

**Malibu Unification Negotiations Committee
Meeting Minutes**

**Tuesday, August 9, 2016
Malibu City Hall, 23825 Stuart Ranch Road, Malibu, CA**

- I. Call to Order / Roll Call
 - *The committee called the meeting to order at 7:01 p.m. with the following committee members present:*

<i>Tom Larmore</i>	<i>Laura Rosenthal</i>
<i>Debbie Mulvaney (via teleconference)</i>	<i>Makan Delrahim</i>
<i>Paul Silvern</i>	<i>Manel Sweetmore</i>

- II. Approve Meeting Minutes for August 2, 2016
 - *Mr. Silvern and Ms. Rosenthal provided minor corrections to the August 2, 2016 minutes.*
 - *By consensus, the committee approved the corrected minutes of the August 2, 2016 meeting.*

- III. Follow-up Business from Previous Meetings
 - Report on follow-up with SSC about the data contained in the Phase 1 reports.
 - *Ms. Orlansky stated that Mike Ricketts, School Services of California, Inc. (SSC), is scheduled to speak with Ms. Jan Maez, SMMUSD CFO, later in the week to follow up on the data questions posed by the committee.*
 - Status of the Committee's data request to the District related to Topic 1 and questions for SMMUSD's bond counsel/financial advisor
 - *Ms. Orlansky stated she expected the committee would receive a response from the District before the end of the week.*
 - *Ms. Mulvaney stated that Ms. Maez is preparing a current bond report for the Board that should contain the updated bond information the committee requested. Once the report is available, Ms. Mulvaney will ensure all committee members receive copies.*

- IV. Work session with Procopio on environmental liability issues (Topic 4)
 - *Mr. John Lemmo, Partner, Procopio, participated in this agenda item discussion by teleconference.*
 - *Mr. Lemmo provided an overview of his August 8, 2016 memorandum to the committee that responded to questions related to environmental conditions at Malibu school sites, and the allocation of potential liability. (Memo attached.)*
 - *Key comments Mr. Lemmo shared with the committee included*
 - *His August 8, 2016 memo is based solely on public information as he is not privy to information discussed by the Board in Closed Session.*
 - *The background section of the memo describes the District's ongoing remediation of PCBs in Malibu schools, and SMMUSD's development plan for all school sites. According to this plan, remediation of contaminants at Malibu schools is expected to be completed by 2020.*

- *SMMUSD's ongoing remediation work being performed on known contamination is funded by SMMUSD bonds. At the time of separation, the logistics of completing projects underway could be negotiated between SMUSD and MUSD.*
- *After reorganization is complete and MUSD exists as a separate district, any future project development and remediation at Malibu schools would be MUSD's responsibility. In other words, post-separation, once the pre-separation contemplated work is completed, future problems would be addressed and solutions funded solely by the affected district.*
- *To provide some perspective, future remediation liability and costs are frequently a concern in property transactions, especially if an environmental problem has already been identified. In such transactions, the parties typically perform due diligence prior to completion of the transaction to determine the impact of any known environmental contamination on the assessed value of the property.*
- *In some other school district reorganizations, voters have approved the general deal and supporting transactions were sorted out through arbitration. However, this practice does not dictate how things must work in a reorganization of SMMUSD, especially if special State legislation outlines a different process.*
- *Any pre-defined split of assets and liabilities between SMUSD and MUSD would have to be determined and formatted into either an agreement or special legislation.*
- *Mr. Lemmo clarified that the acronym PEA, found on page one of his memo, means Preliminary Endangerment Assessment.*
- *Ms. Rosenthal reported that, in response to a request from a Malibu resident that the City of Malibu declare two school sites (Juan Cabrillo Elementary School (JCES) and Malibu High School (MHS)) a public nuisance due to PCB contamination, the Malibu City Council, on advice from the City Attorney, declined to take that action but is directing its lobbyist to contact local EPA representatives. In addition, Ms. Rosenthal stated the City is encouraging the District to test and remediate the remaining schools within the next two years, during which time the remediation funding would be SMMUSD's responsibility.*
- *Ms. Rosenthal distributed copies of SMMUSD's prepared comments on facility improvement projects that Mr. Carey Upton, Interim Director of Facility Improvement Projects for SMMUSD, presented to the Malibu City Council at its August 8, 2016 meeting.*
- *Other items discussed during the committee's work session on environmental liability issues included:*
 - *The scope of the committee's work on environmental liability issues.*
 - *Claims made in the America Unites lawsuit against SMMUSD, and the status of this lawsuit – The lawsuit is pending a judge's ruling, after which there may be appeals to a higher court.*
 - *How the remediation work currently scheduled in Malibu is being funded out of Malibu's portion of ES bonds, and that any additional work done as a result of the America Unites lawsuit would likely be similarly funded.*

- *The District's plans for future (in the next two years) testing for contamination at Malibu's schools, other than JCES and MHS.*
- *If additional bond funds were required to complete remediation, the bond authority would move with Malibu following separation. Mr. Larmore explained that the ES bonds were already divided between the schools in Santa Monica and Malibu, and the allocation would not change post-separation.*
- *Workers compensation insurance and claims relate to both the currently known and unknown environmental contaminants. Mr. Lemmo confirmed that, by law, all school districts must carry workers compensation insurance.*
- *Mr. Gary Bradbury, SMMUSD Risk Management Specialist, who discussed insurance issues at the committee's July 19, 2016 meeting, is a good resource for the committee's questions regarding workers compensation insurance.*
- *Whether the cost of windows and doors being replaced at all schools in SMMUSD are counted as remediation costs for the Malibu schools. Ms. Mulvaney stated that these are separable projects, and the amounts spent to date will be included in the forthcoming bond report.*
- *The process for implementing a reorganization involves multiple entities and multiple steps, even after the SMMUSD Board of Education approves a plan. One issue the Board will need to decide is how much of the separation process can and should be completed through special legislation.*
- *The range of possibilities for which reorganization components would be put to the voters in both Santa Monica and Malibu, and which would be put only before the voters in Malibu.*
- *By consensus, the committee agreed that:*
 - *There are three categories of real property environmental liability: (1) Contamination that is not known at the time of separation; (2) Contamination that is known before separation, and for which SMMUSD has developed, approved, funded, and begun a remediation plan; and (3) Contamination that is known before separation, but for which SMMUSD has not yet developed, approved, or funded a remediation plan.*
 - *After separation, any future discovered environmental liability (Category 1) should be the responsibility of the affected new district, including all related costs. In addition, each district should indemnify the other against any future discovered liability.*
 - *The current, ongoing remediation of PCBs, as contemplated in SMMUSD's development plan (Category 2) would not be affected by separation and would continue to be funded by the SMMUSD bond program.*
 - *For Category 3, each district will be liable for its own properties and in charge of developing, approving, funding, and implementing a remediation plan. For schools in Malibu, the portion of ES bonds allocated to Malibu are a potential source of funding for any additional remediation work.*

- *The latest cost estimates for remediation of the known but not yet addressed environmental contamination in Malibu schools would be helpful to the committee.*
 - *A Transition Team should be established by the SMMUSD Board and tasked with negotiating the details of separation that will inevitably need to be resolved, even after a separation is approved and moving ahead. The Transition Team would also be responsible for the negotiation of logistics for completing any remediation projects underway at the time of separation.*
 - *The committee discussed tentative decisions about its scope of work.*
 - *By consensus, the committee agreed that:*
 - *The formal drafting of an implementation agreement or special legislation was beyond the committee's scope of work.*
 - *A fifth topic should be added to the committee's plan of work to address implementation steps, such as the committee's recommendations to establish a Transition Team. It should also include principles for guiding the Board's implementation decisions, e.g., steps that will be expedient, low risk, and achieve the most agreeable results.*
 - *Any further discussion of the issues raised by the pending America Unites lawsuit will be suspended until the court responds.*
 - *Any further discussion on the different scenarios and legal views on what aspects of the SMMUSD reorganization would need to be ratified by voters in one or both of the jurisdictions is postponed.*
 - *Nothing further is needed from Procopio at this time.*
- V. Continuation of August 2, 2016 Worksession on Topic 3, Operating Budget Impacts
- *The committee discussed the draft term sheet that summarized its August 2, 2016 work on the principles (i.e., parameters) and criteria for evaluating options for resolving the issues outlined in Topic 3, Operating Budget Impacts. (Copy attached)*
 - *By consensus, the committee agreed on the following changes and additions to the section on Revenue Sources:*
 - *Correct references to Unrestricted General Fund Revenue by deleting "Fund;"*
 - *Delete "Other (non LCFF) State revenue" because it's no longer a needed subheading;*
 - *Add a new subsection to more clearly delineate revenue sources to include as opposed to revenue sources to exclude; and*
 - *Add a category of "new revenue streams post-separation" as a source of revenue to exclude, but note there will be some caveats/nuances to this exclusion. For example, the revenue from Malibu's new parcel tax, if approved by the voters (a prerequisite to separation), would be included and, at some point, new revenue generated post-separation might trigger a renegotiation of terms between the districts.*
 - *By consensus, the committee agreed to the following terms under "D. Sources of data" to use when making calculations:*
 - *Audited financials will be the source of data for making a final calculation of amounts to be paid from one district to the other.*

- *When the mechanics related to calculations and payments are resolved, the realities of school district budgeting (e.g., cash flow, budgeting cycles) will need to be taken into consideration.*
- *The committee acknowledged there can be a 2% to 5% swing in the numbers from unaudited to audited financials, and agreed it would make sense to look at this differential over a specified number of years.*

VI. Public Comments

- None.

VII. Agenda Planning for Upcoming Meetings:

- *August 16 – No meeting.*
- *August 23 at District Offices*
 - *The committee agreed to continue work on the term sheet for Topic 3.*
 - *Referencing the working draft of the term sheet (dated 8/8/2016), the committee agreed to discuss the principles/parameters related to C (time frames), which the committee recognized will inevitably bring in issues related to B (definition of “revenue neutrality”), E (other mechanics of calculations/payments), and F (criteria and purpose of any reopeners.*
 - *On August 23, Ms. Mulvaney will be out of the country and may or may not be able to call in.*
- *August 30 at Malibu City Hall*
 - *Ms. Rosenthal discussed a conflict between the committee meeting and a City of Malibu event on August 30. The committee would consider rescheduling the meeting to Thursday, September 1, and agreed to make a final decision at the August 23 meeting about the scheduling of a meeting for the last week in August.*

VIII. Adjournment

- *The committee adjourned the meeting at 9:04 p.m.*

MEMORANDUM

AUSTIN
DEL MAR HEIGHTS
PHOENIX
SAN DIEGO
SILICON VALLEY

TO: Malibu Unification Negotiation Committee
Santa Monica-Malibu Unified School District

FILE NO: 123956-01

FROM: John C. Lemmo

DATE: August 8, 2016

RE: Reorganization of Santa Monica-Malibu Unified School District:
Questions Regarding Environmental Conditions at Malibu School Sites, and Allocation
of Potential Liability

This Memorandum addresses requested legal considerations regarding known environmental conditions at the Malibu school sites, and allocation of potential liabilities between the two districts that would result from reorganization of the District.

You have asked several related questions for guidance. The questions are repeated below, followed by our responses. First, we provide a background statement that provides our assumptions and facts as we understand them.

BACKGROUND

All facts and assumptions discussed herein were obtained from publicly accessible documentation. Environmentally impaired or contaminated properties raise issues and concerns that relate to the type, quantity and concentration of, and human exposure to, substances of concern. There are many factors that affect how property owners and other responsible parties address the presence of hazardous or toxic substances. Those factors include the ambient or “background” conditions, and stability of substances if they can remain undisturbed (e.g., managed, capped or sealed). These matters are the subject of numerous statutes, standards, and regulations that are important considerations for construction and use of school sites in California.

We understand that the District undertook modernization projects at the combination Malibu school site several years ago. Trenching and other construction activity generated dust, and employees and others raised concerns about indoor air quality. As part of a CEQA and/or PEA-related study, the District detected the presence of PCBs and other contaminants, some in very high concentrations. PCBs were used as a plasticizer in construction materials until banned in the 1970s. The potential adverse health effects of PCBs have been widely studied. The District elected to perform soil removal as mitigation.

In 2013-2014, the District performed an aggressive indoor air assessment with US EPA oversight, and DTSC provided regulatory oversight for the project PEA. The District's indoor air quality survey detected PCBs in caulk samples at both school sites. A group of employees and school parents advocated for strict remediation of the concerns.

The District developed a management plan for PCBs, similar to an asbestos abatement plan to ensure an exposure-sensitive method of dealing with the contaminants. In 2015, the District began to implement abatement activity for all known areas of concerns. Plaintiffs filed a TSCA-based lawsuit in federal court. Plaintiffs independently performed additional sampling, which resulted in additional locations to be abated. Renovations commenced in summer 2016, and are underway.

The plaintiffs seek injunctive relief under the federal Toxic Substances Control Act ("TSCA", 15 U.S.C. §2601 *et seq.*) The trial occurred a few months ago, and post-trial briefing concluded in June. The parties expect a ruling from Judge Anderson in mid- to late August. A ruling in plaintiff's favor would likely be in the form of injunctive relief, such as an order that the District prepare an abatement or management plan similar to that which it has already completed. Remediation of contaminants is included in the school sites development plan, expected to be completed by 2020. It is our understanding that all detected PCB areas of concern have been remediated. To the extent future detections occur, they will be managed pursuant to the development plan.

QUESTIONS FROM COMMITTEE

1. "How to accomplish the objective (as stated in the Board's December 17, 2015 action) to establish a structure under which MUSD assumes responsibility for any and all environmental liabilities arising from the ownership, use and operation of the Malibu schools and other Malibu property transferred to MUSD and releases, indemnifies and defends SMUSD for any future claims arising from such liabilities.

Related sub-issues identified by the Committee include the following:

- *Presence or potential presence of hazardous substances on or at Malibu facilities;*
- *Current or potential directives or requirements regarding environmental conditions from responsible government agencies;*
- *Current or potential claims or actions by third parties or school employees relating to environmental conditions at Malibu facilities."*

The Board objective stated in its December 17, 2015 action was somewhat narrower than the Committee's restatement. The documentation we have been provided specifies that "MUSD assumes responsibility for any remaining remediation of any contamination in Malibu schools and indemnifies SMUSD for any future claims arising from such remediation work or failure to undertake appropriate work." The Committee is directed to negotiate "how" this will be implemented. We further note that a November 2015 resolution stated that "MUSD, not SMUSD, should be responsible for any reasonably necessary remediation of environmental contaminants, including [PCBs], from the schools located within MUSD."

The current ongoing remediation of PCBs appears to be fully contemplated in the District development plan, and funded by the bond program. After reorganization is complete and MUSD

exists as its own district, any future project development and remediation would be fully borne by MUSD. The reorganization resolution would specify that each district would bear full responsibility for school sites and future projects within each district.

Future remediation liability and costs are commonly a concern for transactions involving environmentally-impaired properties. This is a key reason many impaired commercial and industrial properties remain as un- or underutilized “blight” in many communities. Here, the school properties will transfer as part of the reorganization and will continue as operating schools. The reorganization itself provides an opportunity to include the transfer of future remediation costs as part of the asset/liability transfer.

To the extent the future MUSD undertakes new remediation (or any other project for that matter), it would generally be solely responsible for any liabilities or harm arising from that activity. The SMUSD should have no significant exposure for those future projects, because they would be MUSD’s projects. However, a potential claimant could be expected to argue that the SMUSD is really a successor entity to the SMMUSD, and to the extent the SMMUSD was a responsible party to an environmental release or use of hazardous substances, it should bear some or all of the liability. Therefore, MUSD can and should indemnify the SMUSD against any claims arising from future remediation within the MUSD as part of the distribution of assets at reorganization. Similarly, the SMUSD should indemnify the MUSD against such claims related to Santa Monica school sites, in that a potential claimant could argue that MUSD is a successor entity to SMMUSD.

There may be additional or “new” environmental concerns yet to be discovered at the Malibu sites. That is equally true for the Santa Monica sites. The Committee could recommend that the District perform further assessment of the sites, and perhaps intrusive Phase II testing if recommended by an environmental consultant. In commercial property transactions, thorough environmental diligence is an important factor in establishing terms of “the deal” and indemnification. It is difficult, and risky, to guess at potential exposure for environmental impairment without first conducting sufficient baseline diligence (the “Phase I” review). Here, it appears that the District has already undertaken significant review and analysis of the environmental condition of the sites through its CEQA and PEA reviews, and its PCB remediation overseen by US EPA. In light of the foregoing, indemnification as part of reorganization appears reasonable and the most appropriate path.

We have not been informed about any directives or additional requirements being imposed by any regulatory authorities. There is no requirement that MUSD or SMUSD look for or seek out environmental concerns in the absence of some triggering activity (a “project”) that might disturb or affect the existing conditions. However, when PCBs or other contaminants are detected or suspected as part of future activities at the sites, MUSD will bear costs and liabilities for remediation and compliance with applicable law.

You asked about third-party claims related to environmental liability. Exposures can relate to adjacent or nearby property owners and adverse health effect to exposed individuals. This area of law is often referred to as “toxic tort” liability, and is complex. It is beyond the scope of this brief memo to quantify risk with regard to the Malibu sites. However, the reorganization resolution should specify that liability for existing conditions and future activity at the Malibu sites shall be fully borne by MUSD, and SMUSD shall be indemnified accordingly. This can and should be done as part of the allocation of assets and liabilities.

For the remediation activity SMMUSD is currently conducting, the Committee may wish to recommend that both SMUSD and MUSD share liability and defense costs for claims arising therefrom. This might help address any questions from Malibu constituents concerning whether SMMUSD is diligently completing the work it set out to do to benefit the Malibu schools, utilizing bond funds.

2. *“How to accomplish the objective (as stated in the Board's December 17, 2015 action) for dismissal of the pending lawsuit brought by America Unites against SMMUSD, assuming it is still pending or on appeal on the date of separation, or an enforceable agreement from the plaintiffs that SMUSD will be dismissed from the lawsuit.”*

The duty to defend and liability for pending claims against SMMUSD that are specific to the Malibu sites should be allocated at date of reorganization. It is our understanding that the trial court is expected to issue a final ruling this month in the America Unites case. Either party may appeal. To the extent there is an appeal of the America Unites case, the plaintiffs can continue to control who the defendant(s) is/are. Best efforts can be made with regard to dismissal of SMUSD. In any event, MUSD can agree to assume the duty to defend and any liability (injunctive relief) in the case for both MUSD and SMUSD. “Dismissal” with prejudice may not be within the control of MUSD absent final resolution of the litigation.

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Term Sheet for Topic 3, Operating Budget Impacts

A “term sheet” is a nonbinding agreement that sets forth the basic terms and conditions under which an agreement is made. It serves as a template for developing a document that provides more details about an eventual agreement.

Purpose

This term sheet outlines the general principles and parameters for a nonbinding MUNC agreement on a formula (and related procedures) for eliminating any significant adverse financial impact on SMUSD from separation; *financial impact* is defined as the difference in revenue per student in SMMUSD (if the governance structure remains the same) vs. revenue per student in a Santa Monica only district. The phrase “revenue neutrality” refers to the goal of eliminating any significant adverse financial impact on SMUSD from separation.

The table below lists issues in the order that the MUNC tentatively agreed to discuss them. The last entry in the table is a list of criteria that the committee agreed to use for evaluating the various options considered.

Principle/Parameter	Terms of Agreement
<p>A. Revenue sources</p> <ul style="list-style-type: none"> • Revenue sources to include • Revenue sources to exclude 	<p>Unrestricted General Revenue Fund: Revenue Sources to Include</p> <ol style="list-style-type: none"> 1. LCFF revenue <ol style="list-style-type: none"> a. All categories of LCFF except State Aid b. LCFF State Aid 2. Other (non-LCFF) State revenue 3. Other Local revenue <ol style="list-style-type: none"> a. Parcel taxes b. Leases and rentals c. City of Santa Monica contract d. City of Malibu contract e. Santa Monica sales tax: Prop Y; and new 2016 sales tax (if adopted) <p>Revenue Sources to Exclude and Rationale for Exclusion</p> <ul style="list-style-type: none"> • SMMEF – the rationale for exclusion is that this revenue is money raised by PTAs, businesses, etc. in each district respectively, and the committee does not want to create any disincentives for local fund raising efforts. • Lottery Fund Revenue and Mandated Cost Block Grant Revenue – the rationale for exclusion is that these State revenue sources are allocated to school districts on a per ADA basis and would not affect the calculation of the delta.

B. Defining in greater detail what “revenue neutrality” means to include: <ul style="list-style-type: none">• The size of the “delta” that requires payment.• Whether the delta is calculated on an annual or cumulative basis.	
C. Time frame for how long a formula for revenue neutrality remains in place. A time frame can be established either: <ul style="list-style-type: none">• According to the calendar; and/or• according to some event.	
D. Source(s) of data to use when making calculations <ul style="list-style-type: none">• Unaudited actuals• Audited actuals• Other	
E. Other mechanics related to calculations/payments <ul style="list-style-type: none">• When in the calendar year the calculation is performed• Payment schedule• Timing of any reconciliation	
F. Criteria and purpose for reopening any of the agreed-upon formulas and/or other terms of payment	
G. Terms that ensure both the enforceability and legality of agreements	
H. Steps involved in implementation, e.g., MOU, special legislation	
I. Other?	

Evaluation Criteria

The committee tentatively agreed on the following criteria for evaluating options for achieving revenue neutrality for SMUSD:

- 1) The option must be financially viable for both SMUSD and MUSD. (Note: financial viability for each district will need to be further defined.)
- 2) The option must ensure a degree of predictability for both SMUSD and MUSD, e.g., it needs to recognize the realities of a school district's budgeting process.
- 3) The option must avoid establishing unintended negative incentives for either SMUSD or MUSD.

For each option, the committee also agreed to consider both the impact on revenue per student and the impact on each district's total budget.