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Checklist for Sale or Lease of School District Surplus Property

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Summary

The following is an executive summary of the process and statutory time requirements throughout the process; a more detailed discussion follows.

- > First identify the surplus real property and convene a committee to develop a District wide policy on the use of surplus real property. (Ed. Code §§ 17387, et seq.)
- > Declare intent to sell or lease the property to general public: To place the property on the market, the Board must consider the committee’s recommendation that the property be declared surplus and declare its intent to dispose of the property in a resolution. (Ed. Code § 17466.)
- > Offers required by the Naylor Act (Ed. Code § 17485, et seq.): The Naylor Act only applies to real property that has been used entirely or partially for school playgrounds, playing fields, or other outdoor recreational uses and open-space land particularly suited for recreational purposes. If the Naylor Act does apply, the District must offer to negotiate to sell or lease the property to certain entities, usually for a below-market rate. The District may seek a waiver of the Naylor Act. (Ed. Code § 33050.) The District must allow Naylor Act entities sixty days to respond to the offer. (Ed. Code § 17489(c).)
- > Selling or leasing with option to purchase (Ed. Code § 17464 and Gov. Code § 54220):
 - > The property must be offered to a first group of designated entities for park and recreational purposes pursuant to Government Code sections 54220, *et seq.* (Ed. Code § 17464(b).) These entities must be allowed sixty days after receiving notice to respond and are also entitled to a negotiation period of ninety days after giving notice to the District of their interest in the property. This requirement cannot be waived.
 - > The property must be offered to a second group of designated public entities. This group must also be notified that it has sixty days to make offers, but is not entitled to an additional negotiation period.
- > Lease (with no option to purchase): No additional notices, beyond the requisite offers to Naylor Act entities, are expressly required. The District may proceed to lease the property to the highest responsible bidder pursuant to Education Code sections 17466, et seq. (Note: More conservatively, and in recognition of limited legal precedent, additional notices may still be sent.)
- > Leasing vacant classrooms (Ed. Code § 17465): The District must offer the classrooms to other school districts in the District’s SELPA or the County Office of Education (“COE”) for use for special education programs. The school districts or the County Office of Education are entitled to a negotiation period of sixty days from receipt of the offer.

- > All property sales (Govt. Code § 65402(c)): The District must notify the local city or county planning agency, if such city or county has adopted a general plan which affects or includes the area where the property is located.
- > Competitive bidding (Ed. Code §§ 17466, et seq.): The District may ultimately sell or lease the property to the highest responsible bidder. Bids may not be opened until at least three weeks after the Board adopts its resolution of intent to sell or lease the property. Districts may seek waivers of the competitive bidding process from the State Board of Education; in recent years, waivers from the bidding process have been granted, but districts have still been required to provide mandatory notices and engage in certain public procedures.
- > The Education Code also contains a provision indicating that failure to comply with the Education Code’s surplus property provisions or the Naylor Act will not invalidate a conveyance of property that has already occurred. (Ed. Code §§ 17483 & 17496.)

Detailed Checklist

I. Determination of Surplus Status

- ❑ Prior to taking any action to dispose of real property, the District must declare the property as “surplus land” or “exempt surplus land” pursuant to Government Code section 54221(b)(1). This requirement is further discussed below under section III.
- ❑ The School Board must appoint a committee of between seven and eleven members (“7-11 Committee”, or “Advisory Committee”), who are representative of each of the following (Ed. Code § 17388-17389):
 - ❑ The ethnic, age group, and socioeconomic composition of the District.
 - ❑ The business community, such as store owners, managers, or supervisors.
 - ❑ Landowners or renters, with preference to be given to representatives of neighborhood associations.
 - ❑ Teachers.
 - ❑ Administrators.
 - ❑ Parents of Students.
 - ❑ 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 and counties in which surplus space and real property is located.

- The 7-11 Committee must do all of the following (Ed. Code § 17390):
 - Review the projected school enrollment and other data provided by the District to determine the amount of surplus real property.
 - Establish a priority list of use of surplus space and real property that will be acceptable to the community.
 - Cause to have circulated throughout the attendance area a priority list of surplus space and real property and provide for hearings of community input to the community on acceptable uses of space and real property, including the sale or lease of surplus real property for child care development purposes.
 - Make a final determination of limits of tolerance of use of space and real property.
 - Forward to the Board a report recommending uses of surplus space and real property.
 - The 7-11 Committee’s recommendation is advisory only, and need not be implemented by the Board.
- Determine whether the project is a workforce housing project exempt from the 7-11 Committee requirement.
 - Effective January 1, 2018, Assembly Bill (“AB”) 1157 exempted school districts from the requirement that they establish a 7-11 Committee to consider declaring property surplus if the district intends to use the surplus property for employee rental housing. The expressed legislative intent behind AB 1157 was to exempt school district property to be used for district workforce housing from the surplus property process, but the law stops short of a broad exemption beyond removing the 7-11 Committee process.

II. Consider Physical and Political Aspects of Site

- Optional: Clarify Site’s Physical Development Constraints, both for the District’s purposes and for the information of prospective buyers and developers.
 - Ensure title is free and clear of tax lien liabilities, restrictive covenants, conditions and restrictions, restrictive easements, and any additional constraints.
 - Obtain a boundary/survey map to verify acreage and land area and a legal description.
 - Determine current zoning and general plan restrictions on the property as well as the likelihood and time line for changes to a more favorable designation. This review should also reveal other restrictions and costs such as Coastal Commission approval, Corps of Engineers approval, availability of water and sewer connections, off-site costs such as traffic mitigation, park dedication fees, fees for special districts, etc.

- Obtain a soils or geological study, if potential problems are identified (e.g. liquefaction risks, slope problems, etc.).
- Consider having the site inspected to determine whether it contains any toxic or hazardous materials.
- Obtain an asbestos study and removal cost estimate for existing buildings.
- Optional: Clarify Political and Policy Issues.
 - Although an appraisal is not required, it is often wise to obtain at least one appraisal to obtain minimum and target values, whether the district elects to share the appraisal or keep it confidential.
 - Meet with key political players in City or County having jurisdiction to ensure that highest and best use recommendations have potential for obtaining development approvals.
 - If possible, obtain information from City or County which outlines its approval process (e.g., allowable densities and land uses, fees, exactions).
 - Meet with key homeowners' associations and community leaders concerning recommended development plan.

III. Board Action Declaring Property Surplus

- Although the Education Code does not require the District to adopt an initial resolution to commence the process of whether to declare District property as surplus, as of January 1, 2020, the District must declare the property as “surplus land” or “exempt surplus land” pursuant to Government Code section 54221(b)(1). The declaration must be made at a regular meeting and must be supported by written findings. Generally, all school district real property appears to fall into the category of “exempt surplus land,” but the District may wish to consult with legal counsel for confirmation, as this is a new legal requirement. Declaring the property as exempt surplus land will mean that the majority of the requirements in Government Code sections 54220, *et seq.*, will not apply, except for the requirement to make written solicitations to agencies to purchase or lease the property for park and recreational purposes. This requirement is discussed in greater detail in section IV.B, below.
- The Board may wish to make the above declaration in a resolution, which action would be preliminary to the later resolution of intent to lease or sell the property, and can be used to trigger the offer of the property to other public agencies. To do so, the Board can adopt a resolution taking each of the following actions:
 - Consider the 7-11 Committee’s recommendations. (Ed. Code § 17388.)
 - Describe the property to be declared surplus.

- Declare the property as exempt surplus land.
- Authorize offers to other public agencies.

IV. Required Offers

A. Offers Required by the Naylor Act

- Determine whether the Naylor Act (Ed. Code §§ 17485, et seq.) applies. The Naylor Act applies when all of the following conditions are present (Ed. Code § 17486):
 - All or a portion of the property is used for school playground, playing field, or other outdoor recreational purposes and open-space land particularly suited for recreational purposes.
 - The land has been used for such purposes for at least eight years immediately preceding the Board's decision to sell or lease the property.
 - No other available publicly owned land in the vicinity is adequate to meet the existing and foreseeable needs of the community for playground, playing field, or other outdoor recreational and open-space purposes, as determined by the governing body of the agency which proposes to purchase or lease land from the District.
- The District may exempt two surplus properties from the Naylor Act for each planned school site acquisition if the District has an immediate need for an additional school site and is actively seeking to acquire an additional site, and may exempt one surplus property from the Naylor Act if the District is seeking immediate expansion of the classroom capacity of an existing school by 50% or more. (Ed. Code § 17497.)
- No more than 30% of the total surplus school acreage (inclusive of both developed and undeveloped property) owned by a school district may be purchased or leased by public agencies through the Naylor Act. (Ed. Code § 17499(a).)
- If the Naylor Act applies and the property is not exempted, the District must first make a written offer to sell or lease the property to the following agencies for use as outdoor recreational space, in order of priority (Ed. Code § 17489):
 - First, to any city within which the land is situated.
 - Second, to any park or recreation district within which the land is situated.
 - Third, to any regional park authority having jurisdiction within the area in which the land is situated.
 - Fourth, to any county within which the land is situated.

- If any of the above entities wishes to purchase or lease the property, the entity must notify the District in writing within 60 days after receiving written notification from the District of its offer to sell or lease the property. (Ed. Code § 17489.)
- In the event the Naylor Act applies, the District may seek a waiver of Naylor Act requirements from the California Department of Education. (Ed. Code § 33050.) To request a waiver, the District must do the following:
 - Enable the employees' unions to participate in the development of the waiver. (Ed. Code § 33050 (d).)
 - Hold a public hearing on the issue. (Ed. Code § 33050 (a).)
 - Submit an application to the State Board of Education.
 - The State Board of Education must provide 30 days written notice of the hearing on the waiver to each public agency to which an offer of sale or lease must be made under the Naylor Act. (Ed. Code § 33051.5.)
- If the Naylor Act applies, the price of the land shall not exceed the school district's cost of the original acquisition, with adjustments made for any percentage increase or decrease in the CPI from the original date of purchase to the year in which the offer of sale is made, plus the cost of any improvement to the land made by the school district since the original acquisition. However, the final sale price shall not be less than 25 percent 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. (Ed. Code § 17491(a).)
- If public entities decline a school district's offer to sell or lease school property under the Naylor Act, the property may be sold, leased and/or developed to the same extent as is permitted on adjacent property. The process of zoning necessary for such development is to be expedited by the local city or county. (Gov. Code § 65852.9.)

B. Offers to Sell or Lease with Option to Purchase

- The District must first make written solicitations to the following government agencies: any park or recreation department of any city or county within which the land is situated, any regional park authority having jurisdiction within the area in which the land is situated, and the State Resources Agency. Such agencies must use the property for park and recreational purposes if they purchase or lease the property under Government Code section 54222. (Ed. Code § 17464(b); Gov. Code § 54222(b).)
- Government Code section 54222 also requires written solicitations to additional government agencies, however, by declaring the property as "exempt surplus land," discussed above, the District appears to be exempt from these requirements. This is an

issue that the District may wish to discuss with legal counsel for confirmation, as this is a new legal requirement.

- If any of the above entities is interested in obtaining the property, it must so notify the District of its interest in purchasing or leasing the land within 60 days of the District's written solicitation. (Gov. Code § 54222(e).)
- In the event of such notification, the District and the purchasing or leasing entity must enter into good faith negotiations to determine a mutually satisfactory price. If the price cannot be agreed upon after a good faith negotiation period of at least 90 days, the District's obligations under Government Code section 54222 are discharged. (Gov. Code § 54223(a).)
- If the District does not agree to price and terms of sale during the 90-day period described above, the District can proceed to the next step in the process. However, if negotiations are unsuccessful and the District ultimately disposes of the land to an entity that uses the property for development of 10 or more residential units, additional requirements related to provision of affordable housing units will apply. (Gov. Code, § 54233.)
- If none of the above government agencies purchases or leases the property with an option to purchase under the foregoing procedures, the property must be offered at fair market value to the following additional entities (Ed. Code § 17464(c)):
 - In writing to the Director of General Services, Regents of the University of California, the Trustees of the California State University, the county and city in which the property is situated, and any public housing authority in the county in which the property is situated, and to any entity referenced in the paragraph immediately below (regarding Ed. Code § 17464(c)(2)) that has submitted a written request to the District to be directly notified of the offer for sale or lease with an option to purchase the real property by the District. (Ed. Code § 17464(c)(1).) This notice must be mailed no later than the date of the second publication described in the paragraph immediately below.
 - By public notice, published once per week for three successive weeks (with at least five days between each publication, not counting the actual publication dates) in a newspaper of general circulation within the district, specifying that the property is being made available to any public district, public authority, public agency, and other political subdivision or public corporation in the state or of the federal government, and to other nonprofit charitable or nonprofit public benefit corporations. (Ed. Code § 17464(c)(2).)
 - If any of the above entities is interested in purchasing the property, it must so notify the District within 60 days of the third publication of the District's notice of intent to sell or lease. If the parties do not agree upon a mutually satisfactory price within this 60 day period, the property may be sold or leased by competitive bidding.

C. Offers to Lease with No Option to Purchase

- The District may choose to notify all of the same government agencies and other entities identified above, although doing so does not appear to be required expressly by the Education Code. If the District elects not to do so, it can proceed to Step VI, below, “Board Action Declaring Intention to Sell or Lease the Property”.
- Note: There is no express statutory guidance or case law clarifying whether additional notices are required. A more conservative approach would be to follow the same process as applicable to sales or leases with options to purchase, although that does not appear to be mandatory.

D. Additional Offers if Leasing Vacant Classrooms

- The District must offer to lease the classrooms for special education programs that are provided by either other school districts that comprise part of the District’s SELPA, or by the COE (and that serve the District’s students, in whole or in part). (Ed. Code § 17465(b).)
- Upon adoption of the resolution of intent to lease real property (further described below), the District must notify in writing the other districts or the COE, as applicable, of its intent to lease vacant classrooms. (Ed. Code § 17465(c).)
 - The notice shall describe the vacant classrooms, specify that the lease shall not exceed a 99-year term, specify that the lease payment and other lease terms are subject to negotiation, and state that the offer is valid for no more than 60 days after receipt thereof. (Ed. Code § 17465(c).)
- The school district/COE shall inform the Board in writing of its intent to lease or not lease the classrooms within 60 days from the receipt of the notification. (Ed. Code § 17465(e).)
- The District may include in its resolution of intent a time for a regular Board meeting at which sealed proposals to lease will be received and considered, and may post copies of the resolution and publish notice of the adoption of the resolution. However, the Board shall not act on any proposal prior to the first of the following conditions occurring (Ed. Code § 17465(d)):
 - Receipt from the public education agency or the county superintendent, as appropriate, of its intent to lease the classrooms or of its intent not to do so.
 - Expiration of the 60-day period.
- The lease terms shall be negotiated by the entity desiring to lease the vacant classrooms and the Board (the terms may be negotiated prior to availability of the classrooms). (Ed. Code § 17465(f)(1).)

- The lease payments shall not exceed the District’s actual costs for maintenance, operation, and custodial services for the leased classrooms. (Ed. Code § 17465(f)(2).) If more than one school district offers to lease classrooms, the leasing district may elect to negotiate either individually or jointly with the interested districts. (Ed. Code § 17465(f)(3).)
- If the parties are unable to arrive at a mutually satisfactory lease within the 60-day period, the District may offer the property to other parties. (Ed. Code § 17465(g).)

E. Offers to Interested Charter Schools No Longer Required

- For a period of time prior to July 1, 2016, the governing board of a school district seeking to sell or lease surplus real property was required to offer that property for sale or lease to interested charter schools if certain criteria were met. This requirement sunset on July 1, 2016, and is no longer applicable. (Ed. Code, § 17457.5.)

V. Notification of Local City or County Planning Agency Prior to Sale

- If the local city or county planning agency has adopted a general plan or part thereof which affects or includes the area where the property is located, the District must notify the agency in writing before the District may sell the property. The notification must identify the property’s location, and the purpose and extent of the proposed sale. (Govt. Code § 65402(a), (c).)
- The local planning agency must report back to the District within 40 days, indicating whether the proposed sale is in conformity with the general plan. If the agency fails to respond within 40 days, it is conclusively deemed a finding that the proposed sale is in conformity with the general plan or part thereof. (Govt. Code § 65402(c).)
- Even if the planning agency disapproves of the location, purpose or extent of the property sale, the District may overrule such disapproval. (Govt. Code § 65402(c).)

VI. Board Action Declaring Intention to Sell or Lease the Property

- If the property remains unsold or unleased after the foregoing steps, the Board must declare its intention in a regular meeting to sell or lease the property prior to putting the property up to competitive bid. To do so, it should adopt a resolution taking each of the following actions:
 - Consider the 7-11 Committee’s recommendations. (Ed. Code § 17387, et seq.)
 - Describe the property proposed to be sold or leased in such a manner as to identify it. (Ed. Code § 17466.)
 - Specify the minimum price and the terms upon which the property will be sold or leased. (Ed. Code § 17466.)

- ❑ State the commission or rate, if any, which the board will pay to a broker out of the minimum price. (Ed. Code § 17466.)
- ❑ Specify a date at least three weeks later for a public Board meeting at which proposals to purchase or lease will be received and considered. (Ed. Code § 17466.)
- ❑ The resolution must be adopted by a two-thirds vote of the Board. (Ed. Code § 17466.)
- ❑ The District must give public notice of the adoption of the resolution by posting copies of the resolution signed by the Board in three public places in the District at least 15 days before the meeting where the bids are opened, and by publishing the notice at least once per week for three successive weeks before the meeting where the bids are opened in a newspaper of general circulation within the county in which the District is located. (Ed. Code § 17469.)
- ❑ The governing board of a District that intends to sell surplus real property must also make efforts to notify the former owner from whom the District acquired the property 60 days in advance of the meeting at which the resolution will be considered. (Ed. Code § 17470.) Also, special rules may apply to property that was acquired by eminent domain, including that the former owner may have to be offered a right of first refusal in certain circumstances. (Civ. Proc. Code § 1245.245.)
- ❑ Optional: Although not required by law, the District may wish to obtain a preliminary title report to determine if there are any exceptions in the report which would affect the bid process. Also, the preliminary title report should be made available to prospective bidders who may require the report as part of their due diligence process before submitting a bid.
- ❑ CEQA Compliance: The District should give consideration to the application of the California Environmental Quality Act (“CEQA”). Generally, a sale or lease of property is exempt from detailed CEQA review if it can be said with certainty that there is no possibility that the sale or lease will have a significant environmental effect. (Cal. Code Regs., tit. 14, § 15061(b)(3).) The District may adopt a Notice of Exemption at the same time it adopts the resolution described above. (*Id.*, § 15062.)

VII. Competitive Bidding

- ❑ At the public Board meeting where the bids are opened (in open session), the Board must do the following (Ed. Code §§ 17472, 17473):
 - ❑ Open, examine, and declare all sealed proposals which have been received by the Board.
 - ❑ Call for oral bids.
 - ❑ Either accept the highest responsible bid (after deducting the commission, if any) which conforms to all terms and conditions specified in the resolution of intention to sell or lease the property, or reject all bids.

- If an oral bid is the highest bid, it does not need to be accepted unless it exceeds the written bids by at least 5%.
- The bid may be accepted at an adjourned meeting of the Board within ten days of the bid opening. (Ed. Code § 17475.)
- The District may seek a waiver of the competitive bidding requirements from the State Board of Education. (Ed. Code § 33050.) In recent years, the State Board has been granting some waivers of the competitive bidding requirement, particularly where a district intends to sell property to a developer, including when the sale is contingent on the developer's obtaining entitlements to build on the property. In such circumstances, the district may prefer the buyer most qualified to seek and obtain those entitlements, rather than the highest bidder in all instances. Such waivers have not, however, exempted districts from the various notice requirements set forth above, and certain public process is still required, including use of a request for proposal and a waiting period for public input after proposals are received.

To request a waiver, the District must do the following:

- Enable the employees' unions to participate in the development of the waiver. (Ed. Code § 33050 (d).)
- Hold a public hearing on the issue. (Ed. Code § 33050 (a).)
- Submit an application to the State Board of Education.

VIII. Exceptions

- The District may bypass the above described notification and bidding procedures in several situations, including the following:
 - Child Care and Development Services (Ed. Code § 17458): The District may sell or lease any surplus real property to any contracting agency exclusively for the delivery of child care and development services (as defined in Ed. Code § 8208), for not less than five years.
 - 30 Days (Ed. Code § 17480): The District may lease any property for a period not exceeding 30 separate or consecutive calendar days in each fiscal year.
 - Residences (Ed. Code § 17481): The Board, by a two-thirds vote of its members, may lease school district property with a residence which cannot be developed for District purposes because of the unavailability of funds for a term not exceeding three months.
 - Historic Buildings (Ed. Code § 17482): The Board may sell or lease a building that has an historic value, and the site upon which the building is located, for fair market value to

certain non-profit or civic organizations, if the county board of supervisors finds that various conditions exist.

- Land Exchanges (Ed. Code § 17536): The exchange of real property is exempt from the surplus property procedures described herein. An exchange of properties with a private person or entity may be accomplished by a resolution adopted by a two-thirds majority of the Board. Due to an apparent error made when the Education Code was reorganized, exchanges with public agencies are no longer as clearly addressed in the Education Code; legal counsel should be consulted regarding those requirements.
- Certain Employee Housing Projects (Ed. Code § 17456): As of 2018, AB 1157 added language to Education Code section 17456 regarding the financing of school district employee housing projects. That statute exempts certain sale/saleback and lease/leaseback property transactions from the full surplus property process, including notice and offer requirements and competitive bidding. These types of transactions generally generate funding through a certificate of participation. The statute now also specifies that "the construction, reconstruction, or renovation of rental housing facilities for school district employees" is a permissible capital outlay expenditure for purposes of such a sale/saleback or lease/leaseback transaction.

IX. Use of Proceeds of Sale or Lease with Option to Purchase

- Statutory limitations on the use of the proceeds of the sale of surplus property apply to (1) sales and (2) leases with the option to purchase. They do not apply to leases with no option to purchase.
- The proceeds of the sale of surplus property generally must be used for capital outlay or non-recurring maintenance costs. The proceeds of a lease with option to purchase may be deposited in a restricted fund for routine repairs for up to a 5-year period. The proceeds must be used for one-time expenditures, and may not be used for ongoing expenditures, such as general operating expenses. (Ed. Code § 17462(a).)
- With concurrence of the State Allocation Board that the District has no anticipated need for additional sites or construction in the next ten years or major deferred maintenance requirements, the District may surrender its state facility funding eligibility for those ten years and place the proceeds into its general fund, again for one-time expenditures. (Ed. Code § 17462(a).)
- Subject to certain conditions and State Allocation Board concurrence, a school district having an average daily attendance of less than 10,001 in any fiscal year may deposit interest earned on the funds from a sale of surplus property in that fiscal year into the general fund for any general fund purpose, while surrendering state facilities funding for ten years. (Ed. Code § 17463.)

- Under 2009 budget legislation, as revised in 2011, school districts were authorized to deposit the proceeds of the sale of surplus property that was purchased entirely with local funds into the general fund for one-time expenditures if certain conditions were met. However, this legislation expired on January 1, 2016. (Former Ed. Code § 17463.7.)
- Effective as of October 2, 2013, the Legislature authorized the State Allocation Board (SAB) to establish a program requiring school districts to return state school facilities funding to the State if the school district sells surplus property that was purchased, modernized, or improved using that funding, and the following conditions are met:
 - The property is not being sold to a charter school, another school district, a county office of education, or any agency that will use the property exclusively for the delivery of child care and development services.
 - The proceeds from the sale will not be used for capital outlay.
 - The property was purchased, or the improvements were constructed or modernized, within 10 years before the property is sold. (Ed. Code, §17462.3.)
- The SAB has since established such a program by adopting sections 1700-1702 of Title 2 of the California Code of Regulations.

X. Use of Proceeds of Lease with No Option to Purchase

- There are no statutory limitations on the use of proceeds from a lease of surplus property if the lease does not include an option to purchase.



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