

OPTIONS

SRCS has the following options: (1) SRCS could follow the procedures for leasing surplus property; or (2) SRCS could seek a waiver from the State Board of Education and enter into a new lease agreement. Both of these options are discussed below, as are implications associated with following neither option.

DISCUSSION

A. Option 1: Engage in Surplus Property Procedures

SRCS may enter into a new lease agreement for the Property (and the personal property located thereon) pursuant to the procedures discussed below. (See Cal. Educ. Code § 17455)

1. Form a "7-11" Committee.

The first step to leasing surplus school facilities is formation of a District advisory committee ("7-11 committee") comprised of not less than seven and no more than eleven (11) members of the community, appointed according to law. (Cal. Educ. Code §§ 17388, 17389).

The 7-11 committee must:

- determine the amount of surplus space and real property;
- establish and circulate a priority list of use through the community;
- make a final determination of the limits of tolerance of use of the space and real property; and
- forward a report to SRCS's Board recommending uses of surplus space and real property. (Cal. Educ. Code § 17390).

2. Statutory Offers.

Once SRCS has determined that it will lease the surplus property, it must follow the protocol discussed below.

(a) *To Charter Schools Who Have Submitted a Written Request*

*A temporary preference has been afforded to Charter Schools. If property is declared surplus after July 1, 2012, then a School District **must** first offer to sell or lease the property (as applicable) to any charter school who has submitted a written request. (See Cal. Educ. Code § 17457.5). **This preference expired on June 30, 2016.***

(b) *Child Care/Child Development Services Agencies*

The next level of priority is for "Childcare/Development Services Agencies." SRCS *may*, at its option, offer to lease the property to such agencies that will use the lease to deliver child care/child development services for the shorter of:

- the duration of the lease; or
- five (5) years (in the event of a sale.) (Cal. Educ. Code § 17458).

3. The Public Bid Process

If the above procedures do not lead to the sale or lease of the property, then the following process must be used.

(a) *Adopt a Resolution of Intention to Lease*

In a regular open meeting, the school board *must* adopt a resolution declaring its intention to lease the property by a 2/3 vote of all its members.

The resolution must:

- describe the property in such a manner to identify it;
- specify the minimum price;
- specify the terms upon which it will be leased;
- specify the commission, or rate thereof, if any, which the Board will pay to a licensed real estate broker out of the minimum price; and
- fix a time not less than **3 weeks** after the resolution meeting for another public meeting to be held at which time sealed bids will be received and considered; (Cal. Educ. Code § 17466.)
- be posted as signed by the Board or majority thereof in 3 public places, not less than 15 days before the date of the bid opening meeting; *and*
- be published not less than once a week for three successive weeks before the meeting in a newspaper of general circulation. (Cal. Educ. Code § 17469.)

[*Note*: if any broker's commission is to be paid, the resolution must specify the broker's name and the amount (or rate)]. (Cal. Educ. Code § 17468).

(b) *If the Property Includes Classrooms, Notify Other Districts*

A District which adopts a notice of intention to lease which includes vacant classrooms must first offer the lease of the classrooms for special education programs to other District's within the applicable SELPA, or to the County Office of Education.

(c) *Open Bids and Award the Lease*

At the time and place designated the resolution, SRCS must open, examine and declare the sealed, written proposals which have been received. (Cal. Educ. Code § 17472.)

Before accepting any written proposal, the Board must call for oral bids. (Cal. Educ. Code § 17473.)

SRCS shall accept the highest written proposal of those responsible bidders, which conforms to all terms and conditions specified in the resolution:

—*unless* either

- a responsible oral bid is made which exceeds the highest written proposal by five percent more; or
- the Board rejects all bids. (Cal. Educ. Code §§ 17475, 17476.)

SRCS shall make its final acceptance of the highest proposal either at the same session where the proposals were opened or at any session held within the 10 days following. (Cal. Educ. Code § 17475.)

Adoption of a resolution of acceptance of a bid authorizes the president of the governing board to execute a lease and deliver it upon performance and compliance by the lessee of all terms and conditions. (Cal. Educ. Code § 17478.)

B. Option Two: SRCS May Seek a Waiver of Some of the Procedures Outlined Above

If SRCS wishes to enter into a lease agreement for the Property, it may avoid some of the procedures discussed above by filing a waiver request with the State Board of Education. (See Cal. Educ. Code § 33050 (a).) Based on our discussions with the SBE, SRCS cannot waive the "7-11" Committee process required under the surplus property procedures but may waive some of the procedures. The following is a discussion of the waiver procedure that would be followed.

1. A Public Hearing Must Be Held.

To obtain a new waiver, SRCS's Board must hold a public hearing and approve making an application to the SBE. (Cal. Educ. Code § 33050). For waivers related to the surplus lease

process, SRCS must provide notice of the hearing to the city in which the property is located, as well as any local park or recreation districts. This notice must be provided at least thirty days prior to the public hearing. (Cal. Educ. Code §§ 33050(f), 17489(a).) If SRCS so chooses, we would prepare the necessary notification documents and a draft resolution authorizing SRCS to submit a waiver application to the SBE.

2. Waiver Must be Approved at State Board of Education Meeting.

Waivers under Cal. Educ. Code § 33050 must be approved by the SBE at one of its meetings which are held once every other month. SBE meetings are scheduled for July 13-14, 2016, September 8-9, 2016, November 2-3, 2016, and January 11-12, 2017.

3. The SBE's Lengthy Review Period.

The SBE requires a significant amount of time to process waiver requests. Based on prior conversations with the SBE, applications must be submitted 10-12 weeks before the meeting where a waiver request will be considered. Based on the SBE's current schedule of meeting dates, the next feasible meeting date where the SBE would be able to review a waiver application from SRCS is November 2-3, 2016.

Based on the foregoing timeline, if SRCS would like to move forward with a waiver request, it should address the proposed waiver at a Board meeting as soon as possible. In order to have the waiver placed on the first available SBE meeting date, we would want to plan to submit SRCS's waiver application not later than August 10, 2016.

4. Additional Steps Required Prior to a Waiver Submission.

To maximize the probability that the waiver will be granted, we recommend seeking input from employee groups. This is required to make the waiver "mandatory" under the Education Code. In prior conversations with the SBE, we have been advised that failure to confer with employee groups is a possible basis for denying a waiver request. The Education Code and the waiver application form merely require that the employee groups be "consulted" regarding the creation of the waiver, which we interpret to require an interaction short of formal bargaining, such as a notification letter.

C. The Legal Implications of Not Following Options One or Two

The processes described above can be complex and time consuming. There is, however a "catch-all" exception.

Education Code section 17483 provides "[t]he failure to comply with the provisions of this article shall not invalidate the transfer or conveyance of real property to a purchaser or encumbrancer for value." No Court has interpreted section 17485. However, a 2010 judicial interpretation of a very similar provision of the Government Code provides guidance.

In *City of Cerritos v. Cerritos Taxpayers Assn.*, (2010) 183 Cal. App. 4th 1417, 1446 the Court interpreted the nearly identical provision of Government Code section 54230.5. The *Cerritos* Court noted "[w]hile this provision may not on its face apply to this transaction, *because the City and the Agency are leasing, not purchasing the property ...*" (Emphasis added).

Nevertheless, the *Cerritos* Court found the provision "clearly demonstrates the Legislature's intention not to elevate form over substance." (*Id.*) As a result, the Court had "no hesitation in concluding that SRCS's failure to comply with Government Code section 54222 ... [did] not operate to invalidate the transaction." (*Id.*)

Although section 17483 may provide a possible "out", there remains a risk that a lawsuit could be brought to:

- Invalidate at lease;
- Force SRCS to comply with the process; or
- Seek damages as a result of not being provided the statutorily afforded priority to lease or purchase the property.

CONCLUSION

If SRCS wishes to enter into a new lease agreement for the Property, SRCS must either follow the surplus property procedures outlined above, or obtain a waiver from the State Board of Education as outlined above.