

## **AGREEMENT**

This AGREEMENT ("**Agreement**") is entered into as of the date signed by the last Party below ("**Effective Date**"), by and between the City of Emeryville, a California municipal corporation ("**City**"), and the Emery Unified School District, a political subdivision of the State of California ("**District**"). City and District are sometimes referred to herein individually as a "**Party**," and collectively as the "**Parties**."

## **R E C I T A L S**

A. In 2014, the District and City entered into a "Joint Occupancy Agreement" (hereinafter the "JOA") relating to the construction and use of the Emery Center of Community Life ("ECCL").

B. Pursuant to the terms of the JOA, a Governance Committee consisting of the City Council and District Board recommends an Annual Operations and Maintenance Budget. The City Council and District Board then each approve an Annual Operations and Maintenance Budget that includes estimates for all expenses associated with the operation and maintenance of the ECCL Project Facilities. The Parties then multiply their respective O&M Percentage Share by the Annual Operations and Maintenance Budget to determine the amount each owes for operations and maintenance expenses. (JOA Attachment F, § 6.1).

C. The JOA also requires the Parties to maintain a schedule for capital replacement projects, and provide contributions to a capital replacement reserve account to fund such projects. (JOA Attachment F, §§ 6.4, 6.5).

D. The JOA further provides that, with limited exceptions not applicable here, alterations to the ECCL Project Facilities shall require the advance written approval of the other Party. (JOA Attachment F, § 9).

E. The JOA further provides that consultant and contractor agreements are subject to approval by the City Council and District Board if they (1) contemplate payment in excess of \$25,000, (2) are related to use, operation, repair, or replacement, (3) are proposed to be included as Operations and Maintenance or Capital Replacement expenses, and (4) are to be paid proportionately by the Parties, (JOA Attachment F, § 10).

F. The District wishes to implement a project involving installation of CO2 sensors, HVAC assessment and improvement, installation of LED Lighting, Building Envelope Improvements, installation of refrigeration controls, and installation of a solar and battery storage system (the "Project"). The Project shall be installed and carried out under an agreement with Syserco (the "Syserco Agreement").

G. The Parties wish to acknowledge their agreement related to the Project as set forth herein.

## A G R E E M E N T

NOW, THEREFORE, for good and valuable consideration, the Parties hereby agree as follows:

1. Term. The term of this Agreement shall commence on the date it is executed by each Party and shall end upon the earliest of the following: (1) the City's early termination of the ECCL Project Lease pursuant to Section 2.2 of the ECCL Project Lease; (2) the District's notification of its desire to terminate this Agreement; or (3) twenty-five years after the date of execution.

2. The City consents to the District's installation and construction of the Project and approves of the contract for the Project's installation as contemplated by Sections 9 and 10 in Attachment F (Operations, Maintenance and Shared Use Agreement) to the JOA. The City shall not be a party to, nor have any financial obligations under the Syserco Agreement. Further, the District shall pay all costs required for the installation of the Project under the Syserco Agreement.

3. The Parties agree that the Solar PV and battery storage system shall not be required to be placed on the Capital Replacement Schedule as discussed in Section 6.4 in Attachment F (Operations, Maintenance and Shared Use Agreement) to the JOA.

4. Solar PV and Battery Storage System.

a. The ongoing operational and maintenance costs for the useful life of the Solar PV and battery storage system ("Solar facilities"), estimated to total approximately \$10,000.00 annually (this amount will increase with inflation over the term of this Agreement) shall be incorporated into the Annual Operations and Maintenance Budget, and such costs shall be shared by the Parties according to their respective O&M Percentage Shares.

b. If the Solar PV and/or battery storage system requires repairs, the cost of contracts for such repairs shall be governed by Section 6.4 in Attachment F (Operations, Maintenance and Shared Use Agreement) to the JOA.

c. The ECCL will continue to use traditional utilities (PG&E, EBCE) for electricity needs that are not met by the Solar facilities. The Parties anticipate the system will cover 96% of electricity needs at the ECCL. The City and the District will include the remaining electricity costs (estimated at 4%) in the Annual Operations and Maintenance Budget, and shall share such costs according to their respective O&M Percentage Shares.

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d. After the solar portion of the Project becomes operational, the Parties shall calculate an annual offset to the District's contribution to the Annual Operations and Maintenance Budget (the "Solar Offset"). The Solar Offset shall be calculated as follows:

- i. A rate of \$0.25 per kWh will be applied (the "Rate").
- ii. The amount of electricity produced by the solar system over the course of the previous year (total kWh) will be determined based on a meter reading exclusive to the solar system. As stated above, this output is expected to meet approximately 96% of the ECCL's needs.
- iii. The Rate will be multiplied by the total kWh provided by the solar system in the prior year, and the resulting product will be multiplied by .29 to calculate the Solar Offset. For clarity and avoidance of doubt, the following simplified illustrations demonstrate the Parties' intent regarding the method of calculating the Solar Offset:

Solar Offset = (Total annual kWh produced by solar) x (\$0.25) x (City's 29% share of O&M)

Example Annual kWh Produced by System	x per kWh Rate	x City's Share (29%)	= City's Annual Contribution
881,584.47	0.25	0.29	\$ 63,914.87

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For clarity and avoidance of doubt, the following simplified illustration demonstrates the Parties' intent regarding the application of the Solar Offset to the O&M Budget and the Parties' respective payment obligations:

	Total O&M Expenses	
	\$ 1,000,000.00	
	District	City
O&M Expenses (assumes 71/29 split)	\$ 710,000.00	\$ 290,000.00
Solar Credit (assumes \$63,914.87 Solar Offset)	\$ (63,914.87)	\$ 63,914.87
Parties' Adjusted Payment Obligations	\$ 646,085.13	\$ 353,914.87

5. Events of Default. Failure by either Party to perform any action or covenant required by this Agreement within the time periods provided herein following notice and expiration of the applicable cure period described below, shall constitute a "default" under this

Agreement. A Party claiming a default shall give written notice of default to the other Party specifying the default complained of. The other Party shall not be in default if (a) in the case of a monetary default, the defaulting Party cures the default within ten (10) days following receipt of the notice of default, or (b) in the case of a non-monetary default, the defaulting Party fully cures, corrects or remedies the default within thirty (30) days following receipt of such notice of default or, if the non-monetary default cannot be cured within 30 days, the defaulting Party commences to cure the default within such 30-day period and thereafter diligently and continuously prosecutes such cure to completion.

6. Non-Binding Mediation. If the Parties are unable to resolve any dispute arising in connection with this Agreement, the Parties agree to submit such dispute to a mutually acceptable professional mediator and to negotiate in good faith toward reaching a resolution of the dispute prior to taking legal action. Each Party shall pay an equal share of the mediator's fees and expenses. Each Party shall be responsible for any other fees or costs such Party incurs in connection with participation in the mediation. The time between a Party's written request for mediation and the mediation itself, not to exceed ninety (90) days, shall toll the running of any applicable period of limitations for filing a claim or action.

7. Remedies. If either Party is in default under this Agreement following notice and expiration of applicable cure periods, the non-defaulting Party, following completion of the non-binding mediation conducted in accordance with Section 6 above, shall be entitled to pursue all remedies provided herein or available at law or in equity. Any legal actions under this Agreement shall be instituted in the Superior Court of Alameda County, State of California. Any failure or delay by either Party in asserting any of its rights or remedies as to any default shall not operate as a waiver of any default or of any such rights or remedies or deprive either such Party of its rights to institute and maintain any actions or proceedings which it may deem necessary to protect, assert or enforce any such rights or remedies. The rights and remedies of the Parties are cumulative, and the exercise by either Party of one or more of such rights or remedies shall not preclude the exercise by it, at the same time or different times, of any other rights or remedies for the same default or any other default by the other Party. Notwithstanding any other provision hereof to the contrary, neither Party shall be entitled to recovery of, and each Party hereby waives any right to pursue, any consequential, special or punitive damages in the event of a default by the other Party.

8. No Waiver. waiver of any breach of any covenant or provision of this Agreement shall be deemed a waiver of any subsequent breach of the same or any other covenant or provision hereof. No waiver shall be valid unless in writing and executed by the waiving Party. An extension of time for performance of any obligation or act shall not be deemed an extension of the time for performance of any other obligation or act, and no extension shall be valid unless in writing and executed by the waiving Party.

9. No Member Liability. No member, official or employee of either Party shall be personally liable to the other in the event of any default or breach by the defaulting Party or for any amount to which the non-defaulting Party may become due.

10. Entire Agreement; Amendment. This Agreement shall constitute the entire understanding and agreement of the Parties, and supersede all negotiations or previous agreements between the Parties with respect to all or any part of the subject matter hereof. This Agreement may be amended only in writing signed by authorized representatives of City and District.

11. Notice. Any notice required or authorized under this Agreement shall be effective if, and only if, in writing and if, and only if, mailed, postage prepaid, by registered or certified mail or sent via overnight courier, to the Party in question at the then current primary business of such Party, or at such other address as that Party may later designate by notice. The current primary business addresses of the Parties are shown below:

District: Emery Unified School District  
4727 San Pablo Avenue  
Emeryville, CA 94608  
Attention: Superintendent

with a copy to: Emery Unified School District  
4727 San Pablo Avenue  
Emeryville, CA 94608  
Attention: District Counsel

City: City of Emeryville  
1333 Park Avenue  
Emeryville, CA 94608-3517  
Attention: City Manager

with a copy to: City of Emeryville  
1333 Park Avenue  
Emeryville, CA 94608-3517  
Attention: City Attorney

Notices shall be effective three business days after mailing if sent by registered or certified mail or one business day after mailing if sent via overnight courier.

12. Severability. Should any provision of this Agreement be found invalid by a court or other body of competent jurisdiction, said invalidity or ineffectiveness shall not affect the validity of the remaining provisions of such agreement which shall remain in force to the maximum extent possible.

13. Interpretation. The Parties acknowledge that each Party and its counsel have reviewed and revised this Agreement and that the rule of construction to the effect that any ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of this Agreement or any document executed and delivered by either Party in connection with this

Agreement. The captions in this Agreement are for convenience of reference only and shall not be used to interpret this Agreement. Whenever the context may require, any pronoun shall include the corresponding masculine, feminine and neuter forms. The words "include" and "including" shall be deemed to be followed by the phrase "without limitation." The words "approval," "consent" and "notice" shall be deemed to be preceded by the word "written."

14. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of California.

15. No Conflicts of Interest. Each Party warrants to the other that no member of the governing body of the District or City and no other public official of such locality or localities during his/her tenure and for one year thereafter, shall have any interest, direct or indirect, in any contract or subcontract, or the proceeds thereof, for work to be performed in connection with this Agreement.

16. Counterparts. This Agreement may be executed in any number of counterparts and by different Parties hereto in separate counterparts, each of which when so executed shall be deemed to be an original and all of which taken together shall constitute one and the same agreement.

17. Further Assurances. From and after the date of each of Agreement, the Parties agree to do such things, perform such acts, and make, execute, acknowledge and deliver such documents as may be reasonably necessary or proper and usual to timely complete the actions contemplated by such agreement.

18. Authorized Representatives. Except as otherwise expressly provided in this Agreement, whenever under the provisions of any of this Agreement the approval of the City or District is required, or the City or District is required to take some action at the request of the other, such approval or request shall be given for the District by the Superintendent or his or her designee, and for the City by the City Manager or his or her designee, and any Party hereto shall be authorized to rely upon and such approval or request.

19. No Assignment. Neither Party may assign its rights or obligations without the express written consent of the other Party which may be granted or denied in its sole discretion.

20. Authority. Each Party represents that the signatory has the authority to bind each respective entity, and assents to each and every term contained within this Agreement.

21. No Third Party Beneficiaries. It is the intention of the Parties that under no circumstances are any rights created for persons or entities who are not parties to this Agreement and the Parties owe no duty to any persons or entities not parties to this Agreement under a third party beneficiary theory or under any other theory of law.

22. Attorneys' Fees. If either Party commences any legal action against the other party arising out of this Agreement or the performance thereof, each Party in such action shall be responsible for its own litigation expenses, including but not limited to court costs, expert witness fees, discovery expenses and attorneys' fees.

23. No Joint Venture. It is expressly understood and agreed that neither Party shall become as a result of this Agreement a partner of the other or a joint venturer with the other Party in the conduct of such Party's business or otherwise. This Agreement is not intended, and shall not be construed, to create the relationship of principal and agent, partnership, joint venture, or association as between District and City.

24. Successors and Assigns. Subject to the restrictions on assignment set forth above, all of the terms, covenants and conditions of this Agreement shall be binding upon District and City and their respective permitted successors and assigns.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the dates set forth below.

**CITY:**

**CITY OF EMERYVILLE**, a municipal corporation


By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: City Manager  
Date: \_\_\_\_\_, 2022

**DISTRICT:**

**EMERY UNIFIED SCHOOL DISTRICT**,  
a political subdivision of the State of California

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: Superintendent  
Date: \_\_\_\_\_, 2022

Approved As To Form:

DocuSigned by:  
  
\_\_\_\_\_  
City Attorney

Approved As To Form:

\_\_\_\_\_  
District Counsel