

# UNIVERSITY OF HOUSTON SYSTEM

## Office of Real Estate Services

### BUSINESS PROCESSES AND LEGAL FRAMEWORK FOR THE ACQUISITION OF REAL PROPERTY<sup>1</sup>

The purpose of this document is to set forth the business processes and associated legal framework for the acquisition of real property by the University of Houston System.

#### **1. University of Houston System has the Sole Power to Acquire Real Property**

Pursuant to the University of Houston System's enabling act, the power to acquire real property is solely vested in the Board of Regents.<sup>2</sup> Therefore, all property acquisitions must be in the name of the University of Houston System and made by and through the Board of Regents.

#### **2. Office of Real Services is Responsible for Coordinating the Acquisition of Real Property**

The acquisition of real property must be coordinated through the Office of Real Estate Services ("ORES").<sup>3</sup> ORES will oversee all phases of the acquisition as required by law, in accordance with University of Houston System's policies, and as outlined in this document. All material documents regarding any aspect of completed acquisitions will be maintained by ORES; including studies, meeting minutes, and memoranda. If the acquisition is not completed, the prospective property files will be maintained by ORES for a period of ten years.

#### **3. Due Diligence Requirements; Feasibility Studies**

Real property purchases vary significantly in scale from small undeveloped parcels to those involving large acreage and improvements. The scope of due diligence to support the acquisition of any specific property will be determined by the Executive Director of Real Estate ("Executive Director") based on the scale of the acquisition and issues related to each individual purchase in accordance with the two methodologies set forth below.

##### *a. Methodology A – Non-Complex Transactions*

Methodology A shall apply to those properties including, but not limited to, property acquisitions of any type that do not include complex financial arrangements to support the acquisition. The following due diligence is required under Methodology A:

- **Information Gathering** – After the proposed acquisition is determined to be of value to the University of Houston System, ORES will, during negotiations and subsequently pursuant to the terms of a feasibility and inspection period defined in a purchase contract, initiate due diligence efforts. Due diligence efforts will typically include: title

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<sup>1</sup> This document does not apply to the acquisition of real property by gift.

<sup>2</sup> TEX. EDUC. CODE §111.39.

<sup>3</sup> System Administrative Policy 03.F.05.

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commitment, appraisal, Phase I and/or Phase II Environmental Site Assessment ("ESA"), and land survey. If the property includes improvements, ORES will request a site inspection from Facilities / Construction Management ("F/CM") or secure an inspection through a third party. If the improvements are intended for use by a specific stakeholder, ORES will consult with the stakeholders on matters related to the use and management of the property by the stakeholders.

- Presenting Findings – ORES will provide the AVC/AVP of Finance a summary of the due diligence information, any studies performed, and an updated justification of the acquisition. The AVC/VP of Finance will advise the Senior Vice Chancellor/Senior Vice President of Administration and Finance ("SVC/SVP of A&F") of the summary, who will review the matter with the Chancellor and other executive leadership.
- Presentation and Authorization – Upon approval by the Chancellor, the property acquisition will follow the Board of Regents Policies regarding delegated authority to implement the completion of the proposed acquisition. Proposed acquisitions requiring Board of Regents action will be presented as a motion for approval.

*b. Methodology B – Complex Transactions*

Methodology B shall apply to those properties, including, but not limited to commercial properties that rely on complex financial arrangements, income generation, or have significant management implications. The following due diligence is required under Methodology B:

- Information Gathering – In addition to due diligence in Methodology A, additional assessments may be performed, comprised of two primary components: a market analysis and a business plan as outlined below, as determined by the AVC/AVP of Finance.
- Presenting Findings – ORES will provide the AVC/AVP of Finance a summary of the due diligence information, studies, and an updated justification of the acquisition. The AVC/AVP of Finance will advise the SVC/SVP of A&F of the summary who will review the matter with the Chancellor and other executive leadership. Upon review and approval by the Chancellor, ORES will prepare or secure a market analysis and business plan. ORES will present to the AVC/AVP of Finance an executive summary consisting of the primary findings and a recommendation as to the ability of the University of Houston System to successfully implement the acquisition. The executive summary will be reviewed with the SVC/SVP of A&F and the Chancellor and other executive leadership.
- Conducting the Market Analysis – The University of Houston System will use the appraisals to determine the fair market value of the property. The market analysis can also consist of a consultant report (i.e., broker's price opinion) to compare appraisal values. An offer's financing terms will be considered in the context of the business plan and will be referenced back into the market analysis only insofar as it provides a value for the consideration offered to the University of Houston System in the transaction. The market analysis will be used as the basis for the University of Houston System in the transaction for negotiations with the property owner unless a contract has been completed where the market analysis will be used as part of the due diligence analysis under a feasibility or inspection period pursuant to the purchase contract.

*c. Business Plan*

A business plan consists of the study of the operational aspects associated with the acquisition of the real property in which there is a need to consider the impact of both upfront costs and annual operating expenses on the financial posture of the University of Houston System. The business plan must also consider the impact of the proposed financing method on the operations associated with the acquisition.

The SVC/SVP of A&F will determine if a business plan is required. Business plan requirements will be determined as is most appropriate for the nature of the transaction and will typically be prepared by the operational areas affected.

*d. Feasibility Study*

A feasibility study consists of evaluation of and subsequent recommendation from data obtained from a condition report for improved properties (generated by F/CM or a third party), market analysis, and any other relevant study to conduct a thorough analysis of the proposed acquisition.

**4. Master Plan**

Any action taken to purchase property will be referred to the Executive Director to initiate the acquisition process. ORES, in consultation with F/CM, will review the Campus Master Plan to determine if the real property under consideration is appropriate for acquisition.

*a. Master Plan Acquisitions*

If the property is in the Campus Master Plan, ORES will develop justification of the acquisition, proposed terms for the transaction, and report the findings for purchase to the AVC/AVP of Finance for presentation to the SVC/SVP of A&F, the Chancellor, and other executive leadership. Upon approval by the Chancellor, the property acquisition will follow Board of Regents Policies regarding delegated authority to implement the completion of the proposed acquisition. Proposed acquisitions requiring Board of Regents action will be presented as a motion for approval

*b. Non-Master Plan Acquisitions*

If the property is not in the Campus Master Plan, strong justification supporting the acquisition will be required from ORES and included in the report delivered to the AVC/AVP of Finance as outlined in Section 4(a) above. The AVC/AVP of Finance will, in consultation with appropriate individuals, determine if the property could be of interest to the University of Houston System. If it is determined that the property is of interest, and funds are available, the SVC/SVP of A&F will present the item with relevant justification and a recommendation for consideration to the Chancellor and other executive leadership.

**5. Board Approval is Required for the Acquisition of Real Property**

The SVC/SVP A&F will review each potential acquisition. Pursuant to Board Policy, the SVC/SVP A&F will present for approval to the Chancellor and Board of Regents the proposed

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acquisition, and make all analyses, appraisals, business plans, and due diligence studies available to the Chancellor and other executive leadership.<sup>4</sup>

## **6. University of Houston System Cannot Pay More than Fair Market Value**

The University of Houston System is required to purchase real property at fair market value.<sup>5</sup> This requirement derives from the Texas Constitution which prohibits an agency of the State from lending its credit to an individual, association, or corporation.<sup>6</sup> Although the prohibition on its face only prohibits grants of money, it has been liberally construed to prohibit grants of state property and contractual rights as well as money.<sup>7</sup> This provision has been interpreted to mean that, if an agency of the State sells or acquires property for “fair market value,” the Constitution has not been violated.<sup>8</sup> “Fair market value” is generally interpreted as the amount that someone who desires but is not obligated to buy would pay someone who desires but is not obligated to sell.<sup>9</sup> The requirement to acquire real property at fair market value is reinforced by Board of Regent’s policy requiring two appraisals.<sup>10</sup>

### *a. Appraisals are held in Confidence*

Appraisals are held in confidence and not released publicly during the acquisition process. Further, the commissioning of an appraisal in no way obligates the University of Houston System to release the figures to property owners during the acquisition process. Only the SVC/SVP A&F may authorize release of an appraisal to a property owner if the SVC/SVP A&F determines that release of the appraisal will facilitate negotiations.

### *b. Parameters if Purchase Price is over Fair Market Value determined by Appraisals*

While the University of Houston System should never endeavor to pay more than the fair market value, there may be limited instances where flexibility is needed in order to acquire a piece of property or properties that is critical to the growth and development of the University of Houston System or its component institutions. In those limited instances, approval from the SVC/SVP of A&F and General Counsel is required to use any of the following tools:

#### **i. Obtain letter from appraiser that offered purchase price is within the fair market value;**

If the offered purchase price is within 10% of the appraised value, then ORES may request the firm that conducted one of the appraisals to evaluate whether the purchase price is an accurate representation of fair market value. The appraiser’s evaluation must state that the purchase

<sup>4</sup> Board of Regents Policy §51.01.

<sup>5</sup> There are few exceptions to this rule. By way of example, Texas Local Government Code §272.001(j) allows a political subdivision of the State to donate, exchange, convey, sell and/or lease property to an institution of higher education, including the University of Houston System, at less than fair market value to promote a public purpose.

<sup>6</sup> Texas Constitution, Art. III, Sec. 51.

<sup>7</sup> Texas Attorney General Opinion MW-373, 1981 citing *Rhoads Drilling Co. v. Allred*, 70 S.W.2d 576, 582 (Tex. 1934) (dicta); Texas Attorney General Opinions WW-790 (1960); WW-153 (1957).

<sup>8</sup> Tex. Atty. Gen. Op. No. GA-0634 (2008) (“It has been uniformly determined that the resale of property at its fair [market] value is not a gratuity or an extension of public credit.”) (citing *Davis v. City of Lubbock*, 326 S.W.2d 699 (Tex. 1959); Tex. Atty. Gen. Op. No. GA-0371 (2005) (“Certainly a land sale for fair market value would not be considered as a gratuitous transaction.”) (citing *Walker v. City of Georgetown*, 86 S.W.3d 249 (Tex. App. – Austin 2002, pet. denied).

<sup>9</sup> Tex. Atty. Gen Op. No. DM-232 (1993).

<sup>10</sup> Board of Regents Policy §51.01.

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price is consistent with the fair market value, be evidenced in a written letter, and maintained in the file.

**ii. Purchase an option to purchase the real property; and**

An option to purchase real property is a legally-binding contract that allows a prospective buyer to enter into an agreement with a seller, in which the buyer is given the exclusive option to purchase the property for a period of time and for a certain or sometimes variable price. In the event another buyer presents an offer during the option period, this offer may be submitted to the appraiser for review to determine if it has an impact on the appraisal of the property.

**iii. Use a third party to purchase the real property at the purchase price and subsequently sell the property to the University of Houston System at the fair market value.**

This option should only be considered in rare and unique circumstances. In the event the University of Houston System is unable to negotiate a purchase price that is consistent with the fair market value determined by an appraisal, then it is possible for a third party to purchase the real property at the purchase price and subsequently sell the real property to the University of Houston System at the fair market value. This requires the third party to provide a gift and/or donation as they are responsible for absorbing the cost of the property above the fair market value.

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