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## FISCAL IMPACT REPORT

ORIGINAL DATE 2-7-09  
 SPONSOR Steinborn LAST UPDATED 2-24-09 HB 606/aHHGAC  
 SHORT TITLE Require Development Lease Notice & Bidding SB  
 ANALYST Woods

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY09	FY10		
NFI	NFI		

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to HB 605, HB607, HB610; SB 474, SB475

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

State Land Office (SLO)

Attorney Generals Office (AGO)

Department of Finance and Administration (DFA)

### SUMMARY

#### Synopsis of HHGAC Amendment

House Health and Government Affairs Committee amendment to House Bill 606 adds an emergency clause to HB 606 and amends the new material contained in Paragraph C on page 2 to state that “if the conveyance is a business lease for real estate planning or development purposes, then, notwithstanding the term of the lease, it shall only be made after public notice and competitive bid.”<sup>1</sup>

### SIGNIFICANT ISSUES

SLO Adds that, “This amendment to HB 606 (which changes the process for the leasing of state trust land, where the lease is a of business lease for real estate planning or development purposes, and requires that these leases be issued only after notice and competitive bid) adds language

<sup>1</sup> Extracted from the AGO response dated 2-20-09 which carries the caveat, *This analysis is neither a formal Attorney General’s Opinion nor an Attorney General’s Advisory Opinion letter. This is a staff analysis in response to the agency’s, committee’s or legislator’s request.*

declaring the passage of this bill to be necessary for the public peace health and safety. This assures that the bill goes into effect immediately after passage. In addition, the language in the original bill stating that ‘if a conveyance is’ a business and planning lease for real estate and planning development it ‘shall only be issued after notice. now adds the word ‘public’ before notice and reads shall only be made after public notice.’ The word ‘issued’ in ‘issued after notice’ is changed to ‘made’ so that the language agrees grammatically with the word ‘conveyance.’ A conveyance is ‘made’ not ‘issued.’”

### Synopsis of Original Bill

House Bill 606 amends Section 19-7-9 to add a new subsection (C), pertaining to the land commissioner’s authority to convey state lands having value for commercial development, requiring that “if the conveyance is a business lease for real estate planning or development purposes, then, notwithstanding the term of the lease, it shall only be issued after notice and competitive bid.”<sup>2</sup>

There is no appropriation attached to this legislation.

### **FISCAL IMPLICATIONS**

SLO advises that the agency budget would need to be increased according to estimates of how many leases this would impact. The advertisement and auction of a lease is a significant expense. As the law is written, only leases for more than five years are required to be sold to the highest bidder at auction. It is more costly and more time consuming to have a bid process than it is to simply issue a lease.

### **SIGNIFICANT ISSUES**

DFA states that this amendment provides for the opportunity for business leases for real estate planning or development purposes only after notice and competitive bid occur on state lands, which previously was not an option. This new option expands the use of state lands which results in potential new revenue for the State of New Mexico.

SLO indicates that, under the New Mexico Constitution, the commissioner of public lands has direction and control of public lands. Art. XIII, Section 2. When a planning and development lease is issued initially for a five year period the state land office continues to be actively involved with the planning and development of the lease. As changes occur, issues can be resolved by the lessee in conjunction with the Commissioner, and the lease can be amended accordingly. This is inherent in the concept of planning and development. However, once a lease is auctioned, no material changes can be made because such changes would warrant a re-auction of the land. No developer would take such a lease if it were subject to revocation and re-auction whenever a material change occurred. In short, the level of development which must be layed out prior to the auction of trust lands for commercial use cannot allow for change, even if it is in the best interest of the development, and it would not allow the Commissioner to have as much input in the development of the lease. Further that:

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<sup>2</sup> Extracted from the AGO response dated 2-5-09.

- As the trustee The Commissioner has a fiduciary duty to the citizens of New Mexico (the beneficiaries of the Enabling Act trust managed by him) which is higher than the duty of a legislator. State trust lands are best served if the person with the fiduciary duty makes the decision whether a planning and development lease can be issued for less than 5 years without notice and competitive bid.
- This bid requirement may discourage planning and development lessees from leasing state trust land and lead them to decide to acquire private land. This could seriously impact the revenue of the state land office.
- This amendment does not define what a planning and development lease is. The planning and/or development that is required for each parcel of land will vary depending upon the market, the topography of the land, etc. It is very hard to define these leases. At the State Land Office each lease is developed and defined in a different way. Furthermore, the standards and practices of commercial real estate planning and development change quickly over time. What defined a planning and development lease five years ago is different from what defines these leases today, and very different from how they may be defined in the future.

SLO concludes by noting that, since the proposed amendment does not define a planning and development lease, it is not clear what kind of leases it applies to. If it did define them, that definition might be quickly inoperative and require further legislative amendment.

AGO suggest that it may be advisable to add at the end of the sentence in subsection (C) “and in accordance with otherwise applicable provisions of the Enabling Act,” in order to make clear that those leases that exceed 5 years in duration are clearly subject to the Enabling Act’s requirements at Section 10.

### **PERFORMANCE IMPLICATIONS**

DFA suggests that, by requiring the stipulations of notice and competitive bid, this amendment allows for fair and equal treatment of all persons involved in leasing process and to maximize the leasing value of state lands.

### **ADMINISTRATIVE IMPLICATIONS**

SLO states: “Publishing and other requirements would be imposed whenever a planning and development lease was issued.”

### **RELATIONSHIP**

Relates to HB 605, HB607, HB 610; SB 474, SB475

### **TECHNICAL ISSUES**

AGO advises that, in Subsection (C), before the word “notice” it may be advisable to add “public” in order to make clear that “notice” means “public notice.” Also, the word “issued” might be more properly “made,” in the context of conveyances.

**OTHER SUBSTANTIVE ISSUES:**

AGO notes that business leases that contain payment for intangibles have been found to be unauthorized under AG Opinion 08-02 (2008).

BW /mt:mc