

January 2013

# Inlaid-Ivory Towers: Higher Education Joint-Use Facilities as Community Redevelopment Bulwarks

Michael N. Widener

*Phoenix School of Law*

Follow this and additional works at: <http://digitalcommons.pace.edu/plr>



Part of the [Education Law Commons](#), and the [Land Use Law Commons](#)

---

### Recommended Citation

Michael N. Widener, *Inlaid-Ivory Towers: Higher Education Joint-Use Facilities as Community Redevelopment Bulwarks*, 33 Pace L. Rev. 327 (2013)

Available at: <http://digitalcommons.pace.edu/plr/vol33/iss1/8>

# INLAID-IVORY TOWERS: HIGHER EDUCATION JOINT-USE FACILITIES AS COMMUNITY REDEVELOPMENT BULWARKS

Michael N. Widener\*

## I. Introduction

The education industry gradually adjusted its operating model toward sustainability during the current period of torpid economic growth. As painful as the recession has been for many liberal arts colleges and universities, substantial restructuring proceeds cautiously.<sup>1</sup> Administrations emphasize cost reductions in non-core activities<sup>2</sup> and modest revenue enhancement, integrating online courses as one adaptation, using new learning technologies with relatively low financial entry barriers.<sup>3</sup> The public should anticipate fundamental changes in the organizational structure of private postsecondary institutions, particularly in the current social

---

\* The author is adjunct professor at the Phoenix School of Law and the University of Phoenix School of Business, counsel to Bonnett, Fairbourn, Friedman & Balint, P.C., and a Zoning Adjustment Hearing Officer for the City of Phoenix. In 2012, he represented the City of Mesa in leasing the MCHE, defined *infra* in the text accompanying note 20, to colleges.

1. See Andrew Martin, *Colleges Start to Confront Cost Burdens*, N.Y. TIMES, May 15, 2012, at B1, available at [http://www.nytimes.com/2012/05/15/business/colleges-begin-to-confront-higher-costs-and-students-debt.html?\\_r=1](http://www.nytimes.com/2012/05/15/business/colleges-begin-to-confront-higher-costs-and-students-debt.html?_r=1).

2. See Walter R. Mead, *Blue Civil War Hits Universities*, AM. INTEREST BLOG (July 19, 2012), <http://blogs.the-american-interest.com/wrm/2012/07/19/blue-civil-war-hits-universities/>.

3. See Josh Fischman, *Liberal-Arts Colleges Venture into Unlikely Territory: Online Courses*, CHRON. OF HIGHER EDUC. WIRED CAMPUS BLOG (June 29, 2011, 6:31 PM), <http://chronicle.com/blogs/wiredcampus/liberal-arts-colleges-venture-into-unlikely-territory-online-courses/32029>; Walter R. Mead, *Major Expansion in Online Learning*, AM. INTEREST BLOG (July 17, 2012), <http://blogs.the-american-interest.com/wrm/2012/07/17/major-expansion-in-online-learning/>.

climate, where the “true value” of college education is subject to vocal debate.<sup>4</sup> Many such colleges are poised to establish new business lines, eliminate nonperforming programs, form new schools or colleges, and, seeking new consumers, to open new campuses. This paper describes one order of change and innovative opportunities for America’s town centers and urban cores to invest in the educational opportunities most communities seek, enabling private, non-profit institutions to penetrate new student niches.

Cozy Columbia College in Columbia, Missouri, since 1851, occupies a thirty-three-acre main campus.<sup>5</sup> It is dwarfed, geographically, by the nearby flagship campus of the University of Missouri, founded in 1839.<sup>6</sup> The University of Missouri is a temporary home to 33,760 students on its 1,250 acre campus.<sup>7</sup> The astonishing fact is that Columbia College has nearly as many enrolled students as Missouri – approximately 25,000.<sup>8</sup> At the request of the armed services in the 1970s, Columbia was among the first colleges in the country with extended military base campuses, launching an Extended Studies Division.<sup>9</sup> Today, Columbia College has thirty-four extension campuses around the nation, which,

---

4. See generally, RICHARD ARUM & JOSIPA ROSKA, *ACADEMICALLY ADRIFT: LIMITED LEARNING ON COLLEGE CAMPUSES* 51-52 (2011) (maintaining that those students who graduate from mediocre or bad high schools enroll in less-selective colleges that, at least during the initial two years following matriculation, fail to challenge them academically, perpetuating the fact of insubstantial learning); Louis Menand, *Live and Learn: Why We Have College*, *NEW YORKER*, June 6, 2011, at 74, available at [http://www.newyorker.com/arts/critics/atlarge/2011/06/06/110606cra\\_tlarge\\_menand](http://www.newyorker.com/arts/critics/atlarge/2011/06/06/110606cra_tlarge_menand) (stating that decline in student motivation leads to the “exceptional” phase in American higher education reaching its end); Dan Kadlec, *Here We Go Again: Is College Worth It?*, *TIME MONEYLAND BLOG* (Apr. 17, 2012), <http://business.time.com/2012/04/17/here-we-go-again-is-college-worth-it/>.

5. *Columbia College*, *U.S. NEWS*, <http://colleges.usnews.rankingsandreviews.com/best-colleges/columbia-college-2456> (last visited Sept. 17, 2012).

6. *MU Facts*, *UNIV. OF MO.*, <http://www.missouri.edu/about/mufacts.php> (last visited Sept. 17, 2012).

7. *Id.*

8. See *Fact Sheet*, *COLUM. COLL.*, <http://www.ccis.edu/about/factsheet.asp> (last visited Sept. 16, 2012).

9. *Columbia College: 1851 to 2012*, *COLUM. COLL.*, <http://www.ccis.edu/about/history.asp> (last visited Sept. 16, 2012).

together with its online campus, serve more than twenty-five thousand military and civilian students annually on the ground and via the Internet.<sup>10</sup> This modestly church-affiliated institution illustrates how non-profit institutions supply the demand for the working adult's training, thereby inviting entrepreneurial supply-side players.

The City of Mesa is Arizona's third largest city<sup>11</sup> with approximately 439,000 residents as of the 2010 census.<sup>12</sup> It is home to two publicly shared campuses, one a decommissioned air force base repurposed to house the College of Technology & Innovation of Arizona State University, Chandler-Gilbert Community College, Mesa Community College, and Embry-Riddle Aeronautical University,<sup>13</sup> together with a charter school providing "polytechnic" K-12 education.<sup>14</sup> It is a successful concentration of learning centers in technical fields; but it lies fifteen miles from Mesa's downtown. This campus is not along a major transit route, although an "express" bus service takes students slowly (requiring an hour or more) to the downtown corridor. This so-called "Power Education Corridor" is neither, therefore, a center of liberal arts learning in, nor a particular aid to direct development of, Mesa's downtown corridor. However, Mesa Community College has a downtown Mesa campus approximately one-half mile from the MCHE<sup>15</sup>

---

10. *Welcome to Columbia College*, COLUM. COLL., <http://www.ccis.edu/about/> (last visited Sept. 16, 2012).

11. City of Mesa, *Welcome to Mesa*, MESA.AZ.GOV, <http://www.mesaaz.gov/Government/welcome.aspx> (last visited Sept. 16, 2012).

12. *QuickFacts: Mesa, Arizona*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/04/0446000.html> (last visited Sept. 16, 2012).

13. *Polytechnic Campus History*, ARIZ. ST. UNIV., <http://campus.asu.edu/polytechnic/history/> (last visited Oct. 3, 2012).

14. *See Elementary School Polytechnic*, ARIZ. ST. UNIV., <http://asuprep.asu.edu/pes/http://asuprep.asu.edu/pes/http://asuprep.asu.edu/pes/> (last visited Oct. 2, 2012).

15. MCHE is an acronym for the Mesa Center for Higher Education. *See infra* note 20 and accompanying text. Furthermore, Benedictine University (IL) and Albright College (PA) have located in the City of Mesa, with the campus of the former occupying another repurposed city building a mile away from the MCHE beginning in the fall of 2013. *See* MESA CHAMBER OF COM., COMPASS: YOUR RESOURCE TO MESA, ARIZONA 2013 6 (2012), *available at* [http://issuu.com/rmcp/docs/mesa\\_chamber\\_of\\_commerce-compass](http://issuu.com/rmcp/docs/mesa_chamber_of_commerce-compass).

that, partnering with publicly-funded Northern Arizona University, offers Bachelor's degrees in elementary or special education, administration of justice, fire science, business administration, interdisciplinary studies and technology management.<sup>16</sup>

Downtown Mesa is undergoing a renaissance attributable to several factors, including extending light rail transit through the downtown core, christened a Transit-Oriented Development Corridor ("T-ODC"). The area within this T-ODC is expected to host medium density residential development blended with commercial and office uses.<sup>17</sup> A number of new government buildings previously were constructed in the corridor. This construction did not lead to the demolition of older government structures. Consequently a surplus of municipal structures resulted, many needing rehabilitation and building code upgrades. Downtown Mesa has suffered like many downtowns during the economic downturn since 2008. It lost retail sales revenues generating vital tax revenue and the City lost jobs due to layoffs. Mesa's Mayor decried the City's lack of educational diversity and the consequences for the local economy.<sup>18</sup> Following feasibility and marketing studies, the City recruited three private colleges to share a single complex that formerly contained the municipal court system.<sup>19</sup> Mesa budgeted fourteen million dollars to attract four colleges in total, using that money to renovate three buildings, the largest of which will become the Mesa Center for Higher Education ("MCHE").<sup>20</sup> This fifty-three thousand square-foot building<sup>21</sup> is

---

16. Press Release, Mesa Cmty. Coll., MCC and NAU Partner to Offer New Degree Options (May 19, 2010), *available at* [http://web.mesacc.edu/ia\\_kb/?View=entry&EntryID=669](http://web.mesacc.edu/ia_kb/?View=entry&EntryID=669).

17. See CITY OF MESA, MESA CENTRAL MAIN PLAN 61 (2012), *available at* <http://www.mesaaz.gov/bettermesa/downtownfocus/pdf/CentralMainPlan.pdf>.

18. See Gary Nelson, *How Mesa Became a College Town*, THE ARIZ. REPUBLIC, July 10, 2012, at A1, *available at* <http://www.azcentral.com/arizonarepublic/news/articles/2012/07/09/20120709-mesa-college-town.html>.

19. See *id.*

20. See *id.*

21. Garin Groff, *Mesa Debuts Downtown Center to Lure Additional Colleges*, E. VALLEY TRIB. (Apr. 24, 2012, 3:24 PM), [http://www.eastvalleytribune.com/local/mesa/article\\_11a37f30-8e5c-11e1-962c-001a4bcf887a.html](http://www.eastvalleytribune.com/local/mesa/article_11a37f30-8e5c-11e1-962c-001a4bcf887a.html).

a centerpiece of Mesa's strategy to develop an educated workforce. Mesa expressly highlighted particular areas to improve workforce development; a focus on liberal arts education was considered proper for preparing emerging leaders.<sup>22</sup> The city unveiled its concept in mid-April 2012, featuring a rendering of the MCHC building's front facade and a sign to advertise the "campus."<sup>23</sup>

This paper describes an unusual public-private partnership for real property development not involving typical infrastructure like bridges and roads. It addresses how communities like Mesa manage their way (adopting policies implicating land use and environmental sustainability principles via repurposing of buildings and sharing of additional community assets and "campus" leasing actions) to attract private sector higher education providers to establish a downtown as a node of intellectual stimulation, including cultural diversions. Etching the ivory tower environment into community centers sustains the quality of place. This quality attracts the "creative class," which forms the core of leadership and entrepreneurship in America's knowledge economy.<sup>24</sup> Community interest in occupation-based approaches to urban economic development remains strong in this country.<sup>25</sup>

This paper identifies the goals of higher education institutions attracted to this opportunity to expand their student base in a time of heightened competition from proprietary institutions capitalizing on career orientations. Having identified the "town's" and "gown's" respective objectives, this paper then analyzes the essential interests of each party to a leasing transaction and how these parties' respective vital needs can be met in a commercial lease instrument. Finally, an appendix to this paper affords the reader evidence of essential leasing terms in establishing this unique form of higher educational cooperative. First, however, the paper describes what is at stake for a community's

---

22. See Nelson, *supra* note 18.

23. See Groff, *supra* note 21.

24. See generally RICHARD FLORIDA, WHO'S YOUR CITY?: HOW THE CREATIVE ECONOMY IS MAKING WHERE TO LIVE THE MOST IMPORTANT DECISION OF YOUR LIFE 107-09 (2008) [hereinafter FLORIDA, WHO'S YOUR CITY?].

25. See generally *id.*

downtown revitalization.

## II. Sirens of the Creative Class

Richard Florida has written copiously about the rise of the “creative class”<sup>26</sup> and the intellectual stimulation driving that class’s migration to megapolitan areas.<sup>27</sup> “Periods of crisis and creative destruction [such as persisted between 2008-2012 result in] new categories of jobs being created as old categories of jobs are destroyed.”<sup>28</sup> The key to a sustained recovery is to turn as many long-term displaced workers, as well as workers with surviving but lower-paying jobs, into fully employed persons holding jobs paying above the minimum wage.<sup>29</sup> This requires, among other factors, a net positive migration of workers of the creative class who are the job generators. The job-generating entrepreneurs are seduced by economic opportunity, to be sure, but also by good schools, arts and culture, outdoor recreational opportunity, and “urban amenities,” such as restaurants, nightlife, and pedestrian friendly downtowns.<sup>30</sup> Innovation is encouraged by attracting the drivers of the creative environment.<sup>31</sup> Florida identifies four keys to municipal seduction: talent,<sup>32</sup> tolerance,<sup>33</sup>

---

26. See e.g., RICHARD FLORIDA, *THE RISE OF THE CREATIVE CLASS AND HOW IT’S TRANSFORMING WORK, LEISURE, COMMUNITY AND EVERYDAY LIFE* 68 (2002) [hereinafter FLORIDA, *THE RISE OF THE CREATIVE CLASS*].

27. See e.g., FLORIDA, *WHO’S YOUR CITY?*, *supra* note 24, at 199-200.

28. Richard Florida, *America Needs to Make Its Bad Jobs Better*, *FIN. TIMES* (July 5, 2010, 10:19 PM), <http://creativeclass.com/rfcgdb/articles/America%20needs%20to%20make%20its%20bad%20jobs%20better.pdf>.

29. See, e.g., Ben Casselman, *Unemployment Scars Likely to Last for Years*, *WALL ST. J.* (Jan. 9, 2012), <http://online.wsj.com/article/SB10001424052970203513604577144483060678656> (discussing relevance of the “labor force participation rate” and its impact on sustainable economies).

30. See FLORIDA, *WHO’S YOUR CITY?*, *supra* note 24, at 11-12.

31. See generally Kathy Mast, *How to Create a Culture of Innovation That Attracts and Retains Top Talent*, *INNOVATION MGMT.* (Feb. 17, 2011), <http://www.innovationmanagement.se/2011/02/17/creating-a-culture-of-innovation-to-attract-and-retain-top-talent/>.

32. See FLORIDA, *THE RISE OF THE CREATIVE CLASS*, *supra* note 26, at 249-66. One driving force behind any effective economic strategy is talented people. See *id.* Americans live in an age of substantial mobility. See *id.* Very

technology,<sup>34</sup> and territory assets.<sup>35</sup>

Getting its influences from other college towns, Mesa believes the private colleges' joint use and collaborative sharing of available MCHE campus space will create a population of students in its downtown core.<sup>36</sup> Students that appreciate the many amenities within the Transit-Oriented Development Corridor, in turn, will contribute as trained members of Mesa's "creative class" after their educational pursuits.<sup>37</sup>

### III. Patterns in Joint Use of Education Facilities

The physical sharing of educational facilities is not a new phenomenon. The City of Indianapolis has enjoyed a remarkable higher education amalgamation since 1969 in the form of IUPUI, a physical merger of that city's campuses and, eventually, separate programs formerly sponsored by Indiana University and Purdue University.<sup>38</sup> "IUPUI has set in motion a shift from primarily [being] a locus of commute-based

---

talented persons in the creative enterprises relocate frequently, so the need of the sustainable economy is to get them to put down roots in the community. *See id.* A community's ability to attract and retain entrepreneurial and technical talent is the defining issue of the creative age. *See id.*

33. *See id.* Economic prosperity relies on cultural, entrepreneurial, civic, scientific and artistic creativity. *See id.* Creative workers with these talents need communities, organizations and peers welcoming new ideas and different people. *See id.* Places receptive to immigration, alternative lifestyles, and new perspectives on social status and power structures benefit significantly in competition for knowledge workers and their company managements. *See id.*

34. *See id.* Technology and innovation are critical components of the community or organization's ability to foster economic growth. *See id.* To be successful, communities and organizations must create avenues for transferring research, ideas, and innovation into marketable and sustainable products. *See id.* Universities and colleges are paramount to this element; they are cornerstone institutions of creative communities. *See id.*

35. *See id.* Such assets are the natural, "built" and psychological settings of the community. *See id.* These assets collectively constitute the "vibe," an inchoate sense of place distinguishing one community from another. *See id.* Creative workers often choose to live in communities that are sustainable, unique and personally inspiring to them. *See id.*

36. *See* Press Release, Mesa Cmty. Coll., *supra* note 16.

37. *See* FLORIDA, THE RISE OF THE CREATIVE CLASS, *supra* note 26, at 259.

38. *See* Ralph D. Gray, *History: The Making of IUPUI*, IUPUI, <http://www.iupui.edu/spirit/history/history-1971.html> (last visited Oct. 2, 2012).



graduate programs to a full-fledged university campus . . . [with] new emphasis on undergraduate programs, student housing and a stronger sense of academic community.”<sup>39</sup> Some twenty years ago, the Auraria Higher Education Center—a master planned project initially resembling a suburban office park with “neighborhoods”— opened in downtown Denver, Colorado.<sup>40</sup> Today, in a highly urbanized setting near the 16th Street Mall, three public institutions share some facilities<sup>41</sup> within its 150 acres.<sup>42</sup> Beginning in 1994, the Universities Center at Dallas was established in a former department store building on Main Street in Dallas, the first multi-institutional teaching center for higher education in that city.<sup>43</sup> This consortium of several higher education institutions serves students who have finished a minimum of fifty “hours of college credit or who have earned an associate’s, bachelor’s, or master’s degree are eligible to enroll in UCD classes.”<sup>44</sup> At the request of its legislature, Florida’s Postsecondary Education Planning Commission published a monograph entitled *The Impact of Joint-Use Facilities on the Delivery of Postsecondary Education in Florida*, which contains a national review of joint-use facilities.<sup>45</sup> More specifically, the paper provides a review of the circumstance of institutional sharing of physical assets,

---

39. Charles R. Bantz, *Greetings from IUPUI*, IUPUI, <http://www.iupui.edu/administration/chancellorsnews/200804.htm> (last visited Jan. 9, 2013); *Campus Center: Indiana University Purdue University - Indianapolis*, SMITHGROUP JJR, <http://www.smithgroupjjr.com/index.aspx?id=567&section=34> (last visited Sept. 17, 2012).

40. See *The Auraria Campus: A Brief History*, AURARIA HIGHER EDUC. CTR., <http://www.ahec.edu/campus/history.htm> (last visited Nov. 21, 2012).

41. See AURARIA HIGHER EDUC. CTR., FROM VISION TO REALITY: AURARIA CAMPUS STRATEGIC IMPLEMENTATION PLAN 5, 48 (2012), available at <http://www.ahec.edu/CampusPlanning/Auraria%20Strategic%20Implementation%20Plan.pdf>.

42. *Id.* at 15.

43. *About Us*, UNIVS. CTR. AT DALL., <http://www.ucddowntown.org/about> (last visited Oct. 2, 2012).

44. *FAQ*, UNIVS. CTR. AT DALL., <http://www.ucddowntown.org/faq> (last visited Oct. 2, 2012).

45. FLA. POSTSEC. EDUC. PLANNING COMM’N, THE IMPACT OF JOINT-USE FACILITIES ON THE DELIVERY OF POSTSECONDARY EDUCATION IN FLORIDA 7-9 (1999), available at [http://www.cepri.state.fl.us/pdf/jointuse\\_cvr.pdf](http://www.cepri.state.fl.us/pdf/jointuse_cvr.pdf).

including real estate, in a dozen states.<sup>46</sup> Most of these consortia consist of public universities, but one, the Macomb University Center in Macomb County (“MUC”), is populated by ten Michigan institutions occupying two campuses.<sup>47</sup> Six of the partners are private colleges and universities including church-related institutions.<sup>48</sup> MUC’s degrees are not amalgams of the partner institutions’ collaboration; each university or college maintains its own admissions and graduation requirements and provides its own instruction.<sup>49</sup>

Joint use facilities may assume a large or small scale, and embrace a diverse spectrum of education and government participating institutions. In August 2012, the Alabama Center for the Arts opened its doors to five hundred students in downtown Decatur, Alabama.<sup>50</sup> The center is a venture among Calhoun State Community College, Athens State University, the City of Decatur, and Morgan County, Alabama,<sup>51</sup> and features performing and visual arts activities, fine arts classrooms and studios used by the two colleges, and faculty offices. The newly constructed, three-story downtown facility contains about 43,000 square feet of usable space.<sup>52</sup> Perhaps America’s most ambitious experiment in joint use facilities combining education, economic development, and city center revitalization is located in downtown Brooklyn, New York. The venture, announced by Mayor Michael Bloomberg in April, 2012, will focus on research and development of technologies to

---

46. *See id.* at 41.

47. *See Macomb University Center*, MACOMB CMTY. COLL., <http://www.macomb.edu/University+Center/> (last visited Oct. 2, 2012).

48. *See id.*

49. *See* MACOMB CMTY. COLL., THE MACOMB UNIVERSITY CENTER CATALOG 2012-2013, i, 30 (2012), *available at* [http://www.macomb.edu/NR/rdonlyres/1FC467AA-5C1F-4DCF-A295-29B1E120E27C/0/UC\\_catalogPROOF5.pdf](http://www.macomb.edu/NR/rdonlyres/1FC467AA-5C1F-4DCF-A295-29B1E120E27C/0/UC_catalogPROOF5.pdf). The catalog explains that “your degree will be awarded from that institution [which you apply to and enroll in].” *Id.* at i. To enter the University Center, students must first obtain a minimum number of undergraduate hours and then “apply to transfer to the University Center partner of [their] choice.” *Id.* at 30.

50. *See* Lucy Berry, *ASU President: Delay Will Pose Challenge in Prepping for Classes*, DECATURDAILY.COM (July 18, 2012), <http://decaturdaily.com/stories/ASU-president-Delay-will-pose-challenge-in-prepping-for-classes,98938>.

51. *See id.*

52. *See id.*

address the critical challenges facing cities, including infrastructure, technology integration, energy efficiency, transportation congestion, public safety, and public health.<sup>53</sup> This Center for Urban Science & Progress (“CUSP”), a joint venture among the City of New York, the Metropolitan Transit Authority of New York (“MTA”), multiple universities, and multiple publicly traded companies, will provide graduate education and degrees in the sciences and engineering.<sup>54</sup> The private enterprises within the CUSP are funding incubator space in order to facilitate technology transfer, for which there will be an in-house director of technology transfer on the campus, leading to the production of functional objects from theoretical experimentation.<sup>55</sup> Education at the Master’s and Doctoral level to 530 students will be the centerpiece among much other significant activity at the CUSP.<sup>56</sup> In the process, 370 Jay Street, a 460,000 square foot building formerly the headquarters of MTA, will be repurposed by 2017 for this research and applied science joint-use campus.<sup>57</sup> As lead developer, New York University will receive fifteen million dollars of city benefits from tax incentives and energy savings, as the university pursues adaptive reuse instead of new construction.<sup>58</sup>

---

53. *New York University to Lead Applied Sciences Center in Downtown Brooklyn*, MIKEBLOOMBERG.COM (Apr. 23, 2012), <http://www.mikebloomberg.com/index.cfm?objectid=DFDDC6BB-C29C-7CA2-F0ACF5B8B5885CB8>.

54. *Id.*

55. *Id.* In July of 2011, NYCEDC issued an RFP seeking a university, institution or consortium to develop and operate a new or expanded campus within the City in exchange for City capital, access to city-owned land—at the Navy Hospital Campus at the Brooklyn Navy Yard, the Goldwater Hospital Campus on Roosevelt Island, or on Governors Island—and the full support and partnership of the Bloomberg Administration. *Id.*

56. *Id.*

57. *Id.*

58. Laura Kusisto, *NYU to Launch Applied-Sciences Institute in Brooklyn*, WALL ST. J. METROPOLIS BLOG (Apr. 23, 2012, 1:00 PM), <http://blogs.wsj.com/metropolis/2012/04/23/nyu-to-launch-applied-sciences-institute-in-brooklyn/>; David W. Dunlap, *As Transit Building is Remade, a Stirring Memorial Will be Removed*, N.Y. TIMES CITY ROOM BLOG (Apr. 26, 2012, 4:25 PM), <http://cityroom.blogs.nytimes.com/2012/04/26/as-transit-building-is-remade-a-stirring-memorial-will-be-removed/>.

What is remarkable about Mesa's particular experiment with the MCHC is that each initial participating institution is a private liberal arts college with no prior experience in out-of-state domestic campus development.<sup>59</sup> Wilkes University, instituted (as a four year college) as Wilkes College in 1947,<sup>60</sup> has schools of education, nursing, pharmacy and business, in addition to its engineering and liberal arts curricula.<sup>61</sup> Westminster College, the site of Churchill's famous "Iron Curtain" speech in 1946 (and current home of the Churchill Institute),<sup>62</sup> founded in 1851, provides, in addition to the liberal arts, teacher education training, health professions programs, and an engineering coordinated program that requires later attendance at a "partner" institution.<sup>63</sup> The following observations about what constraints these institutions will confront as they endeavor to establish their brands in the desert southwest lead into a discussion of the offsetting opportunities.

---

59. Liberal arts colleges previously have shared buildings. Pitzer, Scripps and Claremont McKenna Colleges share the W.M. Keck Science Center, which adjoins all these colleges' campuses, in Claremont, California. *FAQ: What is Keck Science*, W.M. KECK SCI. DEP'T, <http://www.jsd.claremont.edu/prospectives/faq.asp> (last visited Nov. 21, 2012). The three schools also share science faculty and curricula in the W.M. Keck Science Department. *See Welcome to Keck Science*, W.M. KECK SCI. DEP'T, <http://www.jsd.claremont.edu/http://www.jsd.claremont.edu/> (last visited July 25, 2012). W.M. Keck Science Center is not used in any fashion or supported financially by the Claremont community. *Joint Science Department Becomes the W.M. Keck Science Department of Claremont McKenna College, Pitzer College, and Scripps College*, W.M. KECK SCI. DEP'T (Sept. 2, 2011), <http://www.jsd.claremont.edu/news/renamed.asp> (The W.M. Keck Science Center was funded by the Foundation's gift in 1983 and grant in 1988).

60. *History*, WILKES UNIV., <http://www.wilkes.edu/pages/140.asp> (last visited Oct. 8, 2012).

61. *Fast Facts*, WILKES UNIV., <http://www.wilkes.edu/pages/141.asp> (last visited Oct. 8, 2012).

62. *About Us*, THE CHURCHILL INST., <http://www.westminstermo.edu/churchillinstitute/about/Pages/default.aspx> (last visited Oct. 8, 2012).

63. *See Quick Facts*, WESTMINSTER COLL., <http://www.westminstermo.edu/admissions/Pages/QuickFacts.aspx> (last visited Oct. 8, 2012).

## IV. Reaching Outward While Training Inwardly

Private liberal arts colleges today face a variety of challenges to their stability. The major threats include the growing perceived importance of professional and vocational-oriented courses that are needed for employment;<sup>64</sup> the rise of proprietary universities racing to fill that niche;<sup>65</sup> competitive marketing by public universities with larger advertising budgets;<sup>66</sup> tuition and fees price sensitivity;<sup>67</sup> the availability of online and other forms of “distance” instruction where Internet connectivity is pervasive;<sup>68</sup> and, more recently, the growth of joint use facilities closer to the markets generating demand for higher education, as discussed above. As Paul Neely summarized in the current environment, “[t]here may simply be more pure liberal arts colleges than we need, at least as the market defines need.”<sup>69</sup> Neely believes that current market forces affecting education, influenced by materialism and student narcissism, are beyond the individual small college’s control.<sup>70</sup> Further, Neely asserts that the several hundred nominally liberal arts schools of fair quality, but not in the top “tier” (compared to Swarthmore, Williams, Amherst and Pomona), confront escalating competition and unenviable

---

64. Helen Lefkowitz Horowitz, *Balancing Hopes and Limits in the Liberal Arts College*, in AMERICAN COUNCIL OF LEARNED SOCIETIES, LIBERAL ARTS COLLEGES IN AMERICAN HIGHER EDUCATION: CHALLENGES AND OPPORTUNITIES, 16, 16-17 (2005) [the treatise hereinafter ACLS, LIBERAL ARTS COLLEGES], available at [http://www.acls.org/uploadedFiles/Publications/OP/59\\_Liberal\\_Arts\\_Colleges.pdf](http://www.acls.org/uploadedFiles/Publications/OP/59_Liberal_Arts_Colleges.pdf).

65. Lucie Lapovsky, *The Economic Challenges of Liberal Arts Colleges*, in ACLS, LIBERAL ARTS COLLEGES, *supra* note 64, at 50, 54-55.

66. *See generally*, THOMAS J. HAYES, MARKETING COLLEGES AND UNIVERSITIES: A SERVICES APPROACH (2008); *see e.g.*, Neely, *infra* note 69, at 27 (University of Arkansas marketing campaign to recruit scholars); Lapovsky, *supra* note 65, at 68 (notes flagship universities’ “commodity-like marketing”).

67. Lapovsky, *supra* note 65, at 55-56.

68. Richard Ekman, *Selective and Non-Selective Alike: An Argument for the Superior Educational Effectiveness of Smaller Liberal Arts Colleges*, in ACLS, LIBERAL ARTS COLLEGES, *supra* note 64, at 151, 167-68.

69. Paul Neely, *The Threats to Liberal Arts Colleges*, in DISTINCTIVELY AMERICAN: THE RESIDENTIAL LIBERAL ARTS COLLEGE 27, 29 (Steven Koblik & Stephen R. Graubard, eds., 2000).

70. *Id.* at 29, 37.

2013]

## INLAID-IVORY TOWERS

339

choices<sup>71</sup>:

All face escalating costs, increasing competition, and relatively meager capital resources. Many are quite locally based, relying on part-time, nontraditional, nonresidential students, all far from the higher model of liberal arts colleges. These schools . . . see economic salvation in meeting student demands for specialized training. Without large endowments, economics forces them toward a larger scale, undermining the smallness that is part of their social and pedagogical (but not curricular) attraction.

. . . The more that this same public sees higher education as a vocational credential, the more these schools will suffer as well. In other words, credentialism in general will have to loosen its grip for these schools to reverse their current steady decline, and that seems an unlikely prospect.<sup>72</sup>

In response to these market forces, private liberal arts colleges are seeking new markets. They are targeting non-traditional learners who, as a result of the economic downturn, have been swept into the realms of evening and weekend postsecondary instruction, as well as on-line education.<sup>73</sup> This market is currently dominated by several large proprietary institutions including: the Apollo Group (University of Phoenix), Education Management Corporation (Argosy University, Brown Mackie College, the Art Institutes), Kaplan Education (Kaplan University), and DeVry University.<sup>74</sup> These proprietary universities offer relatively few student majors,

---

71. *Id.* at 38.

72. *Id.* at 38-39.

73. See DANIEL L. BENNETT ET AL., CTR. FOR COLL. AFFORD. AND PRODUCT., FOR-PROFIT HIGHER EDUCATION: GROWTH, INNOVATION AND REGULATION, 26 (2010), *available at* [http://www.centerforcollegeaffordability.org/uploads/ForProfit\\_HigherEd.pdf](http://www.centerforcollegeaffordability.org/uploads/ForProfit_HigherEd.pdf).

74. *Id.* at 16-18.

and deemphasize research and collegiality among students.<sup>75</sup> They also change course offerings quickly, fluidly responding to perceived trends in employer demand for different mixes of skills sets.<sup>76</sup>

In contrast, private liberal arts colleges are more inclined towards experimentation across a broad curriculum through analytical thinking, critical evaluation of sources, and fostering student collegiality.<sup>77</sup> Traditionally, these colleges have been slow to change in response to market pressures, which is evidenced in the rate of failure of this category of institutions during recent decades.<sup>78</sup>

Today, liberal arts institutions are entering the arena to compete for the same enrollment prize, non-traditional students or “adult learners.”<sup>79</sup> Are liberal arts colleges primed to compete, or doomed to fail, in this environment? The reduced up-front outlay for occupying community buildings at below-market rents gives these colleges a competitive advantage of affordably while building their brands over a period of several years.<sup>80</sup> Nonetheless, non-profit liberal arts schools may be punching above their weight in a ring with behemoth proprietary players in the adult learner demographic niche. This fact must be recalled by communities courting liberal arts

---

75. John Lee, et al., *Proprietary Education: Threat, or Not?*, NEA HIGHER EDUC. RES. CTR. UPDATE, (Nat'l Educ. Ass'n, Wash., D.C.), Sept. 2010, at 3, available at <http://www.nea.org/assets/docs/HE/vol10no4.pdf>.

76. *Id.*

77. See Stephen Fix, *Response*, in ACLS, LIBERAL ARTS COLLEGES, *supra* note 64, at 40, 43.

78. Roger G. Baldwin & Vicki L. Baker, *The Case of the Disappearing Liberal Arts College*, INSIDE HIGHER ED (July 9, 2009, 3:00AM), <http://www.insidehighered.com/views/2009/07/09/baldwin#ixzz210b3mjOJ> (noting that the 212 liberal arts colleges David W. Breneman identified in 1990 in an article called “Are we Losing Our Liberal Arts Colleges?” (*College Board Review* 156) have decreased in 20 years to 137 colleges. Additionally, “[m]any former liberal arts colleges are evolving, consciously or unconsciously, into more academically complex institutions offering numerous vocational as well as arts and science majors.”).

79. See generally MARTIN VAN DER WERF & GRANT SABATIER, CHRON. OF HIGHER EDUC., THE COLLEGE OF 2020: STUDENTS 48-51 (2009), available at [http://www.washington.edu/faculty/facsen/issues/college\\_2020.pdf](http://www.washington.edu/faculty/facsen/issues/college_2020.pdf).

80. See David Moltz, *Community Colleges Get Creative to Find More Space*, USA TODAY (Mar. 3, 2010, 2:36 PM), [http://usatoday30.usatoday.com/news/education/2010-03-03-IHE-community-college-space03\\_ST\\_N.htm](http://usatoday30.usatoday.com/news/education/2010-03-03-IHE-community-college-space03_ST_N.htm).

colleges seeking new marketplaces for their services.

#### V. Liberal Arts College Cachet

Despite Paul Neely's observation that established liberal arts colleges are "quite locally based,"<sup>81</sup> private colleges are creating branch-campus presences far from their headquarters.<sup>82</sup> Although satellite classroom endeavors are not new, private colleges typically had maintained about a fifty mile radius from their administrative offices.<sup>83</sup> By constructing a single building containing residence rooms, classrooms, and administration offices, Emerson hopes in Los Angeles "to recreate the Boston student life experience."<sup>84</sup> Emerson's President asserts that growth is not the college's primary driver; instead, it is "extending our brand all across the nation."<sup>85</sup> These colleges are encouraged by communities' political leadership discussing the need for an increase in the number of college graduates ready for the jobs of the future.<sup>86</sup>

Certain liberal arts colleges have built-in advantages over proprietary schools. First, many have age and traditions. These traits suggest excellence based upon the longevity in operation and a tested culture.<sup>87</sup> Second, the relatively small size of the campuses implies personal student attention from faculty.<sup>88</sup> This assures students, for now, that they will be mentored by

---

81. See Neely, *supra* note 69, at 38.

82. See Transcript of audio tape: Monica Brady-Myerov, *Private Colleges Branch out to Other States*, NPR (Apr. 4, 2012), <http://www.npr.org/2012/04/04/149973228/private-colleges-branch-out-to-other-states>.

83. *Id.*

84. *Id.*

85. *Id.* Of course, there is not much advantage to deepening one's brand if it is not intended to grow the consumer base for the product offered. Personal attachment to a college is not synonymous with the strength of the brand.

86. *Id.*

87. See generally Eugene M. Lang, *Distinctively American: The Liberal Arts College*, in *DISTINCTIVELY AMERICAN: THE RESIDENTIAL LIBERAL ARTS COLLEGE*, *supra* note 69, at 133, 134-38.

88. See Jeremy S. Hyman & Lynn F. Jacobs, *10 Reasons to Go to a Small College*, U.S. NEWS (July 28, 2010), <http://www.usnews.com/education/blogs/professors-guide/2010/07/28/10-reasons-to-go-to-a-small-college>.



immediate personal contact instead of instructed distantly via the Web or televised lecture.<sup>89</sup> Further implied are notions that there is greater individual tailoring of instruction and faculty advocacy in student career searching. In addition, the liberal arts tradition has been educating “the whole person,” a philosophy purposed to inculcate personal integrity, a sense of values and a perspective on civilization, growing leadership potential in the individual.<sup>90</sup> In short, this intention was to train citizens to assume responsible positions in the communities the colleges served.<sup>91</sup> These traits are still in some demand today in American communities, “credentialism” trends notwithstanding.<sup>92</sup>

A collaborating group of liberal arts colleges can project to the public messages such as their ambition to promote courses offered by the participants; to build an instructional mission centered on community needs; to emphasize the student’s ability to register to take courses with multiple participants; and to reduce tuition costs, by sharing physical facilities.<sup>93</sup> One essential challenge will be for private colleges, historically insular in educational philosophies, to turn outward to their new host community and to abandon traditional independent behaviors.<sup>94</sup>

---

89. See David Wessel, *Tapping Tech to Cap Tuition*, WALL ST. J., July 19, 2012, at A6, available at <http://online.wsj.com/article/SB10001424052702303942404577534691028046050.html>. Hybrid courses promise cost-savings in delivery of content without sacrificing quality of instruction. *Id.*

90. Lang, *supra* note 87, at 134.

91. See *id.* at 135.

92. See Nelson, *supra* note 18, at A4. *But see* Walter Russell Mead, *Credentialing for Future Jobs*, THE AM. INTEREST BLOG (July 22, 2012), <http://blogs.the-american-interest.com/wrm/2012/07/22/credentialing-for-future-jobs/> (“Character building needs to come back and perhaps one day it will, but in the meantime we need to [sic] a much better job at offering the skills training in a cheaper, more focused and more effective way.”).

93. See Richard L. Morrill, *Collaboration in a New Era*, TEAGLE FOUND. (June 9, 2011), [http://www.teaglefoundation.org/teagle/media/library/documents/staff-essays/2011\\_morrill\\_ACS.pdf](http://www.teaglefoundation.org/teagle/media/library/documents/staff-essays/2011_morrill_ACS.pdf).

94. See generally U.S. Dep’t of State, *College and University Education in the United States*, EJOURNAL USA: SOC’Y & VALUES (Nov. 2005), [http://photos.state.gov/libraries/korea/49271/dwoa\\_122709/College-and-University-Education-in-the-United-States.pdf](http://photos.state.gov/libraries/korea/49271/dwoa_122709/College-and-University-Education-in-the-United-States.pdf).

The second challenge for migrating liberal arts colleges will be to hire new faculty aware of the ecology of the “home base” as far as instructional philosophies and school traditions are concerned. No sensible person expects tenured faculty members from Pennsylvania and Missouri, primarily raised, educated, and working easterly of the Missouri River, to migrate to Mesa or Los Angeles. Integrating new faculty seamlessly into the cultures of the employer institutions can be a challenge, unless these colleges allow the faculty to “retain characteristics that make them unique and valuable.”<sup>95</sup> However, separation from the institution’s main culture can hinder the success of the institution’s efforts.<sup>96</sup>

#### VI. The JULE’s Value Proposition and Economic Challenges for the Community

How is a liberal arts college joint-use facility (“JULE” signifying “joint use learning environment” hereinafter) a better value for the community than another use to which its surplus public building might be put? The following is a multi-perspective response to this fundamental question. If a community has a need for additional postsecondary educational opportunities, providing a building and parking at affordable rates to a college is more sensible than leaving these facilities unoccupied and deteriorating. Tenant improvement costs for classrooms are inexpensive relative to other potential uses that trigger more costly “standard build-outs.” Thus, there is a low entry threshold, irrespective of who (town or gown) funds those improvements. Students downtown add vitality to the community, and spend more money at downtown businesses than office workers commuting downtown but shopping closer to their homes.<sup>97</sup> The presence of students attracts new

---

95. *Faculty Hiring: Best Practices in Faculty Hiring*, UNIV. OF OR., <http://facultyhiring.uoregon.edu/integrating-new-faculty-members/> (last visited Nov. 24, 2012).

96. See Stephen R. Lewis, *The Importance of Institutional Culture*, in *ACLS, LIBERAL ARTS COLLEGES*, *supra* note 64, at 188, 190.

97. See generally Annette Steinacker, *The Economic Effect of Urban Colleges on Their Surrounding Communities*, 42 *URBAN STUD.* 1161 (2005), available at <http://www.cgu.edu/include/spe/Urban%20Studies%20-%20university%20impact.pdf>.

retailers and developers of real property assets catering to the needs of the student class, such as private dormitories, college book stores, food service and gathering venues for consumption of food, beverages, and entertainment.<sup>98</sup> Since many of these non-instructional but historically “college amenities” are privatized today,<sup>99</sup> the community gains by allowing strategic development of this infrastructure by the private sector. Privatization of these functions allows allocation of direct community investment in public infrastructure to targets of greatest opportunity. Privatization further generates sales tax revenues and additional private sector job growth.

Transit agencies have experienced considerable success in increasing ridership numbers amongst students,<sup>100</sup> offsetting to some extent the additional economic rider-based burdens placed upon those systems. They can drive the community’s repurposing of underused public facilities such as libraries, community centers, swimming and tennis public facilities, and parks.<sup>101</sup> Such facilities may provide the students with part time employment while in school.<sup>102</sup> In summary, the community level of direct investment, compared to the return on that investment, may be quite favorable, although an increase in the student population will trigger the need for

---

98. See Dave Serchuk, *The New Business of College: Hamburger University*, FORBES (Sept. 14, 2006, 1:40 PM), [http://www.forbes.com/2006/09/14/college-university-outsourcing-lead-careers-cx\\_ds\\_college06\\_0914burger.html](http://www.forbes.com/2006/09/14/college-university-outsourcing-lead-careers-cx_ds_college06_0914burger.html). The current trend in campus “cuisine” is food-truck dining, curtailing “bricks and mortar” investment in favor of vendor curbside service. See Sanette Tanaka, *Food Trucks: The Newest Rivalry on College Campuses*, WALL ST. J. (Aug. 21, 2012, 10:47 PM), [http://online.wsj.com/article\\_email/SB10000872396390443713704577603613526119768-](http://online.wsj.com/article_email/SB10000872396390443713704577603613526119768-1MyQjAxMTAyMDIwMjAyODI3Wj.html?mod=wsj_valetleft_email)

99. Serchuk, *supra* note 98.

100. Brian D. Taylor & Camille N.Y. Fink, *The Factors Influencing Transit Ridership* (Mar. 22, 2003) (unpublished manuscript), *available at* <http://www.uctc.net/papers/681.pdf>.

101. See CITY OF FT. COLLINS, PARKS AND RECREATION POLICY PLAN 8 (2008), *available at* <http://www.fcgov.com/parkplanning/pdf/policy-plan.pdf>.

102. See *generally Off-Campus Student Employment Programs*, UNIV. OF MIAMI, [http://www.miami.edu/index.php/ose/student\\_information/off-campus\\_student\\_employment/](http://www.miami.edu/index.php/ose/student_information/off-campus_student_employment/) (last visited Oct. 14, 2012). *But see Merrill Pottery Co-op*, UNIV. OF CAL., SANTA CRUZ: MERRILL COLL., <http://merrill.ucsc.edu/activities/student-involvement%20/COOP/index.html> (last visited Oct. 14, 2012).

2013]

## INLAID-IVORY TOWERS

345

more efficient use of resources,<sup>103</sup> such as community first responders.

Short, medium, and long term community development challenges are addressed by an influx of a student population. In the short term, community facilities subject to deferred maintenance and vandalism are repurposed, producing some lease and sales tax revenues and creating neighborhood synergy. In the medium term, new business opportunities that cater to student tastes, with their accompanying license fees and rental and sales taxes, increase revenues. Should a JULE thrive, and if students embrace their campus's community, the longer-term value is realized by the growth of the skilled and creative working and management class,<sup>104</sup> with accompanying higher-paying jobs creation in the community. The creative class will generate new jobs in the communities where it takes root.<sup>105</sup>

Time will teach whether the liberal arts colleges' collective foray into an emerging market like adult learners (who are eager and experienced, but in some respects under-prepared, for college-level rigors) will succeed. New frontiers of unfamiliar communities will test the strength<sup>106</sup> of an unfamiliar brand. Few liberal arts colleges have the sorts of resonant brands like "Notre Dame," "MIT," or "Wharton."

---

103. See Katie McGwin, *The Effects of Increasing Off-Campus Populations*, JUMPOFFCAMPUS (Oct. 3, 2012), <http://blog.jumpoffcampus.com/2012/10/03/the-effects-of-increasing-off-campus-populations/>.

104. See INTELI, CREATIVE-BASED STRATEGIES IN SMALL AND MEDIUM-SIZED CITIES: GUIDELINES FOR LOCAL AUTHORITIES 24-26 (2011), available at [http://urbact.eu/fileadmin/Projects/Creative\\_Clusters/documents\\_media/URBACTCreativeClusters\\_TAP\\_INTELI\\_Final.pdf](http://urbact.eu/fileadmin/Projects/Creative_Clusters/documents_media/URBACTCreativeClusters_TAP_INTELI_Final.pdf) (discussing the Human Capital model, which postulates that creative workers drive regional and urban development by attracting further talent, thereby inducing additional investments by businesses that enhance job growth and rising income).

105. *Id.*

106. See Emily Glazer & Melissa Korn, *Colleges Must Learn to Make the Sale*, WALL ST. J., Aug. 16, 2012, at B10, available at [http://online.wsj.com/article\\_email/SB10000872396390444233104577591171686709792-](http://online.wsj.com/article_email/SB10000872396390444233104577591171686709792-1MyQjAxMTAyMDEwOTAxODk3Wj.html?mod=wsj_valetleft_email)

[1MyQjAxMTAyMDEwOTAxODk3Wj.html?mod=wsj\\_valetleft\\_email](http://online.wsj.com/article_email/SB10000872396390444233104577591171686709792-1MyQjAxMTAyMDEwOTAxODk3Wj.html?mod=wsj_valetleft_email) (discussing the new emphasis on "branding" or building institutional identity in higher education illustrated by the investment of public and private not for profits in marketing departments).

Those few such identifiable institutions seldom expand domestic markets with bricks and mortar. Credentialism, adopting Paul Neely's term for education as a utilitarian virtue,<sup>107</sup> remains a challenge to the liberal arts philosophy in the current economy. Today, finding work for materialistic adults is essential to institutional survival. Unhappily in this moment, the media accents unemployment rates among new college graduates.<sup>108</sup> While some generations of adults may reject the concept of hours of instruction via computer terminal, online classes continue to grow.<sup>109</sup> Finding sustainable synergy will be the key to success in the "town and gown partnership" represented by JULEs.

One vital synergy element will be passing on to students the cost-savings realized by lower JULE occupancy costs. If student loan programs cannot keep pace with tuition and fees increases, liberal arts college consortia, in whatever JULE form taken, are threatened.<sup>110</sup> The majority of Americans today are not savers,<sup>111</sup> meaning that there is no reliable reserve to fund the cash component of their education costs.<sup>112</sup> Price competitiveness with proprietary institutions will have a major impact on JULE sustainability, particularly since the major players in the proprietary higher-education arena aggressively market their brands by purchasing stadium naming rights and

---

107. Neely, *supra* note 69, at 38-39.

108. See, e.g., Heidi Shierholz & Kathryn Anne Edwards, *The Class of 2011: Young Workers Face a Dire Labor Market Without a Safety Net*, ECON. POL'Y INST. (Apr. 20, 2011), <http://www.epi.org/publication/bp306-class-of-2011/>; Heidi Shierholz et al., *The Class of 2012: Labor Market for Young Graduates Remains Grim*, ECON. POL'Y INST. (May 3, 2012), <http://www.epi.org/publication/bp340-labor-market-young-graduates/>.

109. Ryan Lytle, *Study: Online Education Continues Growth*, U.S. NEWS (Nov. 11, 2011), <http://www.usnews.com/education/online-education/articles/2011/11/11/study-online-education-continues-growth>.

110. See Wessel, *supra* note 89 (describing the threat posed by hybrid live—and technology—delivered instruction; for example, new instructional models are expected to include out-sourcing of content delivery). With this competition, it is critical to minimize cannibalization through JULE tenant competition for students, preserving thereby the synergy of the facility housing several thriving institutions.

111. See Christine Dugas, *Recession Added Debt, Drained Families' Savings*, USA TODAY (May 14, 2012, 11:51 AM), <http://www.usatoday.com/money/perfi/credit/story/2012-05-11/american-families-dealing-with-debt/54946154/1>.

112. See *id.*

2013]

*INLAID-IVORY TOWERS*

347

television advertising blitzes.<sup>113</sup> Other measures to aid liberal arts colleges in JULE circumstances are discussed below.

## VII. What Communities with Surplus Property Offer Non-Profit Postsecondary Schools

### A. *Affordable Instructional Facilities*

An inventory of a community's property assets may reveal surprising capabilities and economies of scale. Mesa had unused buildings well-enough maintained that remodeling focused merely upon gutting of interiors down to the inner face of their outer walls.<sup>114</sup> Courtrooms in Mesa's JULE could be converted by the movement of interior walls into classroom partitions.<sup>115</sup> Crime laboratories in the courthouse basement were converted suitably into science and engineering laboratories.<sup>116</sup> Since Mesa is the utility provider for electricity, natural gas, water and solid waste disposal in its downtown area,<sup>117</sup> as landlord it alone decides what to charge as a pass through operating expense to the JULE tenants. The community will strive to have the cooperation of the tenants in seeking cost-efficiencies in the retrofitting of the JULE and thereafter in monitoring utilities utilization carefully.

### B. *"Pop Up" Housing Potential*

Liberal arts colleges emphasize collegiality.<sup>118</sup> Collegiality is born of shared experience, and not merely what is gained in

---

113. Jeff Tanner, Recent Development, *Corporations Go Back To School: Colleges Attract Naming Rights Deals*, 2 SPORTS FACILITY REP., NAT'L SPORTS LAW INST., MARQ. UNIV. LAW SCH., no. 2, Fall 2001, <https://law.marquette.edu/national-sports-law-institute/corporations-go-back-school-colleges-attract-naming-rights-deals>.

114. See generally Groff, *supra* note 21.

115. See generally *id.*

116. See generally *id.*

117. City of Mesa, *Available Utility Services*, MESA.AZ.GOV, <http://www.mesaaz.gov/custserv/services.aspx> (last visited Oct. 4, 2012).

118. Carolyn Palmer et al., *A Commentary on "The Educational Role in College Student Housing"*, 35 J. C. & U. STUDENT HOUS. 86, 88 (2008).

the academic workplace.<sup>119</sup> Undergraduate students, especially the traditional-aged (18-22) ones, need “down time” together if they will form bonds with each other and embrace the place where the bonding occurred.<sup>120</sup> The semi-independent nature of student housing aids holistic student development, including improving student interpersonal dynamics and civic and community engagement.<sup>121</sup> It is difficult for cities to commit to the upfront cost of housing where a startup business model of uncertain long term success like the JULE is involved.<sup>122</sup> When there is sufficient confidence in government leadership in the long term success of the JULE, the community may seek to pursue private financing through tax exempt revenue bonds using the local government’s Industrial Development Authority.<sup>123</sup> Otherwise, housing cost risk must be borne by persons that alternatively can endure losses accompanying withdrawal of a JULE’s colleges from the local market or can affordably repurpose the housing development.

When a JULE becomes populated with colleges, there will be short-term demand for school-year living spaces for the students. Communities have underutilized multifamily housing in several guises, such as abandoned motels (motor courts), vacant public buildings, and perhaps even an inventory of vacant lots.<sup>124</sup> Cities should lease or in some manner license development for temporary housing for JULE students and staff, so that relationships may be cultivated as early as

---

119. *Id.* at 92.

120. *See id.*

121. *See id.* at 92-93.

122. *See* Catherine Michel, Note, *Brother Can You Spare a Dime: Tax Increment Financing in Indiana*, 71 IND. L.J. 457, 460-62 (1996); *see generally* REGISTRAR OF CMTY. HOUS., NEW S. WALES GOV’T, FINANCIAL VIABILITY 2-7 (2009), *available at* [http://www.rch.nsw.gov.au/NR/rdonlyres/F54F4338-56D4-4753-A6D7-68AEFF73D5C2/0/Financialviability\\_web.pdf](http://www.rch.nsw.gov.au/NR/rdonlyres/F54F4338-56D4-4753-A6D7-68AEFF73D5C2/0/Financialviability_web.pdf).

123. *See* Claire Reeves La Roche et al., *Student Housing: Trends, Preferences and Needs*, in 2010 EABR & ETLC CONFERENCE PROCEEDINGS DUBLIN, IRELAND 270, 274 (2010). Some attention needs to be paid to whether the bonds are for redevelopment purposes in a blighted area, thereby meeting certain provisions of the Tax Reform Act of 1986. *See* Michel, *supra* note 122, at 469-70.

124. *See e.g.*, ECON. DEV. & HOUS. COMM., CITY OF DALL., STATUS OF NEW TIF DISTRICTS: FORT WORTH AVENUE TWELVE HILLS 9 (2007), *available at* [http://www.dallascityhall.com/committee\\_briefings/briefings0407/ED\\_041607\\_TIFs.pdf](http://www.dallascityhall.com/committee_briefings/briefings0407/ED_041607_TIFs.pdf).

possible in the operation of the JULE. Even those communities that do not want to make capital investments in housing may contribute by allowing eager entrepreneurs<sup>125</sup> of temporary housing construction to lease underutilized improved lots<sup>126</sup> or ground lease vacant parcels to construct interim housing, so as to allow the earliest safe opening of residential environments building collegiality. A second reason for communities to enable temporary housing developed by private parties is that it would enable both the colleges and the community to determine the viability of the JULE without excessive investment.

“Urgent-delivery housing” has become the subject of design and engineering inquiry owing to recent natural disasters.<sup>127</sup> One possible temporary student housing method is building a container dormitory.<sup>128</sup> With hundreds of thousands of ISO

---

125. Cf. Tanya Powley, *Student Property Delivers High Returns*, FIN. TIMES (June 15, 2012, 7:14 PM), <http://www.ft.com/intl/cms/s/0/2c8fc970-b571-11e1-ab92-00144feabdc0.html#axzz20XP6CQnQ> (student accommodation offers attractive investment returns even in a climate of rising tuition due to an imbalance of supply versus demand).

126. See Adrienne Jeffries, *Travelodge Hotel Made from Shipping Containers*, INHABITAT (Aug. 22, 2008), <http://inhabitat.com/travelodge-shipping-container-hotel/> (reporting that a Travelodge located in Uxbridge, England was remodeled using 86 ISO containers retrofitted into bedrooms bolted together onsite, creating a 120 bedroom hotel); Robert Cookson, *Hotel Changes the Landscape of Building*, FIN. TIMES (Jan. 21, 2009, 8:29 PM), <http://www.ft.com/intl/cms/s/0/b9aad44a-e7f1-11dd-b2a5-0000779fd2ac.html#axzz20LnVcSHj> (describing Travelodge’s opening a 300-room hotel made from prefabricated modular steel containers near Heathrow Airport in London, requiring just three weeks to erect).

127. See generally Roy Gilbert, *Doing More for Those Made Homeless by Natural Disasters 1-4* (Disaster Risk Mgmt. Working Paper Series, Paper No. 1, 2001).

128. For photos of the Keetwonen 1,056 container dormitory complex constructed in 2005-06 in Amsterdam, The Netherlands, see *Keetwonen (Amsterdam Student Housing)*, TEMPOHOUSING, <http://www.tempohousing.com/projects/keetwonen.html> (last visited Oct. 6, 2012). For an academic treatment of the Keetwonen and other container housing projects in survey form, see FREDRICK H. ZAL & KENDRA COX, ASS’N OF COLLEGIATE SCHS. OF ARCHITECT., WOOD STRUCTURES SYMP., PRE.FAB: MYTH, HYPE + REALITY (2008), reprinted in WITHOUT A HITCH: NEW DIRECTIONS IN PREFABRICATED ARCHITECTURE 128, 134-35 (Fredrick H. Zal & Kendra Cox eds., 2008), available at <http://scholarworks.umass.edu/cgi/viewcontent.cgi?article=1016&context=wood>. For another dormitory project, four stories in height and completed in 2010, in Le Havre, France, called Cité a Docks, designed by Atelier Cattani Architectes, see Yuka Yoneda, *Cité a Docks: 100 Cool Dorm Rooms Made*



containers rejected from the world's container fleet every year due to age or merely excess container accumulation, recycling activities afford cost and energy savings opportunities for communities atop rapid deployment of temporary student and staff housing.<sup>129</sup> Further, repurposing of recycled materials makes a favorable impression on environmentally conscious students. A second mode of vacant residential lot occupancy involves smaller-scale, low maintenance prefabricated forms.<sup>130</sup> These dwellings may afford spare and simple spaces for persons requiring residency near the JULE on a temporary basis.<sup>131</sup> The failure of the community to welcome some form of housing proximate to the JULE relegates it to "commuter college" status, impairing student cementing of loyalty to the surrounding neighborhoods and the college community at large. This may require temporary zoning and building code amendments to enable this type of housing, at least in the JULE's transitional phase when demand for more permanent forms of occupancy is uncertain.

## VIII. Identifying Core Requirements of the Lease Parties

### A. *The Vital Interests of the Landlord*

#### 1. Landlord Needs

Landlords need rent, paid in full and in a timely manner. The optimal environment for meeting this need is success of all participants in the education enterprise. In short, the landlord

---

*from Shipping Containers*, INHABITAT (Oct. 5, 2010), <http://inhabitat.com/cite-a-docks-100-dorm-rooms-made-from-shipping-containers/>. For a general treatment of uses of ISOs in construction of housing, see generally MARC LEVINSON, *THE BOX: HOW THE SHIPPING CONTAINER MADE THE WORLD SMALLER AND THE WORLD ECONOMY BIGGER* (2006).

129. See generally Peter Grosskurth et al., *Economic Impacts of the Alternative Reuse of Empty ISO Containers*, in COMPUTATIONAL LOGISTICS: SECOND INTERNATIONAL CONFERENCE, ICCL 2011, HAMBURG, GERMANY, SEPTEMBER 2011 PROCEEDINGS 142, 142-59 (Jurgen W. Bose et al. eds., 2011).

130. See, e.g., Kara G. Morrison, *Mod Box Offers High-End Modern Style – in 200 Square Feet*, THE ARIZ. REPUBLIC (July 12, 2012, 1:43 PM), <http://www.azcentral.com/hfe/coolhomes/articles/20120712mod-box-phoenix-cool-home-tom-kelly.html>.

131. See *id.*

of the JULE (and, inferentially, its “consumers”) will thrive if the tenants – all of them – thrive. Consequently, JULE landlords must encourage two tenant behaviors: sharing and diversity.<sup>132</sup>

a. *Sharing*

The landlord needs written assurance from each of the JULE tenants that they will cooperatively share the facilities in all respects. It is intuitive individual human behavior to share and collaborate, as evidenced by websites like Flickr, Facebook, and YouTube.<sup>133</sup> Even the detriment of navigating advertising is no deterrent to sharing through these portals. In commerce, however, there is some tendency not to share, especially sharing information that may afford a competitive advantage. Landlords must counteract this tendency in two ways.<sup>134</sup> First, the written lease must emphasize the tenant obligation to share the joint-use facilities, whether they are classrooms, parking stalls, laboratories, monument sign structures, libraries, lobbies, or any other common areas of the JULE.

The second element of JULE landlord counter-activity is to create the functional equivalent of the owner’s association in a condominium environment. What the landlord needs to secure from its tenants is an agreement to meet periodically for the primary purpose of anticipating and forestalling conflict among tenants.<sup>135</sup> A valuable secondary purpose is to encourage the

---

132. See generally BRISTOL CITY COUNCIL LANDLORD SERVS., TENANT INVOLVEMENT & EMPOWERMENT STRATEGY 2012-2015 (2012), available at [http://www.bristol.gov.uk/sites/default/files/documents/housing/council\\_housing/tenant\\_participation/I%26E%20Strategy%20-%20Summary%20%26%20AP%20Final.pdf](http://www.bristol.gov.uk/sites/default/files/documents/housing/council_housing/tenant_participation/I%26E%20Strategy%20-%20Summary%20%26%20AP%20Final.pdf).

133. See Matt Ridley, *How Facebook Captured Capitalist ‘Kumbaya’*, WALL ST. J. (May 30, 2012, 11:37 AM), <http://online.wsj.com/article/SB10001424052702303807404577434241752959690>.

134. See Shiela M. Leunig, *Maintaining a Competitive Advantage by Developing a Trade Secret Protection Program*, WITI.COM, <http://www.witi.com/wire/feature/sleunig/archives/200001/index.shtml> (last visited Oct. 6, 2012).

135. See *infra* Appendix § 13.3. In the case of the MCHE, the institutions will continue communicating until the JULE opens to discuss

trading among the colleges of intelligence about student interests and “demand,” whether for class offerings or other consumer products the tenants can provide if not directly, then collaboratively. It may come to pass, for instance, that new degree or certificate programs can be provided by a consortium of some or all of the tenants in circumstances that none of the colleges can offer separately. Even a business like Acxiom<sup>136</sup> cannot delve as deeply into the mind of consumers as faculty and administrators with local presence. This requires a mentality, promoted by the landlord, that a rising tide improves each college’s odds of succeeding at the JULE.<sup>137</sup>

b. *Diversity of Offerings*

The current trend in higher education is to offer what the customer demands;<sup>138</sup> the issue for increased JULE college success is to afford a sufficient menu of course offerings to increase enrollment. Unless the student population is composed entirely of lemmings, there is no compulsion for all tenants to offer business, nursing, and IT degrees, and credentials for elementary and secondary teaching. Any lease document should require a tenant to ensure that at least some fraction of courses it offers are dissimilar to those offered by the remaining tenants.<sup>139</sup> The greater the variety of course

---

many dimensions of the JULE’s operation.

136. See JOSEPH TUROW, *THE DAILY YOU: HOW THE NEW ADVERTISING INDUSTRY IS DEFINING YOUR IDENTITY AND YOUR WORTH* 96-97 (2011); *Strategy & Analytics*, ACXIOM, <http://www.acxiom.com/marketing-services/strategy-and-analytics/> (last visited Sept. 25, 2012) (touts multidimensional understanding of customers’ information for “focused allocation of marketing spend”).

137. See *infra* Appendix § 3.3.

138. See, e.g., Susan Edgerton & Paul Farber, *Introduction to IMAGINING THE ACADEMY: HIGHER EDUCATION AND POPULAR CULTURE* 1, 2 (Susan Edgerton et al. eds., 2005); Michael Vasquez, *Early to Rise, Early to Learn: Colleges Offer 6 AM Classes*, MIAMI HERALD (Mar. 25, 2012), <http://www.miamiherald.com/2012/03/25/2711708/early-to-rise-early-to-learn-colleges.html>; Karen Farkas, *Online Education Growing as Colleges Offer More Classes to Meet Student Demand*, CLEVELAND.COM (May 8, 2011, 3:54 PM), [http://blog.cleveland.com/metro/2011/05/online\\_education\\_growing\\_as\\_co.html](http://blog.cleveland.com/metro/2011/05/online_education_growing_as_co.html).

139. See *infra* Appendix § 3.3.

2013]

## INLAID-IVORY TOWERS

353

opportunities, the greater community engagement will be with the JULE. One could take the example of the “Chautauqua” experience—a series of programs, seminars, and classes in which an individual enriches themselves in one of four programs: the arts, education, religion, or recreation<sup>140</sup>—as a model that would not only work as an attractive form of marketing, but also foster community involvement. The JULE becomes an amenity for the community’s citizens while yielding a fair return on taxpayers’ dollars.

Finally, while a diversity of programs broadens the community’s corporate intellect, there is value in coordinating the programs of the various colleges. Articulating programs, both among the colleges in the JULE and between the JULE institutions and other community higher education enterprises, such as community colleges,<sup>141</sup> benefits all entities involved. The smoother the transitions to “graduated” status, the sooner those former students join the work force and generate taxable income, personally and through their employers.

## 2. Landlord Protection

Landlords unlucky enough to lease to unsuccessful college tenants need to recoup as much of their investment in the JULE as possible when each tenant fails. This core need implicates two types of promises from tenants: repurposing opportunity, which includes complete control of the JULE premise’s future use,<sup>142</sup> and a breakage fee when the tenant must cease to operate prior to the lapse of the contracted-for term.<sup>143</sup>

---

140. *About Us/Our Mission*, CHAUTAUQUA INST., <http://www.ciweb.org/our-mission/> (last visited Oct. 6, 2012).

141. *See, e.g., About Us*, COMMUNIVERSITY, <http://www.azcommuniversity.com/about/Pages/default.aspx> (last visited Sept. 25, 2012). The Communiversity offers classes from entry level college education to Master’s Degree-level programs; but the articulation among participants allows students of that JULE to attend the other campuses of the sponsoring institutions as needed. *See id.*

142. *See infra* Appendix § 10.

143. *See infra* Appendix §§ 3.1, 30.

a. *Repurposing Opportunity*

The tenant should not control the future use of any portion of the JULE by a third party. In other words, if the landlord is committed to the education center concept, the tenant cannot have the right to assign or sublease any part of its premises, whether intended for exclusive or shared use, for any purpose that is not directly non-profit, postsecondary education oriented. It matters not whether the community sees the value proposition in the JULE as positioning itself to the creative class as a training center for well qualified employees or purely as a higher paying-jobs generator. If there is to be any auxiliary purpose to the education enterprise of the JULE, the landlord must decide which proprietary vendors may occupy the facilities.<sup>144</sup>

Allowing the tenant to determine the permitted uses of its premises or a portion of them possibly could lead to occupant improvements that are not easily repurposed for educational purposes. Landlords must prohibit alterations to the JULE premises occupied by the tenant that detract from the core educational purpose of the JULE,<sup>145</sup> and this fact must be explained to the college during the initial lease negotiations. Landlord's right to recapture must be maintained when the tenant desires to assign or sublease for a purpose, even one related to education, not in concert with the theme of the JULE.<sup>146</sup>

b. *Breakage Fees*

In order to repurpose the JULE space originally allocated to a departing tenant, the landlord will want to recoup its sunk and otherwise irretrievable tenant improvement costs, as well as its un-amortized brokerage commissions, if any of these remain.<sup>147</sup> The landlord should demand from any prematurely

---

144. *See infra* Appendix § 1.4 (providing tenant's permitted uses do not include non-instructional purposes unless they are approved in advance in writing by landlord).

145. *See infra* Appendix §§ 6.2-6.3.

146. *See infra* Appendix § 10.

147. *See infra* Appendix §§ 3.1, 30.

2013]

## INLAID-IVORY TOWERS

355

departing tenant a breakage fee recognizing that the former cannot completely “eat” its costs of preparing the exclusively-allocated premises<sup>148</sup> and will be obligated, in all likelihood, to alter or convert technology to meet the requirements of a successor institution. The calculation of this breakage fee, naturally, is the “art” of the negotiation. The obvious landlord position is to demand as such a fee a healthy fraction of the rent reserved for the balance of the terminating lease’s scheduled term.<sup>149</sup> The landlord’s argument is that the tenant was uniquely positioned to determine the demand for its product prior to lease inception. If the landlord demanded a long term tenancy as a condition to making a lease to any college, the departing tenant has a counter-argument that a long-term tenant commitment has hampered its spending in other areas that, under a shorter lease term, might have enhanced its chances to succeed in the JULE.

Of course, the argument over breakage fees is altogether avoided if the tenant pays all lease commissions and performs its own build-out and the improvements are reusable due to their generic, classroom-purposed nature.<sup>150</sup> The risk here is that the nature of the tenant’s build-out may be such that it cannot readily be repurposed; therefore, any plans and specifications for such tenant work must be approved<sup>151</sup> for general conformity to the theme of the JULE and utility for a subsequent tenant should the college leave the JULE at or before the end of the term. In ideal conditions, the classrooms and laboratories should be sufficiently generic in build-out to be usable by many colleges, including those that may expand into JULE space vacated by others.

---

148. Landlord may have installment-purchased or leased fixtures and equipment requiring ongoing debt service or lease payments while it finds a replacement tenant. *See infra* Appendix §§ 3.1, 30.

149. *See infra* Appendix §§ 3.1, 30.

150. *See infra* Appendix § 6.2.

151. *See infra* Appendix § 6.3.

### 3. Landlord Concessions

Landlords must avoid being “whipsawed”<sup>152</sup> by college potential tenants. Accordingly, landlords must resist urging to grant a “most favored nation” concession<sup>153</sup> in a generic sense. In other words, while all tenants must be indulged somewhat to encourage the success of each business model proposed, some tenants will be granted concessions that are not afforded universally. Just as in any commercial development, some tenants add more value (if for no other reason than projected enrollment based on program demand) and one or more of the colleges will further the purposes of the community better than the remainder can. Those colleges ought to receive advantages that all tenants cannot enjoy. Landlords can grant occasional “across the board” concessions, such as granting each college an equal number of reserved parking stalls for their local administrations, without promising in advance to give away substantial resources or assets under a “most favored nation” term compromising Landlords’ ability to assign or finance their

---

152. “Subject to 2 difficult situations or opposing pressures at the same time.” *Definition of Whipsaw*, OXFORD DICTIONARY, <http://oxforddictionaries.com/definition/english/whipsaw> (last visited Sept. 25, 2012).

153. In a typical “most-favored nation” (“MFN”) lease clause, the landlord agrees that future tenants will never receive a better deal than the existing one. *See generally* MARK A. SENN, COMMERCIAL REAL ESTATE LEASES § 2.07 (5th ed. 2012); Ronald J. Offenkrantz, *The Warning from Pittsburgh’s Golden Triangle: Home of the Steelers, the Pirates and the Amorphous Favored Nation Clause in the Commercial Lease*, 23 FORDHAM URB. L.J. 69, 69, 72-85 (1995). The effect of MFN clauses is to ensure that the MFN tenant gets the “best deal” of any tenant in the retail, office or industrial complex containing the premises, by obligating the landlord to match (through subsequent amendments to the MFN status holder’s lease) more favorable lease provisions given to other tenants in the complex. *See* Offenkrantz, *supra*, at 69-70. In many commercial projects, the first major tenant to take premises in a building (particularly the anchor) almost always will receive the best deal, so the provision is more of a “feel-good clause.” *See generally id.* However, in a JULE, the largest institutions may not mobilize to open before more aggressive (but smaller scale or less recognizable) colleges that precede them. In this situation, among others, the Landlord does not want the small but “nimble” college to have equal privileges the Landlord reserves for a more desirable target institution. MFN clauses are extremely troublesome for landlords because of their impact on the landlord’s subsequent leasing activities, especially the financial exposure presented to the landlord in the form of rent and other concessions. *See generally id.* at 70-71.

2013]

*INLAID-IVORY TOWERS*

357

leases.

#### 4. Landlords and Branch Campuses

Landlords making economic concessions must be assured that their JULE is not one among several “test locations” in the relevant market. In short, the colleges must agree not to open other campus branches in the same Metropolitan Statistical Area (“MSA”)<sup>154</sup> in a defined period of time.<sup>155</sup> Mesa would be displeased, legitimately, to discover that a college tenant had opened a second branch campus in Phoenix concurrently with starting classes in the JULE, as an experiment to learn which site offered the optimal enrollment numbers. If that outcome is inevitable, the to-be jilted landlord ought to receive its rent for the full term of the JULE lease, having enabled the college to establish a beachhead at an affordable entry price. It is appropriate to ask the tenant prospect not to open another facility in the same MSA until it is well-established within the JULE.

#### 5. Landlords and Tuition

Landlords should seek a tenant concession that it will not charge the community’s students higher tuition and fees than are charged at the college’s main campus for the same program. To allow the tenant to do otherwise may lead to outmigration of the JULE’s students to the tenant’s main campus and its community.

---

154. “The general concept of a metropolitan or micropolitan statistical area is that of a core area containing a substantial population nucleus, together with adjacent communities having a high degree of economic and social integration with that core.” *Metropolitan and Micropolitan*, U.S. CENSUS BUREAU, <http://www.census.gov/population/metro/about/> (last visited Jan. 5, 2013).

155. This must be adjusted, of course, if the tenant plans to open for instruction in the community before the JULE is ready for occupancy; in such event, temporary quarters must be secured without violating the long term lease.



B. *The Vital Interests of the Tenant*

The tenant needs to have the full support of the landlord while introducing the college's brand to the community. This commitment translates to marketing support being manifested in several ways, including enhanced identification signage, mass transit subsidization, land use and zoning adjustment and use of available public infrastructure.

1. Signage

If the community does not have an ordinance that supports wall and monument signs that are readily visible from major rights of way, the tenants will require zoning adjustment of some sort that maximizes visibility of its physical brand to enrolled and potential students. This sign package likely will include limited-access highway "this way to" exit-identification signs. The community may want to consolidate the latter types of signs into a single identification sign for the JULE. Indeed, the community likely will want to consider the creation of a zoning overlay district that incorporates branding via signage and logo placement (such as erection of banners identifying the tenants upon street-posts along the arterial surface streets within the "education" district).

2. Mass Transit Subsidization

Any municipality with mass transit connecting urban nodes to the JULE will seek to encourage the use of such transit by students together with staff and administration personnel. Tenants should be expected to encourage subsidization of ridership and municipalities should be prepared to cooperate in providing transit subsidies for JULE-using riders.

3. Land Use & Zoning Adjustment

The shrewd community seeking to retain a fraction of the JULE's student population after class hours will consider

creating an “entertainment district”-type zoning overlay incorporating areas near the JULE, which allows increased hours of operation of bars, reduced distance-separation of bars, nightclubs and other, more traditionally vigorously regulated uses,<sup>156</sup> thereby attracting students so student recreation in the JULE’s vicinity will be encouraged. Importantly, this does not need to promote behavior antithetical to the established community.<sup>157</sup> The community also may wish to create pedestrian malls near the JULE to entice student investigation of neighborhoods and their shops, galleries, and restaurants at close range.<sup>158</sup>

### C. *Sharing of Available Public Infrastructure*

Communities should consider initiatives such as street closures for special tenant events near the JULE, drawing attention to their brands and student activities in the community. Street fairs, “art walks,” and carnivals are types of

---

156. See CITY OF NEWARK, LAND USE TRENDS AND INITIATIVES 127-28 (2000), *available at* <http://www.ci.newark.nj.us/userimages/downloads/4.0%20Land%20Use%20Trends%20&%20Initiatives.pdf>; Roberta Brandes Grant, *Authentic Urbanism and the Jane Jacobs Legacy*, in URBAN VILLAGES AND THE MAKING OF COMMUNITIES 25, 33-34 (Peter Neal ed., 2003); Peter Hall, *Smart Growth on Two Continents*, in URBAN VILLAGES AND THE MAKING OF COMMUNITIES, *supra*, at 48, 61. Mesa is creating an entertainment zoning district on 493 acres in its downtown adjoining the MCHE, nullifying an otherwise-obligatory 300 linear foot buffer distancing bars and clubs from schools and churches, to accommodate expected light rail traffic and the city’s growing student population. See Gary Nelson, *Mesa to Pursue Nightlife District*, THE ARIZ. REPUBLIC (Nov. 21, 2012, 10:19 PM), <http://www.azcentral.com/arizonarepublic/local/articles/2012/11/15/20121115city-pursue-nightlife-district.html>. The draft ordinance is captioned “12-1025” and may be viewed at <http://mesa.legistar.com/Legislation.aspx>, by entering “12-1025” in the search engine.

157. See M.K. Guetersloh, *Task Force Aims to Better Manage Lively Bar District*, PANTAGRAPH.COM (Feb. 27, 2011, 7:00 AM), [http://www.pantagraph.com/news/local/government-and-politics/article\\_ca6723ae-420a-11e0-85b5-001cc4c002e0.html](http://www.pantagraph.com/news/local/government-and-politics/article_ca6723ae-420a-11e0-85b5-001cc4c002e0.html).

158. See Jon Zemke, *Walk This Way: The Challenge of Pedestrian Malls*, CONCENTRATE, (Dec. 07, 2011), <http://www.concentratemedia.com/features/?page=all> (scroll to and follow “Walk This Way: The Challenge of Pedestrian Malls” hyperlink) (describing Iowa City Ped Mall built in 1977 and challenges to their resonance in American cities).

temporary activities that, if properly managed, engender community support for colleges within their boundaries. Additionally, communities can devote public parking facilities for such special events without charge to lend support to the brand recognition effort. On a longer-term basis, communities should underwrite a certain level of support for joint use of public libraries' collections and facilities, performing arts centers, art galleries and other museums, ball fields, recreation centers, and public parks.

1. The JULE Premises Must Clearly Be Defined in the Lease

There will be fluid movement between initial and subsequent lease terms in classroom and other space each tenant needs to schedule for lectures and laboratories. Landlords will need to drive coordination among the tenants to avoid disputes. The lease should provide for inter-tenant problem solving procedures.<sup>159</sup>

2. Tenants Access

The tenants collectively require twenty-four-hour access to the JULE, with several implications for the parties. First, the lease must recite that such round-the-clock accessibility is obligatory, which will (i) increase utilities consumption and (ii) raise concerns about security of property and persons within the JULE. Since separate metering of flexible and (frequently) shared interior spaces (for example, classrooms) is impractical, dividing the operating expenses by the total number of tenants promises to foment debate about the colleges' respective burdens.<sup>160</sup> The issue also ought to provide a "laboratory" for the students to consider reduction in the consumption of non-renewable resources. Second, the landlord will not desire to be involved in the security of students and staff at the JULE, beyond possibly volunteering that community police will include the JULE parking lot on officers' rounds. Since campus

---

159. *See infra* Appendix § 13.3.

160. *See infra* Appendix § 4.3.

2013]

## INLAID-IVORY TOWERS

361

security is the province of colleges, not communities, the landlord likely will want the tenants to control card access, emergency telephone/alarm/monitoring system installation, and maintenance.<sup>161</sup> Since the colleges have distinct security protocols, mandating that a council of the tenants at the JULE determine what coordination of measures (including installation and maintenance of the security technology and training its operators) best serves the majority of the students. Use of multiple security systems in a single facility confuses users and is not cost-effective.

## IX. The Community End Game

Community governments are a blend of businesses and social engineering institutions. When that hybrid meshes well, good business judgment tempers the community's social engineering vision. When coordination of these purposes fails over a protracted period, Chapter Nine bankruptcy looms.<sup>162</sup> While the vision of the community to grow an educated population is well conceived by its leaders, implementing that vision after choosing partners and establishing a few basic ground rules for operation transcends government purview. Of course communities could contribute in affording internships and co-op work experiences; but their coordination must be led by the educational partners, as local communities historically do not participate in public school system governance. Consequently, community governments must strategize their exits from the JULE from the outset of relationship formation.<sup>163</sup> A mature JULE may exert sufficient financial drag to induce community leaders to disengage; conversely, the JULE may become self-sustaining. Since liability accompanies ownership of assets and the landlord's participation, there is

---

161. See *infra* Appendix §§ 5.8, 7.2, 9.2.

162. See, e.g., Hilary Russ, *Analysis: Stockton, California New Paradigm for Struggling Cities*, REUTERS (July 1, 2012, 8:04 am), <http://www.reuters.com/article/2012/07/01/us-stockton-bankruptcy-filing-idUSBRE86007T20120701>. Municipal bankruptcy is the subject of Adjustment of Debts of a Municipality, 11 U.S.C. §§ 901-946 (2006).

163. See STEPHEN R. COVEY, THE SEVEN HABITS OF HIGHLY EFFECTIVE PEOPLE: RESTORING THE CHARACTER ETHIC 98 (2004). Covey advocated understanding the destination of one's plan at its inception.

little reason for the community to remain involved many years after the JULE opens, if the education partners are trustworthy. Indeed, other than donating land, financing mechanisms may eliminate most of the community's direct investment obligations in a JULE.<sup>164</sup>

In a multi-tenant building, granting an option to any tenant to purchase the JULE (possibly to the exclusion, upon exercise, of other tenants) is unwieldy, modestly stated. Granting rights of first refusal<sup>165</sup> or "of first offer"<sup>166</sup> in a partly-exclusive use/partly-shared facility invites nightmarish outcomes. To what degree must the party with these rights assert them if another tenant seeks to expand or occupy the full JULE? To which portions of the JULE do each tenant's rights apply? The community may consider establishing, in cooperation with its education partners, the JULE's ownership

---

164. New Market Tax Credit (NMTC) financing has emerged as an alternative to tax-exempt financing for public projects, as well as for private sector non-manufacturing projects. Tax credits also are available to private investors for certain structure rehabilitation projects, such as state and federal historic rehabilitation tax credits (up to 20% of qualifying costs). See Benjamin T. Zeigler, *How South Carolina Municipalities are Driving Downtown Development in Tough Economic Times*, PALMETTO PUB. FIN. FORUM (Feb. 22, 2012), <http://www.palmettopfforum.com/2012/02/22/how-south-carolina-municipalities-are-driving-downtown-development-in-tough-economic-times/#.UAjacl0tEW8.email>. Communities ought to consult their bond and finance counsel at the outset of a plan to partner with postsecondary institutions to review available incentives and financing mechanisms. For an outline of development alternative and public private partnerships considerations for infrastructure development decisions, see AURARIA HIGHER EDUC. CTR., *supra* note 41, at 128-31. One such partnership employing Tax Increment Financing bonds is Eddy Street Commons, which opened in 2009, in South Bend, Indiana. The city and the University of Notre Dame collaborated on a new urbanist, mixed-use development in part using TIF bonds issued by the South Bend Redevelopment Agency to build a 1,278 stall parking garage and pay for street, water line and sanitary and storm sewer lines. See Nancy J. Sulok, *Redevelopment Agencies Sign Agreement for Eddy Street Commons in South Bend*, SOUTHBENDTRIBUNE.COM (Feb. 6, 2008), [http://articles.southbendtribune.com/2008-02-06/news/26892647\\_1\\_bond-money-kite-realty-group-developer](http://articles.southbendtribune.com/2008-02-06/news/26892647_1_bond-money-kite-realty-group-developer).

165. See Paul S. Rutter & Duane M. Montgomery, *Options, Rights of First Refusal, Rights of First Negotiation and Rights of First Offer: A Guide Through the Maze*, CORP. REAL EST. & THE LAW (The Int'l Assoc. of Att'ys & Execs. in Corp. Real Est., Frankfort, Ill.), Summer 1999, at 1, 2, available at <http://www.gilchristrutter.com/CM/Articles/Options,%20Rights%20of%20First%20Refusal.pdf>.

166. *Id.* at 4-5.

structure like an office cooperative.<sup>167</sup> There, a tenant or prospective tenant purchases shares (often known as a “share capital” co-op) of ownership (“membership”) in the enterprise that owns the entire building.<sup>168</sup> The number of shares owned by each tenant is determined by comparing the value of the premises it exclusively occupies to the value of the entire JULE. Members, through leases made with the cooperative enterprise, have exclusive occupancy rights to specific space(s) in the building and non-exclusive rights to occupy common areas of the building and grounds under leases from the enterprise.<sup>169</sup> The board of directors of the cooperative (here, presumably comprised of the JULE tenants’ representatives) determines the financial requirements and sustainability of the cooperative, setting aside funds for the replacement of capital improvements and other cooperative assets.<sup>170</sup> Consequently, the rents paid by the cooperative’s shareholders are set at amounts greater than the pass-through expenses of the JULE’s operation.

As this is not an essay on cooperative operation or financing, descriptions of types of cooperative financing are more appropriately treated elsewhere. Briefly, they would touch upon pegging the JULE’s cooperative share price at a “market rate” (subject to market fluctuation) or “limited equity” price, in which, to maintain the affordability of membership,

---

167. Cooperatives have been creatures of shared residential ownership in locations like New York City, San Francisco and Honolulu for decades. As of sometime during the first decade of this century in New York City, the proportion of residential cooperatives exceeded 80 percent. See Michael H. Schill et al., *The Condominium versus Cooperative Puzzle: An Empirical Analysis of Housing in New York City*, 36 J. LEGAL STUD. 275, 276 (2007). Commercial cooperatives are more common in major cities like New York as well. See, e.g., Shawn G. Kennedy, *Real Estate: Commercial Co-Op in Brooklyn*, N.Y. TIMES, June 16, 1982, at D20, available at <http://www.nytimes.com/1982/06/16/business/real-estate-commercial-co-op-in-brooklyn.html>.

168. Robert Szold, *The Functions and Duties of Directors of a Housing Cooperative*, COOP. HOUS. BULL. (Nat’l Assoc. of Hous. Coop., Washington, D.C.), Summer 2010, at 14, available at [http://www.coophousing.org/uploadedFiles/NAHC\\_Site/Resources/nahc%20functions%20Szold.PDF](http://www.coophousing.org/uploadedFiles/NAHC_Site/Resources/nahc%20functions%20Szold.PDF).

169. *Id.*

170. *Id.*

the sum of equity from the sale of one's shares is capped.<sup>171</sup> Indeed, sometimes "zero equity" models entitle a seller of shares to recoup nothing more than its modest purchase price initially paid for the shares, where the shareholders themselves are non-profit enterprises.<sup>172</sup>

If the education partners in the JULE eschew direct participation in its management, one solution is to establish a leasing cooperative, in which an unaffiliated non-profit corporation is established to serve as the manager.<sup>173</sup> Here, the non-profit manager leases space to the education partner tenants. In any event, as the owner of the cooperative premises, it has the right to mortgage the JULE. By contrast, as share owners, individual tenants cannot mortgage their leasehold rights since, in a shared-use facility like a JULE, appetite for lending risk is limited by the fractional-interest nature of the proposed borrower's collateral. While tenant stockholders have only their cooperative stock to offer lenders as collateral, the cooperative's board may pledge each tenant's stock under a blanket JULE mortgage, thereby apportioning the debt to each shareholder. These issues, coupled with tax considerations such as whether stockholders can deduct mortgage interest and *ad valorem* taxes, mandate the landlord community's seeking financial consulting services for alternatives enabling divesting real property assets and landlord obligations arising from JULE ownership.

A second form of ownership for the JULE is the office condominium.<sup>174</sup> Here, the logistical problem is describing the

---

171. BARRY MALLIN, N.Y. DIV. OF HOUS. & CMTY. RENEWAL, LIMITED EQUITY COOPERATIVES: A LEGAL HANDBOOK 3, 8 (1990), *available at* [http://www.uhab.org/sites/default/files/doc\\_library/Limited\\_Equity\\_Cooperatives\\_A\\_Legal\\_Handbook\\_0.pdf](http://www.uhab.org/sites/default/files/doc_library/Limited_Equity_Cooperatives_A_Legal_Handbook_0.pdf)

172. *Housing Cooperative Basics*, ULS HOMEWORKS, [http://www.uls-homeworks.org/housing/housing\\_basics.aspx](http://www.uls-homeworks.org/housing/housing_basics.aspx) (last visited Oct. 17, 2012).

173. *Id.*

174. In 1981, the New York State Attorney General's Office first approved the initial offering plan for a commercial condominium in New York City. See Shawn G. Kennedy, *Real Estate: A Medical Building on West Side*, N.Y. TIMES, Aug. 14, 1985, at D20, *available at* <http://www.nytimes.com/1985/08/14/business/real-estate-a-medical-building-on-west-side.html?scp=1&sq=Medical%20Building%20West%20Side%201985&st=Search>. Most of these projects converted residential buildings that had housed a

“units” of stakeholder ownership. Describing fractional interests may be so complex as to discourage using this ownership form. This hurdle becomes higher as various occupants shrink or expand their operations in the JULE’s classroom and laboratory areas as enrollment dictates.

## X. Conclusion

Those communities seeking higher education partnerships as an accelerant for jobs growth and downtown revitalization must approach these initiatives strategically, fully cognizant of the current risks of such alliances. The salad days of the higher education “industry” may be ebbing; although academe has been an American growth industry for sixty years, many schools have been drained of their cash reserves.<sup>175</sup> In a recent report on sustainable institutions from consulting firm Bain & Co., collaborating with Sterling Partners, a private equity firm investing in education companies, based in part upon reviewing balance sheets of 1,692 private and public schools, the reporters found many instances of over-leveraging, with long-term debt increasing at the rate of twelve percent per year and average annual debt expenses outstripping instruction-related expense by an alarming margin.<sup>176</sup> The report posits an institutional “stress test” to determine at-risk status for a school’s sustainability;<sup>177</sup> a community appropriately might review results of their proposed college partners’ self-administrations of that inventory.

---

few professional office uses, typically occupied by professionals who lived in or near the building. *Id.*; see also Michael F. Jones, *Office Condominiums: Developer Opportunities, Marketing and Structuring*, 16 REAL PROP. PROB. & TR. J. 501 (1981), available at <http://mfjlaw.com/pdf/RPPTJ%20Office%20Condominiums%2016-501.pdf>.

175. See, e.g., Douglas Belkin, *Tough Times for Colleges—and College Towns*, WALL ST. J., July 23, 2012, at A2, available at <http://online.wsj.com/article/SB10000872396390444330904577537452874310424.html>.

176. See *id.* For the twelve-page executive summary of the Bain/Sterling Partners study, see JEFF DENNEEN & TOM DRETTLER, BAIN & CO., THE FINANCIALLY SUSTAINABLE UNIVERSITY (2012), available at [http://www.bain.com/Images/BAIN\\_BRIEF\\_The\\_financially\\_sustainable\\_university.pdf](http://www.bain.com/Images/BAIN_BRIEF_The_financially_sustainable_university.pdf).

177. *Id.* at 7.



Attached as the appendix to this paper is a form of commercial lease usable for a discussion draft by a community landlord of a proposed JULE.<sup>178</sup> The lease assumes these facts:

First, the community is repurposing an unoccupied government building in a build-to-suit fashion for multi-tenant occupancy. As the build-out is uniform across classrooms and laboratories, fundamentally the building's interior functions like instructionally-purposed "executive suites."

Second, the community's capital improvements costs and expenses related to furnishings, fixtures, and equipment, together with ongoing operating costs, are gradually recouped from tenants over time. The intention is to afford the institutions "breathing room" to build their local image and enrollments through strategic marketing and adjustments to their offered courses of study.

Third, the nature of occupancy will be elastic – that is, certain tenants will grow into their JULE premises more quickly. Indeed, some will succeed rapidly while others struggle for enrollment, affecting space demands. Consequently, the configuration of the occupancy of each institution is dynamic, so their "premises" will fluctuate by sizes and types of space required.

Fourth, substantial redundancy in study programs does little to promote the institutions or the community. Replication of courses of study engenders Darwinism among the colleges without diversifying the community's work force.

The lease includes a number of familiar provisions in a generic office lease's form text. Interspersed are novel terms addressing the unique nature of tenant fluid occupancy, where expansion (hopefully) and contraction may occur, perhaps annually, during the lease term. While the landlord under this lease offers the tenant postsecondary institution expansion,<sup>179</sup>

---

178. Readers should note that the attached Appendix is not "cloned" from the form of lease ultimately employed by the City of Mesa for the MCHC; for a final form of that lease, see City of Mesa, *Council, Board, and Committee Research Center*, MESA.AZ.GOV, <http://mesa.legistar.com/LegislationDetail.aspx?ID=1242776&GUID=57F458E3-FC04-4ACB-B47D-029F6341C055> (last visited Jan. 9, 2013).

179. *See infra* Appendix § 1.7.

2013]

*INLAID-IVORY TOWERS*

367

renewal<sup>180</sup> and termination<sup>181</sup> rights, these provisions fall outside conventional boundaries of office lease transactions, recognizing that the landlord community emphasizes affording services instead of bricks-and-mortar provision. Such a service orientation anticipates tomorrow's commercial office provision, where landlords induce tenancies with the message that, "we seek to maintain a partnership while addressing each other's financial goals – how shall we proceed?" instead of stating "consider the available suite and property amenities, then kindly advise what you'll pay."

The lease form anticipates generic circumstances involving the landlord community's leasing to several tenants; these tenants will secure "atolls" of sole occupancy while sharing some classrooms, laboratories, faculty and administrative office areas and parking throughout the JULE's common area. The form's landlord seeks to aid each prospective tenant's success by carving out "spheres of influence" in course offerings to the target community audience,<sup>182</sup> primarily adult learners. Like every other form, it must be evaluated by landlords and tenants alike for applicability to the peculiar circumstances of any JULE. Finally, names of the education partners, like the name of the landlord town and the State of Franklin, are inventions, so resemblances to any community, college, or university with a similar name are purely coincidental.

---

180. *See infra* Appendix § 2.2.

181. *See infra* Appendix §§ 3, 30.

182. *See infra* Appendix § 3.3.

368

*PACE LAW REVIEW*

[Vol. 33:1

**APPENDIX**

TOWN OF MINERVA  
A FRANKLIN MUNICIPAL CORPORATION

LEASE AGREEMENT

With

\_\_\_\_\_

A \_\_\_\_\_ NOT-FOR-PROFIT CORPORATION

for

MINERVA CENTER FOR HIGHER EDUCATION  
123 WEST MAIN STREET  
MINERVA, FRANKLIN

Effective Date: \_\_\_\_\_, 20\_\_

2013]

*INLAID-IVORY TOWERS*

369

**Table of Contents**

<u>Section No.</u>	<u>Item</u>	<u>Page No.</u>
1.	Lease	372
2.	Term	375
3.	Limited Termination Rights; Exclusive and Nonexclusive Rights; Property Hours of Operation	376
4.	Rent, Payment, and Additional Payments	378
5.	Representations, Warranties, and Covenants of Tenant	384
6.	Improvements	386
7.	Maintenance and Repairs	389
8.	Damage and Destruction of Premises	391
9.	Additional Parking and Security	392
10.	Assignment, Subletting, and Other Transfers	393
11.	Identification Signs	394
12.	Tenant Default and Landlord Remedies	395
13.	Outside Property Management, Rules and Problem Resolution	399
14.	Landlord's Default, Tenant Remedies	401
15.	Environmental Protection	402
16.	Insurance	406
17.	Indemnity	408
18.	Surrender of Possession	410
19.	Holding Over; Inspection/Access by Landlord	411
20.	Notice	411
21.	Liens and Mortgages	412
22.	Corporate Authorization	413
23.	Utility Lines and Services Charges	413
24.	Reservations to Minerva	414
25.	Brokers	414
26.	Sale of Premises by Landlord	415
27.	Estoppel Certificate	415
28.	Condemnation	416

370	<i>PACE LAW REVIEW</i>	[Vol. 33:1
29.	Memorandum of Understanding; Commitments	417
30.	Tenant's Termination Option and Breakage Liquidated Damages	418
31.	Miscellaneous	420
	Exhibit A – The Premises	426
	Exhibit B – Landlord Improvements	426
	Exhibit D – Rent Calculation and Schedule	427
	Exhibit F – FF&E Reimbursement	428
	Schedule 3.3 – Degree Programs of Downtown Minerva Education Partners	429
	Schedule 5.7 – Downtown Minerva Amenities for Tenant's Use Under Separate Agreement	430
	Schedule 29.2 – Tenant's Course of Study Offerings	430

2013]

*INLAID-IVORY TOWERS*

371

**Lease Agreement**

This Lease Agreement (“Lease”) is executed to be effective the \_\_\_\_ day of \_\_\_\_\_, 2012 (“Effective Date”) between THE TOWN OF MINERVA, a Franklin municipal corporation (“Minerva” or “Landlord”), and \_\_\_\_\_, a \_\_\_\_\_ not-for-profit corporation (“Tenant”). Landlord and Tenant may be referred to jointly as “Parties,” and each separately as “Party.”

**Recitals**

A. This Lease is being entered into to implement (while superseding) that certain Memorandum of Understanding for a Minerva Downtown Campus dated \_\_\_\_\_, 201\_\_, between Minerva and Tenant.

B. Minerva desires that Tenant locate its State of Franklin campus in the Town of Minerva’s central downtown area; and Tenant desires to establish a branch of an institution of higher education in the Town of Minerva’s downtown area in the Minerva Center for Higher Education.

C. Tenant desires to lease, and Minerva is willing to lease, pursuant to the terms of this Lease, portions of that certain real property, which includes non-exclusive, joint use of the parking lot, and any and all improvements presently existing thereon (subject to their availability, as otherwise provided in this Lease), located upon the real property (“Property”) commonly known as 123 West Main Street, Minerva, Franklin, (as those portions for Tenant’s use are more specifically depicted on the attached **Exhibit “A”** (“Premises”). Portions of the Premises within the interior of the Property’s building (“Building”) shall be for Tenant’s sole and exclusive use; while other portions of the Building shall be used by Tenant jointly with other occupants. In some cases involving the Building’s common areas (e.g., lounges), the joint use shall be simultaneous; while in other cases, the joint use of portions of the Building (e.g., classrooms or laboratories) will be subject to advance scheduling. Those limited portions of the Premises exclusively dedicated to Tenant’s Permitted Uses (as defined

below) are so denoted on **Exhibit “A.”**

D. Minerva will make certain improvements to portions of the Premises (a partial build-out of the Building) as further described in this Lease and attached exhibits within, permitting Tenant to occupy and use the Premises beginning approximately July 1, 2013. The Parties intend this Lease to be effective and enforceable upon entering into this Lease. Rental payments will not begin until the Rent Commencement Date (as defined in Section 4.1 below), being the date Tenant is able to move into the Premises.

E. Tenant shall use the Premises as its primary campus in Franklin for the Permitted Uses and for directly-related administrative uses.

### **Agreement**

In consideration of the foregoing recitals, which are incorporated herein, and the terms and conditions of this Lease, the Parties agree as to the following:

#### **1. Lease**

1.1 The Premises. Landlord hereby leases the Premises to Tenant subject to all matters that a physical inspection of the Premises would disclose (including the effects of occupancy by other institutions of postsecondary education) and all matters of record (including but not limited to: liens, encumbrances, easements, assessments, and restrictions); and further subject to all operational and use restrictions and other terms, limitations, and conditions set forth in this Lease. Additionally, the Premises are subject to: (i) all applicable present and future laws, regulations, ordinances, resolutions, building restrictions and regulations, and zoning laws of the Town of Minerva, and county, state, and federal bodies having jurisdiction; (ii) the condition and state of repair of the Premises as of the Rent Commencement Date; (iii) the right of access by the Town of Minerva to utility lines, telecommunication lines, cable lines, and other similar

2013]

*INLAID-IVORY TOWERS*

373

improvements when needed by the Town of Minerva for repair or replacement. Tenant specifically agrees that from time to time during the Term (as defined below) Tenant shall have (a) exclusive use and occupancy of portions of the Building's floor area for its students and faculty, subject both to negotiation between the Parties and space availability, and (b) non-exclusive use and occupancy of such part of the Building's floor area that shall be concurrently used and occupied by Tenant and other tenants of the Building. Each type of occupancy shall be incorporated in the definition of the Premises; and Premises Rent (as defined in Section 4.1) shall be calculated depending on the exclusivity of Tenant's use rights (i.e., whether exclusively or non-exclusively allocated to Tenant) for portions of the Building.

1.2 Right to Use the Premises. As of the Rent Commencement Date (as defined in Section 4.1), Landlord agrees that so long as Tenant shall timely pay the Premises Rent (as defined in Section 4.1) and other charges required to be paid hereunder, and perform all of its other obligations under this Lease, Tenant shall peaceably have and enjoy the use of the Premises without hindrance from Landlord or anyone claiming by or through Landlord.

1.3 Condition of Premises. Tenant specifically acknowledges that Tenant, as of the Effective Date, has inspected the Premises prior to entering into this Lease and, subject to the Landlord Improvements (as described in Section 6.1 and listed on **Exhibit "B"**) agrees to accept the Premises in an "AS IS, WHERE IS" condition without any warranty or representation from Landlord, either express or implied, of any kind or nature whatsoever with respect to the Premises, including, but not limited to, any warranty of merchantability, habitability, or fitness for any particular or specific purpose, and all such warranties are hereby disclaimed. Provided, however, Landlord shall cause the Landlord Improvements to be constructed in accordance with the final documents, plans, and specifications for such improvements, and Landlord shall transfer those warranties Landlord obtains from contractors, subcontractors, or material men for such improvements to the Property Manager (as defined below in Section 13.1) to allow it to accomplish those repairs or replacements of portions of the



Landlord Improvements as remain under warranty.

1.4 Permitted Uses. Tenant shall only use the Premises as an institution of postsecondary education, including such uses as teaching college courses, or for any related college administrative uses, college recruiting, or similar higher education-related uses; and supporting uses (e.g., coffee shops) to the foregoing uses with the prior written approval of Landlord, which approval may be given or withheld in its sole discretion. Collectively, these uses are referred to elsewhere herein as “Tenant’s Permitted Uses.” Tenant’s Permitted Uses shall not include those uses that duplicate the courses of study of other institutions occupying the Property as described in Section 3.3 below.

1.5 Continuous Operation. Tenant shall continuously use the Premises during the Term (as defined below) for Tenant’s Permitted Uses. If Tenant fails to so use the Premises for a period of 120 consecutive days (other than in the event of a casualty affecting the entire Property), Tenant shall be deemed to have allowed the Premises to “go dark,” which shall be a default under this Lease.

1.6 Compliance with Laws. In its use of the Premises and while on the Property, Tenant shall comply with all applicable laws, ordinances, and regulations.

1.7 Right of Expansion of the Premises. Tenant has provided Landlord a plan for the development of Tenant’s Permitted Uses during the Term; an outline of this plan is described in Sections 29.2 through 29.4 below. Once during each academic year (presumptively August through May/June) of the Term, Tenant shall notify Landlord and Property Manager (in no event later than April 30 for the ensuing fall term of instruction) of its intentions for instruction by identifying the number of classes to be offered for the ensuing academic year, the time block (i.e., morning, afternoon and night) for delivering each such class, and the average number of students anticipated for each such class. To the extent (and only then) that additional classroom and specialty (computer, “wet,” and other laboratory-type) space is available on the Property, Landlord shall allocate such additional space to Tenant, subject to the needs of other tenants of the Property; and this space shall become a portion of its Premises, whether

2013]

*INLAID-IVORY TOWERS*

375

for Tenant's exclusive or joint use with other Building occupants, with an amendment to this Lease documenting the revised Premises and adjusting the Rent accordingly under the terms of **Exhibit "D."**

## 2. Term

2.1 Term. The term ("Term") of this Lease shall commence on the Effective Date and shall continue for a period of five (5) years after the Rent Commencement Date (as defined in Section 4.1), unless terminated earlier as provided in this Lease. Accordingly, the Term will continue until midnight on June 30, 2018 (which is the day before the 5th anniversary of the Rent Commencement Date), unless terminated earlier as provided in this Lease.

2.2 Renewal Periods. Tenant may seek to extend the Term for up to three (3) consecutive periods of five (5) years each (each an "Extended Term(s)"), so long as Tenant is not in default of any of its obligations hereunder (beyond any applicable cure period) at the date upon which Tenant's notice to Landlord of Tenant's request for an Extended Term. Such request for extension shall be provided by Tenant no later than one hundred eighty (180) days prior to the last day of the Term (or the applicable Extended Term) by giving written notice to Landlord; and Tenant's failure timely to notify Landlord of its desire for the extension shall serve as Tenant's notice that Tenant no longer seeks to extend the term hereof. In Landlord's sole discretion, within thirty (30) days of its receipt of Tenant's notice, Landlord may either accept or reject Tenant's request for extension hereof. If an Extended Term is agreed to, the Premises Rent during the Extended Term shall be as set forth in Section 4.1.3.

3. **Limited Termination Rights; Exclusive and Nonexclusive Rights; Property Hours of Operation.**

3.1 No Unilateral Termination Without Compensation to Landlord. Tenant may not terminate this Lease without paying agreed upon Breakage Liquidated Damages (as defined below) and otherwise under the terms set forth in Section 30 of this Lease.

3.2 Exclusive and Nonexclusive Rights. Subject to the terms of this Lease, Tenant shall have only the exclusive right to occupy and use those portions of the Premises so allocated as depicted on **Exhibit "A,"** and then only while Tenant is in compliance with the terms and conditions of this Lease. All other rights granted to Tenant under this Lease are nonexclusive.

3.3 Observing the Exclusive Instructional Rights of Other Tenants. Tenant understands and agrees that the success of the overall private, postsecondary education initiative of Minerva rests in part upon the success of each of the providers in executing its instructional services model. That delivery is more likely to succeed if each tenant establishes certain programs of study unique among the aggregate course offerings of all Minerva private, postsecondary education partners (herein collectively, "Educational Institutions"). Listed on Schedule 3.3 attached hereto are the degree program intentions of the other Educational Institutions. Tenant agrees that through August 2016, Tenant shall not offer degree programs with "majors" or "double majors" that substantially duplicate the majors sponsored by another Educational Institution described on Schedule 3.3. By "substantially duplicate," the Parties mean: offering a bachelor's degree or master's degree bearing the same major (by designation or title, such as "Bachelor of Fine Arts in Creative Writing") listed on Schedule 3.3 to a student completing a degree program of study. Using the prior illustration, Tenant would be permitted to offer: (i) an individual undergraduate class in creative writing or fiction, poetry or drama writing, but cannot offer a B.F.A., Bachelor of Arts, or a Bachelor of Science degree program with a creative

2013]

*INLAID-IVORY TOWERS*

377

writing major (excluding “Rhetoric” or “Technical Writing”) on their Mesa ground campus if such an undergraduate degree program is identified as a major or double major on Schedule 3.3; (ii) a Master’s Degree or Doctoral Degree in creative writing even if a bachelor’s degree-level program in that field is identified on the schedule, provided a Master of Arts or a Master’s of Science degree program in creative writing is not specifically listed as a graduate program (designation/title) on Schedule 3.3. In all events, after August 2016, neither Tenant nor any other Educational Institution shall be restricted in its course offerings. Tenant shall report to Property Manager any “encroachment” upon Tenant’s unique “majors” offerings by another Educational Institution; provided, however, while the Parties agree that (a) Landlord and Property Manager shall have no liability to Tenant for another Educational Institution’s duplication of Tenant’s majors offerings; (b) Tenant and the other Educational Institutions shall use the dispute resolution process described in Section 13.3 below prior to any recourse to the courts; and (c) the other Educational Institutions are intended third-party beneficiaries of this provision. Landlord agrees to cooperate reasonably (and to cause Property Manager to do likewise) in the resolution of any problem-solving process instituted by Tenant, or among the Educational Institutions, under Section 13.3 to curb or limit such duplication. In no event shall Landlord have any obligation or liability to Tenant for the outcome of the grievance process, which will include any subsequent action (whether or not litigation) Tenant may pursue arising from this Section 3.3 or under Section 13.3.

3.3.1 No Violation of Tenant’s Rights. Tenant agrees that establishing unique degree programs and allocating the rights to offer them among the Educational Institutions does not constitute a “restraint of trade” or “unfair competition” as respects Tenant’s operations, and does not otherwise violate Tenant’s legal rights in any manner as a provider of educational services; and Tenant hereby waives the making of all such claims.

3.4 Hours of Operation. Access to the Building shall be available by Property Manager during all classroom and laboratory instructional hours, or such longer hours as are

otherwise established by the Property Manager (“Standard Hours”). Outside the Standard Hours, Tenant shall be responsible for secured access to the Premises at its sole expense, and Tenant shall hold Landlord (including its employees and agents) harmless and indemnify each of them for, from, and against injury and death to persons and loss of property arising from the use of the Property outside the Standard Hours. With the prior approval of Property Manager, Tenant may arrange for access by its faculty, staff, and administrators to the Property on the weekends; but such access shall not alter the effect of the preceding indemnification.

#### 4. Rent, Payment of Rent, and Additional Payments

Rent, as that term is used herein, shall consist of four components payable by Tenant: Premises Rent (described in Section 4.1); FF&E Investment Payments (described in Section 4.2); Operating Cost Reimbursement (described in Section 4.3); and Facilities Charge (described in Section 4.4).

4.1 Premises Rent. Commencing on July 1, 2013 (“Rent Commencement Date”), and thereafter on the first of every month thereafter during the Term of this Lease, Tenant shall pay, without notice or demand, to Landlord a monthly rental amount (the “Premises Rent”) for Tenant’s use of the Premises at the following rates:

4.1.1 Year One. From the Rent Commencement Date until the end of the first lease year thereafter, Tenant’s Premises Rent shall be abated, at the rate, per month, set forth on **Exhibit “D,”** plus applicable taxes on such rent amount, subject to the provisions of the following sentence. If Tenant is in default under this Lease at any time during the Term (or any Extended Term), or if this Lease is terminated for any reason other than a default by Landlord, in addition to all other remedies provided under this Lease and at law, Tenant shall be obligated to pay all past abated Premises Rent—which shall become immediately due and payable upon such default or termination—and the abatement of rent immediately shall cease.

2013]

*INLAID-IVORY TOWERS*

379

4.1.2 Years Two Through Five. From the beginning of the second (2nd) year after the Rent Commencement Date and until the end of the Term at the rate, per month, set forth on **Exhibit “D,”** plus applicable taxes on such rent amount: the rate for the Premises Rent (i) shall adjust according to the additional square footage of the Premises dedicated for the exclusive use of Tenant; and (ii) shall not adjust according to Tenant’s reduction in the amount of square footage dedicated to Tenant (i.e., for any portion of the Premises “surrendered” to Landlord), unless that portion of the Premises simultaneously and exclusively becomes dedicated for the operations of another tenant within the Property.

4.1.3 Extended Term. For any Extended Term, the Premises Rent shall increase by four percent (4%) over the Premises Rent due for the final year of the Term or preceding Extension Term, as the case may be, plus applicable taxes on such Premises Rent amount. For example: if the Premises Rent was \$100 in the last year of the Term, that Rent component for the Extended Term will be \$104 during each year of the Extended Term. Provided, however, Premises Rent calculation for the Extended Term may be affected by modifications of the exclusive or non-exclusive use of portions of the Premises by Tenant during the Extended Term.

4.2 FF&E Investment Payment. Tenant agrees to pay Landlord an amount equal to one-third (1/3) of the FF&E Investment (as defined in Section 6.1.1), plus applicable taxes on such amount, in equal monthly payments over a five year period commencing on the Rent Commencement Date and this sum shall be referred to as the “FF&E Reimbursement.” Tenant’s payment of this FF&E Reimbursement is NOT subject to the abatement provided in Section 4.1.1 above, and this payment does not affect the ownership of any items of furniture and fixtures, none of which shall create any ownership interest in Tenant. Accordingly, from the Rent Commencement Date until the fifth lease year (i.e., 60 months), Tenant shall monthly pay to Landlord, in advance, the FF& E Reimbursement at the rates set forth on **Exhibit “D.”** If Tenant is in default under this Lease beyond any applicable cure period, or if this Lease is terminated for any reason other than a default by Landlord, in addition to all other remedies

provided under this Lease and at law, Tenant shall remain obligated for all such payments, which shall become immediately due and payable upon such default or termination.

4.3 Operating Costs and Landlord Recoupment. As additional Rent, Tenant shall pay one-third (1/3) of (a) all charges to the Property for public utilities that are not directly metered or otherwise directly charged to the Tenant, which shall include (by way of illustration and not limitation): electricity, gas, cable television and Internet, and water and sewer service, (b) all charges of the Property Manager from time to time under its Management Agreement with Landlord, and (c) the costs of insurance coverage for the Property paid by Landlord, with (a), (b) and (c) above together being referred to in this Lease as "Operating Costs." This Rent component shall be referred to herein as the "Operating Costs Fraction." Tenant's payment of Tenant's Operating Costs Fraction is NOT subject to the abatement provided in Section 4.1.1 above. An estimate of the approximate Operating Costs Fraction payable by Tenant is set forth on **Exhibit "D."** In the event a fourth (4th) or subsequent tenant shall occupy portions of the Property, Tenant's share of the Operating Costs Fraction shall be appropriately adjusted to reflect additional participants in utilities' consumption and greater overall consumption of utilities and the additional burden on the personnel resources of the Property Manager. The Operating Costs Fraction shall be paid as provided below, but shall be invoiced, together with applicable taxes on such amount, in arrears of initial payment, meaning, the charges leading to this Rent component already shall have been paid by Landlord when Tenant's payment of the Operating Costs Fraction is due. Consequently, at the conclusion of the Term, Tenant shall be obligated to make a final Operating Costs Fraction payment equal to Tenant's applicable share of the Property operating costs incurred during the final month of the Term as it may be renewed, together with applicable taxes on such amount. Tenant will reimburse Landlord for the cost of the property insurance required under Section 16.6 of this Lease. Tenant acknowledges and understands that Landlord carries insurance (and has a self-insurance program) so that Tenant

2013]

*INLAID-IVORY TOWERS*

381

will not need to obtain a separate policy to cover the property insurance requirements for Section 16.6.1 of this Lease. Accordingly, Tenant will reimburse Landlord based on a rate that would be charged by Landlord's carrier based upon an insurance "rate" per \$1,000 of insured value that would be charged to Landlord by Landlord's property insurance carrier for the coverage under Section 16.6.1 of this Lease.

4.4 Facilities Charge. Tenant shall pay to Landlord, as a component of Rent, an annual Facilities Charge of \_\_\_\_ Thousand \_\_\_\_ Hundred Dollars (\$\_\_\_\_\_) in consideration of Landlord's costs of: (a) Tenant's using portions of the Property not subject to expense recoupment via the Operating Costs Fraction; (b) branding the Property as a higher education center; and (c) Landlord's associated marketing (for higher education purposes) investment in the Property. This sum shall be paid on or before August 15 of each year of the Term and is NOT subject to the abatement described in Section 4.1.1 above.

4.5 Modified Gross Lease. This Lease is a modified gross lease. Tenant acknowledges and agrees that its obligations to pay Rent and all other charges due and owed under the terms of this Lease shall be absolute and unconditional, and shall not be affected by any circumstances whatsoever, including, without limitation: (i) any set-off, counterclaim, recoupment, defense, or other right which Tenant may have against Landlord or anyone else for any reason whatsoever; (ii) the invalidity or unenforceability or lack of due authorization or other infirmity of this Lease by or through Tenant or any lack of right, power, or authority of Tenant to enter into this Lease; (iii) any insolvency, bankruptcy, reorganization, or similar proceedings by or against Tenant, or any other person; or (iv) any other cause, whether similar or dissimilar to the foregoing, any future or present law notwithstanding, it being the intention of the Parties that the Rent shall continue to be payable in all events and in the manner and at the times provided by this Lease.

4.6 Obligations Unconditional. Tenant agrees—regardless of any event, occurrence or situation, whether foreseen or unforeseen, and however extraordinary—that it: (i) will not suspend or discontinue, or permit the suspension or discontinuance of, any payments provided for under this Lease



(including without limitation all components of Rent) except as otherwise provided for herein; (ii) will perform and observe all of its other agreements contained in this Lease; and (iii) will not suspend the performance of its obligations hereunder for any cause, including, and without limiting the generality of the foregoing, any acts or circumstances that may constitute failure of consideration, eviction or constructive eviction, destruction or damage to the Premises, commercial frustration of purpose, any change in the tax or other laws or administrative rulings of or administrative actions by the United States of America or the State of Franklin or any political subdivision of either.

#### 4.7 Payment of Rent.

4.7.1 Without notice or demand, the Premises Rent (except that which is abated as provided by Sections 4.1.1 and 8.2), FF&E Reimbursement and Operating Costs Fraction payments are due and payable by Tenant to Landlord on the 1st day of each month during the Term (and any Extension Term) of this Lease in lawful currency of the United States, either by check or electronic transfer. If Tenant fails to pay any installment of Rent in full on or before the due date, Tenant shall be responsible for interest on the unpaid installment at the rate of twelve (12%) per annum from the due date until payment in full is made. In addition, in the event any installment of Rent is paid more than twenty (20) days after the due date, a late penalty equal to ten percent (10%) of the amount of such delinquent installment shall be due and payable in addition thereto.

4.7.2 No payment to or receipt by Landlord of a lesser amount than that which is due and payable under the provisions of this Lease at any time of such payment shall be deemed to be other than a payment on account of the earliest payment due, nor shall any endorsement or statement on any check or payment prejudice in any way Landlord's right to recover the balance of such payment or pursue any other remedy provided in this Lease or by law.

4.7.3 All Rent and any other payments shall be remitted to the following address (unless otherwise specified by Landlord) by the due date required by this Lease:

2013]

*INLAID-IVORY TOWERS*

383

Town of Minerva, Franklin  
Attn.: Real Estate Department  
123 East Main Street  
Minerva, Franklin 09521

4.8 Additional Payments. Tenant shall pay without notice, and without abatement, deduction or setoff, before any fine, penalty, interest or cost may be added thereto, or become due or be imposed by operation of law for the nonpayment thereof, all sums, impositions, costs, expenses and other payments, and all taxes including personal property taxes and GPLET, assessments, special assessments, enhanced municipal services district assessments (including SID 228 assessments), water and sewer rents, rates and charges, charges for public utilities, excises, levies, licenses and permit fees, and other governmental or quasi-governmental taxes or charges, general and special, ordinary and extraordinary, foreseen and unforeseen, of any kind or nature whatsoever which, at any time during the Term may be assessed, levied, confirmed, imposed upon, or grow or become due and payable out of or with respect to, or become a lien on or encumbering, the Premises or any part thereof, or any appurtenances thereto, or any use or occupation of the Premises (all of which are sometimes herein referred to collectively as "Impositions," and, individually, as an "Imposition") provided, however, that:

a. if, by law, any Imposition may at the option of the Tenant be paid in installments (whether or not interest shall accrue on the unpaid balance of such Imposition), Tenant may exercise the option to pay the same (and any accrued interest on the unpaid balance of such Imposition) in installments and in such event, shall pay such installments as they become due during the Term before any fine, penalty, further interest or cost may be added thereto; and

b. any Imposition (including Impositions which have been converted into installment payments by Tenant, as referred to in the above paragraph (A) relating to a fiscal period of the taxing authority, a part of which period is included within the Term and a part of which is included in the period of time after the expiration of the Term shall (whether or not such Imposition shall be assessed, levied, confirmed, imposed upon

or become a lien upon the Premises, or shall become payable, during the Term)) be adjusted between Landlord and Tenant as of the expiration of the Term, so that Tenant shall pay that portion of such Imposition attributable to the Term and Landlord shall pay the remainder thereof.

4.9 Government Property Lease Excise Tax. If and to the extent required under Franklin law, Tenant is hereby notified of its potential tax liability under the Government Property Lease Excise Tax ("GPLET"). Failure of Tenant to pay GPLET (if applicable) is an Event of Default hereunder. Tenant represents that it is an organization that is exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986. Accordingly, Tenant represents that it falls within the GPLET exemption.

## 5. Representations, Warranties, and Covenants of Tenant

5.1 Lawfully Operating in Franklin. Tenant is a not-for-profit corporation duly organized, validly existing, in good standing in the State of Euphoria, and is authorized to operate under the laws of the State of Franklin. Tenant's organizational identification number is \_\_\_\_\_. Tenant has full power and authority to execute, deliver and perform this Lease and the other documents to which it is a party and to enter into and carry out the transactions contemplated by those documents. The execution, delivery and performance of this Lease and the other documents related to the Premises do not, and will not, violate any provision of law applicable to Tenant or its organizational documents, and do not, and will not, conflict with or result in a default under any agreement or instrument to which Tenant is a party or by which it is bound.

5.2 Duly Executed. This Lease has been duly executed and delivered by Tenant and it constitutes a valid, binding and enforceable agreement against Tenant.

5.3 No Additional Authorizations or Consents Needed. No authorizations, consents or approvals are required in connection with the execution and delivery of this Lease or in connection with the carrying out by Tenant of its obligations hereunder beyond those previously obtained by Tenant.

2013]

*INLAID-IVORY TOWERS*

385

5.4 No Defaults. To the best of Tenant's knowledge, Tenant is not in default in the payment of any of Tenant's indebtedness for borrowed money; and Tenant is not in default in any material respect under any order, writ, judgment, injunction, decree, determination, or award or any indenture, agreement, lease or instrument.

5.5 Litigation. Tenant shall notify Landlord within ten (10) business days after the commencement of any action, suit, proceeding or arbitration against Tenant, or any material development in any action, suit, proceeding or arbitration pending against Tenant that, if adversely determined, would materially and adversely affect the Premises, the validity of this Lease or the performance of Tenant's obligations under this Lease.

5.6 Authorizations and Approvals. Tenant shall promptly obtain, from time to time at its own expense, and continuously maintain all such governmental licenses, rights, authorizations, consents, permits and approvals as may be required to enable it to comply with its obligations hereunder, including but not limited to all such approvals necessary to operate an institution of postsecondary education.

5.7 Use of Town Amenities and Venues. Tenant shall endeavor to use, in connection with extracurricular activities and ceremonies, amenities in downtown Minerva such as the public library, the arts center, museums and other cultural facilities. If Tenant has made inquiries as to availability and cost of use of these amenities, Schedule 5.7 describes generally arrangements for their use (which is not binding on the Parties); the usage of some of those facilities is controlled, Tenant acknowledges, by third persons not party to this Lease.

5.8 Computer Hacking and Privacy Invasion Safeguards. Landlord is providing only standard Internet access to the Building without firewalls; accordingly, Tenant is solely responsible for compliance with all laws pertaining to computer files, data security and protection of personal information, as such statutes pertain to issues of liability for user-generated content, computer fraud and abuse, copyright and domain name theft and data theft. By its execution of this Lease, Tenant holds harmless and indemnifies Landlord for, from and against the adverse consequences to Tenant, its

administration, staff, students, faculty and invitees resulting from any computer operations in the Premises whether arising from hacking, virus invasion or “Trojan Horse” infection, or otherwise.

5.9 Hiring Practices. To the extent feasible consistent with job requirements and legal obligations, Tenant shall endeavor to hire its staff from among Town of Minerva residents.

## 6. Improvements

6.1 Landlord Improvements. Landlord agrees to substantially complete the improvements described in the attached **Exhibit “B”** (“Landlord Improvements”) on or before \_\_\_\_\_, 201\_\_ (“Substantial Completion Date”). The term “substantially complete” (as used in the prior sentence) means that the Landlord Improvements are sufficiently complete to allow that portion of the Premises being improved as part of the Landlord Improvements to be usable by Tenant for the Permitted Uses and that a temporary certificate of occupancy has been issued. Other than the Improvements and the parking lot abutting the building, Tenant agrees that Landlord has no other obligation to afford any property or services at the Property and Tenant hereby waives all claims to the contrary.

6.1.1 FF&E Investment. Landlord agrees to procure, whether through purchase or lease, items of furniture, equipment and fixtures (including cabling for wireless Internet connectivity within the Building and a single telephone switch with dedicated office lines for Tenant’s faculty and administration) for the Premises in an amount reasonably sufficient in quantity and utility under the circumstances that all of same shall be shared by Tenant with other tenants for the conduct of the Permitted Uses as described on **Exhibit “F”** (the “FF&E Investment”). The FF&E Investment shall not include any computer equipment in a dedicated (exclusively used by Tenant) computer laboratory or any equipment or trade fixtures not itemized on **Exhibit “F.”** Tenant and Landlord will work in good faith in determining the types of furniture, equipment and fixtures that Landlord will procure with the FF&E Investment; provided, however, (a) all such

2013]

*INLAID-IVORY TOWERS*

387

furniture, equipment and fixtures will be procured by Landlord in compliance with all applicable Town of Minerva Charter provisions, the Minerva Town Code, the Town of Minerva procurement policies and procedures, and state statutes and (b) such items shall not include laboratory equipment smaller in scale than hoods and sinks, or any computer software (or software as a service (“SaaS”)) other than those programs pre-loaded on computers leased for the Property’s computer laboratory.

6.1.2 Improvements’ Ownership and Treatment. All furniture, equipment and fixtures purchased or leased with the FF&E Investment shall be owned exclusively by Landlord; Landlord shall repair, maintain, and replace same. Tenant shall not remove such furniture, equipment and fixtures from the Premises without the prior written consent of Property Manager in each instance. Further, in addition to and without limiting any other indemnity in this Lease, Tenant shall indemnify, defend, and hold Landlord harmless from any claim relating to or arising out of the use by Tenant’s invitees and employees of the furniture, equipment or fixtures purchased or leased under Section 6.1.1.

6.2 Tenant Premises Outfitting. Tenant agrees to complete, at its own expense, by the Substantial Completion Date, all improvements (other than the Improvements) necessary for the Premises to be operated for the Permitted Uses, including but not limited to fixturing the remainder of the Premises, and installing all additional cabling (apart from the wireless Internet cabling described in Section 6.1.1), furniture, equipment, trade fixtures, specialized telephone equipment and other personal property needed by the Tenant to operate in the Premises under Tenant’s Permitted Uses (“Tenant’s Fit-Out”). Tenant shall supply at Tenant’s sole expense all physical assets needed for Tenant’s Permitted Uses that are not described on **Exhibits “B” and “F”**; this shall include, without limitation, all telephone equipment (including handsets, PBX consoles, interior call switching devices) and all computer hardware and software and office equipment intended for exclusive use of Tenant’s students, faculty and administrators (including that to be used in portions of the Premises for Tenant’s exclusive operations). Landlord shall

have no obligation to advance sums or reimburse sums for Tenant's acquisition of such items included within Tenant's Fit-Out. Further, Tenant shall mark, tag, label or otherwise identify, by irremovable methods, its personal property (including its trade fixtures) so as to eliminate confusion between Tenant's property incorporated in Tenant's Fit-Out and the personal property portion of the Improvements.

6.3 No Alterations. Tenant shall make no structural improvements, alterations, additions, enhancements or modifications to the Premises during the Term of this Lease without the prior written permission of Landlord, which permission shall not be unreasonably withheld; provided, however, the Parties agree that it shall not be unreasonable for Landlord to prohibit altogether roof penetrations or Tenant's intended (a) placement upon the roof exterior of excessively heavy equipment and (b) structural element(s) modifications.

6.4 Title to Alterations and Improvements. Title (ownership) to all improvements, alterations, additions, enhancements or modifications on the Premises (but not personal property incorporated in Tenant's Fit-Out) shall immediately, upon completion or installation thereof, become the property of the Landlord without payment therefor by Landlord, and shall be surrendered to Landlord upon expiration or other termination of this Lease. Tenant agrees to execute and deliver to the Landlord, within ten (10) business days after the Landlord's request therefor, a quitclaim deed (or an assignment of all ownership rights) confirming that title to such improvements and alterations is vested in the Landlord.

6.5 Mechanic's Liens. Tenant shall keep the Premises and the Property and all improvements thereon free of any mechanic or material man's lien from any third party claiming by or through Tenant. In the event that any such lien is filed, Tenant shall, at its sole cost, cause such lien to be removed by bonding over, obtaining court relief, or otherwise removing it within thirty (30) calendar days of notice thereof. If Tenant fails to so remove the lien, Tenant shall reimburse Landlord for all costs (including but not limited to costs to bond over such lien and attorney fees and costs) it incurs to remove the lien.

6.6 No Implied Consent. Nothing contained in this Lease shall be deemed or construed in any way as constituting

2013]

*INLAID-IVORY TOWERS*

389

Landlord's express or implied authorization, consent or request to any contractor, subcontractor, laborer or material man, architect, or consultant, for the construction or demolition of any improvement, the performance of any labor or services or the furnishing of any materials for any improvements, alterations to or repair of the Premises or any part thereof.

6.7 Permits Required. Tenant's construction (whether electrical, plumbing or mechanical construction, or reconstruction) involving the Premises, if consented to by Landlord, shall conform to the Town Code for the Town of Minerva, including the Town of Minerva's construction and technical codes. Tenant shall be responsible for determining whether it is subject to any other building/construction codes or permit requirements, and for compliance with them to the extent they are applicable to Tenant's work. No such work shall be commenced without first submitting required plans to and obtaining required permits from the Town of Minerva. All such work shall be permitted, inspected and approved by the Town of Minerva.

## 7. Maintenance and Repairs

7.1 Landlord's Maintenance, Repairs, and Replacements. Except as described as a Tenant obligation in Section 7.2, Landlord shall keep the Premises and the Improvements (but no component of Tenant's Fit-Out) therein in a neat and clean condition and in good order, condition and repair, and shall make and perform all maintenance and all necessary repairs and replacements thereto, structural and non-structural, interior and exterior, ordinary and extraordinary, foreseen and unforeseen, of every nature, kind and description. Without limiting the foregoing, Landlord shall repair and maintain (and replace when necessary) all structures, improvements, landscaping, roofs, HVAC improvements, plumbing and electrical improvements, fixtures, walls, ceilings, floor coverings, parking areas, landscape areas, asphalt, concrete, driveways, and pathways in or on the Premises. All repairs made by Landlord shall be substantially equal in quality to the original work, shall be performed by licensed contractors, and shall be made in accordance with all



laws, ordinances and regulations whether heretofore or hereafter enacted; and the cost of such work shall be passed through via Tenant's payment of its Operating Expenses Fraction, unless any such repair is (a) a capital expenditure such as the replacement of the roof or the structural floor (versus floor covering, which shall be an element of Tenant's Operating Expenses Fraction), or (b) a warranty item reimbursed by the manufacturer or distributor, or (c) recouped from the proceeds of Landlord's insurance.

7.2 Tenant Fit-Out Maintenance and Repairs.

Tenant's obligation to maintain and make repairs shall include all necessary non-structural replacements, renewals, alterations, additions and betterments to Tenant's Fit-Out, including proprietary security devices, telephone and Tenant's specialized cabling. The necessity for or adequacy of maintenance and repairs to Tenant's Fit-Out shall be measured by the standards which are appropriate for improvements of similar construction, age and class, provided that Tenant shall in any event make all repairs necessary to Tenant's Fit-Out to avoid any structural damage or other damage or injury to the Premises and all improvements therein.

7.3 Damage to Improvements. Any portion of the Improvements damaged or destroyed by Tenant directly (as determined by Property Manager and including for definition Tenant's employees, contractors, and agents), ordinary wear and tear excepted, shall be promptly repaired or replaced by Tenant at its sole cost to the reasonable satisfaction of Landlord and, in the event Landlord causes the work of repair or replacement to be performed, shall be reimbursed by Tenant directly to Landlord, not through increased payment of the Operating Expenses Fraction. In lieu of reimbursement for such repair or replacement, where required by the Landlord, Tenant shall pay to Landlord an amount sufficient to compensate for the loss.

7.4 Trash Removal. Tenant shall at all times cooperate with Property Manager to keep the Premises in a neat, clean, safe, sanitary and orderly condition and shall encourage Tenant's invitees to keep such area free of all trash and debris, such as by participating in any recycling or like

2013]

*INLAID-IVORY TOWERS*

391

sustainability initiatives that may be implemented by Property Manager from time to time.

7.5 Emergency Repairs. Within fifteen (15) days of the Effective Date, Tenant shall provide to Property Manager and thereafter update Property Manager with a list of names and telephone numbers for 24-hour emergency Tenant contact for issues involving the Premises.

## 8. Damage to and Destruction of Premises

8.1 Landlord's Obligations to Restore. If, at any time during the Term, the Property or any part of the Improvements shall be damaged or destroyed by casualty or other occurrence of any kind or nature, ordinary or extraordinary, foreseen or unforeseen ("casualty"), Landlord, at its sole cost and expense, to the extent of available insurance proceeds shall repair, alter, restore, replace, or rebuild the same substantially to the value, condition, and character that existed immediately prior to such damage or destruction, and Landlord shall proceed and complete such restoration with reasonable diligence; and the restoration shall be performed by licensed Franklin contractors. If any casualty renders the whole or any material part of the Premises untenable and Landlord determines (in Landlord's reasonable discretion) that it cannot make the Premises tenantable within 270 days after the date of the casualty, then Landlord will so notify Tenant within 30 days after the date of the casualty and may, in such notice, terminate this Lease effective on the date of the casualty. Anything herein to the contrary notwithstanding, Landlord shall immediately secure the Property and undertake temporary repairs and work necessary to protect the public and to protect the Property from further damage; provided, if the damage or partial destruction is caused due to deliberate or reckless conduct of Tenant's employees, agents or contractors excluded from Landlord's insurance coverage, the terms of Section 7.3 above shall apply as if restated here.

8.2 Lease Obligations Abated. At such times when Tenant is not in default hereunder that part or all of the Premises shall be untenable due to the partial or total destruction thereof, Tenant's obligations under this Lease—

including but not limited to Tenant's obligations to pay Premises Rent, Operating Costs Fraction and any other amounts owing under this Lease—shall be equitably abated, based upon (a) the portion of the Premises in which the Permitted Uses cannot be conducted and (b) the period of interruption of the Permitted Uses. Tenant shall not have the right, however, to terminate this Lease due to the temporary untenability of the Building, and for this purpose, Tenant hereby waives all rights to which Tenant might otherwise be entitled under applicable Franklin law. In all events, the full amount of Premises Rent and Operating Costs Fraction owed by Tenant hereunder shall resume when Landlord obtains a certificate of occupancy (or equivalent clearance) from the Town of Minerva for the repairs or restoration and notifies Tenant in writing that the Premises are available for occupancy.

## 9. Additional Parking and Security

9.1 Additional Parking in Property Vicinity. The Property has approximately 250 parking spaces (as may be adjusted downward to comply with ADA requirements) located adjacent to the Premises. Tenant acknowledges that parking is on a first-come, first-served basis and that only one (1) parking stall has been reserved for Tenant's use under any circumstances. Tenant, at its sole expense, and subject to availability, may obtain permits for parking spaces elsewhere and pay those then-applicable rates as may be changed from time-to-time. Landlord does not guaranty the availability of parking spaces other than one (1) reserved stall on the Property or at any other location. Tenant and its employees and invitees are subject to compliance with the applicable parking provisions of the Minerva Town Code and Town of Minerva's parking requirements, and this Lease is not intended to modify or amend in any manner the Minerva Town Code.

9.2 Security. Tenant shall be solely responsible for the security for its Premises, including but not limited to security within the Building and the parking lots that are part thereof. In addition to and without limiting any other

2013]

*INLAID-IVORY TOWERS*

393

indemnity in this Lease, Tenant shall indemnify, defend, and hold Landlord harmless from any claim relating to or arising out of security (including, but not limited to, adequacy of security, lack of security, and types of security installed) for the Property or for any employee, invitee, or person on the Property or the Building. In so indemnifying and holding harmless Landlord, Tenant acknowledges the provisions of Section 3.4 restricting Landlord's obligation for security to its initial installation of key card access to the Building's exterior doors, Tenant hereby waives any future claim of Landlord's obligation to ensure that the cards are held exclusively by persons authorized to access the Building. Expressly, but not by way of limitation, Tenant acknowledges and agrees that while the Building's key card access is part of the Improvements, the liability of Landlord does not include guarantying that such limited access is (a) reserved to authorized persons (as set forth in the preceding sentence) or (b) operational at all times, any provisions of Section 7.1 above to the contrary notwithstanding.

**10. Assignment, Subletting, and Other Transfers**

10.1 From Effective Date and Five Years After the Rent Commencement Date. During the Term, Tenant shall not transfer, assign, encumber, pledge or hypothecate its interest in this Lease or any right or interest hereunder, or sublet the Premises or any part thereof, nor permit any other person to occupy the Premises (each of which events is herein called a "Transfer"), without the prior written consent of Landlord, which consent may be withheld in the Landlord's sole and absolute discretion. Landlord may, as a condition of approval, require any potential transferee to submit historical and financial information to Landlord at least thirty (30) days prior to the proposed Transfer date. Tenant shall submit any proposed documentation relating to a proposed Transfer for Landlord's review and approval. Any Transfer entered into without the consent of Landlord shall be void upon notification by Landlord to Tenant. Any such Transfer shall require the transferee to assume all of the obligations of the Tenant under this Lease from the date of the transfer and thereafter, and

shall not release Tenant from any claim or liability arising prior to the date of transfer.

10.2 During Extension Periods. During any Extension Term, Tenant may Transfer this Lease if all of the following requirements are satisfied: (i) the transferee is an Franklin-licensed and accredited four-year, liberal arts college or university in good standing with all applicable regional accrediting agencies having jurisdiction over higher education institutions; (ii) the proposed transferee's proposed academic offerings are sufficiently in demand in the Athena County market and would not (if implemented) violate the terms of Section 3.3; and, (iii) the board of trustees (or equivalent) of the proposed transferee assumes, and agrees in writing to perform, all of Tenant's obligations under this Lease. If all of the requirements listed in the prior sentence are not satisfied, such proposed Transfer shall require the prior written consent of Landlord, which consent may be withheld in the Landlord's sole and absolute discretion and (in the case of Tenant's pending consent) may be subject to conditions and limitations. All Transfers shall require the transferee to assume all of the obligations of the Tenant under this Lease from the date of the Transfer and thereafter (other than providing the course offerings formerly provided by Tenant), and shall not release Tenant from any claim or liability hereunder arising prior to the date of the Transfer.

## 11. Identification Signs

Tenant may install on the exterior of the Property a sign or signs identifying its business with the prior approval of Landlord, which shall not be unreasonably withheld; provided, however, signage is subject to compliance with (a) Landlord's written comprehensive sign program for the Property approved by the Town's Design Review Board, and (b) the Minerva Town Code (when applicable), including its Zoning Ordinance requirements (implicating a process and approvals separate from this Lease).

2013]

*INLAID-IVORY TOWERS*

395

**12. Tenant Default and Landlord Remedies**

12.1 Events of Default. Each of the following shall constitute a material default of this Lease by Tenant (“Event of Default”):

12.1.1 The failure of Tenant to pay any installment of Premises Rent due or any other amount of Rent described in Section 4 due from Tenant under this Lease, provided that Tenant does not fully cure such failure within ten (10) business days after delivery by Landlord of a written notice of such failure; or

12.1.2 The failure of Tenant to perform any of its other obligations under this Lease, provided that Tenant does not cure such failure within thirty (30) calendar days after delivery by Landlord of a written notice of such default; provided, however, if a cure of the default reasonably requires more than thirty (30) calendar days to complete and Landlord agrees, then the time to cure shall be extended so long as the cure is being diligently pursued; or

12.1.3 The filing of any mechanic’s, material men’s or other lien or any kind against the Premises or Property because of any act or omission of Tenant which lien is not discharged, by bonding or otherwise, within thirty (30) calendar days of receipt of actual notice thereof by Tenant; or

12.1.4 The taking of possession for a period of thirty (30) days or more of all or substantially all of the personal property used on or at the Property belonging to Tenant by or pursuant to lawful authority of any legislative act, resolution, rule, order or decree of any court or governmental board, agency, officer, receiver, trustee or liquidator; or

12.1.5 The voluntary abandonment by Tenant of its operations or a substantial portion of its operations at the Property for a period of thirty (30) days or more; or

12.1.6 The failure of Tenant to maintain all insurance coverage required by Section 16.1 of this Lease (and any cure must cover any lapsed or uncovered period of time); or

12.1.7 Tenant dissolves or files, petitions or institutes any proceeding under the United States Bankruptcy Code, 11 U.S.C. Section 101 et seq. (the “Bankruptcy Code”), either as such Bankruptcy Code now exists or under any amendment

thereof which may hereafter be enacted, or under any act or acts, state or federal, dealing with, or relating to the subject or subjects of bankruptcy or insolvency, or under any amendment of such act or acts, either as a bankrupt, or as an insolvent, or as a debtor, or in any similar capacity, wherein or whereby Tenant asks or seeks or prays for a reorganization or to effect a plan of reorganization or for a readjustment of Tenant's debts, or for any other similar relief, or any involuntary petition in bankruptcy is filed against Tenant and the same is not stayed or discharged within ninety (90) days from such filing or any other petition or any other proceedings of the foregoing or similar kind or character is filed or instituted or taken against Tenant, or a receiver of the business or of the property or assets of Tenant shall be appointed by any court except one appointed at the instance or request of Landlord, or Tenant shall make a general assignment for the benefit of Tenant's creditors.

12.2 Landlord's Remedies. Upon the occurrence of an Event of Default under this Lease, Landlord may, without prejudice to any other rights and remedies available to Landlord at law or equity, exercise one or more of the following remedies, all of which shall be construed and held to be cumulative and non-exclusive:

12.2.1 Terminate this Lease and re-enter without notice and take possession of the Premises and take possession or remove any property therein; or

12.2.2 Without terminating this Lease, re-enter without notice, terminate Tenant's right to possession of the Premises, and take possession of the Premises and take possession of or remove any property therein; or

12.2.3 With or without such re-entry, recover possession of the Premises and demand Premises Rent in the manner prescribed by any statute; or

12.2.4 With or without terminating this Lease, re-let the Premises or any portion thereof.

12.3 Tenant's Repayment Obligation for Landlord's Costs for Landlord Improvements. If this Lease is terminated under the terms of Sections 12.1 and 12.2 above or is terminated for any reason whatsoever other than an uncured default by Landlord, in order to compensate Landlord for the

2013]

*INLAID-IVORY TOWERS*

397

cost of the improvements installed by Landlord, Tenant shall pay Landlord liquidated monetary damages in addition to those described in Sections 12.5 through 12.7, inclusive, in an amount equal to the difference between the following: (a) the amount of all costs and expenses Landlord incurred for the Landlord Improvements (including, but not limited to, costs for design and installation of such improvements) divided by the total number of Educational Institutions in the Building (including Tenant), less (i.e., minus) (b) the sum of all Premises Rent payments made by Tenant through the date of such termination or, stated as an equation: (Landlord Improvements cost ÷ total number of Property lessees) – Premises Rent Payments Made = damages due from Tenant under this Section. The Landlord Improvements are those improvements described or depicted in **Exhibit “B”** hereto. Landlord shall invoice Tenant for the repayment obligation due hereunder and Tenant shall pay such sum within ten (10) business days of invoice. The repayment obligation paid under this Section 12.3 is in addition to (and shall not reduce or offset) damages that Tenant is obligated to pay under any other Section of this Lease or as a matter of law.

12.4 No Implied Termination. Landlord shall not be deemed to have terminated this Lease unless Landlord shall have notified Tenant in writing that it has so elected to terminate this Lease. Tenant hereby waives all claims based on Landlord’s reentering and taking possession of the Premises or removing and storing the property of Tenant and shall save Landlord harmless from all losses, costs or damages occasioned thereby. No such reentry shall be considered or construed to be a forcible entry by Landlord.

12.5 Landlord’s Costs to Re-Lease. Landlord is authorized to make such repairs, refurbishments or improvements to the Premises and other improvements thereon, as may be necessary for the purpose of attempting to re-let the Premises, and the costs and expenses incurred for such repairs, redecorating, refurbishments and improvements shall be paid by Tenant to Landlord within ten (10) business days after receipt of Landlord’s statement therefor.

12.6 Landlord’s Damages Relating to Rent. Landlord shall be entitled to recover from Tenant all damages incurred



by Landlord by reason of the Event of Default, which shall include, without limitation: (i) all amounts due and owed as of the termination; plus (ii) the equivalent of the amount of Rent payable under this Lease by Tenant for the remainder of the Term if this Lease were still in effect, less the amount Tenant proves could be reasonably avoided through re-leasing the Premises; plus (iii) all of Landlord's expenses in connection with any repossession or re-letting including, but not limited to: repossession costs, repairs, redecorating, refurbishments or improvements to the Premises, brokerage commissions, attorney's fees, and legal expenses, all of which shall be paid within ten (10) business days of invoices provided by Landlord to Tenant evidencing such sums.

12.7 Landlord May Perform Tenant's Obligations, Interest on Amounts Owing. In the Event of a Default, Landlord may—but shall not be obligated to—cure such default (i.e., make payments or perform or comply with such obligations). All amounts paid or expended by Landlord to cure such default shall become an additional obligation of Tenant to Landlord, which Tenant agrees to pay within five (5) business days of invoice to Tenant. If Tenant fails to pay any amount owed under this Lease on or before the due date, Tenant shall be responsible for interest on the unpaid amount at the rate of twelve (12%) per annum from the due date until payment in full is made.

12.8 No Waiver by Landlord. There shall be no implied waivers. No express waiver by Landlord of any breach or default by Tenant in the performance of its obligations under this Lease shall be deemed to be a waiver of any subsequent default by Tenant in the performance of any of such obligations, and no express waiver shall affect an Event of Default in a manner other than as specified in the waiver. The consent or approval by Landlord to or of any act by Tenant requiring Landlord's consent or approval shall not be deemed to waive or render unnecessary Landlord's consent or approval to or for any subsequent similar acts by Tenant.

12.9 Content of Default Notice. Any default notice tendered by Landlord to Tenant hereunder shall be deemed to be sufficient if it is reasonably calculated to put Tenant on inquiry as to the nature and extent of such default(s).

2013]

*INLAID-IVORY TOWERS*

399

**13. Outside Property Management; Property Rules; Problem Resolution Protocol**

13.1 Property Manager and Fees Payment. Landlord has given, or will provide, Tenant with the name(s), address(es) and telephone number(s) of the property manager charged with executing Landlord's responsibilities under this Lease as to repairs, maintenance, and servicing of the Premises and any or all related equipment, fixtures and appurtenances and with scheduling the use of the joint-use facilities of the Building ("Property Manager"). Tenant shall pay a portion of the Property Manager's fees for services rendered and reimbursable expenses as provided in Section 4.3. At any time during the Term that the Property has no Property Manager, Landlord may charge a reasonable fee for services rendered in management of the Property and scheduling joint-use Property facilities.

13.2 Policy and Procedure Adoption. Landlord and Property Manager shall together prepare from time to time certain policies and procedures for the efficient management of the Property that will affect all tenants of the Property. Prior to implementing these policies and procedures, Tenant and the other tenants shall be given notice of what is proposed and shall give Tenant the opportunity to review and comment upon them for a minimum of five (5) business days before their implementation (except if an emergency arises that requires implementing temporary measures; e.g., unauthorized student occupation of the Building). The adopted policies and procedures for the Property shall be binding upon Tenant and the other tenants of the Property until they are modified or canceled. Objections to adopted policies and procedures may be the subject of the protocol described in Section 13.3.

13.3 Problem Solving and Dispute Resolution Protocol. The Parties acknowledge that there will be circumstances requiring participation in joint problem-solving before disagreements escalate into disputes, such as issues regarding any expansion of the Premises (as identified in Section 1.7 above). Accordingly, the Parties agree that the following problem-solving protocol shall apply in all circumstances, except those identified in subpart (d) below:

a. Tenant and all other tenants of the Property shall appoint a “dispute resolution officer.” This person shall report directly to the chief operating officer (“COO”) of the Minerva branch of each tenant institution. The dispute resolution officer for all tenants shall meet with an official of Landlord (the Property Manager, at all times that Landlord has retained the services of an outside property manager) at least three (3) times annually in a “Building Council”-type session, whether or not there is an active dispute, in order to discuss any potential or current grievances in the operation of the Property or its services.

b. If a tenant has a grievance with another tenant, the grieving tenant shall notify the other tenant of the grievance, and shall concurrently notify Landlord and the Property Manager. Within thirty (30) days of Landlord’s receipt of the notice of grievance, their respective dispute resolution officers shall meet and confer to resolve the grievance on mutually acceptable terms. For this purpose, the Property Manager shall act as a conciliator between the two (or more, if applicable) tenants’ dispute resolution officers. If the conciliation is not successful in reaching a mutually acceptable solution to the grievance, then the Property Manager shall determine if formal mediation between the two (or more) tenants is warranted.

c. If the Property Manager determines mediation between the two tenants is warranted, the Property Manager shall schedule a formal mediation at the Property, and employ a trained mediator residing in Athena County, Franklin, who shall not then be employed by the Town of Minerva or any of the disputants. The fees of the mediator shall be shared equally between (or among) the tenant parties to the grievance. The COO of each tenant disputant shall attend the mediation session. If the mediation is participated in by the tenants (or, if applicable, one or more tenants and Landlord) in good faith, yet results in no outcome mutually acceptable to the participants, then any Party will be free to pursue any remedies available to them in law or equity.

d. This protocol shall be obligatory for all grievances except those involving the payment of Premises Rent, FF&E Reimbursement, Operating Costs Fraction or other sums

2013]

*INLAID-IVORY TOWERS*

401

Tenant is obligated to pay under this Lease (including amounts that may become due under Sections 12 or 30). Therefore, if Tenant or Landlord proceeds directly to litigation in any dispute involving matters unrelated to a required Tenant payment, the other Party may interpose as a defense the obligation of the litigating party to proceed first with the protocol contained in this Section 13.3.

#### 14. Landlord's Default and Tenant Remedies

14.1 Landlord Default. The following shall constitute a material default of this Lease by Landlord (a "Landlord Default"): the failure of Landlord to perform any of its obligations under this Lease, provided that Landlord does not cure such failure within thirty (30) calendar days after delivery by Tenant to Landlord of a written notice of such default (except as addressed by Section 14.4). However, if a cure of the default reasonably requires more than thirty (30) calendar days to complete and Tenant agrees, then the time to cure shall be extended so long as the cure is being diligently pursued.

14.2 Content of Default Notice. Any default notice tendered to Landlord hereunder shall be deemed to be sufficient if it is reasonably calculated to put Landlord on inquiry as to the nature and extent of such default.

14.3 Tenant Remedies. Upon the occurrence of a Landlord Default under this Lease, except as set forth in Section 14.4, Tenant may seek any right or remedy allowed at law or in equity or by statute or otherwise (except as provided below) for such breach (including but not limited to seeking specific performance), all of which shall be construed and held to be cumulative and non-exclusive; provided, however, Tenant shall not seek, and hereby waives any right to, damages from Landlord for loss of profits, loss of sub-rents, loss of any other revenue, loss of business opportunity, loss of good will, or loss due to business interference.

14.4 Tenant Remedies Related to Substantial Completion Date. Notwithstanding any other provisions to the contrary, if Landlord fails to substantially complete the Improvements by the Substantial Completion Date, Tenant's sole and exclusive remedy shall be that the Rent

Commencement Date shall be extended day-for-day until the Improvements are substantially completed as required by Section 6.1.

## 15. Environmental Protection

15.1 Definitions. Unless the context shall clearly require otherwise, the terms defined in this Section shall, for all purposes of this Lease, have the meanings herein specified, with the following definitions to be equally applicable to both the single and plural forms of any of the following:

15.1.1 *Environmental Laws*. The term “Environmental Law(s)” shall mean any one or all of the following, as the same are amended from time to time: the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C § 9601 et seq.; the Resource Conservation and Recovery Act, 42 U.S.C § 6901 et seq.; the Toxic Substances Control Act, 15 U.S.C § 2601 et seq.; the Safe Drinking Water Act, 42 U.S.C § 300f et seq.; the Clean Water Act, 33 U.S.C § 1251 et seq.; the Clean Air Act, 42 U.S.C § 7401 et seq.; the Franklin Hazardous Waste Management Act, F.R.S. §§ 49-921 et seq., the Franklin Environmental Quality Act, F.R.S. tit. 49, as amended; and all regulations thereunder and any other laws, regulations and ordinances (whether enacted by the local, state or federal government) now in effect or hereafter enacted that deal with the regulation or protection of the environment, including the ambient air, ground water, surface water, and land use, including substrata land, or that govern the use of hazardous materials, hazardous waste and hazardous substances and petroleum products.

15.1.2 *Hazardous Material*. The term “Hazardous Material” shall mean any toxic or hazardous material, hazardous substance or hazardous waste, or any pollutant or contaminant as defined or regulated pursuant to any Environmental Law or petroleum products. For purposes of this definition, “petroleum” includes: petroleum-based substances comprised of a complex blend of hydrocarbons derived from crude oil through processes of separation, conversion, upgrading and finishing (e.g., distillate fuel oils, petroleum solvents and used oils).

2013]

*INLAID-IVORY TOWERS*

403

15.1.3 *Release.* The term “Release” means any releasing, spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, disposing, or dumping.

15.2 Tenant Compliance.

15.2.1 Tenant shall, at Tenant’s own expense, comply with all present and hereafter enacted Environmental Laws, including any amendments thereto, affecting Tenant’s activities on and affecting the Property during the period of Tenant’s occupancy of the Premises under this Lease.

15.2.2 Tenant shall not cause or permit any Hazardous Material to be brought upon, kept or used in or about the Property by Tenant’s agents, employees, contractors or invitees, in violation or threatened or suspected violation of any Environmental Law. The Parties recognize and agree that Tenant may bring on the Property such materials as cleaners, solvents, or paint that are ordinarily and customarily used in the conduct of Tenant’s permitted activities under this Lease, provided that such use shall comply fully with all applicable Environmental Laws.

15.3 Indemnification. To the fullest extent permitted by law, Tenant shall indemnify, defend (with counsel reasonably acceptable to Landlord), protect and hold harmless Landlord, and its employees and agents for, from and against any and all liability, loss, damage, expense, penalties and legal and investigation fees or costs, arising from or related to any claim or action for injury, liability, or damage to persons or property and any and all claims or actions brought by any person, entity or governmental body, alleging or arising in connection with contamination of the environment or violation of any Environmental Law or other statute, ordinance, rule, regulation, judgment or order of any government or judicial entity in each case which are incurred or assessed as a result of any of Tenant’s activities or operations on or discharged on or from the Property during the Term of this Lease. This obligation includes, but is not limited to, all costs and expenses related to cleaning up the Property, including land, soil and underground or surface water as required under the law. Tenant’s obligations and liabilities under this Section of the Lease shall survive the termination of this Lease. The

indemnification of Landlord by Tenant as described above includes, without limitation, costs incurred in connection with any investigation of site conditions or any cleanup, remedial, removal or restoration work required by any federal, state or local governmental agency or political subdivision because of Hazardous Material located on the Property or present in the soil or ground water on or under the Property due to Tenant's, or its officers', directors', employees', agents', contractors' or invitees' or its sub-tenant's occupancy, activities or operations thereon. If Landlord's right to enforce Tenant's promise to indemnify is not an adequate remedy at law for Tenant's failure to abide by the provision of this Section 15.3, Landlord shall have the right to injunctive relief in the event of any violation or threatened violation by Tenant.

15.4 Remediation. Without limiting the foregoing, if the presence of any Hazardous Material during the Term of this Lease caused or permitted by Tenant results in any Release on the Property in violation or potential violation of any Environmental Law, Landlord shall promptly take action to remediate the affected property at its sole expense as necessary to return the property to the condition existing prior to the introduction of any such Hazardous Material.

15.5 Governmental Submittals. Tenant shall cooperate with Landlord to (at Tenant's expense) make all submissions to, provide all information to, and comply with all requirements of the appropriate governmental authority ("Government") under the Environmental Laws with respect to Tenant's, or its officers', directors', employees', agents', contractors' or invitees' or its sub-tenants' occupancy, activities or operations on the Property. Should the Government determine that a site characterization, site assessment and/or cleanup plan should be prepared and/or that a cleanup should be undertaken because of any spills or discharges of Hazardous Materials by reasons of Tenant's activities or actions on the Property which occur during the term of this Lease, then Landlord shall, at Tenant's expense, prepare and submit the required plans and financial assurances, and carry out the approved plans and cleanup.

15.6 Information Sharing. Tenant shall immediately notify Landlord of any of the following: (i) Tenant's receipt of

2013]

*INLAID-IVORY TOWERS*

405

any notification from any governmental entity either charging or informing Tenant that it will be charged with a significant (as defined below) violation of Environmental Laws; and (ii) any significant change in Tenant's activities on the Property that is reasonably likely to adversely change Tenant's or Landlord's obligations or liabilities under the Environmental Laws. In addition, Tenant agrees to provide Landlord with copies of documents reflecting the physical condition of the Property, including but not limited to, any environmental testing of soils and groundwater if such documents or tests are obtained by Tenant. A "significant violation of Environmental Law" shall be any violation that requires more than thirty (30) calendar days to resolve.

15.7 Sublease. If Tenant shall receive prior written authorization from Landlord to sublease all or a portion of the Premises (or is allowed under the terms of Lease to sublease without approve of Landlord), Tenant shall insert provisions substantially identical to the provisions of this Section entitled "Environmental Protection" in any sublease agreement or contract by which it grants a right or privilege to any person, firm, corporation, or other entity under this Lease.

15.8 Actions of Tenant. The activities or actions of Tenant under this Environmental Protection Section of this Lease shall include the activities or actions of Tenant's officers, directors, employees, agents, contractors, invitees and successors.

15.9 Right to Enter Premises. Landlord's rights under this Section 15 specifically include the right of Landlord, the United States Government, the Environmental Protection Agency ("EPA"), the Franklin Department of Environmental Quality ("FDEQ") and the Franklin Department of Occupational Safety and Health ("FDOSH") to enter the Premises, without notice to Tenant for purposes of: (i) inspecting Tenant's compliance with environmental, occupational safety and health laws and regulations, whether or not such party is responsible for enforcing such laws; (ii) conducting environmental investigation or remediation, including, without limitation, performing tests and surveys, drillings, test-pitting, borings, compiling data and/or records, and other activities related to environmental investigation; and



(iii) carrying out remedial or removal actions as required or necessary under applicable laws, including, without limitation, installing monitoring wells, pumping wells and/or treatment facilities. Landlord shall endeavor to give Tenant twenty-four (24) hour's prior notice of its intention to enter the Premises unless it determines immediate entry is required for safety, environmental, operations, or security purposes. Tenant shall have no claim against the United States Government, EPA, FDEQ, FDOSH, or Landlord, or any officer, agent, employee, or contractor thereof on account of any such entries.

## 16. Insurance

16.1 Tenant Coverage Required. Upon the Effective Date, Tenant shall procure and at all times maintain the following types and amounts of insurance for its operations at, and use of, the Premises:

16.1.1 General Liability Insurance. General Liability Insurance with minimum coverage of \$3,000,000 assuring coverage with respect to incidents at the Property or with respect to student, faculty and staff death or injury. Liability coverage must include Product Liability, Personal/Advertising Injury and Contractual Liability coverage and shall include coverage for environmental and pollution liability. If Tenant's standard policy coverage does not afford the specified assurances, Tenant shall procure special endorsements or a custom policy that provides this coverage. The Landlord, its agents, officials, volunteers, officers, elected officials and employees each shall be named as an additional insured on all such coverage.

16.1.2 Automobile Liability Insurance. Automobile Liability Insurance for all owned, non-owned and hired vehicles in the amount of at least \$1,000,000 per occurrence.

16.1.3 Property Insurance. Tenant shall be responsible for carrying Fire and Extended Risk insurance for the full replacement value of its personal property and trade fixtures incorporated in the Tenant's Fit-Out. Such coverage shall include business interruption coverage in an amount sufficient to pay all the Rent described in Section 4. All merchandise, furniture, floor coverings, and personal property and fixtures

2013]

*INLAID-IVORY TOWERS*

407

belonging to Tenant and all persons claiming by or through Tenant on the Premises shall be at Tenant's sole risk to insure.

16.1.4 Workers' Compensation Insurance. Tenant shall maintain Workers' Compensation Insurance to cover obligations imposed by federal and state statute.

16.2 Evidence and Requirements of Tenant Insurance Coverage. Upon the Effective Date, Tenant shall provide the Landlord with a Certificate(s) of Insurance (using the appropriate ACORD certificate) signed by the issuer with applicable endorsements. Landlord reserves the right to request additional copies of any or all of the policies, endorsements, or notices relating to the policies.

16.2.1 Tenant's insurance shall be primary of all other sources available. No policy shall expire, be cancelled or materially changed to affect the coverage available without advance written notice to the Landlord.

16.2.2 All insurance certificates and applicable endorsements are subject to advance review and approval by Landlord's Risk Manager.

16.2.3 All insurance policies (whether or not required by this Lease) shall contain a waiver of subrogation in favor of the Landlord, and its agents, officials, volunteers, officers, elected officials and employees.

16.2.4 All policies shall be from a company or companies rated A- or better, and are authorized to do business in the State of Franklin.

16.3 No Limits on Tenant Indemnification. The procuring of such policies of insurance shall not be construed to be a limitation upon Tenant's liability or as a full performance on its part of the indemnification provisions of this Lease.

16.4 Landlord's Right to Adjust Insurance. Landlord may reasonably adjust the amount and type of insurance Tenant is required to obtain and maintain under this Lease as reasonably required by Landlord's Risk Manager from time to time.

16.5 Use of Proceeds. Proceeds (or an equivalent amount of such proceeds) of any property damage insurance shall be applied as required by this Lease.

16.6 Insurance by Landlord.

16.6.1 Property Insurance. Landlord will carry Broad Form Property Damage coverage for the structure and permanent fixtures to the Property and for the Improvements but not that furniture, equipment, and personal property that is Tenant's Fit-Out or any property of Tenant's students and invitees, or persons claiming by or through Tenant located on the Property from time to time.

16.6.2 Landlord Election to Procure. In the event Tenant shall fail to procure any insurance required under this Section 16, or Tenant allows it to lapse, Landlord may, upon written notice to Tenant, procure and maintain any or all of the insurance required of Tenant under this Section. In such event, all costs of such insurance procured and maintained by Landlord on behalf of Tenant shall be the responsibility of Tenant and shall be fully reimbursed to Landlord within ten (10) business days after Landlord advises Tenant of the cost thereof.

16.6.3 Reimbursement of Premium Cost. Tenant will reimburse Landlord for the cost of the Property Insurance required under Section 16.1. Tenant acknowledges and understands that Landlord carries insurance (and has a self-insurance program) so that it will not need to obtain a separate policy to cover the property insurance requirements for Section 16.1.3. Accordingly, Tenant will reimburse Landlord an amount that would be charged by Landlord's carrier (but for the self-insurance program) based on an insurance "rate" per \$1,000 of insured value coverage.

## 17. Indemnity

17.1 Indemnity.

17.1.1 Tenant will pay, defend, protect, indemnify and save harmless (individually and collectively) Landlord and its officials, elected officials, employees, volunteers, and agents (collectively, "Indemnified Persons"), for, from and against all liabilities, losses, damages, costs, expenses (including reasonable attorney's fees and costs), causes of action (whether in contract, tort, or otherwise), suits, claims, demands, and judgments of every kind, character and nature whatsoever (collectively,

2013]

*INLAID-IVORY TOWERS*

409

“Liabilities”) directly or indirectly arising from or relating to Tenant’s performance under this Lease, or due to Tenant’s, or its officers’, directors’, employees’, agents’, contractors’ or invitees’ or its sub-lessees’ occupancy of, or activities or operations on, the Premises, including, but not limited to, the following:

a. any liability directly or indirectly arising out of or connected with the use, non-use, condition or occupancy of the Property or any part thereof, or any accident, injury to or death of any person or damage to property in or upon the Property, during the Term of this Lease;

b. any breach or violation by Tenant of any agreement, covenant, warranty, representation, or condition of this Lease, any other documents executed in connection with this Lease;

c. any violation by Tenant, or its officers, directors, employees, agents, contractors or invitees or its sub-lessees, of any contract, agreement or restriction relating to the Premises;

d. any violation by Tenant, or its officers, directors, employees, agents, contractors or invitees or its sub-lessees, of any law, ordinance, or regulation affecting the Premises or any part thereof or the ownership, occupancy or use thereof during the Term of this Lease; provided, however, that nothing in this Section 17.1.1 shall be deemed to provide indemnification to an Indemnified Person, with respect to Liabilities arising from the fraud, gross negligence or willful misconduct of such Indemnified Person.

17.1.2 After service of a legal action to an Indemnified Person for which Tenant’s indemnification obligations would apply, such served Indemnified Person shall notify Tenant in writing of the commencement thereof; the failure to give such notice shall not result in the loss of rights to indemnity hereunder, except that the liability of Tenant shall be reduced by the amount of any loss, damage or expense incurred by Tenant as the result of such failure to give notice. Tenant may (or if so requested by the Indemnified Person, shall) participate therein and assume the defenses thereof, with counsel reasonably satisfactory to such Indemnified Person and Tenant. If Tenant shall, after notice and within a period of time necessary to preserve any and all defenses to any claim asserted,

fail to assume the defense or to employ counsel for that purpose satisfactory to the Indemnified Person, the Indemnified Person shall have the right, but not the obligation, to undertake the defense of, and to compromise or settle the claim or other matters on behalf of, for the account of, and at the risk of, Tenant, and Tenant shall be responsible for the reasonable fees, costs, and expenses, (including reasonable attorney's fees and costs) of the Indemnified Person in conducting its defense.

17.1.3 The indemnification provisions in this Section shall not be exclusive or in limitation of, but shall be in addition to, the rights to indemnification of the Indemnified Persons under any other Section of this Lease or any applicable law.

17.1.4 The obligations of Tenant under this Section 17 shall survive any assignment or termination (voluntary or involuntary) of this Lease.

## 18. Surrender of Possession

18.1 Condition of Property. Upon the expiration or earlier termination of this Lease, Tenant's right to occupy the Property and exercise the privileges and rights granted under this Lease shall cease, and Tenant shall peaceably surrender the same and leave the Building free of trash and debris, broom clean and in good condition, except for normal wear and tear. All trade fixtures, equipment, and other personal property installed or placed by Tenant in or on the Premises not permanently affixed thereto as part of Tenant's Fit-Out shall remain the property of Tenant, and Tenant shall have the right at any time during the Term of this Lease, to remove the same from the Premises, provided that Tenant shall repair, at its sole cost, any damage caused by such removal. Any of Tenant's property not removed by Tenant within thirty (30) days after the expiration or termination of this Lease shall become a part of the Premises or be deemed abandoned by Tenant, and ownership thereof shall vest in Landlord. Tenant shall, however, remain financially liable to Landlord for the costs of repairs to the Premises or any other portion of the Property incurred as a result of Landlord's removal and/or relocation of property formerly belonging to Tenant not otherwise removed from the Premises as provided herein, and shall remit to

2013]

*INLAID-IVORY TOWERS*

411

Landlord payment for such costs within ten (10) business days of Tenant's receipt of Landlord's invoice therefor.

**19. Holding Over; Inspection/Access by Landlord**

19.1 Holding Over. Tenant shall not remain in possession of the Premises after the expiration or earlier termination of the Term without the express written consent of Landlord. Should Tenant remain in any other part of the Property without the express written consent of Landlord, such tenancy shall be at the sufferance of Landlord and not a renewal of the Term and in such case, the Premises Rent shall be one hundred fifty percent (150%) times the amount payable during the last year (or month as applicable for month-to-month rent payments) of the Term, together with all other charges due pursuant to this Lease; and such tenancy at sufferance shall be subject to every other term, covenant and provision of this Lease. In the event in which Tenant remains without Landlord consent, Tenant shall be liable for all of Landlord's direct and consequential damages, which shall include, without limitation: costs, fees, expenses, damages and attorney's fees incurred by Landlord as a result of Tenant's trespass, and damages and expenses incurred by Landlord for its inability to deliver possession of the Premises to another occupant.

19.2 Landlord's Access. Landlord may enter the Premises at reasonable times and upon reasonable notice for any reasonable purpose including, but not limited to: inspecting the condition of the Premises, verifying compliance with the terms and conditions of this Lease, performing maintenance or repairs, or the exercise of its governmental functions for such activities as fire protection or security. However, no notice will be required in any emergency situation as reasonably determined by Landlord.

**20. Notice**

20.1 Method of Delivery; Addresses. All notices required or permitted under this Lease shall not be effective unless personally delivered or mailed by certified mail, return

412

*PACE LAW REVIEW*

[Vol. 33:1

receipt requested, postage prepaid, or by reputable commercial overnight courier service, to the following addresses:

TO LANDLORD:      The Town of Minerva  
                           Attn.: Real Estate  
                           123 East Main Street  
                           Minerva, Franklin 09521

With copies to:      The Town of Minerva  
                           Attn.: Economic Development Director  
                           123 East Main Street  
                           Minerva, Franklin 09521  
                           The Town of Minerva  
                           Attn: Town Attorney

TO TENANT:         \_\_\_\_\_

                          \_\_\_\_\_

With copy to:       \_\_\_\_\_

                          \_\_\_\_\_

20.2      Deemed Delivery and Change. Any notice shall be deemed to have been received two (2) business days after the date of mailing, if given by certified mail, or upon actual receipt if personally delivered or if given by courier service. Any Party may designate in writing a different address for notice purposes by giving such notice in accordance with this subsection.

## 21. Liens and Mortgages

Except as may be permitted under the terms of this Lease, Tenant shall not engage in any financing or other transaction creating any mortgage or deed of trust upon the Property or this Lease, place or suffer to be placed upon any part of the Property any lien or other encumbrance, or suffer any levy or attachment to be made on Tenant's interest in the Premises or this Lease. Except as contemplated in this Lease, any such mortgage or deed of trust, encumbrance, or lien shall be

2013]

*INLAID-IVORY TOWERS*

413

deemed to be a violation of this Section, constituting a failure by Tenant to comply with the terms of the Lease, on the date of its execution or filing of record regardless of whether or when it is foreclosed or otherwise enforced.

**22. Corporate Authorization**

Tenant shall provide a certified copy of a resolution of its Board of Trustees (or equivalent body of overseers) authorizing Tenant to enter into this Lease to Landlord within thirty (30) calendar days of Tenant's execution of this Lease.

**23. Utility Lines and Service Charges**

23.1 Payment Obligations. Tenant shall timely and fully pay for all utilities, including trash collection, telephone (including the Improvements' land line system for which individual bills shall issue) and cable and related charges provided to the Premises under direct contract with Tenant. The charges and method of payment for each utility or service shall be determined by the appropriate supplier of the utility or service in accordance with applicable laws and regulations, on such basis as the appropriate supplier of the utility or service may establish; and Landlord shall have no responsibility therefor.

23.2 Utility Line Usage. Landlord retains the right to the continued use for any utility lines and utility improvements and services (including but not limited to all uses allowed in a Public Utility and Facilities Easement ("PUFE") under the Minerva Town Code) as are presently on, under, over, or through the Premises and the right to repair, maintain, and replace the same when necessary in Landlord's sole discretion, including but not limited to any utility easements on the Property. Landlord shall conduct such repairs in such a manner and at such times as to not unreasonably interfere with Tenant's activities thereon.



#### 24. Reservations to Minerva

The Premises are accepted, and the Property is used, by Tenant subject to any and all existing easements or other encumbrances on record, or any that an ALTA survey of the Premises would reveal. Landlord shall have the right to install, lay, construct, maintain, repair and operate such water lines, sanitary sewers, drains, storm water sewers, pipelines, manholes, connections; water, oil and gas pipelines; telephone and telegraph power lines; and such other appliances and appurtenances necessary or convenient to use in connection therewith (“Utility Improvements”), over, on, across or in proximity to the Property or any part thereof, as will not unreasonably interfere with Tenant’s operations hereunder, and to enter upon the Property for such purposes; provided, however, that Landlord provides Tenant with written notice of such entry no less than thirty (30) calendar days prior to any construction in the Premises. Landlord also reserves the right to grant franchises, easements, rights-of-way, and permits, over, on, across or in proximity to any portions of the Property, provided, that Landlord shall not exercise such rights so as to interfere unreasonably with Tenant’s activities on the Property. Landlord agrees that any rights granted to any parties by reason of this clause shall contain provisions that the Property shall be restored to its original condition, at no cost to Tenant, upon the completion of any construction.

#### 25. Brokers

Tenant represents and warrants that it has not had any dealings with any real estate brokers, finders or agents in connection with this Lease except otherwise as disclosed in this Lease. To the fullest extent permitted by law, Tenant further agrees to indemnify, defend (with counsel selected by Landlord) and hold Landlord and Landlord’s successors and assigns harmless for, from and against any and all claims, costs, commissions, fees or damages by any person or firm whom Tenant authorized or employed, or acted by implication to authorize or employ, to act for Tenant in connection with this Lease.

2013]

*INLAID-IVORY TOWERS*

415

**26. Sale of Premises by Landlord**

If there is a sale or other conveyance by Landlord of its interest in the Premises, Landlord shall be deemed released from all liability accruing from and after the date of consummating such sale or conveyance as respects the performance of any covenant or obligation on the part of Landlord contained in this Lease to be performed. Upon such a sale or conveyance, the covenants and obligations contained in this Lease on the part of Landlord shall be binding on its successors or assigns. Landlord and any of its successors in interest agree not to disturb or otherwise interfere with Tenant's possession of the Premises for the unexpired Term of the Lease, except as otherwise provided herein. From and after such sale or conveyance, Tenant shall be bound to such successor or assign who becomes the new Landlord under this Lease; and Tenant shall attorn to such successor or assign as its Landlord; such attornment shall be effective and self-operative without the execution of any further instruments on the part of either party.

**27. Estoppel Certificate**

Both Parties shall, without charge, at any time and from time to time hereafter, within thirty (30) calendar days after written request from the other Party to do so, certify by written instrument duly executed and acknowledged by the Party and certified to the requesting Party and to any prospective lender or purchaser the following, to the extent such information is true and correct at the time such request is made: (i) as to whether this Lease is in full force and effect along with the amount and current payment status of the Rent components and other amounts due hereunder from Tenant; (ii) as to whether this Lease has been modified or amended in any respect and describe such modifications or amendments, if any; (iii) as to whether there are any existing defaults, to the knowledge of the Party executing the certificate, and specifying the nature of such defaults, if any; (iv) as to whether that Party has assigned or transferred its interests or any portion thereof in this Lease; and (v) as to any other matters as may be

reasonably requested. Any such certificate may be relied upon by the requesting Party and any prospective purchaser or lender to whom the same was certified.

## 28. Condemnation

28.1 Entire or Partial Condemnation. If the whole (or any part) of the Premises shall be taken or condemned by any competent authority for any public use or purposes during the Term of this Lease, this Lease shall terminate with respect to the part of the Premises so taken, and Tenant reserves unto itself the right to claim and prosecute its claim in all appropriate courts and agencies for any award or damages based upon loss, damage or injury to its leasehold interest (as well as relocation and moving costs) without impairing any rights of (or the award payable to) Landlord for the taking of or injury to the Landlord's interests.

28.2 Continuation of Lease. In the event of a taking of less than all of the Premises, this Lease shall continue in effect with respect to the portion of the Premises not so taken; the Premises Rent shall not be adjusted except if the taking materially affects Tenant's use of the Premises and in such event the Premises Rent shall be equitably adjusted as agreed to by the Parties. Provided, further, however, if the taking is so material that the remaining part of the Premises cannot feasibly be used or converted for use by Tenant for the uses contemplated by the Lease, Tenant may, at its option, terminate this Lease within ninety (90) days after such taking by serving upon Landlord at any time within said ninety (90) day period, a thirty (30) day written notice of Tenant's election to so terminate accompanied by a certificate of Tenant that the remaining part of the Premises cannot feasibly be used or converted for use by Tenant.

28.3 Temporary Taking. If the temporary use of the whole or any part of the Premises or the appurtenances thereto shall be taken, the Term shall not be reduced or affected in any way. The entire award of such taking (whether paid by way of damages, rent, or otherwise) shall be payable to Tenant, unless the period of occupation and use by the condemning authority shall extend beyond the date of expiration of this Lease, in

2013]

*INLAID-IVORY TOWERS*

417

which event the award made for such taking shall be apportioned between Landlord and Tenant as of the date of such expiration.

28.4 Notice of Condemnation. In the event any action is filed to condemn the Premises or Tenant's leasehold estate or any part thereof by any public or quasi-public authority under the power of eminent domain, either Landlord or Tenant shall give prompt notice thereof to the other Party. Each Party shall have the right, at its own cost and expense, to represent its respective interest in each proceeding, negotiation or settlement with respect to any taking or threatened taking and to make full proof of its claims. No agreement, settlement, conveyance or transfer to or with the condemning authority affecting Tenant's leasehold interest shall be made without the consent of Tenant, which shall not be unreasonably withheld or delayed.

**29. Supersession of Memorandum of Understanding;  
Commitments**

29.1 MOU. This Lease is being entered into in part to implement the Memorandum of Understanding for a Minerva Campus Development Agreement ("MOU") dated \_\_\_\_\_ 201\_\_ and entered into between Landlord and Tenant. The Parties agree that the MOU is superseded hereby, as of the Effective Date of this Lease.

29.2 Degree Programs. The Premises will be used for classes commencing no later than the Fall 2013 semester. At the Premises, Tenant will provide the following number of degree programs: in the first academic year, Tenant will offer a minimum of \_\_\_\_\_ degree programs among those described on Schedule 29.2 attached hereto; by the third academic year, Tenant will offer \_\_\_\_\_ such degree programs; by the fifth academic year and through the remainder of the Term of the Lease, Tenant will offer at least \_\_\_\_\_ such degree programs. The first academic year shall be the year students first are able to attend classes on the Premises or, as used in this Section 29, the \_\_\_\_\_ semester of 201\_\_.

29.3 Students. At the Premises, Tenant will enroll the following minimum number of students: Tenant will enroll a

minimum of \_\_\_\_ students in the first academic year; \_\_\_\_\_ students by the third academic year; and \_\_\_\_ students by the fifth academic year.

29.4 Employees. At the Premises, Tenant shall employ the following minimum number of full-time employees (faculty or staff): \_\_ full-time employees in the first academic year; \_\_ full-time employees by the third academic year; and \_\_ full-time employees by the fifth academic year and through the remainder of the Term of this Lease.

29.5 Financial Support. Tenant agrees to provide significant financial incentives for student and community support for Tenant's operations at the Property, in compliance with applicable laws.

29.6 Trademark/Logos. The Parties agree and acknowledge that each Party's trademarks/logos may not be used without permission from the other Party. Landlord shall obtain prior approval from Tenant's Office of Marketing and Communications (or its designated representative), and Tenant shall obtain prior permission from Landlord's Public Information Officer.

### **30. Tenant's Termination Option; Breakage Liquidated Damages**

30.1 Option - the Grant. Landlord hereby grants Tenant the option to terminate this Lease provided, however, that Tenant may exercise the termination option only if, at the time when Tenant exercises the option: (i) this Lease is still in effect; (ii) there is no uncured Event of Default under Section 12 of this Lease; (iii) Tenant is in full compliance with all terms and conditions of this Lease; and (iv) Tenant exercises the option in compliance with this Lease (including, but not limited to, exercising the option strictly as described in Section 30.2 below).

30.2 Manner of Exercising the Option. Tenant must exercise the termination option a minimum of one hundred twenty (120) days in advance of the effective date of the termination, by delivering in writing a notice of the intended termination ("Termination Notice") which shall include (a) a statement of the precise date and time of day upon which this

2013]

*INLAID-IVORY TOWERS*

419

Lease and Tenant's occupancy of the Premises shall cease ("Proposed Termination Date"); (b) a statement that all personal property and trade fixtures (for example, sign panels not forming a part of the Improvements) Tenant is permitted to remove, which shall be removed on or prior to the Termination Date, and all damage caused by such removal shall be paid for at the sole cost of Tenant; and (c) fifty percent (50%) of the Breakage Liquidated Damages in the form of immediately available funds. A failure to include any of these components shall void the Termination Notice for all purposes and this Lease will continue beyond the Proposed Termination Date.

30.3 Complete Exit. This Lease shall not be deemed terminated if Tenant holds over in the Premises past the Termination Date or occupies (with persons or property of Tenant) any other portion of the Property or fails to pay the remaining fifty percent (50%) of the Breakage Liquidated Damages stipulated in Section 30.4 below in immediately available funds on or before the Proposed Termination Date. In any of such events, Tenant shall remain responsible for the payment of all Rent and other sums due hereunder, and Tenant must reissue the Termination Notice to be deemed to have terminated this Lease.

30.4 Breakage Liquidated Damages. In consideration of the termination option hereby granted, Tenant agrees that it shall pay Landlord, as liquidated damages and not as a penalty, the sum of the following items, to be paid in full prior to the effectiveness of Tenant's termination:

a. The full amount of any abated Premises Rent set forth in this Lease; plus

b. Nine (9) months of Premises Rent for every twelve (12) months (including here as a full month any fraction of a month) of the scheduled Term remaining (i.e., absent the termination) from and after the Proposed Termination Date; plus

c. The full amount of the FF&E Reimbursement and the Operating Costs Fraction for the period through the date of termination, with the Operating Costs Fraction and FF&E Reimbursement to be estimated based upon the Operating Expenses and FF&E Investment, as applicable, for the month prior to the month of termination.

d. If fewer than 12 months remain in the Term (or the Extension Term, if in process) as of the termination effective date, Tenant shall pay nine (9) months of Premises Rent and FF&E Reimbursement.

### 31. Miscellaneous

31.1 Compliance with Laws and Governmental Capacity. Tenant shall at all times comply with all federal, State and local laws, ordinances, rules, and regulations which are applicable to its activities on the Premises (including, but not limited, to the Americans with Disabilities Act and the Minerva Town Code). Any approvals Tenant is required to obtain from Landlord under this Lease are in addition to and separate from approvals Tenant must obtain from Landlord (acting in its governmental capacity through its boards or departments), including but not limited to, applicable approvals required under the Town of Minerva Building Code or Zoning Ordinance. Notwithstanding anything in this Lease to the contrary, this Lease does not affect the Town of Minerva in its governmental capacity.

31.2 Governing Law, Venue, and Jurisdiction. The laws of the State of Franklin, including its conflicts of law provisions, shall govern the matters set forth in this Lease. Venue and jurisdiction for any action brought under this Lease shall only be brought in (and shall not be removed from) Superior Court, in Athena County, Franklin. In the event of any litigation or arbitration between Landlord and Tenant arising under this Lease, the successful party shall be entitled to recover its attorney's fees, expert witness fees and other costs incurred in connection with such litigation or arbitration.

31.3 No Personal Liability of Officials of Landlord or Tenant. None of the covenants, stipulations, promises, agreements and obligations of Landlord or Tenant contained herein shall be deemed to be covenants, stipulations, promises, agreements or obligations of any official, officer, agent or employee of Landlord or Tenant in his or her individual capacity, and no recourse shall be had for the payment for any claim based thereon or any claim hereunder against any official, officer, agent or employee of Landlord or Tenant.

2013]

*INLAID-IVORY TOWERS*

421

31.4 Severability. If any provision of this Lease is declared void or unenforceable (or is construed as requiring the Landlord to do any act in violation of any applicable law, including any constitutional provision, law, regulation, Town Code or Charter), such provision shall be deemed severed from this Lease and this Lease shall otherwise remain in full force and effect; provided that this Lease shall retroactively be deemed reformed to the extent reasonably possible in such a manner so that the reformed agreement (and any related agreements effective as of the same date) provide essentially the same rights and benefits to the parties as if such severance and reformation were not required. Unless prohibited by any applicable law, the Parties further shall perform all acts and execute, acknowledge and/or deliver all amendments, instruments and consents necessary to accomplish and to give effect to the purposes of this Lease, as reformed.

31.5 Sales and Property Taxes. Tenant shall pay any leasehold tax, sales tax, personal property tax, transaction privilege tax, license or permit fee or any other tax assessed against Landlord associated with this Lease. In the event that laws or judicial decisions result in the imposition of a real property tax or any other form of tax or imposition on the interest of Landlord, such tax shall also be paid by Tenant for the period this Lease is in effect to the extent such taxes are reasonably attributable to the Premises or a portion thereof or the operation of Tenant's business.

31.6 Approvals, Consents, and Notices. All approvals, consents and notices called for in this Lease shall be in writing, signed by the appropriate Party, and may not be established solely by oral testimony.

31.7 Entire Agreement; Amendments. This Lease is the entire agreement between the Parties relating to the Premises, and this Lease shall completely and fully supersede all other prior understandings or agreements, both written and oral, between Landlord and Tenant relating to leasing the Premises. Any modification of or amendment to this Lease shall only be enforceable if it is in writing signed by the Party to be bound.

31.8 Notice of Franklin Law Regarding Mandatory Cancellation. This Agreement may be subject to cancellation



pursuant to any Franklin statute pertaining to the right of cancellation due to conflict of interest by any person in representation of the Parties.

31.9 No Waiver. No provision of this Lease may be waived or modified except by a writing signed by the Party against whom such waiver or modification is sought.

31.10 Non-Waiver of Rights. No waiver or default by Landlord of any of the terms, conditions, covenants or agreements hereof to be performed, kept or observed by Tenant shall be construed or act as a waiver of any subsequent default of any of the terms, covenants, conditions or agreements herein contained to be performed, kept or observed by Tenant, and Landlord shall not be restricted from later enforcing any of the terms and conditions of this Lease.

31.11 Non-Discrimination. Tenant agrees that: (i) it does not discriminate against any person on the grounds of race, color, national origin, or disability, age, or familial status shall be excluded from participation, denied the benefits of, or be otherwise subject to unlawful discrimination in the use of the Premises; (ii) in the construction of any improvements on the Premises and the furnishing of services thereon, it will not discriminate against any person on the grounds of race, color, national origin, or disability or otherwise exclude from participation in, deny the benefits of, or otherwise be subject to unlawful discrimination.

31.12 Drug Free Work Place. Tenant shall require a drug free workplace for all employees working at the Premises. Tenant's employees who are working at the Premises shall be notified by the Tenant that they are prohibited from the manufacture, distribution, dispensation, possession or unlawful use of a controlled substance on the Premises. Tenant shall ensure that employees do not use or possess controlled substances while performing their duties within the Property.

31.13 E-Verify Requirements. To the extent applicable under federal or Franklin law, Tenant represents and warrants compliance with all federal immigration laws and regulations that relate to their employees and their compliance with the E-verify requirements of statutes and regulations. Breach of the above-mentioned warranty shall be deemed a breach of this Lease and may result in the termination of this Lease by

2013]

*INLAID-IVORY TOWERS*

423

Landlord. Landlord retains the legal right to randomly inspect the papers and records of any employee who works under this Lease or on the Premises to ensure compliance with the above-mentioned laws.

31.14 Scrutinized Business Operations. Pursuant to Franklin statutes, Tenant certifies that it does not have scrutinized business operations in Sudan or Iran. For the purpose of this Section the term “scrutinized business operations” shall have the meanings set forth in applicable Franklin statutes. If Landlord determines that Tenant submitted a false certification, Landlord may impose remedies as provided by law including terminating this Lease.

31.15 Incorporation of Recitals. The recitals set forth herein are acknowledged by the Parties to be true and correct and are incorporated herein by this reference.

31.16 Time of the Essence. Time is of the essence with respect to the obligations to be performed under this Lease.

31.17 Successors. The terms, conditions, and covenants of this Lease shall, subject to the provisions limiting assignments, apply to and bind the heirs, successors, executors, administrators and assigns of all the Parties hereto.

31.18 No Third Party Beneficiaries. This Lease is intended solely for the benefit of the Parties. Nothing set forth in this Lease, or in any presentation, report, or other document is intended to create, or shall create, any rights in any third parties. There shall be no third party beneficiaries to this Lease except as otherwise noted herein.

31.19 Construction. The terms and provisions of this Lease shall be interpreted and construed in accordance with their usual and customary meanings. The Parties each hereby waive the application of any rule of law which would otherwise be applicable in connection with the interpretation and construction of this Lease that ambiguous or conflicting terms or provisions contained in this Lease shall be interpreted or construed against the Party who prepared or whose attorney prepared the executed Lease or any earlier draft of the same.

31.20 Days. If the last day of any time period stated in this Lease, or the date on which any obligation to be performed under this Lease, shall fall on a day the Town of Minerva is closed (Saturday, Sunday, or any legal holiday observed by

Minerva), then the duration of such time period or the date of performance, as applicable, shall be extended so that it shall end on the next succeeding day that is not a day the Town of Minerva is closed.

31.21 Minerva's Educational Initiative. Tenant acknowledges that the Town of Minerva is promoting (a) higher education within its boundaries and (b) the town as a destination for higher educational institutions, including the Property. Tenant acknowledges and understands that other educational institutions may offer academic and enrichment programs that compete in some measure with Tenant's programs. Tenant agrees that it shall assert no claim against the Town of Minerva for promoting education within the Town or promoting it as a destination for higher educational institutions, including but not limited to any claims against the Town of Minerva for breach of good faith and fair dealing, unfair competition, restraint of trade, interference with business opportunity, or any similar or related common law or statutory claims.

31.22 Surviving Provisions. All warranties, representations, and duties to indemnify, defend, and hold harmless shall survive the termination, cancellation or expiration of this Lease. Additionally, all obligations to restore the Premises shall survive the termination or expiration of this Lease. Additionally, any other section of this Lease, which reasonably should survive, shall survive upon such termination, cancellation or expiration.

31.23 Counterparts. This Lease and any addendum may be executed in counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. The signature pages from one or more counterparts may be removed from the counterparts and the signature pages all attached to a single instrument so that the signatures of all Parties may be physically attached to a single document. The Parties agree that they may reflect and confirm their agreement to be bound hereby, and their execution and delivery of this Lease, by transmitting a signed copy of the signature page hereof, by facsimile or email, to the other Party hereto.

2013]

*INLAID-IVORY TOWERS*

425

**IN WITNESS WHEREOF**, the Parties have executed this Lease Agreement the day and year first above written.

LANDLORD  
THE TOWN OF MINERVA, FRANKLIN, a  
Franklin municipal corporation  
By: \_\_\_\_\_  
Name:  
Title: Town Manager

STATE OF FRANKLIN            )  
  ) ss.  
County of Athena            )

ACKNOWLEDGED before me this \_\_\_ day of \_\_\_\_\_,  
2012, by \_\_\_\_\_ the Manager of the Town of Minerva, a  
Franklin municipal corporation.

\_\_\_\_\_  
Notary Public

TENANT: \_\_\_\_\_, a not-for-profit  
corporation of the State of \_\_\_\_\_  
By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

STATE OF \_\_\_\_\_            )  
  ) ss.  
County of \_\_\_\_\_            )

ACKNOWLEDGED before me this \_\_\_ day of \_\_\_\_\_,  
2012, by \_\_\_\_\_, in his capacity as \_\_\_\_\_ of  
\_\_\_\_\_, a \_\_\_\_\_ not-for-profit corporation, for the  
purposes therein contained.

\_\_\_\_\_  
Notary Public

**Exhibit A -- The Premises**

The Premises diagram, reflecting Tenant's exclusive and non-exclusive facilities

**Exhibit B -- Landlord Improvements**

The interior improvements shall consist of those items contained in the Owner/Contractor Contract for Construction (AIA Form XXX dated \_\_\_\_, 201\_\_). Additionally, the following categories of furnishings, fixtures and equipment shall be furnished to the classrooms, computer laboratories, wet laboratories, faculty offices and common areas of the Building:

**Classrooms:**

- Desks (\_\_ per \_\_ square feet of usable classroom space)
- Chairs (\_\_ per \_\_ square feet of usable classroom space)
- White boards (\_\_ square feet minimum)
- Computer projection equipment per classroom

**Computer laboratories:**

- Desks (\_\_ per \_\_ square feet of usable lab space)
- Chairs (\_\_ per \_\_ square feet of usable lab space)
- Desktop computers
- Printers

**Wet laboratories:**

- Work benches
- Sinks
- Gas connections

**Common Areas** (e.g., hallways, lobbies, entry vestibules, conference rooms):

**Faculty Offices:**

- Desk
- Chairs

2013]

INLAID-IVORY TOWERS

427

**NOTE:** The Tenant Fit-Out, as defined in Section 6.2 of the Lease to which this Exhibit B is attached, shall consist of all items of personal property and trade fixtures that are not set forth above in Part I.

### Exhibit D -- Rent Schedule

#### Premises Rent:

Tenant's Premises Rent shall be the sum of the following amounts:

For *shared* classrooms, \$2,400 per term (semester) per class

For *dedicated* (committed exclusively for Tenant's use) classrooms, \$3,000 per term per class

For *joint use* computer laboratory (\$ \_\_\_\_\_ per term per class)

For *joint use* science laboratory (\$ \_\_\_\_\_ per term per class)

For *dedicated* science laboratory (committed for Tenant's exclusive use) (\$ \_\_\_\_\_ per class per term)

Illustration for a single academic year:

Tenant has one dedicated classroom inside which it conducts six classes per term and uses two shared classrooms and one science laboratory in which it conducts three classes per term.

Dedicated classroom rent = 6 (classes conducted) X 1 (classroom) X 2 (terms per year) X \$3,000 = \$36,000 per academic year

428

PACE LAW REVIEW

[Vol. 33:1

Shared classroom rent = 3 (classes conducted) X 2 (shared classrooms) X 2 (terms per year) X \$2,400 = \$28,800 per academic year

Shared laboratory rent= 3 (classes conducted) X 2 (terms per year) X \$\_\_\_\_\_ = \$\_\_\_\_\_ per academic year

Total Premises Rent per academic year = \$ \_\_\_\_\_

#### **Exhibit F – FF&E Reimbursement:**

Tenant's FF&E Reimbursement shall equal one third (1/3) times (a) Landlord's monthly payment for all leased items that constitute part of the FF&E Investment, plus (b) the Landlord's total cost of the purchased component of the FF&E Investment (as defined in Section 4), amortized over sixty (60) months (regardless of when such purchased items are acquired, unless Landlord chooses a long amortization period in its sole discretion), with such FF&E Reimbursement sum to be paid by Tenant monthly concurrently with the Premises Rent.

Tenant's fractional Operating Costs obligation, assuming the annual operating expenses are approximately \$5 per square foot, including the Property Manager's fee for services, and that the *rentable* square footage of the building on the Property is \_\_\_\_ rentable square feet, shall be \$ \_\_\_\_\_ annually

Total estimated operating costs fraction per academic year = \$ \_\_\_\_\_

2013]

*INLAID-IVORY TOWERS*

429

**Schedules to Lease****Schedule 3.3** – Degree Programs of Downtown Minerva Educational Institutions

## Athena College

1. International Studies – Bachelor of Arts focused upon global economic development, environment and health, global justice and human rights, international relations and diplomacy, international institutions, and global cultures.
2. International Business – Bachelor of Arts
3. Sustainability Studies – Bachelor of Arts

## Bartholomew College

1. Bachelor of Science in Information Systems
2. Bachelor of Science in Psychology and Organizational Behavior
3. Bachelor of Science in Business Administration (domestic focus, not international in scope)

## Edison University

1. Master of Business Administration
2. Master of Science in Engineering Management
3. Master of Arts AND Master of Fine Arts in Creative Writing
4. Master of Science in Education in Teaching English as a Second Language
5. Master of Science in Education in Educational Technology
6. Bachelor of Science in Mechanical Engineering
7. Master of Science in Mechanical Engineering'
8. Bachelor of Business Administration in Accounting
9. Bachelor of Business Administration in Entrepreneurship
10. Bachelor of Science in Nursing



430

*PACE LAW REVIEW*

[Vol. 33:1

**Da Vinci University**

1. Bachelor of Fine Arts
2. Bachelor of Arts in Criminal Justice
3. Bachelor of Arts in Communication Arts
4. Bachelor of Arts in Psychology
5. Bachelor of Arts in Theology
6. Bachelor of Science in Therapeutic Nutrition
7. Bachelor of Business Administration in Management and Organizational Behavior

**Schedule 5.7 – Minerva Town Center Amenities**

[Insert narratives of library, museum, auditorium, arena/field etc., venues and capacities for meetings/student seating]

**Schedule 29.2 – Projected Schedule of Course Offerings by Tenant (phasing in by academic years following commencement of operations)**