



Office of the City Manager

CONSENT CALENDAR  
November 27, 2012

To: Honorable Mayor and Members of the City Council  
From:  Christine Daniel, City Manager  
Submitted by: Andrew Clough, Director, Public Works  
Subject: License Agreement: Berkeley Unified School District to Use City Council Chambers and Adjoining Meeting Space at 2134 Martin Luther King, Jr. Way

RECOMMENDATION

Adopt a Resolution authorizing the City Manager to execute a license agreement with the Berkeley Unified School District (BUSD) to use City Council Chambers, located at 2134 Martin Luther King Jr. Way (Old City Hall) for the purpose of regular and special meetings of BUSD Board of Education, and to use adjacent onsite parking.

FISCAL IMPACTS OF RECOMMENDATION

The rental rate is \$1 per month, and utilities will be paid by the City of Berkeley.

The total rent revenue during the term from December 1, 2012 to June 30, 2013 is projected to be \$7 and will be entered into revenue account: 866-5412-349-0202. The CMS number for this license agreement is CMS No. EUA4I.

CURRENT SITUATION AND ITS EFFECTS

The lease with Berkeley Unified School District for approximately 31,500 square feet of office space at 2134 Martin Luther King Jr. Way recently expired and the School District Administrative Offices have relocated into a District owned facility.

The District would like to continue using the City Council Chambers, the adjoining meeting space and onsite parking on Wednesdays for its regular and special Board of Education meetings.

BACKGROUND

BUSD began leasing 2134 Martin Luther King, Jr. Way (Old City Hall) from the City in the late 1970s. In addition to office use, the District held regularly scheduled Board of Education meetings in the City Council Chambers, and utilized the adjoining meeting space. The BUSD lease recently expired and the District moved its staff into the newly renovated, District-owned facility at 2020 Bonar Street. They would like to temporarily use portions of Old City Hall that include the City Council Chambers, the adjoining meeting space, and onsite parking for School Board Meetings.

RATIONALE FOR RECOMMENDATION

BUSD's request to temporarily use Council Chambers, adjoining meeting space, and onsite parking for School Board Meetings will not interfere with City uses.

ALTERNATIVE ACTIONS CONSIDERED

None.

CONTACT PERSON

Hallie Llamas, Real Property Administrator, Public Works, 510-981-6334

Attachments:

1: Resolution

Exhibit A: License Agreement

RESOLUTION NO. -N.S.

LICENSE AGREEMENT: BERKELEY UNIFIED SCHOOL DISTRICT TO USE CITY COUNCIL CHAMBERS, AND ADJOINING MEETING SPACE, AND ONSITE PARKING AT 2134 MARTIN LUTHER KING, JR. WAY

WHEREAS, since the late 1970s the Berkeley Unified School District has leased 2134 Martin Luther King Jr. Way from the City for its administrative offices; and

WHEREAS, the District held regularly scheduled Board of Education meetings in the City Council Chambers and utilized the adjoining meeting space; and

WHEREAS, the District's lease recently expired and its staff has relocated to a District owned facility; and

WHEREAS, the District would like to temporarily use portions of Old City Hall that include the City Council Chambers, the adjoining meeting space, and onsite parking for School Board Meetings; and

WHEREAS, the District's use will not interfere with the City's use; and

WHEREAS, the rent revenue will be entered into revenue account number 866-5412-349-0202, and the license agreement has been entered into the City contract database and assigned Contract Management System No. EUA4I.

NOW THEREFORE, BE IT RESOLVED by the Council of the City of Berkley that the City Manager is authorized to execute a license agreement and any amendments with Berkeley Unified School District for use of portions of 2134 Martin Luther King, Jr. Way

Exhibit A: License Agreement.

# Exhibit A

## REAL PROPERTY LICENSE AGREEMENT

This LICENSE AGREEMENT is made on \_\_\_\_\_, 2012, between the CITY OF BERKELEY ("City"), a Charter City organized and existing under the laws of the State of California and the Berkeley Unified School District ("District"), who agree as follows:

- A. City is the owner of the real property at 2134 Martin Luther King, Jr. Way, Berkeley, California, commonly known as "Old City Hall."
- B. District wishes to license from the City certain portions of Old City Hall, as described below, on a non-exclusive basis under the terms and conditions set forth below.
- C. District has examined Old City Hall, is fully informed of the condition thereof, and agrees to license certain portions of Old City Hall, as further described below, in their "as is" condition.

### 1. DESCRIPTION OF PREMISES

City licenses to District the following portions of Old City Hall (hereinafter "the Premises"), as described below and as further depicted on **Exhibit A** hereto:

- a. Use of that portion of the second floor of Old City Hall, known as the City Council Chambers, and the adjoining area known as "Executive Session Space," on Wednesdays, beginning at 5:00 p.m., for regular and special meetings of District's Board of Education (hereinafter "School Board"). Meetings of the School Board are typically held on the second and fourth Wednesday of each month, beginning at 7:30 p.m., but District may use the City Council Chambers for special meetings of the School Board on Wednesday evenings as necessary or appropriate.
- b. Use of twelve (12) parking spaces adjacent to Old City Hall during School Board meetings, on a first-come, first-served basis, except when such parking spaces are temporarily unavailable due to required paving or maintenance.

### 2. TERM

This License shall take effect once duly approved by the Berkeley City Council and executed by both District and City ("the Effective Date") and shall terminate on June 30, 2013, unless modified or amended in writing by the Parties hereto.

**3. LICENSE FEE**

In consideration of the rights conveyed by this License, District shall pay to City \$1.00 (one-dollar) per month. Such payment shall be made on the effective date of this License. The License Fee shall be paid to City at the address to which notices to City are given.

**4. SECURITY DEPOSIT**

No security deposit shall be required in connection with this License.

**5. USE OF PREMISES; OPERATION**

District will use the City Council Chambers and adjoining meeting space only on Wednesdays beginning at 5 p.m., and solely for meetings of its School Board. District shall not use nor permit the use of the whole or any part of the Premises for any other purpose without the City's prior written consent.

**6. UTILITIES AND SERVICES**

The City agrees to pay all utilities including electricity, gas, heat, telephone, sewer use, water, refuse collection, janitorial service and other utilities used in the premises in connection with School Board or associated meetings only. For all other District meetings, District is responsible for janitorial, clean up, security and all liability associated with meetings.

**7. IMPROVEMENTS**

a. District shall not erect additions or structures nor make nor cause to be made any alterations, improvements, additions, or fixtures that affect the exterior or interior of the Premises, nor shall District mark, paint, drill or in any way deface any floors, walls, ceilings, or partitions of the Premises without first obtaining City's written permission.

b. All alterations, improvements or additions that are now or in the future attached permanently to the Premises shall be the property of City and remain with the Premises at the termination of this License.

**8. INDEMNITY**

(a) To the fullest extent permitted by law, District shall (1) immediately defend and (2) indemnify City, and its directors, officers, and employees from and against all liabilities regardless of nature, type, or cause, arising out of or resulting from or in connection with this License. Liabilities subject to the duties to defend and indemnify include, without limitation, all claims, losses, damages, penalties, fines, and judgments; associated investigation and administrative expenses; defense costs, including but not limited to reasonable attorneys' fees;

court costs; and costs of alternative dispute resolution. The District's obligation to indemnify applies regardless of whether a liability is a result of the negligence of any other person, unless it is adjudicated that the liability is caused by the sole active negligence or sole willful misconduct of an indemnified party.

(b) The duty to defend is a separate and distinct obligation from the District's duty to indemnify. The District shall be obligated to defend, in all legal, equitable, administrative, or special proceedings, with counsel approved by the City, the City and its directors, officers, and employees, immediately upon submittal to the District of the claim in any form or at any stage of an action or proceeding, whether or not liability is established. A determination of comparative active negligence or willful misconduct by an indemnified party does not relieve the District from its separate and distinct obligation to defend City. The obligation to defend extends through final judgment, including exhaustion of any appeals. The defense obligation includes an obligation to provide independent defense counsel if District asserts that liability is caused in whole or in part by the negligence or willful misconduct of the indemnified party. If it is finally adjudicated that liability was caused by the sole active negligence or sole willful misconduct of an indemnified party, District may submit a claim to the City for reimbursement of reasonable attorneys' fees and defense costs.

(c) The review, acceptance or approval of any of District's work or work product by any indemnified party shall not affect, relieve or reduce the District's indemnification or defense obligations. This Section survives the termination of this License. The provisions of this Section are not limited by and do not affect the provisions of this License relating to insurance.

(d) Liabilities subject to this Section include any claim of discrimination or harassment, including but not limited to sexual harassment, arising from the conduct of the District or any of the District's officers, employees, agents, licensees, or subcontractors. In the event of a discrimination or harassment complaint against any employee, agent, licensee or subcontractor of the District or its subcontractors, the District shall take immediate and appropriate action in response to such complaint, including, but not limited to termination or appropriate discipline of any responsible employee, agent, licensee or subcontractor.

## **9. INSURANCE**

a. District at its cost shall maintain public liability and property damage insurance with a single combined liability limit of \$1,000,000 (ONE MILLION DOLLARS) and property damage limits of not less than \$2,000,000 (TWO MILLION DOLLARS) insuring against all liability of District and its authorized representatives arising out of and in connection with District's use or occupancy of the Premises. District may satisfy these insurance requirements through participation in a pooled insurance arrangement. All such insurance shall insure performance by District of the preceding indemnity provisions.

b. At the commencement of the License term, District shall forward proof of insurance to the City at the addresses provided herein for Notices.

**10. CITY NON-DISCRIMINATION ORDINANCE**

District agrees to comply with the provisions of Berkeley Municipal Code Chapter 13.26 as amended from time to time. In the performance of this License, the District agrees as follows:

a. The District shall not discriminate against any employee or applicant for employment because of race, color, religion, ancestry, national origin, age (over 40), sex, pregnancy, marital status, disability, sexual orientation or AIDS.

b. The District shall permit the City access to records of employment advertisements, application forms, EEO-1 forms, affirmative action plans and any other documents which, in the opinion of the City, are necessary to monitor compliance with this non-discrimination provision, and will, in addition, fill-out in a timely fashion, forms supplied by the City to monitor these non-discrimination provisions.

**11. NUCLEAR FREE BERKELEY**

District agrees to comply with Berkeley Municipal Code Chapter 12.90, the Nuclear Free Berkeley Act, as amended from time to time.

**12. OPPRESSIVE STATES**

a. In accordance with Resolution No. 59,853-N.S., District certifies that it has no contractual relations with, and agrees during the term of this License to forego contractual relations to provide personal services to or to purchase, sell, license or distribute commodities in the conduct of business with, the following entities:

- (1) The governing regime in any Oppressive State.
- (2) Any business or corporation organized under the authority of the governing regime of any Oppressive State.
- (3) Any individual, firm, partnership, corporation, association, or any other commercial organization, and including parent-entities and wholly-owned subsidiaries (to the extent that their operations are related to the purpose of its contract with the City), for the express purpose of assisting in business operations or trading with any public or private entity located in any Oppressive State.

b. For purposes of this License, the Tibet Autonomous Region and the provinces of Abo, Kham, and U-Tsang shall be deemed oppressive states.

c. District's failure to comply with this section shall constitute a default of this License and City may terminate this License.

### **13. BERKELEY LIVING WAGE ORDINANCE**

a. District agrees to comply with Berkeley Municipal Code Chapter 13.27, the Berkeley Living Wage Ordinance. If District employs six (6) or more part-time, full-time or stipend employees, and generates \$350,000 or more in annual gross receipts, District will be required to provide all eligible employees with City mandated minimum compensation during the term of this License, as defined in B.M.C. Chapter 13.27, and well as comply with the terms enumerated herein.

b. District shall be required to maintain all reasonable records and documents that would establish whether District is subject to Berkeley's Living Wage Ordinance (LWO). If District is subject to the LWO, as defined therein, District shall be further required to maintain monthly records of those employees located on the licensed Premises. These records shall include the total number of hours worked, the number of hours spent providing service on the licensed property, the hourly rate paid, and the amount paid by District for health benefits, if any, for each of its employees providing services under the License. The records described in this Section shall be made available upon the City's request. The failure to produce these records upon demand shall be considered a default.

c. If District is subject to the LWO, District shall include the requirements of the ordinance, as defined in B.M.C. Chapter 13.27, in any and all subleases in which District enters with regard to the subject Premises. Subtenants shall be required to comply with this ordinance with regard to any employees who spend 25% or more of their compensated time on the licensed property.

d. If District fails to comply with the requirements of this the LWO and this License, the City shall have the rights and remedies described in this Section, in addition to any rights and remedies provided by law or equity.

District's failure to comply with this Section shall constitute default of the License, upon which City may terminate this License.

In addition, at City's sole discretion, District may be responsible for liquidated damages in the amount of \$50 per employee per day for each and every instance of an underpayment to an employee. It is mutually understood and agreed that District's failure to pay any of its eligible employees at least the applicable living wage rate will result in damages being sustained by the City; that the nature and amount of the damages will be extremely difficult and impractical to fix; that the liquidated damages set forth herein is the nearest and most exact measure of damage for such breach that can be fixed at this time; and that the liquidated damage amount is not intended as a penalty of forfeiture for District's breach.

**14. BERKELEY EQUAL BENEFITS ORDINANCE**

a. District hereby agrees to comply with the provisions of the Berkeley Equal Benefits Ordinance, B.M.C. Chapter 13.29. If District is currently subject to the Berkeley Equal Benefits Ordinance, District will be required to provide all eligible employees with City mandated equal benefits during the term of this License, as defined in B.M.C. Chapter 13.29, as well as comply with the terms enumerated herein.

b. If District is currently or becomes subject to the Berkeley Equal Benefits Ordinance, District agrees to supply the City with any records the City deems necessary to determine compliance with this provision. Failure to do so shall be a considered a default of this License.

c. If District fails to comply with the requirements of this Section, City shall have the rights and remedies described in this Section, in addition to any rights and remedies provided by law or equity.

District's failure to comply with this Section shall constitute default of the License, upon which City may terminate this License.

In addition, at City's sole discretion, District may be responsible for liquidated damages in the amount of \$50.00 per employee per day for each and every instance of violation of this Section. It is mutually understood and agreed that District's failure to provide its employees with equal benefits will result in damages being sustained by City; that the nature and amount of these damages will be extremely difficult and impractical to fix; that the liquidated damages set forth herein is the nearest and most exact measure of damages for such breach that can be fixed at this time; and that the liquidated damage amount is not intended as a penalty or forfeiture for District's breach.

**15. PESTICIDES**

All use of pesticides on the Premises shall be in compliance with the City of Berkeley's Pesticide Use Policy as it exists at the time of such use.

**16. SIGNS**

District shall not install or letter any signs on the Premises without the prior written consent of City. All signs on the Premises shall conform to the provisions of Berkeley Municipal Code Chapter 20.04.

**17. DAMAGE OR DESTRUCTION**

If the Premises are totally or partially destroyed from any cause, rendering the Premises totally or partially inaccessible or unusable, City may elect to terminate this License or

continue this License in effect by giving notice to District within thirty (30) days of the date of destruction. If City elects to continue this License in full force and effect, then City shall restore the Premises and the rent shall be abated, from the date of destruction until the date restoration is completed, in an amount proportionate to the extent to which the destruction interferes with District's use of the Premises. If City fails to give notice of its decision to terminate or continue this License within the period stated, District may elect to terminate this License. District waives the provisions of Civil Code sections 1932(2) and 1933(4) with respect to any destruction of the Premises.

**18. ASSIGNMENT AND SUBLETTING**

District shall not voluntarily assign or encumber its interest in this License or in the Premises, or sublease all or any part of the Premises, or allow any other person or entity (except District's authorized representative) to occupy or use all or any part of the Premises, without first obtaining City's written consent. Any assignments, encumbrance, or sublease without City's written consent shall be voidable and, at City's election, shall constitute a default. No consent to any assignment, encumbrance, or sublease shall constitute a further waiver of the provisions of this paragraph.

**19. ENTRY**

City and its authorized representatives shall have the right to enter the Premises at all reasonable times for any of the following purposes: to determine whether the Premises are in good condition and whether District is complying with its obligations under the License; to do any acts that may be necessary to protect City's interest in the Premises; or to perform City's duties under this License. City shall not be liable in any manner for any inconvenience, disturbance, loss of business, nuisance, or other damage arising out of City's entry on the Premises as provided in this section, except damage resulting from the acts or omissions of City or its authorized representatives.

**20. NOTICES**

All notices that are required under this Agreement shall be provided in the manner set forth herein, unless specified otherwise. Notice to a party shall be delivered to the attention of the person listed below, or to such other person or persons as may hereafter be designated by that party in writing. Notice shall be in writing sent by e-mail, facsimile, or regular first class mail. In the case of e-mail and facsimile communications, valid notice shall be deemed to have been delivered upon sending, provided the sender obtained an electronic confirmation of delivery. E-mail and facsimile communications shall be deemed to have been received on the date of such transmission, provided such date was a business day and delivered prior to 4:00 p.m. PST. Otherwise, receipt of e-mail and facsimile communications shall be deemed to have occurred on the following business day. In the case of regular mail notice, notice shall be deemed to have been delivered on the mailing date and received five (5) business days after the date of mailing.

To the District: Superintended of Schools  
Berkeley Unified School District  
2020 Bonar Street  
Berkeley, CA 94702

To the City: City Manager  
City of Berkeley  
2180 Milvia Street, Fifth Floor  
Berkeley, CA 94704

With a Copy To:

Real Property Administrator  
City of Berkeley  
1947 Center Street, Fourth Floor  
Berkeley, CA 94704

**21. EXCUSABLE DELAYS**

If the performance of any act required of District or City is prevented or delayed by reason of strikes, lockouts, labor disputes, act of God, acts of the public enemy, fire, floods, epidemics, freight embargoes or other cause beyond the control of the party required to perform an act, the performance of such act shall be excused for the period of the delay and the period for the performance of such act shall be extended for thirty (30) days.

**22. HOLDING OVER**

If District continues to use or remain in possession of the Premises with City's consent after the expiration of the term of this License without having received a written amendment or modification of this License, such use or possession by District shall be construed to be on a month-to-month basis, terminable on thirty (30) days' notice given at any time by either party. All provisions of this License, except those pertaining to term, shall continue to apply.

**23. SURRENDER OF PREMISES, REMOVAL OF PERSONAL PROPERTY**

At the termination of this License, District shall: 1) give up and surrender the Premises, in its current condition as of the Commencement Date, subject to reasonable use and wear and tear thereof, damage by fire and the elements excepted; and 2) remove all property which is not a fixture of or permanent attachment to the Premises and which is owned and was installed by District during the term of this License or any previous lease or license.

**24. TERMS BINDING ON SUCCESSORS**

All the terms, covenants and conditions of this License shall inure to the benefit of and be binding upon the successors and assigns of the parties to this License. The provisions of this section shall not be deemed as a waiver of any of the conditions against assignment set forth above.

**25. GOVERNING LAW**

The laws of the State of California shall govern this License.

**26. ENTIRE AGREEMENT, AMENDMENTS**

This License and all exhibits attached and any documents expressly incorporated by reference contain the entire agreement between the parties regarding the license of the Premises described herein and shall supersede any and all prior agreements, oral or written, between the parties regarding the license of these Premises. This License cannot be altered or otherwise modified except by a written amendment by the parties.

**27. CONSENT OF PARTIES**

Whenever consent or approval of either party is required, that party shall not unreasonably withhold such consent or approval.

**28. AUDIT.**

The City Auditor's Office, or its designee, may conduct an audit of District's financial and compliance records maintained in connection with the operations and services performed under this Agreement, and with the payments made under this Agreement. In the event of such audit, District agrees to make all such financial and compliance records available to the Auditor's Office, or to its designee. City agrees to provide District an opportunity to discuss and respond to any findings before a final audit report is filed.

**IN WITNESS WHEREOF**, District and City have executed this License as of the date written on the first paragraph of this License.

**BERKELEY UNIFIED SCHOOL DISTRICT**

By: \_\_\_\_\_  
Superintendent of Schools

**CITY OF BERKELEY**

By: \_\_\_\_\_  
City Manager

REGISTERED BY: \_\_\_\_\_

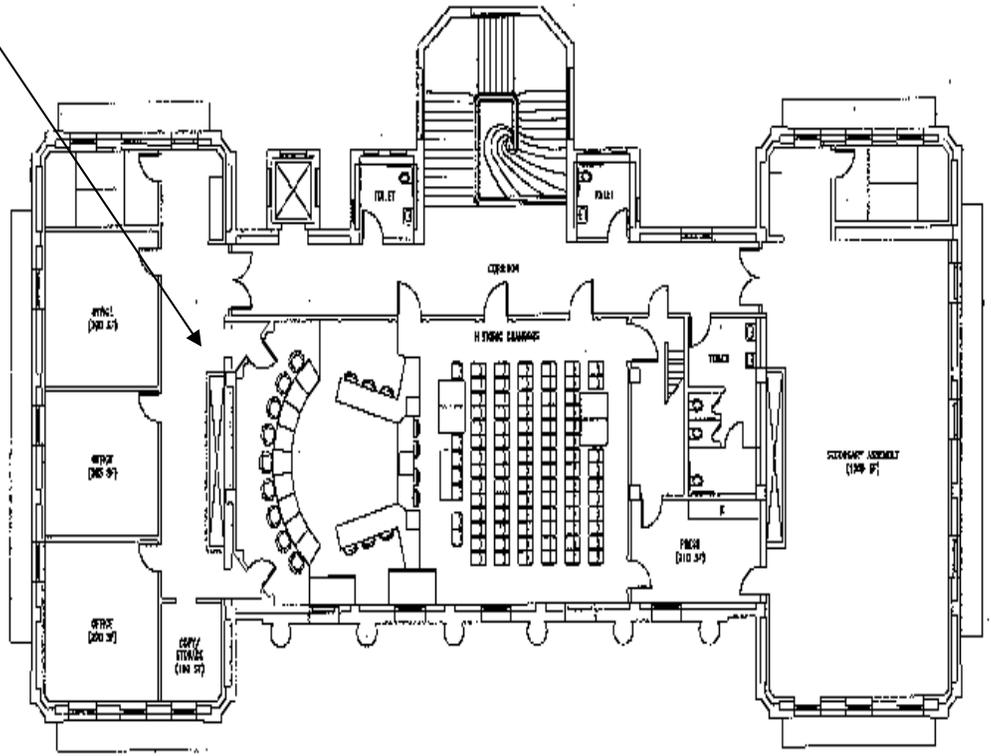
ATTEST: \_\_\_\_\_  
City Auditor

ATTEST: \_\_\_\_\_  
City Clerk

APPROVED AS TO FORM: \_\_\_\_\_  
City Attorney

# Exhibit "A"

City Council Chambers & adjoining meeting space



SECOND FLOOR PLAN

1/16"=1'-0"