



LUCE FORWARD

Charter School Facilities: Rules, Restrictions, and Opportunities

California Charter Schools Association Conference 2011

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Topics We Will Cover

- Legal restrictions on school site development
- Basic steps in due diligence
- Applicability of building codes
- Options for addressing zoning requirements
- Handling environmental review (under CEQA)
- Issues to address in lease or acquisition of property

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Funding sources affect legal restrictions that apply

- School district rules apply if you are:
 - Using district facilities or land
 - Using district or state bond funds
 - Getting State bond funds through SAB
- Most “school district” rules don’t apply if you:
 - Obtain all funds from charter school operations
 - Use a mix of charter school and private funds
- Even totally private funding and development will have some special “public school” restrictions

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If charter school uses school district resources or state bond funds, that usually means:

- Obtaining CDE site approval
- DTSC clearance for land
- CEQA review
- Field Act compliance
- DSA approval of plans

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It also means ...

- Paying prevailing wage
- Adopting labor compliance program
- Hiring experts in eligibility, DTSC, etc. to help

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Legal restrictions on charter school site selection

- Asbestos screening
 - Federal law requires screening and remediation (15 USC section 2643; 40 CFR sec. 763)
 - State law requires owner to disclose asbestos in premises (Health & Safety Code sec.25915 et seq.)
- Lead exposure
 - Federal law requires schools to be reviewed for sources of lead exposure; State forbids use of lead in school construction (Ed. Code section 32245)
- DHS certifies contractors
- Be especially cautious with pre-1980 structures

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Other charter site location limits?

- AB 1358 limits charter schools within 2 miles of airport without DOT approval
- Charter school law prescribes geographical limits
 - Typically within district, county or surrounding counties
 - Some schools have waivers or statutory exemptions

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Other school district site location limits inapplicable to charters, including:

- Freeway proximity
- Power lines
- High pressure gas lines under site
- Air pollution emitters
- Proximity to bars, alcohol sales
- Seismic safety
- Historical agricultural use of site
- Environmental hazards (e.g., methane)

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Change in law for Charter Schools Facilities Program

- SB 592 adopted late last year
- Old rule: school districts had to hold title to state-funded charter school facilities
- New rule: Charter Schools can now directly hold title to state-funded charter school facilities, subject to certain specified conditions

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Recommended due diligence

- Phase I site assessment
 - Discloses all common environmental hazards
 - Gives you immunity from “cleanup” liability as an “innocent purchaser” if done before acquiring property under CERCLA and State law (H&S sec. 25395.110)
 - Helps with subsequent CEQA analysis
 - ASTM standard requires:
 - Interviews with owner and neighbors
 - Visual inspection
 - Visit to planning department to see current, prior uses
 - Searches of databases and public records for environmental liens, cleanup orders, etc.
 - Doesn't require actual site testing

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Recommended due diligence

- Ask owner for background information:
 - Asbestos screening/remediation reports
 - Permits for occupancy, construction work
 - Property insurance policies and history of claims
 - Prior studies on the property, including: ADA compliance, architectural plans, mold reports, soils, inspections
 - Contracts for services, maintenance, equipment warranties
 - Boundary/property surveys
 - Pending, threatened disputes affecting the property

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Recommended due diligence

- Get a preliminary title report to identify:
 - Easements
 - Covenants regarding uses or other obligations
 - Taxes or assessments due
 - Other encumbrances that must be cleared
- Ask for copies of the actual documents to review

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Zoning compliance?

- Cities and counties don't plan for schools
- School districts may adopt resolutions exempting school sites from zoning compliance (Gov. Code section 53091 et seq.)
- Districts may adopt zoning exemption on behalf of charter school, but only within district's boundaries (Gov. Code 53097.3)
- Consequently, charter schools almost always seek conditional use permits (CUP) to meet local zoning requirements

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Getting a conditional use permit

- Conditional use permit is a form of “contract” zoning:
 - Like a zone change, grant of a CUP is discretionary
 - “General welfare” standard gives lots of latitude to condition approval
 - Conditions are limited to things within your control, and related to your use, or they are invalid
- Process requires:
 - Environmental review under CEQA
 - Notice to neighbors who may be affected
 - Public hearing
 - Right of appeal from planning commission

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Getting a conditional use permit

- CUP process requires time:
 - City may require traffic and other studies to be submitted with application
 - Political process means neighborhood support is key
 - City staff will often require additional information and resubmittals
- Process requires money, too:
 - CEQA consultants may be needed
 - City will take deposit against its work
- City staff may be helpful if consulted prior to permit application, especially in smaller cities

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Building code compliance?

- School districts exempt from local building code enforcement (limited Fire Code jurisdiction)
- Federal facilities exempt from local building codes
- Charter schools *are subject* to building code enforcement (Education Code sec. 47610, but statute does *not* address zoning)

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Building code compliance?

- Most common impediments to meeting code for classroom use:
 - Hallway widths
 - Sprinklers (fire)
 - Fire doors
 - ADA requirements (e.g., elevators)
 - Electrical systems
- ***Remodeling will require updating entire facility to current code***

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Building code compliance?

- Architect, consultant or contractor may look at space
 - Describe your use clearly, as this matters
 - Get a report and estimate for corrections
 - Use in valuing or negotiating price for facility

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Environmental review under CEQA

- “Public officials must consider potential environmental impacts of their decisions”
- If getting CUP, City will conduct review or do via consultant from approved list
- If not, consider conducting your own environmental review:
 - Adopt CEQA guidelines
 - Prepare initial study, etc.
 - Coordinate with local agencies
 - Consult “resource” agencies
- Public gets opportunities for input

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Environmental Review under CEQA

- Three levels of review:
 - Project exempt:
 - No possibility of impact or statutory exemption
 - Prepare initial study to support determination
 - File notice after decision is made
 - 30 days for public to challenge
 - Negative Declaration (or mitigated negative exemption)
 - No substantial evidence that impacts aren't insignificant
 - Initial study shows more information needed
 - Mitigation measures added to project
 - Draft needs public review, so takes 60 days+ before decision
 - Environmental impact report

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Environmental Review under CEQA

- Environmental impact report
 - Project may have significant impacts
 - Public gets to help decide “scope” of report
 - Multiple expert reports typically needed
 - Draft gets public review
 - Public hearing required before “certification”
 - Agency can find that benefits of the project outweigh adverse environmental impacts
 - 100 days is minimum period to complete

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Environmental Review under CEQA

- Common school site issues:
 - Traffic safety, parking and potential liability
 - Neighborhood compatibility
 - Offsite drainage and onsite grading
 - Sewer or septic systems
 - Global warming is new issue

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Options for contracting for construction

- Competitive bidding not generally required, but design-bid-build common
- Lease, lease-backs
- Construction management
- Design-build fixed price
- Time and materials

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Prevailing Wage Laws?

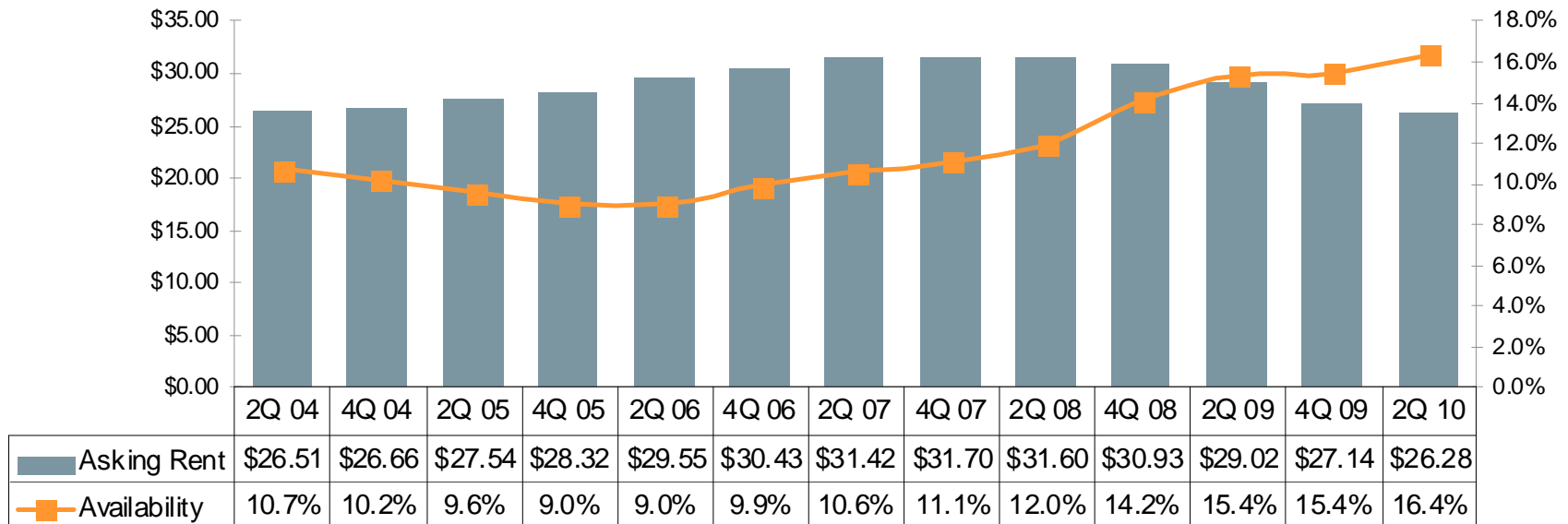
- Apply to “public works” as defined in Labor Code section 1720 et seq., which is triggered by use of public funds
 - Requires contractor to pay “prevailing wages rates” set by the State (usually higher than local wages) and comply with certain record keeping and other requirements
 - If public agency contracts for improvements, prevailing wage laws apply
 - If any public funds are used (other than just ADA funding), prevailing wage laws apply

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Unprecedented Market Factors Favoring Tenants

- Historical Rental Rates vs. Availability Rates: San Diego

Office and Flex Space - Overall



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Negotiate Terms Your School Needs

- Occupancy Costs Register Record Decline
 - Effective Rents plummeted because the starting point for rents – net or base rents – collapsed, and the value of concession packages soared
 - Landlords increased the value of concession packages to levels not seen in decades in most markets

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Other Key Issues

- Landlords should be more willing to consider non-traditional uses such as schools.
- Everything is on the table
- Maximize flexibility while still taking advantage of depressed rents
 - Early Termination Rights
 - Expansion Rights
- Assignment Rights
- Controlling Costs – Operating Expenses

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Tips on renting a facility

- Everything is negotiable: unlike residential leases there are a few “implied” terms
- Standard forms are very pro-landlord
- Who is responsible produce a certificate of occupancy?
- Can the landlord produce a certificate of occupancy?
- Are there “rules” on signage, loitering, keeping doors open, special events that can be changed when others complain?
- Who is the tenant? Who is responsible if default?
 - Deductible Single location (SAE) vs. multiple location operation

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Tips on renting a facility

- Condition lease on getting zoning, building code clearance, due diligence completed
- Make sure you get all required disclosures
- Pass-through property tax exemption
- Limit landlord access to campus
- Lease isn't confidential
- Seek right to terminate if charter lost or finances substantially cut by state
- Security issues / Finger printing

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Tips on renting a facility

- Make sure “use” is broad enough
- Watch insurance requirements
 - Business interruption coverage
 - Proceeds belong to landlord
 - Restrictions on self-insurance
 - Deductible Requirements
 - Charter School insures own personal property and improvements
- Indemnity Requirements – watch overbroad provisions
 - Waiver of Subrogation
- Make sure tenant improvements are to code
- Who is responsible for HVAC, windows, etc.?

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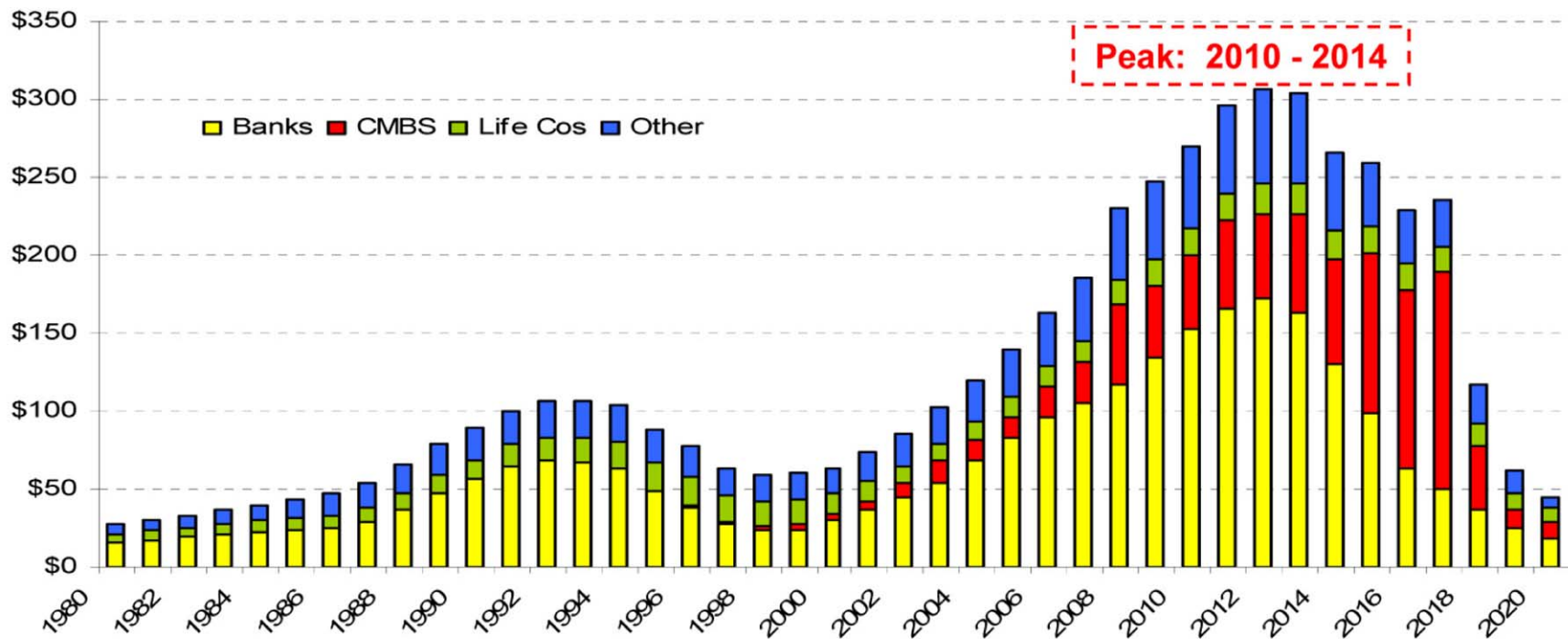
Tips on renting a facility

- Can you sublet or sublease or allow shared use of leased space?
- Review restrictions on use of common areas
- Ability to use parking areas for playgrounds and other facilities
- Look at rental rate formulas for leased space and for common areas

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Landlord's Financial Ability

- Commercial Real Estate Loan Maturities
 - \$3+ Trillion Outstanding



Source: Deutsche Bank; January 2010

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Landlord's Financial Ability

- Impact on Tenants
 - Who is the Landlord? Who does the Tenant deal with?
 - Tenant complaints
 - Lease negotiations / approvals
 - How will Tenant Improvements be funded?
 - Importance of SNDAs
 - Protecting your Security Deposit
 - Remedies – Tenant Cure / Offset Rights

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Questions?

- Questions, comments, other tips?

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