

BOARD OF REGENTS
BRIEFING PAPER

1. Agenda Item Title: Correction and Amendment to University
Gateway Project Lease

Meeting Date: June 11-12, 2015

2. BACKGROUND & POLICY CONTEXT OF ISSUE:

The Board, at its December 5, 2014 meeting, approved the “Implementing Agreements” for the University Gateway Project, which included UNLV entering into a certain Lease of a to be built Parking Structure and Polices Services Space. The Lease provides UNLV with the Option to purchase the Parking Structure and Police Services Building and a Purchase & Sale Agreement to govern that purchase is attached to the Lease as an Exhibit. The Lease also allows for the Developer to “Put” the Parking Structure and Police Services Building to UNLV, which Put is also to be governed by the same Purchase & Sale Agreement. An error was discovered in this Lease as explained in the below paragraphs.

A. Termination Right: The Board has previously approved UNLV entering into a certain Lease of certain Premises, to include a to-be-built Parking Structure and Polices Services Building. During the negotiations the university initially wanted to purchase its improvements directly, but the developer asked that we leave the improvements under the same payment structure to assist with their ability to complete the transaction. The Lease transaction was then negotiated to provide UNLV with the Option to purchase the Premises for a scheduled price and a Purchase & Sale Agreement to govern that purchase was negotiated and attached to the Lease as an Exhibit. Because a purchase by UNLV could require financing to fund the purchase price and due to the possibility that suitable financing might not be available, the Purchase & Sale Agreement contains a provision allowing UNLV to terminate the Purchase & Sale Agreement at its discretion.

Later, during the negotiations, the Developer identified the need to have the right to require UNLV to purchase the Premises (i.e. a “Put”), which Put is also to be governed by the same Purchase & Sale Agreement. Neither UNLV nor the developer focused on the provision of the Purchase and Sale Agreement allowing UNLV to terminate the Purchase & Sale Agreement although, by its terms, that provision does apply in the context of Developer’s exercise of its Put. As a result, as written, the Lease and Purchase & Sale Agreement would allow UNLV to avoid the Put by terminating the Purchase & Sale Agreement after exercise of the Put by the Developer. The “Put” was assumed to be a right needed by the developer and agreed to by UNLV. The summary document of the implementing agreements provided to the Board of Regents at the December, 2014 Board meeting did assume the “Put” option was a right and not something that could be cancelled by UNLV. A section of that summary document is pasted below:

Lease/Purchase Agreement: provides for UNLV's lease and eventual acquisition of a to-be-built parking structure in which UNLV will lease more than 625 new parking spaces for UNLV's exclusive use. The parking structure will also contain approximately 10,000 gross square feet of office for the Police Services division. The Lease has a term of 20 years and will have a total cost equal to \$1,300,000 allocated to land cost, \$14,255,000 for Parking Structure improvements for 610 spaces (plus interest), \$2,150,000 for shell office space and \$408,000 for an additional 16 parking spaces for Police Services use (total of \$18,113,000), with a buy-out upon expiration of \$1.00. The lease grants to UNLV an option to purchase the parking structure and police office space after 5 years from C.O. at a purchase price equal to the amount on the amortization schedule, exercisable with a 9 month notice to complete the purchase. The lease also grants to the Landlord a right to Put the property to UNLV at the same price and terms, exercisable any time after C.O. with 9 months to close. The total annual rent payments will be \$1,310,000 per year. The form of the lease agreement is similar to other leases approved by the Board. The lease will provide for early purchase at the present value of the remaining lease stream computed by reference to current estimated bond interest rates which UNLV would incur if it financed the purchase upon completion.

B. Extended Delivery Date: The Developer, in order to meet the agreed upon deadline for delivery of possession of the Completed Premises as set forth in the Lease, commenced construction in advance of having complete financing in place. Financing the Project has taken the Developer longer than anticipated (although the Developer has now identified a Lender) but, as a result of the delays in putting financing in place, the Project has incurred delays. The Developer now seeks UNLV’s agreement to extend that deadline from May 30, 2016 to December 31, 2016.

3. SPECIFIC ACTIONS BEING RECOMMENDED OR REQUESTED:

President Len Jessup requests the Board to approve the attached language of the Lease which was one of the Implementing Agreements for the University Gateway Project (approved at the December 2014 Board of Regents meeting) in order to correct an error (the correction would eliminate UNLV's right to terminate the Purchase & Sale Agreement when the Purchase & Sale Agreement is entered into upon exercise of Landlord's "Put"); and extend the date by which the Landlord must deliver possession of a completed Parking Structure and Police Services Space from May 30, 2016 to December 31, 2016. A copy of the Amendment to Lease reflecting the changes is attached and the relevant Lease provisions are highlighted below to reflect the changes for which approval is sought.

1. Section 3.5 of the Purchase Agreement will be amended as follows:

3.5 **Termination.** Purchaser may terminate this Agreement at any time by written notice to Seller and Escrow provided Purchaser shall be responsible for Escrow and termination costs and any other costs reasonably incurred by Seller in reliance on Purchaser's Notice of Exercise. ~~(Or Put Notice, as the case may be.)~~ **[THE FOREGOING SECTION 3.5 APPLIES ONLY WHEN THIS AGREEMENT IS BEING USED IN CONNECTION WITH TENANT'S EXERCISE OF ITS PURCHASE OPTION AND NOT IN CONNECTION WITH LANDLORD'S EXERCISE OF ITS PUT OPTION].**

2. Section 5.4 of the Lease will be amended as follows:

Section 5.4 Termination. Notwithstanding any other provision of this Lease, in the event that Landlord shall fail to deliver possession of the Premises as provided in Section 5.1 and this Section 5.4 by ~~May 30~~ **December 31**, 2016, as such date may be extended pursuant to Section 5.5 ("**Outside Date**"), or refuses to cure any title exception that is not a Permitted Exception as provided in Section 5.2, Tenant may terminate this Lease and all its obligations hereunder (except those obligations which by their terms survive termination hereof) by giving written notice to Landlord (i) in the case of failure to deliver possession, that this Lease shall terminate by a date specified in such notice which date shall be not less than ninety (90) days after the date of such notice, whereupon this Lease shall terminate if Landlord fails to give possession of the Premises as provided in this Article 5 to Tenant prior to the date specified in such notice; and (ii) in the case of Landlord's refusal to cure a title exception not constituting a Permitted Exception that materially and adversely affects Tenant's use of the Premises, by written notice to Landlord within fifteen (15) days after receipt of Landlord's written notice of its refusal to cure. In the event of a failure by Landlord to timely deliver possession as herein provided, the parties agree that it would be impractical to determine Tenant's damages and the parties therefore agree that Tenant shall be entitled to liquidated damages in the amount of One Thousand Dollars (\$1,000) per day for any day during ~~June January~~ and ~~July February~~ of ~~2015~~ **2016**, and Three Thousand Six Hundred Fifty-five Dollars (\$3,655) per day, thereafter commencing on the Outside Date and continuing until the earlier of the Substantial Completion Date or Termination of the Lease by Tenant as hereinabove provided.

4. IMPETUS (WHY NOW?):

The Lender has identified the issue described above and is not willing to proceed unless an amendment of the Lease removes UNLV's right to terminate the Purchase & Sale Agreement in the context of Developer's exercise of its Put, as a condition to providing the necessary financing. As a result, the Developer will incur further delays should the Lease not be amended. If the Lease is not amended, the Developer may not be able to obtain financing and the Project will incur significant further delay and may not be completed in a time frame that meets UNLV's needs.

5. BULLET POINTS TO SUPPORT REQUEST/RECOMMENDATION:

- UNLV's intention in negotiating the Implementing Agreements for the University Gateway Project included the "Put" option being a right of the Developer. However, when the Purchase and Sale Agreement attached as an exhibit to the Lease and the Put provisions of the Lease are read together, the Put option is an option that is subject to UNLV's approval
- UNLV needs the additional parking spaces to be completed timely
- The Project Developer may be unable to complete the Project if financing is unavailable due to the terms of the Lease/Purchase & Sale Agreement
- The Project may be completed later than planned resulting in significant space and parking issues for UNLV

6. POTENTIAL ARGUMENTS AGAINST THE REQUEST/RECOMMENDATION:

- Don't correct the error and leave documents as they were originally approved.

7. ALTERNATIVE(S) TO WHAT IS BEING REQUESTED/RECOMMENDED:

By leaving the Lease in its current form, the Developer would suffer additional delays due to financing issues and UNLV would either accept later delivery or seek alternative parking and Police Services office space

8. COMPLIANCE WITH BOARD POLICY:

- Consistent With Current Board Policy: Title #____ Chapter #____ Section #____
- Amends Current Board Policy: Title #____ Chapter #____ Section #____
- Amends Current Procedures & Guidelines Manual: Chapter #____ Section #____
- Other:_____
- Fiscal Impact: Yes____ No_X____
Explain:_____

FIRST AMENDMENT TO LEASE AGREEMENT

This **FIRST AMENDMENT TO LEASE AGREEMENT**, dated for reference purposes as of June 12, 2015 (this "**First Amendment**"), is made by and between **NEW TOWN MD, LLC**, a Nevada limited liability company ("**Landlord**") and **THE BOARD OF REGENTS OF THE NEVADA SYSTEM OF HIGHER EDUCATION**, on behalf of the University of Nevada, Las Vegas ("**Tenant**").

RECITALS

A. Landlord and Tenant entered into a Lease Agreement, dated as of December 5, 2014 (the "**Lease**") under which Landlord leased to Tenant certain real property located at the northeast corner of Maryland Parkway and Dorothy Avenue, Las Vegas, Nevada in Clark County, Nevada.

B. The parties now desire and agree to modify the Lease as provided in this First Amendment.

C. Capitalized words used in this First Amendment that are not otherwise defined in this document shall have the meanings set forth in the Lease Agreement.

D. The execution and delivery of this First Amendment have been duly authorized by all necessary corporate, limited liability company and other institutional action on the part of Landlord and Tenant.

NOW, THEREFORE, the Landlord and the Tenant hereby agree as follows:

1. **Modification of Section 5.4.** Section 5.4 of the Lease is deleted in its entirety and the following is substituted in lieu thereof:

"Section 5.4 Termination. Notwithstanding any other provision of this Lease, in the event that Landlord shall fail to deliver possession of the Premises as provided in Section 5.1 and this Section 5.4 by December 31, 2016, as such date may be extended pursuant to Section 5.5 ("**Outside Date**"), or refuses to cure any title exception that is not a Permitted Exception as provided in Section 5.2, Tenant may terminate this Lease and all its obligations hereunder (except those obligations which by their terms survive termination hereof) by giving written notice to Landlord (i) in the case of failure to deliver possession, that this Lease shall terminate by a date specified in such notice which date shall be not less than ninety (90) days after the date of such notice, whereupon this Lease shall terminate if Landlord fails to give possession of the Premises as provided in this Article 5 to Tenant prior to the date specified in such notice; and (ii) in the case of Landlord's refusal to cure a title exception not constituting a Permitted

Exception that materially and adversely affects Tenant's use of the Premises, by written notice to Landlord within fifteen (15) days after receipt of Landlord's written notice of its refusal to cure. In the event of a failure by Landlord to timely deliver possession as herein provided, the parties agree that it would be impractical to determine Tenant's damages and the parties therefore agree that Tenant shall be entitled to liquidated damages in the amount of One Thousand Dollars (\$1,000) per day for any day during January and February of 2017, and Three Thousand Six Hundred Fifty-five Dollars (\$3,655) per day, thereafter commencing on the Outside Date and continuing until the earlier of the Substantial Completion Date or Termination of the Lease by Tenant as hereinabove provided."

2. Modification of Exhibit E. Section 3.5 of Exhibit E attached to the Lease (the form of Purchase and Sale Agreement) is deleted in its entirety and the following is substituted in lieu thereof:

"3.5 Termination. Purchaser may terminate this Agreement at any time by written notice to Seller and Escrow provided Purchaser shall be responsible for Escrow and termination costs and any other costs reasonably incurred by Seller in reliance on Purchaser's Notice of Exercise. [THE FOREGOING SECTION 3.5 APPLIES ONLY WHEN THIS AGREEMENT IS BEING USED IN CONNECTION WITH TENANT'S EXERCISE OF ITS PURCHASE OPTION AND NOT IN CONNECTION WITH LANDLORD'S EXERCISE OF ITS PUT OPTION]."

3. Lease to Remain in Effect. Except as explicitly modified by this First Amendment, the Lease shall remain in full force and effect as executed by the parties.

IN WITNESS WHEREOF, the parties have caused this First Amendment to be executed by their respective duly authorized agents.

SIGNATURES APPEAR ON THE NEXT PAGE

LANDLORD:

NEW TOWN MD, LLC, a Nevada limited liability company

By: _____

Title: _____

Date: _____

TENANT:

BOARD OF REGENTS OF THE NEVADA SYSTEM OF HIGHER EDUCATION, ON BEHALF OF THE UNIVERSITY OF NEVADA, LAS VEGAS

Recommended By:

By: _____

Title: _____

Date: _____

Approved By:

By: _____

Title: _____

Date: _____