The Winston School Response

The Winston School's (the School) response to Del Mar City Council’s "Statement Regarding the Winston School" and related ten-page "Facts on Winston and the City of Del Mar" written by Councilmembers Dwight Worden and Sherryl Parks on June 2, 2020 (updated on June 11), includes a six-page synopsis of significant issues and a detailed supporting document including original source materials.

The School is particularly concerned with the allegations made by Councilmembers Dwight Worden and Sherryl Parks regarding an appraisal the School commissioned for its portion of the Shores Park. The second statement, written and signed only by these two Councilmembers, takes an erroneous assumption made in the City Council statement and claims it as fact.

"The appraisal is completed; Winston refuses to share it; lease negotiations end."

However, the appraisal had not been completed and all meetings were put on hold in March when COVID-19 forced all State of California to shut down schools. There had been no interaction with the lease subcommittee since that time, and as such, they had no basis on which to make that claim.

This paper includes responses to the following items:

Material Misstatements, Errors and Omissions

1. The City Council canceled lease negotiations with the School in direct violation of the Lease terms.
2. A false claim was made that Winston "refused" to share an appraisal with the City without basis.
3. The statement omitted acknowledgement of an MOU clause that states the Lease will be renegotiated upon completion of redevelopment.
4. The statement omitted the School's alternate $147,000 lease proposal and facility-sharing benefits in the $1 rent, a rate consistent with other local non-profit leases.
5. The School's Lease rate with the Del Mar Unified School District was misrepresented; the contracts did not have similar terms.
6. The City proposals for rent reduction were one-sided, economically unfeasible, and the one related to affordable housing was illegal.
7. Councilmembers deny they suggested the School build affordable housing despite written proof to the contrary.
8. The City Council used unsubstantiated legal claims for “Public Gift of Funds” to delay progress and refuse to offer legal support for such claims.
9. The City erroneously claims it had exclusive legal rights to purchase the Shores but had the School sign a noncompete clause.
Demonstrations of Bias Against the School

10. Attempt to diminish the School's role in purchasing Shores Park by claiming it did not “donate” to the project.
11. Placing unjustified blame on the School for delays in the Shore Park redevelopment.
13. City Councilmembers made inaccurate and defamatory comments about the School in an open Council meeting in direct violation of the Del Mar Code of Civil Discourse.

1. **The termination of Lease negotiations by the City is in direct violation of the Lease terms.**

The decision to terminate Lease negotiations during a pandemic is a violation of the Lease terms. This action was surprising given the written notice on March 13, 2020, from Dr. Dena Harris, Head of School, formally requesting the City place a hold on Lease negotiations. This notice was sent to the Assistant City Manager and copied to the City Manager and the entire City Council.

Although the City refers to Section 3 of the Lease in their October 8, 2020, breach-of-lease term letter to the School, they chose to ignore the important protection of this Lease, and indeed most leases, provide to tenants.

Section 3(c) of the Lease states:

“The Redevelopment Deadlines set forth shall be extended to the extent that Tenant’s performance is prevented or hindered by circumstances out of Tenant’s reasonable control including an act of God, casualty, epidemic, war, terrorism, insurrection, riot, fire, flood, earthquake, strike, or boycott. Tenant’s inability to fund the redevelopment or to timely process entitlements and proceed with construction shall not extend the Redevelopment Deadlines.”

Supporting Documents: **Appendix A: Retraction Request to City Council, Appendix B: Lease Section 13, Appendix C: March Letter from Dr. Harris to City regarding the postponement.**

2. **Winston did not "refuse to share" the appraisal with the City**

The City falsely accuses the School of withholding the appraisal from the City when, in fact, all meetings had been postponed due to the COVID-19 pandemic. As shown in Appendix D, the draft appraisal received on February 29 was for "fair value" as if it were "for sale in a competitive and open market" and did not consider the many restrictions in effect for the underlying property. These issues are similar to those the City faced when purchasing the Shores property when the initial appraisal was for $22M vs. the $8.5M paid due to the deed restrict limiting the property’s use to public facilities.

Ongoing meetings with the appraiser were all put on hold once concerns regarding COVID-19 started to escalate in early March, culminating with schools' immediate shutdown across California on March 16, 2020. Not only did the School notify the City that all discussions needed to be paused, but it also made the City Manager aware of the issues with the draft appraisal in a phone call with the Head of School on May 1, 2020.
3. Memorandum of Understanding clause that discusses Lease renegotiating omitted

The agreement to renegotiate the Lease price was agreed to in the MOU signed by the parties on February 21, 2006. In relevant part, the MOU states:

"Upon completion of a complete development and replacement of the Buildings by the Winston School, the Parties shall enter into good faith negotiations for a new lease."

The MOU language does specify that the renegotiation would happen after redevelopment. The School was asked to define new terms in advance to assist with bank financing options. As explained further in item 5, this term was included in the MOU as a placeholder until the construction was complete.

Supporting Documents: Appendix E: MOU section, Appendix F: Lease basis page

4. The School offered the City a range of lease options from $1 to $147,000

The School did propose a $1 rental rate to the City. This arrangement is typical in municipalities where the lessee invests a significant sum on facilities that can also be utilized by the community and more particularly, when the lessee is a non-profit organization. Winston’s $10 million redevelopment plan undoubtedly qualifies. It is also similar to leases the City already has with other local non-profit organizations, like the School.

Additionally, Winston has a long history of allowing other Del Mar groups to utilize the campus. The School’s redevelopment plans include highly specialized spaces that could have been a tremendous value for residents, community and civic groups, including a potential exhibit space for local artists. However, the City rejected this offer for the community, refusing to acknowledge any value for these facilities.

The $1 rent rate option would reduce annual rent; however, it would also allow the City to provide new services to residents without needing a multi-million-dollar capital investment of its own. It is that benefit that makes a “$1 lease” a popular solution for small cities.

The City Council omitted the fact that the School also proposed an alternative $147,000 land lease in a letter from our attorney dated July 19, 2019. This proposal is in keeping with the intent of the MOU.

City Statement Reference: Supplement Page 5
Supporting Documents: Appendix G: Land Lease Proposal, Appendix H: Facility Shared Use Schedule

5. Del Mar City Lease is not comparable to Del Mar Union School District Lease

At several points, the City-published statement mentions that the Lease rate was the same as it was with the Del Mar Union School District (DMUSD)—as if this were a benefit.
However, the School's lease with the DMUSD was for land, buildings, maintenance and major repairs. The School's Lease with the City is for land-only and requires the School to pay 50% of the playing fields' water bill.

Therefore, failure to adjust the Lease to a "ground lease" as cited in both the MOU and City/DMUSD lease description means the School would pay $10 million to rebuild the campus, lease the buildings, and pay the City for maintenance and repairs it is not providing.

City Statement Reference: Supplement Page 3, paragraphs 2-3

6. The City's recommendations regarding reducing rent payments

The City references "compromises and options to meet the needs of both parties" and that "unfortunately, Winston rejected all the City suggestions."

However, these suggestions were utterly one-sided. In exchange for the 25-year extension needed to get favorable financing, the City removed important protections and added significant new restrictions. In order to "save millions of dollars," the City recommended the School abandon its redevelopment plan and instead fundraise to pay the City's rent. Under this option, the School would continue to use the 1940's buildings that cannot meet the needs of any school under current statutory code requirements.

The City also recommended rent reduction options that were either economically infeasible, not within the School's control or unsafe for students. Some were impermissible under the Lease or illegal, as explained in the next section. Additionally, almost every one reduced the footprint on which the School could build.

City Statement Reference: Supplement Page 5, paragraphs 2 and 6 Supporting Documents: Appendix I: City's Revenue Alternatives Letter

7. City Council proposed affordable housing on the Winston site

The City claims it never proposed the School build affordable housing on its campus. However, included in the City's counter-proposal dated December 20, 2018, and signed by Deputy Mayor Haviland, was the following:

"Build and manage affordable housing units. Units need to be affordable for duration of lease term. Incorporating housing units helps the City toward its affordable housing requirements. This option could provide housing for school faculty or staff. The School can keep the rent."

There are significant issues with this proposal:

(1) It falls outside of the School's 501(c)(3) exemption.
(2) It is economically impossible since these projects are funded with tax credits that non-profits do not receive.
(3) Most importantly, it is illegal because owners of these developments are expressly prohibited from discriminating against certain classes of renters.
The Winston School is also cited as a possible solution on pages 5 and 26-28 of the Del Mar "22 in 5" Four Key Strategies to Provide 22 Affordable Housing Units in Five Years study. Although the City Council promised to exclude the Shores Park at the City Council meeting, the recommendation that the School includes affordable housing units were made immediately after that.

Supporting Documents: Appendix G: Attorney’s response regarding the illegality of proposal, Appendix I: City’s Revenue Alternatives Letter

8. The City uses unsubstantiated legal claims to stonewall negotiations

Councilmember Worden has been using the claim of "Public Gift of Funds" in meetings, correspondence with the School and the City Council’s published paper without substantiation. The School's attorneys have provided legal justification for why this is not applicable and asked the City to provide admissible evidence supporting its claim. The City has refused to respond for over a year.

There are several fundamental reasons the regulation does not apply here:

(1) The MOU states the parties will renegotiate once the campus is redeveloped,
(2) A rent reduction in exchange for services provided to benefit Del Mar residents is not a gift of funds,
(3) The regulations do not apply to charter cities, like the City.

The support document includes additional details.

City Paper References: Supplement Page 5 and 9
Supporting Documents: Appendix J: Legal citations refuting Public Gift of Funds

9. The City did not have exclusive right to purchase the Shores Park from the District

The City statement claims that the opportunity to acquire the land at the reduced public-use price was unique to the City. However, Winston, as a non-profit school, would have also been able to purchase the property. This fact is known as the City included a noncompete clause in the MOU with the School.

The School understood the benefits of teaming up with the City, so instead chose to work closely with the Friends of Del Mar Parks in a joint effort to make the purchase possible. The Winston Headmaster co-chaired the Friends of Del Mar Parks committee.

City Paper References: Supplement Page 2 (c)
Supporting Documents: Appendix K: MOU noncompete clause

Demonstrations of Bias Against The Winston School

In addition to the factual errors and omissions described above, the City Council’s statement demonstrates a clear bias against the School.
10. "Winston did not make any donations to the Shores purchase."

This statement is an apparent attempt to downplay the significant role the School played in the purchase of the Shores Park. This is an insult to every person on the Friends of Del Mar Parks committee who worked hard to make the daunting task a reality. The School strongly disagrees with this insinuation and firmly believes there would be no Shores Park today without Winston’s efforts in the past.

- The School acted as co-chair on the Friends Del Mar Park committee for fundraising purposes.
- The School not only participated but lead the fundraising efforts, securing the first $1M donation and raising a total of $3M.
- All donations were managed by Winston using our 501(c)3 tax-exempt status because no other non-profit in the Del Mar community was willing to step up and do so.
- The Kerckhoff family donated the land with the requirement it is used for educational purposes. A legal judgment upheld the deed to the District, making the presence of the School paramount to the purchase.

City Statement References: Supplement Page 8 (g)
Supporting Documents: Appendix M: "Winston Raises $1M towards Shores" newspaper article

11. Shores Park planning on hold due to lease negotiations

The School is baffled by this attempt to shift blame for the City’s lack of progress. There has never been a point in which the School’s plans have interfered with those of the City. The only way the Lease negotiations could have impacted the Shores Park plans would be if the lease subcommittee hoped to drive the School away and use the entire Shores site.

City Statement Reference: Supplement Page 6, paragraph 1

12. Brown Act Due-Process Violations

The City Council appears to have different submissions standards when it comes to Winston versus other community-based “Red Dot” submissions. Several of the City Council’s actions violate the Ralph M. Brown Act (Govt. Code §§ 54950 et seq.) (Brown Act) regarding open and transparent local government meetings.

- Red Dots submitted by the School were rejected because they pertain to items not on the agenda, but others were permitted to do so.
- The City Council provided others on the agenda the opportunity to speak via phone during virtual meetings. However, this opportunity was not offered to Winston even when School-related items were on the agenda.
- The City Council stated it had nothing to report out following the June 1, 2020, closed session when they had voted to terminate Lease negotiations and publish the statement and ten-page paper written by Councilmembers Worden and Parks against the School. This violation of due-process laws denied the School the opportunity to object to or prepare a timely response to the inaccurate report.

Supporting Documents: Appendix L, Red Dot submitted by Winston Board President, not included in the public record.
13. City Council Members used COVID-19 remote meetings to make derogatory statements

The City Council’s remote meeting guidelines gave Councilmembers the power to make false, even slanderous statements without providing the recipient the opportunity to respond. This is counter to the Del Mar Code on Civil Discourse, which states, "Together we will promote inclusion; listen to understand; show respect; be clear and be fair; and focus on the issue."

For example, here is a just one of the statements made by Councilmember Parks during the June 1, 2020, meeting regarding the Winston fence permit:

"It’s not surprising that an abandoned school needs a fence. The way they have maintained the temporary fence doesn’t show me that they are very vigilant about protecting their own business. [more..] All of your temporary cones are halfway down. There is no obstruction in the upper parking area either. I think that if your neighbors, who appear to be concerned about the School and could partner with you, if you can’t come to Del Mar and protect that building then I think you need in the interim to show more due diligence."

The orange cones Councilmember Parks refers to were placed there by the City to prevent public parking, not protect the School. The School did not "abandon" the School site. Instead, there have been one or two staff members on-site each school day since March 13, 2020. Not only is the statement factually inaccurate, but it shows a disdain for the School and our neighbors that is disturbing.

Due diligence? The School and its neighbors sent letter after letter to the City regarding installing a fence which were all ignored. The School even published a video based on security tapes to demonstrate how urgent the circumstances were. The City refused to allow the fence’s permit to progress along the standard approval process for almost a month using unprecedented arguments to do so. Substantial temporary fencing would have been a violation of City regulations - leaving the School and its neighbors at risk and without any recourse.