

**GUIDELINES FOR PRIVATE DEVELOPMENT  
ON  
UNIVERSITY CAMPUSES**

**Updated March 1999**

Prepared by

**Texas Association of Senior State College and University Business Officers**

for

**Texas Higher Education Coordinating Board**

## Texas Higher Education Coordinating Board

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### Coordinating Board Mission

The mission of the Texas Higher Education Coordinating Board is to provide the Legislature advice and comprehensive planning capability for higher education, to coordinate the effective delivery of higher education, to efficiently administer assigned statewide programs, and to advance higher education for the people of Texas.

THECB Strategic Plan

### Coordinating Board Philosophy

The Texas Higher Education Coordinating Board will promote access to quality higher education across the state with the conviction that access without quality is mediocrity and that quality without access is unacceptable. The Board will be open, ethical, responsive, and committed to public service. The Board will approach its work with a sense of purpose and responsibility to the people of Texas and is committed to the best use of public monies.

THECB Strategic Plan

## EXECUTIVE SUMMARY

This is an updated report that provides guidelines for construction projects by a private investor/developer on a public university campus. The report may prove helpful to public institutions of higher education exploring the private investor/developer option.

The report was prepared by an advisory committee of the Texas Association of Senior State College and University Business Officers (TASSCUBO) at the request of the Commissioner of Higher Education. The advisory committee reached several conclusions:

- Many successful private development projects have been implemented on Texas public university campuses. Direct contact with the people who participated in these projects will probably give the best information about private development.
- This report must not be considered all-inclusive or comprehensive. The guidelines should be adapted to the specific situation on a particular campus. Even though there may be similarities between projects on different campuses, no two projects will be exactly the same.
- If a project is to be handled by a private investor/developer, it is important that the institution be represented by officials who have the authority and the ability to negotiate from a position of strength and on a basis equal to that of the investor/developer and his or her representative. The institutional representative(s) must also have a thorough understanding of the limits of their authority and must be able to determine when it is necessary to consult with other institutional officials, legal counsel, and/or members of the governing board. The decision to pursue a project involving a private investor/developer or to proceed with an institutionally backed project is not an easy one, and it should not be made quickly or without detailed, careful analysis as recommended in this report.
- Whether the project is handled by an investor/developer or solely as an institutional project, the student/customer/user does not really care who “owns” the project, whether it is a residence hall, student apartments, parking garage, day care center, research park, hotel, or special events facility. If the facility is located on the campus, many people will consider it to be an institutional facility. The institution may be perceived as responsible for its operation and maintenance. If something goes awry, breaks, or if someone is injured, the institution should be prepared to address the problem or grievance with a high level of care and concern.
- Universities must act to ensure a level of facility quality consistent with standards applied for all campus projects.
- Universities must carefully evaluate the ongoing interpretations of private development projects on the financial commitment, both direct and implied, of the university. This evaluation should include the issue of whether the project will alter the investment rating of the institution.
- The Coordinating Board's Office of Campus Planning can provide considerable information and assistance on private development projects.

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## BACKGROUND

In January 1987, the Texas Higher Education Coordinating Board asked its staff to create guidelines for facilities that might be built by private enterprise on state-owned land at public colleges and universities in Texas. Those guidelines were never drafted because Senate Bill 1144, passed by the 70th Legislature, removed the Board's authority over auxiliary enterprise buildings developed by private enterprise on the campuses of public institutions of higher education.

Except for any space that would eventually be required to receive formula funding, the Board generally does not have authority over private development on public university property, but the Board continued to be concerned about the potential liability that might affect a university or the State of Texas if a private project failed. The Board also recognized that a growing number of institutions either had arranged for private development on their campuses or had expressed interest in those developments.

For those reasons, in 1991, then Commissioner of Higher Education Kenneth Ashworth appointed an advisory committee to develop and recommend *Guidelines for Private Development on University Campuses*. These guidelines were developed to assist campuses when contracting with private enterprises to build, own, and/or operate facilities on the campuses of public universities in Texas.

In late 1998, Commissioner of Higher Education Don Brown asked the Texas Association of State Colleges and University Business Officers (TASSCUBO) to assist in reviewing these guidelines. TASSCUBO President Jose Garcia appointed a committee to perform this task. The committee consisted of Chair Ray Hayes and members Randy Harris, David Larson, Robert Lovitt, and Juan Sandoval. Coordinating Board staff Roger Elliott, Bill Beckham and Jan Greenberg assisted the committee. The committee did not develop new guidelines, but updated the 1991 guidelines.

This document is focused on the private development of physical facilities and buildings located on land owned by a university. Private developments can also take many other forms, such as leased space within a student center or academic building.

This document may seem to raise many questions about private development in its attempt to fully outline all of the issues. In fact, there are many good reasons to consider private development on a university campus. These reasons include allowing university administrators to focus on the university's primary missions and making the best use of scarce financial resources.

## PRIVATE DEVELOPMENT VERSUS INSTITUTIONAL DEVELOPMENT

Officials at public higher education institutions should ask these questions before making a decision to contract with a private developer to construct and/or manage or operate any project to be located on university property:

- What institutional purpose will be served by the proposed project?
- What does the private investor/developer have to offer that can be provided better by the developer than the institution?

As a general rule, any developer should demonstrate a higher level of expertise than the institution in constructing and/or operating, managing, or maintaining the proposed project. There should not be an automatic presumption that private development on a public university campus is always preferred or is necessarily better than institutional development. The institution should be particularly cautious when considering any project where it is known in advance that the institution's managerial experience and expertise exceed that of the developer. Student housing and campus parking are examples of such projects. With respect to these projects, the institution should consider seeking creative financing arrangements that allow it to retain greater control over the operation and maintenance of the project after completion. The best financing arrangement will depend on the individual institution, its governing board, appointed officers and other administrative personnel, and the situation.

There is no simple formula that can be applied to all institutions or to all situations. Negotiations may provide an opportunity for innovation and creativity in presenting options for consideration by the investor/developer. The institution's representatives should maximize the negotiating value of existing assets of the institution in an effort to leverage those assets from a position of strength. For example, trading a long-term lease on a strategically located piece of real estate for a significant investment in the campus by the investor/developer might be possible. This transaction could be especially appealing for a campus with large amounts of land not likely to be needed by the institution to directly support its primary academic programs.

It is also critical to negotiate a project buy-out price in advance at which the developer agrees to sell the university all or some specific portion of the project. A set price, formula or strategy for determining price should be agreed to in writing. An option to purchase would not preclude other negotiated agreements during the life of the project but would allow the institution to regain full control of the project at a predetermined price if necessary.

Development of projects through privatization should be considered when they are consistent with the Campus Master Plan. Evaluation of a proposed joint venture project development should include:

- Comparison of the cost of private development to cost of development by the university
- Assessment of the university's architectural, engineering, and management infrastructure to determine if institutional resources are available to start and sustain university development of

the proposed joint venture project

- Assessment of the university's capacity to participate in financing of the proposed project in light of other institutional capital funding obligations and plans
- Evaluation of the financial stability of the developer
- Evaluation of independently prepared/audited financial statements of the developer

A Request for Proposals (RFP) should be prepared and submitted to all developers who may have an interest in submitting a proposal for the planned project. (Sample RFPs are available in the Campus Planning Division's Reference Library at the Coordinating Board). A Request for Information (RFI) to potential developers may precede the RFP if the institution desires preliminary information before defining the specific elements of the proposed development. The university may wish to form a committee comprised of faculty, staff, and professionals from outside the university to screen and evaluate proposals from interested developers.

## PROJECT FEASIBILITY

The institution and/or the developer should conduct a feasibility study. On most university campuses there are a number of resources that could be called upon for advice and assistance. These include experts in architecture, land use planning, agricultural economics, real estate, management, marketing, institutional studies/institutional research, and possibly many others, depending on the institution involved in the project. If the study is contracted externally, the institution should be sure the consultant is qualified and should insist on the right to examine previous work of the consultant. A number of different factors must be considered when evaluating the feasibility of any major project to be undertaken on the campus of a public institution. Perhaps the most important of these factors are the legal analysis, site planning, ownership and management analysis, market analysis, and economics analysis.

The market analysis, including feasibility and financing, should be considered in depth first. Is there a need for the intended development? Is the project doable? The goal of the market analysis is to collect all data necessary to allow the institution to make an intelligent, informed decision regarding the proposed project and to provide an indication of the potential attractiveness of the project from a marketing point of view.

A number of very specific analyses should comprise the market analysis, with particular attention to these areas:

- Demand – Competition, demographics, and trends affecting future demand
- Supply – Existing supply, vacancy rates, and occupancy/use levels
- Building Starts and Permits – What other construction is under way in the immediate vicinity?
- City Services – Existing and planned streets; water, sewer, gas and electricity availability. Will these services be increasing or decreasing?
- Community Planning – Does it encourage or discourage development and growth?
- Construction Cost/Financing – Are costs rising? Are they reasonable? Is financing available at reasonable rates?
- Zoning and Codes – Is the proposed development allowed under current zoning and/or local building codes?
- Community Impact – Which community components are affected directly or indirectly? Which community components perceive the project favorably or unfavorably? Will they affect the feasibility of the project?
- Restrictions – Are there restrictions on the use of land in the conveyance (donative instrument)? Are there restrictions on use of income from the property?

There are, of course, many other questions and concerns that should also be addressed depending upon the specific situation and the institution considering the project.

If the market analysis is positive, the next step is the economic analysis. The economic analysis should provide a reliable indication of the feasibility of the project from an economic perspective. Without regard to the origin of the idea for the proposed project, the institution should be prepared to undertake its own economic study as well as carefully research and examine any study presented by the private developer.

Examples of questions to be considered during the economic analysis phase of the study:

- Is there an investor with a specific idea for a specific site?
- Does the institution have a specific site requiring development?
- Does the institution need redevelopment of a facility?

A thorough economic analysis includes the use of a number of different tools, ranging from relatively simple ratio analyses to a more complex, sophisticated discounted cash-flow model.

## PROJECT DEVELOPMENT

### *Campus Master Plan*

An important requisite for campus development, whether by a private developer or by the institution, is a Campus Master Plan which contains a clearly defined set of covenants and restrictions. The Campus Master Plan encompasses concepts for the planned growth and enhancement of the physical facilities of the university as recommended by the president of the university and approved by the governing board.

The physical facilities section of the Campus Master Plan should ensure that physical development of the campus is congruent with the campus capital development plans, capital budgets, the academic plan, and the mission and goals of the university. It should outline the review and approval process for construction projects, permitted uses, and general site development guidelines, including setbacks, coverage, easements, landscaping and grounds maintenance standards, site grading and drainage, signage, parking, exterior lighting, building design and construction, telecommunications, utilities, and environmental considerations. Planning is important to ensure proper control of project development and to reduce the possibility of indiscriminate or haphazard development of the property.

### *Lease Agreement*

Non-subordination of the land to be committed to the project is an extremely important item to be considered early in negotiations. The non-subordination clause in the ground lease agreement or lease hold agreement ensures that the institution does not lose the land if the project fails. Since the clause could be an obstacle to project financing, the ground lease must be structured to accommodate a mortgage holder and should properly address the rights of all parties if the development defaults. With this clause in the lease agreement, a prudent and wise developer/investor should take steps to assure that the probability for success is sufficiently high to warrant investment in a structure with no ability to own the "ground" beneath it if the project fails. The ground lease agreement or the lease hold agreement should also include sections covering:

- Demise – term and rental, length of the lease and rental terms, escalation clause, option to renew, and related items
- Mortgaging leasehold on the structure, stipulations on foreclosure, refinancing, and related items
- A clause that will allow the institution, at its option to pay off the debt on the building or other structure and assume full ownership of the project if the developer defaults
- Restrictions on use of the land and improvements to this land
- Facility design standards and approval

- Material standards and approval
- Improvements, alterations, additions to property
- Protective covenants and restrictions as part of the lease
- Repair and maintenance standards and requirements for facilities
- Provision for utilities and other services such as custodial, maintenance of equipment, grounds, and related items
- Utility easements, right to enter, and related items
- Mechanics and other liens
- Indemnity
- Insurance provisions
- Assignments and subleases
- Lessee compliance with federal and state laws regarding handling and disposal of hazardous materials
- Right of university to inspect the premises
- Lessor's defense of legal actions
- Prohibition against general obligations against the institution or against the State of Texas
- Prohibition against pledge of specific assets of the State of Texas or university revenues to support the project
- Default provisions
- Covenant and use and quiet enjoyment of the property
- Options requiring demolition and when they might be appropriate – requiring the developer to restore the property to its original condition at the end of the lease
- Buy-out provisions and valuation procedures
- Delivery of possession of the premises
- Determination of ownership of lessee's fixtures at the termination of the lease

- Potential taxability, assessments, charges and levees which may be due on the property
- Texas laws to apply
- Identification of applicable building standards which the developer will be required to follow
- Developer and project conformity with university safety standards
- The university's right to control selection and actions of users/occupants of the project, to include rules and regulations concerning rights and responsibilities of students residing in university housing
- Consideration of issues related to Unrelated Business Income Tax (UBIT)
- Control of rent structure and annual rent increases
- Financial occupancy guarantees that may be required
- Define management fees and other expenses to be charged to the project

This is not an exhaustive list of every important area that should be addressed in the ground lease agreement. Legal counsel should be involved in all project negotiations. The degree of involvement by the institutional governing board will vary by institution. However, the governing board should be consulted or advised very early in the process of drafting and negotiating the ground lease agreement.

## PROJECT IMPLEMENTATION

### *Preconstruction and Construction Phases of the Project*

- The institution and the private developer should agree on general construction criteria early in the negotiation process. What guarantees that the project developer's plans and specifications comply with the Campus Master Plan and with the established standards of the institution for all similar campus projects?
- Does the institution have an adequate control mechanism in place during the development phase of the project to guarantee compliance with established standards? While the developer has ultimate responsibility for construction, appropriate institutional staff should be actively involved to assure the project meets agreed-upon criteria.
- Is there a clearly defined, written review process for all parties to the agreement? Are the policies and procedures for final project approval adequate?
- Are payment and performance bonds required? Are insurance requirements clearly defined?
- Does the institution have access to the construction site for purposes of inspection? Are periodic progress reports required?
- Are the construction start date and the occupancy date specified in writing?
- Are all necessary architectural, design, and construction considerations thoroughly covered?
- Are penalties specified for failure to meet the occupancy date?

Others items may be added to this list, depending on the nature and scope of the particular project.

### *Operation, Management and Maintenance of the Completed Project*

The developer, the institution, or both may manage the project. To clearly define their roles and responsibilities for operation, management, and maintenance of the project, a detailed management agreement should be signed by all necessary parties after appropriate negotiations have taken place. The developer/investor is assuming significant financial risk and must maintain a proper level of control during the life of the project. A number of important questions should be addressed in the management agreement:

- What is the institution's role in management of the completed facility?
- Does the agreement provide that the institution may contract with the developer/owner to manage the facility or to manage specific areas or services associated with operation of the facility? If so, have the advantages and disadvantages of the arrangement been carefully defined and assessed?

- What institutional resources, if any, may be consumed in connection management of the facility?
- Does the management agreement ensure full compliance with the institution's standards for operation, management and maintenance at all times? What recourse is there if standards are not met?
- To what extent will the developer/owner/manager of the facility be required to comply with institutional rules and regulations regarding on-campus solicitation or other policies intended to control access to the campus? This is particularly critical in the case of student housing.
- Does the institution have the right to review annual operating budgets of the owner/manager before the budgets are implemented?
- Will the institution regularly be provided with periodic operating statements and financial reports?
- Will the institution be allowed to conduct an audit of the financial records of the owner/manager of the facility? Are there any limitations or restrictions associated with this right?
- Who has responsibility for promoting and marketing the facility? How is advertising approved and controlled to ensure that it is in the best interests of the institution and complies with institutional standards for advertising? Who controls use of the university's name, logo, and related items?
- Who has responsibility for setting rental/use charges for the facility? Do rates require approval of the institution's governing board? Is institutional concurrence required before such rates/charges may be increased or decreased?
- In the case of a residence hall, who is responsible for initiating the contract with the students? Who approves the contract? Who makes decisions regarding contract enforcement, loss of deposits, eviction, and related matters?
- How are the institution's standards for maintenance of the facility communicated and enforced? What action may the institution take if the standards are not maintained by the owner/manager of the facility? What action may the institution take if serious problems, such as air conditioning system failure, boiler failure, or roof leaks develop and are not repaired quickly by the owner/manager?
- Who will have primary responsibility for routine preventative maintenance, including custodial, grounds, mechanical/electrical systems, and upkeep?
- What if the owner/manager contracts with a third party for maintenance? Does the institution have the right to approve the contractor preferred by the owner/manager? What problems can be anticipated if the institution contracts with the owner/manager to provide all or a portion of the maintenance services? Have the potential pitfalls of such an arrangement been identified in advance?

- Does the institution reserve the right to inspect the facility periodically to ensure that maintenance standards are being complied with by the owner/manager or by the contractor hired to provide those services?
- Can the institution be held liable/negligent in case of serious maintenance failure?
- Who has responsibility for promptly addressing routine maintenance complaints from residents/occupants/users of the facility? Who has responsibility for correcting problems at night, on weekends, or on holidays, including payment of all costs associated with providing these services?
- Who will have responsibility for utilities, including electricity, water, gas, sewer, and telephones? Will the institution sell utility services to the owner/manager of the facility?
- Who will have responsibility for auxiliary services, such as food service, to be provided on the premises?

## Appendix A

### Examples of Private Development Projects on Campuses of Public Institutions in Texas

University of Texas at Arlington Mr. M. Dan Williams, Senior Vice President Finance and Administration 817-272-2102	Day Care Facility
University of Texas at Dallas Mr. L. Robert Lovitt, Vice President Business Affairs 972-883-2213	Student Apartments
University of Texas at San Antonio Mr. David R. Larson, Vice President Business Affairs 210-691-4201	Student Apartments
West Texas A&M University Mr. Gary Barnes, Vice President Business and Finance 806-651-2095	Student Apartments, Hotel
Texas A&M International University Mr. Jose Garcia, Vice President Finance and Administration 956-326-2380	Student Apartments
University of North Texas Mr. Phillip C. Diebel, Vice President Finance and Business Affairs 940-565-2055	Parking Garage, Hotel
University of Houston Mr. Randy Harris, Vice President Administration and Finance 713-743-5550	Student Apartments
Texas A&M University-Corpus Christi Mr. Ray Hayes, Executive Vice President Finance and Administration 512-994-2321	Student Apartments
Texas A&M University Mr. William Krumm, Vice President Finance and Comptroller 409-862-7777	Research Park

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