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## FISCAL IMPACT REPORT

**ORIGINAL DATE** 02/17/09  
**LAST UPDATED** 03/15/09    **HB** \_\_\_\_\_

**SPONSOR** Fischmann

**SHORT TITLE** Require Development Lease Notice & Bidding    **SB** 540/aSCONC/aSJC

**ANALYST** Woods

### APPROPRIATION (dollars in thousands)

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

(Parenthesis ( ) Indicate Expenditure Decreases)

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY09	FY10	FY11	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
<b>Total</b>		\$0.1 See SLO Fiscal Implications			Recurring	Land Trust 09800

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to HB 605, SB 475, SB 474, HB 607, HB 610, SB 539, HB 606

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Attorney Generals Office (AGO)

State Land Office (SLO)

#### Other Input Received From

Quality Growth Alliance of Dona Ana County

### SUMMARY

#### Synopsis of SJC Amendment

Senate Judiciary Committee amendment to SB 540, as amended, strikes the Senate Conservation Committee amendment number 1 from the bill which stated:

On page 2, line 24, after “purposes”, insert “and if the lease encompasses forty or more acres”.

Synopsis of SCONC Amendment

Senate Conservation Committee amendment to SB 540 apply the bill’s notice and competitive bid requirements for business leases to only those leases that encompass forty or more acres. As amended, the new subsection C of section 19-7-9 reads: “[I]f the conveyance is a business lease for real estate planning or development purposes and if the lease encompasses forty or more acres, it shall only be issued after notice and competitive bid.”<sup>1</sup>

**SIGNIFICANT ISSUES**

AGO states, “As noted in our earlier analysis of this bill, 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.”

SLO states, “This amendment allows the State Land Office to complete small short term planning and development leases with smaller businesses without the complexity of notice and competitive bidding. However, where the project is larger, forty acres or more, the notice and bidding process must be applied.”

**ADMINISTRATIVE IMPLICATIONS**

SLO indicates that publishing and other requirements would be imposed when a planning and development lease is issued for land encompassing forty or more acres.

**TECHNICAL ISSUES**

AGO states, “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 states, “Business leases that contain payment for intangibles have been found to be unauthorized under AG Opinion 08-02 (2008).”

Synopsis of Original Bill

The Attorney General’s Office (AGO) indicates that SB 540 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>

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<sup>1</sup> AGO response to amendment dated 2-26-09.

<sup>2</sup> The AGO response 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.*

## FISCAL IMPLICATIONS

SLO states that the agency’s “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.”

HED states that the requirement for notice and competitive bid has a cost impact to the Lessor due to publication requirements. The fiscal impact is dependent on the number of leases that would be involved. Competitive bidding could potentially increase revenue to the State for the lease of state property to an outside entity as the Lessor.

## SIGNIFICANT ISSUES

SLO states advises 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 laid 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. SLO further states:

- 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 a 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.
- 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 states 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**

None noted by respondents.

### **ADMINISTRATIVE IMPLICATIONS**

SLO advises that publishing and other requirements would be imposed whenever a planning and development lease was issued.

### **RELATIONSHIP**

Relates to HB 605 (“Review of Development Business Leases”); SB 475 (“AG Review of Development Land Leases”); SB 474 (“State Land Lessee Improvements Requirements”); HB 607 (same); HB 610, SB 539 (“Land Commissioner Classification and Accounting”) HB 606 is a duplicate.

### **TECHNICAL ISSUES**

AGO suggests 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 states: “Business leases that contain payment for intangibles have been found to be unauthorized under AG Opinion 08-02 (2008).”

HED suggests that the notice and bidding process takes additional time and effort to complete; therefore lease turnaround time will be increased. Further, planning and development lessees may seek private land in lieu of having to compete for public land.

### **OTHER COMMENTS**

Commenting on its support of the legislation, Quality Growth Alliance of Dona Ana County notes the following:

Current law exempts State Land Office Business Planning leases of 5 years or less from competitive bidding requirements. In the Las Cruces area we have seen a series of planning leases designed to encourage future property sale and development, covering thousands of acres, all of a duration of 5 years or less, and none conducted with proper competitive bidding. There appears to have been an intentional effort to avoid competitive bidding processes in these transactions.

At one time, it may have been that leases for terms of less than 5 years routinely

involved small amounts of money, and were more efficiently conducted without competitive bidding. But today, these planning leases in this area usually result in developers receiving millions to tens of millions in credits against the future purchase of State Land. This allows the lease holder to effectively buy the leased land at a deep discount from its fair market value.

The discount due to the credits are so great, often in the range of 40% to 60%, that they generally other potential buyers from bidding on the eventual sale of the land. We feel that competitive bidding on State Land Office development planning leases should be required for two reasons.

1. The monetary value of these leases is high. Unlike most leases, the value of these transactions to the leaseholder is not determined by their length, but by the value of added improvements. Competitive bidding is the only way to assure taxpayers that the State Land Office is receiving full value for its investment on all high value transactions intended to result in the eventual sale of taxpayer owned property.

2. Real estate is a highly illiquid asset. However thorough an appraisal may be, it is subject to many assumptions. For this reason, appraisals routinely under estimate or over estimate the final selling price of a parcel by 50-100% or more. The only way to truly get market value for a property is to subject it to the market. Competitive bidding for all non-grazing planning development leases should be required to insure taxpayers and State Land Beneficiaries get fair value for the use and eventual sale of state trust land.

## **ALTERNATIVES**

HED indicates that an alternative is to require the lease of property to follow State procurement guidelines; however, legislation will be required.

## **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL?**

HED advises, “If the bill is not passed, the lease of public land will not have competitive bid and public notice requirements. The leasing process may be regarded as not being fair and equal to all persons and not allowing the State to maximize the leasing value of its land.”

## **AMENDMENTS**

AGO notes its comments under *Significant* and *Technical Issues*.

BW/svb