

## **UNIVERSITY OF MASSACHUSETTS BUILDING AUTHORITY**



### **POLICY AND PROCEDURES FOR THE PURCHASE AND SALE OF REAL ESTATE**

#### **BACKGROUND**

The Authority is a body politic and corporate created by and existing under Chapter 773 of the Acts of 1960 (the Enabling Act). The Authority is constituted as a public instrumentality and the exercise of the powers conferred by the Enabling Act are deemed and held to be the performance of an essential governmental function.

The Authority is created for “the general purposes of aiding and contributing to the performance of the educational and other purposes of the university by providing dormitories, dining commons and other buildings and structures for use of the university, its students, staff and their dependents, and for lease to or use by an organization or association, in any form, of students or others, the activities of which are part of the activities at the university and subject to regulation by the trustees, a research foundation or other research organization, the operation of which, in conjunction with the university, is approved by the trustees or any other entity, the activities of which are approved by the trustees as furthering the purposes of the university.”

Pursuant to Section 4 of the Enabling Act, the Authority is authorized and empowered:

- “(i) to acquire real and personal property by lease, purchase or otherwise, provided that the Authority shall have no power to acquire property by any eminent domain proceedings and to hold and dispose of real and personal property in the exercise of its powers and the performance of its duties under this act;
- (j) to acquire from the Commonwealth by purchase, lease or grant, such property of the Commonwealth, real or personal, or easements or rights therein, as may be necessary or desirable for carrying out the provisions of this act; . . .

- (m) to make and enter into all contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers under this act....”

Pursuant to Section 19B of the Enabling Act, the Authority “may sell the buildings or other structures upon any land acquired by it and which are not included in a project, or may remove the same, and may sell or lease any lands or rights or interest in lands or other property acquired for the purposes of this act whenever the same shall, in the opinion of the Authority, cease to be needed for such purposes....”

By virtue of these provisions of the Enabling Act, the Authority has the right and power to purchase real and personal property, to lease real and personal property, to acquire property by gift, to hold title to any such property in its own name, and to sell any such property (except that the sale of any property which the Authority has acquired from the Commonwealth must be approved by the Governor and Council, but the Authority owns no such property).

Pursuant to the Enabling Act, the Authority borrows funds through the issuance of tax-exempt and taxable bonds for various purposes including those described above, and all such borrowing is done at the request of the Trustees of the University. The Authority contracts with the University to pay the debt service on the bonds and the costs of the Authority, and the University agrees to operate and maintain the property purchased with bond proceeds in conformity with state and federal law, including but not limited to the Internal Revenue Code of 1986, as amended, and the regulations promulgated thereunder. Under contracts related to such bonds, the Authority and the University have covenanted to ensure the tax exemption of the tax-exempt bonds. In addition, the Authority previously has adopted a policy entitled “Procedures for Post-Issuance Tax-Exempt Bond Compliance,” which sets forth, in part, certain obligations with respect to the sale or other disposition of the property purchased with the proceeds of tax-exempt bonds. As set forth herein, this policy is subject to or modifies, as applicable, such prior policy.

## **POLICY**

On occasion, the Authority is requested by the University to acquire real property or the Authority may determine that it is in the Authority’s best interest to do so. Furthermore, once having acquired real or personal property, the Authority may subsequently determine that it is appropriate to sell the same. In anticipation of such needs, it is appropriate for the Authority to establish a policy relating to the circumstances under which it will acquire and sell real property and the procedures that it will follow in doing so.

There are no statutes to which the Authority is subject that require the Authority to follow any particular process in connection with either the purchase or sale of property, other than the statutes and regulations applicable to tax-exempt debt which apply to the sale of property acquired with such debt. As a result, the Authority is free to establish its own policy and procedures in connection with any such acquisition and sale of property, and that policy and those procedures are set forth in this document.

## **I. POLICY AND PROCEDURES RELATING TO PURCHASES**

The policy and procedures relating to the purchase of real property include provisions relating to the following:

- A. Site Selection – Identification of property to be purchased,
- B. Determination of price to be paid ,
- C. Negotiations regarding terms of purchase,
- D. Due diligence with respect to the condition of the property, and
- E. Authority Approval of the Acquisition.

In addition, as with all of the Authority's undertakings, the Authority will evaluate the University's request to ensure that it is consistent with the Authority's mission, and will work with the University or the appropriate campus to modify as necessary.

In order for the Authority to determine whether to undertake any such purchase, and whether doing so is consistent with the Authority's mission, the campus making the request should initial the request in writing by providing to the Authority a business plan addressing in detail each of the following issues, at a minimum:

- a. Detailed description of the programming requirements and intended use of the property and the need which the purchase is intended to address, including the time within which the need must be addressed and why,
- b. Identification of the desired characteristics of the property, including size, features, amenities, condition, level of finishes, energy efficiency of building design, special utility requirements, parking, proximity to public transportation, campus or other properties,
- c. If a specific property has been identified for acquisition, a detailed description of how well and how completely the property fulfills the identified need, and why such need cannot be filled without the acquisition of the property,
- d. How the acquisition of the property is consistent the campus' approved land and facilities use master plan<sup>1</sup>,
- e. The amount and source of funds available for the acquisition and any necessary renovation and repair, and the campus's means of repayment of those costs, and
- f. Any other information relevant to the Authority's consideration whether to undertake the acquisition of the property.

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<sup>1</sup> The University Board of Trustees Land Use and Facilities Planning Policy (Doc. T93-122, as amended) requires each campus to prepare a land and facilities use master plan, which is to be approved by the Board of Trustees and updated on a periodic basis.

A. Site Selection

The University may request that the Authority find a property which has certain desired characteristics and is located in a given area, or it may request that a particular property be purchased.

1. In the event that the request is general, then the site selection process should include the following, based upon the business plan submitted by the University:

- a. Identify intended use of the property,
- b. Identify source of funding and the budget for the acquisition and any necessary renovation of the property to be acquired,
- c. Identify all of the University's desired characteristics of the property, including size, features, amenities, condition, level of finishes, energy efficiency of building design, special utility requirements, parking, proximity to public transportation, campus or other properties, etc.,
- d. Develop a Request for Proposals which fully describes the property requirements, procurement process, proposal submission requirements, and terms of the purchase and sale agreement to be executed in connection with the acquisition,
- e. Distribute the RFP and advertise the RFP in appropriate locations to maximize response. Possible locations include the Central Register, newspapers of local circulation, and COM-PASS,
- f. Review proposals and develop a list of properties to evaluate,
- g. Evaluate properties on list (including due diligence as described in Section 3 below) to identify short list of proposed properties that meet the anticipated needs,
- h. Determine which property proposal contains the most advantageous offer considering all factors, and
- i. Negotiate and execute a purchase and sale agreement regarding selected property.

2. If the Authority is requested to purchase a specific property, then site selection has already been completed. But the Authority will need to review the University's business plan, evaluate the property and make its own independent determination that it is in the best interest of the Authority to acquire the specific property, and if so, it will need to determine an appropriate price to pay for the property.

B. Determination of Purchase Price

1. Where Site is selected by RFP. In the event that an RFP process is used to identify the property to be purchased then the price will be negotiated as described in the RFP. The RFP could identify a maximum price or price range it is willing to pay for property based

upon its understanding of property values for similar properties in the area. In the alternative, it could indicate that the price which the Authority will pay shall not exceed the fair market value of the property as determined by the Authority's independent appraisal or opinion of value.

2. Where site is preselected by the University. In the event that the Authority is requested to purchase a specific parcel then the method of determining the purchase price will vary depending upon whether or not the parcel has been listed for sale by the owner. In the event that it has been listed for sale, then the market itself will help to establish an appropriate purchase price. The Authority may want to obtain an independent appraisal or at least an opinion of value. Then the price to be paid will be negotiated with the owner.

When the property identified is not already listed for sale, then the Authority runs the risk that the owner, knowing that the Authority or the University is interested in the property, either (1) is not willing to sell the property, or (2) will hold out for a price which far exceeds its fair market value. If the owner is not willing to sell, the Authority may have little leverage to acquire the property as it does not have a power of eminent domain. If the owner is willing to sell, then it will be necessary for the Authority to establish a process by which it can estimate the fair market value of the property and determine the price it is willing to pay.

Where the property to be acquired does not abut a campus and is not in close proximity to a campus, it may be possible to minimize the likelihood of an owner holding out for an exorbitant price by purchasing the property through a straw. This possibility will have to be evaluated on a case-by case basis.

Any process to determine an appropriate purchase price will be based upon one or more independent appraisals or opinions of value of the property, but a number of variations are possible depending upon the circumstances. At the very least, the Authority shall obtain an independent appraisal of the fair market value of the property, separate from any appraisal that the University may provide, except in the event that it is not practical to obtain a separate appraisal or it has specifically authorized the University to undertake an appraisal on its behalf. The Authority can then explore the following alternatives, which are similar to alternatives used by private parties in connection with an option to purchase property or a right of first offer to purchase:

1. Offer to purchase the property at a price equal to the appraised value,
2. Offer to purchase the property at a price determined by the Authority's appraisal and an appraisal obtained by the owner. Alternatives include (a) the higher, (b) the lower or (c) the average of the two appraisals, if they are within some specified percentage (say 10%) of each other, or (d) if the appraisals are not within the appropriate range, a third appraisal could be obtained from an appraiser not previously used by either party, and the price determined by averaging the 2 closest appraisals, with a stipulation that the price to be paid would be no less than the lower of the first 2 appraisals and no more than the higher of the first 2 appraisals. The cost of the third appraisal would ordinarily be shared by the parties, but in appropriate circumstances, the

Authority could undertake to pay that cost. In addition, the Authority could agree to pay the cost of the owner's appraisal as an additional inducement.

3. Offer to purchase the property at a price less than the fair market value of the property as determined by an appraisal satisfactory to the Authority. In the event that, in the judgment of the Authority, a property has a unique value or location, the Authority may elect to purchase a property at a price which exceeds its fair market value.

#### C. Negotiations with Owner of Property to be Acquired

All negotiations regarding the purchase of property by the Authority shall be conducted by the Authority or its authorized representatives, on its own behalf. The University shall not be authorized to undertake such negotiations, nor shall the Authority be bound or obligated by any agreement, formal or informal, oral or written, that may be made by a campus in connection with the acquisition of any property.

#### D. Due Diligence

For every acquisition, the Authority shall undertake appropriate due diligence with respect to the property to be acquired in order to limit potential liability and ensure that the property satisfactorily meets the purposes for which it is being acquired, and that the Authority can adequately assess future operations and maintenance costs. Due diligence should include at a minimum:

1. Appraisal or opinion of value which has been obtained from an appraiser engaged by the Authority, separate from any appraisal or opinion of value provided by the University, unless it is not practical to obtain a separate appraisal,
2. Phase I environmental site assessment, with further environmental studies as recommended in the Phase I Report,
3. Structural and building systems inspection and report,
4. Review of existing environmental permits and approvals affecting the property, and other permits that may be required for the intended use of the property,
5. Review of estimated costs of maintaining property and opportunities to achieve energy efficiency, if applicable,
6. ALTA/ACSM Land Survey of property, and
7. Examination of title to property to ensure that the Authority obtains good and clear record and marketable title to the property insurable by a title insurance company of the Authority's selection.

Much of the due diligence will be performed after a purchase and sale agreement has been executed, but circumstances may warrant performing some investigations earlier.

E. Authority Approval of Acquisition

No property shall be acquired by the Authority without the express approval of the Authority pursuant to a resolution or resolutions relating to the acquisition and necessary financing adopted by the Authority at a meeting or meetings of the Authority duly noticed and held.

**II. POLICY AND PROCEDURES RELATING TO SALES**

The policy and procedures relating to the sale of real property owned by the Authority include provisions relating to the following:

- A. Determination to Sell,
- B. Authority Approval of the Sale,
- C. Method of Sale,
- D. Determination of Price,
- E. Negotiations regarding Terms of Sale,
- F. Use of Proceeds of Sale,
- G. Special Provisions regarding Sale of Properties acquired from the Commonwealth, and
- H. Special Provisions regarding Sale of Properties purchased with the proceeds of tax-exempt debt.

The Authority shall undertake the sale of one of its properties only upon the determination that the property is no longer needed for the purposes of the Authority's Enabling Act. Ordinarily, such a consideration will be initiated by request of the campus which has been utilizing such property, rather than by the Authority itself.

A. Determination to Sell

In order for the Authority to make the necessary determination that one of its properties is no longer needed for the purposes of the Enabling Act, the campus shall initiate the request by submitting to the Authority a written proposal, describing in detail the following:

- a. Description of the current use of the property, and the cost to operate and maintain the property,
- b. In the event that the campus no longer has a continuing need for such use, an explanation of why such use is no longer needed by the campus, in either the short term or the long term, and an analysis of possible alternative uses for the property which were considered by the campus before making a request for sale of the property, and why each of those alternatives was rejected,
- c. In the event that the campus does have a continuing need for such use, an explanation of why the property no longer adequately serves the programming

need that it was initially intended to serve, including an analysis of the cost to improve or modify the property so that it can continue to serve that need. In the event that, even as improved, the property cannot adequately serve the need, a detailed proposal as to how the campus intends to continue to fulfill the programming need without the property.

- d. A description of how the transfer of the property is consistent the campus' approved land and facilities use master plan, and
- e. Any other information relevant to the campus' request that the property be sold.

In considering whether to sell a property, the Authority shall consider such other factors as it shall deem relevant including, but not limited to, any outstanding debt relating to the prior acquisition, development or renovation of the property.

#### B. Approval of Sale by the Authority

No property of the Authority shall be sold without the express approval of the Authority pursuant to a resolution adopted by the Authority at a meeting of the Authority duly noticed and held.

#### C. Method of Sale

Sale of property by the Authority may be undertaken by means of an advertised Request for Proposals, a listing for sale through a real estate broker, auction, or such other means as the Authority shall determine to be in its best interest, given the nature of the specific property being sold. [Further details regarding individual methods may be provided.]

#### D. Determination of Price

The Authority shall sell, transfer and convey property for not less than its fair market value, except in extraordinary circumstances where the unique nature of the property is not amenable to fair market pricing. In each case, before offering any property for sale, the Authority shall obtain an appraisal or opinion of value for the property, prepared by an appraiser engaged by the Authority, in order to determine to the extent possible, the fair market value of the property.

#### E. Negotiations regarding Terms of Sale

All negotiations regarding the sale of property by the Authority shall be conducted by the Authority or its authorized representatives, on its own behalf. The University shall not be authorized to undertake such negotiations or communicate with any potential or actual purchaser, except as specifically authorized or directed by the Authority, nor shall the Authority be bound or obligated by any agreement, formal or informal, oral or written, that may be made by a campus in connection with the disposition of any of its properties.



F. Use of Proceeds of Sale

As required by Section 19B of the Enabling Act, the proceeds of the sale of any Authority property (other than a sale of property initially acquired from the Commonwealth which shall be governed by Section G below) shall be held by the Authority as revenue for the project with respect to which the property was initially acquired. Use of such revenues shall be determined by the Authority, in its sole discretion. In general, such revenue shall be held and used to fund, in whole or in part, necessary capital improvements to other Authority properties and facilities utilized by the same campus, construction of new facilities or acquisition of other property for such campus, or other similar uses. Such revenue shall in no event be used to fund the obligations of the campus with respect to non-Authority owned property or facilities, or the payment of debt service on Authority bonds or any other financial obligation of the campus.

G. Special Provisions regarding Sale of Properties initially acquired from the Commonwealth

In addition to complying with the other provisions of this policy, as required by Section 19B of the Enabling Act, no property which the Authority has acquired from the Commonwealth pursuant to the provisions of the Enabling Act shall be sold without the prior approval of the Governor and the Governor's Council. In addition, the proceeds of any sale of such property shall be paid to the Treasurer and Receiver-General of the Commonwealth to be credited on the books of the Commonwealth to the General Fund.

H. Special Provisions Regarding Sale of Properties purchased with the Proceeds of Tax-Exempt Debt

Notwithstanding anything herein to the contrary, any sale of property purchased with the proceeds of tax exempt debt shall be subject to the Authority's "Procedures for Post-Issuance Tax-Exempt Bond Compliance," including the requirement that the Authority is responsible for monitoring sales of such assets to ensure that such property is not sold without consultation with outside legal counsel specializing in the tax aspects of tax-exempt bonds.

Summary

The procedures outlined above are not meant to be exhaustive, but should cover most circumstances under which the Authority determines to purchase or sell a single parcel of real property. Similar procedures can be used for an assemblage of properties, though the pricing mechanism may differ and a more complex strategy for acquisition or disposition will be required.