

Board Office Use: Legislative File Info.	
File ID Number	22-0544
Introduction Date	3/9/2022
Enactment Number	22-0447
Enactment Date	3/9/2022 er



Memo

To Board of Education

From Kyla Johnson-Trammell, Superintendent
Tadashi Nakadegawa, Deputy Chief of Facilities Planning & Management

Board Meeting Date March 9, 2022

Subject Amendment No. 1 to Agreement between the Oakland Unified School District and KABOOM!, Inc. – Community Partner Playspace – Oakland Academy of Knowledge and Burckhalter Elementary School

Action Requested Approval by the Board of Education of Amendment No. 1 to the Community Partner Playspace Agreement for the construction of a new play space at Oakland Academy of Knowledge, located at 8755 Fontaine Street, Oakland, CA 95605, and Burckhalter Elementary School, located at 3994 Burckhalter Avenue, Oakland, CA 94605.

Discussion On December 15, 2021, the Board approved a Community Partner Playspace Agreement (“Original Agreement”) with KABOOM!, Inc. (“KABOOM”) for the construction of a new play space for Horace Mann Elementary School.

On February 8, 2022, the District’s Board of Education (“Board”) adopted Resolution No. 2122-0030, which approved certain school consolidations, including the closure of Horace Mann Elementary School (“Horace Mann”) at the end of 2022-23. As part of the school consolidation process, certain welcoming schools, including Oakland Academy of Knowledge (“OAK”) and Burckhalter Elementary School (“Burckhalter”), have been proposed to receive students enrolled at schools approved for consolidation. OAK and Burckhalter each applied to KABOOM! for construction of a new play space.

In light of the approved closure of Horace Mann, and in support of the students, families, and communities impacted by such closure, this Amendment No. 1 amends and restates the Original Agreement in its entirety, in order to transform spaces at OAK and Burckhalter into first-rate playspaces to support positive impacts on Oakland’s youngest residents, their families, and their communities as a whole.

Recommendation Approval by the Board of Education of Amendment No. 1 to the Community Partner Playspace Agreement for the construction of new play spaces at Oakland Academy of Knowledge, located at 8755 Fontaine Street, Oakland, CA 95605, and Burckhalter Elementary School, located at 3994 Burckhalter Avenue, Oakland, CA 94605.

Fiscal Impact

Funding Resource is Measure J (for playmatting; not to exceed \$70,000 for Oakland Academy of Knowledge; and not to exceed \$60,000 for Burckhalter Elementary School)

Attachments

- Amendment No. 1 to Community Partner Playspace Agreement
- Enactment No. 21-2064

**AMENDMENT NO. 1 TO
COMMUNITY PARTNER PLAYSACE AGREEMENT BETWEEN
OAKLAND UNIFIED SCHOOL DISTRICT AND
KABOOM!, INC.**

RECITALS

On December 15, 2021, the Board of Education (“Board”) of the Oakland Unified School District (referred to herein as the “Community Partner” or “District”) approved that certain Community Partner Playspace Agreement for the construction of a new play space at Horace Mann Elementary School located at 5222 Ygnacio Avenue, Oakland, CA 94601 (“Original Agreement”), executed on December 16, 2021, made between the District and KABOOM!, Inc. (referred to herein as “KABOOM!”). District and KABOOM! may be individually referred to herein as a “Party,” or may be collectively referred to herein as the “Parties.”

The purpose of the Original Agreement was to formally establish a partnership between KABOOM! and the District to describe and agree to the parameters and scope of each Party’s intended engagement in the partnership. The Original Agreement set forth a structure in which the Parties would work in a mutually beneficial manner to bring new play infrastructures to the Districts’ Schools. The Original Agreement would serve as a template agreement for any future projects on which the District and KABOOM! collaborate.

On February 8, 2022, the District’s Board of Education (“Board”) adopted Resolution No. 2122-0030, which approved certain school consolidations, including the closure of Horace Mann Elementary School (“Horace Mann”) at the end of 2022-23.

As part of the school consolidation process, certain welcoming schools, including Oakland Academy of Knowledge and Burckhalter Elementary School, have been proposed to receive students enrolled at schools approved for consolidation.

Oakland Academy of Knowledge, located at 8755 Fontaine Street, Oakland, CA 95605 (“OAK”), and Burckhalter Elementary School, located at 3994 Burckhalter Avenue, Oakland, CA 94605 (“Burckhalter”), each applied to KABOOM! for construction of a new playspace.

In light of the approved closure of Horace Mann, and in support of the students, families, and communities impacted by such closure, the Parties hereby desire to amend and restate the Original Agreement in its entirety (“Amendment No. 1” or “Agreement”), in order to transform spaces at OAK and Burckhalter into first-rate playspaces to support positive impacts on Oakland’s youngest residents, their families, and their communities as a whole.

KABOOM! believes that play is a critical part of childhood, and key to a child’s ability to thrive – physically, socially, emotionally, cognitively and creatively. This is especially true for kids growing up in under-resourced urban communities. The District is focused on transforming the District’s schools to create a world-class education system for the children of Oakland to learn, grow, and play.

KABOOM! is pleased that the District has agreed to collaborate with KABOOM! in the construction of new playspaces at the two (2) District sites (collectively, “Schools”): (a) Oakland Academy of Knowledge, 8755 Fontaine Street, Oakland, CA 95605 (the “OAK Project”); and (b) Burckhalter Elementary School, 3994 Burckhalter Avenue, Oakland, CA 94605 (the “Burckhalter Project”; collectively with the OAK Project, the “Project” or “Projects”). This Agreement, which sets forth the District's obligations in connection with each Project and certain matters on which the Parties have agreed, will, when executed by the duly authorized representatives of each Party, supersede any prior agreements, including the Original Agreement, and represent the complete legally binding agreement between the Parties regarding each Project. The District acknowledges and understands the primary source of funding for each Project is a contribution from Funding Partners. In the event that such a contribution is not funded by December 31, 2023, then this Agreement is terminated upon written notification from KABOOM!.

Now, therefore, in consideration of the mutual covenants and agreements contained herein, the receipt and sufficiency of which is hereby acknowledged, the Parties hereto agree as follows:

AGREEMENT

1. Obligations of the District. The District shall work with KABOOM! as well as community residents to design, plan and build each Project. By executing this Agreement, the District is agreeing to each of the following obligations:
 - (a) Project Site.
 - i. Ownership. At the time of execution of this Agreement, the District shall provide KABOOM! with proof of land ownership evidenced by either a deed granting title to the property to the District or a letter from the property owner showing approval for each Project. The District is the owner of the playspaces in their entirety, for the lifetime of the product, including the equipment and/or safety surfacing at the time purchased by KABOOM!.
 - ii. Permits. Prior to Build Week, but no less than 30 days prior to, the District shall obtain or cause to be obtained all necessary permits and licenses regarding the installation, possession and use of the playspaces in compliance with applicable laws and regulations. District shall not be responsible for any delays that result from County Department of Public Health orders that close, decrease, or limit the District's ability to obtain necessary permits and licenses.
 - iii. Preparation. The District shall ensure that the Project site is safe for volunteers and children, which responsibility includes: (1) recruiting fifteen (15) adult volunteers to participate in preparation activities two to three days prior to Build Week, only if volunteers' presence on District property is consistent with Alameda County Department of Public Health guidelines and District policies regarding visitor access to District property; (2) preparing the site for the installation of each Project at least two weeks before Build Week, which may include removing existing playground equipment, footers and safety surfacing, grading the land, repairing/replacing existing safety surfacing (matting), removing fencing/barrier, and performing soil tests in the locations where play structures are mounted; (3) preparing each site for the installation of the Project, which may include repairing/resurfacing asphalt after District's removal of existing safety surfacing (matting) under the existing play structure in a cost not to exceed \$70,000 for OAK and a cost not to exceed \$60,000 for Burckhalter for repairing/resurfacing asphalt; (4) conducting up to two (2) utility checks as reasonably requested by KABOOM! with the appropriate utility companies, with the first test being completed on or before Design Day (as defined below) and with all utility check documentation provided upon completion to the KABOOM! project manager who shall supervise the planning and installation of the equipment (the "Project Manager"); and (5) conducting up to two (2) soil site tests as reasonably requested by KABOOM!, with the first test being completed on or before Design Day and with all soil check documentation provided to the Project Manager upon completion. The District is responsible for undertaking any necessary risk mitigation should the soil be deemed unsafe for children and volunteers. The District acknowledges that in the event that soil is deemed unsafe and risk mitigation is required that there may be a delay in the Build Week and/or Project completion to allow for proper mitigation.
 - iv. Safety and Security. The District shall ensure the security of equipment, tools, and supplies from the beginning of the preparation activities until the conclusion of Build Week, including any postponement.
 - v. Maintenance. Maintenance of the facility and supervision of its use is the sole responsibility of the District. The District shall collaborate with KABOOM! during the Project planning process to develop a maintenance program (a copy of which has been provided) for the play equipment and, with the support of the property owner (if owner is a separate party), shall maintain the equipment and the property before and after the Build Week to ensure a safe and attractive playspace. In furtherance of the foregoing, in the event any equipment included in the Project no longer is permitted for any reason to be located at its original site of construction or such site is no longer controlled by the District for any reason, then the District promptly shall notify KABOOM! following its becoming aware of such situation and shall, at the District's sole cost and expense, take such steps as may be

necessary to promptly and safely relocate the equipment (including any permanent signage and other fixtures) to an alternate site that serves children or to ensure that the successor controlling person of such site shall continue to make such equipment available to children in the same manner contemplated as of the Build Week and maintain (or permit the District to maintain) such play equipment in accordance with the maintenance program. In addition, if applicable, the District shall accept and maintain engineered wood fiber as play equipment safety surfacing, meeting standards established by Consumer Product Safety Commission guidelines, for the lifetime of the playspace. If applicable, the Community Partner will finance, install, and maintain alternative surfacing in the form rubber matting as playground safety surfacing meeting all safety guidelines as established by the American Society for Testing and Materials (ASTM F2223 and ASTM-1292) and the Consumer Product Safety Commission's Handbook for Playground Safety, for the lifetime of the playground. Guidance and materials for the purpose of developing a maintenance plan for the playspace are available, upon request, from the play equipment and safety surfacing manufacturers.

- (b) Design Day. The District agrees to host a KABOOM!-facilitated "Design Day" and shall make best efforts to secure the attendance of at least twenty (20) adult volunteers and twenty (20) youth, only so long as volunteers' presence on District property is consistent with Alameda County Department of Public Health guidelines and District policies regarding visitor access to District property. Design Day is planned to occur on a date as mutually agreed upon in writing by the Parties.
- (c) Build Week. The District shall recruit volunteers from the community to participate in a -3-4 day installation event for each Project, which is scheduled to occur on mutually agreeable dates and which is referred to herein as "Build Week", only so long as volunteers' presence on District property is consistent with Alameda County Department of Public Health guidelines and District policies regarding visitor access to District property. The District shall ensure that all volunteers sign a waiver (a copy of which has been provided). At each Build Week, the District shall provide water, tools, dumpsters, and restroom facilities for all volunteers on each day. Volunteers shall participate consistent with District Board Policy 1240 and Administrative Regulation 1240, incorporated herein by reference.

Build Week shall be scheduled for a mutually agreeable date, as mutually agreed upon in writing by the Parties. In the event that volunteer participation is precluded or limited by Public Health guidelines or District policies, Parties agree to have the playspace professionally installed without volunteers on site to occur on a mutually agreed upon date. Any additional fees associated with professional installation shall be the responsibility of KABOOM!.
- (d) Promotion; Intellectual Property. The District shall seek prior approval from KABOOM! and/or the Funding Partner for any materials that reference each Project or contain the name, trademarks, service marks, logos and other intellectual property (collectively, and together with all goodwill attached or which shall become attached to any of them, the "Marks") of KABOOM! and/or the Funding Partner, including press releases, fliers and promotional materials. The District acknowledges and agrees that each of KABOOM! and the Funding Partner is the sole owner of all right, title and interest in and to its respective Marks. The Parties acknowledge that KABOOM! and the Funding Partner may take all steps to protect their Marks as they deem appropriate. Any use of the Marks will inure to the sole benefit of KABOOM! or the Funding Partner (as applicable). The District shall not use the Marks in any manner that would harm the reputation of KABOOM! or the Funding Partner or disparage or negatively reflect upon the Marks. Upon expiration of or termination of this Agreement for any reason, the District shall cease all use of the Marks. The District shall collaborate with KABOOM! and the Funding Partner to secure media coverage for each Project.
- (e) Signage. The District shall allow the names and logos of KABOOM! and the Funding Partner to be displayed on permanent signage (a copy of which has been provided), and shall be no greater than 19 ½ inches wide by 30 ¼ inches tall and mounted on poles in a mutually agreed location. If applicable, the District shall allow individual instructional signs to accompany the equipment.
- (f) Costs. The District is solely responsible for and shall hold KABOOM! and the Funding Partner harmless from any costs incurred by the District for any prior site preparation, upgrades or improvements or any equipment or materials purchased to supplement those secured by KABOOM!.
- (g) Warranty. The equipment and the safety-surfacing related to each Project may be covered under warranty by the applicable manufacturers (a copy of which has been provided). The District acknowledges that any warranties

and/or guarantees on any equipment or material are subject to the respective manufacturer's terms thereof, and the District agrees to look solely to such manufacturers for any such warranty and/or guarantee. Neither KABOOM! nor the Funding Partner nor any of their respective affiliates, directors, officers, managers, partners, members, shareholders, employees, agents or representatives, have made nor are in any manner responsible or liable for any representation, warranty or guarantee, express or implied, in fact or in law, relative to any equipment or material, including its quality, mechanical condition or fitness for a particular purpose.

- (h) Insurance. The District is self-insured and is responsible for providing coverage for its own employees and against liability for bodily injury, death and property damage that may arise out of or be based on the use or operation of the playspace/ playground at each Project site, from 7 (seven) calendar days before the Build Week and for a minimum of one year afterward, in each case, in amounts not less than one million dollars (\$1,000,000). This self-insurance shall be primary and non-contributing with any other insurance covering KABOOM! and its Funding Partners.

If KABOOM! engages with any contractor, independent contractor, or subcontractor to perform work in connection with this Agreement, KABOOM! shall require that any contractor, independent contractor, or subcontractor procure and maintain at all times during the performance of such work, Workers' Compensation Insurance in conformance with the laws of the State of California and Federal laws when applicable. Liability Insurance shall not be less than One Million Dollars (\$1,000,000) per accident or disease.

KABOOM! shall obtain and maintain insurance to be insured against liability for workers' compensation in accordance with applicable State law and will comply with such provisions before commencing the performance of the Work of this Agreement. (California Labor Code Section 3700).

KABOOM! maintains Commercial General Liability insurance, including automobile coverage with limits of One Million Dollars (\$1,000,000) per occurrence for bodily injury and property damage. Evidence of insurance shall be provided upon request. Nothing in said policy shall operate to increase the Insurer's liability as set forth in the policy beyond the amount or amounts shown or to which the Insurer would have been liable if only one interest were named as an insured.

KABOOM! represents and warrants it has, and, prior to each Design Day, shall provide evidence of, the insurance coverages as required to this Agreement, which is attached hereto and made a part hereof. KABOOM! shall maintain such insurances for the term of this Agreement. KABOOM! shall submit evidence of its insurance to District as requested.

- i. As promptly and reasonably practicable following execution of this Agreement and, in any event, at least three (3) business days prior to the first Build Week, the District will be endorsed to the required Commercial General Liability policies held by KABOOM! and its playground equipment manufacturer as an additional insured by endorsement. All evidence of such insurance, which should be available via Certificates of Insurance.
 - ii. KABOOM! shall ensure that its contract with its playground equipment manufacturer in connection with this Agreement expressly requires that the District will be endorsed as an additional insured on such playground equipment manufacturer's insurance policies, which must comply with the insurance requirements set forth herein.
- (i) Data and Reporting Requirements. The District shall (i) promptly following the confirmation of each Project, distribute one or more play-related surveys provided by KABOOM! to its stakeholders, including parents/caregivers, volunteers, staff and board members, (ii) cause members of its planning committee to complete a post-build survey provided by KABOOM! within 2 weeks from the Build Week and a 6-month survey provided by KABOOM! within 7 months from the Build Week.
- (j) Code of Conduct. The District agrees to comply with the build site rules (a copy of which has been provided). The District shall allow the build site rules to be displayed on site and communicate and enforce the build site rules for all participants in each Project's Design Day and Build Week events.

2. Obligations of KABOOM!

- (a) **Project Management.** KABOOM! shall manage the overall execution of each project on the behalf of the Community Partner and Funding Partner. KABOOM! shall provide technical and organizational leadership and guidance for each Project and shall:
 - i. Coordinate Funding Partner participation, facilitate design, including regular planning meetings, and work with vendors to procure equipment and materials in a timely manner, except to the extent that safety surfacing other than engineered wood fiber is used, which shall be procured by the District.
 - ii. Manage construction logistics for each Project, coordinate site preparation activities with the District, inventory equipment and materials, and assure that the necessary tools and materials and other general supplies are available during Build Week.
 - iii. Procure on the behalf of the Community Partner and install new equipment (two play structures) after the repaired/replaced existing safety surfacing (matting) has been installed.
 - iv. Lead the Build Week activities, including the coordination of Build Week captains and volunteers.
 - v. Make available certain educational and promotional materials related to each Project.
 - (b) **Project Site Preparation.** KABOOM! in collaboration with the District shall coordinate site preparation prior to Build Week which includes laying out playspace location, digging holes, setting footers, inventory of equipment, cutting lumber, and prepping/priming any painting projects to ensure that each Project site is prepared for Build Week. KABOOM! acknowledges that in the event that soil is deemed unsafe and risk mitigation is required that there may be a delay in the Build Week and/or Project completion to allow for proper mitigation and/or remediation.
 - (c) **Inspection.** KABOOM! in collaboration with the District, will secure an Installation Supervisor to review the structure at the conclusion of the Build Week (or, if KABOOM! assumes responsibility for the construction going beyond one day, at the conclusion of the installation) to ensure that the structure is safe and built to all appropriate standards and guidelines. KABOOM! shall be responsible for the costs for an Installation Supervisor unless the Project is not completed by the mutually agreed upon timeline and the untimely completion is due to failure of the District, in which case the District shall secure the Installation Supervisor. The District understands and acknowledges that it will accept ownership of the playspace construction regardless of its review to certify the construction.
 - (d) **Promotion.** KABOOM! will provide proposed promotional materials relating to each Project for the District's review and approval, which approval shall not be unreasonably withheld or delayed.
 - (e) **Website Listing.** KABOOM! will place the playspace on its list of KABOOM! projects on the KABOOM! website and KABOOM! will send information to the District on maintenance programming and enhancements.
 - (f) **Post-Build Week.** The District shall: (i) within two weeks following the Build Week, complete and submit a Post Build Report, in the form to be made available by KABOOM!, and (ii) shall use its commercially reasonable efforts to provide, and otherwise shall cooperate in good faith with KABOOM! regarding obtaining, such other information related to each Project as KABOOM! from time to time may request.
3. **Build Week Postponement.** The Build Week shall not be postponed except when weather or other conditions jeopardize the safety of the volunteers or threaten the structural integrity of the playspace. The decision to postpone the Build Week will be made by majority agreement of the representatives of KABOOM!, the District and the Funding Partner, except where such decision must be made by KABOOM! on the construction site and representatives of the District and the Funding Partner are not available for consultation. In the event that the Build Week is postponed, KABOOM!, the District and the Funding Partner shall develop a plan for rescheduling the Build Week at the next earliest date possible for each Party. The Funding Partner shall be responsible for all additional expenses related to the rescheduled Build Week, including, without limitation, equipment, labor and materials, storage and travel costs and expenses; provided, however, that the Funding Partner shall be notified of the estimated amount of such additional expenses in connection with rescheduling of the Build Week. Notwithstanding the foregoing, in the event that the date of the Build Week is cancelled or changed as a result of the District's failure to satisfy its obligations in connection with each Project, then the District shall be liable to KABOOM! and the Funding Partner for all such additional expenses related to the rescheduled Build Week.

- (a) Parties acknowledge that in the event that soil is deemed unsafe and risk mitigation is required as set forth in Section 1(a)(iii) that there may be a delay in the Build Week and/or Project completion to allow for proper mitigation. Any delays/postponement of Build Week resulting from necessary soil mitigation, shall result in KABOOM!, the District, and the Funding Partner developing a plan for rescheduling the Build Week.
 - (b) Parties acknowledge that in the event that permits required by Section 1(a)(ii) are delayed through no fault of the District's timeliness in filing for permits that there may be a delay in the Build Week and/or Project completion to allow for proper mitigation. Any delays/postponement of Build Week resulting from obtaining necessary permits, shall result in KABOOM!, the District, and the Funding Partner developing a plan for rescheduling the Build Week.
4. Funding Partner Relations. KABOOM! will execute a separate contract with the Funding Partner pursuant to which the Funding Partner will agree to provide financial and human resources for each Project. In recognition of the Funding Partner's contribution of such resources, the Funding Partner shall receive first placement on any recognition materials developed for the Project, including signage, banners, T-shirts, press releases, website and newsletter stories, and flyers, and the District shall not solicit sponsors or donors in relation to the Project whose products or services directly compete with the products or services of the Funding Partner as identified to the District by KABOOM! and/or the Funding Partner. In the event the District solicits other sponsors or donors, then the District shall not permit such sponsors or donors to compete with the Funding Partner for signage and sponsorship recognition.
5. Indemnification. Each Party shall indemnify and hold harmless the other Party and their respective affiliates', directors, Governing Board, agents, representatives, officers, consultants, employees, trustees, and volunteers from any and all losses, liabilities, claims, actions, fees and expenses (including interest and penalties due and payable with respect thereto and reasonable attorneys' and accountants' fees and any other reasonable out-of-pocket expenses incurred in investigating, preparing, defending or settling any action), including but not limited to any of the foregoing arising under, out of, or in connection with any breach of this Agreement by the indemnifying party, any negligence or misconduct taken in connection with this Agreement by indemnifying party or its employees, representatives, officers, consultants, and volunteers. This provision shall survive any termination or expiration of this Agreement.
- In addition, the District shall indemnify and hold harmless the Funding Partner and KABOOM! and their respective affiliates' directors, officers, managers, partners, members, shareholders, employees, agents and representatives from any and all losses, liabilities, claims, actions, fees and expenses (including interest and penalties due and payable with respect thereto and reasonable attorneys' and accountants' fees and any other reasonable out-of-pocket expenses incurred in investigating, preparing, defending or settling any action), resulting from the use, operation, maintenance, safety and condition of any playground property and equipment installed under this Agreement, including those for personal injury, death, or property damage, except to the extent resulting from the gross negligence or willful misconduct of such indemnified person. This provision shall survive any termination or expiration of this Agreement.
6. Termination. In the event that the District fails to satisfy its obligations required under Section 1 or otherwise breaches this Agreement in the context of one of the Projects, KABOOM! may terminate that portion of the Agreement related to such Project upon written notice to the District of such termination. Such termination pursuant to the preceding sentence shall not terminate the Agreement for the other Project. Furthermore, if either Party is delayed or prevented from fulfilling any of its obligations for one of the Projects hereunder by any cause beyond its reasonable control, including acts of God, acts or omissions of civil or military authorities, fire, strike, flood, riot, act of terrorism, war, transportation delay, or inability due to such causes to obtain required labor, materials or facilities, such Party shall not be liable hereunder for such delay or failure and either Party may terminate this Agreement as it pertains to such Project if the other Party is unable to perform any obligation hereunder for such Project for a period longer than ten (10) calendar days due to such force majeure event, in which case this Agreement shall become void and have no effect for such Project, and no Party shall have any liability to the other Party in such context for such Project, except that nothing herein will relieve any Party from liability for any intentional breach of this Agreement prior to such termination.
7. General Provisions. The District represents to KABOOM! that all information provided by it to KABOOM!, including in the application, is true, correct and complete in all respects and does not omit any information relevant to each Project. Each Party has all requisite power and authority, including any necessary approval by its governing body, to execute and deliver this Agreement, and to perform its obligations hereunder. This Agreement may not be assigned or

transferred by either Party without the prior written consent of the other Party hereto. This Agreement shall inure to the benefit of and be binding upon the Parties hereto, their respective successors and permitted assigns, and where expressly stated, their affiliates and representatives. This Agreement shall be governed by and construed under the laws of the State of California, without regard to conflicts of laws principles to the extent that the application of the laws of another jurisdiction would be required thereby. This Agreement may be altered, modified or amended only by a written document signed by both Parties. This Agreement may be executed in two or more counterparts, each of which shall be an original and all of which, when taken together, shall constitute the same agreement and may be delivered by facsimile or electronic mail transmission with the same force and effect as if originally executed copies hereof were delivered. Any notices required or permitted to be given hereunder shall be sent by certified or registered United States mail, postage prepaid, by personal delivery addressed to the applicable Party or by facsimile or electronic mail transmission (the receipt of which is confirmed) at the address set forth under such Party's signature below. The Funding Partner shall be an intended third party beneficiary of Sections 1(a), (d), (e), (f), (g) and (h) and Sections 2(c), 3, 4, 5 and 7 of this Agreement and is entitled to enforce its rights under such sections as if it were a party to this Agreement.

8. Status of KABOOM!. KABOOM! in the performance of this Agreement, shall be and act as an independent contractor. KABOOM! understands and agrees that it and all of its employees shall not be considered officers, employees, agents, partner and are not entitled to benefits of any kind or nature normally provided employees of the District and/or to which the District's employees are normally entitled, including, but not limited to, State Unemployment Compensation or Worker's Compensation. KABOOM! shall assume full responsibility for payment of all Federal, State, and local taxes or contributions, including unemployment insurance, social security and income taxes with respect to KABOOM!'s employees. In the performance of the work herein contemplated, KABOOM! is an independent contractor or business entity, with the sole authority for controlling and directing the performance of the details of the work as noted in its obligations in Section 2(a).
9. Term. This Agreement shall commence as of the Effective Date and remain in effect through December 31, 2023, unless the term ("Term") is extended or terminated earlier pursuant to the terms set forth in Section 6 herein.
10. Assignment. The obligations of KABOOM! under this Agreement shall not be assigned by KABOOM! without the express prior written consent of the District.
11. Drug-Free / Smoke-Free Policy. No drugs, alcohol, and/or smoking are allowed at any time in any buildings and/or grounds on District's property. No students, staff, visitors, KABOOM! employees, representatives, or subcontractors are to use controlled substances, alcohol or tobacco on these sites.
12. Coronavirus/COVID 19.
 - (a) Through its execution of this Agreement, KABOOM! declares that it is able to meet its obligations and perform the Services required pursuant to this Agreement in accordance with any shelter-in-place (or similar) order or curfew (or similar) order ("Orders") issued by local or state authorities and with any social distancing/hygiene (or similar) requirements.
 - (b) To the extent that KABOOM! provides Services in person, KABOOM! agrees to include additional information as required by OUSD if any Orders are issued by local or state authorities that would prevent KABOOM! from providing Services in person.
 - (c) KABOOM! agrees to notify OUSD, via email pursuant to the Notices provision, within twelve (12) hours if any employee, subcontractor, agent, or representative of KABOOM! tests positive for COVID-19, shows or reports symptoms consistent with COVID-19, or reports to KABOOM! possible COVID-19 exposure within seventy two hours (72) of being on OUSD property.
 - (d) KABOOM! agrees to immediately adhere to and follow any OUSD directives regards health and safety protocols including, but not limited to, providing OUSD with information regarding possible exposure of OUSD employees to KABOOM! or any employee, subcontractor, agent, or representative of KABOOM! and information necessary to perform contact tracing.

(e) KABOOM! shall bear all costs of compliance with this Paragraph, including but not limited to those imposed by this Agreement.

13. Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion. KABOOM! certifies to the best of his/her/its knowledge and belief, that it and its principals are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency according to Federal Acquisition Regulation Subpart 9.4, and by signing this Agreement, certifies that KABOOM! does not appear on the Excluded Parties List (<https://www.sam.gov/>).
14. Litigation. This Agreement shall be performed in Oakland, California and is governed by the laws of the State of California. The Alameda County Superior Court shall have jurisdiction over any state court litigation initiated to enforce or interpret this Agreement.
15. Legal Notices. All legal notices provided for under this Agreement shall be sent via email to the email address set forth below and shall be either (i) personally delivered during normal business hours or (ii) sent by U.S. Mail (certified, return receipt requested) with postage prepaid to the other Party at the address set forth below.

OUSD

Name: Joshua R. Daniels
Site/Dept: Office of General Counsel
Address: 1000 Broadway, Suite 300
City, ST Zip: Oakland, CA 94607
Phone: 510-879-8535
Email: ousdlegal@ousd.org

KABOOM!

Name: KABOOM!
Title: c/o Gerry Megas, Chief Financial Officer
Address: 4301 Connecticut Ave NW, Suite ML-1
City, ST Zip: Washington, D.C. 20008
Phone: 202) 464-6180
Email: gmegas@kaboom.org

Notice shall be effective when received if personally served or emailed or, if mailed, three days after mailing. Either Party must give written notice of a change of mailing address or email.

16. Incorporation of Recitals and Exhibits. The Recitals and all exhibits attached hereto, if any, are hereby incorporated herein by reference.
17. Integration/Entire Agreement of Parties. This Agreement constitutes the entire agreement and understanding between the Parties in respect of the transactions contemplated by this Agreement and supersedes all prior discussions, negotiations, and agreements, whether oral or written, express or implied, between or among the Parties with respect to the subject matter hereof, including, without limitation, the Original Agreement, which Original Agreement shall be deemed null and void, and of no further force or effect whatsoever following the date hereof. The Agreement may be amended or modified only by a written instrument executed by both Parties.
18. 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.
19. Agreement Contingent on Board Approval. District shall not be bound by the terms of this Agreement until it has been formally approved by the District's Board. This Agreement shall be deemed to be approved when it has been signed by the Board, and/or the Superintendent as its designee.

By executing this Agreement where indicated below, each of KABOOM! and District agrees, as of the date identified above, to be legally bound by all of the terms and provisions set forth above.

Oakland Unified School District

KABOOM!, Inc.

By: *GS O. Yee* Date: 3/10/2022
Dr. Gary Yee
Board of Education, President

DocuSigned by:
By: *Gerry Megas* Date: 2/24/2022
Name: Gerry Megas
Title: Chief Financial Officer

Address:
4301 Connecticut Ave. NW, Suite ML-1
Washington, DC 20008
T: (202) 464- 6180
F: (202) 659-0210
e-mail: gmeegas@kaboom.org

By: *Kyla Johnson-Trammell* Date: 3/10/2022
Dr. Kyla Johnson-Trammell
Superintendent
Board of Education, Secretary

Approved as to Form

By: *Caitlin Kent* Date: 2/25/2022
Facilities Attorney

Board Office Use: Legislative File Info.	
File ID Number	21-2878
Introduction Date	12/15/2021
Enactment Number	21-2064
Enactment Date	12/15/2021 er



Memo

To Board of Education

From Kyla Johnson-Trammell, Superintendent
Tadashi Nakadegawa, Deputy Chief of Facilities Planning & Management

Board Meeting Date December 15, 2021

Subject Agreement between the Oakland Unified School District and KABOOM!, Inc. – Community Partner Playspace – Horace Mann Elementary School

Action Requested Approval by the Board of Education of the Community Partner Playspace Agreement for the construction of a new play space at Horace Mann Elementary School located at 5222 Ygnacio Ave., Oakland, CA 94601.

Discussion The Board is being asked to approve a Community Partner Playspace Agreement with KABOOM!, Inc. (“KABOOM”) for a redesigned and new play space for Horace Mann Elementary School. KABOOM is partnering with the District to transform outdated, under-resourced play areas into first-rate play spaces to improve the way children learn, grow, and play in Oakland schools. KABOOM will fund the redesign and purchase of new play structures for Horace Mann Elementary School. KABOOM and the District will host a “Design Day” and a “Build Day” (one-day installation of the Project) at Horace Mann Elementary School that will include additional opportunities for community engagement in Project development and completion. The District shall only permit volunteers and children to attend Design Day and Build Day if their presence is consistent with Alameda County Department of Public Health guidelines and District policies regarding visitor access to District property.

KABOOM will act as an independent contractor and agrees to manage the overall execution of the Project, lead the “Build Day” activities, coordinate site preparation prior to Build Day with the District, and help to secure an Installation Supervisor to review the structure at the end of “Build Day” to ensure safety. The District’s obligations include removing existing playground equipment, safety surfacing, and preparing the site for installation (repairs or resurfacing not to exceed \$60,000).

Recommendation Approval by the Board of Education of the Community Partner Playspace Agreement for the construction of a new play space at Horace Mann Elementary School located at 5222 Ygnacio Ave., Oakland, CA 94601.

Fiscal Impact Funding Resource is Measure J (for playmatting; not to exceed \$60,000)

Attachments

- Community Partner Playspace Agreement



COMMUNITY PARTNER PLAYSPACE AGREEMENT

November 16, 2021

RECITALS

KABOOM! believes that play is a critical part of childhood, and key to a child's ability to thrive – physically, socially, emotionally, cognitively and creatively. This is especially true for kids growing up in under-resourced urban communities. **Oakland Unified School District** (referred to herein as the "District") is focused on transforming the District's schools to create a world-class education system for the children of Oakland to learn, grow, and play. Given District's limited resources, KABOOM! and the District are entering into a partnership to transform spaces into first-rate playspaces for students at schools across Oakland, thereby having a positive impact on Oakland's youngest residents, their families, and their communities as a whole.

The purpose of this Agreement is to formally establish a partnership between KABOOM! and the District to describe and agree to the parameters and scope of each Party's intended engagement in the partnership. This Agreement sets forth a structure in which the Parties will work in a mutually beneficial manner to bring new play infrastructure to the District's School. This agreement will serve as a template agreement for any future projects on which the District and KABOOM! collaborate.

KABOOM!, Inc. (referred to herein as KABOOM!) is pleased that Oakland Unified School District (referred to herein as the "Community Partner" or "District") has agreed to collaborate with KABOOM! in the construction of a new playspace at Horace Mann Elementary School, 5222 Ygnacio Ave, Oakland, CA 94601 (the "Project"). This Community Partner Agreement (this "Agreement"), which sets forth the District's obligations in connection with the Project and certain matters on which the parties have agreed, will, when executed by the duly authorized representatives of each party, supersede any prior agreements and represent the complete legally binding agreement between the parties regarding the Project. The District acknowledges and understands the primary source of funding for the Project(s) is a contribution from Funding Partners. In the event that such a contribution is not funded by December 31, 2022, then this agreement is terminated upon written notification from KABOOM!.

AGREEMENT

1. Obligations of the District. The District shall work with KABOOM! as well as community residents to design, plan and build the Project. By executing this Agreement, the District is agreeing to each of the following obligations:
 - (a) Project Site.
 - i. Ownership. At the time of execution of this Agreement, the District shall provide KABOOM! with proof of land ownership evidenced by either a deed granting title to the property to the District or a letter from the property owner showing approval for the Project. The District is the owner of the playspace in its entirety, for the lifetime of the product, including the equipment and/or safety surfacing at the time purchased by KABOOM!.
 - ii. Permits. Prior to Build Day, but no less than 30 days prior to, the District shall obtain or cause to be obtained all necessary permits and licenses regarding the installation, possession and use of the playspace in compliance with applicable laws and regulations. District shall not be responsible for any delays that result from County Department of Public Health orders that close, decrease, or limit the District's ability to obtain necessary permits and licenses.

- iii. Preparation. The District shall ensure that the Project site is safe for volunteers and children, which responsibility includes: (1) recruiting fifteen (15) adult volunteers to participate in preparation activities two to three days prior to Build Day, only if volunteers' presence on District property is consistent with Alameda County Department of Public Health guidelines and District policies regarding visitor access to District property; (2) preparing the site for the installation of the Project at least two weeks before Build Day, which may include removing existing playground equipment, footers and safety surfacing, grading the land, repairing/replacing existing safety surfacing (matting), removing fencing/barrier, and performing soil tests in the two locations where play structures are mounted; (3) preparing the site for the installation of the Project, which may include repairing/resurfacing asphalt after District's removal of existing safety surfacing (matting) under the existing play structure in a cost not to exceed \$60,000 for repairing/resurfacing asphalt; (4) conducting up to two (2) utility checks as reasonably requested by KABOOM! with the appropriate utility companies, with the first test being completed on or before Design Day (as defined below) and with all utility check documentation provided upon completion to the KABOOM! project manager who shall supervise the planning and installation of the equipment (the "Project Manager"); and (5) conducting up to two (2) soil site tests as reasonably requested by KABOOM!, with the first test being completed on or before Design Day and with all soil check documentation provided to the Project Manager upon completion. The District is responsible for undertaking any necessary risk mitigation should the soil be deemed unsafe for children and volunteers. The District acknowledges that in the event that soil is deemed unsafe and risk mitigation is required that there may be a delay in the Build Day and/or Project completion to allow for proper mitigation.
 - iv. Safety and Security. The District shall ensure the security of equipment, tools, and supplies from the beginning of the preparation activities until the conclusion of Build Day, including any postponement.
 - v. Maintenance. Maintenance of the facility and supervision of its use is the sole responsibility of the District. The District shall collaborate with KABOOM! during the Project planning process to develop a maintenance program (a copy of which has been provided) for the play equipment and, with the support of the property owner (if owner is a separate party), shall maintain the equipment and the property before and after the Build Day to ensure a safe and attractive playspace. In furtherance of the foregoing, in the event any equipment included in the Project no longer is permitted for any reason to be located at its original site of construction or such site is no longer controlled by the District for any reason, then the District promptly shall notify KABOOM! following its becoming aware of such situation and shall, at the District's sole cost and expense, take such steps as may be necessary to promptly and safely relocate the equipment (including any permanent signage and other fixtures) to an alternate site that serves children or to ensure that the successor controlling person of such site shall continue to make such equipment available to children in the same manner contemplated as of the Build Day and maintain (or permit the District to maintain) such play equipment in accordance with the maintenance program. In addition, if applicable, the District shall accept and maintain engineered wood fiber as play equipment safety surfacing, meeting standards established by Consumer Product Safety Commission guidelines, for the lifetime of the play space. If applicable, the Community Partner will finance, install, and maintain alternative surfacing in the form rubber matting as playground safety surfacing meeting all safety guidelines as established by the American Society for Testing and Materials (ASTM F2223 and ASTM-1292) and the Consumer Product Safety Commission's Handbook for Playground Safety, for the lifetime of the playground. Guidance and materials for the purpose of developing a maintenance plan for the playspace are available, upon request, from the play equipment and safety surfacing manufacturers.
- (b) Design Day. The District agrees to host a KABOOM!-facilitated "Design Day" and shall make best efforts to secure the attendance of at least twenty (20) adult volunteers and twenty (20) youth, only so long as volunteers' presence on District property is consistent with Alameda County Department of Public Health guidelines and District policies regarding visitor access to District property. Design Day is planned to occur during the month of January 2022 or on another date as mutually agreed upon in writing by the Parties.

- (c) Build Day. The District shall recruit volunteers from the community to participate in a one-day "Build Day" installation event for the Project, only so long as volunteers' presence on District property is consistent with Alameda County Department of Public Health guidelines and District policies regarding visitor access to District property. The District shall ensure that all volunteers sign a waiver (a copy of which has been provided). On the Build Day, the District shall provide water, tools, dumpsters, and restroom facilities for all volunteers. Volunteers shall participate consistent with District Board Policy 1240 and Administrative Regulation 1240, incorporated herein by reference.
- Build Day shall be scheduled for a mutually agreeable date, as mutually agreed upon in writing by the Parties. In the event that volunteer participation is precluded or limited by Public Health guidelines or District policies, Parties agree to have the playspace professionally installed without volunteers on site to occur on a mutually agreed upon date. Any additional fees associated with professional installation shall be the responsibility of KABOOM!.
- (d) Promotion; Intellectual Property. The District shall seek prior approval from KABOOM! and/or the Funding Partner for any materials that reference the Project or contain the name, trademarks, service marks, logos and other intellectual property (collectively, and together with all goodwill attached or which shall become attached to any of them, the "Marks") of KABOOM! and/or the Funding Partner, including press releases, fliers and promotional materials. The District acknowledges and agrees that each of KABOOM! and the Funding Partner is the sole owner of all right, title and interest in and to its respective Marks. The parties acknowledge that KABOOM! and the Funding Partner may take all steps to protect their Marks as they deem appropriate. Any use of the Marks will inure to the sole benefit of KABOOM! or the Funding Partner (as applicable). The District shall not use the Marks in any manner that would harm the reputation of KABOOM! or the Funding Partner or disparage or negatively reflect upon the Marks. Upon expiration of or termination of this Agreement for any reason, the District shall cease all use of the Marks. The District shall collaborate with KABOOM! and the Funding Partner to secure media coverage for the Project.
- (e) Signage. The District shall allow the names and logos of KABOOM! and the Funding Partner to be displayed on permanent signage (a copy of which has been provided), and shall be no greater than 19 ½ inches wide by 30 ¼ inches tall and mounted on poles in a mutually agreed location. If applicable, the District shall allow individual instructional signs to accompany the equipment.
- (f) Costs. The District is solely responsible for and shall hold KABOOM! and the Funding Partner harmless from any costs incurred by the District for any prior site preparation, upgrades or improvements or any equipment or materials purchased to supplement those secured by KABOOM!.
- (g) Warranty. The equipment and the safety-surfacing related to the Project may be covered under warranty by the applicable manufacturers (a copy of which has been provided). The District acknowledges that any warranties and/or guarantees on any equipment or material are subject to the respective manufacturer's terms thereof, and the District agrees to look solely to such manufacturers for any such warranty and/or guarantee. Neither KABOOM! nor the Funding Partner nor any of their respective affiliates, directors, officers, managers, partners, members, shareholders, employees, agents or representatives, have made nor are in any manner responsible or liable for any representation, warranty or guarantee, express or implied, in fact or in law, relative to any equipment or material, including its quality, mechanical condition or fitness for a particular purpose.
- (h) Insurance. The District is self-insured and is responsible for providing coverage for its own employees and against liability for bodily injury, death and property damage that may arise out of or be based on the use or operation of the playspace/ playground at the Project site, from 7 (seven) calendar days before the Build Day and for a minimum of one year afterward, in each case, in amounts not less than one million dollars (\$1,000,000). This self-insurance shall be primary and non-contributing with any other insurance covering KABOOM! and its Funding Partners.

If KABOOM! engages with any contractor, independent contractor, or subcontractor to perform work in connection with this Agreement, KABOOM! shall require that any contractor, independent contractor, or subcontractor procure and maintain at all times during the performance of such work, Workers' Compensation Insurance in conformance with the laws of the State of California and Federal laws

when applicable. Liability Insurance shall not be less than One Million Dollars (\$1,000,000) per accident or disease.

KABOOM! shall obtain and maintain insurance to be insured against liability for workers' compensation in accordance with applicable State law and will comply with such provisions before commencing the performance of the Work of this Contract. (California Labor Code Section 3700).

KABOOM! maintains Commercial General Liability insurance, including automobile coverage with limits of One Million Dollars (\$1,000,000) per occurrence for bodily injury and property damage. Evidence of insurance shall be provided upon request. Nothing in said policy shall operate to increase the Insurer's liability as set forth in the policy beyond the amount or amounts shown or to which the Insurer would have been liable if only one interest were named as an insured

KABOOM! represents and warrants it has, and, prior to each Design Day, shall provide evidence of, the insurance coverages as required to this Agreement, which is attached hereto and made a part hereof. KABOOM! shall maintain such insurances for the term of this agreement. KABOOM! shall submit evidence of its insurance to District as requested

- i. As promptly and reasonably practicable following execution of this Agreement and, in any event, at least three (3) business days prior to the first Build Day, the District will be endorsed to the required Commercial General Liability policies held by KABOOM! and its playground equipment manufacturer as an additional insured by endorsement. All evidence of such insurance, which should be available via Certificates of Insurance.
 - ii. KABOOM! shall ensure that its contract with its playground equipment manufacturer in connection with this Agreement expressly requires that the District will be endorsed as an additional insured on such playground equipment manufacturer's insurance policies, which must comply with the insurance requirements set forth herein.
- (i) Data and Reporting Requirements. The District shall (i) promptly following the confirmation of the Project, distribute one or more play-related surveys provided by KABOOM! to its stakeholders, including parents/caregivers, volunteers, staff and board members, (ii) cause members of its planning committee to complete a post-build survey provided by KABOOM! within 2 weeks from the Build Day and a 6-month survey provided by KABOOM! within 7 months from the Build Day.
- (j) Code of Conduct. The District agrees to comply with the build site rules (a copy of which has been provided). The District shall allow the build site rules to be displayed on site and communicate and enforce the build site rules for all participants in the Project's Design Day and Build Day events.

2. Obligations of KABOOM!.

- (a) Project Management. KABOOM! shall manage the overall execution of the project on the behalf of the Community Partner and Funding Partner. KABOOM! shall provide technical and organizational leadership and guidance for the Project and shall:
- i. Coordinate Funding Partner participation, facilitate design, including regular planning meetings, and work with vendors to procure equipment and materials in a timely manner, except to the extent that safety surfacing other than engineered wood fiber is used, which shall be procured by the District.
 - ii. Manage construction logistics for the Project, coordinate site preparation activities with the District, inventory equipment and materials, and assure that the necessary tools and materials and other general supplies are available on the Build Day.
 - iii. Procure on the behalf of the Community Partner and install new equipment (two play structures) after the repaired/replaced existing safety surfacing (matting) has been installed.
 - iv. Lead the Build Day activities, including the coordination of Build Day captains and volunteers.
 - v. Make available certain educational and promotional materials related to the Project.

- (b) Project Site Preparation KABOOM! in collaboration with the District shall coordinate site preparation prior to Build Day which includes laying out playspace location, digging holes, setting footers, inventory of equipment, cutting lumber, and prepping/priming any painting projects to ensure that the Project site is prepared for Build Day. KABOOM! acknowledges that in the event that soil is deemed unsafe and risk mitigation is required that there may be a delay in the Build Day and/or Project completion to allow for proper mitigation and/or remediation.
 - (c) Inspection. KABOOM! in collaboration with the District, will secure an Installation Supervisor to review the structure at the conclusion of the Build Day (or, if KABOOM! assumes responsibility for the construction going beyond one day, at the conclusion of the installation) to ensure that the structure is safe and built to all appropriate standards and guidelines. KABOOM! shall be responsible for the costs for an Installation Supervisor unless the Project is not completed by the mutually agreed upon timeline and the untimely completion is due to failure of the District, in which case the District shall secure the Installation Supervisor. The District understands and acknowledges that it will accept ownership of the playspace construction regardless of its review to certify the construction.
 - (d) Promotion. KABOOM! will provide proposed promotional materials relating to the Project for the District's review and approval, which approval shall not be unreasonably withheld or delayed.
 - (e) Website Listing. KABOOM! will place the playspace on its list of KABOOM! projects on the KABOOM! website and KABOOM! will send information to the District on maintenance programming and enhancements.
 - (f) Post-Build Day. The District shall: (i) within two weeks following the Build Day, complete and submit a Post Build Report, in the form to be made available by KABOOM!, and (ii) shall use its commercially reasonable efforts to provide, and otherwise shall cooperate in good faith with KABOOM! regarding obtaining, such other information related to the Project as KABOOM! from time to time may request.
3. Build Day Postponement. The Build Day shall not be postponed except when weather or other conditions jeopardize the safety of the volunteers or threaten the structural integrity of the playspace. The decision to postpone the Build Day will be made by majority agreement of the representatives of KABOOM!, the District and the Funding Partner, except where such decision must be made by KABOOM! on the construction site and representatives of the District and the Funding Partner are not available for consultation. In the event that the Build Day is postponed, KABOOM!, the District and the Funding Partner shall develop a plan for rescheduling the Build Day at the next earliest date possible for each party. The Funding Partner shall be responsible for all additional expenses related to the rescheduled Build Day, including, without limitation, equipment, labor and materials, storage and travel costs and expenses; *provided, however*, that the Funding Partner shall be notified of the estimated amount of such additional expenses in connection with rescheduling of the Build Day. Notwithstanding the foregoing, in the event that the date of the Build Day is cancelled or changed as a result of the District's failure to satisfy its obligations in connection with the Project, then the District shall be liable to KABOOM! and the Funding Partner for all such additional expenses related to the rescheduled Build Day.
- (a) Parties acknowledge that in the event that soil is deemed unsafe and risk mitigation is required as set forth in Section 1(a)(iii) that there may be a delay in the Build Day and/or Project completion to allow for proper mitigation. Any delays/postponement of Build Day resulting from necessary soil mitigation, shall result in KABOOM!, the District, and the Funding Partner developing a plan for rescheduling the Build Day.
 - (b) Parties acknowledge that in the event that permits required by Section 1(a)(ii) are delayed through no fault of the District's timeliness in filing for permits that there may be a delay in the Build Day and/or Project completion to allow for proper mitigation. Any delays/postponement of Build Day resulting from obtaining necessary permits, shall result in KABOOM!, the District, and the Funding Partner developing a plan for rescheduling the Build Day.
4. Funding Partner Relations. KABOOM! will execute a separate contract with the Funding Partner pursuant to which the Funding Partner will agree to provide financial and human resources for the Project. In recognition of the Funding Partner's contribution of such resources, the Funding Partner shall receive first placement on any recognition materials developed for the Project, including signage, banners, T-shirts, press releases, website and newsletter stories, and

flyers, and the District shall not solicit sponsors or donors in relation to the Project whose products or services directly compete with the products or services of the Funding Partner as identified to the District by KABOOM! and/or the Funding Partner. In the event the District solicits other sponsors or donors, then the District shall not permit such sponsors or donors to compete with the Funding Partner for signage and sponsorship recognition.

5. Indemnification. Each Party shall indemnify and hold harmless the other Party and their respective affiliates', directors, Governing Board, agents, representatives, officers, consultants, employees, trustees, and volunteers from any and all losses, liabilities, claims, actions, fees and expenses (including interest and penalties due and payable with respect thereto and reasonable attorneys' and accountants' fees and any other reasonable out-of-pocket expenses incurred in investigating, preparing, defending or settling any action), including but not limited to any of the foregoing arising under, out of, or in connection with any breach of this Agreement by the indemnifying party, any negligence or misconduct taken in connection with this Agreement by indemnifying party or its employees, representatives, officers, consultants, and volunteers. This provision shall survive any termination or expiration of this Addendum or the Agreement.

In addition, the District shall indemnify and hold harmless the Funding Partner and KABOOM! and their respective affiliates' directors, officers, managers, partners, members, shareholders, employees, agents and representatives from any and all losses, liabilities, claims, actions, fees and expenses (including interest and penalties due and payable with respect thereto and reasonable attorneys' and accountants' fees and any other reasonable out-of-pocket expenses incurred in investigating, preparing, defending or settling any action), resulting from the use, operation, maintenance, safety and condition of any playground property and equipment installed under this Agreement, including those for personal injury, death, or property damage, except to the extent resulting from the gross negligence or willful misconduct of such indemnified person. This provision shall survive any termination or expiration of this Agreement.

6. Termination. In the event that the District fails to satisfy its obligations required under Section 1 or otherwise breaches this Agreement, KABOOM! may terminate this Agreement upon written notice to the District of such termination. Furthermore, if either party is delayed or prevented from fulfilling any of its obligations hereunder by any cause beyond its reasonable control, including acts of God, acts or omissions of civil or military authorities, fire, strike, flood, riot, act of terrorism, war, transportation delay, or inability due to such causes to obtain required labor, materials or facilities, such party shall not be liable hereunder for such delay or failure and either party may terminate this Agreement if the other is unable to perform any obligation hereunder for a period longer than ten (10) calendar days due to such force majeure event, in which case this Agreement shall become void and have no effect, and no party shall have any liability to the other party, except that nothing herein will relieve any party from liability for any intentional breach of this Agreement prior to such termination.

7. General Provisions. The District represents to KABOOM! that all information provided by it to KABOOM!, including in the application, is true, correct and complete in all respects and does not omit any information relevant to the Project. Each party has all requisite power and authority, including any necessary approval by its governing body, to execute and deliver this Agreement, and to perform its obligations hereunder. This Agreement may not be assigned or transferred by either party without the prior written consent of the other party hereto. This Agreement shall inure to the benefit of and be binding upon the parties hereto, their respective successors and permitted assigns, and where expressly stated, their affiliates and representatives. This Agreement shall be governed by and construed under the laws of the State of California, without regard to conflicts of laws principles to the extent that the application of the laws of another jurisdiction would be required thereby. This Agreement may be altered, modified or amended only by a written document signed by both parties. This Agreement may be executed in two or more counterparts, each of which shall be an original and all of which, when taken together, shall constitute the same agreement and may be delivered by facsimile or electronic mail transmission with the same force and effect as if originally executed copies hereof were delivered. Any notices required or permitted to be given hereunder shall be sent by certified or registered United States mail, postage prepaid, by personal delivery addressed to the applicable party or by facsimile or electronic mail transmission (the receipt of which is confirmed) at the address set forth under such party's signature below. The Funding Partner shall be an intended third party beneficiary of Sections 1(a), (d) (e), (f), (g) and (h) and Sections 2(c), 3, 4, 5 and 7 of this Agreement and is entitled to enforce its rights under such sections as if it were a party to this Agreement.

8. Status of KABOOM!. KABOOM! in the performance of this Agreement, shall be and act as an independent contractor. KABOOM! understands and agrees that it and all of its employees shall not be considered officers, employees,

agents, partner and are not entitled to benefits of any kind or nature normally provided employees of the District and/or to which the District's employees are normally entitled, including, but not limited to, State Unemployment Compensation or Worker's Compensation. KABOOM! shall assume full responsibility for payment of all Federal, State, and local taxes or contributions, including unemployment insurance, social security and income taxes with respect to KABOOM's employees. In the performance of the work herein contemplated, KABOOM is an independent contractor or business entity, with the sole authority for controlling and directing the performance of the details of the work as noted in its obligations in Section 2(a).

9. Term. This Agreement shall commence as of the Effective Date and remain in effect through December 31, 2022, unless the term ("Term") is extended or terminated earlier pursuant to the terms set forth in Section 6 herein.
10. Assignment. The obligations of KABOOM! under this Agreement shall not be assigned by KABOOM! without the express prior written consent of the District.
11. Drug-Free / Smoke Free Policy. No drugs, alcohol, and/or smoking are allowed at any time in any buildings and/or grounds on District's property. No students, staff, visitors, KABOOM! employees, representatives, or subcontractors are to use controlled substances, alcohol or tobacco on these sites.
12. Coronavirus/COVID 19.
 - (a) Through its execution of this Agreement, KABOOM! declares that it is able to meet its obligations and perform the Services required pursuant to this Agreement in accordance with any shelter-in-place (or similar) order or curfew (or similar) order ("Orders") issued by local or state authorities and with any social distancing/hygiene (or similar) requirements.
 - (b) To the extent that KABOOM! provides Services in person, KABOOM! agrees to include additional information as required by OUSD if any Orders are issued by local or state authorities that would prevent KABOOM! from providing Services in person.
 - (c) KABOOM! agrees to notify OUSD, via email pursuant to the Notices provision, within twelve (12) hours if any employee, subcontractor, agent, or representative of KABOOM! tests positive for COVID-19, shows or reports symptoms consistent with COVID-19, or reports to KABOOM! possible COVID-19 exposure within seventy two hours (72) of being on OUSD property.
 - (d) KABOOM! agrees to immediately adhere to and follow any OUSD directives regards health and safety protocols including, but not limited to, providing OUSD with information regarding possible exposure of OUSD employees to KABOOM! or any employee, subcontractor, agent, or representative of KABOOM! and information necessary to perform contact tracing.
 - (e) KABOOM! shall bear all costs of compliance with this Paragraph, including but not limited to those imposed by this Agreement.
13. Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion. KABOOM! certifies to the best of his/her/its knowledge and belief, that it and its principals are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency according to Federal Acquisition Regulation Subpart 9.4, and by signing this contract, certifies that KABOOM! does not appear on the Excluded Parties List (<https://www.sam.gov>).
14. Litigation. This Agreement shall be performed in Oakland, California and is governed by the laws of the State of California. The Alameda County Superior Court shall have jurisdiction over any state court litigation initiated to enforce or interpret this Agreement.
15. Legal Notices. All legal notices provided for under this Agreement shall be sent via email to the email address set forth below and shall be either (i) personally delivered during normal business hours or (ii) sent by U.S. Mail (certified, return receipt requested) with postage prepaid to the other PARTY at the address set forth below.

OUSD

Name: Joshua R. Daniels
Site/Dept: Office of General Counsel
Address: 1000 Broadway, Suite 300
City, ST Zip: Oakland, CA 94607
Phone: 510-879-8535
Email: ousdlegal@ousd.org

KABOOM!

Name: KABOOM!
Title: **c/o Gerry Megas, Chief Financial Officer**
Address: **4301 Connecticut Ave NW, Suite ML-1**
City, ST Zip: **Washington, D.C. 20008**
Phone: **(202) 464-6180**
Email: **gmegas@kaboom.org**

Notice shall be effective when received if personally served or emailed or, if mailed, three days after mailing. Either PARTY must give written notice of a change of mailing address or email.

16. Incorporation of Recitals and Exhibits. The Recitals and each exhibit attached hereto are hereby incorporated herein by reference.
17. Integration/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 both Parties.
18. 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.
19. Contract Contingent on Governing Board Approval. District shall not be bound by the terms of this Agreement until it has been formally approved by the District's Governing Board. This Agreement shall be deemed to be approved when it has been signed by the Board of Education, and/or the Superintendent as its designee.

By executing this Agreement where indicated below, each of KABOOM! and OUSD agrees, as of the date identified above, to be legally bound by all of the terms and provisions set forth above.

Oakland Unified School District

KABOOM!, Inc.

By:  Date: 12/16/2021
Shanthy Gonzales
Board of Education, President

DocuSigned by:
By:  Date: 11/18/2021
Name: Gerry Megias
Title: Chief Financial Officer

Address:
4301 Connecticut Ave. NW, Suite ML-1
Washington, DC 20008
T: (202) 464- 6180
F: (202) 659-0210
e-mail: gmevias@kaboom.org

By:  Date: 12/16/2021
Dr. Kyla Johnson-Trammell
Superintendent
Board of Education, Secretary

Approved as to Form

By:  Date: 11/19/2021
Office of the General Counsel