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MEMORANDUM

ATTORNEY-CLIENT COMMUNICATION
PRIVILEGED & CONFIDENTIAL

DATE: October 18, 2019 **CLIENT/MATTER:** 3393-602

TO: Kevin Owen
Assistant Director, Technical Services
Mt. San Antonio College

FROM: Trevin E. Sims, Esq.

RE: Use of District Facilities under the Civic Center Act

The Mount San Antonio Community College District ("College") asked us to address several questions concerning the College's obligations and options under the Civic Center Act ("Act"). The questions and our responses are set forth below.

I. THE CIVIC CENTER ACT STATES THAT, "THERE IS A CIVIC CENTER AT EACH AND EVERY COMMUNITY COLLEGE…" IT GOES ON TO STATE THAT, "THE MANAGEMENT, DIRECTION, AND CONTROL OF THE CIVIC CENTER IS VESTED IN THE GOVERNING BOARD OF THE COMMUNITY COLLEGE DISTRICT." DOES THIS IMPLY THAT THE ENTIRE CAMPUS IS A CIVIC CENTER OR IS THE COLLEGE ABLE TO DESIGNATE CERTAIN FACILITIES AS "CIVIC CENTERS" THAT WOULD BE GOVERNED BY THIS ACT, AND FACILITIES NOT DESIGNATED AS CIVIC CENTERS WOULD NOT BE SUBJECT TO THE REGULATIONS OF THE CIVIC CENTER ACT?

The Act is not clear on whether all facilities and grounds at a college are a civic center. Additionally, there is no court case, Attorney General's opinion or other control or persuasive authority that directly addresses this question. Nevertheless, while the language of the Act is not crystal clear, we believe the Act (1) requires the creation of one or more "civic centers" at each college; (2) requires the College to permit the use of "other" facilities (i.e., non-civic centers) to certain groups if comparable facilities are not otherwise available; and (3) permits the College to allow use of any facility.

The Act provides:

> There is **a civic center** at each and every community college within the state where the citizens, Camp Fire Girls, Boy Scout troops, farmers' organizations, school-community advisory councils, senior citizens' organizations, clubs, and associations formed for recreational, educational, political, economic, artistic, or moral activities of the public school districts may engage in supervised recreational activities, and where they may meet and discuss, from time to time, as they may desire, any subjects and questions which in their judgment appertain to the educational, political, economic, artistic, and moral interests of the citizens of the communities in which they reside. Governing boards of the community college districts **may authorize** the use, by citizens and organizations of **any other properties** under their control, for supervised recreational activities.

(Ed. Code section 82537(a).)[1]

The language of Section 82537(a) suggests that there must be at least one specific location or facility at a college that must be open and available to all for listed uses. Importantly, the last sentence in the subsection expressly gives the College discretion to permit use of "other properties" for "supervised recreational activities." While it again is not exactly clear and still untested, this language can be reasonably read to mean that not all college property is a civic center.

The conclusion is also arguably supported by Section 82542, which provides:

> (a) Except as provided in subdivision (b), the governing board of a community college district ***shall*** grant without charge the use of any college facilities or grounds under its control, pursuant to the requirements of this article, ***when an alternative location is not available***, to nonprofit organizations and clubs and associations organized for general character building or welfare purposes (Emphasis added.)

Importantly, Section 82542 only requires making a facility or ground available "when an alternative location is not available." If every facility and ground was a civic center under Section 82537(a), it would seem unnecessary to include this additional requirement in Section 82542. As a result, if the College has appropriately designated one or more civic centers, and sufficient alternative facilities are available, there is a reasonable argument that the College can deny use of certain other facilities and grounds.

In addition to the language of the Act, Education Code section 70902 provides some support for the authority of the College to not designate all facilities and grounds as a civic center. Section 70902, known as the "Permissive Education Code," provides:

[1]Some take the view that every facility and ground is a civic center. The language of the Civic Center Act applicable to elementary and secondary schools is different than the community college Act. The K-12 statute provides, "There is a civic center **at each and every public school facility and grounds** within the state." This phrasing has be interpreted by many to mean each facility and playfield at a school is itself a civic center and thus subject to use. While the language in the community college Act is arguably not as expansive, it has been argued that the Legislature's intent was the same. Further, there is unclear language from old court cases that could be read to support this view.

> (a) Every community college district shall be under the control of a board of trustees, which is referred to herein as the 'governing board.' The governing board of each community college district shall establish, maintain, operate, and govern one or more community colleges in accordance with law. In so doing, **the governing board may initiate and carry on any program, activity, or may otherwise act in any manner that is not in conflict with or inconsistent with, or preempted by, any law and that is not in conflict with the purposes for which community college districts are established.** (Emphasis added.)

The argument is that since the Act does not clearly require the College to offer all facilities and grounds as a civic center, the permissive education code permits the College to deny certain use, so long as it has otherwise complied with the Act, e.g., made reasonable alternative locations available.

II. UNDER THE CIVIC CENTER ACT, THERE SEEM TO BE TWO MAJOR CLASSIFICATIONS OF FACILITY USES, COMMUNITY/NON-PROFIT AND COMMERCIAL/FOR PROFIT. WHAT METRIC SHOULD BE USED TO CLEARLY DETERMINE THE DIFFERENCE BETWEEN THOSE TWO TYPES OF GROUPS? SOME COMMUNITY COLLEGES ADD A THIRD CATEGORY, "FILM SHOOT," AND CHARGE A HIGHER PRICE THAN NON-PROFIT AND FOR-PROFIT USAGE, IS THIS PERMISSIBLE AND WHAT SHOULD BE THE MEANS FOR DETERMINING THE PRICE?

The Act effectively creates several classes of uses for purposes of fees and charges that may be imposed.

A. Non-Profit Uses

As discussed above, the Act requires the College to permit use to certain users "if an alternative location is not available." (Section 82542(a).) It is not clear whether this is intended to mean no alternative within the community or at the College in particular. We believe it was intended to mean the former; however, in practice, our experience is that public educational agencies have not strictly interpreted or applied the language in this way. Instead, agencies have generally designated and made facilities available largely without regard to the availability of alternative locations in the greater community.

The users identified in this group include, but are not limited to:

1. Student clubs and organizations.

2. Fundraising entertainments or meetings where admission fees charged or contributions solicited are expended for the welfare of the students of the district.

3. Parent-teachers' associations.

4. School-community advisory councils.

5. Camp Fire Girls, Girl Scout troops, and Boy Scout troops.

6. Senior citizens' organizations.

7. Other public agencies.

8. Organizations, clubs, or associations organized for cultural activities and general character building or welfare purposes, such as folk and square dancing.

For these users, the College may, but is not required to, charge a fee not to exceed: (a) the cost of opening and closing the facilities, if no college employees would otherwise be available to perform that function as a part of their normal duties; (b) the cost of a college employee's presence during the organization's use of the facilities, if the governing board determines that the supervision is needed, and if that employee would not otherwise be present as part of his or her normal duties; (c) the cost of janitorial services, if the services are necessary, and would not have otherwise been performed as part of the janitor's normal duties; (d) the cost of utilities directly attributable to the organization's use of the facilities. (Section 82542(b).)

B. Other "Activities"

Section 82542(c) provides:

> The governing board **may charge** an amount not to exceed its direct costs or not to exceed fair rental value of college facilities and grounds under its control, and pursuant to the requirements of this article, **for activities other than those specified in subdivision (a)**. A governing board that decides to levy these charges shall first adopt a policy specifying which activities shall be charged an amount not to exceed direct costs and which activities shall be charged an amount not to exceed fair rental value.

This subdivision clearly creates a different class of users and activities that the College may charge direct costs or fair rental value. It does not, however, provide any guidance on how to distinguish these users/activities from those listed under Section 82542(a). As a result, the College has discretion to make this distinction, so long as it does not exercise that discretion in an arbitrary or discriminatory way. One reasonable basis for making this distinction would likely be to distinguish between whether the user is a non-profit organization or not. The list of users in Section 82542(a) is not intended to be an exhaustive list; however, the examples listed suggest that the Legislature's intent was to designate users that are traditionally considered to be non-profit or civic in nature. So, for example, the College could require the user to identify its name and organizational structure (e.g., 501(c)(3), limited liability partnership, etc.) in the use application. Based, in part, on this information, the College could determine the appropriate user category.

C. Non-Charitable Admission Fee Events

Section 82542(i) provides:

> For entertainment or a meeting **where an admission fee is charged** or a contribution is solicited and the net receipts of the admission fees or contributions are **not expended for the welfare of the students of the district or for charitable purposes**, a charge **not less than fair rental value shall** be levied for the use of the college facilities, property, and grounds, as determined by the governing board of the district.

The Legislature has not specified types of users that fall under this category, but has identified a specific type of use that is subject to a minimum charge. Again, the College has some discretion in determining what is an "entertainment" or "meeting" and thus falls within this category of use. For example, the user application can also require the user to identify if a fee or contribution will be imposed, and how that fee or contribution will be used.

Many agencies do charge a separate fee for use of facility and grounds as film shoot locations. There is no language in the Act that specifically addresses film shoots. However, we believe there a good faith argument for such fees. The use is in furtherance of an "entertainment" (e.g., the feature film) where a fee will be charged to the movie-goers. Moreover, the fees collected from the movie-goers are not used for charitable or non-profit purposes. In addition, agencies can rely on the permissive education code for these separate fees.

III. TO WHAT EXTENT ARE WE ABLE TO TURN DOWN REQUESTS FOR USE OF COLLEGE FACILITIES? CAN LACK OF AVAILABLE STAFF BE A REASON TO DENY A REQUEST?

The Act does not specifically address the College's ability to turn down a request. At the same time, the Act grants the College wide discretion in regulating and establishing rules for use. Specifically, it provides that the College may grant use "upon terms and conditions which the board deems proper" (Section 82537(b).) and use "is subject to reasonable rules and regulations as the governing board of the district prescribes" (Section 82537(d).). Further, the Act does not guarantee any user the right to use at any particular time or on any particular date. At the same time, the Act suggests that the College's rules and regulations should aid and encourage use.

> The governing board of the community college district shall make all needful rules and regulations for conducting the civic meetings and for such recreational activities as are provided for in this chapter and ***which aid, assist, and lend encouragement to the activities***.

(Section 82537(f).)

Finally, again, the permissive education code allows the College to take such actions that are not otherwise prohibited by law.

With this as the framework, we believe the College has authority to deny use for operational reasons – such as a lack of necessary staff – so long as those reasons are not arbitrary or discriminatory, and do not unreasonably limit use. Again, we note that there is no express controlling legal authority on this issue. Moreover, the denial of use for such reasons should be considered in view of the clear legislative intent to encourage and aid in the use of college facilities. A court would likely find that a regulation of this nature that unreasonably limits use is unlawful.

IV. UNDER THE CIVIC CENTER ACT, WE ARE REQUIRED TO MAKE FACILITIES AVAILABLE AT NO CHARGE, OTHER THAN OPERATING COSTS. DUE TO VARYING RATES FOR LABOR AT THE COLLEGE, DEPENDING ON AN EMPLOYEE'S LONGEVITY STATUS AND SCHEDULING ROTATIONS, IT IS NOT POSSIBLE TO KNOW IN ADVANCE WHICH INDIVIDUAL AND THEREFORE

WHAT EXACT LABOR RATE WILL BE ASSOCIATED WITH AN EVENT. IS IT PERMISSIBLE TO USE A REASONABLE ESTIMATE IN SETTING THE FEE SCHEDULE SO AS TO BE ABLE TO PROVIDE CONSISTENT PRICING TO ALL USERS?

An estimated, consistent rate is required. The Act and its regulations contemplate calculating and applying a determined rate, rather than the actual rate of a specific employee that varies based on longevity or other factors. For example, the College may charge "direct costs" for certain users. The Act defines direct costs as "those costs of supplies, utilities, janitorial services, services of any other district employees, and salaries paid community college district employees necessitated by the organization's use of the college facilities and grounds of the district." (Section 82542(c)(1).)

Section 59601 of the regulations then defines direct costs as the "estimated" costs.

> "Direct costs" are the **estimated** costs identified by a community college district as follows:
>
> (1) "Capital direct costs" include the estimated costs for maintenance, repair, restoration, and refurbishment for use of the college facilities or grounds pursuant to Education Code section 82542.
>
> (A) For purposes of estimating capital direct costs, "college facilities" shall be limited to nonclassroom space, but may apply to specialty teaching spaces, including, but not limited to, dance studios, music practice or performance spaces, and theaters.
>
> (B) Capital direct costs shall not apply to classroom-based programs that operate after school hours, including, but not limited to, after school programs, tutoring programs, or child care programs.
>
> 1. A program is defined as classroom-based for purposes of this subdivision if participants spend at least 50 percent of operational hours in a classroom.
>
> (C) Capital direct costs shall not apply to organizations retained by the college or community college district to provide instruction or instructional activities to students during school hours.
>
> (2) "Operational direct costs" include the **estimated** costs of supplies, utilities, janitorial services, services of any other community college district employees and/or contracted workers, and salaries and benefits paid to community college district employees directly associated with the administration of the direct cost user fees to operate and maintain school facilities or grounds.

(5 CCR § 59601.)

Finally, Section 59604 of the regulations further explains the method of calculating employee-related costs:

> Specific to each college facility and grounds (or like college facilities and grounds as described in section 59602(b)), the community college district shall quantify annual operational direct costs by estimating the following costs:
>
> (a) The annual cost of salaries and benefits for all community college district employee labor or contracted services required to operate, clean, and maintain the school facility or grounds, which may include janitorial services, setup and teardown time, and security.
>
> (b) The annual cost of supplies required to operate and maintain the college facility or grounds, including all community college district equipment used by applicants.
>
> (c) The annual cost of utilities required to operate the college facility or grounds, including any community college district or applicant-provided equipment.
>
> (d) The prorated annual salaries and benefits paid to community college district employees directly associated with the administration of direct cost user fees for time spent administering such fees authorized under this article.

Finally, the fees charged must be included in a published fee schedule. Each user is then charged the estimated fee (as calculated per the regulations) listed in the published schedule, rather than the actual cost of the employee who might happen to be assigned to the user's event.

V. IN ADMINISTERING THE CIVIC CENTER ACT AT MT. SAN ANTONIO COLLEGE, HOW SHOULD WE INTERPRET THE MEANING OF "FAIR RENTAL VALUE" WHEN CONSTRUCTING THE FEE SCHEDULE FOR FOR-PROFIT AND/OR FILM SHOOT ENTITIES? ARE WE ALLOWED TO PRICE FACILITIES ON PAR WITH COMPARABLE COMMERCIAL FACILITIES IN THE AREA?

Fair rental value ("FRV") is defined in the Act. Section 82542 provides: "As used in this section, **"fair rental value" means** the direct costs to the district, plus the amortized costs of the college facilities or grounds used for the duration of the activity authorized." As a result, the College must calculate the FRV as specified in the Act. This requires the College to calculate the "direct costs" as provided in the regulations and then add the calculated amortized costs.

However, as discussed in Section II above, the District may charge more than the FRV for certain fee-based entertainments and meetings, including likely film shoots. The Act establishes no parameters for the College's calculation of this fee. Thus, under the broad regulation authority granted under the Act and the permissive education code, there is a strong argument that the College may charge a fee comparable to what other commercial facilities charge for film shoots.

VI. MOST OF OUR FACILITIES ARE CURRENTLY CONTRACTED AND PRICED FOR A BLOCK OF TIME (4 OR 6 HOURS), WITH SPECIFIC INCLUSIONS (TECHNOLOGY, STAFF, ETC). USE BEYOND THAT INITIAL TIME BLOCK IS BILLED ON AN HOURLY BASIS. THIS ENABLES US TO BE MORE EFFICIENT AND UNIFORM WITH PRICING RATHER THAN PRICING EACH CONTRACT ON A LINE-BY-LINE HOUR-BY-HOUR BASIS AND IT ALSO ENABLES US TO HAVE A BETTER CHANCE AT FINDING STAFF TO WORK AN EVENT. EMPLOYEES ARE LESS LIKELY TO COME IN FOR A 1-2 HOUR SHIFT THAN THEY ARE FOR A HALF

OR FULL DAY SHIFT. IN SOME INSTANCES, A USER MAY ONLY WANT A FACILITY FOR A PORTION OF THE TIME BLOCK, RATHER THAN THE ENTIRE BLOCK. CURRENT PRACTICE IS TO NOT SUBDIVIDE THE BLOCK OF TIME, AS THAT BLOCK USUALLY HAS ONE-TIME ADMINISTRATIVE FEES OR OTHER FEES THAT ARE NOT TIED TO THE DURATION OF TIME. IS THERE ANY REASON WHY THIS PRACTICE SHOULD NOT CONTINUE?

Where the District imposes a fee, the Act requires that it do so on an hourly basis. The Act does not expressly preclude the establishment of minimum blocks of time. Moreover, the Act provides the College with broad discretion in establishing reasonable rules and regulations for use. While no court has specifically addressed the issue, we believe that there is a good faith argument that the Act and permissive education code permit the College to establish reasonable, minimum time blocks for the hourly fee.

VII. WHEN FOR-PROFIT ORGANIZATIONS SELL ADMISSIONS TO THEIR EVENTS HELD AT MT. SAC, IS IT PERMISSIBLE TO ASSESS A PER-TICKET SURCHARGE AS A MEANS OF GENERATING ADDITIONAL REVENUE FOR THE COLLEGE?

As discussed in Sections II and V above, the College may charge more than the FRV for certain fee-based uses. The Act does not, however, establish how the College is to determine the charge, if the charge is going to exceed the FRV. Therefore, there is a good faith argument that the College could charge a per-ticket surcharge. The potential counter-argument is that any fee charged to such a user still must be imposed on an hourly basis.

VIII. WITH REGARD TO EDUCATION CODE 76360 AND PARKING FEES, TO WHAT EXTENT CAN A PREMIUM BE CHARGED FOR EVENT PARKING, AND WHAT OTHER REQUIREMENTS MIGHT THERE BE GOVERNING WHO CAN COLLECT THOSE PREMIUM FEES?

Education code section 76360 provides:

> …
>
> (d) The governing board of a community college district may also require the payment of a fee, to be established by the governing board, for the use of parking services by persons other than students and employees.
>
> (e) All parking fees collected shall be deposited in the designated fund of the district in accordance with the California Community Colleges Budget and Accounting Manual, and shall be expended only for parking services or for purposes of reducing the costs to students and employees of the college of using public transportation to and from the college.
>
> (f) Fees collected for use of parking services provided for by investment of student body funds under the authority of Section 76064 shall be deposited in a designated fund in accordance with the California Community Colleges Budget and Accounting Manual for repayment to the student organization.

> (g) "Parking services," as used in this section, means the purchase, construction, and operation and maintenance of parking facilities for vehicles and motor vehicles as defined by Sections 415 and 670 of the Vehicle Code.

This section permits the College to charge parking fees to individuals other than students or employees. The statute does not provide for how the College must determine and impose those fees. Under the permissive education code, the College has wide discretion in how it imposes such fees. In general, the fee structure imposed simply must not be arbitrary or discriminatory. Therefore, there is a good faith argument that the College may charge premium rates for event parking. Further, the statute provides that the fees collected are to be deposited in designated funds of the College. We interpret this requirement in the statute to provide the College (not a particular user) with discretion to determine in which fund the fees are deposited, subject to any specific requirements of the Community College Accounting Manual.

IX. VERY OFTEN, RENTERS OF MT. SAC FACILITIES NEED ADDITIONAL RESOURCES FOR THEIR EVENT. EXAMPLES OF THESE TYPES OF THINGS ARE MICROPHONES, LIGHTING, POWER DISTRIBUTION, STAGING, PROJECTORS, TABLES, CHAIRS, EASELS, ETC. CAN A RENTAL FEE BE ASSESSED ON THESE ITEMS?

The District likely may charge a separate fee for use of College equipment. The Act provides for community use of facilities and grounds. Notably, the Act is silent regarding community use of equipment. The Act provides that the College may charge for "direct costs," which is defined to include "supplies, utilities, janitorial services, services of any other district employees, and salaries paid community college district employees necessitated by the organization's use of the college facilities and grounds of the district." Notably, neither the statute nor the regulations mention or otherwise address "equipment" and furniture. As a result, under the permissive education code, we believe the College has authority to charge a separate fee for use of its equipment and movable furniture.

X. MT. SAC IS ALWAYS LOOKING FOR ADDITIONAL REVENUE STREAMS TO AUGMENT OR EXPAND OPERATIONS. WHAT OPPORTUNITIES ARE THERE, ESPECIALLY WITH COMMERCIAL/FOR-PROFIT AND FILM SHOOT GROUPS, TO GENERATE ADDITIONAL OPERATING REVENUE THROUGH FACILITY RENTALS?

Please see Sections V and VII above.

XI. WOULD A FEE SCHEDULE SIMILAR TO THE ONE USED AT LOS ANGELES SOUTHWEST COLLEGE, BE PERMISSIBLE TO USE AT MT. SAC?
HTTP://WWW.LASC.EDU/NEWS/LASC-PRICING-FACILITY-RENTALS.PDF

The Southwest College schedule is an hourly fee-based schedule that appears consistent with the requirements of the Act and its regulations.

XII. THERE ARE A NUMBER OF MT. SAC STAFF MEMBERS WHO ARE AFFILIATED WITH OUTSIDE ORGANIZATIONS, EITHER NON-PROFIT OR FOR-PROFIT. AS A MEANS TO REDUCE THE FACILITY COST TO THOSE

ORGANIZATIONS, THESE STAFF MEMBERS VOLUNTEER, WHILE OFF-DUTY, TO BE THE COLLEGE REPRESENTATIVE PRESENT AT THESE EVENTS, UNLOCKING, LOCKING, SUPERVISING, AND CLEANING UP. DOES THIS PRESENT ANY LEGAL OR EQUITY ISSUES TO THE COLLEGE, EITHER EXPOSING THE COLLEGE TO UNNECESSARY LIABILITY, OR CREATING VARIED FEE SCHEDULES DEPENDING ON AN EMPLOYEE'S WILLINGNESS TO VOLUNTEER FOR ONE ORGANIZATION OVER ANOTHER? SHOULD THIS PRACTICE CONTINUE?

The Act does not preclude a College employee from using or participating in the use of College facilities under the Act. Generally, however, employees (when acting on behalf of an outside organization) should be required to comply with the same policies and procedures as other outside users. Permitting an employee to use a facility in conjunction with an outside organization on terms more favorable to those offered to other outside users could potentially create conflicts of interests and be a violation of the Act.

Further, permitting employees to perform the operational role in an "off-duty" capacity as a volunteer creates uncertain liability and employment issues. If the employee is off-duty and an injury or loss occurs, there is a potential that the College's liability exposure is increased by not having an assigned, accountable employee for the use. Moreover, where the employee is off-duty and acting in a volunteer role, the College may be limited in its ability to address the employee's failure to properly perform the required operational functions through discipline or other employment-based means. There could also still be a legal dispute over whether the employee was actually in the capacity of employee for workers' compensation purposes, if the employee was injured during the event.

XIII. WE HAVE MANY OUTSIDE ATHLETICS ORGANIZATIONS USE OUR ATHLETIC FACILITIES EACH YEAR. IN SOME CASES, THE MT. SAC TEAM ASSOCIATED WITH THE SPORT OF THE CONTRACT USER VOLUNTEERS TO WORK THE EVENT IN EXCHANGE FOR A "DONATION" TO THEIR PROGRAM. AS AN EXAMPLE, THE BASEBALL TEAM AND COACHES WILL VOLUNTEER AT A RED SOX SCOUT BALL GAME TO MONITOR, OPERATE AND CLEAN UP THE FACILITIES, OR THE SWIM TEAM WOULD DO THE SAME FOR A SWIM MEET. ARE THERE ANY ISSUES WITH THIS SITUATION CONTINUING, AND WHAT CONTRACTS, DOCUMENTS AND FEES SHOULD BE ASSOCIATED WITH SOMETHING LIKE THIS? (AT THE CURRENT TIME, WE ARE REQUIRING A CONTRACT, WITH JUST AN ADMINISTRATIVE FEE, AND LIABILITY INSURANCE FROM THE ORGANIZATION.) IS THERE A WAY TO FORMALLY DOCUMENT AND CONTRACTUALLY BIND THE "DONATION" MADE TO THE MT. SAC ATHLETIC GROUP IN SITUATIONS SUCH AS THIS?

Depending upon the specific facts, this practice could present a "contracting out" or transfer of unit work issue. In many agencies, it is the custodians and classified maintenance staff who have significant responsibility for many of the operational tasks related to third-party facility use. The employee's cost is recouped by the agency as part of the facility use fee. As a practical matter, these uses can be an important source of overtime for these employees. As a result, a structure that reduces that potential additional income could be challenged by the affected employees' union as an illegal transfer of bargaining unit work because it was not negotiated. If the College has a

long standing practice of allowing volunteers to perform these duties, it could mount a defense against such a charge by asserting that an established past practice allows the use of these volunteers. In addition, the College should be careful with regard to just how "voluntary" the teams' participation actually is in such a scenario. This scenario also raises potential liability and workers' compensation issues to those addressed in Section XII above.

With regard to the donation, there is no preclusion to a user agreeing to donate to a team in exchange for the team voluntarily assisting its use. However, as a practical matter, it is likely that the donation is not truly an enforceable obligation. A donation or gift by definition is generally something that is provided without consideration from the recipient, and consideration is a requirement of an enforceable contract or obligation. Moreover, attempting to make the user's donation "enforceable" could raise issues regarding the teams' participation as voluntary or work they are effectively compelled to perform and be compensated for. As a result, attempting to transform the donation component of the use into an enforceable contractual obligation is likely problematic. Perhaps one option to address the "enforcement" of the donation is to have the user pay the full use fee to the College, and then the College "donate" the portion saved on employee cost to the volunteer team. This, however, would not address some of the other issues raised above.

XIV. WITH THE NEW STADIUM THAT WE ARE OPENING, WE ARE ALREADY BEING APPROACHED BY TRACK AND FIELD GROUPS WANTING TO RENT THE FACILITY. FOR THESE TYPES OF EVENTS, THEY OFTEN WANT MT. SAC TO PROVIDE STAFF TO SET UP AND WORK THE VARIOUS TRACK AND FIELD COMPETITIONS. IN A SITUATION LIKE THIS, THE STAFFING WOULD BE INCLUDED IN THE FACILITY CONTRACT. THE ATHLETIC DEPARTMENT IS INTERESTED IN USING STUDENTS AS THESE WORKERS, IN EXCHANGE FOR A DONATION TO THEIR TEAM PROGRAM. SINCE THE LABOR IS A COMPONENT OF THE CONTRACT, SHOULD STUDENTS BE WORKING AS "VOLUNTEERS," OR DO THEY NEED TO BE HIRED? IN A SITUATION SUCH AS THIS, IS THERE A WAY FOR A PORTION OF A FACILITY USE FEE TO BE DIVERTED TO A SPECIFIC TEAM/DEPARTMENT ON CAMPUS OUTSIDE OF THE EVENT SERVICES OFFICE? ARE THERE ANY OTHER ISSUES WITH THIS SCENARIO THAT WE SHOULD BE AWARE OF?

See response to Section XIII.

XV. MT. SAC HAS A CULINARY PROGRAM WITH A TEACHING KITCHEN AND RESTAURANT. THERE HAS BEEN A DESIRE TO MAKE THE RESTAURANT AVAILABLE TO OUTSIDE GROUPS FOR EVENTS AND CHARGE A PER-PLATE FEE TO THE USER. SHOULD THERE BE FORMAL CONTRACTS AND INSURANCE IN PLACE FOR THESE TYPES OF USES? SHOULD THERE BE ADDITIONAL FEES ASSESSED TO THE GROUP (CUSTODIAL, SUPPLIES, ADMINISTRATIVE, ETC.)? CAN THE PER-PLATE FEE, WHICH IS DESIRED TO BE COLLECTED DIRECTLY BY THE CULINARY PROGRAM, CONTAIN ANY OTHER RENTAL CHARGES, ESPECIALLY IF THEY ARE NOT COORDINATED BY THE EVENT SERVICES OFFICE? SHOULD THE PER-PLATE FEE BE COLLECTED DIRECTLY BY THE CULINARY PROGRAM OR DOES THAT NEED TO BE CONTRACTED, PROCESSED, AND COLLECTED THROUGH THE EVENT SERVICES OFFICE?

To the extent the College would simply be providing the facility and necessary operational staff for the third-party to use it, the fee would be subject to the Act's hourly rate parameters. As discussed in Sections V and VII above, if the use is a fee-based entertainment, the College may charge a fee greater than the FRV and it has fairly wide discretion in calculating that fee. Most importantly, with this type of use, the College is not limited to the direct cost calculation structure. Thus, it could, for example (like with film shoots), seek to determine what a comparable, commercial restaurant-type facility might charge for use. Finally, as discussed previously, still determining an hourly fee for this use would be the safest option given the Act's focus on hourly fees. That said, under the Act and permissive education code, there is a good faith argument that the College could impose a non-hourly based fee for these fee-based uses.

XVI. OUR PLANETARIUM OFFERS VISITS AND SHOWS TO SCHOOLS AND SCOUT GROUPS THROUGHOUT THE YEAR. EACH VISIT USUALLY CONSISTS OF A PLANETARIUM SHOW AND A MODEL ROCKET ACTIVITY WHERE THE KIDS ARE ABLE TO BUILD A SMALL "ROCKET" OUT OF FOAM AND THEN LAUNCH IT WITH COMPRESSED AIR. FEES ARE COLLECTED BY THE PLANETARIUM ON A PER-PERSON BASIS. THE PLANETARIUM ALSO RENTS OUT THE FACILITY TO BIRTHDAY PARTIES, AND HAS ACTIVITIES AND SHOWS AVAILABLE, SIMILAR TO THE SCHOOL VISITS. ALL OF THESE ACTIVITIES ARE HANDLED OUTSIDE OF THE EVENT SERVICES OFFICE. WHAT SORT OF CONTRACTING, INSURANCE, FEE STRUCTURE AND COLLECTION PROCESS SHOULD THERE BE FOR THESE TYPES OF EVENTS?

It appears there are two distinct activities here.

First, the Planetarium is offering fee-based tours and activities. This activity is likely not an activity under the Act. In effect, the College is providing a service, and visitors are paying for the service, which simply takes place in the facility. It is likely this "service" is authorized under the permissive education code and the College has fairly broad discretion in how it structures the service.

Second, the College is allowing users to use the Planetarium facility for community, civic, private, etc., activities. These types of activities would likely be under the Act, and thus subject to the same application, fee, contractual and use requirements as the College's other Act uses.

XVII. WE REQUIRE LIABILITY INSURANCE FROM ALL CONTRACT USERS PROCESSED THROUGH OUR EVENT SERVICES OFFICE WITH MT. SAC NAMED AS ADDITIONAL INSURED AND A MINIMUM OF $1,000,000 GENERAL LIABILITY. THERE ARE OFTEN FIELD TRIPS, BIRTHDAY PARTIES, AND OTHER EVENTS HOSTED/COORDINATED BY OTHER DEPARTMENTS ON CAMPUS. DO THOSE TYPES OF USES REQUIRE LIABILITY INSURANCE FROM THE USERS?

Whether insurance is required by law can vary based on the user or activity. For example, with regard to uses under the Act, the only statutory provision, Education Code section 82548, provides:

> The governing board of any community college district may require any person, group, or organization granted the use of community college property pursuant to this article for the purposes of athletic activities to obtain a certificate of insurance from a liability insurance

carrier and to submit such certificate to the district for approval prior to using any district property. The certificate shall evidence a minimum coverage of three hundred thousand dollars ($300,000) for any liability for injury or damage to property which may arise out of such use of community college property. The governing board of any community college may require more than such minimum coverage.

We are not aware of any law that specifically addresses the College requiring insurance from other users. Thus, while not required by law, the College arguably has authority under the permissive education code to require insurance. Further, it is likely best practice to require insurance from most classes of third-party users. The College should consult its risk manager as to the appropriate scope, type, and limits of coverage.

XVIII. WHEN VENDORS COME ON CAMPUS (RED CROSS BLOOD DRIVE, MOBILE HEALTH TESTING LABS, EXHIBITORS, RADIO PROMO DEPARTMENTS, FOOD VENDORS AT EVENTS, ETC.), WHAT TYPE OF INSURANCE IS REQUIRED FROM THOSE ENTITIES? IF THEY ARE DRIVING VEHICLES ONTO CAMPUS, IS ADDITIONAL INSURANCE REQUIRED?

We are not aware of any law requiring these users to have insurance. However, the College likely has authority to impose an insurance requirement. The College should consult its risk manager as to appropriate scope, type, and limits of coverage.

XIX. IN THE SITUATION WHERE A CONTRACTED USER'S EVENT IS NEGATIVELY IMPACTED BY A COLLEGE ACTION OR FACILITY, ESPECIALLY IF THE USER CLAIMS A LOSS OF REVENUE, WHAT SORT OF HOLD HARMLESS AGREEMENT SHOULD BE IN PLACE? DOES THE COLLEGE NEED LIABILITY INSURANCE TO PROTECT ITSELF IN THESE SITUATIONS? SOME SCENARIOS AS EXAMPLES: (1) EVENT CANCELLATION DUE TO FACILITY ISSUE (POWER OUTAGE, FLOOD, UNSAFE CONDITIONS, ETC.); (2 AN ISSUE WITH THE COLLEGE PROCESSING OR SELLING TICKETS TO AN EVENT, RESULTING IN DECREASED SALES. THIS COULD EITHER BE DUE TO AN INTERNET OUTAGE, OR A MISCONFIGURATION OF THE SYSTEM BY A COLLEGE STAFF MEMBER; OR (3) ACTS OF GOD.

The Act does not address potential College liability if a user's event is negatively impacted by a College act or omission. However, our opinion is that the College would not be liable, particularly where the act is reasonable. To further minimize any claims against the College, the application and any contract should likely include notice that the use could be effected by College needs or other factors, and an affirmative waiver of claims from the user. Further, acts of God should be addressed in the facility use agreement through what is called a "Force Majeure" clause. This is a standard contract provision that basically states neither party is responsible under the contract if something beyond the control of either parties occurs, such as an earthquake, a strike, war, terrorist activity, etc.

CONTRACTS AND ADDENDUMS

XX. I HAVE ATTACHED OUR CONTRACT DOCUMENT AS IT CURRENTLY STANDS, I SUSPECT IT COULD USE A MAJOR REVAMP. WE ARE INTERESTED IN

GETTING IT UPDATED TO CURRENT-DAY STANDARDS. FROM A PROCESSING STANDPOINT, COULD ALL THE STANDARD TERMS AND CONDITIONS BE CONTAINED IN THE MAIN DOCUMENT AND THEN WE USE EXHIBITS AT THE END TO SPECIFY WHAT EXACTLY IS BEING CONTRACTED? WHEN DATES, TIMES, AND FEES CHANGE PRIOR TO THE EVENT, WHAT SHOULD THE PROCESS BE FOR RATIFYING THOSE CHANGES?

The College's contract could be updated in various respects to address issues raised in this memorandum and in other aspects. We have assisted numerous agencies in revising their Act forms, and there is a wide variation in the documentation based on each agency's specific needs. For example, as you suggest, some agencies use separate forms or exhibits to address differing insurance requirements depending on the user or type of use. We suggest that we discuss the options in light of the College's operational needs/desires to determine the best structure for revised forms.