AGREEMENT BETWEEN THE CITY OF SAN LEANDRO AND THE SAN LEANDRO UNIFIED SCHOOL DISTRICT FOR THE RIGHT TO CONSTRUCT A WALKING PATH ON CITY LAND AT MCCARTNEY PARK LOCATED ADJACENT TO WASHINGTON ELEMENTARY SCHOOL

This AGREEMENT is made and entered into on _____ of 2013 by and between the CITY OF SAN LEANDRO, a municipal corporation of the State of California **("City")** and the SAN LEANDRO UNIFIED SCHOOL DISTRICT **("District"),** together referred to herein as the "Parties."

RECITALS

WHEREAS, Section 10900 et seq. of the Education Code (the Community Recreation Act) authorizes cities and school districts to organize, promote and conduct programs or community recreation for the promotion and attainment of general educational and recreational objectives, and to construct, maintain and operate recreation centers, including outdoor playing fields;

WHEREAS, it is the policy of the City and the District to jointly undertake the development, installation, construction and maintenance of recreational facilities to reduce capital and operational costs to both governmental agencies; and

WHEREAS, the City and the District entered into an agreement dated March 21, 1960 for the construction and operation of the park, with amendments for maintenance; and

WHEREAS, attached to this Agreement and incorporated by this reference are Exhibit A, the shaded area of which depicts the location of the proposed new walking path to be constructed by the District, and Exhibit B, detailed plans for the path, and Exhibit C, Hazardous Materials Definitions.

NOW THEREFORE, in consideration of the covenants and conditions hereinafter set forth, and pursuant to the provisions of the Education Code described above, it is agreed as follows:

1. INCORPORATION OF RECITALS.

All the recitals above are true and correct and incorporated herein.

2. TERM.

The term of this Agreement (the "Term") shall commence upon the District's issuance to the City of a Notice to Begin Access and shall continue until the completion of the construction of the walking path, but in no event for more than five (5) years, unless earlier terminated pursuant to the terms of this Agreement.

3. CONSTRUCTION AND RIGHT OF ENTRY.

District shall cause to be constructed and developed a walking path at the location depicted on Exhibit A and the District may improve the area as depicted and described on Exhibit B to allow walking path use (the "Work"). District shall pay all required fees associated with the Work. District shall obtain the advance approval of City for the Work performed at the area depicted on Exhibit B. Any work in the area depicted on Exhibit A shall be in conformance with the plans approved by the Division of the State Architect.

3.1. Workmanlike Standard. The Work shall be performed in a good and workmanlike manner consistent with the standard of care and level of skill presently maintained by the practice of professionals in this locale; in compliance with all applicable federal, state and local laws, ordinances, rules and regulations, in a manner so as not to disturb the occupancy, business or quiet enjoyment of any other tenants or licensees of the Property; and in a manner so as to avoid harm to person(s) or the Property with the understanding that any construction work may create traffic, noise and dust associated with the Work. Where applicable, all Work at the site depicted on Exhibit B shall be completed to meet at a minimum the Standard Plans and Specifications of City.

3.2. Damage to City Property During Construction. Precautions must be taken by District to avoid interference with or damage to City's real and personal property. Equipment must not damage wire lines at, over or near the Property, as well as any other utilities or structures located thereon, including irrigation lines and sprinkler heads. District shall be liable for any damage to the Property, or any other property of City or City right-of-way, that occurs by its use of the Property, unless caused by the gross negligence or willful misconduct of City or its employees, agents or contractors. Any waste generated in the process of completing the Work, except pre-existing hazardous materials, will be the responsibility of District at District's sole cost and expense.

3.3. Access to Property. City hereby agrees and grants permission to District to enter the Property as may be necessary to perform the Work based on the covenants and conditions of this Agreement. The City reserves the right of its authorized officers, employees, agents or contractors, to enter into and access the Property at any time.

3.4. Relevant Laws. The District shall obtain and maintain any and all necessary permits from relevant agencies and comply with all current laws, ordinances, orders, rules, regulations and permits with respect to its performance of the activities relevant to this right of entry.

4. USE AND MAINTENANCE.

Subject to the limits herein stated, the right of entry granted herein is a right to enter onto the Property for the purposes of constructing and developing a walking path.
Use: the entire walking path can be used by the public for recreational purposes when school is not in session; otherwise, it is for the exclusive use of the school.

Maintenance: the Parties mutually agree that the City will maintain the path and that the cost for said maintenance will be split equally between the Parties. The City will submit invoices to the District quarterly for reimbursement.

5. INDEMNIFICATION.

To the fullest extent allowed by law, District shall defend, save, and hold City and its elected and appointed officers, officials, employees, agents, volunteers and representatives (all of the foregoing, collectively the "lndemnitees") harmless from any and all claims or causes of action for death or injury to persons, or damage to property resulting from the negligent or inadequate supervision of its contractors, students, employees, and agents in the construction and development of the Property. District shall defend, indemnify, save, and hold the "lndemnitees") harmless from any and all claims or causes of action for death or injury to persons, or damage to property resulting from the negligent use, or inadequate supervision of students and District use of the Property.

6. INSURANCE REQUIREMENTS.

Before commencing the Work, District, at its own cost and expense, unless otherwise specified below, shall procure the types and amounts of insurance listed below against claims for injuries to persons or damages to property that may arise from or in connection with the performance of the Work hereunder by the District and its agents, representatives, employees, and subcontractors. Consistent with the following provisions, District shall provide proof satisfactory to City of such insurance that meets the requirements of this section and under forms of insurance satisfactory in all respects, and that such insurance is in effect prior to beginning Work on the City's property. District shall maintain the insurance policies required by this section during the Work. District shall not allow any subcontractor to commence work on any subcontract until District has obtained all insurance required herein for the subcontractor(s) and provided evidence that such insurance is in effect to City.

6.1 Workers' Compensation.

6.1.1 General Requirements. District shall, at its sole cost and expense, maintain Statutory Workers' Compensation Insurance and Employer's Liability Insurance for any and all persons employed directly or indirectly by District. The Statutory Workers' Compensation Insurance and Employer's Liability Insurance shall be provided with limits of not less than $1,000,000 per accident. In the alternative, District may rely on a self-insurance program to meet those requirements, but only if the program of self-insurance complies fully with the provisions of the California Labor Code. Determination of whether a self-insurance program meets the standards of the California Labor Code shall be solely in the discretion of the City.

The Workers' Compensation policy shall be endorsed with a waiver of subrogation in favor of the entity for all work performed by the District, its employees, agents, and subcontractors.

6.1.2 Submittal Requirements. To comply with Subsection 6.1, District shall submit the following:

a. Certificate of Liability Insurance in the amounts specified in the section; and

b. Waiver of Subrogation Endorsement as required by the section.

6.2 Commercial General and Automobile Liability Insurance.

6.2.1 General Requirements. District, at its own cost and expense, shall maintain commercial general liability insurance for the term of this Agreement in an amount not less than $1,000,000 and automobile liability insurance for the term of this Agreement in an amount not less than $1,000,000 per occurrence, combined single limit coverage for risks associated with the Work contemplated. If a Commercial General Liability Insurance or an Automobile Liability form or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to the Work to be performed or the general aggregate limit shall be at least twice the required occurrence limit. Such coverage shall include but shall not be limited to, protection against claims arising from bodily and personal injury, including death resulting therefrom, and damage to property resulting from activities contemplated under this Agreement, including the use of owned and non-owned automobiles.

6.2.2 Minimum Scope of Coverage. Commercial general coverage shall be at least as broad as Insurance Services Office Commercial General Liability occurrence form CG 0001 (most recent edition) covering comprehensive General Liability on an "occurrence" basis. Automobile coverage shall be at least as broad as Insurance Services Office Automobile Liability form CA 0001, Code 1 (any auto). No endorsement shall be attached limiting the coverage.

6.2.3 Additional Requirements. Each of the following shall be included in the insurance coverage or added as a certified endorsement to the policy:

a. The Insurance shall cover on an occurrence or an accident basis, and not on a claims-made basis.

b. City, its officers, officials, employees, and volunteers are to be covered as additional insureds as respects: liability arising out of work or operations performed by or on behalf of the District; or automobiles owned, leased, hired, or borrowed by the District.

c. District hereby agrees to waive subrogation which any insurer or contractor may require from vendor by virtue of the payment of any loss. District agrees to obtain any endorsements that may be necessary to affect this waiver of subrogation.

d. For any claims related to this agreement or the Work hereunder, the District's insurance covered shall be primary insurance as respects the City, its officers, officials, employees, and volunteers. Any insurance or self-insurance maintained by the City, its officers, officials, employees, or volunteers shall be excess of the District's insurance and shall not contribute with it.

6.2.4 Submittal Requirements. To comply with Subsection 4.2, District shall submit the following:

a. Certificate of Liability Insurance in the amounts specified in the section;

b. Additional Insured Endorsement as required by the section;

c. Waiver of Subrogation Endorsement as required by the section; and

d. Primary Insurance Endorsement as required by the section.

6.3 Professional Liability Insurance.

6.3.1 General Requirements. District, at its own cost and expense, shall maintain during the Work professional liability insurance for licensed professionals performing work pursuant to this agreement in an amount not less than $1,000,000 covering the licensed professionals' errors and omissions. Any deductible or self-insured retention shall not exceed $150,000 per claim.

6.3.2 Claims-Made Limitations. The following provisions shall apply if the professional liability coverage is written on a claims-made form:

a. The retroactive date of the policy must be shown and must be before the date Work commences.

b. Insurance must be maintained and evidence of insurance must be provided for at least 5 years after completion of the Work, so long as commercially available at reasonable rates.

c. If coverage is canceled or not renewed and it is not replaced with another claims-made policy form with a retroactive date that precedes the date of the Work, District shall purchase an

extended period coverage for a minimum of 5 years after completion of the Work.

d. A copy of the claim reporting requirements must be submitted to the City for review prior to the commencement of the Work.

6.3.3 Additional Requirements**.** A certified endorsement to include contractual liability shall be included in the policy.

6.3.4 Submittal Requirements. To comply with Subsection 4.3, District shall submit the Certificate of Liability Insurance in the amounts specified in the section.

6.4 All Policies Requirements.

6.4.1 Acceptability of Insurers. All insurance required by this section is to be placed with insurers with a Bests' rating of no less than A:VII.

6.4.2 Verification of Coverage**.** Prior to beginning the Work, District shall furnish City with complete copies of all Certificates of Liability Insurance delivered to District by the insurer, including complete copies of all endorsements attached to the policies. All copies of Certificates of Liability Insurance and certified endorsements shall show the signature of a person authorized by that insurer to bind coverage on its behalf. If the City does not receive the required insurance documents prior to the District beginning the Work, it shall not waive the District's obligation to provide them. The City reserves the right to require complete copies of all required insurance policies at any time.

6.4.3 Deductibles and Self-Insured Retentions**.** District shall disclose to and obtain the written approval of City for the self-insured retentions and deductibles before beginning the Work called for by any term of this agreement. At the option of the City, either: the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the City, its officers, employees, and volunteers; or the District shall provide a financial guarantee satisfactory to the City guaranteeing payment of losses and related investigations, claim administration and defense expenses.

6.4.4 Wasting Policies. No policy required by this Section 6 shall include a "wasting" policy limit (i.e., limit that is eroded by the cost of defense).

6.4.5 Endorsement Requirements**.** Each insurance policy required by Section 6 shall be endorsed to state that coverage shall not be canceled by either party, except after 30 days' prior written notice has been provided to the City.

6.4.6 Subcontractors. District shall include all subcontractors as insureds under its policies or shall furnish separate certificates and certified endorsements for each subcontractor. All coverages for subcontractors shall be subject to all of the requirements stated herein.

6.5 Remedies. In addition to any other remedies City may have if District fails to provide or maintain any insurance policies or policy endorsements to the extent and within the time herein required, City may, at its sole option exercise any of the following remedies, which are alternatives to other remedies City may have and are not the exclusive remedy for District's breach:

- Obtain such insurance and charge the District;
- Order District to stop the Work until District demonstrates compliance with the requirements hereof; and/or
- Terminate this Agreement.

7. RESOLUTION OF DISPUTES.

Any dispute arising out of the use of the Property shall be resolved by the City Manager and Superintendent of the District. In the event they are unsuccessful in resolving any dispute, the Parties agree to submit the dispute to mediation.

8. NO WARRANTY OF SUITABILITY.

It is the District's election to undertake the Work. City makes no representations or warranties regarding the suitability, condition or fitness of the Property for District's intended use.

9. TERMINATION.

Either Party may terminate this Agreement, with or without cause, upon sixty (60) calendar days' written notice to the other Party.

10. NO INTEREST IN PROPERTY.

Nothing herein shall be deemed to create a lease or easement to any property, or to grant any interest in the Property other than a non-exclusive real property license to enter upon and use the Property, revocable as set forth herein. This Agreement shall not be recorded, or be an encumbrance upon the Property.

11. ENVIRONMENTAL DISCLOSURE AND INDEMNITY.

Prior to the commencement of any Work, the City shall notify the District in writing regarding the presence of any known Hazardous Materials (as defined in Exhibit C) or underground utilities located at the properties depicted on Exhibits A and B.

If, during construction, pre-existing hazardous substances are encountered by the District's contractor, all work shall cease in that area and the District shall promptly

notify the City. Thereafter, the Parties shall attempt to resolve how to remove or abate the condition in accordance with applicable law. If no agreement can be reached regarding the method of abatement or how that work shall be funded, the District may cease work in the area where the condition is located and the City shall be responsible for the site.

District shall indemnify, defend (with counsel approved by the City) and hold the Indemnitees (as defined in Section 5) harmless from and against all Claims arising during the Term of this Agreement and resulting, arising, or based directly or indirectly in whole or in part, upon (i) the presence, release, use, generation, discharge, transport, storage or disposal of any Hazardous Materials on or under, in or about, or the transportation of any such Hazardous Materials to or from the Property during the Term, where such actions or events were caused by the District or its agents, (ii) the failure of the District, the District's employees, agents, contractors, and subcontractors or any person acting on behalf of any of the foregoing to comply with Hazardous Materials Laws (as defined in Exhibit C), or (iii) the breach by the District of any of its covenants contained in this Section. The foregoing indemnity shall further apply to any contamination of any property or natural resources caused by the District or its agents arising in connection with the generation, use, handling, treatment, storage, transport or disposal of any such Hazardous Materials, and irrespective of whether any of such activities were or will be undertaken in accordance with Hazardous Materials Laws and shall include, without limitation, any Claims arising in connection with any investigation of site conditions or any cleanup, remedial, removal or restoration work ordered by a court or required by any federal, state, or local governmental agency or political subdivision. This Section shall survive the expiration or earlier termination of this Agreement.

12. NOTICE.

Notices herein required to be given or which may be given by either Party to the other shall be deemed to have been fully given when served personally on the City or District, or when made in writing and deposited in the United States mail, certified mail, return receipt requested, postage prepaid and addressed as follows:

To City: City of San Leandro
City Hall
Engineering & Transportation Department
835 East 14th Street
San Leandro, CA 94577
Attn: Tara Peterson, Administrative Services Manager

With Copy to: City Attorney
Meyers Nave
555 12th Street, Suite 1500
Oakland, CA 94607

To District: Song Chin-Bendib
Assistant Superintendent
Business & Operations
14735 Juniper Street
San Leandro, CA 94579

13. MISCELLANEOUS.

A. Joint and Several Obligation. If more than one entity is designated in, or signatory to, this Agreement, the obligations hereunder imposed upon the District shall be joint and several; and the term "the District" as used herein shall refer to each and every of said signatory parties, severally as well as jointly.

B. Agreements. This instrument contains all of the agreements and conditions entered into and made by and between the Parties with respect to the property and may not be modified orally, or in any manner, other than by an agreement in writing signed by all the Parties hereto or their respective successors in interest.

C. Conditions of Notice. Whenever, in this Agreement the approval or consent of a party is required, such approval or consent must be in advance, shall be in writing, and shall be executed by a person having the express authority to grant such approval or consent unless the terms of this Agreement specifically allow an oral approval or consent of a party.

D. Time of Essence. Time is, and shall be, of the essence for each term and provision of this Agreement

E. Terms, Conditions and Covenants. Each and every term, condition, covenant and provision of this Agreement is and shall be deemed to be a material part of the consideration for the City's entry into this Agreement and any breach hereof by the District shall be deemed to be a material breach. Each term and provision of this Agreement performable by the District shall be construed to be both a covenant and a condition.

F. Headings. The headings of the several paragraphs and sections of this Agreement are inserted only as a matter of convenience and for reference and in no way define, limit or describe the scope or intent of any provisions of this Agreement and shall not be construed to affect in any manner the terms and provisions hereof or the interpretation or construction thereof.

G. Severability. In the event any covenant, condition or provision herein contained is held to be invalid by a court of competent jurisdiction, the invalidity of any such covenant, condition or provision shall in no way affect any other covenant, condition or provision herein contained, provided the invalidity of any such covenant, condition or provision does not materially prejudice either the City or the District in its respective rights and obligations contained in the valid covenants, conditions and provisions of this Agreement.

H. Incorporation of Exhibits. All exhibits and addenda referred to herein, and any exhibits or schedules which may from time to time be referred to in any duly executed amendment hereto, are by such reference incorporated herein and shall be deemed a part of this Agreement as if set forth fully herein.

I. Counterparts. This Agreement may be executed simultaneously in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

J. Construction of Agreement. This Agreement shall be interpreted and construed only by the contents hereof and there shall be no presumption or standard of construction in favor of or against either party.

K. Choice of Law. This Agreement shall be construed by and in accordance with the laws of the State of California.

WHEREFORE, the Parties hereto have executed this Agreement as of the Effective Date.

SAN LEANDRO UNIFIED SCHOOL DISTRICT

By: _____

Its: _____

CITY OF SAN LEANDRO

By: _____
Chris Zapata

Its: City Manager

Attest: _____

Approved as to form:

_____
Richard D. Pio Roda, City Attorney

Exhibit A

Overall Plan

Exhibit B

Detailed Plan

Exhibit C

Hazardous Materials Definitions

A. Hazardous Materials. As used herein, **"Hazardous Materials"** means any substance, material, or waste which is or becomes regulated by any local, state or federal authority, agency or governmental body, including any material or substance which is: **(i)** defined as a "hazardous waste," "extremely hazardous waste," or "restricted hazardous waste" under Sections 25115, 25117 or 25122.7, or listed pursuant to Section 25140 of the California Health and Safety Code, Division 20, Chapter 6.5 (Hazardous Waste Control Law); (ii) defined as a "hazardous substance" under Section 25316 of the California Health and Safety Code, Division 20, Chapter 6.8 (Carpenter-Presley-Tanner Hazardous Substance Account Act); (iii) defined as a "hazardous material," "hazardous substance," or "hazardous waste" under Section 25501 of the California Health and Safety Code, Division 20, Chapter 6.95 (Hazardous Materials Release Response Plans and Inventory); (iv) defined as a "hazardous substance" under Section 25281 of the California Health and Safety Code, Division 20, Chapter 6.7 (Underground Storage of Hazardous Substances); (v) petroleum; (vi) friable asbestos; (vii) polychlorinated biphenyls; (viii) listed under Article 9 or defined as "hazardous" or "extremely hazardous" pursuant to Article 11 of Title 22 of the California Administrative Code, Division 4, Chapter 20; (ix) designated as "hazardous substances" pursuant to Section 311 of the Clean Water Act (33 U.S.C. §1317); (x) defined as a "hazardous waste" pursuant to Section 1004 of the Resource Conservation and Recovery Act, 42 U.S.C. §6901, et *seq.* (42 U.S.C. §6903); or (xi) defined as "hazardous substances" pursuant to Section 101 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9601, et *seq.,* as the foregoing statutes and regulations now exist or may hereafter be amended.

B. Hazardous Materials Laws. As used herein **"Hazardous Materials Laws"** means all federal, state and local laws, ordinances, regulations, orders and directives pertaining to Hazardous Materials, including without limitation, the laws, statutes and regulations cited in the preceding Section A above, as any of the foregoing may be amended from time to time.