Cool Pools Rule:
Development and Financing of 21st Century Student Housing

Public Private Partnerships and Other Private Housing Development

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Background

For those who were college students during the 60s, 70s and 80s, "student housing" generally fit into one of two categories: on-campus dormitories or "residence halls" and off-campus single family homes and traditional multi-family apartment buildings. For purposes of this paper, the definition of "student housing" used is that of Axiometrics Inc., an apartment market research firm: "housing geared toward students who attend a college or university."[1]

"Dorms" were easily recognizable by exterior architectural features which were consistent with other academic buildings on campus, and were often grouped in clusters around "quads" or "yards." On the interior, dorms of that era were practically indistinguishable from college to college: cinder block walls, bunk beds, utilitarian furniture, tile floors, common bathrooms and, if lucky, a wall-mounted telephone.[2] Another category in the 60s and 70s, the fraternity or sorority house, often on-campus or just on the perimeter of university property, had its own identifiable characteristics -- think *Animal House*.

Off-campus housing features were equally predictable. While not necessarily "geared toward students," single family homes within a mile or two of campus were often leased by four or more students who were jointly liable for the monthly rent under a lease for a 12-month term. These houses came mostly unfurnished, and were filled by residents with second hand furniture and few, if any, modern conveniences and often featured unappreciative neighbors and street parking with night-time parking bans. The students residing in these houses also were forced to evade detection of violating the limits imposed by local ordinance on the number of unrelated persons permitted to live together.[3]

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[1] *A Class of Its Own, A Guide to Understanding Investment in the Student Housing Sector*, p. 2 © 2014, Axiometrics, Inc., http://cdn2.hubspot.net/hub/301953/file-1910966995-pdf/Student_Housing-A_Class_of_Its_Own_FINAL.pdf?__hssc=42720378.10.1433692374055&__hstc=42720378.17a8cd7d377308909490e956402ad272.1433536082714.1433536082714.1433692374055.2&hsCtaTracking=f7f3aaa0-b4fb-484d-9bb6-17a657ccfa15%7Cb6cf46f0-d80b-425b-a3bf-f8f2eff43c8b (last accessed June 7, 2015).

[2] The "room draw" method for selecting dorm rooms has been unchanged for at least 140 years. The Harvard University Catalogue for 1873-1874 described the process in terms easily recognizable to current students: "the assignment of rooms will be made, absolutely by lot." *The Harvard University Catalogue 1873-1874*, Charles A. Sever, pub., 1874, p. 98.

[3] See pp. 4 - 8 below, for this and other means by which local municipalities have discouraged the use of single family homes for student housing.

Off-campus apartment projects in which students resided were not even considered as a separate asset class from traditional apartment complexes. With the exception of certain "married student housing" constructed by or for universities, students residing in apartment buildings with other students faced the same leasing arrangements as non-student residents: annual lease terms versus school-year terms and rent on a per-unit versus per-bed basis. The student housing product of the current decade breaks the mold in which dorms, off-campus homes, and non-student geared housing of the prior decades were cast.

University-provided housing for students had its origins in 12th century "rooms" at Oxford and Cambridge in England. On-campus living in the United States dates back at least to the 1760s when Columbia University opened College Hall (1760) with sleeping rooms for undergraduates as well as professors[4], and Harvard College opened Hollis Hall (1763). Hollis Hall, whose residents over the last 250 years have included Ralph Waldo Emerson, Henry David Thoreau and John Updike, is still in use today as a dormitory for first year students.[5]

Throughout most of the 20th century, universities constructed dormitories on a reactive versus a proactive basis – when, in a period of expanding enrollment, existing dorms were full. As late as 1958, the entire nine campus University of California system could house only 2,900 students. By, 1970, there was campus housing for nearly 20,000.[6] The trend to more modern housing options for university students picked up pace in the decade beginning in the mid-1990s when only 17% of the residence halls built on campus were in the traditional dorm style as opposed to contemporary apartment units.[7] In that same time period – starting around 1994 – both private and public universities saw the opportunity to partner with private developers, contractors, and property managers for the development of student housing projects on and off campus.

One of the nation's largest and most successful student housing REITs, American Campus Communities (NYSE: ACC), undertook its first student housing project in 1994 on the campus of a public university at Langston University in Oklahoma. Since then, ACC has developed more than $4.2 billion in student housing for its own account and that of its university clients. Albeit the largest player in terms of projects owned, ACC is but one of at least twenty active developers in the student housing market. Another REIT, Education Realty Trust, Inc. (NYSE: EdR) is in the middle of a public private partnership (P3) that began in 2011 with the

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[4] The student rooms in College Hall were spacious compared to 20th century dorms or even Manhattan apartments of today. Each residence included a 378 square foot sleeping area for two students with two separate 81 square foot study areas, a total living area of 540 square feet. http://www.wikicu.com/History_of_student_housing (last accessed June 7, 2015)

[5] Harvard room rates, however, have not remained the same. In 1874, room rents were $44 per year for rooms in Hollis, with the most expensive rooms ($300 per year) being in Matthews Hall. *The Harvard University Catalogue 1873-1874*, *supra*, at 100. For the 2015 academic year, room and board at Harvard is $14,669, of which $9,009 is the room cost.

[6] *The Evolution of the College Dorm*, © 2015, Time Magazine. http://content/time.com/time/photogallery/0,29307,1838306_1759877,00.html (last accessed June 7, 2015).

[7] Id. http://content/time.com/time/photogallery/0,29307,1838306_1759889,00.html (last accessed June 7, 2015).

University of Kentucky, involving over 6,500 new student housing beds. In April 2015, Campus Apartments LLC, a private, vertically integrated developer, owner and manager of student housing, announced that it had teamed up with Clarion Partners, a real estate investment manager, to form a $403 million closed-end fund, Campus-Clarion Student Housing Partners LP, to invest in student housing projects around the United States.

Several factors have contributed to the boom in student housing construction and of the increased role of public private partnerships (P3) in that sector:

- An aging campus housing stock with less university-owned space for new housing.
- A boom in college student enrollment with a corresponding demand for greater amenities by Generation Z.
- A desire by universities to focus more of its resources on academic growth and to move construction and operation of residence halls to an "off balance sheet" position.
- A need to expedite the development and construction process which is handled best by the private sector.
- Changes in state laws, particularly tax exemption laws, which have promoted P3 opportunities.
- Zoning, municipal and NIMBY pressures on single-family off-campus housing.

Many universities suffer from an aging and short supply of on-campus housing. Until a new facility opens in 2017, Northwestern University's most recently constructed residence hall was built in 2002 and some dormitories are approaching their centennial. Liberty University closed admissions for the fall of 2015 because it reached full capacity in its student housing. The senior vice-president for finance and business services at Miami University in Oxford, Ohio, predicted that demand would exceed capacity by 500 to 600 beds by 2017.[8] There are over 148,000 students enrolled in Boston-based colleges with 36,305 living on campus. Boston University, alone, claims to house 11,000 of its 16,000 students on campus.[9]

Population trends confirm the demand for more student housing for those in the "Generation Z" age group.[10] The United States Department of Education has projected that enrollment in all post-secondary degree-granting institutions will grow from approximately 22,000,000 to 24,000,000 students from 2015 through the fall of 2022, of which approximately

[8] http://www.multihousingnews.com/newsletters/daily-newsletter/mhndailyfeature/protests-sway-miami-u-on-student-housing-site/1004120087.html (last accessed June 10, 2015). Likewise, the May 2015 room draw at Dartmouth left 187 students without fall term housing. http://thedartmouth.com/2015/05/27/room-draw-leaves-187-without-housing/ (last accessed June 13, 2015).

[9] https://www.bostonglobe.com/metro/2015/04/08/more-college-students-living-boston-campuses/tbSJ3Ab9Bx47pRR9JQmpMO/story.html (last accessed June 10, 2015).

[10] According to the U.S. Chamber of Commerce, the current generation – "Generation Z" – includes those born in the year 2000 and thereafter. Thus, the first class of Generation Z students should be entering college in 2018 and, with luck, graduating in 2022. *The Millennial Generation*, Research Review, p. 2, © 2012, National Chamber Foundation.

15,000,000 will be full-time students. Public university enrollment is expected to grow to approximately 17,500,000 by 2022, a 14% increase from 2011.[11]

The housing now being constructed for these Generation Z students, and the Millennials before them, feature amenities ranging from resort-style swimming pools and hot tubs to outdoor fireplaces, volleyball courts and rock climbing walls. By example, the NRP Group's "Edge 1120" – a 199-unit, 599-bed student living facility which opens across the street from the University of Toledo campus for the 2015-2016 school year – offers modern fitness facilities, a clubhouse with multiple flat screen televisions, an outdoor kitchen with bar-style seating, outdoor grill and fire pits, resort-style swimming pool and a stand-up tanning booth. Cool pools and similar amenities rule the day among today's college students.

Local Regulations Addressing "The Hubbub of an 'Animal House'"[12]

The impact on residential neighborhoods of groups of unsupervised college students living together in off-campus housing is not simply the stuff of movies. One court described the effects of the large number of student rental properties on a suburban Philadelphia neighborhood:

> [The] neighbors testified about excessive noise from radios, stereos, and parties that last through the early morning hours; cars parked on sidewalks which force neighborhood children to walk or ride their bicycles in the street in order to pass student houses; constant traffic and parking congestion; trash left on the premises of student houses as well as scattered on neighbors properties; and public urination.[13]

Faced with these grievances, communities resorted to various strategies—particularly the use of zoning regulations--to restrict, or at least discourage, student housing in residential neighborhoods. The Supreme Court green-lighted this approach in *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974) when it rebuffed a constitutional challenge brought by a landlord renting to six SUNY students to a zoning ordinance that defined "one-family dwellings," to mean those occupied by "persons related by blood, adoption, or marriage, living and cooking together as a household unit" or alternatively, occupied by "[a] number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit through [*sic*] not related by blood, adoption, or marriage." *Id.* at 2, 94 S.Ct. at 1537-38. In upholding the constitutionality of the ordinance, the Court observed that the village's police power was not limited to eliminating "filth, stench, and unhealthy places," but could also properly be exercised to preserve neighborhoods "where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Id.*

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[11] Hussar, W.J., and Bailey, T.M. (2013), *Projections of Education Statistics to 2022* (NCES 2014-051), U.S. Department of Education, National Center for Education Statistics. Washington, DC; U.S. Government Printing Office.

[12] *Ames Rental Property Ass'n v. City of Ames*, 736 N.W.2d 255, 262 (Iowa 2007).

[13] *Farley v. Zoning Hearing Bd. of Lower Merion Tp.,* 161 Pa. Cmwlth. 229, 636 A.2d 1232 (1994).

Three years after *Belle Terre*, however, the Supreme Court narrowed some of the limitations that could be imposed on "the types of groups" who could occupy single family dwelling units by a restrictive definition of "family." In *Moore v. City of East Cleveland*, *Ohio,* 431 U.S. 494, 498, 97 S.Ct. 1932, 1935, 52 L.Ed.2d 531 (1977), the Court cautioned that a zoning ordinance could not constitutionally carve out categories of ***related*** individuals, as the East Cleveland ordinance had, in defining a "family" in order to restrict the types of people living in single family residences. *Id.* at 498-99, 97 S.Ct. at 1935.

Armed with these decisions, communities faced with complaints engendered by private off-campus student housing[14] enacted ordinances that attempted to restrict its density and scope. Most, with at least one notable exception,[15] have withstood challenges to their enforceability. Keep in mind, these zoning regulations originally intended to address problems at student residences owned by private individual landlords, apply with equal force to large projects developed in conjunction with colleges and universities.

The Philadelphia suburb whose residents' grievances with student housing were described in the opening paragraph created a special "student home" use, permitted only as a special exception, and which restricted occupancy to "no more than three (3) students."[16] The ordinance also imposed distance restrictions between student homes in most residential districts.[17] The Pennsylvania Commonwealth Court determined the ordinance passed muster under Pennsylvania's constitution.[18]

One year earlier, however, the Court of Appeals of Maryland struck down Prince George's County's "mini-dorm" ordinance that directly regulated and restricted "off-campus residence[s]" which housed "at least three (3), but not more than five (5), individuals, all or part of whom are unrelated to one another by blood, adoption, or marriage and who are registered full-time or part-time students at an institution of higher learning."[19] The court distinguished Prince George's' ordinance from that at issue in *Belle Terre* because it differentiated between who could dwell on certain property based not "on the ***nature of the property***, such as a

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[14] On occasion, residents have also challenged renovations to ***on-campus*** housing under local zoning laws. *See, In re Champlain College Maple Street Dormitory*, 186 Vt. 313 (2009).

[15] *Kirsch v. Prince George's County*, 331 Md. 89, 93, 626 A.2d 372, 373-74 (1993).

[16] *Farley*, 161 Pa. Cmwlth. at 234-35, 636 A.2d at 1234-35. *See also, Cellini v. Scott Tp. Zoning Bd.,* Cmwlth. Ct. of Pa. No. 202 C.D. 2011, 2012 WL 8668126 (Jan. 12, 2012) (construing township ordinance allowing "student housing facility" as a special exception in certain residential districts).

[17] *Farley*, 161 Pa. Cmwlth. at 235, 636 A.2d at 1235.

[18] Plaintiffs' challenges to the ordinance under the U.S. Constitution were also rejected in federal court, *Smith v. Lower Merion Township*, No. 90-7501, 1992 WL 112247, (E.D. Pa., May 7, 1992) *aff'd* 995 F.2d 219 (3rd Cir. 1993). However, in 2015, House Bill 809 was introduced in the Pennsylvania General Assembly which, if passed, would prohibit all municipal ordinances that limit the occupation of a dwelling unit based on an individual's enrollment in a post-secondary educational institution or the number of unrelated individuals sharing the dwelling.

[19] *Kirsch*, 331 Md. at 93, 626 A.2d at 373-74.

fraternity house or a lodging house," but based on "the ***occupation*** of the persons who would dwell within."[20] That distinction, the Maryland court found, violated the equal protection of laws under both the federal and state constitutions.

Other jurisdictions have avoided the equal protection issue raised by Prince George's County's "mini dorm" ordinance by limiting its general definition of "family" to a small number of unrelated persons "living together as a household unit." Columbia, South Carolina's code defining a "family" as "a group of individuals, of not more than three persons, not related by blood or marriage but living together as a single housekeeping unit,"[21] withstood a challenge under that state's due process clause. Although the ordinance did not distinguish between student and non-student occupants, the court specifically noted that its analysis of the ordinance's legality took into account that "the City is home to several colleges and universities."[22]

Other ordinances have used the term, "functional family," to regulate the type and number of occupants in a single-family residence. Some specify a limit on the number of unrelated people who can form a "functional family;[23] while others do not.[24] These regulations identify specific attributes of a household that must be met to qualify as a "functional family," such as living and cooking together, sharing expenses for food, utilities, and the like, and evidence that "the group is permanent and stable."[25] Some create a presumption that more than a certain number of unrelated people cannot be the functional equivalent of a traditional family.[26]

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[20] *Id.* at 107, 626 A.2d at 381.

[21] Columbia, South Carolina City Code, § 17-55.

[22] *McMaster v. Columbia Bd. of Zoning Appeals*, 395 S.C. 499, 508, 719 S.E.2d 660, 664 (2011). *See also, Ames Rental*, 736 N.W. 2d at 261 (likewise noting "it cannot be ignored that Ames is a university campus city," in finding that a zoning regulation restricting the number of unrelated persons who can live together in single-family housing to three).

[23] *See e.g.,* Ann Arbor, Michigan Code, § 5.7 (4) ("functional family means a group of no more than 6 people plus their offspring"); Town of Henrietta, N.Y., Local Law No. 3 of 2011 ("Family includes…Four or more persons occupying a dwelling unit and living together as a traditional family or the functional equivalent of a traditional family…It shall be presumptive evidence that four or more persons living in a single dwelling unit who are not related by blood, marriage or legal adoption do not constitute the functional equivalent of a family.").

[24] *See e.g.,* Piscataway, N.J., Code § 21-3 (family means one or more persons who occupy a dwelling as a single non-profit housekeeping unit with no restriction on number of unrelated persons).

[25] Town of Henrietta, N.Y, Local Law No. 3 of 2011. Evidence of "permanency and stability" include:

(a) The presence of minor dependent children regularly residing in the household who are enrolled in a local school.
(b) Members of the household having the same address for the purpose of voter registration, driver's license, motor vehicle registration and filing taxes.
(c) Members of the household are employed in the area.
(d) The household has been living together as a unit for a year or more, whether in the current dwelling unit or other dwelling units.
(e) Common ownership of the furniture and appliances among the members of the household.
(f) The group is not transient or temporary in nature.

[26] Albany, N.Y. City Code, § 375-7 [B]; Town of Henrietta, N.Y., Local Law No. 3 of 2011.

Regulations using the "functional family" definition have uniformly been upheld as constitutional and have generally been effective in limiting the number of students who can occupy a single-family residence.[27] One court explained the policy behind such ordinances:

> At issue here is not plaintiffs' desire to rent their buildings to functional families, but to rent them to unrelated, transient college students.…They do not represent a group that is bonded together and intends to live as a unit for the foreseeable future, but a group of casual friends living together for the limited duration of their education.[28]

Less common and less effective, but nonetheless creative, are challenges to the occupancy of unrelated students in multi-family rental properties on the theory that they are subject to regulations pertaining to boarding or lodging houses. In Massachusetts, "[t]he lodging house act was enacted approximately one hundred years ago, during World War I, largely in response to concerns about immoral conduct and the spread of venereal disease."[29] Defined as "lodgings let to four or more persons not within the second degree of kindred to the person conducting it," including "fraternity houses and dormitories of educational institutions," lodging houses are licensed by the State of Massachusetts and are subject to a number of monitoring and reporting requirements, non-compliance with which is punishable by criminal sanction.[30] The Massachusetts Supreme Judicial Court made short work of the City of Worcester's argument that leasing two-family and three-family units to groups of four unrelated college students constituted operating lodging houses in violation of the act: "Construing 'lodgings' as the city suggests would lead to absurd results and selective enforcement."[31]

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[27] *See e.g., Morissey v. Apostol*, 75 A.D.3d 993, 996, 906 N.Y.S.2d 639 (3rd Dep't 2010) (upholding ordinance restricting single-family dwellings to no more than four unrelated persons and who must additionally live as "functional equivalent as a traditional family"); *State v. Champoux*, 252 Neb. 769, 777, 566 N.W.2d 763, 768 (1997) (upholding ordinance providing that "family may include not . . . more than two persons who are unrelated"); *City of Brookings v. Winker*, 1996 S.D. 129, ¶ 2, 554 N.W.2d 827, 828 (upholding ordinance "limit[ing] to three the number of unrelated adults who may live within" a single-family unit); *Dinan v. Bd. of Zoning Appeals of Town of Stratford*, 220 Conn. 61, 65, 595 A.2d 864, 866 (1991) (upholding an ordinance restricting "the letting of rooms to not more than two persons in addition to the family of the occupant of the family dwelling unit").

[28] *Stegeman v. City of Ann Arbor*, 213 Mich. App. 487, 493, 540 N.W.2d 724 (1995) (upholding an ordinance restricting single-family dwellings to no more than six unrelated people living as a functional family). *See also State v. Hwang*, Sup. Ct. N.J., Div. No. 51-2013, 2015 WL 966155 (March 6, 2015) (finding defendant in violation of ordinance by renting to five Rutgers students who did not qualify as "a single non-profit housekeeping unit"). *But see, Borough of Glassboro v. Vallorosi*, 117 N.J. 421, 424 (1990) (finding ten students who ate meals together, "cooked for each other, and generally shared household chores, grocery shopping, and yard work," and had a common checking account, were the "functional equivalent of a family").

[29] *City of Worcester v. College Hill Properties, LLC*, 465 Mass. 134, 137, 987 N.E.2d 1236, 1240 (2013).

[30] Mass G.L. c. 140, §§ 24, 26, 27.

[31] *City of Worcester*, 465 Mass. at 144-45, 987 N.E.2d at 1245.

The challenge to the rental of a house—divided into two apartments—to eleven Bowdoin College students on the ground that it constituted a prohibited boarding house, rather than two allowable household dwellings, met with a similar lack of success.[32] The court rejected the contention that a group of unrelated students could not constitute a household.[33] It explained: "[T]o hold otherwise would open an inquiry into what is of no concern to the Town: are the tenants blood relatives; married; engaged; significantly committed; how committed and for how long; and if not any of those things, then why are they living together?"[34] In contrast to "more curious" ordinances that do inquire into those types of matters,[35] the Maine court left those considerations behind in determining the town's code did not prohibit groups of unrelated college students living together.

One final approach to restricting the development of student housing is worth mention. Hamden, Connecticut, which has ordinances specifically regulating student housing,[36] has, nevertheless, had a persistent problem with the activities of students of Quinnipiac University and the University's non-responsiveness to those complaints. The posting of a video of Quinnipiac's President at a large off-campus year-end party at university-owned houses proved to be a particular irritant.[37] The situation prompted the state representative for the district that includes Hamden to introduce legislation permitting municipalities to levy taxes on "residential real property intended for use or used as student housing," by a private tax-exempt university[38] which are currently exempt from taxation under Connecticut law.

Town and gown tensions are nothing new. Their importance grows, however, in relation to the scale of the project proposed to meet current-day expectations for student housing. To the extent such tensions lead to challenges to property tax exemptions – as at Quinnipiac – they strike at the heart of a key benefit to public private partnerships.

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[32] *Adams v. Town of Brunswick*, 987 A.2d 502 (Sup. Jud. Ct. Me. 2010).

[33] *Id.* at 507.

[34] *Id.* at 507-08.

[35] *Supra* at n. 25.

[36] Hamden, Ct. Zoning Regulations, §§ 670, et seq.

[37] https://www.youtube.com/watch?v=AKHNEQ2qUQI

[38] Conn. H.B. 6965 reads, in part: "[A]ny residential real property intended for use or used as student housing, except a dormitory, that is held by or on behalf of such entity, shall be taxable by a municipality in accordance with the provisions of chapters 201, 203 and 204 of the general statutes. For purposes of this subsection: (1) 'Residential real property' means any house or building, or portion thereof, which is rented, leased or hired out to be occupied as a home or residence of one or more students, and (2) 'dormitory' means a building containing living or sleeping facilities consisting of twenty or more beds intended for use or used as student housing and maintained by a private nonprofit institution of higher learning, as defined in section 12-20a of the general statutes."

Property Tax Exemptions and the Structure of P3 Student Housing Deals

An advantage over private developers and owners that public and private universities have in their ownership and operation of student housing facilities is the availability of property tax exemptions. However, state property tax exemptions vary significantly and with those variations come differences in structures available for dealing with private owners and developers.

Ohio law exempts from taxation "public colleges and academies and all buildings connected with them, and all lands connected with public institutions of learning, not used with a view to profit." R.C. §5709.07(A)(4). Private universities in Ohio are governed by R.C. §5709.12(B) which exempts "real and tangible personal property belonging to institutions that is used exclusively for charitable purposes…." "Real property … belonging to a charitable or educational institution … shall be considered as used exclusively for charitable or public purposes by such institution … if it … is used by such institution … or by one or more other such institutions … under a lease, sublease, or other contractual arrangement…[f]or other charitable, educational, or public purposes [or is] … made available under the direction or control of such institution … for use in furtherance of or incidental to its charitable, educational, or public purposes and not with the view to profit." R.C. 5709.121(A).

Under one method to take advantage of the Ohio exemptions while shifting the cost of construction to private developers, university-owned land is ground leased to a private developer for a term (typically 55 years or less), and the developer constructs the student housing and master leases it back to the university to operate as student housing. The exempt university is treated as the owner of both land and building under the "single estate theory" of property taxation and is also the entity using it in furtherance of its educational purposes.[39]

Where the property is not *owned* by the university and/or used *exclusively* for its exempt purpose, the Ohio Supreme Court has been quick to deny the tax exemption. In *Equity Dublin Assocs. v. Testa*, 142 Ohio St.3d 152, 2014-Ohio-5243, exemption was sought for land and buildings owned by a private developer but leased to the university for classroom purposes. The Supreme Court rejected the claim that the facilities were "buildings connected with" the university and held that the reference in R.C. 5709.07(A)(4) to "public colleges and academies is intended to refer to property insofar as it is owned and occupied and used by those institutions…" *Id*. at ¶40.

Likewise, in *Athens Cty. Aud. v. Wilkins*, 106 Ohio St.3d 293, 2005-Ohio-4986, two privately owned dormitories were leased to a state technical college and listed as "campus housing" in college literature. The dorms housed only students of the college. The college set rules for use of the dorms, coordinated room assignments and move-in and move-out dates, collected student rents, and remitted to the private owner the revenue remaining after deducting other operating expenses and a marketing fee. *Id*. at ¶4. Rejecting the argument that these dorms were "connected with" or "used by" the college, the Court denied the right to tax

[39] Ohio does not tax leasehold interests in real estate. R.C. 5701.02; *Franklin Cty. v. Lockbourne Manor, Inc*. (1958), 168 Ohio St. 286, 154 N.E.2d 147.

exemption under R.C. 5709.07(A)(4) because the building owner could not "overcome its status as a private, for-profit company not engaged in the business of education." *Id*. at ¶22.[40]

The interplay of requirements for university "ownership" and/or "exclusive use" are subject to variations from state to state. In North Carolina, student housing for a public university is tax exempt whether the public university owns legal or equitable title to the housing. In 1999, Appalachian State University established the non-profit Appalachian Student Housing Corporation (ASHC) to fund construction of a 10-building, 768-bed student housing complex and oversee its operations. The complex leases only to ASU students and lease terms parallel the academic year. Complaints regarding the operation of the facility go through the university. The property is held in trust by ASHC for the benefit of the university, but the university cannot obtain legal title until 2025.

Holding that equitable title as beneficiary of the ASHC trust was sufficient to establish that the property "belonged" to the state university, the North Carolina Court of Appeals upheld the property's tax exemption. *Appeal of Appalachian Student Housing Corp*., 165 N.C. App. 379, 598 S.E.2d 701 (2004).

As to the degree to which housing must be used exclusively for students of the university, the Supreme Court of Texas recently held that a student housing facility owned by the Texas Student Housing Authority which housed nearby Texas A&M students during the school year, did not lose its tax exempt status by hosting summer camps and other programs for high school students. *Texas Student Housing Authority v. Brazos County Appraisal District*, Texas Supreme Court Case No. 13-0593, __ S.W.3d __, 2015 WL 1870013 (April 24, 2015). The County Appraisal District had voided the Authority's property tax exemption and assessed millions of dollars in back taxes. In reversing that decision, the Texas Supreme Court held that *ownership* by the Authority was sufficient to entitle it to tax exemption, and the applicable exemption statute did not condition the exemption upon exclusive use by university students. *Id*. at 7.

Other states have adopted statutes and programs specifically geared to opening up opportunities for public private partnerships in student housing. Georgia and Kentucky provide two examples.

<u>The University System of Georgia P3 Model</u>

In November 2014, a statewide ballot measure known as the "Georgia Private College Buildings Tax Exemption Referendum 1" was passed by the voters with 73.7% of the vote. The measure, which was placed on the ballot by the Georgia state legislature and signed by Governor Deal in April 2014, extends the "public property" ad valorem tax exemption to privately held and operated student dormitories and parking decks that are contractually obligated to serve

[40] In a case where a private university leased a house to a private, non-profit fraternity for use as student housing for its members, the Ohio Supreme Court rejected the university's claim of property tax exemption under R.C. 5709.12 and 5709.121(A) because "providing housing for the exclusive use of a private fraternal organization is not in furtherance of or incidental to CWRU's educational purpose." *Case W. Res. Univ. v. Wilkins*, 105 Ohio St.3d 276, 2005-Ohio-1649, at ¶31. A key factor in the Court's decision was that "[u]nlike the other residence halls at CWRU, occupancy of the House is not open to just any student enrolled at CWRU." *Id*.

universities within the University System of Georgia. Passage of this referendum was touted as making Georgia the "biggest test of private dorms."[41]

The tax exemption measure was just one part of an overall restructuring of the ownership and financing of state university housing in Georgia.[42] Prior to that, in order to finance the construction or rehab of residence halls within the state university system, the Board of Regents (BOR) would enter into a ground lease with an entity formed by a foundation affiliated with the particular university. The entity would construct the project in accordance with specifications approved by the BOR. A local or state authority would issue bonds, the proceeds of which were loaned to the entity to finance construction of the student housing. The BOR would enter into an annual rental agreement for use of the facility with the rent sufficient for the entity to pay debt service and to maintain appropriate reserves for replacement and repair. The BOR would own the land and buildings free and clear upon expiration of the ground lease and retirement of the bonds.[43]

By June 2013, the University System of Georgia (USG) had long-term capital lease obligations in excess of $3.6 billion for facilities financed under the former method. A new P3 was devised with the intent of "de-levering its balance sheet, while providing a high quality and affordable campus experience." RFQC, at 5. The USG had over 62,000 beds in 31 different post-secondary state institutions. The process of identifying its Phase 1 P3 partner (the "concessionaire") was begun by the BOG as soon as Governor Deal signed the legislation putting the student housing tax exemption measure on the ballot. The RFQC issued in April 2014 for Phase 1 involved nine state universities encompassing the transfer of responsibility for 6,195 existing beds and the construction of 3,683 new beds on those nine campuses. Notably, the University of Georgia was not included among the nine institutions in Phase 1.

Nine potential concessionaires submitted responses to the RFQC from which the BOR selected three to compete in a Request for Proposal process. On November 12, 2014, barely one week after the Georgia Private College Buildings Tax Exemption Referendum 1 was passed by the voters, the BOR selected Corvias Campus Living as the concessionaire for Phase 1. A Master Concession Agreement (MCA) establishing a 65-year P3 between Corvias and the BOR was entered into shortly thereafter.

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[41] http://diverseeducation.com/article/62655/ (April 6, 2014) (last accessed May 29, 2015).

[42] In fact, had the tax referendum not been approved by the voters, the University System of Georgia reserved the right to recast the ground lease interest of the private developer (an interest taxable for ad valorem purposes under Georgia law) as a usufruct, not subject to property taxation. Request for Qualified Concessionaires Regarding Investment and Development of a Portfolio of Student Housing for the Board of Regents of the University System of Georgia Phase I (hereafter the "RFQC"), at 8. http://www.usg.edu/fiscal_affairs/p3_docs/Request_for_Qualified_Concessionaire_(RFQC).pdf (last accessed June 14, 2015).

[43] RFQC, at 4-5. Analogous arrangements are tax exempt under Ohio law where facilities used for public university housing are under the control of a 501(c)(3) organization with which the state has entered into a "qualified joint use agreement" and rents are paid sufficient to meet debt service coverage ratios on the bonds. R.C. 5709.07(A)(4)(a)-(c).

The terms of the deal between Corvias and the Board of Regents include the following:

- The BOR continued to operate the existing housing at the nine Phase 1 campuses until July 1, 2015 (the "Turnover Date"), at which point they were turned over to Corvias.

- Separate ground leases will be entered into for the various properties covering an area essentially equivalent to the footprint of the housing structure plus some additional surrounding land.

- Each lease is subject to the BOR's right of early termination upon payment of a termination fee equivalent to the appraised value of Corvias' interest in the project using an income capitalization approach to value.

- The buildings will be turned over to Corvias on an as-is, where-is basis, and with no transfer of existing replacement or repair reserves.

- $10 million in prepaid rent was payable on the Turnover Date.

- Base rent for existing buildings is to be based on 25% of a certain "Base Rent Percentage" times a rolling prior period gross revenue figures. Similar calculations are used in determining Base Rent for newly constructed buildings with estimated gross revenues utilized after the first five fiscal quarters. Contingent Rent based upon a set percentage of the concessionaire's gross revenues is also payable to the BOR.

- On the Turnover Date, Corvias will make a payment of $325 million to the BOR to be applied toward defeasance of the existing bonds on the transferred facilities with the balance, if any, applied 50% to *additional* prepaid rent and 50% to the first installment of rent.

- An annual deposit is required to a capital repair and replacement reserve in a set amount per bed (approximately $175) for both existing facilities and new construction (subject to 3% annual increases) with $5.6 million upfront funding.

- Corvias was required to close on financing for the 3,683 of new bed construction by May 1, 2015.

- Secured performance guarantees for Corvias' obligations are required. Corvias is required to complete construction and deliver new facilities by July 15, 2016, subject to substantial liquidated damages for late delivery.

- The BOR will continue to be responsible for room draws and assigning rooms and may serve as agent for Corvias in the collection of rents. Corvias can hire management agents subject to BOR approval. The BOR will also have exclusive authority over setting residency requirements for students at each institution. No minimum occupancy levels are guaranteed by the BOR.

- Rental housing agreements are to be between Corvias and the individual students per an agreed form provided by the BOR.

- Rents have been preset for the 2015-2016 school year with formulae for determining rents in the two subsequent academic years. Corvias is entitled to retain rentals from summer camps and other summer housing usage.

- Corvias received a 10-year right of first refusal (renewable by the parties for successive 10-year terms) to develop all new on-campus housing at the Phase 1 institutions.

The University of Kentucky – Education Realty Trust Partnership

In 2011, the University of Kentucky negotiated to turn over its inventory of 6,000 beds and apartments to Education Realty Trust, Inc. (NYSE: EDR) and for the construction of new beds over a multi-phase P3 project. To date, the project is in its fifth phase with the thirteenth residence facility constructed by EdR, University Flats, set to open in fall 2017.

The first two dormitories, which opened in fall 2013, consisted of 601 beds and were constructed at a cost of $25.2 million. The University leased the property to EdR for 75 years. The structure of the lease resulted in a determination by the County Property Valuation Administrator that EdR was the owner of the buildings and was obligated to pay property taxes. Following consultation with the Kentucky Department of Revenue, EdR agreed to pay approximately $280,000 per year in property taxes on the first two properties, but restructured the leases for future deals so that the University retained ownership of the dorms and preserved the tax exemption.

Under the current lease structure, EdR receives a 2% management fee for managing each building, a 9% preferred return, and 75% of the remaining net income. UK receives the other 25% of the net income. Base rents payable to UK are calculated as a percentage of total revenues. For Phase II-B (1,610 beds opening in three facilities in August 2015), the University receives a return of 10.3% of total revenue. For Phase II-C (1,141 beds in two facilities opening in August 2016), base rents are 8.1% of total revenue. Each lease is for 75 years with the University retaining an early termination right upon payment of a termination fee.[44]

For both Phases II-B and II-C, the University funds the demolition cost for the existing buildings as well as the cost of utility infrastructure improvements. The University also reserves all naming rights. EdR must fund a replacement reserve equal to $206 per bed in Phase II-B and $212 per bed in Phase II-C, subject to future increases. EdR assumes the construction and operating risks and must comply with the University's existing vendor contracts. EdR must pay prevailing wages for construction.

Student rents are set by agreement at $4,021 per bed per semester for the Phase II-B buildings and rents ranging from $4,142 per bed for a two-bedroom, 1 bath unit to $4,723 per

[44] https://www.uky.edu/OPBPA/pdf/FINAL_HOUSING_SUMMARY_FCR3_NC.pdf (last accessed June 14, 2015); http://www.uky.edu/OPBPA/pdf/PHASE_2C_HOUSING_SUMMARY_TERM_SHEET_2014-01-31.pdf (last accessed June 14, 2015).

bed for a 1 bedroom, 1 bath unit with kitchenette. Subsequent year increases are based upon the greater of a set percentage, a 2-year rolling average in the CPI or the percentage rate increase of other university-owned housing.

The University provides lawn care and snow removal while EdR is responsible for all other maintenance and operating costs. UK and EdR are jointly responsible for insuring the property. The University is responsible for making assignments to residence halls and all students are governed by the UK Code of Student Conduct.

Conclusion

The design and amenities of housing options on college campuses have significantly improved from the cinder block stereotype of the 1960s and 1970s. College students in the 21st century demand features more typically found in higher-end market rate apartment projects. Universities, as well, are eager to fulfill that need in order to maintain their competitive position in the market for student enrollment. Public private partnerships and the entry into the student housing sector of traditional apartment developers have met both of these demands. Today's college student is now living in modern quarters, and public and private universities are minimizing their exposure to the risk and expense of funding hundreds of millions of dollars of renovations and new construction necessitated by an aging university housing stock.