

REVISED AND REPOSTED FEBRUARY 28, 2008

**DEL MAR UNION SCHOOL DISTRICT
BOARD OF TRUSTEES
Del Mar Union School District
Conference Room
225 9th Street
Del Mar, CA 92014**

**NOTICE OF SPECIAL BOARD MEETING
BY THE BOARD OF TRUSTEES**

**Friday, February 29, 2008
9:30 A.M.**

Written notice is hereby given in accordance with Education Code Section 35144, Government Code 54956, and other applicable law that the following Special Board Meeting of the Board of Trustees, will be held on Friday, February 29, 2008 beginning at 9:30 a.m. at the Del Mar Union School District Office, Conference Room, 225 9th Street, Del Mar, CA 92014.

PLEASE NOTE: Any member of the public who wishes to address the board on an item on the agenda or on another topic which lies within the governing board's jurisdiction may do so, but must present a written request on the form provided. The President of the Board will call for speaker slips when the meeting is called to order. A member of the public who wishes to address the Board on such item is limited to three minutes unless such time limit is waived by a majority vote of the Board. The total amount of time to be allowed on any item is twenty minutes, unless the time limit is waived by a majority vote of the Board.

In accordance with the Brown Act, unless an item has been placed on the published agenda, there shall be no action taken. The Board may 1) acknowledge receipt of the information, 2) refer to staff for further study, 3) refer the matter to the next agenda.

In compliance with the Americans with Disabilities Act, if you need special assistance, disability-related modifications or accommodations, including auxiliary aids or services, in order to participate in the public meetings of the District's governing board, please contact the office of the District Superintendent at (858) 523-6198. Notification 72 hours prior to the meeting will enable the District to make reasonable arrangements to ensure accommodation and accessibility to this meeting. Upon request, the District shall also make available this agenda and all other public records associated with this meeting in appropriate alternative formats for persons with a disability.

CALL TO ORDER - OPEN SESSION – 9:30 a.m.

BUSINESS TO BE TRANSACTED WILL BE LIMITED TO THE FOLLOWING:

A. APPROVAL OF THE AGENDA

Motion ____ *Second* ____ *Ayes* ____ *Nays* ____

B. PUBLIC COMMENT

ADJOURN TO CLOSED SESSION

Time: _____

CALL TO ORDER – CLOSED SESSION

CLOSED SESSION AGENDA:

- C. PUBLIC EMPLOYMENT APPOINTMENT/EMPLOYMENT: TITLE: SUPERINTENDENT (INTERIM)
(G.C. 54957)
- D. PUBLIC EMPLOYEE DISCIPLINE/DISMISSAL/RELEASE PURSUANT TO GOVERNMENT CODE
54957

ADJOURN TO OPEN SESSION

Time: _____

RECONVENE TO OPEN SESSION

- E. REPORT OF ACTION TAKEN IN CLOSED SESSION
- F. CONSIDER APPROVAL OF THE PROPOSED SETTLEMENT AND MUTUAL RELEASE AGREEMENT
BETWEEN THE BRADY COMPANY/SAN DIEGO, INC. AND THE DEL MAR UNION SCHOOL
DISTRICT FOR REPAIR WORK AT TORREY HILLS SCHOOL IN THE AMOUNT OF \$29,702.00.

Motion ___ Second ___ Ayes ___ Nays ___

- G. CONSIDER APPROVAL OF THE PROPOSED SETTLEMENT AND MUTUAL RELEASE AGREEMENT
BETWEEN TOWER GLASS, INC. AND THE DEL MAR UNION SCHOOL DISTRICT FOR REPAIR
WORK AT TORREY HILLS SCHOOL IN THE AMOUNT OF \$22,379.27

Motion ___ Second ___ Ayes ___ Nays ___

- H. **ADJOURNMENT OF SPECIAL BOARD MEETING OF FEBRUARY 29, 2008.**

Time: _____ p.m. Motion ___ Second ___ Ayes ___ Nays ___ Abstain ___

Special Meeting of February 29, 2008

February 28, 2008

To: Board Members
From: Rodger Smith
Subject: Approval of the Proposed Settlement and Mutual Release Agreement between the Brady Company/San Diego, Inc. and the Del Mar Union School District

The Brady Company was one of the contractors whose work was involved in the repair of the window systems at Torrey Hills School. In conjunction with the District's legal counsel and counsel from Douglas E. Barnhart, Inc., an agreement has been reached through which the Brady Company will reimburse the DMUSD for expenses related to the repair of windows at Torrey Hills School. The settlement consists of a payment from the Brady Company to the District of \$29,252.66.

Fiscal Impact: This settlement will be used to reimburse CFD 95-1 for expenses that were incurred for the repair of the window systems at Torrey Hills School. There is no general fund impact that results as a result of approving this settlement.

Recommended: Board Approval of the Proposed Settlement and Mutual Release Agreement between the Brady Company/San Diego, Inc. and the Del Mar Union School District is Recommended.

SETTLEMENT AND MUTUAL RELEASE AGREEMENT

THIS SETTLEMENT AND MUTUAL RELEASE AGREEMENT (“Agreement”) is made effective as of this _____ day of _____ 2008, by and between **DEL MAR UNION SCHOOL DISTRICT** (the “District”), and **BRADY COMPANY/SAN DIEGO, INC.** (“Brady”) (all parties collectively referred to herein as the “Parties”).

RECITALS

A. The District is, and at all times mentioned herein was, a public school district organized and operating within San Diego County, California pursuant to the California Education Code;

B. On or about July 25, 2001, the District entered into a Construction Services Contract with Brady (“Contract”) for the performance of work on Bid Packages 12, 13, 14 and 15 for the Sorrento Hills Elementary School Project (the “Project”);

C. Brady has completed all of its work on the Project;

D. The District contends, and Brady denies, that work performed by Brady pursuant to the Contract contributed to the subsequent failure of the work, which resulted in leaks and the growth of mold requiring the District to repair the work and remediate the mold. Brady contends, and the District denies, that the failure of the work was the result of either design errors for which the District and its agents and servants are solely responsible or of the failure of the work of other contractors at the site (the “Dispute”);

E. After the alleged failure of the work, Brady performed corrective work on behalf of the District (the “Corrective Work”); and

F. The Parties desire to resolve and release claims related to the Project, the Dispute and/or the Corrective Work as set forth below.

AGREEMENT

In consideration of the foregoing recitals, the mutual understandings contained in this Agreement, and other good, valuable, and sufficient consideration, the Parties hereto agree as follows:

1. Settlement Terms:

1. A. The Parties agree that the District has allocated a cost of \$127,954.66 to Brady for the Dispute that the District asserts is due to Brady’s work. Brady acknowledges the District’s allocation and, without agreeing thereto, chooses to settle the Dispute regarding

that amount pursuant to this Agreement. The District acknowledges that Brady has performed Corrective Work at Brady's sole expense in the amount of \$98,702.00. The Parties, therefore, agree and acknowledge that the District shall receive from Brady, and Brady shall pay to the District the difference between the District's allocated cost and the amount of the Corrective Work. Therefore, Brady shall, within fifteen (15) working days after receipt of a fully executed copy of this agreement, pay to the District the sum of \$29,252.66 by check made payable to the Del Mar Union School District and delivered to Rodger Smith, Director of HR/Facilities Planning, Del Mar Union School District, 225 Ninth Street, Del Mar, CA 92014.

- B. The District and Brady acknowledge that Brady's payment to the District of \$29,252.66, constitutes full and final settlement of the Dispute and constitutes full and final settlement of payment to Brady for the Corrective Work.
 - C. Brady and the District agree to mutually release one another as set forth in Paragraph 3 below.
2. Representation and Warranty. The Parties and signatories hereby each represent, covenant and warrant that they are authorized (individually or by their respective principals) to enter into and execute this Agreement and that they have not previously assigned any claims released or assigned in this Agreement, in whole or in part, or taken any other steps which would adversely affect the rights which are the subject of this Agreement. In the event that any of the above representations or warranties are breached or any of the representations and/or warranties contained in this Paragraph prove false, the breaching or misrepresenting party hereby agrees to defend, indemnify and hold the other party harmless from all damages, loss, liability, costs and attorneys' fees resulting from said breach or misrepresentation.
3. Releases.
- A. Except as set forth in this Agreement, the District and its individuals, predecessors, successors, assigns, principals, directors, officers, agents, employees, and representatives, release and forever discharge Brady and all of its individuals, predecessors, successors, assigns, principals, agents, employees, representatives, attorneys, bonding companies and insurers from any and all liability, demands, causes of action, or responsibility of any kind for the Dispute and/or the Corrective Work and/or claims which relate to the allegations that were made or could have been made in connection with the Dispute and/or the Corrective Work, except for claims: unrelated to the Dispute and/or the Corrective Work or

payment described in Paragraph 1; or for latent construction defects, including without limitation, causes of action for breach of contract, negligence, and breach of warranty.

B. Except as set forth in this Agreement, Brady and all of its individuals, predecessors, successors, assigns, principals, agents, employees, representatives, attorneys, bonding companies and insurers release and forever discharge the District and all of its predecessors, successors, assigns, principals, agents, employees, representatives, attorneys, bonding companies and insurers from any and all liability, demands, causes of action, or responsibility of any kind for the Dispute and/or the Corrective Work and/or claims which relate to the allegations that were made or could have been made in connection with the Dispute and/or the Corrective, except for claims: unrelated to the Dispute and/or the Corrective Work or payment described in Paragraph 1(A); or for latent construction defects, including without limitation, causes of action for breach of contract, negligence, and breach of warranty.

4. Civil Code Section 1542. With respect to the releases described in Paragraph 3 of this Agreement, the Parties expressly waive all rights under California Civil Code section 1542 which provides that a general release does not extend to unknown or unsuspected claims which, if known, would have materially affected the settlement. California Civil Code section 1542 provides:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

The Parties hereto acknowledge that except for matters expressly represented or recited herein, the facts and law in relation to this matter and the claims released by the terms of this Agreement may turn out to be different from the facts or law as now known to each party or its counsel.

Each Party therefore expressly assumes the risk of the existence of different or presently unknown facts or law and agrees that this Agreement shall be in all respects effective and binding as to such party despite the possibility of new or different facts or law.

5. Third Party Actions, Warranties and Latent Construction Defects Exclusion. The Parties agree that specifically excluded from the Releases in Paragraphs 3 and 4., above, are any liabilities, demands, claims and causes of actions which arise from or relate to warranties or latent or other construction defects or defective workmanship in the Project and/or the

Corrective Work or any third party actions against the District arising out of Brady's work on the Project and/or the Corrective Work, and that the Parties shall not be precluded from bringing any action at law or in equity arising from or relating to such matters. The District represents and warrants that as of the date of this Agreement, it is unaware of any warranty issues or latent construction defect claims, or third party actions threatened or pending arising out of construction of the Project and/or the Corrective Work.

6. No Admission of Liability. The Parties understand and agree that this Agreement is not to be construed as an admission of liability whatsoever on the part of any of them, and that the release is made solely for the purpose of avoiding the burden which would be imposed upon them by any litigation.
7. Consultation with Legal Counsel. The Parties represent that they have consulted legal counsel prior to the execution of this Agreement and have executed this Agreement with full knowledge of its meaning and effect.
8. Execution of Terms of Agreement. The Parties agree to perform any acts and execute any documents consistent with the terms and conditions of this Agreement which may be needed, desired or required to effectuate the terms, conditions and provisions hereof.
9. Attorneys' Fees Incurred in Resolving the Dispute. The Parties agree that they will not seek attorneys' fees or costs they have incurred relating to the Dispute against one another.
10. Drafting of Agreement. The Parties agree that this Agreement shall not be construed in favor of, or against, any party by reason of the extent to which any party or its counsel participated in the drafting of this Agreement.
11. Agreement Binding on Successors. It is agreed that this Agreement, together with the releases, shall be binding upon and inure to the benefit of the heirs, executors, administrators, personal representatives, successors in interest and assigns of the respective Parties hereto.
12. Entire Agreement. This Agreement embodies the entire understanding and agreement between the Parties pertaining to the matters described herein and supersedes and cancels all prior oral or written agreements between the Parties with respect to the Dispute. Each party acknowledges that no party, agent or representative of the other party has made any promise, representation or warranty, express or implied, not expressly contained in this Agreement, that induced the other party to sign this document. No modification of this Agreement shall be valid unless agreed to in writing by the Parties.

13. Attorney's Fees for Enforcement of This Agreement. The prevailing party in any action to interpret or enforce this Agreement shall be awarded reasonable costs and attorney's fees.
14. Severability. In the event that any provision or any part of any provision of this Agreement shall be void or unenforceable for any reason whatsoever, then such provision shall be stricken and of no force and effect. The remaining provisions of this Agreement, however, shall continue in full force and effect, and to the extent required, shall be modified to preserve their validity.
15. Counterparts. This Agreement may be executed in separate counterparts, the whole of which shall constitute a binding agreement. Facsimile signatures, when received, shall have the same force and effect as original signatures.
16. Governing Law. This Agreement shall be construed in accordance with and be governed by the laws of the State of California. If any action is brought to interpret or enforce any term of this Agreement, the action shall be brought in a state or federal court situated in the County of San Diego, State of California.

DEL MAR UNION SCHOOL DISTRICT
INC

BRADY COMPANY/SAN DIEGO,

By: _____

By:

Its: _____

Its:

APPROVED AS TO FORM :

Paula de Sousa
BEST BEST & KRIEGER LLP
CERCOS
Attorneys for Del Mar Union School District
Diego,

Theodore R. Cercos
LINCOLN, GUSTAFSON &
Attorneys for Brady Company/San
Inc.

Special Meeting of February 29, 2008

February 28, 2008

To: Board Members

From: Rodger Smith

Subject: Approval of the Proposed Settlement and Mutual Release Agreement between Tower Glass, Inc. and the Del Mar Union School District

Tower Glass, Inc. was one of the contractors whose work was involved in the repair of the window systems at Torrey Hills School. In conjunction with the District's legal counsel and counsel from Douglas E. Barnhart, Inc., an agreement has been reached through which Tower Glass will reimburse the DMUSD for expenses related to the repair of windows at Torrey Hills School. The settlement consists of a payment from Tower Glass to the District of \$22,379.27.

Fiscal Impact: This settlement will be used to reimburse CFD 95-1 for expenses that were incurred for the repair of the window systems at Torrey Hills School. There is no general fund impact that results as a result of approving this settlement.

Recommended: Board Approval of the Proposed Settlement and Mutual Release Agreement between Tower Glass, Inc. and the Del Mar Union School District is Recommended.

SETTLEMENT AND MUTUAL RELEASE AGREEMENT

THIS SETTLEMENT AND MUTUAL RELEASE AGREEMENT ("Agreement") is made effective as of this _____ day of _____, 2008, by and between **DEL MAR UNION SCHOOL DISTRICT** ("District"), and **TOWER GLASS, INC.** ("Tower") (all parties collectively referred to herein as the "Parties").

RECITALS

A. The District is, and at all times mentioned herein was, a public school district organized and operating within San Diego County, California pursuant to the California Education Code;

B. On or about July 25, 2001, the District entered into a Construction Services Contract with Tower ("Contract") for the performance of work (glass, glazing and aluminum sliding windows) on the Torrey Hills Elementary School Project (formerly known as Sorrento Hills Elementary School Project) (the "Project");

C. Tower has completed all of its work on the Project;

D. The District contends and Tower denies that work performed by Tower pursuant to the Contract contributed to the subsequent failure of the work, resulting in leaks and the growth of mold requiring the District to repair the work and remediate the mold (the "Dispute");

E. The Parties desire to resolve and release claims related to the Project and/or the Dispute as set forth below.

AGREEMENT

In consideration of the foregoing recitals, the mutual understandings contained in this Agreement, and other good, valuable, and sufficient consideration, the Parties hereto agree as follows:

1. Settlement Terms:

A. Upon execution of this Agreement, Tower shall execute a check payable to the District in the amount of \$22,379.27, for payment to the District within fifteen (15) working days following the execution of this Agreement.

- B. The District and Tower acknowledge that Tower's payment to the District of \$22,379.27 constitutes full and final settlement of the Dispute.
 - C. Tower and the District agree to mutually release one another as set forth in Paragraph 3 below.
2. Representation and Warranty. The Parties and signatories hereby each represent, covenant and warrant that they are authorized (individually or by their respective principals) to enter into and execute this Agreement and that they have not previously assigned any claims released or assigned in this Agreement, in whole or in part, or taken any other steps which would adversely affect the rights which are the subject of this Agreement. In the event that any of the above representations or warranties are breached or any of the representations and/or warranties contained in this Paragraph prove false, the breaching or misrepresenting party hereby agrees to defend, indemnify and hold the other party harmless from all damages, loss, liability, costs and attorneys' fees resulting from said breach or misrepresentation.
3. Releases.
- A. Except as set forth in this Agreement, the District and its individuals, predecessors, successors, assigns, principals, directors, officers, agents, employees, and representatives, release and forever discharge Tower and all of its individuals, predecessors, successors, assigns, principals, agents, employees, representatives, attorneys, bonding companies and insurers from any and all liability, demands, causes of action, or responsibility of any kind for the Dispute and/or claims which relate to the allegations that were made or could have been made in connection with the Dispute, except for claims: unrelated to the Dispute or payment described in Paragraph 1(A); or for latent construction defects, including without limitation, causes of action for breach of contract, negligence, and breach of warranty.
 - B. Except as set forth in this Agreement, Tower and all of its individuals, predecessors, successors, assigns, principals, agents, employees, representatives, attorneys, bonding companies and insurers release and forever discharge the District and all of its predecessors, successors, assigns, principals, agents, employees, representatives, attorneys, bonding companies and insurers from any and all liability, demands, causes of action, or responsibility of any kind for the Dispute and/or claims which relate to the allegations that were made or could have been made in connection with the Dispute, except for claims: unrelated to the Dispute or payment described in Paragraph 1(A); or for latent construction

defects, including without limitation, causes of action for breach of contract, negligence, and breach of warranty.

4. Civil Code Section 1542. With respect to the releases described in Paragraph 3 of this Agreement, the Parties expressly waive all rights under California Civil Code section 1542 which provides that a general release does not extend to unknown or unsuspected claims which, if known, would have materially affected the settlement. California Civil Code section 1542 provides:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

The Parties hereto acknowledge that except for matters expressly represented or recited herein, the facts and law in relation to this matter and the claims released by the terms of this Agreement may turn out to be different from the facts or law as now known to each party or its counsel.

Each Party therefore expressly assumes the risk of the existence of different or presently unknown facts or law and agrees that this Agreement shall be in all respects effective and binding as to such party despite the possibility of new or different facts or law.

5. Third Party Actions, Warranties and Latent Construction Defects Exclusion. The Parties agree that specifically excluded from the Releases in Paragraphs 3 and 4, above, are any liabilities, demands, claims and causes of actions which arise from or relate to warranties or latent construction or workmanship defects in the Project, or any third party actions against the District arising out of Tower's work on the Project, other than those items included in the Dispute, and that the Parties shall not be precluded from bringing any action at law or in equity arising from or relating to such matters. The District represents that as of the date of this Agreement, it is unaware of any warranty issues or latent construction or workmanship defect claims, or third party actions threatened or pending arising out of construction of the Project.
6. No Admission of Liability. The Parties understand and agree that this Agreement is not to be construed as an admission of liability whatsoever on the part of any of them, and that the release is made solely for the purpose of avoiding the burden which would be imposed upon them by any litigation.

7. Consultation with Legal Counsel. The Parties represent that they have consulted legal counsel prior to the execution of this Agreement and have executed this Agreement with full knowledge of its meaning and effect.
8. Execution of Terms of Agreement. The Parties agree to perform any acts and execute any documents consistent with the terms and conditions of this Agreement which may be needed, desired or required to effectuate the terms, conditions and provisions hereof.
9. Attorneys' Fees Incurred in Resolving the Dispute. The Parties agree that they will not seek attorneys' fees or costs they have incurred relating to the Dispute against one another.
10. Drafting of Agreement. The Parties agree that this Agreement shall not be construed in favor of, or against, any party by reason of the extent to which any party or its counsel participated in the drafting of this Agreement.
11. Agreement Binding on Successors. It is agreed that this Agreement, together with the releases, shall be binding upon and inure to the benefit of the heirs, executors, administrators, personal representatives, successors in interest and assigns of the respective Parties hereto.
12. Entire Agreement. This Agreement embodies the entire understanding and agreement between the Parties pertaining to the matters described herein and supersedes and cancels all prior oral or written agreements between the Parties with respect to the Dispute. Each party acknowledges that no party, agent or representative of the other party has made any promise, representation or warranty, express or implied, not expressly contained in this Agreement, that induced the other party to sign this document. No modification of this Agreement shall be valid unless agreed to in writing by the Parties.
13. Attorney's Fees for Enforcement of This Agreement. The prevailing party in any action to interpret or enforce this Agreement shall be awarded reasonable costs and attorney's fees.
14. Severability. In the event that any provision or any part of any provision of this Agreement shall be void or unenforceable for any reason whatsoever, then such provision shall be stricken and of no force and effect. The remaining provisions of this Agreement, however, shall continue in full force and effect, and to the extent required, shall be modified to preserve their validity.
15. Counterparts. This Agreement may be executed in separate counterparts, the whole of which shall constitute a binding agreement. Facsimile signatures, when received, shall have the same force and effect as original signatures.

16. Governing Law. This Agreement shall be construed in accordance with and be governed by the laws of the State of California. If any action is brought to interpret or enforce any term of this Agreement, the action shall be brought in a state or federal court situated in the County of San Diego, State of California.
17. Settlement Negotiations Inadmissible. Except as may otherwise be required under California law, no evidence of any discussion or communications made or information or materials transmitted in the course of negotiations for this Agreement, shall be admissible or presented in any action or proceeding between the parties before any court, agency, or other tribunal, as evidence of or relevant to any matters resolved or released by this Agreement.

DEL MAR UNION SCHOOL DISTRICT

TOWER GLASS, INC

By: _____

By:

Its: _____

Its:

APPROVED AS TO FORM :

Paula de Sousa
BEST BEST & KRIEGER LLP

Attorneys for Del Mar Union School District

Attorneys for Tower Glass, Inc.