The Winston School Response to the Del Mar City Council Support Document

The following document provides supporting materials for the School's response to the 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.

Lease negotiations between the City and School were halted in mid-March due to the COVID-19 pandemic. Therefore, the City's termination of Lease negotiations and same-day website publication against the School on June 2, 2020, were completely unexpected. The School was given no notice and not provided the opportunity to respond in advance of the public posting. Interestingly, just one day earlier—on June 1--the City stated it had nothing to report out from its Closed Session in which they voted to unilaterally and without justification terminate Lease negotiations and publish the two statements. As a result, the public was left with the idea that the City's one-sided statements were based on facts that were full of demonstrable misstatements, omissions and biased opinions.

Please see the School's summary response for an overview of issues detailed below.

Material Misstatements, Errors and Omissions

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

The decision to terminate Lease negotiations during the COVID-19 pandemic is a clear violation of the lease terms. 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."

Although the Lease does not require written notice, Dr. Dena Harris, Winston Head of School, formally requested the City place a hold on lease negotiations due to the COVID-19 crisis in a letter dated March 13, 2020. This notice was sent to the Assistant City Manager and copied to the City Manager and the entire City Council. This email stated:

"Therefore, I am formally requesting that all decisions, meetings, discussions, planning, and negotiations that pertain to the redevelopment, planning and revised lease terms are placed on hold for a minimum of 30 days."

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 City's appraisal when, in fact, meetings had all been put on hold due to California Governor Gavin Newsom’s COVID-19 Stay-at-Home order. Councilmembers Worden and Parks made multiple inflammatory and inaccurate claims regarding the appraisal, based on "inference" and not actual communications.

**City Statement:** *"In March 2020, Winston confirmed it had the appraisal, but in spite of its prior commitment to share the appraisal, was declining to share it with the City. The reasonable inference is that the appraisal did not support Winston’s claim that the rent was too high."*

**City Paper:** *"The appraisal is completed; Winston refuses to share it; lease negotiations end."* (Emphasis added.)

There are multiple errors in the paper regarding the timing of the proposal. For example, there was a 90-day waiting period for any appraiser at this time, so a year-end deadline was never possible.

However, to focus on the most blatant factual error, the School did not "refuse to share" the appraisal. Winston received a draft of the appraisal on February 29, 2020. However, as shown in Attachment D, the appraisal was for "fair value" as if it were "for sale in a competitive and open market" and did not take into account the many restrictions in effect for the Shores property, including:

- Public facilities zoning
- Deed restriction with Del Mar Union School District
- A 55-year lease that requires playing fields
- City’s commitment to the donors requiring open space
- Del Mar Design Review Board process that would prohibit complete development of the Shores property.

The City had similar issues when having the property appraised for the purchase from the DMUSD.

The School scheduled a meeting with the appraiser and our real estate developer to review the specifics of the appraisal and documentation evidencing such was supplied. However, the School’s work with the appraiser was all put on hold once the Governor mandated school closures.

The School communicated with the City regarding the status of the appraisal:

- February 19, 2020, letter to Deputy Mayor Terry Gaasterland regarding the appraisal status
- February 25, 2020, a letter from the School Board President
- March 13, 2020, the School notified the City Council and Staff that all negotiations needed to be placed on hold due to the pandemic.
- May 1, 2020, the City Manager was informed of our issues with the draft appraisal in a conference call with the Head of School

**City Statement Reference:** Opening Statement, Supplement Page 5, paragraphs 3-5

**Supporting Documents:** [Appendix C: Dr. Harris email](#), [Appendix D: Draft Appraisal Assumptions](#)
3. Memorandum of Understanding clause that discusses lease renegotiating omitted

This agreement to renegotiate is part of the MOU. The MOU language was also omitted from the City's statement.

MOU 2(B)(2): "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."

Lease: H. This Ground Lease ("Lease") is interred into as contemplated by the Memorandum of Understanding between the Winston School of San Diego and the City of Del Mar, dated February 21, 2006 ("MOU").

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

4. The School offered the City a range of rent rate options from $1 to $147,000. The $1 Lease proposal had potential to benefit Del Mar residents

The School proposed a $1 rental rate to the City as is common in municipalities where the lessee invests a significant sum on facilities that can also be enjoyed by the community. The types of spaces, as shown below, would work perfectly for services for all Del Mar residents and especially for senior citizens.

The City requested a list of all the groups and a potential calendar. This documentation showed that the facilities would be open to local charities for 65% of the possible time annually. While no one suggested the campus be used to full capacity from 8 am to 8 pm, this provided excellent scheduling flexibility.

This was an opportunity to expand the services available to City residents without a major capital expenditure. This is even more of an issue now with the current City deficits as a result of COVID-19. The City does not have the designated funds to invest in the Shores Park development and has removed it from the budget.

Contrary to the Councilmembers’ claim, this proposal would not have been possible at the time of the Lease signing as the School did not have specific redevelopment benefits to offer the community at that time. Under current leadership, the School's curriculum and supporting plans described above are more robust and align with the Del Mar community’s needs in a way not imagined at the commencement of the Lease period.

Although the School believes the best option for both the School and residents of Del Mar is the “$1 lease”, the School also made an alternate proposal once the City Council refused to give the School any value for the joint facilities. This proposal--a true land lease--was made formally by our legal counsel on July 19, 2019, and shared with the City Staff and City Council.
There is no way Councilmembers were unaware of this offer, and yet they chose to omit it from their paper.

The value of the land as a percent of the lease was calculated using industry standards. The July 19 letter stated:

Winston is proposing: (i) redevelopment of the School Site with a modern school and related amenities that integrate into the surrounding neighborhood; and (ii) amendment of the lease agreement dated July 1, 2008, by and between Winston and the City ("Lease") to a $147,000 land lease.

This letter also contains information regarding the School's request for legal support for Councilmember Worden's claim of Public Gift of Funds. The School never received a response.

City Statement References: 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 DMUSD lease

The DMUSD lease was a comprehensive lease that included land, buildings, maintenance, and significant repairs. Sections 11 of the lease states:

"Lessor shall be responsible for major maintenance, including not limited to repairing leaking roofing, repaving worn roadways, and irrigation repair. Major maintenance shall be defined as any repair or replacement costing in excess of $1,000."

The description of the lease with the City is for a "land lease" only and the School has spent tens of thousands of dollars maintaining the campus during its lease with the City.

6. The City's recommendations regarding rent reduction options were not feasible

"The City proposed a number of compromises and options to meet the needs of both parties. The City expressed a willingness to revisit the rent amount if Winston could back its position with facts that the rent was too high. Unfortunately, Winston rejected all the City suggestions. Winston continued to insist on a dramatic lowering of rent, yet refused to share the promised appraisal to back that up."

"The City also offered an alternative that would relieve Winston's need to rebuild its school saving Winston millions of dollars."

The proposal removed significant lease protections and demanded additional restrictions in exchange for a 25-year extension and proposed 'saving the School millions of dollars' by removing the School's need to renovate the 1940s buildings. The current facilities cannot meet the capacity for electricity and plumbing requirements, and they do not provide adequate ventilation or appropriate classroom spaces for today's needs. Not renovating was never an option.
The City’s revenue-generating recommendations were either economically infeasible, not under our control, unsafe for our students, impermissible under the Lease or illegal. The recommendations all further restricted the School’s use of our leasehold. For example,

1. The School would be required to meet parking code on our property (rescinding the agreed-upon joint access to parking, the City is attempting to do so again in its September 24, 2020, letter),
2. Provide off-street loading and unloading of buses for 16 school districts,
3. Reduce our footprint by 10%, and
4. Build 28 public parking spots that would be available while School is in session, which is physically impossible and violates student safety guidelines.

It is inconceivable that the City thought there is room for these options on the School’s 1.8 acres, leading the School to reasonably infer the City’s proposal was not genuine. It was at this meeting* that Councilmember Worden told the participants:

"It was not our intent to have a school here. Even if you spend $20 million to rebuild the school, you will have to take it down when you leave."

* October 2, 2019 meeting attended by Dwight Worden, Sherryl Parks, Scott Huth, Kristen Crane for the City of Del Mar. Laura Cunitz (Board President), Dena Harris (Head of School), Kim Kanetis (Finance Director), Maureen Kendrick (Executive Assistant) for The Winston School.

City Statement References: 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

Councilmembers Worden and Parks claim the City never proposed the School build affordable housing on the site.

"FACTS: The City has never proposed multi-family housing on the Shores site. Multi-family housing is not allowed by the Community Plan, by zoning, or by the Winston lease. Limited housing for teachers or staff on the Winston campus is allowed as a use "ancillary" to Winston’s education purposes. The City suggested Winston consider this option to house teachers, a caretaker, or other staff. The City did not propose housing on the Shores Park site. In fact, the City Council has publicly and specifically rejected that option."

This attempted spin does not match the City’s proposal. Note how they replaced the words "affordable housing" with "multi-family housing" above to make their claim. This was yet another recommendation that would leave no room for the actual school buildings when combined with the others.

"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. "

The Winston School  215 Ninth Street   Del Mar   California   92014   (858) 259-8155
However, housing commissions responsible for the management of affordable housing require a covenant to be recorded against the property that requires affordable housing be maintained for at least fifty-five years, which is longer than the lease's remaining life.

Investors in affordable-housing projects receive a credit applicable to their federal and state income taxes in exchange for investing in housing reserved for and affordable to lower-income households. Non-profit entities do not pay these taxes, thereby, making the proposal economically unfeasible.

Owners of these developments are expressly prohibited from discriminating against certain classes in the operation and management of the housing. (See 26 CFR § 1.42–9(a).) They must also certify compliance with the terms of the low-income housing commitment, which includes a provision prohibiting an owner from refusing to rent to tenants with Section 8 vouchers. There is no legal option to offer housing to only our teachers or staff.

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**

In addition to the fact that the renegotiation of the Lease was included in the MOU, the School provided the following legal support in a letter from our attorneys on July 19, 2019 (quoted below), that it also does not apply to $1 leases or to the City of Del Mar at all. We have asked the City to provide legal evidence supporting its claim for almost a year and they have not responded.

"It is our position that, because the amendment will fulfill a public purpose and promote social welfare, such an amendment is not a gift of public funds”.

(Alameda v. Janssen (1940) 16 Cal.2d 276, 281; City & County of San Francisco v. Collins (1932) 216 Cal. 187, 193 [social welfare expenditures of counties are not illegal gifts]; American Co. v. City of Lakeport (1934) 220 Cal. 548, 556 [mere incidental benefit to an individual does not make a "public" purpose a "private" purpose]; Mannheim v Superior Court (1970) 3 Cal.3d 678, 691 [the concept of public benefit is liberally construed]; Community Mem. Hosp. v. County of Ventura (1996) 50 Cal. App. 4th 199, 207.)

Moreover, charter cities are not required to comply with the constitutional prohibition on the gift of public funds.

(Tevis v. City & County of San Francisco (1954) 43 Cal.2d 190; Los Angeles Gas & Elec. Corp. v. City of Los Angeles (1922) 188 Cal. 307)."

City Statement 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 DMUSD**

The City statement falsely claims the City was the only party who could purchase the Shores Park.

“This opportunity to acquire at a dramatically lower price was unique to the City and was not available to Winston.”

Winston, as a non-profit, would have been able to purchase the Shores. This was known at the time as the City included a clause in the MOU with Winston prohibiting the School from competing with the City to purchase the property.

In fact, the opposite is true; the City could not purchase the property without the School’s presence. The Kerckhoff Deed was still in effect, requiring there to be a school on the property. The City’s claims the deed restricting the land to school use was inconsequential when there was, in fact, an open lawsuit that disputed that claim that put the deadline for purchase at risk.

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

**Demonstrations of Bias Against The Winston School**

10. **Winston did not make any donations to the Shores purchase**

The Winston School played an integral part in the successful acquisition of the Shores Park.

a. The Winston School secured the first $1 million donation.

b. The Kerckhoff Deed was still in effect, requiring there to be a school on the property.

c. No other Del Mar non-profit was willing to use their 501(c)(3) status to accept donations.

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

11. **The City Rejected Winston's Public Comments Resulting in the Brown Act and Due Process Violations**

The City Council appears to have a different submission standard when it comes to Winston. Several of the City Council’s actions violate the language and the Brown Act’s intent regarding transparent government.

For example, the School’s fence permit was placed on hold at the beginning of May and not put on the City Council agenda until June 1, 2020. The School submitted a Red Dot for the City Council meeting on May 18 regarding the urgent nature of the fence proposal. However, the material was rejected by Melinda Gould, Administrative Assistant, City of Del Mar, and not included in the public record because it was "not on the agenda.”
The School submitted two items for the June 1 meeting for which the School fence was specifically on the agenda. One a short statement to be read under the virtual meeting requirements and the other a more in-depth report with updated drawings. The second one was also rejected even though it had pertinent information the Council mentioned needing in the meeting. The Council provided others on the agenda the opportunity to speak at the meeting; the School was not afforded this option.

On June 15, 2020, the City accepted Red Dots regarding the School even though the School was not on the agenda. Upon learning of this unexpected action, and after reading a statement submitted by a resident with significant factual errors, the School quickly submitted a Red Dot of its own just after the 4 pm deadline. It was declined, but Councilmember Worden read from other submissions made after the deadline in that same meeting.

Supporting Documents: Appendix L, Red Dot submitted by Winston Board President, not included in the public record.

Appendices:
Appendix A: Winston Request to Remove Inaccurate and Defamatory City Statements
Appendix B: Winston Lease, Pandemics
Appendix C: Notification of Postponement of all Lease Negotiation Meetings
Appendix D: Draft Appraisal Assumptions
Appendix E: Memorandum of Understanding Lease Renegotiation Clause
Appendix F: Winston Ground Lease Page 1
Appendix G: Winston proposal for Del Mar for Land Lease
Appendix H: Schedule of Available Times for Shared Facilities
Appendix I: City Council Optional Revenue Generating Proposal to Winston School
Appendix J: Public Gift of Funds Legal Rebuttal
Appendix K: Memorandum of Understanding Non-Compete Clause
Appendix L: Winston Red Dot Submission
Appendix M: Winston School $1 Million Donation News Article

Also, the following full documents are available for download:
City of Del Mar - Winston Memorandum of Understanding
City of Del Mar - Winston Lease