Appendix A:

The Winston School Request to Remove Inaccurate and Defamatory City Statements to City Attorney and City Council

June 10, 2020
June 10, 2020

VI A E-MAIL AND U.S. MAIL

Leslie Devaney, Esq.
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Re: The Winston School Request to Remove Inaccurate and Defamatory City Statements

Dear Ms. Devaney:

On behalf of The Winston School (“School”), I appreciate the opportunity to inform you that the statement issued by the City of Del Mar (“City”) on the June 2, 2020 on the City’s official website with the accompanying ten-page “Facts About The Winston School and the City of Del Mar” (“Statement”), as drafted by City Councilmembers Dwight Worden and Sherryl Parks, contains misstatements, conjecture about the School’s intent and material omissions, resulting in an inaccurate and defamatory assessment of the School. Moreover, to the public, the information contained on the City’s official website indicates the City approves of the message by the entire City Council of the City of Del Mar (“City Council”). This, in and of itself, is misleading. The document only reflects the opinions of two members of the council and was neither voted on nor approved by the City Council in a noticed public meeting or included in the requisite notification required by the Ralph M. Brown Act (Govt. Code §§ 54950 et seq.) (“Brown Act”) following a closed City Council session.

As such, we appreciate the opportunity to submit the following comments to be included in the public record in order to remediate the issues and direct harm to the School as caused by the Statement and the termination of current negotiations between the parties. This correspondence is also intended addresses several other problematic claims made in the Statement.

1. The City Improperly Terminated the Lease Negotiations.

The decision to terminate the negotiations related to the 2008 lease between the City and the School (“Lease”) during the time of a declared pandemic that comprises a national and global crisis is a clear violation of the Lease terms. This action is especially concerning given the

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1 See https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020
written notice submitted to the City by Dr. Dena Harris, Head of School, on March 13, 2020. This notice formally requested the City place a hold on Lease negotiations while the School addressed the resultant effects of the pandemic designation and California Governor Newsom’s Declaration of the State of Emergency, stating as follows:

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.

However, regardless of the School’s formal request, the obligations set forth in the Lease, including redevelopment dates for which the City is now trying to enforce, were suspended upon the declaration of the pandemic. Specifically, Section 3(c) of Lease, which provides contractual force majeure coverage, 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.

(Emphasis added.)

2. **The City Has Misrepresented the School’s Lease Amendment Proposals.**

The Statement posted to official website includes the School’s request for a $1 rent rate – a position that we maintain is defensible given the City’s current and past precedent with similarly situated organizations within the City’s jurisdiction, as well as its inability to hide behind the shield alleged “gift of public funds” due to its status as a charter city. However, the Statement – and all other public-facing City publications – conveniently omits the material fact the School has also repeatedly proposed a land lease (“Land Lease Proposal”).

For example, during the public Lease Realignment presentation on November 12, 2018 prior to the City Council Closed Session, the School discussed a $136,000 Land Lease Proposal. An increased $147,000 Land Lease Proposal has also been discussed in meetings with the City Staff and presented formally in a letter to the City Manager on July 19, 2019, which stated:

Winston is proposing: (i) redevelopment of the School Site with a modern school and related amenities that integrate into the surrounding neighborhood; and

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2 See Exhibit A.
5 *Nissho-Iwai Co. v. Occidental Crude Sales, Inc.*, 729 F.2d 1530, 1540 (5th Cir. 1984) (interpreting California law).
6 See Exhibit B.
(ii) amendment of the lease agreement dated July 1, 2008 by and between Winston and the City (“Lease”) to a $147,000 land lease.

The School’s Land Lease Proposals are in keeping with the original intent of the parties to engage in future Lease negotiations related to the required redevelopment of the School site, as demonstrated in Section 2(B)(2) of the February 21, 2006 Memorandum of Understanding (“MOU”) between the City and School. 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.

3. The City Rejected the School’s Public Comments Resulting in Brown Act and Due Process Violations.

Several of the City Council’s actions violate the language and the intent of the Brown Act. Specifically, the City hindered the School’s ability to submit permitted public comment when it wholly rejected documents transmitted by the School in advance of a publicly noticed City Council meeting. The rejected documents directly addressed items on the agenda and related to the School’s fence application (Agenda Item 9), by providing updated drawings and explaining the School’s position that the fence is intended to remediate an unchecked public health and safety emergency. This City action resulted in a direct violation of Section 54954.3(a) of the Government Code and is an abuse of the School’s due process rights.


Per the Section 18 of the Lease, the School is not required to indemnify the City for claims related to property damage or personal injury that result from City’s negligence or misconduct. Here, delaying the consideration of the fence application and creating administrative hurdles in light of the mounting evidence of property damage or injury, actual notice of which was provided to the City, equates to the level of negligence and misconduct that voids the School’s indemnification requirements. Therefore, the City shall be solely responsible for its costs incurred in the defense or settlement of any claims that occur during the period of delay, and any restitution/damages determined to be due.

5. The City’s Actions Demonstrate Bias Against the School and Potential Future Actions.

City councilmembers wear multiple hats. It is commonly understood that they function as local legislators. But sometimes they act in a quasi-adjudicatory capacity similar to judges.7 Hearing and deciding development applications is one of the times that a city council acts in a quasi-adjudicatory capacity.8 When functioning in such an adjudicatory capacity, the City Council

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8 Id.
must be “neutral and unbiased.”9 ” Allowing a biased decision maker to participate in the
decision is enough to invalidate the decision.10 As it relates to dealings with the School, there is
a concern a bias has developed that will impact future discretionary applications – specifically,
those related to the upcoming School site redevelopment applications.

For example, the School is concerned the following actions are indicative already established
bias or future bias:11

- The City’s interference with the School’s ability to provide public testimony during
  publicly noticed hearings despite the fact other individuals were permitted to submit
  such testimony.

- Councilmembers Worden and Parks have both made inaccurate and defamatory
  remarks about the School’s position or actions without providing the School the
  opportunity to respond, including the following:

  1. Councilmember Worden: “Winston asserted the position that the Indemnity
     provisions of the lease agreement we invalidated if the City didn’t circumvent the
     normal process of sign off and ADR instead process them on some kind of
     expedited emergency basis - that I don’t think had any application.”

  2. Councilmember Worden: “Letter that was from Dr. Harris that the City had no
     right to sign off, is not right. I am just frustrated and ask Winston to be more
     careful with the representations going forward.”

  3. Councilmember Parks: “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, even now they’re
     going to have a few months before that fence is in place. So what is the plan
     here? All of your temporary cones are half way down. There is no obstruction on
     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.

Given the tone of these comments and the real and reputational damage created by these
uncorroborated statements, the School believes it is necessary to provide direct rebuttals to the
Councilmembers’ remarks, respectively, as follows:

9 Id., quoting BreakZone Billiards v. City of Torrance (2000) 81 Cal.App.4th 1205, 1234; see also Asimow et al., Cal.
   Practice Guide: Administrative Law (The Rutter Group 2019) ¶ 3:426, at p. 3-70 [“A decisionmaker must be
   unbiased (meaning that the decisionmaker has no conflict of interest, has not prejudged the specific facts of the
   case, and is free of prejudice against or in favor of any party”). “

10 Woody’s, 233 Cal.App.4th at 1022.


The School was seeking to adhere to the normal permitting process, the City added an unprecedented pre-approval requirement – not required in the Lease – that delayed the permit by a month. The School attempted to convey the urgency of the matter multiple times and in multiple forms to the City, but was rebuffed and prohibited from moving forward with securing the School site.

2. As discussed in further detail below, the School acknowledges the City’s right, as the landlord, to sign permit applications. However, the Lease specifically obligates the City to sign permit applications for tenant improvements and entitlement, and does permit the Councilmembers discretion as one would anticipate when determining whether to approve the action for which the application is required.

3. The temporary orange fence and cones were put up by the City not by the School in its effort to limit public parking.

4. The School has not been abandoned, and we have been clear and consistent on this point. There is a staff person on site during the normal school day. However, these staff members (and neighbors) were being intimidated by other members of the public (unrelated to the School) and did not feel safe confronting them. As the School has previously committed, the installation of the fence will only take a few weeks. The presence of contractors on-site would have deterred trespassers and vandals.

6. **City Council Preapproval Prior to Permit Signing Was Improper.**

Over the past month, the City issued a letter enforcing redevelopment timelines which includes penalties for non-conformance. Concurrently, the City granted itself, in sole and unbridled discretion, the right to determine if the School had the right to apply for approvals to allow for improvements aimed at securing the site and delayed the application process by a month without providing the School any recourse. This arbitrary and capricious grant of power, eliminated the checks and balances built into the Lease by allowing the City to control whether the School is forced into a default of the Lease terms outside of its control with no available recourse or cure opportunity.

The Assistant City Manager confirmed during the June 2nd City Council Meeting that the School’s prior permit to add a “replacement” trailer did not require City Council approval. And to clarify, due to the apparent confusion, the trailer was new and not a replacement. When questioned about the lack of prior City Council approval, the Assistant City Manager responded that “we have a new City Manager and are looking at that with a fresh perspective.” This change in personnel does not constitute authority to override the conditions of the Lease.

7. **Notice of Required Tenant Improvements and Plans for Redevelopment.**

The School’s existing buildings, built in the 1940s, cannot meet the health & safety standards required to meet the State’s various regulatory agencies’ new requirements to address COVID-19 safety guidelines. For example, the rooms are not configured properly, the airflow is abysmal
and plumbing and electric systems are at capacity. In order to operate in full compliance of the law, upgrades are, understandably going to be required.

The COVID-19 pandemic has forced the School to accelerate its redevelopment timeline. And to accommodate this change in circumstances, instead of starting from scratch, the School plans to completely renovate four of its buildings within the existing framework as soon as possible. Until the renovations are complete, the School plans to offer blended on- and off-campus learning for the 2020-21 school year with plans to completely reopen for the 2021-22 school year.

In order to make the application as seamless as possible, the School has engaged architects and contractors with a long history of development in the City. With their experience and working knowledge of the City regulations, we hope to be able to effectively work with the City’s permitting staff to complete the improvements within the School’s fifteen (15) month deadline. As always, the School is engaging the community and we have no reason to believe this project will not follow the standard permit process.

8. **Conclusion.**

Please note, the School and this firm will be preparing a point-by-point rebuttal that includes additional misstatements and factual errors. In the meantime, based the inaccuracy of the statements made by the City and their defamatory nature, we respectfully request the City remove these from the City website and issue a retraction statement by end of business Tuesday, June 16, 2020.

Please do not hesitate to contact the undersigned if there are any questions or concerns with contents of this correspondence.

Sincerely,

Whitney A. Hodges
for SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

SMRH-4819-8797-8175.1
Enclosures

cc: Mayor Ellie Haviland
    Deputy Mayor Gassterland
    Councilmember David Druker
    Councilmember Sherryll Parks
    Council Dwight Worden
    CJ Johnson, City Manager
    Kristen Crane, Assistant City Manager
    Dr. Dena Harris, Head of School
    Laura Cunitz, Winston School Board President