

Real Estate Transactions in School Districts Revisited

School board members may face decisions related to a district's acquisition or sale of real estate. These situations arise in a variety of circumstances. For example, a district may need to purchase land in order to build an additional school as part of its plan for future student population growth or consolidation. The district may also need to sell real estate after closing a school that the school board does not intend to use in the future. In each of these situations, leasing the property may be preferable to a purchase or sale, particularly if the need for the transaction is short term or temporary. Finally, districts are often faced with the need to acquire or grant an easement to allow for limited use of a particular property. In most real estate transactions, the district administration typically works with legal counsel on the details of the transaction. However, board members should have a general understanding of the options and processes involved in order to inform their decision making. This Legal Comment will discuss the processes related to real estate transactions, including when a district is obligated to obtain elector approval.

Real estate acquisitions

Elector approval is required for certain actions in common and union high school districts. By contrast, unified school districts do not have the same requirements for elector approval, and the following discussion of elector approval is inapplicable to these districts. The powers that are reserved to the electors in a common or union high school district are exercised by the school board in unified school districts without statutorily required elector involvement.

Acquisition of real estate generally requires elector approval. Specifically, electors may authorize a school board to acquire – by purchase or condemnation – real estate, structures and facilities included within such real estate "necessary for school district purposes."[1] Thus, the electors have the discretion to determine whether the purchase of real estate is "necessary for school district purposes" and to grant or deny authority for the acquisition. Electors may also designate sites for school district buildings and provide for the erection of suitable buildings on those sites.[2] Administrators and school board members must, therefore, factor elector approval into the acquisition planning process so that approval is obtained in a timely manner.

Elector authorization for the acquisition of real estate is typically given at a special or annual meeting of the electors. Elector approval authorizes, but does not compel, a district to complete a transaction. A school board retains the authority to finalize the precise terms of the transaction, including the purchase price, and to decide whether to complete the transaction, even if it has received prior elector approval.

In some instances, elector approval may be obtained by means other than at a special or annual meeting or may not be required to complete the acquisition of real estate. For example, if a purchase transaction involves borrowing, the approval of a borrowing resolution by the electors at a referendum election may constitute elector authorization to use the money to complete the purchase.[3] In addition, if a board borrows money under the statutory $1 million exemption from referendum approval, this exemption may permit the board to use the borrowed funds to purchase real estate without separately securing elector approval for the purchase.[4] Boards also likely have independent authority under state statute to enter into agreements with other governmental units for the purchase of land, buildings and equipment for educational purposes without elector approval.[5] Finally, a board generally can accept land donated as a gift without securing prior elector approval.[6]

When purchasing real estate, it is not uncommon for a district to secure an option to purchase the real estate before seeking elector approval of the transaction. Securing an option to purchase (or entering into a purchase agreement with elector approval as a contingency) before seeking electoral approval offers some advantages. For example, if the district is able to secure the right to purchase in advance of the time that the district seeks elector approval, the terms of the transaction are set, and electors may be provided with greater detail regarding the proposed transaction. Therefore, the board may be interested in negotiating an option to purchase or a conditional purchase agreement as an initial step.

Under this approach, the order of events for the acquisition of property will typically follow this progression:

1. Negotiate an option to purchase or a conditional purchase agreement;
2. Obtain elector approval at a special or annual meeting;
3. Determine the source of funding;
4. Undertake "due diligence" investigations;
5. Obtain board approval for the purchase;
6. Exercise the option to purchase or waive purchase contingencies;
7. Complete the purchase transaction.

The district's "due diligence" investigations cover a number of issues to be addressed before purchasing real estate. Generally, however, it means making sure that the property may be used for its intended purpose without incurring undue costs. Such due diligence investigations may include conducting an environmental review/audit; reviewing soil samples to determine the suitability for building construction; identifying and addressing any zoning and land division issues; and confirming that electric, gas, sewer, water or other utility services are available to the property.

The overall acquisition process may include various other steps and considerations. For example, when a district is negotiating with a private landowner for the purchase of real estate, the district may need to provide information to the landowner regarding the district's ability to condemn the property to compel acquisition. In addition, if the purchase of the property could result in the relocation of a business, farm operation or tenant, the district may be responsible for giving notice of relocation rights and paying "relocation costs" under Wisconsin law.[7] If the district is considering the purchase of a property that is listed on the National Register of Historic Places in Wisconsin or the State Register of Historic Places, or is a locally designated historic place, then as early as possible before the purchase, the district should:

1. Determine its long-range plans for the property;
2. Assess whether and to what extent the plans or the purchase itself will affect the historic property; and
3. Notify the state historic preservation officer of any effect its proposed action will have on the historic property.[8]

The district should consider obtaining a property appraisal in order to ensure that the purchase price reflects fair market value. Finally, an agricultural impact statement may be necessary if the land that the district proposes to purchase is agricultural land.[9] It is important for the district to consider these factors early in the process so that appropriate consultations and actions are made in order to avoid delays.

Real estate sales

Unlike the acquisition of real estate, Wisconsin law does not require elector approval for the sale of district real estate. A board may "sell any property belonging to and not needed by the school district."[10] Thus, a board has the authority to determine the terms of the sale, such as the price, timing and conditions of the transaction, and to complete the sale. When establishing a sales price, the district is required to obtain a fair value for the property, within its reasonable discretion. It is not uncommon for a district to seek an appraisal or a market comparison (prepared by a real estate agent) to aid in determining a fair price for real estate.

When selling district real estate, some boards opt to use a bid process in which the property is sold to the highest bidder. A bid process may increase the purchase price if there are a sufficient number of potential buyers interested in the property. Utilizing a bid process also helps to establish a time frame within which a district markets and enters into an agreement for the property's sale. The board can establish the parameters of the bid process through board policy or by action related specifically to the sale transaction. However, even if the board maintains some flexibility in selecting the buyer through its established bid process, this course of action creates a situation in which the board loses some control over the selection of a buyer.

Alternatively, districts can sell real estate by listing the property with a real estate broker or soliciting proposals to be negotiated with one or more prospective buyers. This process is more akin to the process associated with the sale of privately owned real estate. Such an approach affords the district more discretion in determining whether to proceed with

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a particular proposal (subject to nondiscrimination and other relevant laws) and in determining the specific terms of a purchase agreement. Depending upon how the district structures the negotiated proposal process, it is still possible to obtain a competitive price if the district is able to solicit competing offers within a common time frame.

Lease of third-party property

When additional space is needed for instructional or other school-sponsored activities, another option is to lease space from third parties; however, elector approval is required under Wisconsin law for common and union high school districts. The statute governing the acquisition of real estate also requires a school board for a common or union high school district to obtain elector approval for "the lease of suitable buildings for a period not exceeding 20 years with annual rentals fixed by the lease."[11] Thus, when considering the lease of facilities from a third party, the district's process should include elector approval at an annual or special meeting. As in the case of purchase agreements, however, the district retains the discretion to determine the terms of the lease agreement, subject to the limitation that the term not exceed 20 years.

Lease of school district property

When leasing school district property to others, the question of whether elector approval is needed for common or union high school districts is usually determined by the particular circumstances. On the one hand, Wis. Stat. § 120.13(17) authorizes a school board, subject to certain conditions, to grant "temporary use of school grounds, buildings, facilities or equipment" if such use "does not interfere with use for school purposes or school-related functions." This law provides the basis for facility-use policies governing off-hour, weekend, evening and other temporary use of school facilities by community members and others. No elector approval is required for such temporary use. On the other hand, in cases where the board intends to enter into a lease of school property other than on a temporary basis, the board may generally lease school sites, buildings and equipment only if approved at an annual or special school district meeting.[12] Consultation with legal counsel is advisable if a proposed lease of school district property does not clearly fall within the category of temporary use.

Easements

Easements generally involve the transfer of some, but not all, of the rights associated with ownership of a particular property. For example, a landowner may grant an easement to a utility company to extend lines, poles or pipes under, over or across a strip of land, without transferring the underlying ownership of the land to the utility.

Common and union high school districts should consider whether to obtain elector approval in connection with the acquisition of easement rights because easement rights constitute a form of real estate or property interest. Although there are varying legal opinions regarding whether elector approval is necessary for the transfer of easements, by obtaining elector approval, a district eliminates the risk of someone contesting that the district did not have proper authority to transfer the easement.

In the case of the transfer of easement rights in school district property to others, a board has the power to grant such easements without need for elector approval.

Conclusion

Boards may be required to make decisions about whether to purchase, sell or lease property. There are a number of steps and options for boards to consider, including the possibility that the transaction must first be approved by the electors. Accordingly, districts and boards should involve legal counsel early in the process to determine the best course of action based on the particular facts and circumstances. ■

Endnotes

1. Wis. Stat. s. 120.10(5m).
2. Wis. Stat. s. 120.10(5).
3. Wis. Stat. s. 67.05(7)(d)1.
4. Wis. Stat. ss. 67.05(7)(d)2; 67.05(6a)(b).
5. Wis. Stat. ss. 120.13(3); 120.25.
6. Wis. Stat. s. 118.27(2).
7. Wis. Stat. s. 32.185 et. seq.
8. Wis. Stat. s. 120.12(21).
9. Wis. Stat. s. 32.035.
10. Wis. Stat. s. 120.13(19m).
11. Wis. Stat. s. 120.10(5).
12. Wis. Stat. s. 120.13(25).

**This Legal Comment was written by Michael J. Julka, Brian P. Goodman, and Daniel T. Fahey of Boardman & Clark LLP, WASB Legal Counsel. This Legal Comment is an updated and revised version of a previous article in Wisconsin School News, "Real Estate Transactions in School Districts" (June 2012).*

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