

**PROPOSITION 39 CHARTER FACILITIES USE AGREEMENT
BY AND BETWEEN
MT. DIABLO UNIFIED SCHOOL DISTRICT AND
CLAYTON VALLEY CHARTER SCHOOL**

THIS AGREEMENT (“Agreement”) is made this __ day of May 2012, by and between the Mt. Diablo Unified School District (“District”), a public school district organized and existing under the laws of the State of California and the Clayton Valley Charter High School (“Charter School”), a California public charter school. The District and the Charter School are collectively referred to herein as “the parties.”

RECITALS

WHEREAS, the Charter School is a non-profit public benefit corporation that is operating a charter authorized by the District;

WHEREAS, pursuant to the requirements of California Education Code section 47614 and its implementing regulations (also known as “Proposition 39”), the Charter School has made a written request for facilities for the 2012-2013 school year, a true and correct copy of which is attached as Exhibit A and hereby incorporated by reference; and

WHEREAS, pursuant to the requirements of Proposition 39 and its implementing regulations the District’s Board of Education has made a written offer to provide the Charter School with facilities for its in-District students, a true and correct copy of which is attached as Exhibit B and hereby incorporated by reference, and the Charter School has accepted the terms of that offer; and

WHEREAS, the parties desire to set forth the terms and conditions pursuant to which the Charter School will occupy and use facilities (the “Dedicated Space”) at Clayton Valley High School located at 1101 Alberta Way, Concord, CA, (“Site”) commencing with the 2012-2013 school year. See Exhibit C for a detailed description of the Dedicated Space.

NOW THEREFORE, in consideration of the covenants and agreements hereinafter set forth, the parties agree as follows:

Section 1. Use of Dedicated Space. The District agrees to allow the Charter School exclusive use of the entire premises as the Dedicated Space for the sole purpose of operating the Charter School educational program in accordance with their charter. The Charter School’s right to exclusive use of the Dedicated Space shall be coterminous with the terms of this Agreement and shall be for the 2012-2013 school year only. Upon the termination of this Agreement, the right to exclusive use and occupation of the Dedicated Space and the facilities and equipment thereon shall revert to the District subject to the parties’ negotiation of a successor Agreement, if necessary, containing the terms of the District’s provision of facilities to the Charter School in accordance with the provisions of Proposition 39. As titleholder to the Dedicated Space and the facilities and equipment

located thereon, the District reserves the right at the termination of this Agreement to recoup the full rights and benefits of such ownership, including, but not limited to, use of such Dedicated Space, facilities and equipment for District services.

The Charter School shall otherwise have full and exclusive use of the Dedicated Space. The Charter School shall comply with District policies and/or practices regarding the operations and maintenance of the facilities, and the furnishings and equipment provided by the District.

Although the Charter School shall have the exclusive use of the Dedicated Space, Charter School agrees to comply with the provisions of the Civic Center Act (Education Code section 38131 et seq.) and District Board Policies and Administrative Regulations in making use of the facilities accessible to members of the community.

The District shall be responsible for approving facilities requests for the use of the Dedicated Space under the Civic Center Act ("Act") (Education Code section 38121). The District and the Charter School shall work in good faith to comply with the Act including, but not limited to, all the parties promptly contacting each other's Facilities Department with copies of all requests, invoices, and other correspondence between the Charter School and third-parties' requesting use of the Dedicated Space. Upon approval by the District of a request under the Act, the Charter School shall be responsible for making the Dedicated Space available to the public and thus, shall receive the payments due under the Act. If facilities requests are made directly to the Charter School, it shall promptly fax the request to the District's Maintenance and Operations Office.

Section 3. Full and Complete Satisfaction. The parties agree that the provision of facilities pursuant to this Agreement constitutes full and complete satisfaction of the District's obligation to provide facilities to the Charter School under Education Code section 47614 and the Proposition 39 regulations for the 2012-2013 school year.

Section 4. Facility & Amenities – Occupancy and Use.

FURNISHINGS AND EQUIPMENT: The District shall provide, in accordance with the Proposition 39 regulations, furnishings and equipment at the Site. These furnishings and equipment shall remain the property of the District. The District and the Charter School shall develop a mutually agreeable inventory of the furnishings and equipment that will be located at the Site. No later than October 1, 2012, the Charter School shall provide the District with a complete inventory of all Charter School owned furnishings and equipment at the Site. The Charter School inventory shall be updated as the Charter School purchases new furnishings and equipment and/or surpluses and sells furnishings and equipment. The allocation of furnishings and equipment shall include the textbooks and kitchen equipment located on the Dedicated Space during the 2011-2012 school year. The parties are in disagreement as to whether the radio tower and its equipment are included in the definition of "furnishings and equipment" pursuant to Proposition 39; the parties will have further discussions on this issue and will come to an agreement.

INSTRUMENTS, BAND UNIFORMS, AND WEIGHT EQUIPMENT: For the 2012-2013 school year, the Charter School will have the use of the instruments, band uniforms, and weight equipment currently located at the site; ownership of these items shall remain with the District. The Charter School shall be responsible for the maintenance of these items.

SECURITY: The Dedicated Space shall be wired to the Clayton Valley High School alarm system. The Charter School shall be responsible for costs incurred due to false alarms and security breaches that are related to the Dedicated Space and are caused by the Charter School, or its students, employees, agents or invitees. The Charter School shall cooperate with the District on security issues. The Charter School may have a unique security code. If there is a fire at the property, the Charter School shall immediately notify the District but no later than within one business day. As the owner of the property and thus, the entity ultimately liable for its condition, the District retains the right to enter the Dedicated Space for the purpose of inspecting the same, or to make capital improvements and repairs. The District shall attempt to provide reasonable notice where practicable but shall not be obligated to do so in the event of an emergency or imminent threat to the health or safety of occupants.

EMERGENCY: In an emergency, including if the Space is destroyed or damaged in any material way, the District reserves the right to temporarily interrupt the Charter School's use of the Space, or any Charter School Campus facilities or systems.

Section 5. Modernization. In the event that the District designates matching facilities funds for the facility and begins modernizing the facility, the District and the Charter School will meet to discuss the issue of modernization for the Site. The District will continue to move forward with the Measure C improvements currently planned for the Dedicated Space in the 2012-2013 school year.

Section 6. Term. The term of this Agreement shall begin on its date of execution and shall end on June 30, 2013.

Notwithstanding the term of this Agreement, the Charter School's right to renew this Agreement shall be subject to compliance with the annual facilities request requirements of Education Code section 47614 and 5 C.C.R. sections 11969 et seq.. Upon timely notification of the Charter School's facilities needs in accordance with 5 C.C.R. sections 11969 et seq., the parties shall amend the terms of this Agreement, if necessary, and the parties shall execute a new Agreement. The District reserves the right to provide alternative facilities at the end of the term of this Agreement that meet the requirements of Prop. 39, and makes no guarantee that the Dedicated Space will be available for any additional term beyond the current term.

Section 7. Termination. This Agreement will automatically terminate upon the termination or revocation of Charter School's charter or the cessation of Charter School's operations for any reason, except that in the case of a revocation or non-renewal of the Charter School's charter, this Agreement shall not terminate until the Charter School has exhausted all of its statutory rights to appeal said revocation or non-renewal.

Section 8. Fees and Payment.

A. The District shall charge the pro rata share amount referred to in Education Code section 47614(b)(1). The Charter School and the District agree that the total pro rata share amount payment for the 2012-2013 school year for interior and exterior space will be based upon actual costs incurred in the 2011/2012 school year. The actual pro rata share amount shall be determined after the District closes its books on September 15, 2012.

B. The District will invoice the Charter School and the Charter School will make installment payments on this invoiced amount payable to "Mount Diablo Unified School District" and delivered to the District's Office of Charter Schools according to the following schedule:

Section 9: Payment Schedule.

- 25% by December 31, 2012;
- 25% by March 31, 2013;
- 50% by June 30, 2013

A. The Charter School may choose to prepay any of the installment payments without incurring a prepayment penalty from the District.

B. Charter School payments of undisputed amounts that are more than 30 calendar days late arriving at the District will incur a one (1%) percent per month interest charge on the balance.

C. The District will deduct from subsequent transfer payments payable to the Charter School any undisputed scheduled payment amount due from this Agreement, plus interest charges, that is more than 60 calendar days past due.

D. The Fees are detailed in Exhibit D, Table, I attached to this agreement.

E. The Fee does not include Site-specific costs which the school must include in its own budget. The Fee does not include, among other items, the cost of internet service, phone service, custodial, or campus security.

F. Either the Charter School or the District may call, at any time, for a meeting to discuss adjustments or reconciliation of these figures whenever there is reason to believe that these estimates do not reflect actual amounts owing.

Section 10. Utilities.

A. The Charter School shall be solely responsible for the cost of all utilities used or consumed by the Charter School on the Site. With respect to internet connectivity, the

Charter School shall assume use of the pre-existing T-1 line and shall transfer billing for the use of such line over to the Charter School. The Charter School shall obtain its own internet service provider and shall assume sole responsibility for upkeep and maintenance of all telephone systems, data lines, and related equipment, software and hardware.

B. The District shall be excused from performance and shall not be liable if: (i) there is an interruption in utilities services caused by circumstances beyond the District's control; or (ii) there occurs any failure or defect in the District's physical plant or utility lines, whether or not attributable to the District. In the event of such interruption, failure or defect, the District shall make reasonable attempt(s) to restore such utility service(s). The reasonable cost of repair or maintenance of a physical plant or utility lines attributable to the Charter School shall be considered to be a reasonable maintenance cost for which the District shall bear liability.

Section 11. Maintenance.

A. Facilities, furnishings, and equipment provided to the Charter School shall remain the property of the District. The ongoing operations and maintenance of the facilities and furnishings and equipment is the responsibility of the Charter School. Projects eligible to be included in the District deferred maintenance plan established pursuant to Education Code section 17582 and the replacement of furnishings and equipment supplied by the District in accordance with District schedules and practices shall remain the responsibility of the District. The Charter School shall comply with District policies regarding the operations and maintenance of the facilities and furnishings and equipment, except to the extent variation is approved by the District.

B. The District shall be responsible for the major maintenance of the facilities used by the Charter School. For purposes of this section, "major maintenance" includes the major repair or replacement of plumbing, heating, ventilation, air conditioning, electrical, roofing, and floor systems, exterior and interior painting, and any other items considered deferred maintenance under Education Code section 17582. All other kinds of maintenance shall be considered routine maintenance.

Section 12. Installation of Improvements.

A. The Charter School shall not construct or install any improvements on the Dedicated Space without the prior written consent of the District, and if required, the Division of the State Architect. Improvements shall be defined as changes to the structure of the Dedicated Space with a cost of more than \$2,000, and shall not include painting of the Dedicated Space or changing internal locks. If the Charter School intends to rekey the Dedicated Space, it agrees to provide the District with ten (10) working days advance notice and shall provide copies of keys within 48 hours of installing the new locks. The District's approval of any improvements, including the construction schedule, work hours, and modifications, shall be at the District's reasonable discretion. However, the District shall not refuse permission for improvements or alterations requested by the Charter

School that are necessary for the continued operation or use of some portion of the Dedicated Space.

B. Contractors retained by the Charter School with respect to the construction or installation of improvements shall be fully licensed and bonded as required by law and must maintain levels of casualty, liability and workers' compensation insurance and performance and payment bonds consistent with District construction requirements. The construction or installation of improvements shall be performed in a sound and workmanlike manner, in compliance with all laws applicable to charter schools, including buildings codes and potentially prevailing wage laws. The District or the District's agent shall have a continuing right at all times during the period that improvements are being constructed or installed to enter the premises and to inspect the work, provided that such entries and inspections do not unreasonably interfere with the progress of the construction or interrupt instruction to students.

C. The Charter School shall be entitled to install signage customarily used by other schools in the District at the Dedicated Space. The Charter School shall seek advanced written approval from the District of all signage, including location and size, but the District shall not unreasonably deny approval of signage that complies with District custom and practice.

Section 13. Condition of Property.

A. The District is not aware of any defect in or condition of the Dedicated Space that would prevent their use for the Charter School's purposes other than those communicated to the District by the Charter School on May 16, 2012. The parties will discuss those conditions communicated on May 16 as they do not agree that all the conditions communicated constitute defects. The District has not received any notice of violation of statute, ordinance, regulation, order or holding from any state or federal agency with jurisdiction over the Dedicated Space that calls into question the appropriateness or sufficiency of the Dedicated Space for their intended purpose.

B. The Charter School, at its expense, shall comply with all applicable laws, regulations, rules and orders with respect to its use and occupancy of the Dedicated Space, including, without limitation, those relating to health, safety, noise, environmental protection, waste disposal, and water and air quality. The Charter School shall not be responsible for any and all environmental conditions that existed prior to the Charter School's occupancy of the Dedicated Space. The District shall remain responsible for compliance with the ADA, FEHA, and other applicable building code standards for any existing compliance issue prior to the date of execution of this Agreement. The Charter School shall only assume responsibility for compliance with ADA and FEHA access rights to the extent of any modifications or improvement made by the Charter School.

C. Should any discharge, leakage, spillage, emission, or pollution of any type occur upon or from the Dedicated Space due to the Charter School's use and occupancy thereof, the Charter School, at its expense, shall be obligated to clean all the property

affected, to the satisfaction of the District and any governmental agencies having jurisdiction over the Dedicated Space.

Section 14. Title to Property. The parties acknowledge that title to the Dedicated Space is held by the District and shall remain in the District at all times.

Section 15. Fingerprinting. The Charter School shall be responsible for ensuring compliance with all applicable fingerprinting and criminal background investigation requirements described in Education Code section 45125.1. Verification of compliance with the aforementioned fingerprinting and criminal background investigation requirements shall be maintained as required by law at the Dedicated Space, and shall provide in writing to the District on a quarterly basis. For those employees who were District employees prior to conversion and have previously undergone a background check, the Charter School shall not be obligated to perform another check on these employees pursuant to this section. The District will also be responsible for ensuring compliance with all applicable fingerprinting and criminal background investigation requirements described in Education Code section 45125.1 for any individuals it sends to the Dedicated Space prior to permitting contact with Charter School students.

Section 16. Insurance.

A. The District will continue to maintain its current levels of insurance on the structures on the Dedicated Space. The Charter School shall, during the term of this Agreement, maintain in force the required levels of insurance in the amounts specified by the District. Specifically, the coverage and limits as designated in the 2011/12 California Charter School Association Joint Powers Agreement which is attached as Exhibit E and incorporated herein by reference.

B. The Charter School shall secure and maintain property insurance that addresses business interruption and casualty needs, including flood, fire, earthquake, and other hazards with replacement costs coverage for all assets listed in the Charter School's property inventory and consumables. The Charter School shall secure property coverage with a minimum policy limit of 80 percent of the fair market value of the Charter School's contents.

Section 17. Indemnification

A. The Charter School shall, to the fullest extent permitted by law, indemnify, defend, and hold harmless the District, its officers, directors, employees, attorneys, agents, representatives, volunteers, successors and assigns (collectively hereinafter District and/or District Personnel) from and against any and all actions, suits, claims, demands, losses, costs, penalties, obligations, errors, omissions, or liabilities, including legal costs, attorney's fees, and expert witness fees, whether or not suit is actually filed, and/or any judgment rendered against District and/or District Personnel, that may be asserted or claimed by any person, firm or entity arising out of the Charter School's use of the Site or from the conduct of its business or from any activity, work, or other things done,

permitted or suffered by the Charter School in or about the Site after the District delivers possession of the Site to the Charter School. This indemnity and hold harmless provision shall exclude actions brought against the District arising out of the negligence or intentional acts, errors or omissions of the District and/or District Personnel.

B. The District shall, to the fullest extent permitted by law, indemnify, defend, and hold harmless the Charter School, its officers, directors, employees, attorneys, agents, representatives, volunteers, successors and assigns (collectively hereinafter Charter School and/or Charter School' Personnel) from and against any and all actions, suits, claims, demands, losses, costs, penalties, obligations, errors, omissions, or liabilities, including legal costs, attorney's fees, and expert witness fees, whether or not suit is actually filed, and/or any judgment rendered against the Charter School and/or Charter School's Personnel, that may be asserted or claimed by any person, firm or entity arising out of the District's prior or current use or maintenance of the Site or from the prior or current conduct of its business or from any activity, work, or other things done, permitted or suffered by the District in or about the Site after District delivers possession of the Site to the Charter School. This indemnity and hold harmless provision shall exclude actions brought against the Charter School arising out of the negligence or intentional acts, errors or omissions of the Charter School and/or Charter School's Personnel.

Section 18. Access. The Charter School shall permit the District, its agents, representatives, or employees, to enter upon the Dedicated Space for the purpose of inspecting same or to make repairs, alterations, or additions to any portion of the Dedicated Space. The District shall attempt to give reasonable notice where practicable but shall not be obligated to do so in the event of emergency or imminent threat to the health or safety of occupants.

Section 19. Surrender of Dedicated Space. Upon the Termination Date or other termination of this Agreement, the Charter School shall peaceably quit and surrender to the District the Dedicated Space together with the Charter School improvements and all alterations approved by the District in good order and condition, except for normal wear and tear after the Charter School's having made the last necessary repair required on its part under this Agreement, and further except for any portion of the Dedicated Space condemned and any damage and destruction for which the Charter School is not responsible hereunder.

Section 20. Dispute Resolution. Notwithstanding anything in this Agreement to the contrary, disputes between the Parties regarding this Agreement, including, the alleged violation, misinterpretation, or misapplication of this Agreement, or Proposition 39, shall be resolved using the dispute resolution process identified in the Charter Petition submitted to the District in June 2011.

Section 21. Damage and Destruction of Dedicated Space:

A. **Partial Damage.** If the Dedicated Space is damaged by any casualty which is covered by applicable insurance, and the Charter School still has access to at least sixty

percent (60%) of the usable classroom space, then the Dedicated Space shall be restored provided insurance proceeds are available to pay for the cost of restoration, and provided such restoration can be completed within one hundred twenty (120) days after the commencement of the work in the opinion of a registered architect or engineer approved by District. In such an event, this Agreement shall continue in full force and effect, except that the Charter School shall be entitled to a proportionate reduction of all fees and payments while such restoration takes place, such proportionate reduction is to be based upon the extent to which the restoration efforts interfere with Charter School's business on the Dedicated Space. The District shall provide the Charter School temporary housing on the Dedicated Space, or another school site that is near to the Dedicated Space for any part of the Charter School program that is displaced by the partial damage and/or the repair work of the same.

B. Total Destruction. If the Dedicated Space is totally destroyed (defined as the destruction of more than sixty percent (60%) or more of the usable classroom space), or the Dedicated Space cannot be restored as required herein, notwithstanding the availability of insurance proceeds, then this Agreement shall be terminated effective the date of the damage. Immediately upon the effective date of the damage, the District will comply with Proposition 39 and provide a school facility to the Charter School as soon as possible so as to avoid any interruption in the educational program of the Charter School.

Section 22. Capacity to Sign. All parties represent and warrant that they possess all necessary capacity and authority to sign and enter into this Agreement. Each individual signing this Agreement for a party which is a public agency, a corporation, a partnership, a limited liability company, or other legal entity, or signing under a power of attorney or as a trustee, guardian, conservator, or in any other legal capacity, represents and warrants that he or she has the necessary capacity and authority to act for, sign, and bind the respective entity or principal on whose behalf he or she is signing.

Section 23. Notice. Any notice required or permitted to be given under this Agreement shall be deemed to have been given, served and received if given in writing and personally delivered or either deposited in the United States mail, registered or certified mail, postage prepaid, return receipt required, or sent by overnight delivery service or facsimile transmission, addressed as follows:

If to the District: Office of General Counsel
1936 Carlotta Drive
Concord, CA 94519
Attention: Deborah A. Cooksey

If to the School: David Linzey, Executive Director
1101 Alberta Way
Concord, CA 94521

Any notice personally given or sent by facsimile transmission shall be effective upon receipt. Any notice sent by overnight delivery service shall be effective the business day next following delivery thereof to the overnight delivery service. Any notice given by mail shall be effective three (3) days after deposit in the United States mail.

Section 24. Subcontract and Assignment. Neither party shall assign its rights, duties or privileges under this Agreement, nor shall a party attempt to confer any of its rights, duties or privileges under this Agreement (including that of sublease) on any third party, without the written consent of the other party.

Section 25. Independent Status. This Agreement is by and between two independent entities and is not intended to and shall not be construed to create the relationship of agent, servant, employee, partnership, joint venture, or association.

Section 26. Entire Agreement of Parties. This Agreement constitutes the entire agreement between the parties and supersedes all prior discussions, negotiations and agreements, whether oral or written. This Agreement may be amended or modified only by a written instrument executed by the parties.

Section 26. California Law. This Agreement shall be governed by and the rights, duties and obligations of the parties shall be determined and enforced in accordance with the laws of the State of California. The parties further agree that any action or proceeding brought to enforce the terms and conditions of this Agreement shall be maintained in Contra Costa County, California.

Section 28. Attorneys' Fees. Except as otherwise specified herein if either party files any action or brings any proceeding against the other party arising out of this Agreement, the parties shall bear their own attorneys' fees and costs.

Section 29. Waiver. The waiver by any party of any breach of any term, covenant, or condition herein contained shall not be deemed to be a waiver of such term, covenant, condition, or any subsequent breach of the same or any other term, covenant, or condition herein contained.

Section 30. Successors and Assigns. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, legal representatives, successors, and assigns.

Section 31. Modifications. Written modifications of this Agreement may be made by mutual written agreement at any time and must express intent to modify this Agreement. Any modification of this agreement must be in writing and executed by duly authorized representatives of both parties.

Section 32. Counterparts. This Agreement and all amendments and supplements to it may be executed in counterparts, and all counterparts together shall be construed as one document.

Section 33. Captions. The captions contained in this Agreement are for convenience only and shall not in any way affect the meaning or interpretation hereof nor serve as evidence of the interpretation hereof, or of the intention of the parties hereto.

Section 34. Severability. Should any provision of this Agreement be determined to be invalid, illegal or unenforceable in any respect, such provision shall be severed and the remaining provisions shall continue as valid, legal and enforceable.

Section 35. Incorporation of Recitals and Exhibits. The Recitals and each exhibit attached hereto are incorporated herein by reference.

Section 36. Time is of the essence. Time is of the essence in this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the date first above written.

MOUNT DIABLO UNIFIED SCHOOL DISTRICT

Sherry Whitmarsh, President, Board of Education **Date**

Steven Lawrence, Ph.D., Secretary, Board of Education **Date**

APPROVED AS TO FORM:

Deborah A. Cooksey, Associate General Counsel **Date**

CLAYTON VALLEY COMMUNITY CHARTER HIGH SCHOOL

By: _____ **Date:** _____

Title: _____