



Office of the City Manager

INFORMATION CALENDAR

November 14, 2006

To: Honorable Mayor and
Members of the City Council

From:  Phil Kamlarz, City Manager

Submitted by: Lisa Caronna, Deputy City Manager

Subject: Status Report: Warm Water Pool at the Berkeley High School (BHS)
Tennis Court Site

INTRODUCTION

This is a status report on the Warm Water Pool at the BHS Tennis Court Site on Milvia St. On July 18, 2006, Council took action to develop a schedule and related possible financing for the construction of a new warm water pool at the BHS Milvia Street tennis court site, including but not limited to: 1) developing a full-scale project; 2) exploring options for: a) a special mail ballot election in 2007; b) a June or November election in 2008; or c) funding through certificates of participation; 3) moving this project up to the first tier of priorities in the City's work plan; and 4) authorizing the City Manager to expend the necessary monies from the General Fund already set aside for the warm water pool to accomplish Council's direction.

CURRENT SITUATION AND ITS EFFECTS

In order for the warm water pool to be fully implemented as a viable future project, a number of steps need to take place. Planning (including CEQA), design, costing, site control, and ongoing maintenance costs must be finalized to determine the project's feasibility and financing options. We anticipate all components of the project will be complete in October 2007 allowing for either a special mail-in ballot election in November 2007 when the project is complete, or through an election consolidated with the State in June 2008. Special mail-in ballots cost approximately \$200,000 versus the cost of approximately \$100,000 for Berkeley to call for a consolidated election with the State and then \$10,000 for each additional ballot measure on the State election ballot.

CEQA

BUSD has distributed a Draft EIR for the BHS South of Bancroft Master Plan. Comments are due to the District on November 9, 2006, and District action is anticipated in December. City staff are currently reviewing the document and preparing comments. The Draft EIR for the south campus area addresses many of the issues related to the warm water pool; however, the adequacy of the document for the purpose of constructing a warm water pool are undetermined as of yet.

Project Design

The detailed project design is required to both assess the program and fully cost the project. The City is receiving responses to a Request For Qualification (RFQ) to select an architect with expertise in pool design. The RFQ is currently posted on the city website with a deadline for submittal by December 7. Final selection of an architect is anticipated in January 2007 with the final schematic design complete in August 2007. The design process includes three user-focused community meetings to review project requirements, as well as design options for the pool proposed for the Milvia Street tennis court site.

Site Control

The District owns the Milvia Street site. The City will be investigating various options ranging from land purchase to joint use or joint occupancy of the site with the District. According to State Procedures for Disposition of Surplus Property (see Attachment 1), in order for the property to be either sold and/or leased for the purposes of a warm water pool by the City of Berkeley, the District must first determine that the property is surplus to the needs of the District and make critical findings. The determination is undertaken by an advisory committee as established in State procedures and the District cannot sell it for much below fair market value. We will be exploring both purchase and lease options as we move forward in this process.

The District Superintendent is currently assessing the best means of activating a committee (either existing or new) for the Milvia Street warm water pool site. We have been informed this process may take up to one year to complete after the committee is formed.

Bonds and Financing

Once the actual costs are better known, bond and financing options will be fully developed. Opportunities for bringing a bond measure to the voters based on what we believe to be the likely schedule of completion of project development in a year (October 2007) are either a special mail-in ballot in November 2007, or through an election consolidated with the State in June 2008. Developing options for certificates of participation will be concurrent with determination of the final costs for the project in advance of a decision to go to the voters for bond approval.

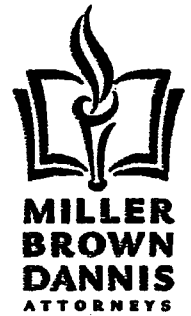
FISCAL IMPACTS OF POSSIBLE FUTURE ACTION

Project expenses are being drawn from a \$1,000,000 General Fund allocation for the warm water pool as originally allocated in the FY 2006 budget. This allocation recommended to be carried over to Fiscal Year 2007 and will be included as part of the First Amendment to the Appropriations Ordinance. Funds are currently budgeted in Capital Improvement Fund budget: 610-5215-463-1103 (Hourly salaries - \$100,000), 610-5215-463-3038 (Miscellaneous Professional Services - \$200,000), and 610-5215-463-6570 (Infrastructure Building - \$700,000).

CONTACT PERSON

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Attachment 1: Procedures for Disposition of Surplus Property



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January 10, 2006

VIA EMAIL DELIVERY AND U.S. MAIL

Eric D. Smith
Berkeley Unified School District
2134 Martin Luther King, Jr. Way
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Re: Procedures for Disposition of Surplus Property;
Our file No. 1385.1000

Dear ^{Eric}~~Mr.~~ Smith:

This letter provides an explanation of the process for disposition of surplus real property for the District's 7-11 Committee. This letter outlines the statutory process for selling or leasing surplus district property. Before District property can be marketed for private use or development, the District must first determine that it is surplus to the needs of the District, and then offer it to other public agencies for use as open space, recreational or park use, for development of low- and moderate-income housing, or for other uses.

Legal Analysis

A. Preliminary Evaluation

1. Prior to any sale or long term lease of excess property (with certain limited exceptions), the District must appoint an advisory committee to advise the governing board in the development of district-wide policies and procedures in the use or disposition of school buildings and space that are not needed for school purposes. (Ed. Code, §§ 17387, 17388.) The advisory committee may consist of seven to eleven members and must include representatives of the community, teachers, administrators, and parents. (Ed. Code, § 17389.)

2. The general duties of the advisory committee are to evaluate school space and projected enrollments and to prepare and present to the District governing board a report

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recommending a determination of whether real property is surplus space. (Ed. Code, § 17390.)

3. The advisory committee should evaluate the property to determine its highest and best use. How the property is ultimately used is to some degree dictated by statute.

4. Local zoning authorities should be consulted to determine potential permissible uses.

5. If the property is to be sold or ground leased for a long term, the District may also wish to consider getting an appraisal as a guide for determining the most profitable use and fair market value of the property.

6. The District should also consider a title report for the property. A title report will disclose restrictions, covenants, or reversionary clauses that might affect the eventual disposition of the property.

B. Planning Commission Notice

The District may not dispose of the Property until it provides notice to the local planning commission of its intent to sell the property. (Gov. Code, § 65402.) The planning commission has forty (40) days to determine whether the disposition is in conformity with an applicable adopted general plan or the disposition is conclusively deemed in compliance with the general plan. However, if the planning commission disapproves the disposition, the District may overrule the planning commission's determination. (Id.) This notice should be given immediately after the Board acts to declare the property surplus and to direct that it be sold.

C. Offers to Public Entities

The Education and Government Codes mandate offering surplus property to other public agencies prior to making the property available for sale or lease through open bidding. These mandates are specifically prioritized by agency and potential usage. (Ed. Code, §§ 17464 and 17485.)

1. The District may first offer real property to be sold or leased to a contracting agency as defined in Education Code section 8208 for the delivery of childcare services for a period of not less than five (5) years. (Ed. Code, § 17458.) This provision is discretionary.

2. If the District intends to lease vacant classrooms, it must first adopt a resolution of intent to lease vacant classrooms and offer those classrooms to special education programs provided by other districts within its special education local plan area or

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by the county office of education. The lease payment shall not exceed the District's costs for maintenance, operation, and custodial services. (Ed. Code, § 17465.) The District may proceed with the public bidding process for lease of vacant classrooms, but shall not accept a proposal to lease until it receives a response from all eligible agencies or the time expires within which a SELPA or the county office can respond.

3. If the property to be sold or leased, or a portion of it, meets the following criteria, the sale or lease must be treated in accordance with the Naylor Act. (Ed. Code, § 17485, et seq.) Those criteria are that the property (a) consists of land that has been used for at least eight (8) years for playground, playing fields, or other outdoor recreational purposes, or (b) is open space land particularly suited for recreational purposes, and (c) no other available publicly owned land in the vicinity is adequate to meet the existing and foreseeable needs of the community for playground, playing fields, or other outdoor recreational and open space purposes.

The Naylor Act requires that such land be offered to the city, any park or recreation district, any regional park authority, or the county within which the land may be situated unless certain exceptions apply. Should one of these entities elect to purchase or lease the open space portion of the school site, the amount for which that land may be sold or leased is severely limited. In general, the property may not be sold for more than the cost of acquisition, adjusted by the consumer price index, plus the cost of any improvement to the open space portion of the land that the school district has made since the 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.

If the District elects to lease the property, it cannot lease the property at an annual rate of more than one twentieth (1/20th) of the maximum sales price for the property.

4. If the property is for sale or lease with an option to purchase, the property must be offered to other public agencies. A written offer to sell or lease the property must first be made to specified public agencies pursuant to Government Code section 54220, et seq. (Ed. Code, § 17464.) These statutes require the property to be offered for the purposes of developing low- and moderate-income housing, for park and recreational purposes, or for economic development zones. (Gov. Code, § 54222.) If the property is not suited for such uses, the District may dispense with this priority. (Ed. Code, § 17464.)

5. If the property is for sale or lease with an option to purchase, the property must then be offered for sale or lease with an option to purchase at fair market value to specified other public agencies and nonprofit charitable organizations. (Ed. Code, § 1764(b)(2).) The offer must be made in writing to specified governmental agencies and other entities that have submitted a written request to be notified of any offer, and may be made by public notice published in a newspaper of general circulation for three (3)

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successive weeks to all other public agencies. Any public agency that desires to purchase or lease the property must notify the District of its intent within sixty (60) days after the third publication notice.

6. These agencies must be afforded sixty (60) days to respond to the offer to sell the property. If one or more parties respond, the parties must then enter into good faith negotiations for a period of sixty (60) days. If the parties do not agree on mutually satisfactory terms, the District may proceed to open bidding. If the District receives offers from more than one public agency, the governing board must negotiate with the responding parties in the order of priority set forth in the statutes, but may exercise its discretion to determine which offer to accept and may negotiate the terms of the acceptance. (Ed. Code, § 17464(b)(2).)

7. Certain small parcels are exempt from the public offering requirements of Government Code section 54220, et seq. as exempt surplus land, if they are sold to the owner of contiguous land. The District's property does not appear to meet the criteria for this exemption.

D. Open Bidding

1. Under certain circumstances, the bid procedures may be waived by direct application to the State Board of Education. Requirements of Government Code section 54220, et seq., and some provisions of the Naylor Act may not be waived. If a waiver is obtained, the District may proceed with a sale or lease to any party on mutually agreeable terms upon a majority vote of the governing board.

2. Prior to finalizing bid documents, the District may wish to schedule conferences with prospective bidders to determine what terms and conditions may be acceptable on the open market. Notice of such conferences may be made by publication. Although no such conference is required, this device may serve to reveal useful information relative to the prospective sale or lease.

3. If the property is to be sold, notice of the public meeting must be sent by certified mail to the previous owner of the property at least sixty (60) days prior to the public meeting. (Ed. Code, § 17470.)

4. The initial step in ordering a sale or lease of surplus property is adoption by a two-thirds vote of the governing board of a resolution declaring its intention to sell or lease the property. The resolution must include a description of the property, the minimum sale price or rental, the terms, and the commission, if any, the governing board will pay to a licensed real estate broker. The resolution must also set a time for a public meeting at which sealed bids will be received and considered. The public meeting must be at least three (3)

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weeks after adoption of the resolution. (Ed. Code, § 17466.) A majority of the members of the governing board must sign this resolution.. (Ed. Code, § 17469.)

5. Notice of the time and place for receipt of bids shall be given by posting copies of the resolution in three public places in the district at least fifteen (15) days before the date of the bid opening and by publishing the notice at least once a week for three (3) successive weeks prior to the meeting in a newspaper of general circulation published in the county in which the district is situated. (Ed. Code, § 17469.)

6. At the time and place of the public meeting established by resolution, all sealed proposals that have been received by the District are to be opened, examined, and declared in a public session. After opening the written bids, oral bids may be called for and considered if the oral bid is at least five percent (5%) over the highest written bid. The highest conforming bid made by a responsible bidder must be accepted unless all bids are rejected. (Ed. Code, §§ 17472, 17473, and 17476.) An oral bid may not be accepted before it is reduced to writing. (Ed. Code, § 17473.)

7. The bid may be accepted immediately or within ten (10) days. (Ed. Code, § 17475.) Acceptance and award is to be done with a resolution of acceptance. The resolution shall direct the governing board president, other presiding officer, or a specified member, to execute a deed or lease and deliver it upon performance of terms and conditions precedent. (Ed. Code, § 17478.)

8. If the District intends only to lease the property, has complied with all requirements through notice and solicitation of bids, and has received no conforming proposals, it may then enter into a lease with any lessee for an amount not less than fair market value on such terms and conditions as may be agreed upon between the District and the lessee. Such a lease may not be for a term in excess of three (3) years. The governing board may approve such a lease by a simple majority vote. (Ed. Code, § 17477.)

E. Other Issues

The above are the procedures for a lease or sale of District real property. The District should also consider whether compliance with the California Environmental Quality Act, Public Resources Code section 21000, et seq. ("CEQA") is necessary prior to taking action. Usually, CEQA compliance must be considered before school closure, and the tenant or buyer will need to comply with CEQA in order to use the property after a sale or lease. The local jurisdiction, rather than the District, is usually the lead agency under CEQA for a subsequent use of property.

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Also, the Education Code has provisions for joint use of facilities or for a joint venture that can authorize private development of District property with some educational use of the property. (Ed. Code, §§ 17515, et seq., 17527, et seq.)

F. Joint Use of School Property

The District can enter into a joint use agreement with some entities without determining the property surplus after compliance with applicable public offering and public bidding requirements. (Ed. Code, § 17527, et seq.) The District is authorized to lease space in school buildings on a priority basis to educational agencies for conducting special education programs and as a second priority to other education agencies. (Ed. Code, § 17527.)

The tenant in a joint use situation can be an educational entity, a "non-public school," a business, an individual or corporation, but NOT a private K-12 school. The Board makes a prior determination that the tenant will not jeopardize the safety of students, interfere with the operating school's functions or disrupt residents of the neighborhood. (Ed. Code, § 17529.)

No more than 45 percent of the school's space can be leased during normal school hours, and no more than 30 percent of the District's total school space can be leased during normal school hours. (Ed. Code, § 17531.) These restrictions do not apply to leases with daycare centers, nursery schools or special education classes. (Ed. Code, § 17532.)

The lease cannot exceed five years. (Ed. Code, § 17534.) Rent to non-public entities cannot be less than fair market value. (Ed. Code, § 17535.) These entities, but NOT non-public schools, education-related and public entities, must comply with local permit and zoning requirements. Non-public schools and education-related entities, if on an operating campus, are exempt from the jurisdiction of a local agency having general planning jurisdiction. (Ed. Code, § 17533.)

G. Joint Occupancy Provisions

The District may also elect to utilize the joint occupancy provisions to develop the property jointly. These provisions authorize the District to let any real property owned by the District "if the instrument by which such property is let requires the lessee therein to construct on the demised premises, or provide for the construction thereon of, a building or buildings for the joint use of the district" and the developer. (Ed. Code, § 17518, emphasis added.)

Although the joint occupancy provisions require that the District request proposals, unlike the joint use provisions, the District is not required to take the highest bidder, and instead is allowed to weigh the advantages and disadvantages of the various proposals submitted. This

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would enable the District to take into consideration the financial strength of a developer as well as the type of project proposed.

In order to comply with the procedural requirements of the joint occupancy provisions, the District must first adopt a resolution declaring the District's intent to consider proposals for joint occupancy. The resolution must set a time not less than ninety (90) days after its adoption for a public meeting to receive and consider the proposals. Notice of the time and place for receipt of proposals shall be given by publication of the resolution each week for three weeks. (Ed. Code, § 17522.)

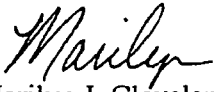
At the public meeting, the District's governing board may consider the various proposals. However, the District cannot approve a proposal or enter into any agreement with a developer until the State Board of Education has approved the proposal. The District must submit its preferred proposal to the State Board of Education. (Ed. Code, § 17524.) The State Board of Education must notify the District of its approval or disapproval within forty five (45) days of submission by the District.

Finally, the joint occupancy provisions require that the developer provide either a bond or a letter of credit ensuring completion of the project. (Ed. Code, § 17524.)

Please contact us if you have any questions or want to discuss these processes, including the advantages and disadvantages they each provide.

Very truly yours,

MILLER BROWN & DANNIS



Marilyn J. Cleveland

MJC/pmj