

## **CONSULTING AND BROKERAGE AGREEMENT**



THIS CONSULTING AND BROKERAGE AGREEMENT (“Agreement”) is made and entered into as of **July 30, 2019** (the “**Effective Date**”), by and between Napa Valley Unified School District (“Owner”), and 3D Strategies, Inc., a California (“Consultant”).

### 1. **BASIC AGREEMENTS**

1.1 **Basic Services.** In compliance with all of the terms and conditions of this Agreement, the Consultant shall provide those services specified in the “Scope of Services” attached hereto as Exhibit “A”, which services are referred to herein as the “Basic Services”.

1.2 **Additional Services.** Owner shall have the right at any time during the performance of the services, without invalidating this Agreement, to order extra work beyond that specified in the Scope of Services or make changes by altering, adding to or deducting from said work (“Additional Services”), by written request to Consultant, subject to the written acceptance of Consultant. The written request and acceptance of Additional Work shall be written amendments to the Scope of Services. No Additional Services may be undertaken unless authorized by Owner in advance and in writing, including email. Additional Services shall be paid for by Owner as provided in Section 2.2. All services performed in connection with this Agreement may be referred to herein as the “Services.” All terms and conditions under this Agreement applicable to Basic Services shall be applicable to all Services except as otherwise agreed to in writing by Owner and Consultant.

1.3 **Standard of Performance.** As a material inducement to Owner to enter into this Agreement, Consultant hereby represents that Consultant has all applicable licenses to perform the Basic Services and is experienced in performing work or services similar to the Basic Services and, in light of such experience, Consultant hereby covenants that it shall follow applicable industry standards in performing all services required hereunder and using only qualified personnel. Owner and Consultant agree that Consultant shall comply with all applicable federal, state and local laws, ordinances, regulations and orders in performing the services hereunder. Irrespective of the above, Consultant does not represent an ability to provide any form of legal advice and that Consultant is not licensed with the state of California to provide said legal counsel. As such, Owner shall rely on their own legal counsel for said legal advice and counsel.

2. **COMPENSATION.** The Owner shall compensate the Consultant for the services to be performed in accordance with the terms and conditions of this Agreement as follows:

2.1 **Basic Services.** For the Basic Services, as described in the Scope of Services, Consultant shall be paid in accordance with the “Schedule of Compensation” attached hereto as Exhibit “B” (the “Basic Services Fee”). Said compensation shall be inclusive of all benefits, compensation costs and expenses unless specifically set forth to the contrary in this Section 2

or in Exhibit "B". Consultant shall pay its own income taxes, federal, state or city, and self-employment taxes.

2.2 Additional Services. For Additional Services, as described in Section 1.2 hereof, compensation shall be paid as set forth in the Schedule of Compensation attached hereto as Exhibit "B" or pursuant to a separate written agreement between Owner and Consultant specifying the Additional Services to be performed (the "Additional Services Fee" and, together with the Basic Services Fee and any other amounts owed by Owner pursuant to this Agreement, the "Fees").

2.3 Payment. Payment of the compensation set forth herein shall be made as set forth in Exhibit B. In addition, Consultant shall be entitled to receive reimbursement for expenses up to \$1,000 per month, with any amounts in excess of \$1,000 approved in writing in advance by Owner. Consultant shall render an invoice (together with all applicable lien releases and other supporting documentation reasonably requested by Owner) to Owner for all Services and approved reimbursable expenses for which Consultant seeks payment. Upon timely submission by Consultant, Owner shall pay Consultant for all payments due and payable within thirty (30) days thereafter. All past due and unpaid amounts shall bear interest of 0.8% per month assessed from the due date until payment is received. Consultant will continue to perform its obligations hereunder and pursue prosecution of the Services during any claim, dispute, or proceeding between the parties hereto as if such claim, dispute, or proceeding had not been instituted, provided that Owner continues to make payments to Consultant as required under this Agreement for Services that are not the subject of any dispute.

### 3. INSURANCE AND INDEMNIFICATION.

3.1 Insurance. At Owner's request and as required, Consultant shall provide Owner with certification of insurance evidencing Consultant's current policies of Commercial General Liability Insurance and Comprehensive Automobile Liability Insurance.

#### 3.2 Indemnification.

(a) Consultant Indemnity. Consultant, on behalf of itself and its officers, employees, invitees, licensees, independent contractors and agents (all of said parties are herein collectively referred to as the "Consultant Indemnitor"), shall indemnify, protect, defend (with counsel reasonably acceptable to Owner and to Consultant Indemnitor's insurance company), save and hold Owner and its parent, affiliated and subsidiary entities and their respective principals, agents, employees, partners, directors, officers (all of said parties are herein collectively referred to as the "Owner Indemnitee") harmless from and against all liability, damage, loss, claims, demands, actions and expenses of any nature whatsoever, including, but not limited to, attorneys' fees (collectively, "Claims"), to the extent such Claims arise out of or are connected with, or are claimed to arise out of or be connected with: (i) the negligent act, error or omission of a Consultant Indemnitor; or (ii) the willful misconduct of a Consultant Indemnitor; and excluding any such claim or liability to the extent arising from the negligence or willful misconduct of an Indemnitee. In no case shall the cost of said indemnity exceed the payments received by the Consultant from the Owner, net of any expenses associated therewith.

(b) Owner Release. Owner hereby acknowledges and agrees that it shall not hold Consultant liable or responsible for any inaccuracies or incomplete information contained in any site plans, maps, drawings, materials, reports, studies, investigations, or documents provided by Owner or to Owner by any appraisers, lenders, investors, architects, engineers, brokers or real estate salespersons and/or any other consultants (collectively, "Third Parties"). In addition, Consultant shall have no liability to Owner for its recommendations of any Third Parties. In connection with the foregoing, Owner hereby releases and agrees to hold Consultant harmless from any liability, expense, fee or damage arising from: (a) the negligence or willful misconduct of Owner or any Third Parties; and (b) any inaccuracies or incomplete information contained in any site plans, maps, drawings, materials, reports, studies, investigations, or documents provided by any Third Party. Nothing in this Section shall release Consultant from fraud, gross negligence, willful misconduct, any indemnity obligation set forth in this Agreement and/or any breach of this Agreement by Consultant.

4. TERMINATION. Consultant shall have the right to cancel and terminate this Agreement at any time whether or not a default exists hereunder, and Consultant shall incur no penalty or liability to Owner or any other person by reason of such cancellation. Owner may terminate this Agreement for any or no reason following sixty (60) days prior written notice of termination to Consultant, and Owner shall incur no penalty or liability to Consultant or any other person by reason of such cancellation other than the compensation to be paid for this sixty (60) day period, including any future brokerage commissions and/or bonuses that have resulted from Consultant's prior efforts. Upon receipt or delivery of notice of termination of the Agreement, Consultant shall promptly take whatever reasonable steps are required to economically and efficiently transition any services remaining under the Agreement to Owner, as of such termination date, including but not limited to, delivery of all Work Product (as hereinafter defined) to Owner.

5. WORK PRODUCT. All data, survey results, models, reports, plans and specifications obtained or prepared by the Consultant in connection with the performance of services under this Agreement (collectively, "Work Product") shall be the property of Owner, including all copyrights, rights of reproduction and other interests relating thereto, except as provided herein. Consultant may retain a copy of project Work Product for its records.

6. MISCELLANEOUS.

6.1 [Intentionally omitted.]

6.2 Party Representatives. Owner's designated representative is **Jennifer Gibb**. Consultant's designated representative and project principal is **Dominic Dutra**. The parties each specifically acknowledge that no other officer, employee or agent except the designated representatives shall have authority to modify this Agreement, give any consent or approval on behalf of their represented party, order or approve Additional Services, or waive any rights hereunder this Agreement. As the Consultant's designated representative and project principal, Dominic Dutra shall have primary authority and oversight of the performance of all Consultant services under this Agreement. Consultant shall not replace Dominic Dutra as the Consultant's designated representative and project principal without the prior written consent of Owner.

6.3 Limitation of Liability. No direct or indirect constituent partner or member of Consultant or Owner, or any affiliate, nor any trustee, beneficiary, shareholder, partner, member, manager, officer, director, employee or other agent of any of the foregoing, shall have any personal liability in connection with this Agreement. IN NO EVENT SHALL A PARTY BE LIABLE TO THE OTHER PARTY FOR LOST PROFITS, OR FOR EXEMPLARY, PUNITIVE, SPECIAL, INCIDENTAL, INDIRECT OR CONSEQUENTIAL DAMAGES FOR ANY CAUSE OF ACTION, WHETHER IN CONTRACT OR TORT, IN CONNECTION WITH OR ARISING OUT OF THIS AGREEMENT AND, MOREOVER, IN NO CASE SHALL SAID LIABILITY EXCEED THE PAYMENTS RECEIVED BY THE CONSULTANT FROM THE OWNER, NET OF ANY EXPENSES ASSOCIATED THEREWITH.

6.4 Disclaimer and Release. Owner represents and warrants that Consultant has made no promise, guarantee, or assurance of any particular outcome, approval, or success of the Project, and Consultant disclaims any representations or statements made by any of its employees, agents, contractors, members, managers, officers, or directors, or any other agent of any of the foregoing promising, guaranteeing, or assuring any particular outcome, Approval, or success of the Project. Owner is not relying on any prior representations or statements regarding the Approval or success of the Project by Consultant, and acknowledges that the nature of the Project renders the outcome uncertain at the outset. Owner releases Consultant from any and all liability for the final Project outcome and any failure to achieve Approval of the Project on terms satisfactory to Owner.

6.5 General.

(a) Consultant shall perform all services required herein as an independent contractor of Owner and shall remain at all times as to Owner a wholly independent contractor with only such obligations as are consistent with that role. Consultant shall not at any time or in any manner represent that it or any of its agents or employees are employees of Owner.

(b) Consultant may not assign this Agreement without the prior written approval of Owner. Owner, in its sole and absolute discretion, may assign this Agreement at any time provided that Owner's assignee executes an undertaking to Consultant to be bound by the terms and conditions of this Agreement. Upon any such assignment by Owner, and upon the written assumption of liability and execution of a written undertaking of this Agreement by an assignee subject to Consultant's written acceptance, Owner shall be released from all obligations and liability under this Agreement that accrue after the effective date of such assignment.

(c) Any notice which either party may desire to give to the other party must be in writing and shall be effective upon confirmed receipt or refusal thereof, addressed to the respective parties at the addresses designated by such parties.

(d) Consultant, for itself and its employees and personnel, acknowledges, confirms and agrees that all information learned in the course of their employment and all data furnished by Owner, all plans, drawings, computer programs, specifications, and other documents relating to the Project, Owner's business and the terms of

this Agreement are and shall remain of a confidential nature, unless and until such matter is publicly known, or becomes publicly known, without fault of Consultant.

(e) No waiver of any default hereunder shall be construed as a waiver of any subsequent breach.

(f) This Agreement shall be construed in accordance with the laws of the state in which the Project is located. This Agreement is made and shall be performed in Fremont, California, and any dispute arising from or in connection with this Agreement shall be adjudicated in the state or federal courts having jurisdiction of such subject matter situated in Alameda County, California. The parties accordingly submit to the personal jurisdiction of such courts and waive any objection to said venue.

(g) All previous negotiations and agreements between the parties hereto, with respect to the transaction set forth herein, are merged in this instrument, which fully and completely express the parties' rights and obligations.

(h) The terms, provisions, representations and certification contained in this Agreement, or inferable therefrom, shall survive the termination of this Agreement and the payment of the remuneration hereinabove provided.

(i) The prevailing party in any action against the other related to this Agreement shall be entitled to have and to recover from the other party its actual attorneys' fees and other expenses in connection with such action.

(j) If any term or provision of this Agreement shall be found to be unenforceable, then, notwithstanding such term or provision, this Agreement shall be and remain in full force and effect and such term shall be deemed stricken to the least extent necessary to avoid such unenforceability, and the Agreement shall be construed to give fullest effect possible to the original intent of the parties.

(k) All exhibits attached hereto are incorporated herein by this reference for the sole purposes of setting forth the scope of the Basic Services, the terms of payment, and any schedule of performance.

(l) Each individual executing this Agreement represents and warrants that he or she is duly authorized to execute and deliver this Agreement on behalf of the party to this Agreement.

(m) This Agreement may be executed in any number of counterparts, each of which shall be deemed an original but all of which when taken together shall be deemed an original and shall constitute one and the same instrument. In order to facilitate the transaction contemplated herein, electronically mailed or facsimile signatures may be used in place of original signatures on this Agreement. Each party intends to be bound by the signatures on the electronically mailed or facsimiled document, is aware that the other party will rely on such signatures, and hereby waive any defenses to the enforcement of the terms of this Agreement based on the form of signature.

***[Signatures on following page]***

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

**OWNER**

Napa Valley Unified School District

By: \_\_\_\_\_  
\_\_\_\_\_, its Designated Representative

**CONSULTANT**

3D Strategies, Inc. a California corporation

By: \_\_\_\_\_  
Dominic D. Dutra, its Designated Representative

## **EXHIBIT “A”**

### 7-11 ADVISORY SERVICES SCOPE OF WORK

PLEASE NOTE THAT CONSULTANT IS NOT LICENSED TO PROVIDE LEGAL ADVICE AND THAT THE FOLLOWING IS SUBJECT TO THE OWNER/DISTRICT'S LEGAL COUNSEL REVIEW, MODIFICATION AND DIRECTION

Pursuant to the State of California Education Code Sections 17387-17391, an advisory committee shall be formed to advise the District and Board of Trustees in the development of policies and procedures governing the use or disposition of District surplus property or real Property. The advisory committee (also called a “7-11 Committee” referring to the number of committee members, a “3280 Committee” or “District Advisory Committee”) acts as a community stakeholder engagement process to evaluate if district-owned real property has a current or future need for educational purposes. Under the current legal environment, a school district cannot sell, lease, mortgage or otherwise dispose of real property without completing the surplus property process including holding an advisory committee representative of specific community groups and the district Board of Education declaring the site surplus (other than under a few narrow exceptions outlined in the above Education Code sections). All meetings are Brown Act applicable and community participation during public comment periods is allowed and encouraged to provide a range of insights and guidance to the Committee.

Under California law (Education Code sec. 17389), the Committee must have at least seven (7) members and no more than eleven (11) members and contain persons who can be representative of each of the following:

- a. The ethnic, age group and socioeconomic composition of the district;
- b. The business community, such as store owners, managers, or supervisors;
- c. Landowners or renters, with preference to be given to representatives of neighborhood associations;
- d. Teachers;
- e. Administrators;
- f. Parents of Students;
- g. Persons with expertise in environmental impact, legal contracts, building codes, and land use planning, including, but not limited to, knowledge of the zoning and other land use restrictions of the cities or cities and counties in which surplus space and real property is located.

This proposal focuses on managing the District Advisory Committee for four (4) District-owned sites including:

**Mt. George International School**

1019 Second Ave., Napa, California 94558

**Yountville Elementary School**

6554 Yount St., Yountville CA 94599

**Alta Heights Elementary School**

15 Montecito Blvd., Napa, California 94559

**West Park Elementary School**

2315 West Park Ave., Napa, California 94558

The intent of the Board of Education in forming the District Advisory Committee is to support an inclusive stakeholder engagement process that follows the requirements set forth by the Education Code, recognizes the fiduciary responsibility of the Board, and incorporates input from a wide set of community members including city staff, teachers, parents, students, neighbors, local government leaders, business representatives and other stakeholders.

The directive for the Committee, per the Education Code, is to submit a recommendation to the Board of Trustees for each site identifying if that site does - or does not - have a current or future educational purpose. 3D STRATEGIES, INC. proposes to assist in that process by managing the creation of the committee, providing background information from a real estate perspective on the sites and acting as a resource to the Committee chair and members regarding land use, real estate brokerage and development issues and procedures regarding the disposition of school district real property. While 3D STRATEGIES, INC. would act as the organizing entity on behalf of the District, legal counsel for the District is required to be present and available for questions. A final report will be drafted and these Findings and Recommendations provided to the Board of Education.

#### PROJECT MANAGEMENT & ADVISORY

The Committee must be empowered to make informed decisions regarding the District's needs for the potential sites through a thorough understanding of each sites' characteristics and current and future uses. 3D STRATEGIES, INC. will prepare a summary of the sites for the Committee's review, discussion and potential inclusion into the Committee's recommendation to the Board. This process will allow the Committee to discuss and determine the best option for each site regarding the surplus status in order to further the District's core beliefs and mission of providing high quality education.

**Consider Options.** The committee should consider all options for the use and disposition of the sites. These options will be informed by information on potential uses and values of the sites, District enrollment trends, community input and the Education Code, which has extensive regulations on the surplus process. Such options and considerations include:

- Joint-use/joint occupancy agreements
- Sale or lease for use to another public entity
- Sell or lease to a private entity

## **Pre-Meeting Activities:**

Prior to the first Committee meeting, 3D STRATEGIES, INC. will:

Develop Committee application and assist in selecting Committee members, including tracking compliance with Education Code requirements on committee representation  
Develop meeting agendas to be made available to the public at least 72 hours in advance  
Advise and provide copies of key Committee Information Packets including property summaries of zoning and General Plan designations, site maps, etc.

## **Meetings and Post-Meeting Activities**

At the Committee meetings, 3D STRATEGIES, INC. will:

- Assist District Staff, District Legal Counsel and Committee Chair and Vice-Chair with the facilitation of the meeting agendas
- Guide the Committee through each site with a presentation of their potential uses
- Discuss the current use of the site and Highest and Best Use from a real estate perspective
- Explain the potential next steps in relation to the sale or lease of school district real estate assets in California
- Offer expert opinions regarding maintaining, managing and disposing of school district real estate
- Assist the Committee in developing their recommendation to the Board on surplus status and drafting the statement on their recommendation for presentation by the Committee chairperson
- Provide advice and analysis with District Legal Counsel on next steps for the Committee and the Board to declare the site(s) surplus given the Committee's recommendation (in conjunction with District legal counsel) and the declaration of intent to sell or lease (should the site be deemed surplus)
- Be available for any questions or concerns from the Committee or members of the public

This process will allow the Committee to discuss and determine the best option for each site with respect to furthering the District's core mission of providing high quality education.

## **EXHIBIT “B”**

### **FEE FOR SERVICES**

#### **Consulting and Brokerage Fees:**

- 3D STRATEGIES, INC. proposes a fee of Four Thousand Five Hundred Dollars (\$4,500) per month for the preparation, facilitation and reports for the 7-11 Advisory Committee including all meeting activities (including application development and completion of the Final Advisory Report for Board consideration.
  
- 3D STRATEGIES, INC. expert management at each public Committee meeting, and all travel expenses with an overall, not to exceed amount of \$25,000. The schedule for the work would be determined by the District’s schedule for the proposed meetings, expected to begin in August 2019. **This limit is NOT inclusive of appraisal fees which will be required for those properties studied.**

To the extent the Owner elects to sell any of the properties studied, a standard fee of six percent (6%) of the ultimate sales prices shall be paid by the as follows:

- The fee of six percent (6%) shall be shared 50/50 with any payment required to be paid to a cooperating broker of a buyer who is selected by the Owner and successfully completes the acquisition of the property
- The fee shall be reduced to five percent (5%) if no payment is required to a cooperating broker

To the extent the Owner elects to lease the Subject Property, a lease fee shall be paid based on the total gross rents to be received over the lease term as follows;

- 5% for years 1-5
- 4% for years 6-10
- 3% for years 11-20