except by an instrument in writing signed by District and City.
15. **COUNTERPARTS.** This Agreement may be executed in counterparts, each of which so executed shall be deemed an original irrespective of the date of the execution, and such counterparts shall together constitute one and the same agreement.

[Remainder of Page Intentionally Left Blank]

IN WITNESS WHEREOF, the parties have entered into this Agreement as of the Effective Date.

DISTRICT:

SAN MARINO UNIFIED SCHOOL DISTRICT

By: _____
_____, Superintendent

CITY:

CITY OF SAN MARINO

By: _____
Dr. Marcella Marlowe, City Manager

ATTEST:

By: _____
_____, City Clerk