



MEMORANDUM

Date: October 15, 2013

To: The Honorable Chairman and Members
Pima County Board of Supervisors

From: C.H. Huckelberry
County Administrator

A handwritten signature in black ink, appearing to be "CH Huckelberry", is written over the typed name and title.

Re: **Tenant Lease with Accelerate Diagnostics, Inc.**

At the Board of Supervisors meeting today, there was a great deal of discussion regarding Addendum Item 9, an amendment to the original lease term of Accelerate Diagnostics, Inc. Essentially, the amendment documented Accelerate's assumption of option space contained in the original lease, which allowed Accelerate to expand their operations.

The first question related to the amount of space in the option. The lease contained one contiguous option space of 4,332 square feet and three separate, small rooms for custodial, storage and information technology totaling 209 square feet; for a total of 4,541 square feet.

The next question related to the lease rate and whether the lease rate of the option space expansion was the same rate as the original lease or at market rate; the difference being \$9.25 in the original lease versus \$11.84. The applicable lease rate was discussed with the County Attorney prior to developing the lease amendment. The County Attorney is of the opinion, and I concur, that the original lease rate applies to the option expansion due to very specific language in the terms of the lease:

"Subject to Sections 1)c) and 2)b) above, the rental rate ... during the Initial Term will be \$9.25 per usable square foot per year."

Section 1)c) states *"at the then-current rate."* The current rate during the term of the initial lease is \$9.25 per square foot as specified in Section 6)a). It does not say at *"the then current market rate."* The lease is still within the initial term; hence, the rate of \$9.25.

I am enclosing an email from Deputy County Attorney Regina Nassen that clearly articulates the controlling terms of the lease with regard to the lease rate for expansion space contained in the original lease. As you can see in the discussion by Ms. Nassen, the only issue relates to the interest rate of four percent charged by the County. I would argue this interest rate is relatively close the private market today, given continued low interest

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rates for mortgages and short-term borrowing reflected in US Treasury bill rates and other financial instruments. In addition, it is relatively immaterial due to the very short payback period of two years.

Another issue arose over the stated parking fees in the lease agreement. It was my direction that inserted this language, since everyone (staff, clients and other tenants), including Accelerate, parks for free at our Abrams Public Health Facility. The revitalization of the hospital and the success of clinic space within the Abrams Facility have created a parking issue – a good problem to have compared to past use of these facilities. At some point in time, a parking garage will be constructed, but it is highly unlikely we would even begin construction prior to the expiration of the original Accelerate lease.

However, all of the tenants within Abrams and all of the University employees employed at The University of Arizona Medical Center–South Campus must become accustomed to the idea of paying for parking when the County actually does construct a parking garage. Insertion of this language in the lease is to put the issue on the radar of Accelerate and every other tenant and user of the Kino Campus; sooner or later, they will all be paying for parking, and they will be paying at a market rate.

What was missing from the discussion at the Board meeting today was the fact that Accelerate Diagnostics, Inc. has been hugely successful; it was an economic development action of the Board of Supervisors that attracted this Denver, Colorado-based firm to Tucson. The performance measures originally placed in the contract dealt with 30 employees being paid at a rate of an average of \$65,000 annually during the initial three-year lease period. Less than halfway into this period, Accelerate now employs 50 employees who average more than \$100,000 in annual salary. Their rapid growth is one of the reasons for executing the option. In addition, they are looking at additional space within the Abrams Facility during their initial three-year lease and three-year option period.

We welcome Accelerate's expansion and will consider even future amendments to facilitate the rapid growth of this very successful biotech firm.

CHH/mjk

Attachment

c: Regina Nassen, Deputy County Attorney
Reid Spaulding, Director, Facilities Management

Maura Kwiatkowski

From: Regina L. Nassen <Regina.Nassen@pcao.pima.gov>
Sent: Tuesday, October 15, 2013 12:44 PM
To: Regina Nassen; Chuck Huckelberry
Cc: Chris Straub
Subject: Accelerate Lease Amendment (Attorney-Client Privilege)
Attachments: RE: Accelr8 - Pima County lease

Importance: High

Chuck and Reid—

I gather there was a question at the BOS meeting regarding whether the amendment to the Accelerate lease provides for the appropriate rental rate; the rate contemplated in the original lease for the expansion space. It does.

Section 6)a) of the original lease provides that “Subject to Sections 1)c) and 2)b) above, the rental rate ... during the Initial Term will be \$9.25 per usable square foot per year.” Section 1)c) is the expansion-space provision; Section 2)b) is an enforcement provision (the rental rate goes up if the tenant fails to meet certain economic goals). The Amendment states that the Tenant will begin paying rent for the expansion space “at the rate set forth in Section 6 of the Lease” when the tenant’s occupancy commences.

The fact that Section 6)a) says “subject to” Section 1)c) *implies* that a different rate applies to the expansion space. But *in fact* Section 1)c) clearly states that the tenant has the right to lease the additional space “at the then-current rate per usable square foot.” The inclusion of the “subject to” language is simply a result of the drafting process. Initial drafts of the lease did provide that the expansion space would be at a higher rental rate. In the August 13, 2012 draft, from the tenant’s lawyer, this changed. I alerted you, Chuck, to that change. After you discussed it with Larry Mehren, you emailed me back indicating that you were okay with the lower lease rate for the expansion space (see attached email chain). This was one of the last drafts, as we were finishing up the lease; we were also working on the loan agreement with the State, and your memo to the BOS. Not too surprisingly, we didn’t think to delete the now-unnecessary reference to Section 1)c) in Section 6)a); its continued inclusion is, however, an entirely harmless error.

Section 1)c) of the original lease provides that any build-out of the expansion space “must be done at Tenant’s expense.” In the Amendment, the County is agreeing to pay for the Tis, but the Tenant is agreeing to pay the County back for the the cost of the Tis, plus interest (at an admittedly low rate), over the remaining initial term of the lease. That is not clearly inconsistent with the original intent.

Arguably, in fact, none of this *legally* required a formal amendment to the lease. It isn’t really a change to the lease; it is the tenant’s *exercise* of an option or right it already has under the original lease as written, and therefore could have been handled without a formal amendment. The County, however, prefers to document a tenant’s exercise of any expansion or extension options in the form of an amendment even when that’s not legally required. And the Amendment in this case does include approximately 170 square feet of space that is *not* part of the expansion space as originally defined in the original lease. The inclusion of that additional space, though not particularly significant in light of the overall square footages involved, does technically require a formal amendment. And, although the TI build-out is arguably consistent with the original term as noted above, the fact that the County is financing the cost of the improvements likewise makes a formal amendment preferable just to foreclose any *argument* that the expenditure for the Tis wasn’t appropriately authorized.

If you have any additional questions or concerns about the amendment, please let me know. Thanks!

Maura Kwiatkowski

From: Regina L. Nassen <Regina.Nassen@pcao.pima.gov>
Sent: Monday, August 13, 2012 5:34 PM
To: Chuck Huckelberry
Subject: RE: Accelr8 - Pima County lease

Cool. Makes sense

Sent from my Android phone using TouchDown (www.nitrodesk.com)

-----Original Message-----

From: Chuck Huckelberry [Chuck.Huckelberry@pima.gov]
Received: Monday, 13 Aug 2012, 5:01pm
To: Regina L. Nassen [Regina.Nassen@pcao.pima.gov]
Subject: RE: Accelr8 - Pima County lease

I had a follow up call with Larry and changed my mind. I would rather see them grow in place with the lower rate for three years as long as they understand the space is "as-is" and they are required to give us 6 month notice to move who we may have in the space out. This means that the worst we can do is experience the lower rate for 2 and half years.

From: Regina L. Nassen [mailto:Regina.Nassen@pcao.pima.gov]
Sent: Monday, August 13, 2012 1:24 PM
To: Chuck Huckelberry
Subject: FW: Accelr8 - Pima County lease

Chuck please note second point. Significant change in deal

Sent from my Android phone using TouchDown (www.nitrodesk.com)

-----Original Message-----

From: Owen, Jill Casson [jowen@swlaw.com]
Received: Monday, 13 Aug 2012, 12:08pm
To: Regina L. Nassen [Regina.Nassen@pcao.pima.gov]
CC: 'lawrence.mehren@gmail.com' [lawrence.mehren@gmail.com]; Mahoney, Dan [dmahoney@swlaw.com]; Simon, Marc G. [msimon@swlaw.com]
Subject: Accelr8 - Pima County lease

Regina,

Hope you had a fantastic weekend and didn't have to work too much. Attached is a slightly revised lease and a blackline reflecting those changes.

Do you have, or is the County preparing, Exhibit B? Could you forward when you have available?

Please note two changes. First, in section 2)b), I've clarified that failure to satisfy the employment condition is not a default under Section 11), and that the sole remedy is the rent increase. Second, Paragraph 1)c) has been modified to read that upon exercise of the option, the rent shall be at the then-current rent. The parties initially talked of 25,000 sf premises, so it seems that if Accelr8 expands into the additional area, it should be at the same rate for the remaining premises. A higher rate for the option area is a deterrent to expansion during the initial term.

Again, I'm sending to our client at the same time, so there may be additional comments.

It's my understanding that the TI exhibit is taking shape. If you receive a copy, will you forward for review?

Thanks,

Jill

Jill Casson Owen

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