

THE FACTS ON WINSTON AND THE CITY OF DEL MAR

INTRODUCTION.

This statement was prepared by councilmembers Dwight Worden and Sherryl Parks, the two Del Mar council liaisons on Winston School issues. It sets forth the facts about the City's purchase of the Shores Property for a community park. It clarifies the facts about the Winston lease and clears up some of the many misstatements about these matters circulating in the community. This statement is based on original source documents and interviews with key parties who participated in the proceedings.

THE SHORES ACQUISITION.

The Early Days. The Shores property was purchased by the Del Mar Union School District (DMUSD) in 1945 for \$10. A \$55,000 school bond was then passed to build three school buildings on site and the school opened in 1947. In 1949 a \$60,000 school bond was passed for expansion and a larger school opened in 1951.¹ The property is configured today pretty much as it was then. It was generally open to the public and used by the community as a baseball field and for other recreational purposes in addition to serving as an elementary school.

DMUSD closes the Shores School. In or about the 1970's the DMUSD closed the Shores School as its student population base moved east. The school site was then used by Mira Costa College for a time. In 1988 the Winston School was founded and has been on the site for many years.

DMUSD sells the Shores Property to the City.

- a. **DMUSD wanted \$22 million for the property.** In the mid 2000's the DMUSD sought to sell the Shores site as "surplus property." It commissioned an appraisal and was planning to sell to developers on the open market at \$22 million based on its appraised value for commercial or housing development.
- b. **The Del Mar community and Winston want to preserve the land for park and school use.** The Shores property is beautiful, with an impressive ocean view and the only active playing fields in town. The Del Mar community did not want to see the property developed. The community much preferred preserving the property for park and open space use. Winston was concerned about its future if the property were sold and was hoping for the right to stay on site by long-term lease. This brought the City, Winston, and the community together with a common goal: to see if this beautiful property could be preserved as park and open space with Winston getting a long-term lease.

¹ From the DMUSD website.

c. **The City's right of first refusal dramatically lowers the price.** The City notified DMUSD of the City's right of first refusal under state law to buy the property for park and open space purposes. The City obtained its own appraisal based on the Public Facilities (PF) zoning which did not allow commercial or housing development. After negotiations the City secured the right to buy the property for the greatly reduced price of \$8.5 million. This opportunity to acquire at a dramatically lower price was unique to the City and was not available to Winston. Here is an outline of how the purchase occurred:

- The Shores site was originally sold to the DMUSD in 1945 by the Kerchoff Co. for \$10, with a deed restriction limiting the property to school use.
- In the mid 2000's The DMUSD declared the Shores site to be surplus property and proposed to sell it to developers for commercial or housing development at its appraised value of \$22 million.
- DMUSD filed a quiet title action to try and remove the deed restriction limiting the property to school use. Elsie Kerchoff intervened in the case and objected, but was found not to have standing.
- The DMUSD's proposal to sell the property for development was controversial in the community. A citizen PR campaign commenced around this issue and new DMUSD Board members were elected.
- The city had its own appraisal prepared under then current zoning that did not allow commercial or residential development.
- After negotiations the City secured the right from the new DMUSD Board to buy the property at the greatly reduced price of \$8.5 million.
- Because DMUSD still thought the property was worth \$22 million and suspected the City might rezone and resell the property at profit, the purchase agreement contained a clause that if the property were rezoned by the city and sold, 75% of any excess over \$8.5 million would go to DMUSD.
- The City took this \$8.5 million purchase opportunity to Winston and the community noting the City did not have \$8.5 million of general fund money to buy the property. Citizens formed the "Friends of the Park" (FOP) organization and promised to raise the full amount in 12 months. Winston also agreed to engage in fundraising for the acquisition in exchange for a long-term 55 year lease.
- After a few months, FOP returned to the City reporting difficulty raising funds because of community concerns the city might move the fire station and city hall to the site. In response, the City Council adopted a resolution confirming no intention to put a fire station or city hall on the site.²

² City of Del Mar Resolution 2007-35 dated August 6, 2007. This Resolution was honored by the City even though by law it was non-binding.

- As the deadline of February 28, 2008 to close the deal approached Winston and FOP reported they were only able to raise \$5.3 million of the \$8.5 million needed. Winston raised and contributed \$2,954,023.93, about 1/3 of the total purchase price. Winston has been recouping these contributions as prepaid rent, meaning no new money rent is due until 2023.
- Given the fundraising shortfall, the City signed a short-term note with DMUSD to keep the purchase alive and ultimately sold its Balboa Reservoir site to cover the shortfall and close the purchase deal.

WINSTON'S LEASE

The City takes over the DMUSD lease without changing the terms to Winston. At the time the City purchased the Shores property in 2008 Winston had been operating its school onsite for many years. At the time of City purchase Winston was onsite under a 2004 lease from DMUSD which was to end in 2008. Winston, understandably, was concerned about its future beyond lease expiration in 2008. The City as new owner took over the Winston lease from DMUSD pursuant to an assignment of lease dated May 15, 2008 and Winston was allowed to stay on site with no changes until a new 55 year long-term lease was agreed to by the City and Winston.

The City and Winston commit to a 55 year Winston lease. As part of the purchase negotiations for the property, and before the new Winston lease was signed in 2010, the City and Winston entered an MOU dated February 21, 2006. That MOU promised Winston a long-term 55 year lease allowing it to stay on the property in exchange for Winston's fund raising efforts and contributions to the purchase price. That MOU set out detailed and specific terms to be included in the new lease, including that the lease would be for 55 years, and that the rent would be \$197,245 per year, the same amount Winston had been paying to DMUSD. This commitment to a 55 year lease for Winston is also referenced in the City's 2007 Resolution 2007-35.

The agreement for a 55 year Winston lease was at the heart of the relationship between the City and Winston during the purchase negotiations and fundraising period before a new lease could be signed. By committing in advance to a 55 year Winston lease the City secured Winston's commitment to proceed with fundraising efforts and contributions to the purchase price for the property. In return, Winston was assured that it could undertake these efforts in reliance on the promise of a 55 year lease.

A read through of the documents makes clear that this early commitment was important and honored on both sides. In 2010 it was brought to completion when the new 55 year Winston lease was signed by the parties. Nothing in any of this was unclear, unfair, the result of undue pressure, or objected to by the City or Winston.

A New lease is signed between the City and Winston. As promised, a new 55 year ground lease in favor of Winston was signed in 2010. It honored the commitment to a long-term 55

year lease for Winston and contained all the specified lease provisions that were called for by the prior MOUs. The new lease was made retroactive to July 2008, ending in 2063. Among other things, the lease is clear that it supersedes and replaces all prior “offers, Memoranda of Understandings, negotiations, and discussions, written or oral...” Lease Section 34. This is important. It confirms the current relationship between Winston and the City is governed exclusively by that lease itself.

Winston’s rent stays as it was and Winston gets other benefits. The rent as set by the DMUSD-Winston lease dating to 2004 stayed the same in the new lease--\$197,245 per year--except that the new lease gave Winston rent credits for its contributions to the purchase so that Winston will not pay any new rent money until 2023. The new lease also suspended the CPI rent adjustments through the prepaid rent period, significantly benefiting Winston. As part of the deal Winston also acquired title to the school buildings it was using at a price of \$1. All of this was discussed in detail, agreed to by Winston, and confirmed in the lease.

Winston’s obligation to rebuild its school. The lease requires Winston to rebuild a new school over the long-term of its lease. It also requires Winston to scrape and return the site to the City in a clean and graded condition at the end of the 55 year lease in 2063. Milestones are set in the lease to assure Winston’s progress over time. Again, all this was discussed in detail, voluntarily agreed to by Winston, and set out in clear language in the lease.

No complaints from Winston about the rent or the lease for the first ten years. For ten years following the purchase there were no complaints from Winston that the lease was unfair, that the rent was too high, that Winston would have difficulty refinancing, that the milestones were unreasonable, or that the lease was in need of any change. As its first milestone deadline of December 2019 approached (to file complete redevelopment plans with the City), for the first time Winston contended in June 2018, among other demands, that its rent was too high and needed to be reduced from \$197,245 per year to \$1 per year because the lease was unfair. Thus, the discussions about the lease began in mid-2018.

Winston demands dramatic changes in the lease. Winston started the negotiation process by insisting on significant lease revisions:

- Rent reduction from \$197,245 to \$1 per year
- Doubling the 55 year lease term to 99 years
- Two additional lease extension options of 25 years each in favor of Winston potentially extending the lease to a total of 149 years
- Extending the upcoming milestone due date of December 31, 2019 for Winston’s submittal of complete redevelopment plans

In every respect the City responded promptly and respectfully to Winston’s requests, including offering suggestions and counterproposals as to how the rent might be lowered. The city acknowledged that Winston provided a valuable service to its students and was an

important part of the community. The City also noted, based on the advice of counsel, that it could not lower the rent from \$197,245 to \$1 without offsetting value to the community to avoid an unconstitutional gift of public funds.

The City proposed a number of strategies to lower Winston's rent or costs, including reducing the size of Winston's footprint, City joint use of Winston facilities, and potential construction of a few housing units for teachers or school staff on the Winston campus to the benefit of Winston for which the City could get housing credit. The City also offered an alternative that would relieve Winston's need to rebuild its school saving Winston millions of dollars. After some back and forth Winston rejected all the City suggestions and indicated it would proceed under the existing lease. This, for a time, halted discussions.

Discussions restart; Winston commits to an appraisal. Discussions were restarted in fall 2019. Winston's position remained unchanged: the lease was unfair and major rent reductions were required. After discussion, Winston agreed to obtain an appraisal of the value of its leasehold and to share the appraisal with the city. Winston was sure an appraisal would prove its point that the rent was too high. Winston agreed to provide the appraisal by the end of 2019. In exchange the City committed to extend Winston's upcoming December 2019 milestone by four months so the appraisal could be received and evaluated.

The City was receptive to an appraisal. The City was receptive to reviewing an independent appraisal to bring some objectivity to the discussion about the rent. The City also requested an opportunity to share with Winston the history of the purchase of the Shores Property, the relationship with Friends of the Parks, how Winston's lease was negotiated, and the fundraising, all as summarized above. This seemed necessary as the Winston team doing the 2019 negotiating was not present when these earlier events occurred and they were under serious misunderstandings as to the history. Unfortunately, although it offered to do so confidentially as part of the discussions, the City never got the opportunity to present the relevant history.

The appraisal is completed; Winston refuses to share it; lease negotiations end. While Winston did get the appraisal discussed above, Winston declined to share it with the City. The reasonable inference is that the appraisal did not support Winston's position that its rent was too high. Accordingly, the City gave notice that the negotiation period had ended and that Winston's extended milestone date based on the agreed upon four month extension was now October 2, 2020, with the existing lease remaining in effect.

The City has spent several years in good faith efforts to find common ground with Winston. 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.

Park planning on hold. It was, and still is, important to the City that it be able to proceed with its Shores Park plans. These park planning efforts, including meetings of the Shores Park Advisory Committee, were put on hold while lease negotiations proceeded. This delay deferred the community benefits promised to Del Mar residents and donors.

The City's planning for Shores Park started in June 2014. The community, including Winston, was engaged in the process. Consultants were hired, an advisory committee was appointed, stakeholders were interviewed, a community survey was undertaken, workshops held, and things were well under way by 2015-16, all paid for by the City.

In 2017 the City and Winston entered an MOU to explore opportunities for joint use planning for the site. The idea was to explore shared parking, shared access, and other potential shared uses. The City paid for this process, including consultant expenses. The parties failed to reach agreement and by letter dated May 13, 2019 it was confirmed that the city and Winston would each proceed independently to plan their respective sites.

Sixty five percent of total donations for the Shores property purchase came from the City and non-Winston donors. These donors wanted a park as quickly as possible. While Winston's contributions of prepaid rent were important to the purchase they reflect only about a third of the total needed. It is understandable that the City's primary objective is to plan and deliver the great community park that was promised. The City's is working to further this objective while accommodating Winston's lease rights, cooperating with Winston where possible, and being sensitive to Winston's needs.

CORRECTING THE RECORD.

There are many inaccurate narratives circulating in the Del Mar community about the Winston School, the acquisition of the Shores Property, and Winston's lease from the City. We hope that by carefully and objectively laying out the history above, we can clarify and correct the record on at least some of these matters. We now correct some of the specific and most egregious misrepresentations circulated in the community:

CONTENTION: The City took advantage of the Winston School twelve years ago by imposing an unfair lease on the school. This narrative has been broadly promulgated by Winston and/or its supporters.

FACTS: Winston was advised throughout lease negotiations by its own attorneys and financial advisers. Winston's Board members and Superintendent/Headmaster were knowledgeable, well advised, and heavily involved. The lease was the result of agreement, not pressure or unfairness, and was voluntarily negotiated and accepted by Winston. For the next ten years Winston raised no claim the lease was unfair. In fact the lease and rent were fair and Winston received substantial benefits from the lease including but not limited to:

- The right to stay on site long-term (55 years)

- No rent increase--the rent remained the same as it had been with DMUSD at \$197,245 per year.
- Winston acquired valuable buildings at nominal cost (\$1) as part of the transaction. Winston knew the value and condition of these buildings as Winston had been using them for years.
- Winston's joint use rights to the play field, south parking lot, and ingress/egress were confirmed.
- Winston was given rent credit for its fundraising contributions to the Shores acquisition thereby recouping all the funds its donors contributed and avoiding new money rent payments until 2023.
- Winston received a valuable CPI waiver during the prepaid rent period.

d. **CONTENTION: Winston may have no choice but to double the size of its school to generate income to pay rent if the rent is not lowered.** This narrative has been stated by Winston and/or its supporters and widely repeated in the community.

FACTS: Winston does not have a guaranteed right to enlarge its school. Winston does have the right to submit a development application and to engage the Del Mar development review process. As with any development proposal the Del Mar process is rigorous. It involves environmental review, a Community Participation Process (CPP) to engage neighbors, design review at the DRB, and likely Planning Commission and City Council approvals, depending on the type of application filed and whether appeals are filed.

The Del Mar process is designed to assure neighborhood compatibility and conformance to the Del Mar Community Plan and zoning. The Winston lease does not exempt Winston from any of this, nor does it assure an outcome. So far, no application has been processed through the City to completion by Winston.

Bottom line: Any Winston development application to the City will only be approved if it is consistent with the lease, and with the Del Mar Community Plan and zoning, including design review and neighborhood compatibility. The specter that a much larger school will result with traffic and other detriments to the neighbors and community if Winston's rent is not reduced should be seen for what it is: a political effort to generate community and neighborhood support for a rent reduction that could not otherwise be justified.

- e. **CONTENTION: The city “... proposed that Winston develop multi-family housing on the Shores site.”** This contention was raised by many, including by Winston and/or its supporters, and in a letter to the editor signed by four members of the community.³

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 publically and specifically rejected that option. Nor did the City propose converting the Winston site to housing.

This too is a specter without factual basis used to generate support for lowering Winston’s rent regardless of the lack of real justification for lowering the rent.

- f. **CONTENTION: Deed restrictions require that a school be on the Shores property.** This contention has been raised by many, including prominent Winston supporters.

FACTS: While there once was such a deed restriction it is no longer in effect having been invalidated by state law. See, Cal. Civil Code Section 885.010 et seq. Uses for the Shores property are currently governed by its Public Facilities zoning designation and by the terms of the Winston lease. Winston is allowed to have a school on site by its lease and by the PF zoning, but there is no requirement that a school be on site.

- g. **CONTENTION: Winston and its donors contributed to the Shores acquisition. Promises made to donors are being violated.** This narrative has been promulgated by Winston and/or its supporters.

FACTS: Winston and its supporters did not make any “donations” to the Shores purchase. Rather, they contributed money as pre-paid rent to be fully recouped by Winston. In 2006 the City and Winston signed an MOU about Winston’s future on the Shores site committing that Winston would get a long-term 55 year lease as part of the city purchase at the same rent it had been paying DMUSD. That commitment was reiterated in a 2007 MOU, and was fully honored in Winston’s 55 year lease signed in 2010. See, lease section 34. Winston got the long-term lease it bargained for at the same rent it had been paying and the City violated no promises or commitments.

³ Letter to the Editor, Del Mar Times June 6, 2019 signed by Laura DeMarco, Adam Cherry, Carl Hilliard, and Kim Fletcher

- h. **CONTENTION: The City made misrepresentations to donors and may be liable for donor fraud.** This specter has been raised by several Winston supporters.

FACTS: The Shores Park fundraising was conducted by FOP and Winston. The city is aware, anecdotally, that private citizens engaged in fundraising in the community, including for Winston, may have made unauthorized representations. As fiscal sponsor for the fund raising campaign these matters fall to Winston not the City.

- i. **CONTENTION: The city should reduce Winston’s rent to support Winston School because it is an important part of the community and has an excellent educational program.** This theme has been promulgated by Winston and/or its supporters.

FACTS: School operation and financing is a Winston function, not a City function. The City agrees that Winston’s private school is a valued part of the community and that it has an excellent educational program. The City notes, however, that Winston primarily serves out of town children and school operations are not a part of the City’s mission.

The City acknowledges and appreciates Winston’s help in fund raising for the Shores property acquisition. The City does not, however, have the legal authority to reduce Winston’s rent to \$1 per year or to otherwise donate taxpayer funds to a private school. What Winston has asked for would transfer millions of dollars of money over the life of the lease from Del Mar taxpayers to Winston’s private school. This would be an unconstitutional gift of public funds. City suggestions identifying strategies to provide offsetting community value to avoid this problem were all rejected by Winston.

COMMENT

This has been a difficult process for both sides. The City has tried, at every step, to find ways to accommodate Winston. Winston’s proposals to rewrite the lease were taken seriously by the City, studied in detail, treated respectfully, and in every case responded to promptly. Some Winston requests were reported back to them as acceptable to the city. As to others, the City explained what modifications could make them acceptable.

Winston, however, declined to budge. It simply insisted on a substantial rent reduction without any factual basis in support. Winston declined to share the appraisal it was sure would back up its position, and Winston presented no other evidence as to why its rent was unreasonable. As the custodians of public taxpayer monies restricted to City uses, Del Mar cannot transfer funds to Winston as requested. This is true regardless of how worthwhile Winston’s private activity might be.

Out of respect for the confidentiality of discussions, details are not reported here, but the written record and comments in the public record support the City position and actions on these matters.