Craig A. Sherman
A Professional Law Corporation
1901 FIRST AVENUE, SUITE 219
SAN DIEGO, CA 92101

TELEPHONE
(619) 702-7892

FACSIMILE
(619) 702-9291

December 9, 2015

Via Email
dlindholm@mtsac.edu

Denise Lindholm, Executive Assistant
Mt. San Antonio College Board of Trustees
MT. SAN ANTONIO COMMUNITY COLLEGE DISTRICT

Re: December 9, 2015 Meeting of the Board of Trustees - Consent Item No. 5
Lease/Leaseback Construction – Final Reconciliation and Notice of Completion - Parking Structure Phase 1

Executive Assistant Lindholm:

Please make this comment letter available to the members of the Mt. San Antonio College Board of Trustees ("the Board") prior to the December 9, 2015 Board Meeting.

To the Mt. San Antonio College Board of Trustees and President/CEO Scroggins:

This comment letter is submitted to you on behalf of the organization United Walnut Taxpayers ("United Walnut"), which is currently engaged in litigation against the Mt. San Antonio Community College District and William Scroggins, in his official capacity as President and CEO ("Mt. SAC").

1. This Proposed Official Action Taken to Approve Measure RR Funds Payment to Tilden-Coil Arising Incurred as a Result of the Parking Structure Project is in Contempt of Judge Lavin's Preliminary Injunction Order

Any action by the Mt. San Antonio Board of Trustees ("the Board") to approve Consent Item #5 ("Item #5") for the regular board meeting of Wednesday December 9, 2015 will be in contempt of the Los Angeles Superior Court's May 13, 2015 Preliminary Injunction Order rendered by The Honorable Luis Lavin. Attached hereto as Exhibit A is a true and correct copy of the Preliminary Injunction Order rendered on 5/13/15 in Case No. BC576587 (hereafter, "PI Order").

The PI Order specifically enjoined Mt. SAC, including the Board, from "spending any Measure RR funds on any aspect of this project." (PI Order at p. 9.) Approval of a payment to Tilden-Coil – stated in the staff report to be made from Measure RR funds - flies in the face and is a direct violation of the PI Order should Item #5 be approved. Should the Board explicitly violate the PI Order, United Walnut intends to immediately bring the matter to the attention of the

Superior Court to hold Mt. SAC, and its advising attorneys, in contempt of court and seek all available sanctions for the Board's blatant action. (*See* Staff Report for Item #5 ("Staff Report") at p. 32 [Identifying the "Funding Source" as "Measure RR Bond Anticipated Note funds."].)

2. The Proposed Payment of $1,819,614.65 to Tilden Coil is Arbitrary and Capricious; The Manner of Calculation is Not Supportable by the Information Provided the Board

In addition to any contempt of court sanctions, Mt. SAC faces further liability from a "yes" vote on Item #5 because approval would be arbitrary and capricious, failing the substantial evidence test.[1] Therefore, approval of Item #5 will also result in further liability to Mt. SAC in the form of an amendment and/or supplement to the existing lawsuit against Mt. SAC (Case No. BC576587), or a new lawsuit to rescind the Board's anticipated and intended action on Item #5.

First, approval of Item #5 would make payments to Tilden-Coil under an illegal LLB contract. The payment of $1,819,614.65 to Tilden Coil based on (Staff Report at p. 32 [calculation].) As stated in Davis v. Fresno Unified Sch. Dist., (2015) 237 Cal. App. 4th 261, 285:

> the payment provisions, particularly the length of the period over which payments are made, are important in this context because the primary purpose of the legislation was to provide a source of financing for school construction and the payment provisions will show whether the project is being financed through the contractor or whether the school district is paying for the project by using funds from other source.
>
> (Id., emphasis added)

Second, the proposed approximately $1.8M payment for Phase I is legally unsupported because (1) mere days on job is not a measure under the subject (sham) lease-leaseback, and therefore (2) the payment can only be based on services and value actually provided. Here, there is no explanation, detail, information or analysis being presented to the Board or the public that indicates ANY *actual* cost or *value* of services to be paid for. Instead, the payment to be approved by the Board is based upon a rote calculation of taking the purported Guaranteed Maximum Price, and dividing it *pro-rata* over 35 days worked. (Staff Report at p. 32.)

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[1] Under the Substantial Evidence Test, the trial court is required to review the entire record and to consider all relevant evidence in the administrative record to determine whether there is substantial evidence to support an agency's findings, or whether an agency abused its discretion by failing to proceed in the manner required by law. (*See* Young v. Gannon (2002) 97 Cal.App.4th 209, 224-225)

Ex. "C" of the subject LLB contract is clear on the allowable and required terms for payment from Mt. SAC to Tilden-Coil:

> 3. Payment of Guaranteed Project Cost. District shall pay the Guaranteed Project Cost to Developer in the form of Tenant Improvement Payments and Lease Payments as indicated herein.
>
> 3.1. Tenant Improvement Payments. **Prior to the District's taking delivery or occupancy of the Project, the District shall pay to Developer Seven Million, Nine Hundred Eighty-seven Thousand, Five Hundred Sixteen Dollars ($7,987,516.00) ("Tenant Improvement Payment(s)"), based on the amount of Work performed** according to the Developer's Schedule of Values (Exhibit "G" to the Facilities Lease) and pursuant to the provisions in Exhibit "D" to the Facilities Lease.
>
> 3.2. Lease Payments. **After the Parties execute the Memorandum of Commencement Date, attached to the Facilities Lease as Exhibit "E," the District shall pay to Developer Four Hundred Twenty Thousand Three Hundred Ninety-six Dollars ($420,396.00) ("lease Payment(s)"), as indicated below.**
>
> 3.2.1. **The Lease Payments shall be consideration for the District's rental, use, and occupancy of the Project and the Project Site and shall be made in equal monthly installments for the duration of the Term.**
>
> (Ex. "C" to the LLB contract, attached hereto as Exhibit B at p.3, bold added.)

Pursuant to the terms of the above and subject LLB, as stated in Exhibit "C" thereto at paragraph 3.1, the $ 7,987,516.00 "Tenant Improvement Payment" is made when Mt. SAC can occupy, or make delivery of the Project. (Exhibit B at p. 3.) It is undisputed that the "Parking Structure Phase 1 Project" was never completed. Ergo, there is nothing to occupy or take delivery of and the Tenant Improvement Payment can therefore **not** be part of any calculation of payment to Tilden-Coil.

Additionally, the Memorandum of Commencement Date (Exhibit "E" to the LLB contract, attached hereto as Exhibit C), clearly states that it is "TO BE ENTERED INTO AFTER CONSTRUCTION IS COMPLETE TO COMMENCE THE LEASE TERM." (Id., capitalization in original.) Again, there is no dispute that construction of the Phase 1 Project was never completed, and therefore it calls into question whether Tilden-Coil can legally and contractually be entitled to any of the "Lease Payments." Ignoring these contract provisions, in order to pay Tilden-Coil in the manner and amounts proposed by the Board here, would also be an overpayment and gift of public funds.

These facts call into question whether Tilden-Coil should receive *any* further payment at all (assuming it was not from Measure RR funds). Recognizing Mt. SAC staff's analysis of the payment structure to Tilden-Coil, staff also miscalculates the proposed arbitrary contract-days pro rata amount based upon an incorrect guaranteed project cost. The Staff Report at page 31 states "The Parking Structure Phase 1 Project was approved under the Lease/Leaseback Construction Delivery Method on February 11, 2015, with a Guaranteed Maximum Price of $8,418,921.00." (Id.) This statement is not correct. Exhibit "C" to the LLB contract approved on February 11, 2015, under the heading "Guaranteed Project Cost" ("GPC"), states that "Pursuant to the Facilities Lease, Developer will cause the Project to be constructed for **Eight Million Four Hundred Seven Thousand Nine Hundred Twelve Dollars ($8,407,912.00),** ("Guaranteed Project Cost") (Exhibit B at ¶ 2, emphasis in original.)

The Staff Report at page 31 confirms "[n]o increase to the GMP was required during this project." (Id.) Therefore, the $8,418,921.00 figure cited by staff is false and the calculations for proposed payment to be approved and made by staff, under the heading "Analysis and Impact," is flawed and incorrect as they assume the GPC at $8,418,921.00 instead of the correct figure of $8,407,912.00. (Id.)

Even assuming Mt. SAC's some semblance of correctness or legally supportability of the calculation to pay Tilden-Coil, based on a percentage of Project for days-worked that should be credited back to the District by Tilden-Coil (78.36%), the Board will again be overpaying its preferred and specially situated and always selected contractor, Tilden-Coil, the sum of $11,009.00 should it approve the subject opposed Consent Item #5. Curiously and inconsistently, this sum of $11,009.00 equals exactly the "Preconstruction Fee Adjustment" listed in the Staff Report for the February 11, 2015. (Attached hereto as Exhibit D.) However, "Preconstruction Fee" was specifically excluded from the LLB contract approved on February 11, 2015 (*See* Exhibit D.)

Further still, the LLB contract called for a contingency in the amount of **Two Hundred Seventeen Thousand Seven Hundred Thirty-Three Dollars ($217,733.00)**, with any unused amount to be deducted from the GPC (*See* Exhibit B at p. 2, emphasis in original). There is no indication or information for staff to consider whether any part or the entire contingency was or should be considered, used, and implemented – and there is no apparent deduction of any contingency amount which would lower the overall GPC – that obviously affects the calculation in the proposed payment and Staff Report that might *lower* any amount otherwise payable to Tilden-Coil for a mere amount of days before the early stages of the Project were shut down by the Superior Court. Once again, paying Tilden-Coil a percentage of such whole project contingency, without ANY contingencies, explanations, disclosures, and actual cost overruns having been realized is arbitrary and capricious and amounts to an illegal gift of public funds.

Approval of Item #5 by this Board would be contempt for a current court order, open up Mt. SAC to further liability under current litigation and rises to a level of waste and misuse of public monies that also results in an illegal gift of public funds to Tilden-Coil. Every erroneous calculation and inflation in the Staff Report appears calculated to overstate, as much as possible, an authorized payment and pay Tilden-Coil without scrupulous review, adequate information, explanation, and, in light of the wrongdoings by Mt. SAC and its Measure RR project manager Tilden-Coil, reek of a continuing relationship of something way too cozy, nefarious, and stinky.

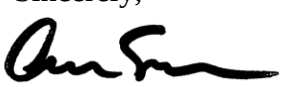
3. Approval of Item #5 would constitute an Illegal Gift

The Board has no power "to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation ...." (Calif. Const. Art. 16, section 6; *see also* County of Alameda v. Janssen (1940) 16 Cal.2d 276, 281 [questioned on other grounds by Cty. of L.A. v. Sec. First Nat'l Bank, (1948) 84 Cal.App.2d 575, 578; *accord* California Housing Finance Agency v. Elliot (1976) 17 Cal.3d 575; Paramount Unified School Dist. v. Teachers Assn. of Paramount (1994) 26 Cal.App.4th 1371.) Tilden-Coil has already been paid a total of $392,836.00 for "construction management" and other "services" related to the Parking Garage project. (Attached hereto as Exhibit E is a copy of a spreadsheet of construction management payments to Tilden-Coil on November 6, 2013 and January 30, 2015.) Those payments, added to the $1.8 million slated for approval under Item #5, will exceed $2 million in payments for a Parking Project that never happened.

While Tilden-Coil may or may not be entitled to *some* payment for value of partial work *actually performed*, those payments (1) may **not** come from Measure RR funds, and (2) must be supported by backup and findings of what it *actually did* (without nonexistent contingencies) such that it is not an unsupported action, arbitrarily and capriciously calculated, and constitute an illegal or unauthorized gift of public funds.

On behalf of United Walnut Taxpayers, it is urged that the Board vote "no" on Consent Item #5 and that this matter – for ANY possible payment of Measure RR funds to Tilden-Coil to finalize and resolve Parking Garage and Measure RR funds spending issues claim – be brought to the attention of the Superior Court via trial, hearing, or extraordinary motion to resolve the same.

Sincerely,



Craig A. Sherman
Attorney for United Walnut Taxpayers

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 05/13/15			DEPT. 86
HONORABLE LUIS A. LAVIN	JUDGE	N DIGIAMBATTISTA	DEPUTY CLERK
HONORABLE	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
NONE	Deputy Sheriff	NONE	Reporter

8:30 am	BC576587	Plaintiff Counsel	
	UNITED WALNUT TAXPAYERS VS MT SAN ANTONIO ETC, ET AL **CEQA** 170.6 O'DONNELL - PLAINTIFF R/T BS154389	Defendant Counsel	NO APPEARANCES

NATURE OF PROCEEDINGS:

ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION
RULING ON SUBMITTED MATTER

The court having taken the above matter under submission on May 7, 2015, now makes its ruling as follows:

Plaintiff United Walnut Taxpayers seeks to enjoin Defendants Mt. San Antonio Community College District and William Scroggins, in his official capacity as President and CEO of Mt. San Antonio Community College, from continuing with construction of a 2,000-plus parking space structure on the campus of Mt. San Antonio Community College and from spending any Measure RR bond funds on that project. The preliminary injunction is granted for the reasons that follow.

Requests for Judicial Notice

The requests for judicial notice are granted.

Evidentiary Objections

Evidentiary objections must be specific and accompanied by a reasonable, definite statement of the grounds. See Evidence Code § 353 (a) (objections must "make clear the specific ground of the objection"). Accordingly, if a party objected to

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several sentences or an entire paragraph in a declaration and one of the sentences is not objectionable, or if a party simply listed a litany of boilerplate objections, the Court overruled the objection. It is not the Court's duty to parse those sentences that are objectionable, or divine the specific basis for an objection, if the moving party has not done so. See People v. Porter, (1947) 82 Cal. App.2d 585, 588 ("An objection must usually be specific and point out the ground or grounds relied upon in a manner sufficient to advise the trial court and opposing counsel of the alleged defect so that the ruling may be made understandingly and the objection obviated if possible."). With these principles in mind, the Court overrules all of the parties' objections except for the following: the District's objections nos. 5, 6, 14, and 17 to the Sherman Declaration are sustained.

Discussion

Plaintiff is likely to prevail on its third and fourth causes of action alleging violations of the City's zoning ordinance.

Mt. San Antonio's campus is zoned as a "Residential Planned Development" (RPD) on the City's zoning map. District's RJN, Ex. 5. The City's zoning code specifies that structures within an RPD zone cannot

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exceed thirty-five feet in height and does not list a parking structure as the type of structure that can be built within this zone. District's RJN, Ex. 12, pp. 1-2; Walnut Zoning Code § 25-89.1(b)(4)(g). However, a school district can exempt itself from local zoning codes under certain circumstances:

"the governing board of a school district may render a city or county zoning ordinance inapplicable to a proposed use of property by the school district. The governing board of the school district may not take this action when the proposed use of the property by the school district is for nonclassroom facilities, including, but not limited to, warehouses, administrative buildings, and automotive storage and repair buildings."

Gov. Code § 53094(b) (Section 53094). The term "nonclassroom facilities" has been interpreted to mean "those not directly used for or related to student instruction." City of Santa Cruz v. Santa Cruz City School Bd. of Education, (1989) 210 Cal.App.3d 1, 7.

Here, the District purported to exempt the parking structure project from the City's zoning code on February 11, 2015. Nellesen Decl., Ex. 21. Plaintiff argues that this exemption is ineffective because the project, a parking structure, is a nonclassroom facility that cannot be exempted from

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the City's zoning codes pursuant to the plain language of Section 53094. Plaintiff is correct.

In City of Santa Cruz v. Santa Cruz City School Bd. of Education, the court considered whether a high school could exempt lighting renovations for the school's playing field from the city's zoning ordinances pursuant to Section 53094. Id., pp. 2-3. The city argued that the language of that statute only allowed an exemption for "a room in a school building," thus excluding outdoor field lighting. Id., p. 4. The court disagreed, finding that "nonclassroom facilities" means "those not directly used for or related to student instruction." Id., p. 7. Applying this definition, the court concluded that the playing field was directly used for student instruction because it was used for physical education classes, interscholastic athletics, spirit activities and band performances which were "an integral and vital part" of the educational program at the high school. Id., pp. 8-9. Thus, the lighting renovations for the field could be exempted from the city's zoning ordinances because they were not nonclassroom facilities. Id.

The Court finds that the parking structure is a nonclassroom facility that cannot be exempted from the City's zoning laws under Section 53094. A parking structure is ordinarily used for parking purposes, not for student instruction. Unlike the

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playing field in City of Santa Cruz, no regular classes will be held in the parking structure and the activity that will primarily take place there (i.e., parking) is not an integral and vital part of the education being provided at Mt. San Antonio. While available parking spaces are ancillary to the classroom instruction of students, the Legislature intended to distinguish between instructional facilities and support facilities, such as administrative buildings, for purposes of the exemption in Section 53094. See City of Santa Cruz, supra, 210 Cal.App.3d at 7. A parking structure falls squarely into the category of support facilities in that it is only tangentially related to student instruction; it simply provides students with another place to park while they receive instruction elsewhere. Thus, it is not directly used for or related to student instruction.

The legislative history of Section 53094 supports this conclusion. Indeed, one of the stated reasons given during the floor analysis of the 1976 amendment to Section 53094 that stripped school districts of the power to override local zoning laws for "nonclassroom facilities" was the perception that the districts had used the exemption "to authorize various nonclassroom facilities, such as parking facilities, in areas where these facilities are not compatible with the zoning and land use of adjacent property." See Plaintiff's RJN, Ex. 7

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NATURE OF PROCEEDINGS:

[Sherman Decl., Ex. J]; see also District's RJN, Ex. 16, pp. 7, 19, 21, 60-61 and 63.

To be sure, the District argues that the parking structure is directly related to student instruction because certain academic departments will use the structure for educational purposes. For example, it claims that the Fire Technology department plans to use the structure to study proper fire/life safety construction issues and the District's robotics program will use the space to practice with their robots. See Shull Decl., 5; Malmgren Decl., 6. These anticipated uses are not ordinary and established uses of the parking structure. Indeed, the District has not shown that a parking facility has ever been used for educational purposes by Mt. San Antonio. In contrast, the playing field at issue in City of Santa Cruz was used for regularly held physical education classes and interscholastic sporting events that were an "integral and vital" part of the scholastic life of the high school. City of Santa Cruz, supra, 210 Cal.App.3d at 8-9. While the additional space in the parking structure may be useful to certain educational programs at intermittent times, this ad hoc and irregular anticipated use of the structure does not mean that it will be directly used for or related to student instruction.

The District also argues that the parking structure

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is directly related to student instruction because it will allow Mt. San Antonio's growing student population to find parking spots and, therefore, attend classes. However, the District misconstrues the term "directly". "Directly" means "in a straight forward manner; in a straight line or course; immediately." Black's Law Dictionary (10th ed. 2014). The proposed parking structure is not "immediately" related to student instruction; rather, it is indirectly related to a student's classroom instruction in the same way that administrative buildings and other support facilities are related to student instruction. The Legislature made a distinction between facilities directly related to student instruction and support facilities when it enacted the present version of Section 53094. In addition, the Legislature only made a distinction between buildings directly used or related to student instruction and support buildings; it did not make a distinction between commercial buildings and noncommercial buildings.

As a separate basis for granting the injunction, the Court finds that Plaintiff is also likely to succeed on its first cause of action alleging that the parking structure was not sufficiently identified in Measure RR when it was presented to the voters. See Taxpayers for Accountable School Bond Spending v. San Diego Unified School Dist., (2013) 215 Cal. App. 4th 1013. The Court does not reach Plaintiff's

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

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NATURE OF PROCEEDINGS:

remaining arguments.

After weighing the relative interim harm to the parties from the issuance or nonissuance of the injunction, the Court finds that an injunction should issue. As stated in the City's zoning codes, the restrictions on land for properties zoned RPD, which includes the Mt. San Antonio's campus, is to encourage the "appropriate and desirable use of land which is sufficiently unique in its physical characteristics and other circumstances to warrant special methods of development." Walnut City Code § 25-88. If the project is permitted to go forward, Plaintiff and the community will lose their interest in the enforcement of the City's zoning codes and in the orderly development of their community. In contrast, the District's harm is primarily financial. As for its students having to look for other parking spots pending this litigation, that harm is less severe than the harm that Plaintiff's members will suffer.

In determining the amount of the undertaking, the District argues that any injunction will delay the project for at least one year since the Phase I site work on the parking structure must occur during the summer months when the majority of students are not on campus. Nellesen Decl., 46. According to the District, such a delay would cause it to incur damages of approximately $8,541,970. Nellesen

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Decl., 69. While the Court appreciates that an undertaking must cover all reasonably foreseeable damages that may be proximately caused by the preliminary injunction, the District's estimated damages are grossly inflated and are not directly related to or foreseeable to an injunction stopping construction of a single parking structure. Instead, the Court finds that an undertaking should be posted by Plaintiff in the amount of $127,076. This amount was calculated as follows: $112,076 for the change order; and $15,000 to restore the building site to a safe condition.

Disposition

Based on the foregoing, the Court grants Plaintiff's request for a preliminary injunction. Defendants and real parties are enjoined from performing or conducting any further construction or dirt removal activity on the proposed parking structure site, or from spending any Measure RR funds on any aspect of this project. Plaintiff shall post an undertaking in the amount of $127,076.

IT IS SO ORDERED.

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NATURE OF PROCEEDINGS:

A copy of this minute order is mailed via U.S. Mail to counsel of record addressed as follows:

CRAIG A. SHERMAN, ESQ., 1901 FIRST AVE., SUITE 335, SAN DIEGO, CA 92101

STAN BARANKIEWICZ, ORBACH, HUFF, ET AL, 1901 AVE OF THE STARS, SUITE 575, LOS ANGELES, CA 90067

DANIEL J. BULFER, ATKINSON, ANDELSON, ET AL, 20 PACIFICA, SUITE 1100, IRVINE, CA 92618

MINUTES ENTERED
05/13/15
COUNTY CLERK

DECLARATION OF SERVICE BY ELECTRONIC SERVICE AND U.S. MAIL

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 2627 Mission Street, Suite 1, San Marino, California.

On May 14, 2015, I served the foregoing NOTICE OF ORDER GRANTING PRELIMINARY INJUNCTION on interested parties to this action,

(XX) BY ELECTRONIC SERVICE: On May 14, 2015, I electronically served the foregoing document on :

Craig A. Sherman, Esq.	shermanlaw@aol.com
Stan Barankiewicz, Esq.	sbarankiewicz@ohshlaw.com
Dan J. Bulfer, Esq.	DBulfer@aalrr.com

(XX) by placing ( ) the original (X) a true copy thereof enclosed in sealed envelopes addressed as follows:

Craig A. Sherman, Esq.
LAW OFFICE OF CRAIG A. SHERMAN
1901 First Avenue, Suite 219
San Diego, CA 92101

Stan M. Barankiewicz II, Esq.
Orbach Huff Suarez & Henderson LLP
1901 Avenue of the Stars, Suite 575
Los Angeles, California 90067

Dan J. Bulfer, Esq.
Atkinson, Andelson, Loya, Ruud & Romo
20 Pacifica, Suite 1100
Irvine, California 92618

(XX) BY MAIL
(XX) I deposited such envelope in the mail at San Marino, California. The envelope was mailed with postage thereon fully prepaid.

Executed on May 14, 2015, at San Marino, California.

I declare under penalty of perjury of the laws of the State of California that the above is true and correct.

Paula Pope

PAULA POPE

EXHIBIT "C"
TO
FACILITIES LEASE

GUARANTEED PROJECT COST AND
OTHER PROJECT COST, FUNDING, AND PAYMENT PROVISIONS

1. Site Lease Payments. As indicated in the Site Lease, Developer shall pay One Dollar ($1.00) to the District as consideration for the Site Lease.

2. Guaranteed Project Cost. Pursuant to the Facilities Lease, Developer will cause the Project to be constructed for **Eight Million Four Hundred Seven Thousand Nine Hundred and Twelve Dollars ($8,407,912.00)**, ("Guaranteed Project Cost"). Except as indicated herein for modifications to the Project approved by the District, Developer will not seek additional compensation from District in excess of Guaranteed Project Cost. District shall pay the Guaranteed Project Cost to Developer in the form of Tenant Improvement Payments and Lease Payments as indicated herein. The Guaranteed Project Cost includes the following components and as further detailed herein:

2.1. Cost to Perform Work.

2.1.1. **Subcontract Costs.** Payments made by the Developer to Subcontractors, which payments shall be made in accordance with the requirements of the Contract Documents.

2.1.2. **Developer-Performed Work.** Costs incurred by the Developer for self-performed work.

2.1.3. **General Requirements.** Costs for general field labor, trash bins, final clean up, punch list, traffic control and signage, storm water pollution prevention plan implementation, weather protection, temporary power, and other items specifically itemized in the guaranteed project cost proposal. It is understood that the Developer's coordination and supervision to perform General Requirements are included in General Conditions and Developer shall not include or charge additional coordination, supervision, or indirect costs associated with performing the general requirements work. The Developer shall receive Overhead and Profit, and Bonds and Insurance on the General Requirements.

2.1.4. **General Conditions.** The amount to be paid be for all costs for labor, equipment and materials for the items identified therein which are necessary for the proper management of the Project, and shall include all costs paid or incurred by the Developer for insurance (except for general liability insurance), permits, taxes, and all contributions, assessments and benefits, holidays, vacations, retirement benefits, and incentives, whether required by law or collective bargaining agreements or otherwise paid or provided by Developer to its employees. The District reserves the right to request changes to the personnel, equipment, or facilities provided as General Conditions as may be necessary or appropriate for the proper management of the Project.

2.1.5. **Fees.** All fees, assessments and charges that are required to be paid to other agencies or entities to permit, authorize or entitle construction, reconstruction or completion of the Project.

2.1.6. **Allowances.** The following allowances are within the Guaranteed Project Cost. Developer shall be permitted to bill for its associated Overhead and Profit, Bonds and Insurance when it is permitted to draw on these allowances, but not before.

2.1.6.1. **Allowances for This Project - $470,000.00**

- **Bedrock blasting, large bolder removal and rock shifting - $50,000.00**
- **Unforeseen underground utility work & discrepancies between utilities shown and C-Below's survey - $50,000.00**
- **Unsuitable soil and compaction efforts outside of soils report recommendations - $75,000.00**
- **Irrigation main line reroute to keep areas active while grading and demo occur - $20,000.00**
- **Additional SWPPP measures other than proposed as there is no erosion control plan in the Contract Documents - $25,000.00**
- **Underground asbestos material removal and disposal - $200,000.00**
- **Acceleration of Trades for Unforeseen Conditions to meet schedule for Marking Lot M - $50,000.00**

Any unused allowance or unused portion thereof shall be added to the district share of the contingency at the sole discretion of the District. Unused allowances not added to the district share of the contingency shall be deducted from the guaranteed project cost The amount to deduct shall be calculated using the steps in the "Changes in the Work" provisions of **Exhibit "D"** to the Facilities Lease including the Deductive Change Order provisions therein.

2.1.7. **Contingency**. There is a contingency planned for this Project in the amount of **Two Hundred Seventeen Thousand Seven hundred Thirty-three Dollars ($217,733.00).** The contingency is to be shared in equal parts by Developer and District.

The Developer may request expenditures against the Developer Contingency for costs under the responsibility of the Developer including Developers errors and omissions, scoping errors, any costs not foreseen during development of the GPC that are the responsibility of the developer, or document errors or omissions to the extent required for a complete operating system that should have been reasonably foreseen by the Developer acting in the capacity as a general contractor using a mutually agreed upon format for documenting such changes. The Developer Contingency shall not be used for unforeseen conditions, design errors or omissions, or District added scope. All Developer Contingency expenditures must be approved by the District. Disputes regarding Developer Contingency expenditures shall be resolved using the "Claims and Disputes" provisions of "Exhibit D". Unused Developer Contingency shall be deducted from the Guaranteed Project Cost. The amount to deduct shall be calculated using the steps in the "Changes in the Work" provisions of Exhibit "D" to the Facilities Lease including the Deductive Change Order provisions therein.

The District Contingency may be drawn upon by the District, and shall be used to cover those issues related to costs for which the District is responsible such as extra cost in the Work of any specific allowance, unforeseen conditions, any District directed changes or additional services, and design errors and omission to the extent not covered by the Developer Contingency. Unused District Contingency shall be deducted from the Guaranteed Project Cost. The amount to deduct shall be calculated using the steps in the "Changes in the Work" provisions of Exhibit "D" to the Facilities Lease including the Deductive Change Order provisions therein.

2.1.8. **Bonds and Insurance**. The Developer shall receive compensation for the actual cost of Bonds and Insurance as required under the Contact Documents up to the amount of 1.75% of the guaranteed project cost less Overhead, Profit, and preconstruction fee adjustment. The developer shall not receive compensation for Bonds and Insurance on allowances or contingency funds that remain unspent.

2.1.9. **Overhead and Profit**. The Developer's Overhead and Profit for the Work to be performed on this project shall be **4.6%** of the Guaranteed Project Cost minus the Preconstruction Fee Adjustment. The Developer shall not receive Overhead and Profit on allowances or contingency funds that are credited back to the District.

2.1.10. **Preconstruction Fee Adjustment.** The increase or decrease, if any, pursuant to paragraph VI.1 of the Preconstruction Services Agreement, **"Exhibit H"** to the Facilities Lease.

3. Payment of Guaranteed Project Cost. District shall pay the Guaranteed Project Cost to Developer in the form of Tenant Improvement Payments and Lease Payments as indicated herein.

3.1. Tenant Improvement Payments. Prior to the District's taking delivery or occupancy of the Project, the District shall pay to Developer **Seven Million, Nine Hundred Eighty-seven Thousand, Five Hundred Sixteen Dollars ($ 7,987,516.00)** ("Tenant Improvement Payment(s)"), based on the amount of Work performed according to the Developer's Schedule of Values **(Exhibit "G"** to the Facilities Lease) and pursuant to the provisions in **Exhibit "D"** to the Facilities Lease.

3.2. Lease Payments. After the Parties execute the Memorandum of Commencement Date, attached to the Facilities Lease as **Exhibit "E**," the District shall pay to Developer **Four Hundred Twenty Thousand Three Hundred Ninety-six Dollars ($420,396.00)** ("Lease Payment(s)"), as indicated below.

3.2.1. The Lease Payments shall be consideration for the District's rental, use, and occupancy of the Project and the Project Site and shall be made in equal monthly installments for the duration of the Term.

3.2.2. The District represents that the total annual Lease Payment obligation does not surpass the District's annual budget and will not require the District to increase or impose additional taxes or obligations on the public that did not exist prior to the execution of the Facilities Lease.

3.2.3. **Fair Rental Value**. District and Developer have agreed and determined that the total Lease Payments constitute adequate consideration for the Facilities Lease and are reasonably equivalent to the fair rental value of the Project. In making such determination, consideration has been given to the obligations of the Parties under the Facilities Lease and Site Lease, the uses and purposes which may be served by the Project and the benefits therefrom which will accrue to the District and the general public.

3.2.4. **Each Payment Constitutes a Current Expense of the District.**

3.2.4.1. The District and Developer understand and intend that the obligation of the District to pay Lease Payments and other payments hereunder constitutes a current expense of the District and shall not in any way be construed to be a debt of the District in contravention of any applicable constitutional or statutory limitation or requirement concerning the creation of indebtedness by the District, nor shall anything contained herein constitute a pledge of the general tax revenues, funds or moneys of the District.

3.2.4.2. Lease Payments due hereunder shall be payable only from current funds which are budgeted and appropriated or otherwise made legally available for this purpose. This Facilities Lease shall not create an immediate indebtedness for any aggregate payments that may become due hereunder.

3.2.4.3. The District covenants to take all necessary actions to include the estimated Lease Payments in each of its final approved annual budgets.

EXHIBIT E

MEMORANDUM OF COMMENCEMENT DATE

[TO BE ENTERED INTO AFTER CONSTRUCTION IS COMPLETE TO COMMENCE THE LEASE TERM]

This MEMORANDUM OF COMMENCEMENT DATE is dated _____ _____, 20___, and is made by and between Tilden Coil Constructors ("Developer"), as Lessor, and Mt. San Antonio College ("District"), as Lessee.

1. Developer and District have previously entered into a Facilities Lease dated as of _____ _____, 20___, (the "Lease") for the leasing by Developer to District of the Project Site and Project in the City of _____, California, referenced in the Lease.

2. District hereby confirms the following:

A. That all construction of the Project required to be performed pursuant to the Facilities Lease has been completed by Developer in all respects;

B. That District has accepted and entered into possession of the Project and now occupies same; and

C. That the term of the Facilities Lease commenced on _____, 20___, and will expire at 11:59 P.M. on _____, 20___.

THIS MEMORANDUM OF COMMENCEMENT DATE IS ACCEPTED AND AGREED on the date indicated below:

Dated: _____	Dated: _____
Mt. San Antonio Community College District	**Tilden-Coil Constructors, Inc.**
By: _____	By: _____
Print Name: Michael Gregoryk	Print Name: Dayne Brassard,
Print Title: Vice President Administrative Services	Print Title: Executive Vice President

BOARD OF TRUSTEES
MT. SAN ANTONIO COLLEGE

DATE: February 11, 2015 **CONSENT**

SUBJECT: Lease/Leaseback Construction Services

BACKGROUND

In 2012, staff conducted an open process to select the best firm to provide construction services under the Lease/Leaseback Construction Delivery Method. Tilden-Coil Constructors, Inc. was selected to provide both pre-construction consulting and construction services. The fee for pre-construction services is based on the construction budget and ranges from 0.75% to 1%. The fee for construction is a guaranteed maximum price.

ANALYSIS AND FISCAL IMPACT

The following contract is presented for approval:

	Contractor:	Tilden-Coil Constructors, Inc.		
	Project:	Parking Structure Phase 1 and South Campus Site Improvements – East		
Item	**Description:**		**Amount**	
	Guaranteed Maximum Price to provide the full range of construction services necessary for the first phase of work on the new Parking Structure including relocation of electrical and data infrastructure, gas lines, water lines, storm drain system, sanitary sewer, demolition, site mass grading, soils export, and the placement and grading of the soil export at the fill site in temporary Student Parking Lot M, as follows: • Subcontractor Costs: $6,581,578.00 • Bid Alternates: $149,508.00 • General Conditions, Overhead, Profit, Bonds, and Insurance: $989,093.00 • Allowances $470,000.00 • Construction Contingency $217,733.00 • Preconstruction Fee Adjustment $11,009.00		$8,418,921.00	
	Guaranteed Maximum Price:			$8,418,921.00

Prepared by: Gary L. Nellesen Reviewed by: Michael D. Gregoryk

Recommended by: Bill Scroggins Agenda Item: Consent #5

SUBJECT: Lease/Leaseback Construction Services

DATE: February 11, 2015

Funding Source

Measure RR Bond Anticipation Note funds.

RECOMMENDATION

It is recommended that the Board of Trustees approves the contract, as presented.

J1-Parking Structure Series A.xls

Project:	J1-Parking Structure									
Org:	45001	728010								
Account:	621700	Construction Management								
				Budget						
			8/2/13	$ 364,225.00						
			1/21/15	$ 28,611.00						
			Total	$ 392,836.00						
Date	PO#	Description	Amount	Balance	13/14 Expenditures	14/15 Expenditures	15/16 Expenditures	16/17 Expenditures	Total Expenditures	Balance
		Beginning Balance		$ 392,836.00						
11/6/13	P0032200	Tilden Coil Constructors	$ 352,836.00	$ 40,000.00	$ 169,361.00	$ 150,109.00	$ -	$ -	$ 319,470.00	$ 73,366.00
1/30/15	P0032200	Tilden c/o #1	$ 40,000.00	$ -					$ -	$ -
				$ -					$ -	$ -
				$ -					$ -	$ -
		PACO →		$ -					$ -	$ -
				$ -					$ -	$ -
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				$ -					$ -	$ -
				$ -					$ -	$ -
									$ -	$ -
									$ -	$ -
		Remaining Budget Balance		$ -					$ -	$ -
		Total Expenditures	$ 392,836.00		$ 169,361.00	$ 150,109.00	$ -			

J1-Parking Structure (BAN).xls

Project:	J1-Parking Structure								
Org:	44001	728010							
Account:	621700	Construction Management			Budget only				
				Budget					
			6/14/10	$ 22,750.00					
			5/31/11	$ 22,444.00					
			Total	$ 45,194.00					
Date	PO#	Description	Amount	Balance	10/11 Expenditures	11/12 Expenditures	12/13 Expenditures	Total Expenditures	Balance
		Beginning Balance		$ 45,194.00					
2/11/11	P0017743	Bovis Lend Lease	$ 45,193.33	$ 0.67	$ 45,193.33			$ 45,193.33	$ -
				$ 0.67					
				$ 0.67					
				$ 0.67					
				$ 0.67					
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				$ 0.67					
				$ 0.67					
				$ 0.67					
				$ 0.67					
				$ 0.67					
				$ 0.67					
		Remaining Budget Balance		$ 0.67					
		Total Expenditures	$ 45,193.33		$ 45,193.33	$ -	$ -	$ 45,193.33	