

DEPARTMENT OF TRANSPORTATION

DIVISION OF PLANNING

Statutory Authority: 17 Delaware Code, Sections 132, 137 and 149; 29 Delaware Code, Section 8404 (17 Del.C. §§132, 137 & 149 29 Del.C. §8404)
2 DE Admin. Code 2311

FINAL

ORDER

2311 Long-Term Lease Policies and Practices

Background

The Delaware Department of Transportation (DelDOT), through its Division of Planning, proposed to adopt regulations to manage its real estate leasing practices and policies.

On occasion, circumstances involving parcels of land under DelDOT's control may present an appropriate opportunity for leasing, as a means of managing the Department's property assets until they are either needed for implementation of the State's transportation program, or are determined to be no longer necessary for such purposes, and made available for disposition under the provisions of 17 Del.C. Section 137.

Public Comment Period

The Department took written comments on the proposed changes to its regulations regarding leasing policies and practices from July 1, 2010 through July 31, 2010. The proposed regulations were published in the *Delaware Register* in the July 2010 issue, Volume 14, on page 21.

Summary of the Evidence and Information Submitted

Four comments were received, for which the comments and the Department's responses are set forth below:

1. When someone leases DelDOT property and is going to develop it, it should be a part of the lease, that the Lessee be the responsible party for any and all maintenance of storm water structures that may be required. It would appear DelDOT could be further burden to provide yearly maintenance inspections, review site plans, and general responsibility should the Lessee default on the lease.

Response: It generally would only be under a long term lease that anyone would develop our property to the point a storm water management pond would be required. In the future we would not lease the property to anyone who would be using our land solely for the placement of a storm water pond on our property rather than their own, or allow any structures to be placed on our leased land that could result in DelDOT becoming responsible for the maintenance and repair of such structure.

2. When the new Policy mentions using a licensed appraiser, can a DelDOT staff member be that licensed appraiser?

Response: No. While DelDOT has qualified staff members who could determine the rental values, it was felt that an independent valuation would be the best way to go.

3. When there is a potential economic development opportunity, how will the reduced value rent be determined?

Response: The Lessee would advise DelDOT and DEDO of the rental they would be willing to pay and DEDO will determine the merit of the rent reduction based on the factors it determines warrants a rental reduction.

4. The Department cannot accept less than 85% of the approved market value rent and all bids shall begin at that rent. The FHWA has responded that this would be contrary to federal law that states if lands acquired using title 23 funds, DelDOT must receive market value for the property.

Response: The 85% rental acceptance should be removed in favor of developing a fair market value rental range. On matters pertaining to social, environmental or economic rent reduction DelDOT must clearly show that

an exemption is in the overall public interest for social, environmental or economic purposes; nonproprietary governmental use or uses under 23 U.S.C.142 (f) Public Transportation. Our Real estate manual will reflect the criteria for evaluating leasing at less than fair market value. The Department also suggests changing the text of the proposed regulation to note that the FHWA will accept a fair market lease range. In addition, if the Department receives a bid for less than fair market value for a property originally obtained with Federal aid, then it will request permission from the FHWA to lease the property at less than fair market value.

Findings of Fact

Based on the record in this docket, I make the following findings of fact:

1. The proposed amendments to the Department's regulations, to provide for rules regarding its property leasing policies and procedures, are useful and proper, and should be adopted as originally proposed during the comment period process required under the Administrative Procedures Act, except as described in the response to comment 4 above, and as shown in bold text in the adopted regulation text below.
2. The adoption of these proposed regulations is in the best interests of the State of Delaware.

Decision and Effective Date

Based on the provisions of Delaware law and the record in this docket, I hereby adopt the Leasing Policies and Practices regulations, as set forth in the version attached hereto, to be effective on September 21, 2010.

IT IS SO ORDERED this 18th day of August, 2010.

Carolann Wicks, Secretary, Delaware Department of Transportation

2311 Long-Term Lease Policies and Practices

1.0 Long-Term Leases

Any future lease of ~~DeIDOT~~ Department]-owned property for a term of five (5) years or more inclusive of any renewal option shall be deemed a "long-term lease", and DeIDOT shall follow the regulation below to determine the value of the leasehold interest. This regulation shall not apply to any leaseback transactions; i.e. any lease by and between DeIDOT and the owner /tenant in legal occupancy on the date the property was originally acquired by DeIDOT.

2.0 Competitive Sealed Bid Process

Unless DeIDOT seeks to proceed under 3.0 below, DeIDOT will provide an opportunity for parties to publicly bid on the lease of the property through a competitive sealed bid process. DeIDOT shall retain the right to reject all bids. Notice of the proposed leasing will be advertised at least twenty (20) days prior to bid opening in a newspaper of general circulation in the county in which the parcel is located. Conspicuous notice shall also be displayed on the property in question at least 20 days prior to bid opening. The second notice will be published approximately ten (10) days prior to bid opening in a newspaper of general circulation in the county in which the parcel is located. ~~DeIDOT~~ Department] shall offer the property for lease **[beginning]** at not less than ~~[95 percent of]~~ the **[lowest]** approved market value ~~[rent range]~~ established by a licensed **[fee]** appraiser.

3.0 Economic and Civic/Benevolent Purpose Consideration.

- 3.1 In the event DeIDOT should be asked by a party or otherwise consider entering into a long-term lease for economic development consideration or civic/benevolent purposes, DeIDOT will first determine market value rent through a licensed appraiser. For purposes of this regulation, an economic development or civic/benevolent purpose proposal is defined as changes to material conditions under the lease that result in less direct monetary value to DeIDOT in exchange for the development of jobs, economic growth and/or the furtherance of a civic/benevolent purpose. The purpose of this value

determination is to allow for a fair, thorough and transparent consideration of the proposed incentive or grant being considered.

3.2 In cases where the request involves a potential economic development opportunity, DeIDOT, after making the value determination referenced above, shall refer the matter to the Delaware Economic Development Office ("DEDO") for its determination of whether the economic development benefits justify the value of the reduced lease. To the extent DEDO recommends moving forward with the lease transaction, DEDO and DeIDOT shall first present such proposal to the Council on Development Finance ("CDF") for CDF review and approval, following the required notice provisions for CDF proceedings. In addition, DeIDOT shall provide conspicuous notice on the property in question at least 20 day prior to the CDF meeting where the proposal is considered. If approved by the CDF, DeIDOT may enter into the lease agreement on the condition that the nature of the lease, terms of rent and other material conditions are consistent with the recommendations of DEDO and approval of CDF. DeIDOT will continue to manage the properties during the lease term.

3.3 In the cases where the request involves a potential civic or other benevolent purpose, DeIDOT shall hold a public meeting in the general vicinity of property in question. The notice shall clearly state the proposed lessee, the proposed lease term, the estimated value of the reduced lease terms and such notice will be advertised at least twenty (20) days prior to the hearing in a newspaper of general circulation in the county in which the parcel is located. Conspicuous notice shall also be displayed on the property in question at least 20 days prior to bid opening. A second notice will be published approximately ten (10) days prior to bid opening in a newspaper of general circulation in the county in which the parcel is located. In addition, DeIDOT shall notify in writing and seek input from the elected State Representative and Senator of the district where the property is located. Upon conclusion of the hearing and a period of 10 days for additional written comments, the Secretary will determine whether or not DeIDOT will lease the property as proposed.

4.0 General Policies Governing Long-Term Leases of DeIDOT Owned Property

4.1 Form leases shall be prepared by in-house legal counsel.

4.2 All long-term leases or modifications thereof shall require the review of in-house legal counsel and the signature of the Secretary or the Secretary's designee.

[4.3 If Federal aid was used to acquire the property suggested for lease, DeIDOT will request permission from the FHWA to lease the property at less than fair market rental value, if no bids are received in any higher amount.]

14 DE Reg. 196 (09/01/10) (Final)