

Memorandum of Understanding between the
City of Del Mar and The Winston School

This Memorandum of Understanding ("Agreement") is made and entered into as of February 21, 2006 by and between the City of Del Mar ("City") and The Winston School ("Winston School") of San Diego, California.

WHEREAS, the City desires to acquire from the Del Mar Union School District that certain real property commonly known as the Del Mar Shores Property, as more particularly described on Exhibit "A" attached hereto ("Property"); and

WHEREAS, the Property is improved with four buildings that are presently used by the Winston School for class, office and auditorium purposes ("Buildings") in the operation of its school for children with learning differences pursuant to the terms of a lease between the Winston School and the Del Mar Union School District ("DMUSD Lease"); and

WHEREAS, the City does not want the Buildings or to bear the cost of their removal; and

WHEREAS, the Winston School desires a long term lease in order to continue the operation of its school on the Property and is willing to acquire the Buildings for a nominal price; and

WHEREAS, the Winston School agrees that it is not, and will not be, a competitor for purchase of the Property, and further agrees, at no cost to the City, to support City's efforts to acquire the Property in exchange for the City's agreement to enter into a lease as hereinafter provided; and

WHEREAS, in order to generate the purchase funds necessary for the acquisition of the Property, the Parties shall individually and jointly seek donations from various individuals and organizations.

NOW, THEREFORE, in consideration of the mutual covenants and conditions herein contained, the Parties hereby agree as follows:

I. FUNDRAISING

A. Each Party shall expend reasonable efforts to secure the funds necessary for the City to acquire the Property within the time limits set forth in a purchase agreement between the City and the DMUSD.

1. It is anticipated that each party will provide fifty percent (50%) of the purchase price of the Property. However, in the event the best

efforts of the Winston School result in a contribution of less than fifty percent (50%), but more than thirty-five percent (35%), then it shall have satisfied its financing obligations hereunder.

2. In determining which portion of the funds raised are attributable to the Winston School's or to the City's contribution, the following shall apply:
 - a. Any donor may specify that his or her donation is to be designated exclusively for the Winston School or exclusively for the acquisition of Open Space/Park purposes and such designation shall apply for the purposes of determining the contribution of the Parties.
 - b. Provided, however, contributions from any individuals, groups or entities jointly approached by the Parties to support the acquisition of the Property shall be attributed 50-50 to the Parties.
 - c. Other than as provided in A.2.b., any donations that are not expressly designated for either purpose shall be credited 50-50.
3. All of the funds credited to the Winston School shall be applied as prepaid rent.

B. This Section I is a material term of this Agreement and time of performance is of the essence.

II. NEW LEASE

If the City is successful in acquiring the Property as contemplated herein, then the Parties will enter into a new lease that shall include the following provisions:

A. Premises

The Premises are described as a portion of the Property located at 215 Ninth Street, Del Mar, California 92014 (hereinafter "Premises"). The Premises shall include the areas delineated and described on Exhibit "B," attached hereto and incorporated herein by reference. This includes the non-exclusive use of the appurtenant parking lot and lawns. The use of the parking lot and lawns shall be shared with any other users of the Property by mutual agreement between the Parties. In the escrow of the Property, the Buildings will be conveyed to the Winston School for a nominal amount, not to exceed \$1,000.00, and in consideration of the terms, covenants and conditions herein contained.

B. Term

The term of the lease shall be 55 years unless terminated or modified as herein provided.

1. In the event that the Winston School fails to submit a complete development application to the City to replace the Buildings within ten (10) years from the commencement of the initial term of the lease and thereafter to diligently pursue approval of all required permits, then the City may, in its sole discretion, terminate or reduce the term of the lease to 39 years.
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. A new lease shall incorporate the rent provisions of Section II.C.1, set forth herein.
3. Should Winston School hold over after expiration of the lease, or any renewal thereof, such holding over shall be deemed a tenancy for month-to-month only.

C. Lease and other Payments

Winston School agrees to pay the following lease, utility, and other expenses to the City in monthly installments paid in advance:

1. The sum of \$197,245.39 per year, payable in monthly installments of \$16,437.12. Winston School agrees to an annual adjustment in rent based upon the Consumer Price Index (CPI), as published by the United States Department of Labor, Bureau of Labor Statistics, All Items, Los Angeles-Long Beach Area 1967=100 (CPI). This provision C.1. is based on the assumption that the start date for the new lease will be June 1, 2007 and all amounts shall be adjusted to that date without regard to the actual beginning of the Term of the Lease. No CPI adjustment shall be made during the period for which rent is prepaid.
2. The City shall attempt to separately meter the Premises for calculation of utility expenses. If Premises cannot be separately metered then Winston School shall pay all utility expenses in the following manner. All utility expenses shall be invoiced by the City on a monthly basis and paid by Winston School within ten (10) days of receipt of invoice. City agrees to make payments to utility companies for reasonable and necessary utility expenses incurred in connection with Winston School's operation upon leased Premises and will charge Winston School as set forth in this

section. Utility expenses include charges for water, sewer services, gas, electricity, lights, power, and refuse removal. Other commodities, conveniences or services used in or upon the leased Premises at any time during the term of this Agreement, including telephone charges, shall be paid by Winston School. Winston School shall pay fifty percent (50%) of the costs of water for the ballfield. The Parties agree to meet and confer regarding water or other utility expenses if and when off Premises improvements are made to the ballfield or other open space areas.

3. The full amount of any other taxes, assessments, obligations and penalties of any sort which may be levied against the City by any local, state or federal authority in connection with the use or occupancy of the Premises by Winston School or with this Memorandum of Understanding. Payment shall be due upon notice by City that payment is due. Any final adjustments to the payments shall be made after the close of each fiscal year.
4. If amounts levied and costs incurred under paragraph 3 apply in part to portions of the School other than the Premises, Winston School shall pay only in proportion to the ratio which the Premises bear to the total area subject to the levies and costs.

D. Restrictions on Use

1. Winston School agrees to use the Premises exclusively for educational, development and such other activities and events that are related to or on behalf of the School. The Winston School shall be responsible for obtaining and complying with all zoning and use permits, requirements and/or variances insofar as they relate to Winston School's use of the Premises. The City or community organizations that may use the Premises shall be responsible for obtaining any required permits or other permissions relating to their activity on the Premises.
2. Notwithstanding the foregoing, and subject to written agreement of the Parties, City shall have limited rights to use the facilities on the leased Premises for community needs and events. Such rights shall be subject to availability, and any expenses attributable to such use shall be paid by the City who shall indemnify the Winston School against any claims for loss, damage or injury arising out of the activities relating to such use. In the event that the Parties are unable to agree upon the nature and/or extent of such shared use then they will submit to mediation for a determination of the reasonableness of such use.

E. Maintenance and Repairs

1. Winston School shall be expected to make improvements and additions to the Premises. Any improvements, including demolition, shall be made only upon the prior written approval of the City, and solely at the expense of Winston School.
2. Upon the termination of the lease, and at the request of the City, the Buildings and any alterations or modifications or new buildings constructed by Winston School shall be removed and the grounds restored to a graded lot. Buildings or other structures may remain only at City's written request and with Winston School's approval. Such removal shall be completed within one year after the termination of the lease.
3. Winston School shall keep said Premises in good, clean and reasonable condition, including but not limited to the Buildings, grounds and landscaping, during the term of this Agreement. Winston School shall be solely responsible for all repairs and maintenance of the Premises, including but not limited to repairing leaking roofing, repaving worn roadways, and irrigation repair.
4. Winston School shall be responsible for all other maintenance and for all custodial services. Any major maintenance by Winston School, including but not limited to repainting exterior surfaces, shall be with the prior written approval of the City and shall be solely at the expense of Winston School. In the event Winston School fails to perform maintenance hereunder, City may so notify Winston School in writing and give Winston School twenty (20) days to perform. Failure of Winston School to perform maintenance by the end of said twenty (20) days will authorize the City to cause the repairs to be made at the expense of the Winston School. Expenses for the repairs shall be paid to the City by the Winston School within twenty (20) days after delivery to the Winston School of an invoice for such maintenance or by offsetting the expenses of such repairs from the prepaid rent. Failure to perform maintenance within a reasonable time, or to pay for it as required, may be grounds for termination of the Lease, as provided in Section II (I) herein.
5. City or its agents shall have the right to enter and inspect the Premises, including the Buildings, at any time during the term of this Agreement. If any repairs are needed, City shall provide notice in writing to Winston School and request that such repairs be completed within a reasonable time. Failure of Winston School to

perform repairs by the end of thirty (30) days will authorize the City to cause the repairs to be made at the expense of the Winston School, which expense shall be paid to the City within thirty (30) days after delivery to the Winston School of an invoice for such repair or by offsetting the expenses of such repairs from the prepaid rent. Failure to complete requested repairs within a reasonable time, or to pay for the repairs as required, may be grounds for termination of the Lease, as provided in Section II (I) herein.

F. Improvements

City shall cooperate with Winston School if Winston School desires to make improvements and/or additions to the Premises. The City shall meet and confer to allow Winston School to occupy other portions of the Property, not part of the Premises, while improvements or additions are being constructed. The Parties further agree to meet and confer to address parking requirements, if needed, for improvements.

G. Insurance and Indemnification

1. Winston School shall carry liability insurance of not less than five million dollars (\$5,000,000) per occurrence for bodily injury and property damage to protect Winston School and City. City shall be named as an additional insured by endorsement to the policy by Winston School, who shall furnish City with a certificate showing that the full insurance is in force, and that City is named as an additional insured. These documents shall be filed with the business office of City before use is made of the Premises. Winston School will provide at least thirty (30) days written notice of cancellation of its liability insurance. Failure to provide the City with evidence of such insurance and to keep such insurance effective shall be grounds for termination under Section II (I).
2. Winston School agrees to indemnify and hold City harmless from any and all claims, demands, damages, actions and any and all other liability including costs and attorneys' fees arising in whole or in part out of the acts or omissions of Winston School, its officers, agents, employees, visitors or students, or out of the activities, treatment or services provided, administered or permitted by Winston School, or out of any other use of the Premises by Winston School, whether authorized by City or not. City shall be liable to Winston School only for damage resulting from the acts or omissions of City or its authorized representatives, and City shall hold Winston School harmless for all damage arising out of any such acts or omissions.

3. Winston School shall be liable to City for any and all damage, including but not limited to damage to the Property of City resulting from the use of said Premises by Winston School, its officers, agents, employees, visitors, or students.

H. General Provisions

Winston School shall:

1. Accept the Premises in an "as-is" condition and be responsible for seismic retrofit, ADA, Title 24 or any other accessibility regulations, including any other state or federal requirements.
2. Be responsible for any activities and costs related to asbestos removal from the Buildings.
3. Not assign, transfer, sublease or license the Premises or the use thereof to any third party without the prior written consent of the City. Any attempted assignment, transfer, sublease or license without such consent shall be null and void. City shall not unreasonably withhold consent for a sublease or similar assignment.

I. Default, Notice, Termination

If the Winston School defaults in the payment of rent or additional rent, or defaults in the performance of any of the terms, covenants, or conditions of this lease, or violates any applicable laws, ordinances or regulations, City shall give to the Winston School written notice of such default. If the Winston School does not cure any rent or additional rent default within 15 days, or other default within 30 days, after the giving of such notice (or, if such other default is of such nature that it cannot be completely cured within such 30 days, if the Winston School does not commence such curing within such 30 days and thereafter proceed with reasonable diligence and in good faith to cure such default), then City may terminate this lease. Termination shall occur after not less than seven (7) days' written notice to the Winston School, and on the date specified in said notice the term of this lease shall terminate, and the Winston School shall quit and surrender the Premises to the City, however, the Winston School shall remain liable for any damages arising out of its failure to perform any terms, covenants or conditions of the lease.

III. INTERPRETATION

If any action at law or in equity is necessary to enforce or interpret the terms of this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees, costs and the necessary disbursements in addition to any other relief to which such party may

be entitled. As used in this provision, a party shall be deemed to prevail only if it recovers an amount in excess of an offer to compromise filed in the action pursuant to the provisions of Section 998 of the Code of Civil Procedure. Any award of attorneys' fees pursuant to this provision shall be based only on the amount recovered in excess of the offer to compromise.

IV. REPRESENTATION

Winston School warrants that it is a private tax exempt entity fully authorized and licensed to establish and maintain educational programs and services as defined by law.

V. INDEPENDENT PARTIES

City agrees that its officers, agents, and employees are not employees of the Winston School. Winston School agrees that its officers, agents, and employees are not employees of the City.

VI. COMMUNICATIONS

Any communication under this lease to City shall be addressed to Lauraine Brekke-Esparza, City Manager, City of Del Mar 1050 Camino del Mar, Del Mar, California 92014. Any communication to Winston School shall be directed to Michael Peterson, Headmaster, the Winston School, 215 Ninth Street, Del Mar, California 92014.

VII. AMENDMENTS

This Agreement may be amended in writing and the amendment must be approved by the City Council and the Winston School's Board of Directors.

VIII. ENTIRE MEMORANDUM OF UNDERSTANDING

This Agreement constitutes the entire agreement between the parties for the term specified herein. No other written or oral understanding or representation shall have any force or effect unless reduced to writing and signed by the parties hereto or their authorized representatives.

IX. TERMINATION


- A. The City may terminate this Agreement if:
 - 1. The Property cannot be acquired upon terms and conditions acceptable to the City.

2. The amount of funds raised within the time limit established in the purchase agreement for the Property is insufficient to carry out the intention of the Parties to this Agreement.
3. The Winston School fails to contribute at least thirty five percent (35%) of the purchase price of the Property to the City. Termination of this Agreement is the sole remedy for breach of this subsection.


The City's option to terminate must be exercised prior to the purchase of the Property.

B. The Winston School may terminate or require renegotiation of this Agreement if the purchase of the Property requires Winston to contribute more than 50% of the purchase price

IN WITNESS WHEREOF, the parties hereto have executed 2 copies of this Agreement as of the day and year first herein above written by their respective officer thereunto duly authorized.



Crystal Crawford, Mayor
City of Del Mar




Sarita Eastman, M.D.
President, Board of Trustees
The Winston School

DATE: Feb. 20, 2006

DATE: 2-21-06

Approved as to form and content:



TAMARA A. SMITH
City Attorney, Del Mar

TRICIA GREENLEE
Hecht, Solberg, Robinson,
Goldberg & Bagley, LLP

EXHIBIT "A"

Legal Description of Property to be provided upon acquisition of
Property from the Del Mar Union School District

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