Leases

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Leases

• **Purpose**
  - To address issues common in CSU real property leasing transactions.
    - Auxiliary agreement update
    - Background and strategies for “arms-length” transactions

• **Topics**
  - Auxiliary Operating Agreements and Facilities Leases
  - Leasing Authority
  - Lease vs. License
  - Common Lease Types
  - Key Lease Principles and Terms
  - Resources and Templates
• Lease “Type” poll:
  • Auxiliary
    • Ground lease/lease back
    • Other
  • Off campus office/academic space
    • Short term (2 years or less)
    • Long term (over 2 years)
  • On campus commercial
    • Restaurant, bank, ATM, other
  • Uncommon
    • Airplane hanger, bowling alley, seafloor lease (pier), residential life estate, roof top, etc.
Leases

• Lease defined
  • Temporary conveyance of real, personal or intellectual property

• Real Property Lease defined
  • “A temporary conveyance of the right to use and occupy real property, usually in exchange for rent; the lease term can be for life, for a fixed period, or for a period terminable at will, but always for less time than the lessor has a right to.” (Black’s Law Dictionary)
Leases-auxiliaries

• Auxiliary Organization Operating Agreements
  • Auxiliary Operating Agreement
    • New as of December 2011
    • Template # CRL036
  • Auxiliary Operating Agreement Student Union Lease Supplemental Clauses
    • New as of December 2011
    • Template # CRL045
  • Templates located at:
    • [http://www.calstate.edu/CSP/crl/crl.shtml#models](http://www.calstate.edu/CSP/crl/crl.shtml#models)
• New auxiliary resources website
  • [http://auxiliary.calstate.edu/](http://auxiliary.calstate.edu/)
• Auxiliary Organization Facility Model Leases
  • Auxiliary Organization Sublease
    • When used - “to sublease CSU facilities (previously leased) to another auxiliary or not-for-profit”
    • New as of December 2011
    • Template # CRL031
  • Support Services Lease
    • When used - “Lease of facilities to any Auxiliary except Student Unions”
    • New as of December 2011
    • Template # CRL033
• Templates located at:
  • [http://www.calstate.edu/CSP/crl/crl.shtml#models](http://www.calstate.edu/CSP/crl/crl.shtml#models)
• CSU Leasing Authority
  • Ed. Code empowers Trustees, as lessor or lessee, to enter into real property leases & licenses
  • This authority has been delegated to campuses with a few exceptions

• Exceptions (applies whether lessor or lessee)
  • Lease as security for financing (personal property)
  • Term of 20 or more years (includes options)
  • Annual rent $1,000,000 or greater
  • CSU property leased out for public private partnership (PPP) development
Leases vs. licenses

- Lease vs. License
  - Lease
    - Exclusive occupancy
    - Leasehold interest
      - Recordable
    - Transferrable and irrevocable
      - Unless otherwise stated in lease
  - License
    - Permission to use
    - Does not give rise to property interest
Leases-v. licenses

• License (continued)
  • Personal to licensee (non-transferrable)
    • Attempted transfer terminates license
  • Revocable by licensor
  • Exclusive or non-exclusive

• Easement distinguished
  • Similar to license. Difference is it does give rise to property interest and encumbers title.
    • Assignable
    • Permanent (unless otherwise stated)

• Follow CSU procedure!
  • ICSUAM 9018.02 (grant of easement)
    • LUPER must grant permission
Leases - Principles

• Key Principles and Terms
  • General contract law applies
    • Commercial leases are often long and complex
    • Consumer protections do not apply (as in residential leases).
  • You live with the “Agreement” as written.
    • For this reason, companies (e.g. banks, cell phone providers, chain restaurants, REITs) hire lawyers to handle lease drafting.
  • Consult General Counsel if necessary!
• Competitive Selection
  • Real estate is inherently unique
    • “Sole sourcing” is generally acceptable
    • Survey the market for the best “deal”
  • CSU as Lessee
    • RFP or not?
      • Not common in commercial real estate
  • Commercial Real Estate Brokers
    • Highly specialized profession.
    • Find a broker who specializes in what you need
      • Office, Land, Multi-family, Mixed Use, Retail, Industrial, Special Purpose
• Commercial brokers (continued)
  • Ask them to document their search for your file
  • Fees are normally paid by landlord!
    • Buyer beware!
  • National versus regional firms?
    • National firms include: CBRE, Cushman Wakefield, Grubb and Ellis

• CSU as Lessor
  • Open opportunities to multiple firms
  • Solicit bids through:
    • Formal RFP
    • Informal Solicitation
Term and Termination

Length
- 3-5 years typical
- Generally not in CSU interest to lease long term
  - Shorter term gives us greater flexibility (both as lessee and lessor).

Commencement (Start)
- Lease commencement may precede rent payments
  - Tenant Improvements needed before opening

Options
- Automatic
  - Should generally be avoided
• Options (continued)
  • “Standard Option”
    • Tenant may exercise at its discretion if in good standing
  • “Mutual Consent”
    • This is not really an option, but rather an agreement to negotiate in good faith
    • Commercial tenants may not like this “option”
  • Rent
    • Make sure rent escalation covers option period
• Holdover
  • Most leases state that term is “month-to-month” if tenant stays beyond end of term
Leases-Term/Rent

• Termination
  • Important! Make sure you can terminate if necessary
  • But, use caution with commercial tenants
    • May need to follow Unlawful Detainer procedures
    • Consult General Counsel before taking action to avoid liability

• Rent
  • Negotiate!
    • We are VERY desirable tenants
    • Our campuses are great markets for vendors
    • Terms are negotiable!
Leases-Rent

• Terms
  • Gross: flat rent amount
  • Net: base rent plus percentage of operating expenses and taxes
  • Triple net: base rent plus pro rata share of maintenance, repair, tax and insurance
  • Percentage rent: rent is a percentage of gross sales
    • Most commonly used for restaurants / retail

• Escalation
  • CPI
  • Scheduled percentage / Stepped
  • None!
• Deposits
  • CSU as Lessee
    • Negotiate deposit amounts to the minimum
      • Limits exposure to unscrupulous landlords who may lay claim to an overblown offset for damages
  • CSU as Lessor
    • Require enough to cover last month’s rent AND damages
      • Rule of thumb is 2 month’s rent
        • But may require more - depending on tenant
Assignment and subleasing
- Presumed assignable
- Assignor/sublessor remains responsible under original lease

Consent
- Campus leases should require campus consent for sublease
- Unless otherwise specified, lessor cannot unreasonably withhold consent to sublease

Cell sites
- Cell service providers will ask for advance approval to assign all rights and obligations under certain circumstances. Acceptable normal industry practice.
• Insurance
  • Note recent increases in coverage amounts
• Possessory Interest
  • Include standard CSU provision
  • Do your part to keep the county assessor up to date on commercial leases on your campus
    • Otherwise vendors are getting a “free ride” and county is missing out on precious revenue
• CSU Seismic Standards
  • CSU as Lessee
    • Before occupying leased space, you must verify that it either meets CSU seismic standards or qualifies for waiver
      • CPDC Waiver Letter must be on file!
    • Waiver Qualifications
      • Less than 2 year term
      • Less than 3,000 sf
      • Re-locatable structure
      • Administrative necessity
• Leases of Interest — questions?
  • Ground Lease
  • Retail / Restaurant
  • Temporary off-campus space
  • Cell sites
  • ATMs
  • Auxiliary Organizations
Lease Resources and Links:

- CSU Model Agreements website
  http://www.calstate.edu/CSP/crl/crl.shtml#models
- Risk Management Insurance Requirements, Coded Memo #RM2011-06
- CSU Auxiliary Organization resource website
  http://auxiliary.calstate.edu/
- CSU Executive Order Index
  http://www.calstate.edu/eo/
- CSU Executive Order 669 - Leases
  http://www.calstate.edu/eo/EO-669.pdf
- SUAM / ICSUAM Section 9018
  http://www.calstate.edu/cpdc/Suam/SUAM9015-9020.pdf