

**STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL**

September 16, 2016

Opinion No. 16-37

LEA Property Available for Use by Charter Schools

Question 1

If a local education agency (“LEA”) identifies a property as underutilized and vacant pursuant to Tenn. Code Ann. § 49-13-136(c) and the Tennessee Department of Education subsequently publishes the property on the list made available to charter school operators in the LEA as well as sponsors seeking to establish a charter school in the LEA, is the LEA required to make such property available for use by the charter school and execute a binding agreement with the charter school for the use of such property?

Opinion 1

The LEA is required to make the underutilized and vacant property available for use by charter schools operating in the LEA; however, the LEA is not necessarily required to execute a binding agreement with the charter school for the use of the property.

Question 2

If the answer to the first question is “yes,” when does the obligation of the LEA to make the property available to charter school operators and sponsors expire?

Opinion 2

The statute does not expressly state when the obligation expires, but it expressly calls for one update each year to an LEA’s listing of underutilized and vacant properties. By implication, then, the obligation of an LEA to make a listed property available to charter school operators and sponsors remains in place for at least one year after the property has been listed.

ANALYSIS

Tennessee Code Annotated § 49-13-136(c) facilitates charter schools’ use of underutilized or vacant property owned or operated by local education agencies (“LEAs”). Each year, no later than October 1, every LEA in which a charter school operates is required to catalog all underutilized and vacant properties owned or operated by the LEA. Tenn. Code Ann. § 49-13-136(c)(1). The LEA must then submit a comprehensive listing of all such properties to the Tennessee Department of Education (“Department”) and the Comptroller of the Treasury. *Id.* The Department is required to “make an LEA’s list available to any charter school operating in the LEA or to any sponsor seeking to establish a public charter school in the LEA.” *Id.*

“An LEA having underutilized and vacant properties shall make the underutilized and vacant properties available for use by charter schools operating in the LEA. Any lease agreement executed between a charter school and an LEA shall not reflect any outstanding bonded debt on the underutilized or vacant property, except” as the parties may agree. Tenn. Code Ann. § 49-13-136(c)(2). “An LEA shall establish a transparent and uniform method of calculating all terms and costs related to any lease, lease-purchase agreement, or other contract or agreement executed between the LEA and a charter school for the use of the LEA’s educational facilities.” Tenn. Code Ann. § 49-13-135. But nothing in Tenn. Code Ann. § 49-13-136 “is intended to frustrate an LEA’s ability to plan for the use of underutilized or vacant properties owned or operated by the LEA.” Tenn. Code Ann. § 49-13-136(e).

Based on the plain language of the statute, vacant and underutilized properties must be made “available” to charter schools, but the statute does not require the LEA enter into a binding contract with a charter school for the use of available property in every instance. To make something “available” is commonly understood to mean to make the thing “accessible.” See *Black’s Law Dictionary*, definition of “available.” And in the context of real estate, to “make available” refers to putting that real estate or property on the market for sale or lease. See Roget’s 21st Century Thesaurus, 3rd ed. 2013, synonyms for “make available.” It is commonly understood, however, that listing a property as available on the market is merely an offer and will result in a transfer of property rights only if the offer is accepted on terms agreeable to both parties. See, e.g., *Johnson v. Cent. Nat’l Ins. Co.*, 356 S.W.2d 277, 281 (Tenn. 1962) (a contract requires “a meeting of the minds of the parties;” there must be “mutual assent to the terms [and] . . . sufficient consideration.”).

Thus, Tenn. Code Ann. § 49-13-136(c)(2) requires an LEA with underutilized and vacant properties to make those properties available for use—in the sense of offering them for sale or lease—to charter schools within the LEA. But Tenn. Code Ann. § 49-13-136 does not require that LEAs make property available for use by charter schools free of cost. Both Tenn. Code Ann. §§ 49-13-135 and 49-13-136(c) contemplate that a charter school wanting to use the property may enter into a contract with an LEA assuming that the parties reach an agreement on terms and conditions, including payment for the use of the property.¹ The second sentence of Tenn. Code Ann. § 49-13-136(c)(2) makes that clear when it refers to “*any* lease agreement.” The determiner, indefinite article “any” indicates that there may or may not be an agreement. Had the legislature intended that in every case there must be an agreement, it would have used as the determiner the definite article: “the agreement” rather than “any agreement.” Similarly and to the same effect, Tenn. Code Ann. § 49-13-135 refers not to “the lease” but rather to “*any* lease, lease-purchase, or other contract or agreement executed between the LEA and a charter school for the use of the LEA’s educational facilities.”

In sum, if a charter school or charter school sponsor wishes to avail itself of the use of a vacant or underutilized property listed by an LEA, the LEA and charter school are expected, and afforded an opportunity, to negotiate contractual terms and conditions, including a contract price,

¹ “An LEA shall establish a transparent and uniform method of calculating all terms and costs related to any lease, lease-purchase agreement, or other contract or agreement executed between the LEA and a charter school for the use of the LEA’s educational facilities.” Tenn. Code Ann. § 49-13-135. “Charter schools may use capital outlay funds for the following purposes: (1) Purchase, lease-purchase, or lease of real property; (2) Purchase, lease-purchase, or lease of school facilities” Tenn. Code Ann. § 49-13-136(a)(1)-(2).

for the use of underutilized and vacant property. When a charter school wishes to lease or buy or otherwise contract for the use of the property, the LEA is required to use a “*transparent and uniform*” method of calculating all terms and costs” related to any contract for the use of the property. Tenn. Code Ann. § 49-13-135 (emphasis added). The statute thereby imposes on the LEA the obligation to act normatively when evaluating and negotiating the contract terms. But unless the parties mutually agree on those terms and conditions, no contract will result. And nothing in the statute requires the LEA and a charter school to reach agreement on contractual terms or to enter into a contract at all. Thus, Tenn. Code Ann. § 49-13-136(c) does not “require” an LEA in every instance to execute a binding agreement with a charter school or charter school sponsor for use of underutilized and vacant property.

While there may be no requirement that the parties consummate a contractual obligation, the statute does contemplate that the parties enter into a written, binding contract when they do reach an agreement for the use of the LEA’s property. In other words, the statute does not contemplate a situation in which a charter school or other person or entity would occupy or use real property of an LEA without a written agreement.

This is consistent with the statutory proviso that nothing in Tenn. Code Ann. § 49-13-136 “is intended to frustrate an LEA’s ability to plan for the use of underutilized or vacant properties owned or operated by the LEA.” Tenn. Code Ann. § 49-13-136(e). This statutory caveat would be rendered meaningless if an LEA could not refuse to contract with a charter school when the LEA has a reasonable, legitimate plan that excluded or conflicted with a charter school’s proposed use of the property.

You have also asked when the obligation of the LEA to make the property available to charter school operators and sponsors expires. Although the statute does not expressly address that question, it does expressly require LEAs to catalog all underutilized and vacant properties just once each year. By implication, then, the obligation of an LEA to make a listed property available to charter school operators and sponsors remains in place for at least one year after the property has been listed, unless, of course, the property is sold or leased to a charter school pursuant to the statute during that year.

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