

Attachment A Selected City Obligations for Leasing Caltrans Property

Caltrans has drafted a Property Management Lease Agreement (PMLA) template¹ to implement Governor Newsom’s Executive Order N-23-20 concerning homelessness (January 8, 2020).² This Attachment A collects a small set of salient questions that the City should answer to itself and to its people before executing the lease for the Caltrans Property at University Avenue and West Frontage Road.

Nomenclature and Term

The subject property is the land surrounding and bounded by the University Avenue onramp and offramp (half-cloverleaf) of eastbound I-580 (westbound I-80) to the west of I-580/I-80. Council Item 23 refers to this property as “Caltrans Property;” the PMLA refers to this property as the **Premises**, the term used herein. The State of California, by and through Caltrans, is the **Landlord** of the Premises. The City of Berkeley is the **Tenant**. The “**intended use**” as a “**temporary emergency shelter and/or feeding program**” (as provided in Section 104.30 of Cal. Streets & Highways Code³) to be sited on the Premises will serve homeless inhabitants referred to as “**clients**.”

The initial lease **term** is a maximum of three years, renewable for up to four successive one-year terms, not to exceed seven years total term.

All citations herein are to Articles of the PMLA unless otherwise identified. Online at: https://www.bcsb.ca.gov/hcfc/documents/row_shelter_pm.pdf

Pre-Lease Condition of Site

1. Has the City conducted, or budgeted to conduct, an inspection of the Premises for suitability to the intended use? (Article 5.2.1 unnumbered paragraph 2)
Landlord “specifically does not warrant the Premises fit for human habitation, whatsoever.” (Art. 5.2.1 ¶ 2)
The City acknowledges that “the Premises are not designed for temporary emergency shelter/feeding program use”. (Art. 5.2.1 ¶ 7(2))
2. Has the City investigated, or budgeted to investigate, “surface, subsurface and groundwater for contamination and hazardous materials” so as to be satisfied that the Premises will safely support the intended use? (Art. 5.2.1 ¶ 4)
3. Pursuant to question 2, has the City produced, or budgeted to produce, the Exhibit B: Hazardous Materials statement? (Art. 5.2.1 ¶ 4; PMLA p. 37)

¹ https://www.bcsb.ca.gov/hcfc/documents/row_shelter_pm.pdf (downloaded Mar. 7, 2020)

² https://www.bcsb.ca.gov/hcfc/executive_order.html (last visited Mar. 8, 2020)

³ https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=SHC§ionNum=104.30.

4. Pursuant to question 2, has City produced, or budgeted to produce, the Exhibit E: Phase I Environmental Site Assessment (ESA)? (Art. 5.2.1 ¶ 4; PMLA pp. 40-41)
5. Is the City prepared to “accept[] all risks associated” with the uses required and permitted by the lease? (Art. 5.2.1 ¶ 4)
6. Has the City reviewed Landlord’s records “which might reflect the potential existence of hazardous materials on or beneath the Premises”? (Art. 5.2.1 ¶ 5)
7. Is the City prepared to commit to “completely remediate and remove” all hazardous substances on the Premises at the conclusion of the term? (Art. 5.2.1 ¶ 5) “Hazardous substances” defined in Section 25316 of Cal. Health & Safety Code.⁴

“It is the intent of the parties hereto that Tenant shall be responsible for and bear the entire cost of removal and disposal of hazardous materials introduced to the Premises, or exposed or disturbed, during Tenant’s period of use and possession as tenant of the Premises.” (Art. 5.6 ¶ 3)
8. Has the City conducted, or budgeted to conduct, “a soil evaluation for lead” for samples “from the surface to a depth of one foot”? (Art. 5.2.2 ¶ 4)
9. Has the City prepared, or budgeted to prepare, “a sampling and analysis plan to Landlord for review and approval”? (Art. 5.2.2 ¶ 4)

In-Use Condition of the Site

10. What measures will the City take to comply with the provision: “Tenant shall not allow the Premises to be used for any unlawful purpose, nor shall Tenant cause, maintain or permit any nuisance in, on, or about the Premises.” (Art. 5.3)
11. What measures will the City take to comply with the provision “Tenant shall not commit or suffer to be committed any waste in or upon the Premises.” (Art. 5.3)
12. What measures will the City take to comply with the prohibition of “any storage of flammable materials, explosives or other materials” (e.g., propane tanks) on the Premises? (Art. 5.5)
13. Has the City reviewed, or budgeted to review, the measures necessary to comply with federal laws (Water Pollution Control Act; Resource Conservation and Recovery Act; Safe Drinking Water Act; Toxic Substances Control Act; Clean Air Act; Comprehensive Environmental Response, Compensation and Liability Act) and state laws (Safe Drinking Water and Toxic Enforcement Act, applicable provisions of Cal. Health & Safety Code and Cal. Water Code), and other comparable laws? (Art. 5.6 ¶ 1)

⁴ https://leginfo.ca.gov/faces/codes_displaySection.xhtml?lawCode=HSC§ionNum=25316.

14. What measures will the City take to comply with the provision “In no case shall Tenant cause or allow the deposit or disposal of any hazardous materials on the Premises.”? (Art. 5.6 ¶ 2; “storage or stockpile” in Art. 5.11 ¶ 3)
15. What measures will the City take to comply with the provision “Tenant shall not park nor store wrecked or inoperable vehicles of any kind on the Premises.” (Art. 5.9)
16. What measures, and at what cost, will the City take for the “continued maintenance of the Premises, [to] keep the Premises free of all grass, weeds, debris, and flammable materials of every description...[to] ensure that the Premises are at all times in an orderly, clean, safe, and sanitary condition”? (Art. 9.1 ¶ 1)
17. What measures, and at what cost, will the City take “for the care, maintenance, and any required pruning of trees, shrubs, or any other landscaping on the Premises”? (Art. 9.1 ¶ 4)

Signs on the Site

18. Is the City prepared to post signs in appropriate locations stating the following? “Warning: Clients of this shelter / feeding program are at increased risk of exposure to Aerially Deposited Lead, vehicle emissions, and other hazardous or harmful materials and substances. Use of this shelter / feeding program is at each inhabitant’s own risk, and neither the State of California nor the California Department of Transportation is liable for any injury or property damage suffered while using the Premises.” (Art. 5.7 ¶ 1)
19. Is the City prepared to post signs in appropriate locations stating the following? “Firearms and illegal weapons may not be possessed on the Premises.” (Art. 5.7 ¶ 1)
20. Is the City prepared to post signs in appropriate locations stating the following? “Open fires are prohibited.” (Art. 5.7 ¶ 1)
21. Is the City prepared to post signs in appropriate locations stating the following? “Use or possession of prescription drugs, or other substances which are designated controlled substances under Federal Law, without a valid medical prescription in the holder’s name, is prohibited on the Premises.” (Art. 5.7 ¶ 1)
22. Is the City prepared to post signs in appropriate locations stating the following? “Use or possession of medical marijuana, or recreational marijuana, is prohibited on the Premises even with a valid medical prescription in the holder’s name.” (Art. 5.7 ¶ 1)
23. Is the City prepared to seek prior written approval of Landlord to “construct, erect, maintain or permit any sign, banner or flag upon the Premises”? (Art. 5.7 ¶ 2)
If not, is the City prepared to pay Landlord “for the cost of [] removal plus interest”? (Art. 5.7 ¶ 2)

Other Governmental Entities

24. Is the City prepared to obtain approval from the Federal Highway Administration (FHWA) in order to lease the Premises? (Art. 2, ¶ 4)
25. Is the City prepared for all federal mandates attending Landlord's acceptance and use of federal funds for highway construction, which may flow down upon the use of the Premises? (Art. 5.8)
26. Is the City prepared to comply with, or seek consent from Landlord for variance from, the following provision? "No shelter improvements will be erected within the area below a horizontal plane extending to a line 20 feet, measured horizontally, from the outermost protrusion of Landlord's adjacent transportation facility structure" (ed. - setback from highway and ramps). (Art. 6.1 ¶ 2)
27. Is the City prepared to bear the cost of "Claims by shelter/feeding program clients arising out of, or related to, the use of the Premises"? (Art. 10.3.A.a)
28. Is the City prepared to bear the cost of "Any illness, personal injury, death, property damage, or any other injury or damage to any person or property," specifically "Claims regarding the proximity of the temporary emergency shelter/feeding program to the adjacent transportation facility." (ed. - I-80/580 and ramps) (Art. 10.3.A.d.3)
29. Does the City accept the following provision? "Tenant understands and agrees that Landlord has a primary obligation to maintain the adjacent transportation facility for use by the motoring public. Accordingly, the covenant of quiet enjoyment normally presumed to be inferred in every real property lease is specifically and affirmatively waived by Tenant herein." (Art. 19.1)

Pollution Control and Environmental Analysis

30. What measures will the City take to comply with "all applicable State and Federal water pollution control requirements regarding storm water and non-storm water discharges from" the Premises? (Art. 5.11 ¶ 1)
31. What measures will the City take to prevent "vehicle or equipment washing, fueling, maintenance and repair on the Premises"? (Art. 5.11 ¶ 2)
32. Has the City implemented, or budgeted to implement, the Best Management Practices (BMPs) in Exhibit D: Stormwater Pollution Prevention? (Art. 5.11 ¶ 3; PMLA p. 39)
33. Has the City determined that the intended use of the Premises is exempt from CEQA? (Art. 5.12 ¶ 1)
 If not, then has the City performed, or budgeted to perform, a CEQA-compliant environmental study of the Premises?
 Has the City drafted, or budgeted to draft, a National Environmental Policy Act-compliant environmental study? (Art. 5.12 ¶ 1)

34. What measures will the City take, and with what budget, to comply with the following provision? "Tenant will ensure that the Premises remain in environmental compliance and will pay all costs of such environmental compliance." (Art. 5.12 ¶ 4)

Information to Clients and Monitoring of Client Conduct

35. Is the City prepared to inform clients of the shelter / feeding program that they "will not be tenants, subtenants, residents, lessees, boarders, or lodgers within the Premises." (Art. 5.13 ¶ 1)

"Tenant acknowledges that no employee, agent, invitee, trespasser, client, client of a temporary emergency shelter / feeding program, program participant, or other person on the Premises shall be designated or attain the status of a 'tenant' or 'resident' for any purpose." (Art. 12.3)

36. Has the City "established rules of entry, continued occupancy, and client services" for the Premises? (Art. 5.13 ¶ 1)
37. Pursuant to question 36, is the City prepared to enforce such rules to which clients "shall be subject"? (Art. 5.13 ¶ 1)
38. Is the City prepared to inform clients that "shelter services shall be limited to occupancy of six (6) months or less as specified in the California Health and Safety Code Section 50801(e)"?⁵ (Art. 5.13 ¶ 1)
39. Pursuant to question 38, is the City prepared to comply with the following provision? "Tenant shall notify all emergency shelter users and clients that Premises use is temporary, and that shelter users are not entitled to relocation benefits when asked to move." (Art. 12.3 ¶ 3)
40. Has the City adopted "health and safety standards for the emergency shelter, and ensure those standards are complied with, in accordance with Chapter 7.8 (commencing with Section 8698) of Division 1 of Title 2 of the Government Code Section."?⁶
41. What measures will the City take to comply with the following provision? "Tenant shall be solely responsible for addressing and resolving pollution, noise, and any other form of nuisance complaints from nearby residents, businesses or other complainants." (Art. 5.13 ¶ 3)
42. Is the City prepared to prohibit clients from erecting flags, banners, or signs of any kind? (Art. 5.13 ¶ 4(2))

⁵ https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=HSC§ionNum=50801.

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https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=GOV&division=1.&title=2.&part=&chapter=7.8.&article=

43. Is the City prepared to prohibit clients from possessing or using controlled substances as defined under federal law, except prescription medicines used in compliance and under the supervision of a medical doctor? (Art. 5.13 ¶ 4(3))
44. Is the City prepared to prohibit clients from possessing or using marijuana, in any form, with or without a prescription issued by a medical doctor? (Art. 5.13 ¶ 4(4))
45. Is the City prepared to prohibit clients from using hypodermic needles or other “sharps,” unless necessary to self-administer prescription medications under a valid prescription of a medical doctor? (Art. 5.13 ¶ 4(5))
46. Is the City prepared to prohibit clients from possessing firearms and illegal weapons? (Art. 5.13 ¶ 4(6))
47. Is the City prepared to remove graffiti within 48 hours of tagging? (Art. 5.13 ¶ 6)
48. What measures will the City take to for the Premises to comply with the Americans with Disabilities Act (ADA)? (Art. 5.13 ¶ 7)

Crime Prevention, Security, and Law Enforcement

49. What measures will the City take to prevent criminal activity on the Premises? (Art. 5.13 ¶ 8)
50. What measures will the City take to prevent illegal tapping of any electrical or natural gas system on the Premises or the adjacent highway? (Art. 5.13 ¶ 9)
51. What measures will the City take to prevent illegal tapping of any water resource on the Premises or the adjacent highway? (Art. 5.13 ¶ 10)
52. Is the City prepared to take sole responsibility for the safety of its clients and third parties from service animals or other animals allowed on the Premises? (Art. 5.13 ¶ 11)
53. What measures will the City take to “not allow any open flames on the Premises”? (Art. 9.1 ¶ 1)
54. Has the City budgeted for the following provision? “City of (Berkeley) law enforcement police * * * shall be primarily responsible for all law enforcement-related issues on the Premises” (Art. 12.4)
55. If question 54 is answered in the negative, has the City budgeted for the alternative “...Tenant shall reimburse Landlord the cost of CHP [California Highway Patrol] services including the Maintenance Zone Enhanced Enforcement Program (MAZEEP)?” (Art. 12.4)

Fencing and Entry Control

56. What measures will the City take “to protect and preserve the fences, if any”? (Art. 9.1 ¶ 3)
57. Has the City planned, or budgeted for, the removal of existing fencing, and installation and maintenance of additional fencing or of entrances to the Premises “to protect Landlord’s adjacent transportation facility, Tenant’s invitees [clients], motoring public, pedestrians, or other third parties”? (Art. 6.1 ¶ 4)
58. Has the City planned, or budgeted for, construction and maintenance of sidewalks and driveways for entrances to the Premises? (Art. 6.1 ¶ 4)

In-Use Construction

59. Has the City planned, and budgeted for, the following provision?
“To construct the temporary emergency shelter and /or feeding program facility, Tenant will be installing, at Tenant’s own cost and expense: (As Applicable)
 - a) Applicable utilities (i.e. electrical, water, gas, sewer);
 - b) Decking over the existing paved surface;
 - c) Temporary modular buildings or tents to provide shelter, restrooms, and bathing facilities;
 - d) Lighting;
 - e) Fencing;
 - f) Storage containers.” (Art. 6.3)
60. Is City prepared to remove, and bear the cost of removal, of “[a]ll actual and alleged improvements that are not considered realty (such as paving, lighting, plumbing, underground utilities or any such improvements affixed to the ground) and placed on the Premises”? (Art. 8)