

Opinion 08-02

February 27, 2008

OPINION OF: GARY K. KING Attorney General

BY: Andrea R. Buzzard, Assistant Attorney General

TO: The Honorable Nathan "Nate" Cote, New Mexico State Representative, P.O. Box 537, Organ, NM 88052; The Honorable Mary Jane Garcia, New Mexico State Senator, P.O. Box 22, Doña Ana, NM 88032

QUESTION:

Did the Commissioner of Public Lands violate the Enabling Act, the Constitution of New Mexico, New Mexico Statutes or the Commissioner's administrative rules by entering into Business Planning Lease No. BL-1775 with Solo Investments LLC, effective January 1, 2007?

CONCLUSION:

Business Planning Lease No. BL-1775 by and between the Commissioner of Public Lands and Solo Investments, LLC contains provisions that are not authorized by New Mexico law. Because we have not examined the specific terms and conditions of other business planning leases that the Commissioner of Public Lands has entered into, our opinion necessarily is limited to Business Planning Lease No. BL-1775.

FACTS:

The New Mexico Commissioner of Public Lands (Commissioner) entered into Business Planning Lease No. BL-1775 with Solo Investments, LLC (Solo) on or about December 26, 2006, effective January 1, 2007, under which the Commissioner, as lessor, leased certain state trust land to Solo. Under its lease, lessee Solo is permitted, under paragraph 12.1, to enter upon, occupy and perform activities with respect to the leased land solely to complete a land development "project," which the lease defines at paragraph 1(m) as:

- (1) applying to the City of Las Cruces (the "City") for annexation of the Land into the City, provided that the City is legally permitted to do so, and using reasonable efforts to obtain approval of such annexation;
- (2) preparing a master plan for development of the Land and submitting such plan to the Local Government for approval and using reasonable efforts to obtain approval of such plan;

- (3) applying for, and using reasonable efforts to obtain, approval from the Local Government of reasonably desirable zoning of the Land;
- (4) at Lessee's discretion, applying for, and using reasonable efforts to obtain, approval from the Local Government of subdivision of the Land; and
- (5) at Lessee's discretion, constructing the infrastructure necessary or desirable for any approved subdivision of the Land.

In return for completing this land development project, Solo receives payment when the leased land is sold. Paragraph 14.5 of the lease requires the Commissioner to publicly offer the land for lease, sale or exchange to the highest and best bidder within 180 days after the expiration of Solo's lease. If the Commissioner enters into a subsequent lease, sale or exchange within two years following the expiration of Solo's lease, the subsequent lessee or purchaser will be obliged to pay the Commissioner the amount of the "improvement value credit," as calculated in paragraph 14.4, and the Commissioner must pay that sum to Solo, less any amount due the Commissioner from Solo.

The "Improvement Value Credit,"[1] payable to Solo is described in paragraph 14.4:

Subject to the conditions and restrictions set forth in this provision, Lessee shall be entitled to Improvement Value Credit equal to the sum of

- (a) Lessee's Reasonable Project Costs approved by the Commissioner of Public Lands, plus
- (b) forty percent (40%) of the Change in Value if the Change in Value is a positive figure of the total consideration received by Lessor from a lease, sale or exchange of the Land pursuant to Paragraph 14.5 over the Final Appraised Value. *Provided that*, if the Change in Value is zero or is a negative number, Lessee shall be entitled to no Improvement Value Credit. *Provided further that* if the Final Appraised Value is equal to or less than the sum of the Base Appraised Value plus Lessee's Reasonable Project Costs (as capped herein), then the Improvement Value Credit will be limited to the agreed percentage of the Change in Value, regardless of the amount of the Reasonable Project Costs.

"Reasonable Project Costs" are described at paragraph 14.3 of the lease as:

Reasonable costs incurred by Lessee in carrying out the project and approved by the Commissioner of Public Lands, including costs of engineering and planning expenses and local governmental fees related to or arising from preparation of the Project Plans, costs of any improvements related to the Land developed or obtained by Lessee, other than ... (intangible improvements), shall be referred to herein as "Lessee's Reasonable Project Costs."

The value of intangible improvements[2] related to the land that are developed or obtained by Solo are computed by the method described at paragraph 14.1(a) and (b) of the lease. This computation yields the "Change in Value" for purposes of applying the 40% entitlement at paragraph 14.4. Paragraph 14.1(a) provides for an appraisal within 120 days of the effective date of the lease to determine "Base Appraised Value." Paragraph 14.1(b) provides for an appraisal on or before expiration of the lease "to determine any change in the value of the Land attributable to Lessee's intangible improvements." Paragraph 14.1(b) provides, in part:

The value of the Land as determined by the Second Appraisal Round shall be referred to as the "Final Appraised Value" of the Land. The difference between the Base Appraised Value of the Land, as established by the First Appraisal Round, and the Final Appraised Value of the Land, as established by the Second Appraisal Round, shall be referred to as the "Change in Value."

Solo's lease describes, at paragraph 13.1, "Authorized Improvements" as:

- (a) Preparation, obtaining approval from Local Government, and recording of Project Plans; and
- (b) Providing infrastructure to or for the Land such as roadways, utilities and other necessary physical amenities needed to develop the Land in accordance with project plans.

Solo's lease provides, at paragraph 13.6:

Compensation for Improvements. Lessee shall not be entitled to compensation for any improvement from any person, except as set forth in Paragraph 14 below. Lessee hereby waives and shall waive any and all rights to any other compensation for improvements, including any rights under NMSA 1978, 19-7-14. Under no circumstances shall lessee be entitled to any compensation from Lessor or the State of New Mexico for any improvement.

ANALYSIS:

Article XIII, Section 2 of the New Mexico Constitution provides: "The commissioner of public lands shall select, locate, classify and have the direction, control, care and disposition of all public lands, under the provisions of the acts of congress relating thereto and such regulations as may be provided by law." (Emphasis added.) State law implementing the constitutional provision states:

A state land office is hereby created, the executive officer of which shall be the commissioner of public lands ... who shall have jurisdiction over all lands owned in this chapter by the state, except as may be otherwise specifically provided by law, and shall have the management, care, custody, control and disposition

thereof in accordance with the provisions of this chapter and the law or laws under which such lands have been or may be acquired.

NMSA 1978, § 19-1-1 (1912) (emphasis added). “Interpreting these constitutional and statutory provisions, the New Mexico Supreme Court has declared that the Commissioner of Public Lands ‘is merely an agent of the state with such powers, and only such, as have been conferred upon him by the constitution and laws of the state, as limited by the [New Mexico] Enabling Act.’” Harvey E. Yates Co. v. Powell, 98 F.3d 1222, 1239 (10th Cir. 1996) (quoting Hickman v. Mylander, 68 N.M. 340, 343, 362 P.2d 500, 502 (1961)); accord Zinn v. Hampson, 61 N.M. 407, 409, 301 P.2d 518, 519 (1956). See also State ex rel. Del Curto v. District Court of Fourth Judicial District, 51 N.M. 297, 306, 183 P.2d 607, 613 (1947) (“The fact is the Commissioner of Public Lands has only such authority as has been granted to him by the Constitution and state laws, as limited by the Enabling Act”). Under Article XIII, Section 2, the Commissioner has no authority to promulgate rules or regulations that are inconsistent with legislative enactments. See Harvey E. Yates Co., 98 F.3d at 1239.

State law does not authorize the Commissioner’s compensation arrangement to Solo. As discussed below, that arrangement bears little resemblance to those contemplated by existing laws that authorize payment by a subsequent lessee or purchaser to a former lessee who has made improvements to leased land.

Existing law allows compensation for a lessee’s improvements. NMSA 1978, Section 19-7-14 (1963) provides that “[w]henever any state lands are sold or leased to a person other than the holder of an existing surface lease and upon which lands there are improvements belonging to such lessee ... the purchaser or subsequent lessee ... shall pay to the commissioner of public lands for the benefit of the owner of the improvements the value thereof as determined by an appraisal made by the commissioner of public lands.” Section 19-7-14 was enacted as part of a legislative package that also included NMSA 1978, Section 19-7-15 and NMSA 1978, Section 19-7-16. See 1963 N.M. Laws, Ch. 237, §§ 1, 2 and 3. Section 19-7-15 defines “improvements” as including water rights and tangible improvements placed upon the land in compliance with NMSA 1978, Section 19-7-51.[3]

For three reasons, the provisions of Solo’s lease that allow compensation for intangible improvements are inconsistent with current law. First, under Section 19-7-14, an owner of improvements is authorized to receive the value of improvements that he has made as determined by an “appraisal,” not as measured by “project costs” or as measured by a “change in value” of the land associated with the improvements. Yet, under Solo’s lease, Solo is entitled to be paid, by a subsequent purchaser of the land who is the highest and best bidder, the amount of (a) his reasonable project costs plus (b) 40% of the “change in value” as determined by “before and after appraisals” of the total consideration received by Lessor.

Second, the lease’s provisions reimbursing Solo for its “reasonable project costs,” which could include both professional fees, governmental fees and the costs of any

improvements, is in conflict with Section 19-7-14 because that statute bases compensation for improvements on an “appraisal” and because that statute does not permit reimbursement for those costs. Third, Sections 19-7-14 and 19-7-15 do not authorize compensation for “intangible improvements,” such as applying for annexation, preparing a master plan, applying for zoning and obtaining approval for a subdivision. These “intangible improvements,” which Solo’s lease defines as “rights or privileges obtained or developed in connection with a Lessee’s use of Trust lands including, but not limited to, development rights and approvals,” are not envisioned by Section 19-7-15. The “change in value” compensation arrangement under the lease to pay for the intangible improvements is not envisioned by Sections 19-7-15 or 19-7-14.

There is nothing in section 19-7-14 that directs a subsequent lessee or purchaser to pay a prior lessee for “changes in value” of leased land or for professional “engineering and planning” expenses and “governmental fees” or for “intangible improvements,” such as “developmental rights and approvals.” There is nothing in Section 19-7-14 that suggests that “developmental rights and approvals,” “changes in value,” or professional or governmental fees are things that belong to a lessee or are otherwise capable of being valued and appraised as improvements.

The pertinent statutes, Section 19-7-14 and Section 19-7-15, that authorize payment for a lessee’s improvements, must be read together and construed in a manner that adheres to the prescribed statutory method. See Fernandez v. Española Public Schools, 2005-NMSC-026, ¶ 6, 138 N.M. 283, 119 P.3d 163 (where a statute provides authority to do a particular thing and the mode of doing it is prescribed, all other modes are excluded; applying the familiar principle of statutory construction known as *expressio unius est exclusion alterius*); New Mexico Industrial Energy Consumers v. New Mexico Public Regulation Commission, 2007-NMSC-053, ¶ 20, 142 N.M. 533, 168 P.3d 105 (in ascertaining legislative intent, the provisions of a statute must be read together with other statutes in *pari materia*). The compensation provisions of Solo’s lease are not comprehended by and conflict with the statutory authorization and mode of permitting payment to a prior lessee for that lessee’s tangible improvements to leased land.

Essentially, Solo is performing services that the State Land Office is attempting to characterize as “improvements.” Although the State Land Office may be motivated by a desire to make the land more valuable, it is limited by the law. Under current law, the State Land Office can achieve the ends it is attempting to reach in the Solo lease only by the legislature’s changing the statute to allow both a subsequent lessee or purchaser to pay for project costs or for “intangible improvements” and to establish a formula for valuing “intangible improvements.”

While we conclude that Business Planning Lease No. BL-1775 by and between the Commissioner of Public Lands and Solo Investments, LLC contains provisions that are not authorized by New Mexico law, we express no opinion about the lease’s enforceability. It is within the province of the courts to decide issues of public policy that bear on the validity of contractual obligations. Consequently, we believe that whether

the Solo lease is enforceable or not enforceable is a question of law for the courts to determine. See Berlangieri v. Running Elk Corp., 2002-NMCA-060, ¶ 11, 132 N.M. 332, 48 P.3d 70 (“Whether a contract is against public policy is a question of law for the court to determine from all the circumstances of each case”) (internal quotation marks and citation omitted). See also State ex rel. Udall v. Colonial Penn Ins. Co., 112 N.M. 123, 130, 812 P.2d 777, 784 (1991) (contracts in violation of our public policy, as manifest in positive law, are unenforceable); Director, Labor and Industrial Division, New Mexico Dept. of Labor v. Echostar, 2006-NMCA-047, ¶ 12, 139 N.M. 493, 134 P.3d 780 (employment agreement that violated public policy as set forth in the Minimum Wage Act was unenforceable).

Finally, because we have not examined the specific terms and conditions of other business planning leases that the Commissioner of Public Lands has entered into, our opinion necessarily is limited to Business Planning Lease No. BL-1775.

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[1] Solo’s lease defines “improvement value credit” at paragraph 1(f) as:

[A] credit approved by the Commissioner to be given to a Lessee at an auction of an interest in the Land, or to be paid to a Lessee by a subsequent lessee, purchaser, or other successor in interest other than Lessor, for the value of designated improvements. Valuation of certain improvements and the Improvement Value Credit shall be determined as set forth in Paragraph 14 of this Lease. The amount, if any, of any improvement value credit shall rest in Lessor’s reasonable discretion consistent with State Land Office Rule 9 (1.2.9 NMAC) and Paragraph 14 below.

[2] Solo’s lease defines “improvements” at paragraph 1(e) as:

- (1) any item of tangible property developed, placed, or constructed by a Lessee on or for the benefit of Trust lands including, but not limited to, buildings, roadways, utilities and permanent equipment and fixtures; and
- (2) any water rights appurtenant to the Leased Premises, including without limitation any water rights developed or used on the Land; and
- (3) any other rights or privileges obtained or developed in connection with a Lessee’s use of Trust lands including, but not limited to, development rights and approvals.

[3] An “improvement” to real property must be tangible property, and is characterized as an improvement only if it is affixed to the realty. 42 C.J.S. Improvements § 1; 41 Am.Jur.2d Improvements § 1. See also Cadle Co. v. Butler, 951 S.W.2d 901, 914 (Tex. Ct. App. 1997) (improvement to real property must be tangible property); Valgardson Housing Systems, Inc. v. State Tax Comm’n, 849 P.2d 618, 622 (Utah App. 1993) (tangible personal property can only be characterized as an improvement to real estate once affixed to realty). The “intangible improvements” that Solo’s lease describes, developmental rights and approvals, are not comprehended by the term “improvement” as that term is generally understood.