



# **MAXIMIZING DISTRICT ASSETS: IMPLEMENTING SUCCESSFUL JOINT VENTURES**

**COMMUNITY COLLEGE LEAGUE OF CALIFORNIA**

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## Introduction

Community college districts, like other educational agencies, can benefit from creative ways to increase revenues. Some community college districts have recently entered into lucrative money-making ventures in cooperation with private businesses. This paper will examine popular methods of working with private businesses to increase district revenues. It will indicate some of the legal requirements, ways to enter into a joint venture, and tips for a successful venture.

## Examples of Public-Private Joint Ventures

There are numerous possibilities for joint ventures with private businesses. These possibilities are only limited by the legal requirements and the community college district's imagination.

Examples of these public-private ventures include the following:

- golf course or driving range
- theater or performing arts center
- stadium for minor league baseball or other sports facilities
- shopping center, restaurant, hotel or commercial venture
- senior care facility, community center, child care facilities
- office space, administrative facilities, or facilities for job training and other educational programs offered by other providers

These ventures can all generate a significant amount of revenue; they are interesting to developers; and the community college can benefit from them, as well.

## What's in it for the Private Business?

The first question is why a private business would be interested in joining a community college district in any sort of business. There are several reasons. First, a community college district may have choice property to be developed. The property may be in a desirable location, and may even be some of the only property left undeveloped in the immediate area. In addition, the property may be a larger parcel than most developers can find in a populated area. The community college district may provide a market for the developer, in that the developer may envision a project that would be appealing to the college community, including faculty, students and staff of the college. The community college district may have a facility that is underutilized, and joint use could provide facilities at a lower cost than separate development. Also, by pooling their resources, the two parties may each be able to have access to a larger or better facility than either could alone.

## Advantages for the Community College District

The community college district can also derive tangible benefits. One, of course, is the financial benefit of an income stream from the project. For example, one California community college district is expecting to generate more than a million dollars per year by leasing 14 acres of property to a hotel developer. In addition, the joint occupancy project may generate opportunities for student internships, field work, and job placement opportunities. Students and staff may also make use of the project for educational, recreational, or business purposes.

## Legal Requirements for Joint Use Agreements and Ventures

The statutory basis for joint use agreements and joint ventures between community college districts and private developers is found in the Education Code. The Education Code permits community colleges to enter into joint use agreements with private developers without meeting the public bidding requirements of the Education Code. A district may enter into “leases and agreements” regarding real property and buildings with any “private person, firm, or corporation” without selection of the lessee or project partner by a bid process. (Ed. Code § 81390, 81393.) Since the statute is not limited to leases, it applies to joint use and development agreements as well. It is important to conform to the statutory scheme at all times, and to follow statutorily prescribed procedures. Failure to do so may expose the community college district to liability.

It is helpful to understand the differences and similarities between joint use agreements and joint ventures. In a joint use agreement, the community college district agrees to allow the private entity to use a portion of district property for a fee. The private entity may then run its own business on the property or construct a facility to be used by both the private entity and the district. In a joint venture, the parties join together in a type of commercial venture or ground lease creating an income stream that includes a sharing of profits. In this paper, we are primarily discussing joint use agreements.

The defining feature of this statutory scheme is joint use of the buildings and real property. Education Code section 81394 states that a district may let real property “if the instrument by which such property is let requires the lessee therein to construct on the demised premises, or provide for the construction thereon of, a building or buildings for the joint use of the district” and the developer. The statutory scheme does not define what proportion must be available for the use of the district. Thus, it may be possible to use this procedure without tying up a significant portion of the development. This flexibility should prove to be attractive to both developers and districts.

Any portion to be used by the district must comply with all statutes, rules, and regulations governing site selection and construction of community college facilities. (Ed. Code § 81391.) The parties may consider tailoring the district’s use of the facility in a way that would place as few demands as possible in this regard. You will want to work with legal counsel to plan an appropriate district use.

The statutory scheme provides other requirements for the agreement. Any lease associated with a development agreement must be limited to 66 years or less. (Ed. Code §81392.) The agreement must provide that the district will take title to the portion of the facilities it occupies upon completion of construction, and the district cannot be required to pay rent. (Ed. Code §81394.)

## A How-to Guide

### Step One: Choose the Property and Project

The first step is to identify an appropriate site and type of project. The site must be owned by the district. In addition, the site should not be needed for other district purposes in the foreseeable future. The site should be of a sufficient size and appropriate character for the project envisioned by the district. For example, one site may be appropriate for a theatre, another for a golf course. Also, a site occupied by inappropriate buildings may require costly

demolition. The project should be selected that most appropriately meets the district's needs. Finally, the district should obtain a preliminary title report and check the funding for site acquisition to be sure the district's use of the property is not prohibited.

### **Step Two: Determine If Interest Exists**

The next step is not legally required but is often essential. The district should conduct an informal inquiry to determine if there is any interest in the project. This can be accomplished by contacting local developers and real estate consultants. Consultation with the city or county to determine its receptivity to the project is a good idea, as well. This informal inquiry could save considerable time and effort if the interest in the development community lies in a different direction from what the district first envisioned. If the developer approaches the district about the project, the district should consult with local authorities to determine receptivity, prior to proceeding.

### **Step Three: Request for Proposals; Board Resolution**

The district should then prepare a request for proposals and qualifications. This request should identify the project site, and outline the parameters for the project. It should be specific enough so the district isn't overrun with proposals it wouldn't want to consider, but general enough so that it doesn't exclude potentially worthwhile projects. This will vary depending on the circumstances. For example, if the district has a fairly clear idea of what type of project it wants, the request for proposals will be quite detailed and specific. If, on the other hand, the district is open to various suggestions and proposals, the request will be more general. The request for proposals should also set forth applicable timelines for submitting responses to the district. The district may want to include minimum qualifications in the request for proposals. It should at least require that each proposal include complete financial statements.

At this point, the district governing board must adopt a resolution declaring its intention to consider proposals for joint use, pursuant to Education Code section 81397. The resolution must describe the site and the intended use by the district of a portion of the building, and must set a time not less than 90 days thereafter for a public meeting at which the board will receive and consider proposals. Notice of the adoption of the resolution and the time and place for receiving proposals must be given by publishing the resolution in a local newspaper of general circulation once a week for three weeks. (Ed. Code §81398.)

### **Step Four: Receipt and Review of Proposals**

At the appointed date and time, the governing board must record receipt of the proposals. (Ed. Code §81399.) Receipt of the proposals must be acknowledged in a public meeting, as stated in the prior resolution adopted and published by the district. The receipt of the proposals may be brief. The board may simply state that the next order of business will be to acknowledge receipt of the proposals. At that point, the board may state the number of proposals that were received, and that the board will consider the proposals in closed session. The proposals will remain public documents, however, and members of the public may review them upon request.

As stated above, the board may consider the proposals in closed session after staff review and analysis. Even if the district has already conducted preliminary discussions or negotiations with a developer as part of its initial informal inquiry, the district must receive and consider all of the proposals in good faith. When the governing board has chosen a proposal to pursue

further, it can then authorize its administrators or legal counsel in closed session to negotiate the specific terms of the agreement.

One approach at this point is to enter into an Exclusive Rights Negotiating Agreement (“ERNA”). This is an agreement between the district and a developer providing that the district will negotiate exclusively with the developer for a prescribed period of time, for example six months, to develop an agreement. Such an agreement will be attractive to the developer who will receive some assurance of the district’s good faith. The district will benefit by keeping an attractive developer on the line while the parties negotiate an agreement. If the developer will have tenants, the ERNA will assure the tenants of the district’s good faith. The board can either ratify an ERNA in an open session, or authorize an administrator to negotiate and enter into an ERNA, also in open session. Since the ERNA binds the district to negotiate with one developer, the district should be sure it is negotiating with a serious potential partner before approving an ERNA. It should also have ways to terminate the ERNA if subsequent information makes this developer less attractive.

It is also advisable to conduct a careful assessment of the district’s obligation to keep the local community informed regarding plans to develop campus property. Sometimes the development plans can have a direct or indirect impact on traffic patterns, noise levels or neighborhood ambiance. Meeting with local neighborhood groups prior to making final arrangements can sometimes prevent political problems that could sidetrack even the best plans.

### **Step Five: Negotiate and Approve the Agreement**

The district may then commence negotiations with the chosen developer with or without an ERNA. At this point, the district must include all of the statutory requirements in any agreement. Upon selection of a potential development partner, the district must require a bond or letter of credit ensuring the project will be completed. (Ed. Code §81400.) Once a draft agreement is ready for board consideration, the district should share the agreement with the public, and entertain public comment during an open session. Upon consideration of the agreement and receipt of public comment, the board may take action concerning the agreement.

One option during the negotiation phase is to negotiate a preliminary agreement known as a “Disposition and Development Agreement” (“DDA”). The purpose of this agreement is to agree initially on as many contract terms as the parties can, so that there will be a preliminary agreement in place while the parties obtain all necessary approvals and meet other requirements necessary to executing a final agreement. For example, the developer may need to conduct geological, engineering and environmental testing to determine whether the property is suitable for the proposed use, and a final agreement could not be executed prior to those tests being completed. The DDA will allow the parties to agree on as many material terms as possible, with an agreement to agree on the remaining terms. This will give each party some comfort during the preliminary stages of the project, before the ground lease is executed. The agreement sets the terms for timing and method of construction and operation as well as the division of responsibility and income between the parties.

This type of project involves issues too numerous to address in this white paper. For example, the district or the developer must coordinate with the city and county governments to obtain the necessary permits and approvals. In addition, the district should be prepared to address issues of environmental compliance and due diligence. While these issues are often primarily

the developers' responsibility, the district should be prepared to address them as well. These may be addressed as public work or private work issues depending on the structure of the project. Districts should consult with their legal counsel to ensure they are protected in any joint venture.

## Tips for a Successful Venture

- Examine the developers' financial statements carefully.
- Get references for the developers and check them.
- Get cash flow projections for construction and operation.
- Define how the district will be paid. If the district will be paid a share of the profits, the profits should be defined as either gross or net, and if they are to be net profits, then the agreement should state explicitly what expenses will be deducted. (Hint: It is better for the district to base its share on gross income.)
- Define who pays any taxes, including property and income taxes. Income-producing uses may not be tax exempt.
- A competent manager is key. Define who will manage the project on behalf of the district, even if this is just supervision of operation and construction by the developer. Management also includes being sure the district is getting the income to which it is entitled and that the developer is fulfilling all conditions to which it agreed. The district may already have a competent manager on staff. Otherwise, the district may decide to hire a consultant for this role. The manager of the project, whether employed by the district or the private entity, will be a critical element in the project's success. A project works best if the district can trust the manager. The district will want the right to reject or remove the private entity's manager if that person is not fulfilling the private entity's commitments.
- Check whether the property or improvements were funded by bonds. If so, check with bond counsel to be sure the project will not affect the tax exempt status of district bonds because the property is being used to produce income.
- Coordinate district and other uses, so the district has the ability to use the project for its own purposes.
- Obtain the district's right of access to the premises and the developer's financial records during the life of the project, and define a breach of the agreement to include denial of such access or violation of law.
- Find a partner you can trust, then build safeguards into the agreement to protect both parties. Good agreements make good projects.

## Tax Issues

As with any project, particularly a project that is designed to generate revenue, potential tax issues may exist that are beyond the scope of this article. Prior to entering into a joint use agreement with a private entity, a community college district should check with its attorney and accounting firm concerning potential tax issues.

## The Authors

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*Ray Giles, the League's former director of special services, edited the report. An additional business-related special paper is available through the League: Music Licensing Agreements for California Community Colleges: "Should our college pay the licensing fees to BMI, ASCAP and SESAC?"*



