

1. Title

Processing of Sales and Leases of Real Property (UT as Seller or Landlord)

2. Policy

Sec. 1 Policy Statement. It is the policy of The University of Texas System to permit the sale or leasing of improved or unimproved real property of the Board of Regents of the U. T. System in a manner that provides the best value for the U. T. System. All sales or leases to other parties of improved or unimproved real property of the Board of Regents shall be entered into in accordance with applicable law and as provided in this policy.

Sec. 2 Purpose. This policy provides requirements and guidelines for sales or leases to other parties of improved or unimproved real property of the Board of Regents.

Sec. 3 Sale or Leasing Methods and General Terms.

3.1 Improved or unimproved real property of the Board of Regents of the U. T. System may be sold or leased to an individual or an entity through

(a) competitive bidding;

(b) competitive sealed proposals (request for proposals); or

(c) direct negotiation.

3.2 The institution shall use the method that provides the best value for the U. T. System. In determining what is the best value to the U. T. System, the institution shall consider

(a) the selling price, rental, or other consideration to be received;

(b) the reputation and creditworthiness of the purchaser or tenant, and, if applicable, the experience of the tenant;

(c) the extent to which occupancy by the tenant serves the needs of the institution, if applicable; and

(d) any other relevant factor that a private seller or landlord would consider in selecting a purchaser or a tenant.

- 3.3 The real estate contract or lease shall contain business terms that are in the best interest of the U. T. System. With respect to a lease transaction, under no circumstances shall the Board of Regents' interest in the real property be subordinated to the lien of any mortgagee of the tenant's leasehold interest.

Sec. 4 Selling Price or Rental Rate.

- 4.1 The Texas Attorney General has construed Texas Constitution Article III, Section 51 to prohibit the grant of State property and contract rights as well as money (Texas Attorney General Opinion MW-373, 1981. Consequently, the sale or lease must be for a fair market value, as determined either by a competitive process, an independent appraisal, a market study, or other documentation of value, or the sale or lease must comply with the requirements for a below-market price as specified in Section 4.2.

- 4.2 In accordance with opinion of the Texas Attorney General cited in Section 4.1, if the lease or sale is at a below-market value, it must meet the following requirements:

- (a) the sale or lease must serve an identifiable public purpose appropriate to the function of the institution;
- (b) adequate consideration must flow to the institution; and
- (c) the institution must maintain sufficient contractual controls to ensure that the public purpose is actually achieved.

- 4.3 The determination of whether the public purpose exists is to be made by the Board of Regents in the first instance. Consequently, a proposed sale or lease below market must be submitted to the Board of Regents for a finding of fact that the transaction serves the public purpose. The institution must supply sufficient documentation to the Board of Regents to enable it to make the finding of fact.

Sec. 5 Lease for Privatized Construction Project for Institutional Purpose.

- 5.1 If the lease is for a privatized construction project to serve an institutional purpose (for example, student housing, bookstore, etc.), the project must (1) serve a demonstrated institutional need, (2) meet design and construction standards consistent with the approved master plan and architectural standards for

the campus, and (3) utilize the competitive sealed proposals process (request for proposals).

- 5.2 A privatized construction project will be approved only when it is demonstrably more desirable than for the institution to own the project. In addition to the other requirements in this policy, the following criteria for approval shall apply to privatized construction projects:
- (a) the institution shall have a market analysis prepared by an independent firm to determine the demand for the proposed project before soliciting proposals from interested providers;
 - (b) the project must be reviewed by the U. T. System Office of Finance before issuance of a request for proposals to determine what effect the project may have on the institution's debt service capacity;
 - (c) the project must be reviewed by the U. T. System Office of General Counsel before issuance of a request for proposals to determine what effect any tax issues may have on the project;
 - (d) the project must be approved by the appropriate Executive Vice Chancellor before issuance of the request for proposals;
 - (e) the request for proposals must be in a form reviewed and approved by the U. T. System Office of General Counsel – Real Estate Office;
 - (f) the lease must contain business and legal terms approved by the U. T. System Office of General Counsel – Real Estate Office;
 - (g) the project must meet construction standards approved by the U. T. System Office of Facilities Planning and Construction (OFPC). If OFPC will not be inspecting the project for code compliance, then construction permits and appropriate inspections must be obtained from the local municipality for all construction associated with the project; and
 - (h) preliminary plans with fully developed elevations and perspective renderings must be submitted to the Facilities

Planning and Construction Committee of the Board of Regents for review and approval.

Sec. 6 Tax Considerations in Leasing.

- 6.1 Section 11.11 of the *Texas Tax Code* governs when U. T. System property is exempt from real property taxes. U. T. System property used for public purposes is tax exempt; U. T. System property used for nonpublic purposes is taxable. Nonpublic purposes are (i) purposes that are not related to the performance of the duties or function of the institution, and (ii) residential housing that serves the public other than students and employees of the institution. If property is leased partially to private tenants for nonpublic purposes and is used partially by the institution for public purposes, then the portion leased to private parties is taxable. Provision must be made in the lease with respect to who will bear the responsibility for payment of real property taxes.
- 6.2 Sections 511 and 512 of the *Internal Revenue Code* impose a tax on the income of exempt organizations that is derived from any unrelated trade or business regularly carried on. A proposed lease must be evaluated to determine whether it may trigger unrelated business taxable income. Consult the U. T. System Office of General Counsel and UTS103, *Unrelated Business Income Tax*, before the lease transaction structure is finalized.
- 6.3 As a general rule, interest on bonds issued by the U. T. System is tax exempt only if the proceeds are used for U. T. System purposes. There is the potential for numerous federal tax issues to arise if the facilities financed by the bonds are used for private purposes, such as a lease to a private party. A lease involving bond-financed property that occurs after the bonds have been issued but before the bonds have been retired must also be evaluated to confirm that it does not jeopardize the tax exempt status of the interest paid on the bonds. Consult the U. T. System Office of Finance before the lease transaction structure is finalized.

- Sec. 7 Approval by the U. T. System Office of General Counsel – Real Estate Office. Each sale and each lease of improved or unimproved real property of the Board of Regents must be approved by the U. T. System Office of General Counsel – Real Estate Office. U. T. System institutions are strongly encouraged to involve the Real Estate Office in the early stages of the proposed transaction.

Sec. 8 Approval by the U. T. System Board of Regents.

8.1 Regental approval is required for each sale or lease that has a total value exceeding \$1,000,000 or that is below fair market value. With respect to leases, the total value includes all rental payments and all tenant finish out paid by U. T. System or allowance granted by U. T. System for finish out; these amounts are to be calculated over the entire term of the lease, including any renewal terms. If a real estate sale contract or a lease must be signed before Regental approval is granted, the document must contain an acceptable limitation such as the following statement:

This [Contract] is not effective until approved by the Board of Regents of The University of Texas System.

8.2 The request for approval of the Board of Regents shall comply with the Board of Regents' *Rules and Regulations*, Rule 70301, which require that the following information be provided to the Board of Regents:

- (a) a description of the process used to select the other party and the rationale for using the process described;
- (b) a description of the process used to set the consideration to be received; and
- (c) a statement of the appraised value as determined by an independent appraisal conducted no earlier than 12 months prior to the Board of Regents' meeting date at which the transaction is to be presented for approval.

8.3 As provided in Section 4.2 above, if the proposed transaction is for less than fair market value, sufficient documentation must be provided by the institution to enable the Board of Regents to make a finding of fact that a public purpose, appropriate to the institution, is served.

Sec. 9 Execution of Documents. Board of Regents' *Rules and Regulations*, Rule 70301, delegates to the Executive Director of Real Estate, or his or her delegate, the authority to sign documents pertaining to improved or unimproved real property of the Board of Regents.

3. Definitions

None

4. Relevant Federal and State Statutes

Texas Constitution Article III, Section 51

Texas Education Code Section 65.31

Texas Education Code Section 65.39

Texas Tax Code Section 11.11

5. Relevant System Policies, Procedures, and Forms

[Board of Regents' Rules and Regulations, Rule 70301](#)

6. Who Should Know

Administrators
Chief Business Officers
Employees

7. System Administration Office(s) Responsible for Policy

Office of General Counsel – Real Estate Office

8. Dates Approved or Amended

September 15, 2005
Amended March 5, 2009
Amended May 31, 2011

9. Contact Information

Questions or comments about this policy should be directed to:

- bor@utsystem.edu