

Transactional Objectives

1. SDUSD desires to contract with the City to establish a school within a facility to be built by the City. The building also will house the new public library.
2. SDUSD (as tenant) will hold the facility, once constructed, through a lease from the City (as landlord). Access to the school facilities from adjacent public streets will require users to cross areas owned by the City but not covered by the leasehold (e.g., elevators, stairways, corridors). There also may be other areas within the building facilities which SDUSD will seek to use in common with the City or other users of space within the building facilities (e.g., reception areas, parking areas).
3. Financing for the SDUSD site will come through \$20.MM in funds provided by SDUSD (the "SDUSD Payment") and delivered to the City, in an appropriate fashion, such as progress billing. In no case should Prop. S funds be prefunded to the City.
4. SDUSD has to be assured the SDUSD payment is secured in an unfettered manner that guarantees completion and delivery of the building in a timely manner (SDUSD has the right to cancel). All related facilities such as parking and common areas for the commencement of tenant improvements, a building certificate of occupancy and the core and shell will be delivered as set forth in the lease.
5. SDUSD has to be assured that in the event the City can no longer operate the, that SDUSD will be able to maintain occupancy without any adverse impact (financial or otherwise). One option to be investigated is for the District to obtain a secured, first lien security interest based on the underlying real property under the library/school.
6. SDUSD will have unfettered rights to purchase the leased premises – terms must be clearly defined, the project must have a satisfactory reciprocal easement agreement (REA), and the project must be parcelized in a manner that enables such. Such rights should include parking.
7. Out years operating expenses and other common area maintenance charges need to be specifically defined in the lease. Should CAMS apply, there needs to be a cap.
8. Sub-meters for utilities.
9. Agreement on common area assessments

Legal Requirements

In order to appropriately protect the interests of SDUSD, the legal team tackling the documentation should have experience in the following areas:

1. The legal team should have experience in construction financings involving funds from multiple sources. Issues that will arise will include, for example, how to assure each separate provider of funds that the "committed" funds of the other providers indeed will be available when it comes time for such other funds to be provided. The sequencing of funding also will be important – for example, it may be fruitful to withhold the SDUSD Payment, or to hold it in escrow, until it is clear that the construction can be completed with the available funds (i.e., after most construction risk has been allayed). SDUSD also will want to scrutinize the conditions applicable to the provision of

funds by other providers, the scope of the contingency, and the rights of the parties to access the contingency (both for cost overruns and for discretionary changes in project scope)

2. Sub-metered utilities. This is a must so that SDUSD has control over the cost.
3. Sub-metered utilities
4. Who pays for utilities? City to provide report.
5. The legal team should have experience with build to suit lease arrangements. Issues that arise in these transactions include (a) the standards to be applied for classifying the costs (and in particular, any cost overruns) that are to be borne by the landlord versus the tenant (b) the scheduling responsibilities of the landlord (and the liability to be borne by the landlord for delays), and (c) the relative rights of the parties to effect changes in the plans..
6. If SDUSD is to engage its own contractor to perform any material portion of the construction, the legal team should have experience with coordinated construction arrangements. Issues that arise include careful delineation of the respective "buckets" of construction work to be performed by each entity, and the relative representations and warranties (and liability) to be borne by each party with respect to construction defects. Care must be taken to assure that the multiple contractor arrangement does not result in irresolvable finger pointing.
7. Since the school facility will be part of a larger collection of building components devoted to mixed uses, the legal team should have experience with issues that arise in connection with mixed use developments, including, for example, the appropriate provisions to be included in the reciprocal easement agreement that will provide SDUSD with its access rights to the school facility. These issues include maintenance standards, affirmative covenants re easements for utility connections, negative covenants by the landlord with respect to incompatible uses, various covenants with respect to the parking facilities (if any) included within the project (e.g., hours of uses, number of spaces devoted to school use, location of such spaces, maintenance standards, use rules, etc.), the respective obligations of the parties for damage to person or property caused by actions on their portions of the project, the respective requirements of the parties to procure insurance (both liability and property damage), and the respective obligations of the parties to rebuild their improvements should a casualty occur.
8. Though related to the "mixed use project issues," it will be helpful for the legal team to have specialized expertise with respect to the following issues:
9. Inasmuch as the utility of the school facilities may be diminished should the City fail to continue to operate the library (and perhaps vice versa), the parties also will have to consider the appropriate respective continuous operation covenants of the parties, and the remedies should a party breach its continuous operation covenant (for example, should the City close the library, SDUSD still will want the City to be obligated to maintain the access routes to the facility in a safe and aesthetic manner).
10. If any "service" provided to the components of the building facilities (such as the school facility) is provided in an aggregate manner (e.g., chilled water), and if such service might become uneconomic were one of the components to cease operating, then arrangements must be made to continue such service notwithstanding the cessation of operation of the other component. Although this issue really is part of the family of "mixed use project issues" noted above, the legal team may require specialized experience in the dealing with utility providers, and financing utility systems, in order to best address these issues.

11. The legal team thus should have experience in negotiating remedies that should apply should the City fail in fulfilling its obligations as landlord (including (a) during the construction phase, as noted above with respect to build to suit leases, and (b) during the operating phase subsequent to completion of construction), and (c) in the event of municipal bankruptcy or abandonment of property. For example, SDUSD may determine that the appropriate remedy for a landlord breach should be a conveyance of fee title ownership to the leased premises to SDUSD. The legal team also should have experience in sorting through how SDUSD's remedial rights will mesh with those of other lenders to the City – these issues may be much akin to those that parties encounter in first lien/second lien structured construction financings.
12. Given that the construction will be undertaken by public bodies, the legal team should have experience with public contracting laws (e.g., competitive bidding, exceptions for design/build projects, etc.) and with the special laws and timing requirements that apply to school construction (e.g., review by the State Architect). [It may be that SDUSD has the requisite expertise on these issues resident within its inside legal counsel's office, though such counsel should work closely with the outside counsel to assure that the various requirements (e.g., timing requirements) are appropriately addressed and accommodated.]