



UTAH SYSTEM OF  
HIGHER EDUCATION

# MEMORANDUM

TAB E

October 30, 2020

## Utah State University – Nontraditional Arrangement Moab

Board Policy [R712, \*Nontraditional Arrangements for Development of Facilities on Campuses\*](#), requires the Board to approve institutional requests to use nontraditional financing arrangements. Similar to a financing arrangement approved by the former Utah State Board of Regents in 2014 for Southern Utah University, Utah State University requests approval to use New Market Tax Credit financing to cover \$2.9 million of construction inflation for the Moab Academic Building. The Moab Academic Building was approved by the former Utah State Board of Regents in November 2018 for \$11,000,000 of construction using donations and other non-state institutional funds. The cost of the project has since risen despite efforts to cost-engineer the project. New Market Tax Credits allow corporate investors to receive a tax credit against their federal income tax in exchange for making an equity investment in a development project in a historically low-income community. By partnering with U.S. Bank (which will receive the tax credits) and creating a private foundation (as required by IRS regulations), the university will receive \$2,900,000 of funding for the Moab Academic Building.

All contracts and agreements will be reviewed by the Office of the Attorney General to ensure compliance with state law and Board policy. The USU Board of Trustees reviewed and approved this request in their October 16 board meeting. Additional information on this financing arrangement is included in the attached letter from the institution and the additional document with questions and answers.

### **Commissioner’s Recommendation**

The Commissioner recommends the Board authorize Utah State University to enter into the nontraditional arrangement to use New Market Tax Credits for the Moab Academic Building as reviewed by the Office of the Attorney General.

### **Attachment:**

October 12, 2020

Commissioner Dave Woolstenhulme  
Utah System of Higher Education  
Board of Regents Building The Gateway  
60 South 400 West  
Salt Lake City, Utah 84101-1284

Subject: Request for Nontraditional Arrangement for Development of Facilities on Moab Campus

Dear Commissioner Woolstenhulme:

Utah State University desires approval to enter into an arrangement with Aggie Redrock Foundation as permitted by Utah Board of Higher Education Policy R712, Nontraditional Arrangements for Development of Facilities on Campuses which will allow for the development of the Moab Academic Building under terms consistent with the New Markets Tax Credits program of the United States Treasury Department. The net amount of funding available through the New Markets Tax Credit program to support construction of the Moab Academic Building is approximately \$2.9 million.

Prior to entering into the arrangement, the Attorney General's Office will have approved the contract documents as to form and legal authority, per section 5.6 of Policy R712. Below is a brief outline of the terms related to the ground and building leases.

### **Ground Lease Summary**

**Landlord:** Utah State University

**Tenant:** Aggie Redrock Foundation

**Rent Amount:** \$1.00 per Year

**Term:** 40 Years

Summary: The University, as owner of the land where the Moab Academic Building will be constructed, agrees to lease the real property upon which the facilities will be constructed to the Aggie Redrock Foundation for a period of 40 years. Upon any termination date of the lease, unencumbered title to all improvements, furnishings, fixtures, and equipment shall transfer to Utah State University.

Note: Aggie Redrock Foundation will be formed with a five member board. Two permanent board members will be USU employees: USU Vice President for Statewide Campuses and Vice President for Business and Finance. Three board members will be independent with close ties to USU

### **Building Lease Summary**

**Lessor:** Aggie Redrock Foundation

**Lessee:** Utah State University

**Rent Amount:** TBD

**Term:** 40 Years

Summary: Aggie Redrock Foundation, as owner of the building, agrees to lease the land and building to Utah State University for a term of 40 years.

The expectation and plan is that, at the end of seven years, the investor will have received the NMTC's in full and will exercise the provision that all documents, leases, titles, etc. transfer back to Utah State University and the structure will be closed.

Utah State University Board of Trustees approved the nontraditional arrangement for development of facilities on campus on October 16, 2020.

We appreciate your support and request that this item be submitted to the Utah Board of Higher Education during the October 30, 2020 Board meeting.

Sincerely,



David T. Cowley  
Vice President for Business and Finance

cc: Rich Amon, Associate Commissioner for Finance & Facilities  
Noelle Cockett, President

## Questions and Responses Regarding USU NMTC Financing Proposal

### 1. What is the New Market Tax Credit (NMTC) Program?

*The New Markets Tax Credit (NMTC) Program is a federal financial program in the United States. It aims to stimulate business and real estate investment in low-income communities in the United States via a federal tax credit. The program is administered by the US Treasury Department's Community Development Financial Institutions Fund (CDFI Fund) and allocated by local Community Development Entities (CDEs) across the United States. Tax credits are issued over a seven-year period through the CDE to business and real estate investors willing to invest in low-income communities in the United States.*

### 2. Why do you need to use Aggie Redrock Foundation?

*Aggie Redrock Foundation is a 501(c)(3) and a Qualified Active Low Income Community Business (QUALICB) established with the purpose of "operated exclusively for the benefit of, to perform the functions of, and/or to carry out the purposes of Utah State University." Expert legal counsel with years of NMTC experience recommended the organizational structure and processes to ensure investors, the Community Development Entity's, and Aggie Redrock Foundation remain independent and qualify for the New Markets Tax Credit (NMTC) Program as outlined by the US Treasury.*

### 3. Why are the ground and building leases longer than the seven-year tax credit period?

*The leases have to be for a term that approximates the useful life of the project, so that it represents a true business transaction. The term of the land lease must be at least 40 years to establish "ownership" of the project. Although financial forecasts show a longer project term, the project will end after seven years. The building lease was designed to match the term of the ground lease.*

### 4. What potential liabilities, financial or otherwise, does USU incur in this deal?

*The risks associated with this transaction are that we default on our obligations to build the project, or we change the use of the facility to a "prohibited" business (e.g. massage or tattoo parlor). These risks are remote and controlled to a great extent by us. We have the funds to build the project and all the necessary approvals. We will not convert the property to a prohibited use. Our potential liability for either of these risks would be the return of the investor's investment.*

### 5. What is the overriding value of this project?

*This project has been in the planning phase for over ten years. The NMTCs are designed to leverage private funds for investment in economic development. This project will expand capacity for degree-seeking students as well as students seeking technical education certificates. In addition, the USU Extension offices for Grand County will be housed in the facility. The project is recognized by Grand County and Moab City as a significant economic development project, as each entity has provided infrastructure funding support to bring this project to fruition.*

## RESOLUTION

A RESOLUTION OF THE BOARD OF HIGHER EDUCATION OF THE STATE OF UTAH (THE "BOARD") AUTHORIZING UTAH STATE UNIVERSITY ("USU") TO ENTER INTO A GROUND LEASE WITH IT AS LANDLORD AND AGGIE REDROCK FOUNDATION ("ARF") AS TENANT; AUTHORIZING USU TO ENTER INTO A BUILDING LEASE WITH IT AS LESSEE AND ARF AS LESSOR; AUTHORIZING USU TO EXECUTE A DEVELOPMENT SERVICES AGREEMENT WITH IT AS DEVELOPER AND ARF AS BUILDING OWNER; AUTHORIZING USU TO EXECUTE A CAPITAL PROJECT ADMINISTRATION MEMORANDUM OF UNDERSTANDING BETWEEN USU AND THE UTAH DIVISION OF FACILITIES CONSTRUCTION AND MANAGEMENT ("DFCM"); AUTHORIZING USU TO EXECUTE A FUND LOAN AGREEMENT WITH IT AS FUND LENDER AND USBCDC INVESTMENT FUND 348, LLC AS FUND BORROWER; AUTHORIZING USU TO EXECUTE A PLEDGE AGREEMENT WITH IT AS FUND LENDER AND USBCDC INVESTMENT FUND 348, LLC AS FUND BORROWER; AUTHORIZING USU TO EXECUTE AN INVESTMENT FUND PUT AND CALL AGREEMENT WITH IT AS PURCHASER AND U.S. BANCORP COMMUNITY DEVELOPMENT CORPORATION AS THE SOLE MEMBER OF USBCDC INVESTMENT FUND 348, LLC; AUTHORIZING USU TO EXECUTE A SUBORDINATION, NON-DISTURBANCE, AND ATTORNMENT AGREEMENT WITH ALLIANCE FINANCE FUND 9, LLC AS LENDER, USU AS UNIVERSITY, AND ARF AS QALICB; AUTHORIZING USU TO EXECUTE OTHER DOCUMENTS REQUIRED IN CONNECTION WITH A NEW MARKETS TAX CREDITS TRANSACTION; AUTHORIZING THE TAKING OF ALL OTHER ACTIONS NECESSARY TO THE CONSUMMATION OF THE TRANSACTIONS CONTEMPLATED BY THIS RESOLUTION; AUTHORIZING USU TO EXERCISE ITS CALL OPTION IN THE INVESTMENT FUND PUT AND CALL AGREEMENT IF AND WHEN IT DECIDES; AND RELATED MATTERS, ALL IN FURTHERANCE OF THE CONSTRUCTION OF A NEW USU CAMPUS IN MOAB, UTAH ("PROJECT").

WHEREAS, the Board is established and exists under and pursuant to Section 53B-1-103, Utah Code Annotated 1953, as amended; and

WHEREAS, pursuant Section 53B-20-101, Utah Code Annotated 1953, as amended, the Board is the successor to, and vested with, all powers and authority relating to all properties, real and personal, tangible and intangible, and to the control and management of the property which was held by the governing board of each institution of higher education prior to the creation of the board; and

WHEREAS, pursuant to Section 53B-20-103, the Board, on behalf of the institutions of higher education, may, among other things, acquire, purchase, construct, improve, remodel, add to, and extend capital facilities projects and buildings including necessary and related utilities; and

WHEREAS, pursuant to Section 53B-20-104(1), the Board shall approve all new construction, repair, or purchase of educational and general buildings and facilities financed from any source at all institutions subject to the jurisdiction of the Board; and

WHEREAS, pursuant to Chapter 21, Title 53B, Utah Code Annotated 1953, as amended, the Board may do the following in order to pay all or part of the cost of acquisition, purchase, construction, improvement, remodeling, addition to, extension, equipment, and furnishing of any project or building: (1) pursuant to Section 53B-21-101(1), borrow money on the credit of the income and revenues to be derived from the operation of the building, the imposition of student building fees, land grant interest, and net profits from proprietary activities, or from sources other than by appropriations by the Legislature to issuing institutions and, in anticipation of the collection of this income and revenues, issue negotiable bonds of the institution in an amount as the Board determines is necessary for these purposes; and provide for the payment of these bonds and the rights of their holders as provided in this chapter; and (2) pursuant to Section 53B-21-108(1), acquire a project under this chapter by purchase or lease of the facilities constituting the project under an agreement which provides the consideration for the purchase or lease to be paid in installments during a period not exceeding 40 years, whenever the Board, by resolution, finds and declares it preferable to the issuance of revenue bonds by the Board in the manner provided in this chapter; and

WHEREAS, the Board has found that there are adequate provisions for quality control in the design and construction of the Project; that there is provision to ensure compliance with appropriate state or local construction codes; that there is design provision for life-cycle costing criteria; that verification has been made by analysis of revenues and expenses, taking all costs of both methods into consideration, that the proposed arrangement can be expected to provide an equivalent facility at less total cost to USU than by use of a revenue bond issue with project construction managed by DFCM; and that verification has been made that the proposed arrangements set forth in the necessary contractual documents (1) are financially feasible for USU, and (2) adequately protect the interests of USU regarding termination, extension, or renewal of the lease, resolution of other eventualities that reasonably can be foreseen, and ultimate ownership of the Project; and

WHEREAS, the Board has found that the proposed arrangement provides significant benefits to the program, students, faculty, or staff of USU or serves a broad public interest that could not be served as well any other way; that the proposed outside developer, ARF, and the proposed use of the Project are proper and appropriate for the image and environment of USU; that compensation to USU, either in cash or in kind (or a combination), is adequate to justify any financial considerations provided by USU to ARF; and that the proposed arrangements set forth in contract documents are financially feasible for USU and adequately protect the interests of USU regarding its initial relationship with ARF, the resolution of eventualities that can reasonably be foreseen, USU's right to control appearance of the Project, external remodeling/additions, level of building and landscape maintenance, parking rights, exterior graphics, access to institutional utility systems and access roads, and termination, extension, or renewal of the lease, and ultimate ownership of the Project; and

WHEREAS, the Board has further found and hereby declares that is preferable to construct the Project through the proposed arrangement rather than through the issuance of revenue bonds by the Board in the manner provided under Chapter 21, Title 53B, Utah Code Annotated 1953, as amended; and

WHEREAS, the Board desires USU to enter into agreements with ARF, a Utah nonprofit corporation, pursuant to which ARF will obtain financing through a New Markets Tax Credits transaction, which will enable ARF to (i) fund a portion of the construction of the Project, and (ii) pay costs in connection therewith; and

WHEREAS, USU's obligations under the Building Lease and related agreements shall be payable solely from the revenues and other moneys pledged therefor and shall not constitute nor give rise to a general obligation or liability of the Board or constitute a charge against its general credit or that of USU; and

WHEREAS, the property that shall be subject to a trust deed that will be granted by ARF to Alliance Finance 9, LLC to secure its obligations under the Loan Agreement and the Secured Promissory Notes referred to therein executed in connection with the New Markets Tax Credits transaction shall be its leasehold interest and, as a result, the rights granted by the trust deed shall be junior and inferior to USU's rights as Lessor of the Ground Lease and no deficiency judgment as a result of such trust deed shall lie and no liability for breach of the agreements secured thereby shall be imposed against USU, the Board, the State of Utah, the proceeds of ad valorem taxes, or appropriations of the Legislature; and

WHEREAS, the Board desires to grant to USU the authority to execute the final documents involved in the New Markets Tax Credits transaction provided that the final documents are first approved as to form and legal authority by either the Attorney General's Office or the General Counsel of USU;

NOW, THEREFORE, BE IT RESOLVED BY THE UTAH BOARD OF HIGHER EDUCATION, AS FOLLOWS:

Section 1. All terms defined in the foregoing recitals hereto shall have the same meanings when used herein.

Section 2. All action heretofore taken (not inconsistent with the provisions of this resolution) by USU and its officers that are directed toward the entering into the financing documents for the New Markets Tax Credits transaction are hereby ratified, approved and confirmed.

Section 3. For the purpose of providing funds to (i) construct the Project and (ii) pay costs in connection therewith, the Board hereby authorizes USU to lend \$10,220,585 to USBCDC INVESTMENT FUND 348, LLC as part of the \$14,450,000 loan that Alliance Finance 9, LLC will make to ARF to construct the Project.

Section 4. The appropriate officers of USU are hereby authorized to take all actions necessary or reasonably required by the documents associated with the New Markets Tax Credits transaction to carry out, give effect to and consummate the transaction as contemplated thereby and are authorized to take all action necessary in conformity with the above referenced statutes.

Section 5. The Board hereby authorizes and approves USU to exercise its call option in the Investment Fund Put and Call Agreement if and when it desires without the need of obtaining further approval from the Board.

Section 6. The appropriate officials of USU are authorized to make any alterations, changes or additions in the Ground Lease, Building Lease, Development Services Agreement, Capital Project Administration Memorandum of Understanding, Fund Loan Agreement Indenture, Pledge Agreement, Investment Fund Put and Call Agreement, and Subordination, Non-Disturbance, and Attornment Agreement, or any other document herein authorized and approved which may be necessary to correct any errors or omissions therein, to remove ambiguities therefrom, to conform the same to other provisions of such instruments, to the provisions of this Resolution or any resolution adopted by the Board, or the provisions of the laws of the State of Utah or the United States and the final agreement with the bank and other participants, all within the parameters established herein.

Section 7. The appropriate officials of USU are hereby authorized and directed to execute and deliver for and on behalf of USU and the Board any or all additional certificates, documents and other papers and to perform all other acts they may deem necessary or appropriate in order to implement and carry out the matters authorized in this Resolution and the documents authorized and approved herein.

Section 8. Upon execution of the Ground Lease, the Building Lease, the Development Services Agreement, the Capital Project Administration Memorandum of Understanding, the Fund Loan Agreement, the Pledge Agreement, the Investment Fund Put and Call Agreement, the Subordination, Non-Disturbance, and Attornment Agreement, the Loan Agreement, the Unconditional Guaranty of New Markets Tax Credits, the Trust Deed, the university's obligations that are created thereby will constitute special limited obligations of USU payable solely from and to the extent of the sources set forth in the Building Lease. No provision of this Resolution or any other instrument authorized hereby, shall be construed as creating a general obligation of USU or the Board, or of creating a general obligation of the State of Utah or any political subdivision thereof, nor as incurring or creating a charge upon the general credit of USU or the Board.

Section 9. After the transaction described in this Resolution has closed, this Resolution shall be and remain irrevocable until the principal of, premium, if any, and interest on the loans involved are deemed to have been fully discharged in accordance with their terms.

Section 10. If any provisions of this Resolution should be held invalid, the invalidity of such provisions shall not affect the validity of any of the other provisions of this Resolution.

Section 11. All resolutions of the Board or parts thereof inconsistent herewith, are hereby repealed to the extent only of such inconsistency. This repealer shall not be construed as reviving any bylaw, order, resolution or ordinance or part thereof.

Section 12. This Resolution shall become effective immediately upon its adoption.



PASSED AND APPROVED BY THE UTAH BOARD OF HIGHER EDUCATION THIS 30th  
DAY OF OCTOBER, 2020.

UTAH BOARD OF HIGHER EDUCATION

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[SEAL]

ATTEST:

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Secretary

After the conduct of other business not pertinent to the above, the meeting was, on motion duly made and seconded, adjourned.

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[SEAL]

ATTEST:

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Secretary

STATE OF UTAH                    )  
  : ss.  
COUNTY OF SALT LAKE    )

I, \_\_\_\_\_, do hereby certify that I am the duly qualified and acting Secretary of the Utah Board of Higher Education.

I further certify that the above and foregoing constitutes a true and correct copy of an excerpt of the minutes of a meeting of said Board held on October 30, 2020 and of a resolution adopted at such meeting, as said minutes and resolution are officially of record in my possession.

IN WITNESS WHEREOF, I have hereunto subscribed my official signature and impressed.

\_\_\_\_\_  
Secretary

[SEAL]