

NEWPORT-MESA UNIFIED SCHOOL DISTRICT

SUMMARY OF SURPLUS PROPERTY PROCEDURES

These materials provide school districts with an overview of practical issues to consider before using or disposing of school district property, as well as the options available and information necessary to better assess current real property use agreements, and make fiscally responsible plans for future use agreements or disposition of school district properties. We will discuss the disposition of surplus real property by way of sale or lease and the options available to school districts for sharing facilities with both public and private entities. The following materials are divided into four categories: (1) disposition of surplus real property; (2) agreements with private entities; (3) agreements with other public entities; and (4) school closures.

I. SALE AND LEASE OF SURPLUS PROPERTY

1. What are the school district's goals/expectations?
2. What limitations (legal, political, etc.) exist on the property?
3. How will these goals, expectations, and limitations be communicated to the Board and to the community?
4. What does the school district desire to do with the funds it receives and is this an allowable use of those funds?
5. With what type of entities (public, private, individual) is the school district dealing?
6. What type of relationship, if any, does the school district have with these entities?
7. What political/community issues will be involved in the school district's decision about the disposition of the property or its ultimate use?
8. Does the school district have a master facilities plan with which the use/disposition of the property must conform?
9. How will the disposition of the property affect the use of other district facilities?
10. Has the school district considered disposing of other properties that may be better suited?

SALE OF PROPERTY

Preliminary Matters

(A) Asset Management Planning

“Asset management”, as a term, is often confusing because it means different things to different people. In the context of California public school districts, asset management simply means treating surplus real property -- property no longer needed for programmatic, administrative, or operational use -- in a businesslike way. A school district does this by taking a holistic look at the need for its real estate over the next ten (10) or twenty (20)

years and deciding, based on policy goals, demographic analysis, and economic analysis, what properties may be declared surplus and can generate revenues and how all other district properties are best used.

A well-run business treats any of its assets in a manner which secures the most value for its shareholders. Similarly, a prudent school district, in dealing with its surplus real estate, will be responsible for securing value from these assets for the benefit of its constituents. Acting like a business in handling its surplus real property carries significant benefits for a school district. For example, when it goes out for a bond or a parcel tax, a district assures its constituents that economic value has been properly realized from assets no longer needed for the district's mission purpose, value which can be turned to advantage for other district capital needs.

A school district engages in proper asset management by planning for the long-term use of all its real property assets. For a property which it determines it may not need for the long-term, the district should first inventory it in order to fully understand what it owns. Second, the district should engage in planning for disposition to ensure that it will not be shortchanged if and when the property were to be put on the market. It does this by recognizing that there are various methods to achieving value for a piece of surplus property. In this context, a district should analyze the pros and cons of each approach to disposition - sale or lease of property, exchange or joint venture, sale of property "as is" or with zoning or development entitlements in place, etc. In this way, the district comes to understand the relationship of risk to reward; in the marketplace greater reward almost always carries with it the assurance of greater risk. The question is how does a school district knowledgeably and prudently find the right balance between that reward and that risk?

A recommended way to approach asset management with the goal of ensuring an ultimately successful disposition is to undertake an Asset Management Planning Report. Although this plan can take different forms, essentially an Asset Management Planning Report should provide the school district with the following information and can do so by carrying out the following tasks:

1. Inventory each potentially surplus property (including reference to each property's characteristics and constraints, such as size, zoning and General Plan designations, title issues, current use, and lease and other encumbrances).
2. Summarize lease obligations and other commitments for use by non-district entities of each property, if any.
3. Discuss constraints and opportunities for each property.
4. In regard to property which may be subject to the Naylor Act, memorialize discussions with the Planning Department and the Parks and Recreation Department of the local jurisdiction so the district can avoid surprises (and possibly create compromise).
5. Articulate real-world disposition options for each property and, working with an appraiser, develop value ranges for each option.

6. Look at all potentially surplus properties holistically with reference to all of the real estate owned by the district; i.e., use this process to discover and act on opportunities to resolve all potential land use issues with the local city or county in which the district operates.
7. Summarize legal and procedural requirements for sale or lease or exchange of public school district real property.
8. Present recommendations to district for the preferred manner of disposition for each property and the priority in which they should occur.

It should be remembered that the final version of any good Asset Management Planning Report will be the result of discussions undertaken among school district staff, the Board of Education, the staff of the local city or county, and members of the public. In this way, the Asset Management Planning Report will be able to lead to wide acceptance by the community in any disposition of the district's real property.

(B) Appointment of Advisory Committee (Education Code section 17388)

Pursuant to Education Code section 17388, before surplus real property is sold or leased, the governing board of a school district must appoint an advisory committee to advise the governing board on the disposition of such property. Education Code section 17389 requires that the advisory committee be composed of not less than seven (7) nor more than eleven (11) members and must be representative of specific groups within the community. Sometimes this committee is called a "7-11 Committee."

Education Code section 17389 states that an advisory committee must be represented by each of the following:

- a. The ethnic, age group, and socioeconomic composition of the school district.
- b. The business community, such as store owners, managers, or supervisors.
- c. Landowners or renters, with preference to be given to representatives of neighborhood associations.
- d. Teachers.
- e. Administrators.
- f. Parents of students.
- g. Persons with expertise in environmental impact, legal contracts, building codes, and land use planning, including, but not limited to, knowledge of the zoning and other land use restrictions of the cities or cities and counties in which the surplus space and real property is located.

The committee's task is to review data to determine the amount of surplus space or real property available, establish a priority list for its use, provide community input on acceptable uses, and forward its recommendations to the governing board. On recommendation from the advisory committee, a school district's governing board may pass a Resolution of Intention to dispose of real property.

Education Code section 17390 specifically states that an advisory committee must do all of the following:

- a. Review the projected school enrollment and other data as provided by the school district to determine the amount of surplus space and real property.
- b. Establish a priority list of use of surplus space and real property that will be acceptable to the community.
- c. Cause to have circulated throughout the attendance area a priority list of surplus space and real property and provide for hearings for community input to the committee on acceptable uses of space and real property, including the sale or lease of surplus real property for childcare development purposes pursuant to Education Code section 17458.
- d. Make a final determination of limits of tolerance of use of space and real property.
- e. Forward to the school district's governing board a report recommending uses of surplus space and real property.

Please note that the provisions for an Advisory Committee do not set forth a minimum time period in which these duties must be completed. Furthermore, as an extension of a legislative body (the school district governing board), please note that the Advisory Committee must follow all Brown Act requirements.

(C) Notice to Local Planning Agency

Government Code section 65402(c) requires a school district to submit a report to its local planning agency before disposing of any real property. The planning agency must report on the disposition's conformity with the applicable general plan within forty (40) days. If the planning agency fails to report on the disposition of such property within forty (40) days, such failure to submit a report is deemed a conclusive finding that the proposed disposition conforms to the general plan. If the planning agency disapproves of the disposition, such disapproval may be overruled by the school district.

(D) California Environmental Quality Act

Prior to disposing of the property, school districts must comply with the California Environmental Quality Act ("CEQA"). School districts may seek a categorical exemption for the sale of surplus property pursuant to CEQA Guidelines section 15132.

(E) Deed Restrictions

Prior to selling any surplus property, a review of the real property deed should be made to discover any possible restrictions.

Requirements Regarding Offering Surplus Property

After the advisory committee recommends the sale of surplus property, a school district must offer to sell the property to certain entities and public agencies as follows:

(A) Sale of Surplus Playground, Playing Fields and Recreational Property pursuant to Education Code section 17485, *et seq.* (“Naylor Act”)

The purpose of the Naylor Act is for the preservation of recreational and open space property by allowing one governmental agency to purchase such property from another at a reduced price. (Education Code section 17485). In order to be subject to the requirements of the Naylor Act, the surplus property must be a site which has the following characteristics:

- a. The property consists of land which is used for school playground, playing field, or other outdoor recreational purposes and open-space land particularly suited for recreational purposes.
- b. The property must have been used for one or more of the purposes set forth in the preceding paragraph for at least eight (8) years immediately preceding the date of the governing board’s determination to sell the property.
- c. No other available publicly owned land in the vicinity is adequate to meet the existing and foreseeable need to the community for playground, playing field, or other outdoor recreational and open-space purposes.

There are some exceptions and limitations to the Naylor Act, which are summarized as follows:

- a. If a school building is already erected on the site, the governing board can retain a portion of the property and the surrounding property which must be retained to avoid reducing the value of that part of the school site containing the structures to less than 50 percent (50%) of the fair market value. (Education Code section 17490.)
- b. The school district can exempt the property from the Naylor Act if it is purchasing a school site at another location or is expanding another school site by 50 percent (50%) or more. (Education Code section 17497.)
- c. A public agency can acquire only so much of the property so as not to exceed 30 percent (30%) of the total surplus land owned by the school district. (Education Code section 17499.)

- d. The acquiring agency must maintain the property's use as recreational or open-space property. (Education Code section 17494.)

If it is determined that the property is subject to the Naylor Act, pursuant to Education Code section 17489, the school district must notify the following government agencies regarding the availability of the property:

- a. First, to any city within which the land may be situated.
- b. Second, to any park or recreation district within which the land may be situated.
- c. Third, to any regional park authority having jurisdiction within the area in which the land is situated.
- d. Fourth, to any county within which the land may be situated.

The notified agencies have sixty (60) days to respond to the school district in writing. If a particular public agency is interested in purchasing the property, Education Code section 17491 sets forth the method for calculating the purchase price. Pursuant to Education Code section 17491, any property sold pursuant to the Naylor Act ("Naylor Act Property") shall not exceed the school district's cost of acquisition, calculated as a pro rata cost of acquiring the entire parcel comprising the school site, adjusted by a factor equivalent to the percentage increase or decrease in the cost of living from the date of purchase to the year in which the offer of sale is made, plus the cost of any improvement to the recreational and open-space portion of the land which the school district has made since its acquisition of the land. In no event shall the price be less than twenty-five percent (25%) of the fair market value of the land or less than the amount necessary to retire the share of local bonded indebtedness plus the amount of the original cost of the approved state aid applications on the property.

(B) Requirements to Offer District Property to Other Public Agencies

If none of the public agencies listed in Education Code section 17489 purchase the surplus property, or if the property is not Naylor Act property as described above, school districts must proceed pursuant to Education Code section 17464 which requires that a school district, prior to offering property for sale to the general public, must first offer such property to certain public agencies through two categories of priority.

- a. Offer to Public Agencies Pursuant to Education Code section 17464(a)

Pursuant to Education Code section 17464(a), school districts must make a written offer to sell the property to certain public agencies in accordance with Government Code section 54222. These public agencies include the following:

- i. Any local entity as defined in Health and Safety Code section 50079 for the purpose of developing low and moderate-income housing (i.e., local housing authorities and/or redevelopment agencies) within whose jurisdiction the property is situated.

- ii. To any park or recreation department of any city within which the property is situated.
- iii. To any park or recreation department of the county within which the property is situated.
- iv. To any regional park authority having jurisdiction within the area in which the property is situated.
- v. To the State Resources Agency.
- vi. To a non-profit neighborhood enterprise association corporation if the property is located in an enterprise zone as referenced in Government Code section 7073.
- vii. To the program area agent if the property is located in a designated program area as defined in Government Code section 65088.4.

If any of the above-referenced entities desires to purchase the surplus property, such entities must notify the school district in writing of their intent to purchase within ninety (90) days after receipt of the school district's notification of intent to sell. (Government Code section 54222(f)).

If the school district receives notice from any of these entities, stating that they desire to purchase the property, the school district and such entities must enter into good-faith negotiations to determine a mutually satisfactory sales price. If a price cannot be agreed upon after good-faith negotiations of not less than sixty (60) days, the property may be disposed of, without further regard to these provisions. (Government Code section 54223).

In the event that the school district receives offers for the purchase of the property from more than one of the above-referenced entities, the school district must give priority to the entity who agrees to use the property for housing for persons and families of low or moderate income. However, first priority must still be given to an entity who agrees to use the property for park or recreational purposes if the property is already being used and will continue to be used for park or recreational purposes, or if the property is designated for park or recreational use in the local general plan and will be developed for that purpose. (Government Code section 54227).

(C) Offer to Public Agencies Pursuant to Education Code section 17464(c)

Education Code section 17464(c) states that as second priority, the school district must offer the property for sale at fair market value to the following public agencies:

- i. Director of General Services for the State of California.
- ii. The Regents of the University of California.

- iii. The Trustees of the California State University.
- iv. The county in which the property is located.
- v. The city in which the property is located.
- vi. Any public housing authority in the county in which the property is located.

In addition to offering the surplus property for sale to the above-referenced public agencies, Education Code section 17464(c) requires that school districts give public notice to any public district, public authority, public agency, public corporation, or any other political subdivision in the state, to the federal government, and to non-profit charitable corporations by publishing the school district's intent to dispose of the property in a newspaper of general circulation within the school district's boundaries.

The school district must publish this notice once a week for three (3) successive weeks with at least five (5) days intervening between the respective publication dates, not counting the publication dates. Written notices to public agencies listed in Education Code section 17464(c) must be mailed no later than the date of the second published notice.

Any entity who desires to purchase the property must, within sixty (60) days after the third publication of the notice, notify the school district of its intent to purchase. If the entity and the school district are unable to arrive at a mutually satisfactory price during the sixty (60)-day period, the school district may dispose of the property to the general public as set forth below. In the event that the school district receives offers from more than one entity, the school district's governing board may determine which offer to accept.

The "Surplus Lands Act"

On October 9, 2019, the Governor approved Assembly Bill No. 1486 (AB 1486), also known as the Surplus Lands Act, which made several changes to the public agency notice requirements for surplus property found in Government Code section 54220 et seq. (the "Notice Statutes"). In sum, the Notice Statutes require certain local agencies, including school districts, to send written offers to certain public agencies prior to selling or leasing real property. AB 1486 attempts to create more opportunities for Housing Sponsors, defined as any agency certified by the identified by the Department of Housing and Community Development ("DHCD") to develop low and moderate income housing.

The Surplus Land Act is a complex bill that includes many changes that are not applicable to school districts. With respect to school districts, AB 1486 changes the Notice Statutes in one key way. The Surplus Land Act requires public agencies to declare their property either "Surplus Land" or "Exempt Surplus Land" before pursuing a sale or lease of the property.

For any land identified as Surplus Land, the land must be offered to the housing authorities identified by DHCD prior to selling or leasing the property.

If land qualifies as Exempt Surplus Land pursuant to the definition provided in the Surplus Land Act, the land does not need to be offered to the housing authorities identified by

DHCD. The definition of “Exempt Surplus Land” includes [l]and that is subject to Sections 17388, 17515, 17536 ... of the Education Code ... unless compliance with this article is expressly required.” In short, the Education Code references cover the following transactions: (1) any real property to be disposed of by the advisement of an Advisory Committee (i.e., a 7-11 Committee) and approval by a governing board of a school district; (2) any real property subject to a lease to be used jointly by a school district and another person or entity; or (3) any real property, owned by a school district, involved in an exchange of real property with a private person or business.

As noted above, school districts are generally required to form an Advisory Committee pursuant to Education Code section 17388 prior to selling or leasing real property. Therefore, unless a school district does not use an Advisory Committee before attempting to sell or lease property, it can deem any property Exempt Surplus Land. In other words, school districts can declare any property “Exempt Surplus Land” that goes through the Advisory Committee and avoid the notice requirements of the Surplus Lands Act.

To meet the requirements of the Surplus Lands Act to declare property Exempt Surplus Land, school districts must make a formal written finding. This finding can be done through a Board resolution that explains how the property at issue qualifies as Exempt Surplus Land. As noted above, there are several exceptions that make property Exempt Surplus Land so the resolution can identify the specific reason. Usually, the Advisory Committee requirement will make school district property qualify as Exempt Surplus Land.

As noted above, the Surplus Lands Act recently went into effect and is fairly complex, with many requirements inapplicable to school districts. Therefore, many entities and people incorrectly claim that any property sold or leased by a school district must go through the notice requirements of the Surplus Lands Act. Accordingly, we recommend adopting a resolution declaring property Exempt Surplus Land early to clarify the issue for any person or entity who may be interested or involved in the sale or lease of the property.

Resolution for Sale of Property

After the school district follows the above-referenced procedures, the school district must sell the surplus property to the highest bidder, or reject all bids pursuant to Education Code sections 17466-17476. Pursuant to these provisions, the school district’s governing board must, in a regular open meeting, adopt a resolution by two-thirds (2/3) vote of all its members, declaring the school district’s intention to sell the property. This resolution must describe the property as well as specify the minimum price and the terms upon which the property will be sold. In addition, the resolution must state the commission, if any, which the district will pay to a licensed real estate broker out of the minimum price. This resolution must fix a time, not less than three (3) weeks thereafter, for a public meeting of the governing board to be held at its regular place of meeting, at which sealed bids to purchase the property will be received and considered.

The language of this resolution is very important as it must contain the terms and conditions upon which the school district will sell the property. Often, it will be practical to adopt a detailed resolution prior to engaging in the notice and negotiation process with public agencies, as set forth above, thereby providing a minimum standard of deal points from which all such negotiations must begin.

The school district may, at its discretion, offer to pay the commission to a licensed real estate broker who is instrumental in obtaining any proposal. If the school district decides to pay such a commission, this must be specified in the above-referenced resolution. No commission may be paid unless it is contained in or with the sealed proposal or stated in or with the oral bid which is finally accepted. Any commission must be paid only out of money received by the school district from the sale of the property.

Furthermore, notice of the adoption of the resolution declaring the school district's intention to sell the property and of the time and place the school district is holding the meeting must be given by posting copies of the resolution signed by the school district's governing board in three (3) public places in the school district, not less than fifteen (15) days prior to the school district's meeting at which the sealed proposals will be received and considered. In addition, the school district must publish such notice not less than once a week for three (3) successive weeks before the district's governing board meeting in a newspaper of general circulation published in the county in which the district or any part thereof is situated.

At the board meeting which the governing board receives and considers the proposals, all sealed bids which have been received, in public session, must be opened, examined and declared. Prior to accepting any written proposal, the governing board must call for oral bids. If upon calling for any oral bids, any responsible person offers to purchase the property upon the terms and conditions specified in the resolution, for a price exceeding by at least five percent (5%) the highest written proposal, after deducting the commission, if any, to be paid a licensed real estate broker, then the oral bid which is the highest after deducting such commission must be accepted by the governing board. Final acceptance by the governing board, however, must not be made until after the oral bid is reduced to writing and signed by the offeror.

Of the written proposals submitted to the school district which conform to all terms and conditions specified in the resolution of intention to sell, which are made by responsible bidders, the proposal which is the highest after deducting any commission, if any, to be paid a licensed real estate broker, must be accepted unless a higher oral bid is accepted as set forth above. In addition, the school district's governing board may, if it deems such action to be for the best public interest, reject any and all bids, either written or oral, and withdraw the property from sale.

USE OF PROCEEDS FROM PROPERTY DISPOSITION- SALE AND LEASE

Use of Proceeds from Property Disposition (Sale)

Education Code section 17462 specifies the manner in which school districts may use surplus property proceeds. Generally, school districts are allowed to use surplus property proceeds for capital outlay expenses or for costs of maintenance of school district property that the governing board of a school district determines will not recur within a five (5)-year period.

Additionally, school districts have the option of depositing their surplus property proceeds into their general fund, if both the governing board of the school district and the State Allocation Board ("SAB") determine that the school district has no anticipated need for additional sites or building construction for the ten (10)-year period following the sale and the school district has no major deferred maintenance requirements. School districts using this option may only use the proceeds

for a one-time expenditure and are specifically prohibited from using the proceeds for ongoing expenditures such as salaries and other operating expenses.

Finally, school districts may deposit surplus property proceeds into a special reserve fund to be used for capital outlay expenses, for costs of maintenance of school district property that the governing board determines will not recur within a five (5)-year period, or for the future maintenance and renovation of schoolsites if the school district's governing board and the SAB determine that the school district has no anticipated need for additional sites or building construction for major deferred maintenance projects for a ten (10)-year period following the sale.

Although the existing law provides methods by which school districts can use surplus property proceeds for general fund or special reserve fund purposes, to do so, a school district essentially has to "opt out" of the School Facility Program for the subsequent ten (10) years. Under Education Code section 17463.7, school districts are given additional options for allocating their surplus property proceeds that, although limited in application and with their own caveats, do not require this "opting out" of the School Facility Program.

Please note that Education Code section 17463.7 applies to school district property purchased (1) entirely with local funds, (2) with the proceeds of a local general obligation bond, or (3) with revenue derived from developer fees. It does not apply to property acquired with any other type of funding. This statute originally had a sunset date of January 1, 2012; however, that date has been extended by subsequent statute so this statute is applicable until January 1, 2024.

Also, the proceeds from the sale of surplus property purchased entirely with local funds are treated differently than the proceeds from the sale of surplus property purchased with a local general obligation bond or revenue derived from developer fees. A school district may deposit all of the proceeds from the sale of surplus property purchased entirely with local funds into the school district's general fund. School districts may use the proceeds for any one-time general fund purpose.

Likewise, proceeds from the sale of surplus property purchased with a local general obligation bond or revenue derived from developer fees may also only be used for a one-time general fund purpose. However, only a percentage of the proceeds from these properties may be deposited in the general fund. The amount of the proceeds from the transaction that may be deposited into the general fund of the school district may not exceed the percentage computed by the difference between the purchase price of the property and the proceeds from the transaction, divided by the amount of the proceeds from the transaction.

Please note that before a school district can make use of this section, it must submit documents to the SAB certifying: (1) the school district has no major deferred maintenance requirements not covered by existing capital outlay resources; (2) the sale does not violate the provisions of a local bond act; and (3) the surplus property is not suitable to meet projected school construction needs for the next ten (10) years. Additionally, prior to using this section a school district must present, at a regularly scheduled board meeting, a plan that identifies: (1) the source of the funds; (2) the use of the funds; and (3) the reasons why the expenditure will not result in ongoing fiscal obligations for the school district.

It is important to realize that school districts that allocate surplus property proceeds pursuant to Education Code section 17463.7 may lose hardship apportionment and eligibility. First, the SAB will reduce an apportionment of hardship assistance awarded to a school district by an amount equal to the amount of the surplus property proceeds that a school district uses for a one-time expenditure under the new law. Second, if a school district exercises the authority granted to it under Education Code section 17463.7, it is ineligible for hardship funding from the State School Deferred Maintenance Fund for five (5) years after the date the proceeds are deposited into the general fund.

Therefore, while Education Code section 17463.7 now provides an additional option for school districts to consider when reviewing their budgets, this flexibility should be weighed against the potential future consequences outlined above.

Use of Proceeds from Property Disposition (Lease)

It is interesting to note that use of proceeds from the lease of surplus property is not specifically addressed in the Education Code sections governing the disposition of surplus property. This lack of clarity led many school districts to take a conservative approach over the years and apply the same restrictions that apply to proceeds from a sale or lease with option to purchase. It is now generally accepted that such proceeds may be expended without the limitations imposed on the proceeds from a sale or lease with option to purchase. In fact, the general fund is likely the appropriate place to hold such funds, pursuant to Education Code section 41002 (which says the general fund is the appropriate place for funds not otherwise designated), unless the district opts, by way of Board resolution pursuant to Education Code section 41003, to allocate a specific fund in which lease proceeds are to be deposited.

The Office of Public School Construction (“OPSC”) had long taken the approach of claiming that lease proceeds derived from a lease of a year or less can be used for general fund purposes, but lease proceeds from leases of longer duration must be put in a capital fund for restricted use. The “one year rule” was not based on any law or regulation and was seemingly an arbitrary distinction made by SAB, although the SAB and OPSC claim it is in accordance with Education Code section 17462.

The legislative history of Education Code section 17462, however, indicates that the restrictions were not intended to apply to lease proceeds. During the crafting of the most recent version of section 17462, which came into effect in 2007, the legislature briefly considered using the term lease throughout the section. However, the final adopted section replaced the word lease with the phrase “lease with an option to purchase.” This change offers evidence that the legislature intended to exclude leases from the restrictions of Education Code section 17462.

The balance of evidence strongly suggests that the restrictions found in Education Code section 17462 do not apply to lease proceeds. Arguably, the general fund is the only appropriate place to hold lease proceed funds (under Section 41002), unless a school district opts, by way of Board resolution pursuant to Education Code Section 41003, to allocate a specific fund in which lease proceeds are to be deposited. However, until this issue is resolved, school districts must remain vigilant and recognize that they are acting at odds with the opinion of the SAB and OPSC.

LEASE OF PROPERTY

Leases are a common method used by school districts to retain unused property in a manner that is economically beneficial to the school district. However, the leasing of a school district's real property is a highly regulated activity. The Education Code contains specific procedures for leasing property that apply depending on the property type and/or its intended use. In general, we will differentiate between the following property types: classroom space, recreational or Naylor Act property, vacant land, improved property not containing classrooms, and property intended for use for child care.

In order to lease school district property, regardless of the type of use, surplus property procedures must be followed, including the formation of an advisory committee pursuant to Education Code section 17387 *et seq.*, that makes recommendations to the school district governing board, as discussed in the Sale of Surplus Property section above.

Board Meeting to Declare Intent to Lease Real Property

Regardless of the type of property or the use intended for that property, the lease process requires that, upon receipt of the advisory committee's recommendations, the governing board make a determination as to the disposition of the property at issue. If the governing board decides to accept the advisory committee's recommendation to lease the property, the board must declare its intent to lease the property by a resolution that is adopted at a regular open meeting by a two-thirds (2/3) vote of all the board members. (Education Code section 17466.) The resolution must describe the property proposed to be leased, specify the minimum rental amount and terms upon which it will be leased (and commission if a broker is involved), and fix a time not less than three (3) weeks thereafter for a public meeting of the governing board at which sealed proposals to lease the property will be received and considered. The stated terms will then be used to determine if a bidder is responsive to the governing board's requirements. The wording of the resolution is critical to ensuring that the school district receives proposals that meet its needs.

After the governing board adopts the resolution of its intent to lease the property, then the board's desired course of action must be implemented under the procedural requirements of the Education Code as discussed below. It is at this point that the type or use of the property for lease becomes relevant; thus resulting in variations to the lease process concerning the notice required and the priorities for leasing. Leasing property without option to purchase generally requires fewer notices than when a district sells property. Specifically, Education Code section 17464 applies only to sale and lease with option to purchase, so the district does not need to send notices to the entities listed here. Please note, however, arguments have been made that Government Code section 54222 applies to any lease even though Education Code section 17459 identifies only the *sale* of real property, not lease, as subject to Government Code Section 54220 *et seq.* While certain fact-specific issues in some transactions render compliance with this statute impractical, until a court determines this issue definitively, we recommend that school districts offer leases in accordance with Government Code section 54222, as a best practice.

Notice Procedures Based on Type of Property: Variations to the Lease Process Subsequent to Adoption of Intent to Lease

Property Designed to Provide Direct Instruction or Instructional Support

If the property to be leased is designed to provide direct instruction or instructional support it must first be offered to charter schools pursuant to Education Code section 17457.5 and amendments to Education Code sections 17230, 17458, 17464 and 17489, as described above.

Classroom Space

If a school district intends to lease classroom space, it must first offer to lease the property for special education programs to school districts that are part of the school district's special education local plan area or the county office of education with jurisdiction over the school district. (Education Code section 17465.) Under Education Code section 17465(c), the school district must notify, in writing, the school districts and county office of its intent to lease the vacant classrooms for special education programs that they provide. The notice must specify that the lease shall not exceed a term of ninety-nine (99) years and that the lease payment and other terms of the lease are subject to negotiation. The notice shall also state that the offer to lease is not valid for more than sixty (60) days after receipt. (Education Code section 17465(c).) If a school district or county office of education is interested in leasing the property, the lease terms shall be negotiated between the parties and the lease payments "shall not exceed the school district's actual costs for maintenance, operations, and custodial services for the leased classrooms." (Education Code sections 17465(f)(1) and (2).) However, if the area school districts and the county office of education are not interested in leasing the property, the school district may then make the property available to the public through a formal notice and bidding process in accordance with Education Code section 17455 *et seq.*, as described below.

Recreation Site--Naylor Act Property

If the property to be leased contains land that was used as a playground, playing field or recreational property for at least eight (8) years immediately preceding the date of the governing board's decision to lease the property, then Education Code section 17485 *et seq.*, imposes certain requirements, including making the land available first to specific public agencies according to a given priority.

As noted above with respect to disposition of property through sale procedures, if it is determined that the property is subject to the Naylor Act (Education Code section 17489), the school district must notify the following governmental agencies regarding the availability of the property for lease:

- a. To any city within which the land is situated.
- b. To any park or recreation district within which the land is situated.
- c. To any regional park authority having jurisdiction within the area in which the land is situated.
- d. To any county within which the land is situated.

The notified agencies have sixty (60) days to respond to the school district in writing. If a particular agency is interested in leasing the property, Education Code section 17491(c) sets forth the method for calculating the lease rate. If none of the notified agencies are interested in leasing the property pursuant to the Naylor Act, then the school district may proceed with the public bidding process under Education Code section 17455 *et seq.*

Lease of Vacant Land

If a school district is considering leasing vacant land, as a preliminary matter, the school district should confirm that the proposed leasing arrangement would comply with any applicable zoning requirements. If the land is vacant and has not been or is not now used for playground, playing field, or recreation purposes, the property would not be considered subject to the Naylor Act. Accordingly, there would be no requirement to offer the property to any entity prior to the public bidding process under Education Code section 17455 *et seq.*, as described below.

Lease of Site with Improvements That Do Not Include Classrooms

If a school district wishes to lease improved property that does not include vacant classrooms, such as property containing only administrative buildings, there is no requirement to offer the property to any entity prior to the public bidding process under Education Code section 17455 *et seq.*

Lease of Property to be Used for Child Care and Development Services

If a school district wishes to lease property specifically for use for child care and development services, as permitted under Education Code section 17458, then the property may be offered first to any contracting agency, which includes school districts, community college districts, colleges or universities, county superintendents of schools, counties, cities, public agencies, private nontax-exempt agencies, private tax-exempt agencies, as well as licensed private agencies and parent cooperatives. The term for such a lease must be no less than five (5) years from the date upon which the property is first offered to the agency or until the school district retakes possession of the property, whichever occurs first. Failure by the leasing agency to comply with this requirement would constitute a breach of contract entitling the school district to immediate possession of the property as well as any damages under the lease agreement.

If none of the contracting agencies are interested in leasing the property for childcare purposes, the school district must comply with the other requirements for leasing the property, depending on the type of property at issue.

The “Surplus Lands Act”

As noted above, school districts can declare their properties “Exempt Surplus Land” pursuant to the Surplus Lands Act and therefore, avoid the notice requirements set forth in the Surplus Lands Act prior to leasing properties.

Offer to Lease to General Public and Other Public Entities through Formal Notice and Bidding Process under Education Code Section 17455

If the property is not leased to any of the specified entities enjoying priority as described above, then the school district must offer the property to the general public, including public entities not specifically addressed above, under the following Education Code procedures.

Public Notice of Resolution of Intention to Lease and Receive Sealed Proposals

The school district must provide public notice of the resolution of intention to lease the property and the time and place of holding the meeting to receive proposals. (Education Code section 17469.) The school district must: 1) post copies of the signed resolution in three public places in the school district, not less than fifteen (15) days before the meeting; and 2) publish notice not less than once per week for three (3) successive weeks before the meeting in a newspaper published in the county. Education Code section 17471 provides abbreviated notice provisions in the event that the governing board determines in its resolution that the “value” of the lease does not exceed \$50 per month based on the market property rental rates.

Board Meeting to Receive Sealed Proposals

At the time and place fixed in the resolution for the meeting of the governing board, “all sealed proposals which have been received shall, in public session, be opened, examined, and declared by the board.” (Education Code section 17472.) The highest proposal made by a responsible bidder that conforms to all terms and conditions specified in the resolution of intention to lease must be accepted unless a higher oral bid is accepted or the governing board rejects all bids. (*Id.*) Because the governing board must award the lease based on the highest proposal, the wording of the resolution containing the terms upon which proposals will be accepted is critical so that the governing board can carefully control the terms of the deal and reject proposals that do not comply with all specified terms.

Prior to accepting any written proposals, the governing board must call for oral bids under the terms and conditions specified in the resolution. (Education Code section 17473.) A responsible oral bid that exceeds the rental price set forth in the resolution by at least 5 percent (5%) shall be accepted when reduced to writing unless the governing board decides to reject all bids and withdraw the property from sale or lease. (Education Code section 17476.) The final acceptance of prevailing bid may be made at either the same session or at any adjourned session of the same meeting held within the following ten (10) days. (Education Code section 17475.)

The procedures discussed above require the award to the highest responsible bidder unless all proposals are rejected. These procedures do not lend themselves to flexibility in the award of proposals based on non-monetary consideration. As a result, the possibility exists that a bid could be received from one entity that contains a rental amount that is greater than the monthly rental amount stated in a competing proposal, but that is less than the total consideration provided in the competing proposal. The selection of the highest bidder becomes a challenge in that case.

To solve this problem, the governing board resolution must be carefully crafted to allow for the evaluation of the various forms of consideration in addition to the monthly rental fee. For example, improvements to the land proposed by the tenant, and the value of any services provided to the school district by the tenant under the lease agreement should be included in the calculation of the

total value of the lease. Additionally, the terms stated in the governing board resolution must be crafted in a manner that allows the governing board to accept only those proposals that meet school district purposes.

WAIVER

The governing board of a school district or a county board of education, on a district-wide or county-wide basis or on behalf of one or more of its schools or programs, after a public hearing on the matter, may request the State Board of Education (“SBE”) to waive all or part of any section of the Education Code or any regulation adopted by the SBE that implements a provision of the Education Code. There are, however, some provisions that may not be waived.

Two of the provisions that cannot be waived are Sections 17459 and 17464(a) (that require that school districts offer surplus property for sale to enumerated public entities) and Section 17462 (that dictates exactly to what uses a school district may put its proceeds from the sale of the surplus property).

Procedure

A waiver can be granted upon the completion and submission of a General Waiver Request (“Request”) to the Waiver Office of the SBE through an online submission form. Prior to the submission of this Request, the District must complete several tasks.

First, the school district should consult with any employee collective bargaining units. Note that the school district’s obligation to consult unions is not limited to employee contract issues, so it would still apply to property transactions. Although union support is not a required condition for approval, the Request must reflect the school district’s efforts to involve any bargaining units. The position of the bargaining unit must be clearly marked and explained on the Request. It is recommended that this meeting occur prior to the public meeting, discussed below.

The Request must also be evaluated by the school district’s advisory committee. In addition, any other committee or counsel with an interest in the waiver topic should also be consulted. If the committee has any objections, a written summary of the objections must be submitted with the Request.

Next, the school district must conduct a public hearing. A public hearing is not simply a board meeting. It must be a properly noticed public hearing held during a board meeting at which time the public may testify regarding the waiver proposal. It is important that the meeting is properly noticed. Distribution of a local board agenda will not constitute notice of the public hearing. Also, the notice must *specifically* invite public testimony. Proper notice can be achieved by printing a notice that includes the time, date, location and subject of the hearing in a newspaper of general circulation.

Finally, the school district must submit an accurate and complete Request to the State. The SBE may contact the school district during the evaluation period for additional information or with questions about the Request.

Approval

Under Section 33051(a), the SBE must approve any and all Requests, except in those cases where the SBE specifically finds any of the following:

- a. The educational needs of the pupils are not adequately addressed.
- b. The waiver affects a program that requires the existence of a schoolsite council and the schoolsite council did not approve the request.
- c. The appropriate councils or advisory committees, including bilingual advisory committees, did not have an adequate opportunity to review the request and the request did not include a written summary of any objections to the request by the councils or advisory committees.
- d. Pupil or school personnel protections are jeopardized.
- e. Guarantees of parental involvement are jeopardized.
- f. The request would substantially increase state costs.
- g. The exclusive representative of employees, if any, as provided in Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code, was not a participant in the development of the waiver.

II. WORKING WITH PRIVATE ENTITIES

With respect to assets, school districts have the option of entering into an agreement with a private entity. Private entities can bring additional income, non-monetary resources and other benefits to a relationship with the school district. When entering into agreements with private entities, or in reviewing existing agreements with private entities, school districts should consider these questions:

1. Does the private entity have any non-monetary benefit to offer the school district (i.e., a company may donate school supplies, books, classroom presentations in addition/in lieu of rent)?
2. Has the district maximized the income the private entity is capable of contributing to the school district?

There are four types of arrangements discussed below that are categorized based on legal authority: (1) Joint Occupancy, (2) Exchange, (3) License Agreements, and (4) Charter School Facility Use Agreements.

JOINT OCCUPANCY

A joint occupancy agreement allows school districts to maintain ownership of the surplus property. A school district may enter into leases and agreements relating to real property and buildings to be used jointly by the school district and any private person, firm, or corporation pursuant to

Education Code section 17515 *et seq.* Joint occupancy does not require the school district to follow surplus property procedures, although it does require construction of facilities.

With regard to construction, the joint use lease or agreement must require the private entity either to construct or provide for the construction of a building on the property for the joint use of the school district and the private entity. The private entity may, however, designate the school district as its agent to construct the facilities.

Procedure for Undertaking a Joint Occupancy Project

Before a joint occupancy lease or agreement is executed, the school district must follow specific procedures. First, the governing board must adopt a resolution declaring its intention to consider proposals. The resolution must describe the proposed site and specify the intended use of that portion of the building to be occupied by the school district. The resolution must also fix a time, not less than ninety (90) days thereafter, for a public meeting of the governing board to be held at its regular place of meeting. The school district must publish the resolution of intention at least once a week for three (3) weeks in a newspaper of general circulation. At the public meeting, the governing board must consider all of the proposals.

Before the school district's governing board can approve any proposal or enter into an agreement regarding the joint occupancy, the school district must submit the proposal to the SBE for approval. The SBE must notify the governing board of its approval or disapproval within forty-five (45) days of submission.

Pursuant to the joint occupancy provisions of the Education Code, the private entity must file either a bond for the performance of the lease or agreement, or an irrevocable letter of credit issued by a state or national bank for the performance of its obligations.

If the school district will receive money from the current state school facilities program for the project, the school district must hold title to the portion of the property that will be funded with state money. Accordingly, this means that the school district and its partner must carefully apportion title among themselves so that the school district will hold title to the percentage of the property proportional to the percentage of state funding.

Although the agreement will apportion title to a certain percentage of the building to each party, the document can further provide that each party will have a license to use the other party's portion of the building upon whatever terms and conditions the parties agree to in the document.

A significant difference between solely and jointly occupied property is the availability of zoning protection. Government Code section 53094, by which school districts may render zoning ordinances inapplicable to school property, does not apply to property developed pursuant to the joint occupancy sections. Any building that is to be used by a private party is subject to the zoning and building code requirements of the local jurisdiction.

Considerations

The viability of a joint occupancy partnership will depend on the school district's need for facilities and educational programs and whether or not a partner that can assist with those needs is available and interested. A benefit of this type of project is that it can facilitate useful partnerships and allow

the district to effectively use sites that may be underutilized. For example, if a school district owns property that is in a commercially desirable location, it may be able to receive significant income, while at the same time retaining an asset that will be more valuable in the future.

However, a significant difference between solely and jointly occupied property is the availability of zoning protection. Government Code section 53094, by which school districts may render zoning ordinances inapplicable to school property, does not apply to property developed pursuant to the joint occupancy sections. Any building that is to be used by a private party is subject to the zoning and building code requirements of the local jurisdiction. Therefore, if the district owns property designated as open space or public use, then any potential partner will need to obtain a zone change or variance in order to establish a commercial or residential use on the district's site. This may affect a private partner's willingness to enter into a partnership or may reduce the amount of money they are willing to spend that will go toward school district facilities or income.

Buildings constructed for use by the joint occupancy partner would also need to comply with any city/county codes specific to construction and location of the buildings on the site. If the school district anticipates that the building will eventually be used for school purposes, it will want to make sure it meets school building standards as well. Finally, a joint occupancy lease may not exceed sixty-six (66) years. We have found that some potential partners are wary of this limitation because it can negatively impact their ability to finance construction on the site.

EXCHANGE

A school district may exchange one or more of the properties rather than selling or leasing them pursuant to Education Code section 17536 *et seq.*, which provides as follows:

The governing board of a school district may exchange any of its real property for real property of another person or private business firm. Any exchange shall be upon such terms and conditions as the parties thereto may agree and may be entered into without complying with any of the provisions in this code [including surplus property procedures applicable to the selling and leasing of surplus property] except as provided in this article.

Education Code section 17536 (emphasis added).

Before ordering any exchange of real property the board shall adopt, by a two-thirds (2/3) vote of its members, a resolution declaring its intention to exchange the property. The resolution shall describe the properties to be exchanged in a manner to identify them, and the terms and conditions, not including the price, upon which they will be exchanged.

Education Code section 17537 (emphasis added).

Therefore, if a school district desires to dispose of surplus property to a private organization, it may do so by following this streamlined procedure if it can: 1) locate a property for which it is willing to exchange its surplus property, and 2) negotiate for the acquisition of the located property by a private organization which will in turn exchange the located property with the school district's surplus property pursuant to an Exchange Agreement.

A decision to exchange its real property allows school districts to forgo following the relatively burdensome surplus property procedures. Specifically, the school district would not be required to appoint an advisory committee pursuant to Education Code section 17387 *et seq.*, offer the property to enumerated public agencies through notices and negotiations, nor offer the property through a public bid process should no public agency acquire the property from the school district.

Considerations

If a school district has property that is not ideal for school use, but does not want to give up an asset during a time of low property values, this option is worth considering. A school district can exchange an asset that is either not producing income for the school district, or even costing the school district money, for an asset that will benefit the school district. Potential exchange partners or properties could be sought through a Request for Proposals process or simply by finding properties the district desires. If a school district does not require a site for development of school district facilities or programs, it may also seek “income-generating” properties.

There are, however, both economical and practical considerations that would have to be addressed should a school district decide to exchange its property for another property. Once the school district found a site it desired, it would need to look at the appraised value of the property it wants to exchange and determine if the school district could obtain the type of site it needs for that amount. It should be noted, however, that the exchange need not be exact. For example, the school district may exchange a more valuable piece of undeveloped property for another site on which a developer agrees to construct a building for the school district. Alternatively, it is acceptable to make up a small difference in value with a cash payment. From a practical standpoint, the school district will need to coordinate the timing of the exchange so that if it is exchanging a site that is currently occupied, it will have made sufficient allowances for moving school district programs or preparing the new site for occupancy.

The “Surplus Lands Act”

As noted above, school districts can declare their properties “Exempt Surplus Land” pursuant to the Surplus Lands Act and therefore, avoid the notice requirements set forth in the Surplus Lands Act prior to exchanging property because the Surplus Lands Act explicitly states that exchanged properties are exempt from the Surplus Lands Act.

LICENSE AGREEMENTS

A license is a grant of permission to another party to use school district property for some defined purpose. It is, in many respects, similar to an easement or a lease. However, the granting of a license does not require the same cumbersome procedures as the dedication of an easement or the surplus property procedures necessary for a lease.

An increasingly prevalent example of private use of school district property is wireless communications facilities. Wireless carriers must install towers throughout the state to relay signals for wireless phones. School sites often prove ideal locations for these facilities.

A school district governing board may approve a license agreement for a wireless communications facility as a standard board meeting agenda item. A license agreement with a wireless carrier should address all significant terms of the agreement, including the following:

1. License fee;
2. Term of the agreement and renewal provisions;
3. Precise identification of the location and dimensions of the facility;
4. Language obligating the carrier to obtain any necessary permits and approvals and pay for utilities and taxes for the subject property;
5. Insurance and indemnification requirements;
6. Termination provisions;
7. Language addressing interference to, or caused by, existing and future communications facilities;
8. Profit sharing for assignment and subletting of tower space;
9. Fingerprinting of employees and coordination requirements; and
10. Exhibits detailing the planned facility and the work to be done on school property.

It is worth noting that some practitioners recommend utilizing a lease instead of a license because the Education Code does not specifically authorize the licensing of school district property for such purposes. However, Education Code section 35160 (“Permissive Education Code”) allows a school district to undertake any activity which is not in conflict with, inconsistent with, or preempted by any law, and which does not conflict with the purposes for which school districts are enacted. We therefore believe a school district may grant a license without complying with the surplus property statutes because those statutes, by their express terms, do not apply to “licenses.”

Considerations

Agreements for the placement of wireless communications facilities are often a source of lost revenue for school districts. The form agreement usually proposed by carriers are unacceptable and do not provide a benefit to the school district. It is important to keep in mind that school districts often have very desirable locations for wireless communications facilities and are in a good position to negotiate the fees, terms and any other benefits that may be available.

School districts should also be aware that the installation of capital improvements on property pursuant to a license arrangement can allow a license to be treated similar to an easement and take on some of the characteristics of an easement, such as irrevocability. Therefore, careful attention should be given to the wording of a license agreement when the terms will involve the installation of capital improvements by the licensee.

CHARTER SCHOOL FACILITY USE AGREEMENTS

Proposition 39, which was passed by voters in 2000, is comprised of two separate parts that relate to school district facilities. One part enabled school districts to pass a general obligation bond for certain specified purposes by a fifty-five percent (55%) majority vote, provided that certain

oversight mechanisms were in place. The second part of Proposition 39 established Education Code section 47614, which addresses a school district's obligation to provide facilities for charter schools operating within the school district. Regulations governing Proposition 39 were adopted in 2002. In November 2007, the State Board of Education (SBE) revised the Regulations governing Proposition 39 requests. Because there is no connection between the two parts, a school district must provide charter school facilities even if it has not passed a bond pursuant to Proposition 39.

Although allowing a charter school to use school district facilities will likely never be a great source of income for a school district, there are items to consider when entering into a facilities use agreement that can, at minimum, reduce the costs and administrative time devoted to charter school facilities.

The following are key provisions of a facilities use agreement that should be examined to determine if the school district can save costs or increase revenue from a charter school's use of a school district's site:

1. The school district final notification
2. Insurance
3. Indemnification
4. Compatibility with school district policies and programs
5. Charges for facilities costs (pro-rata share and oversight costs)
6. Shared space
7. Maintenance and operations
8. Furnishings and equipment
9. Term
10. California Environmental Quality Act (CEQA)

III. WORKING WITH OTHER PUBLIC ENTITIES

Sharing resources among local public entities can result in creative programs that more efficiently use the available resources of both parties. By increasing cooperation and coordination with other public entities, such as cities, counties or neighboring educational institutions, school districts may be able to achieve significant cost savings in areas such as maintenance, repairs, utilities and capital improvements. Although we are focusing on the use of school district facilities, it is important to remember that not only school sites may have sites that can be shared; school districts should also consider the facilities its cities, counties and other public educational institutions have available and consider whether they may provide a use for the school district. Viewing school sites as a resource for the community not only helps to create cost savings for the school district but helps strengthen the district's ties to the community and other local public entities. Developing an ongoing positive dialogue with local public entities can provide a valuable exchange of information and increased

understanding of these entities' respective goals and needs. While this is not always easy due to political constraints, school districts that successfully create a cooperative dialogue and working relationship with other local public entities may greatly benefit their school programs and often the community overall.

The following questions are useful to keep in mind as school districts look to collaborate with other public entities on the use of facilities:

1. Does the school district already have a positive relationship with the public entity?
2. What steps can be taken to improve the relationship and create a productive dialogue?
3. What educational and community needs can be economically combined (i.e., recreation, daycare, senior citizens, health and social services, and libraries)?
4. Does the school district have facilities available (or that could be made available) that could fulfill multiple needs?
5. Do any local public entities have facilities available that could fulfill multiple needs?
6. Does the school district have existing agreements with any local public entities? If so, can these agreements be improved to provide greater economic and/or practical benefits? (Key provisions to consider include maintenance, repairs, operations, utilities, and capital improvements.)

Once a school district has decided to enter into a shared use arrangement with another public entity, it must decide which type of agreement would best fulfill its objectives. Essentially, this means determining the appropriate legal authority that would allow the use of the school district's facility under the particular set of facts and circumstances involved. There are four (4) types of arrangements discussed below that are categorized based on legal authority: (1) Joint Use Leases, (2) Joint Use Grants, (3) Community Recreation Programs, and (4) Civic Center Act.

JOINT USE LEASES

Education Code section 17527 *et seq.*, authorizes the lease of vacant classrooms on a joint use basis with various entities, both public and private, under conditions that will allow the school district to continue to use most of the school facility for school district classroom purposes. The joint use of the property is permitted to take place even during school operating hours. A joint use lease may be entered into with the following types of entities: other school districts, educational entities, governmental units, nonprofit organizations, community agencies, professional agencies, commercial and noncommercial firms, corporations, partnerships, businesses, and individuals. Education Code section 17527 specifically excludes private educational institutions which maintain kindergarten or grades 1 to 12.

Generally, joint use leases require significant advance planning because the school district is required to follow surplus property procedures for leases. (Education Code section 17530.) Specifically, Education Code section 17530 states that applicable provisions of the "Sale or Lease of Real Property" article commencing with Education Code section 17455 must be followed. While

surplus property procedures will be discussed in greater detail in the third section of this presentation, it is important to highlight here that the property must be declared surplus by the governing board before a joint use lease can be entered into. While it is arguable which provisions the legislature had in mind with the phrase “applicable provisions,” we believe that such provisions include the procedures for offering the classrooms for special education programs in Education Code section 17465, a governing board resolution, and notice requirements and procedures for public bidding, as discussed below, in the event the property is not leased to entities with leasing priority. (Education Code section 17455 *et seq.*)

Once the property has been declared surplus, the following process and requirements for joint use leases must be satisfied:

Priority

Education Code section 17527 contains a priority system for offering vacant classrooms for lease. The first priority is to be given to “educational agencies for conducting special education programs.” Under the first priority, the school district must make the classrooms available to special education programs provided to school district pupils by either other school districts that comprise part of the school district’s special education local plan area or by the county office of education having jurisdiction over the leasing school district. These entities have sixty (60) days from receipt of the notification to inform the school district governing board of their intent to lease or not to lease the classrooms. (Education Code section 17465(d).) The lease payments may not exceed the school district’s actual costs for maintenance, operation, and custodial service for the leased classrooms. (Education Code section 17465(f)(2).) If no interest is expressed, or if the parties are not able to agree on terms of the lease, then the school district may proceed to the second tier of priority. Second priority is given to “other educational agencies.” (Education Code section 17527.)

Non-Interference, Neighborhood Disruption and Student Safety

Prior to entering into a lease or rental agreement, the school district must determine that the proposed joint occupancy and use of school district property or buildings will not (a) interfere with the educational program or activities of any school or class conducted upon the real property or in any building, (b) unduly disrupt the residents in the surrounding neighborhood, and (c) jeopardize the safety of the children of the school. (Education Code section 17529.) We recommend that the school district’s board adopt a resolution making such findings.

Space Limitations

Education Code section 17531 limits the amount of space a school district may lease during normal school hours to forty-five percent (45%) of the total classroom space of the specific school and thirty percent (30%) of the school district’s total classroom space in operating schools. (Education Code section 17531.) Provided that the thirty percent (30%) limit is not exceeded, the governing board may, upon a two-thirds (2/3) vote, exceed the forty-five percent (45%) limit per school upon making a finding that the leases are compatible with the educational purpose of the school. Moreover, the school district may lease vacant classroom space exceeding the thirty percent (30%) limit if the lease is for any day care center, nursery school, or special education class. (Education Code section 17532.)

Lease Provisions

The tenant(s) must comply with applicable zoning ordinances, use permits, and construction and safety codes. (Education Code section 17533.) The term of the lease agreement must not exceed five (5) years, except that the limit does not apply to agreements including capital outlay improvements made on school property for park and recreation purposes by public entities and nonprofit corporations. (Education Code section 17534.) The rent or lease of vacant classrooms must be for at least fair market value unless the tenant is a public entity. (Education Code section 17535.) However, a less than fair market value rental amount for the public entity is not mandatory.

Considerations

The benefit to a joint use lease is it allows a school district to generate revenue at a school site while continuing to use the site for classroom purposes. Joint use leases are a viable option for a school site currently used for classroom purposes but with a significant amount of excess space due to declining enrollment or other factors. If the school district does not anticipate a need for that excess space in the near future, does not want to give up use of the entire site, and wants to continue using the classroom space, a joint use lease may be a good approach. The timing needs to be considered carefully, however, since compliance with surplus property procedures can be lengthy and cumbersome. For this reason, short-term lease arrangements are not perfectly suited to a joint use lease. However, there is a five (5)-year term limitation to take into consideration. If a lease longer than five (5) years is needed, including a renewal provision may be an option. While a renewal provision is not expressly authorized, we are not aware of any prohibition to including a renewal provision. A more secure approach to including a longer lease term is to have the public entity lessee provide capital outlay for improvements on the site for park and recreation purposes, in which case the five (5)-year limitation would not apply. It is also important to inform potential lessees of the timelines and procedures, and especially the requirements to first offer the space to certain entities.

To get the maximum economic benefit from the joint use lease, school districts should determine their objectives and negotiate for them. For example, if a school district has a need for certain capital improvements on the site, this should be part of the negotiations. The lessee could be asked to contribute the costs for the improvements or at least share the costs. School districts should carefully consider how operating expenses will be shared, particularly utilities, maintenance, repair and security costs. For example, if the school district intends to provide maintenance and repair to the entire site, the lessee should be required to contribute at least an equitable share of those costs based on percentage of use. In some instances, having certain utilities separately metered can make sense. How these provisions are ultimately best drafted will be fact specific. The critical part is to make certain that the questions have been raised, conscientiously considered, and negotiated.

JOINT USE GRANT PROJECTS

Joint use grant projects are governed by Education Code section 17077.40 *et seq.*, and do not require a school district to follow surplus property procedures. Joint Use Grant Projects allow school districts to seek grants from the SAB for joint use projects for the construction of the following types of school facilities:

- a. Multipurpose rooms;
- b. Libraries;
- c. Gymnasiums;
- d. Child care facilities; or
- e. Teacher education facilities.

Relatively recently, the SAB approved regulatory amendments to the School Facility Program (“SFP”) Joint Use Program, revising the requirements school districts must satisfy to obtain approval of joint use applications. The amendments, discussed in greater detail below, impact the application filing deadline, the requirements for local bond language, the definition of non-profit organizations as joint use partners, and review of final Division of State Architect (“DSA”) approved plans.

General Requirements

Under Education Code section 17077.42, several conditions must be satisfied in order for the grant to be approved. The school district and joint use partner must have a joint use agreement addressing topics such as apportionment of costs for maintenance of the facility. Also, the school district and joint use partner must contribute a total of fifty percent (50%) of the cost of construction for the joint use facility. Of the fifty percent (50%) local contribution, the joint use partner must contribute at least half (twenty-five percent (25%) of the total cost), unless the school district has passed a local bond which specifies that the bond funds are to be used for the joint use project, in which case the school district may provide up to the full fifty percent (50%) local contribution.

Local Bond Funds

If a school district intends to rely on local bond funds in lieu of a contribution from the joint use partner, the language of the bond will need to be specific. The recent amendments require the language in voter-approved local bond measures to now specify that the bond proceeds may or will be used for joint use purposes and the subject joint use project. Inclusion of the term “joint use” in the bond language is critical. The subject joint use project must be identified by either the specific facility type and/or the specific school site.

This amendment affects only voter approved local bonds authorized on or after February 27, 2008. For local bonds passed prior to February 27, 2008, the joint use project may be identified in the voter approved local bond language, the district board resolution authorizing the bond, or school district board meeting minutes.

Eligibility

A school district may apply to the SAB for funding under Education Code section 17077.40 *et seq.*, for a joint use project that meets any of the following criteria:

- a. The joint use project is part of an application for new construction funding under this chapter, and will increase the size or extra cost associated with the joint use of the proposed multipurpose room, gymnasium, child care facility, library, or teacher education facility beyond that necessary for school use.

- b. The joint use project proposes to either reconfigure existing school buildings or construct new school buildings, or both, to provide for a multipurpose room, a gymnasium, a library, a child care facility, or a teacher education facility, and the project will be located at a school that does not have the type of facility for which funds are requested or the existing facility is inadequate.
- c. The joint use project proposes to either reconfigure existing school buildings or construct new school buildings, or both, to provide for facilities to improve pupil academic achievement, and the plans for the facility were accepted for review and approval by the department prior to January 1, 2004.

Application Requirements

In order to be approved for a grant under the School Facility Program, the school district must demonstrate that it has complied with all of the following:

- d. Agreement with a Joint Use Partner

The school district must have entered into a joint use agreement with a governmental agency, public community college, public college or public university, or a nonprofit organization approved by the governing board.

Current SFP Regulation § 1859.2 defines a “Non-Profit Organization” as “an entity that is organized and operated for purposes of not making a profit under the provisions of the Revenue and Taxation Code.” The new amendments clarify this definition with respect to the joint use partner’s funding source, recognition of non-profit status, and operation of community programs or contribution for continuing operational costs of the project. Specifically, the amendments require that the source of funds from the Non-Profit Organization joint use partner be independent of the partner school district.

The Non-Profit Organization, if not a recognized nationally chartered organization, must have independent governance. A recognized nationally chartered organization is one that OPSC or the SAB recognizes as operating on a national basis and having a charter issued by a national headquarters or governing body. Independent governance means that the Non-Profit Organization and school district may have no more than one common board member, ex-officio board member, officer, management or staff member, regardless of whether voting or non-voting, and whether employee, contractor, or agent; however, this restriction applies only to the extent that the employee, contractor or agent has managerial authority in one or both entities. Finally, the Non-Profit Organization joint use partner must provide community programs and some level of funding toward the project or assistance in providing services that aid the continuing operations for the joint use purpose of the project subsequent to construction.

- e. Terms of Joint Use Agreement

The joint use agreement must specify the following: (1) the method of sharing capital and operating costs; (2) the relative responsibilities for the operation and staffing of the facility; (3) the manner in which the safety of the pupils will be ensured; (4) the amount of the contribution to be made by the school district and the joint use partner toward the fifty percent (50%) local share of eligible project

costs; and (5) how the facility will be used to the maximum extent possible for both school and community purposes.

f. Plan Approval

The application can be approved only if the project qualifies for funding under Education Code section 17077.40 and the school district has completed preliminary plans for the project and has received California Department of Education approval of the plans.

The new amendments revise SFP Regulation § 1859.129 regarding review of DSA-approved plans. Specifically, OPSC will review the final DSA-approved plans for apportionments received for a Type II Joint Use Project that is not part of a qualifying SFP Modernization Project. If OPSC determines that the approved plans create a reduction in square footage that is greater than or equal to five percent (5%) of the square footage contained in the preliminary plans, a commensurate reduction to the apportionment already authorized will be taken to the next available SAB meeting.

Submission of Application

Once the eligibility and qualifying criteria have been met, the school district must adopt a resolution supporting the submission of the application for joint use funding to the OPSC. In addition to the requirements set forth above, the school district must also certify that it has and/or will comply with the requirements set out in Section 14 of the Application for Joint Use Funding (i.e., proper accounting, compliance with all Education Code provisions regarding school construction, etc.).

Application Filing Period

For each funding cycle, SAB will accept applications from March 2nd of the prior calendar year through March 1st of the then-current calendar year.

Considerations

Joint use grant projects are an excellent way to maximize the resources of two entities and obtain state funding. Keep in mind, however, that in order to utilize state funding opportunities under the SFP Joint Use Program, school districts must understand and comply with the filing and eligibility requirements. In particular, school districts should be mindful of the recent amendments concerning the earlier application filing timeframe, the specificity required in local bond measures in referencing the use of proceeds for a joint use project, the more stringent requirements on eligible non-profit organizations as joint use partners, and the potential reduction in approved apportionment based on OPSC review of approved plans. In addition, similar considerations, as discussed above for joint use leases, will be applicable as to how operating expenses will be shared for such things as utilities, maintenance, repair and security costs.

COMMUNITY RECREATION PROGRAMS USE AGREEMENT

A shared use agreement, based on Education Code section 10900 *et seq.* (“Community Recreation Programs”), allows school districts to enter into agreements with other public entities that have the authority to provide recreation including cities, counties and other school districts. Agreements authorized under these provisions do not trigger surplus property procedures. However, the

circumstances for using such agreements are limited and school districts should be careful to ensure that the proposed shared use is covered by these provisions.

Purpose and Covered Uses

The purpose of the Community Recreation Programs is to provide for “adequate programs of community recreation” in order to “promote and preserve the health and general welfare of the people of the state and to cultivate the development of good citizenship.” In furtherance of its purpose of providing adequate programs of community recreation, these provisions allow a school district to grant the use of any school district facility to another public entity to promote and preserve health and general welfare through programs of community recreation. (Education Code section 10910.) “Recreation” is broadly defined to include activities that contribute to the mental development of an individual or group including, but not limited to, activities in the fields of science and literature. (Education Code section 10901.) “Recreation Center” is also broadly defined as a place, structure, or area under the jurisdiction of the public entity even if the primary use is for something other than recreation.

Agreement Terms

There are no statutorily required provisions that the agreements must include. Also, there are no limitations as to the length of the term of the agreement. Education Code section 10912 allows the school district to set the fees for use of the facilities. Education Code section 10914.5 allows school districts to establish a separate account for funds received for community recreation programs and authorized expenses associated with the community recreation funds can be paid from such accounts.

Considerations

The Community Recreation Program is best suited for uses that fall clearly into the category of recreation. A use agreement entered into based on the Community Recreation Program provisions has the potential to generate revenue. However, often the greatest benefit to the school district is from the programs or services offered. School districts should carefully consider how operating expenses will be shared for such things as utilities, maintenance, repair, and security costs, as well as possible contributions for capital improvements.

CIVIC CENTER ACT USE OF FACILITIES

Education Code section 38130 *et seq.* (Civic Center Act) permits school districts to grant use of facilities for a variety of purposes to both public and private entities as well as individuals. (See Education Code section 38130(b).) The terms of such use are set by the school district but are subject to certain limitations, which may include charging fees. Education Code section 38134 limits the fees charged under the Civic Center Act to direct costs, except for certain situations or users such as meetings or entertainment where fees are charged. With respect to youth sports, even if the organization charges fees, the school district cannot charge the youth sports organization more than direct costs. (Education Code section 38134(c).) Direct costs are divided into two categories: capital direct costs and operational direct costs. Capital direct costs are defined to include the estimated costs for maintenance, repair, restoration and refurbishment of District nonclassroom space, including specialty teaching stations such as dance studios. Operational direct costs are defined to include the estimated costs of supplies, utilities, janitorial services, services of

District employees, and/or contracted workers and salaries and benefits paid to District implies directly associated with administering the Civic Center Act to operate and maintain District facilities and grounds. It is important that the calculation of direct costs be based on the formula set forth in Education Code section 38134(g) and the California Code of Regulations applicable to the Civic Center Act, and supported by specific verifiable cost information. School districts should make certain that their Civic Center policies and administrative regulations are up to date and in compliance with legal requirements. It is also important that the facility use agreements under the Civic Center Act contain appropriate indemnification and insurance provisions to adequately protect the school district.

Considerations

The Civic Center Act gives school districts the most day to day flexibility because the uses do not infringe upon the school district's uses of the facility, and because the use by others is generally short in duration. While Civic Center Act uses are not generally looked to as a way to generate significant revenue, it does allow school districts the opportunity to recoup costs.

IV. SCHOOL CLOSURE

With respect to school closures and the general process, there are few statutory requirements. Education Code section 17387 requires only that community input should be obtained prior to school closure, but does not include any specifics on the process or procedure for community input, including convening a 7-11 Advisory Committee or following any other surplus property procedures (discussed below). While the use of a 7-11 committee is recommended for school closures as a good practice, the mandate in Education Code section 17388 to convene a 7-11 Advisory Committee refers only to sale or lease without any reference to school closure. However, Education Code section 17387 reads “[i]t is the intent of the Legislature to have the community involved before decisions are made about school closure or the use of surplus space, thus avoiding community conflict” Therefore, it seems to suggest, at a minimum, that community input should be had prior to school closure.

The California Department of Education (“CDE”) provides a checklist that may assist school districts further in the school closure process. Prior to actually closing a school, plans that impact particular groups, such as a transportation plan, should be decided upon for practical reasons in order to facilitate a smooth closure of the school. The CDE checklist provides a good overview of the issues and suggested timeline to facilitate the process. Please note that CDE identifies this timeline as “suggested” only, and notes that timelines will vary based on the size and unique issues for each school district. The timing of the items on the checklist, to the extent they apply to the closure, should be conducted in the manner that makes the most practical sense.

The area of school closures, as it relates to CEQA, has seen some changes in recent years. School closures are usually exempt from CEQA under Public Resources Code section 21080.18 and CEQA Guidelines section 15314. School closures are unique in that they involve both statutory and categorical exemptions from CEQA. There are seldom any CEQA ramifications to a school closure itself. Instead, the concern arises when the students from the closed school are subsequently transferred to other schools (changes in traffic patterns, parking impacts at the other school, additional noise, addition of classrooms, etc.). In 1989, the California Court of Appeal concluded that school closure and attendance reconfiguration actions are “projects” within the

meaning of CEQA. (*East Peninsula Ed. Council, Inc. v. Palos Verdes Peninsula Unified School District* (1989) 210 Cal.App.3d 155.) However, Public Resources Code section 21080.18 provides that CEQA does not apply to the closing of any school or the transfer of the students to other schools as long as the only physical changes involved qualify for exemption under any of the categories set out in the CEQA Guidelines.

Prior to 2002, school district boards found that school closure projects were excluded from CEQA under CEQA Guidelines section 15378(b)(5), which provides that projects under CEQA do not include “[o]rganizational or administrative activities of governments that will not result in direct or indirect physical changes in the environment (such as the reorganization of a school district or detachment of park land).” Section 15378(b)(5) again called into question the usefulness of Public Resources Code section 21080.18. But, the California Court of Appeal extinguished the CEQA Guidelines exclusion for school district reorganizations in 2002 in *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98.

While the state of the law after 2002 clearly provided that school closure was not excluded from CEQA, it remained unclear whether such a project was exempt from CEQA. That question was settled in 2006 with *San Lorenzo Valley Community Advocates v. San Lorenzo Valley Unified School District* (2006) 139 Cal.App.4th 1356, a case involving a reconfiguration of several schools involving both school closures and the transfer of many students. The court used a straightforward application of Public Resources Code section 21080.18 to find the school reconfiguration exempt from CEQA. In other words, the court focused primarily on the categorical exemptions in the CEQA Guidelines. The court disregarded potential offsite impacts of the reconfiguration including traffic and air quality impacts, and instead examined the physical changes that would take place onsite at the receptor schools as a consequence of the reconfiguration. Therefore, the court held that as long as one of the categorical exemptions (and no exceptions) apply, no further analysis is required.

V. CONCLUSION

As shown above, school districts have a myriad of options available regarding the use and disposition of their assets. By selecting the appropriate vehicle for the school district’s goal, and by taking advantage of each of the benefits that a vehicle may offer, school districts can maximize their income and eliminate unnecessary expenses.

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