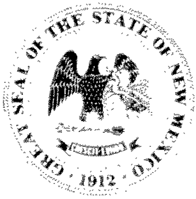

State of New Mexico
House of Representatives
STATE CAPITOL
Santa Fe

September 14, 2009

Ley Schimoler
Office of the General Counsel
State Land Office
310 Old Santa Fe Trail
P.O. Box 1148
Santa Fe, NM 87504

Re: Comments Re Title 19, Chapter 2, Part 22, Rules for Business Planning Leases

Dear Mr. Schimoler:

I write this letter with great apprehension and grave concern about your proposed rule and the impact it would have in the future on the beneficiaries designated by the Constitution of New Mexico and the Enabling Act. I believe the rule puts the citizens of the state and the beneficiaries in danger by providing an opening for depravity and risking costly litigation ultimately paid for by New Mexico taxpayers. I also question the timing of this proposed rule because we will soon have a new state land commissioner who may not agree with the rule, which will result in him or her having to use scarce state resources to change or eliminate the rule. More specific comments are identified in the content of this letter below.

1. Last session, several legislators introduced bills to provide guidance to the State Land Office (SLO) for the placement for sale and lease of state lands for development purposes and that would have provided the SLO a legal framework for, and guidance on how to account for, the intangible and tangible improvements placed on land in accordance with development leases, swaps and sales. The SLO, and the state land commissioner in particular, opposed such legislation for a number of reasons, though primarily because the commissioner and his staff felt it would deter future development opportunities and provide limited flexibility for the SLO to negotiate leases. Of course, the primary concerns of state legislators and local elected officials have been the protection of state lands, getting the best value of the land for the state's beneficiaries and limiting payment for intangible improvements to the land. Compensation for intangible improvements is currently not allowed by statute, and I strongly believe it cannot be made legal by rule. I remind the commissioner that the Enabling Act prohibits the state from using trust resources for making improvements on trust lands. See *Lake Arthur Drainage Dist. v. Field*, 27 N.M. 183, 199 P. 112 (1921) and New Mexico Attorney General Opinion No. 08-02. This proposed rule appears to be in conflict with that landmark case and the attorney general's opinion.

2. The definition of "appurtenant governmental approvals" under Section 19.2.22.7.G includes such "intangible improvements" to land as governmental approval of zoning changes, subdivision approval, annexation and other governmental actions for which the commission may then grant "planning and development credits" to a lessee. As noted in Attorney General Opinion No. 08-02, compensation to a lessee for such intangible improvements is not authorized by current statutes. This definition is referred to throughout the proposed rule.

3. The definitions of "planning development credit" and "reasonable project cost" anticipate compensation to a lessee based upon the increased value of trust lands along with costs associated with developing physical infrastructure, obtaining government approvals and related professional services, regardless of appraised value. Again, the attorney general has opined that current statutes do not allow compensation to lessees to be calculated and paid in this manner. Rather, current law allows compensation based upon appraisals, which would include tangible improvements. Leases such as the alleged "sweetheart deal" entered into in Business Planning Lease No. BL-1775 with Solo Investments LLC, effective January 1, 2007, are not allowed under current law and cannot be made legal by issuing rules.

4. Section 19.2.22.16 appears to limit local government jurisdiction over all state lands, regardless of where the land is located. This section should make it clear that appurtenant governmental approvals, if such term remains in the rule, may be obtained by a lessee only with the permission of the commissioner. The wording in 19.2.22.16.C provides for after-the-fact approval when the commissioner deems it in the best interest of the trust. The term "best interest" is vague and lacks specific meaning, and it may not be in the best interest of the community in which the lease land is located. This paragraph, as does the entire rule, lacks any mention of public input through enhanced notices, public meetings or other attempts at transparency for those living in the community and those elected officials who approve zoning, ordinances and planning documents.

5. Section 19.2.22.18 provides that planning development credits be calculated based in part on the lessee's project costs, including costs related to the above-mentioned "intangible improvements". The commissioner does not have statutory authority to compensate the lessee in this manner, according to the attorney general. In the analysis of HB 607 (2009), the Department of Finance and Administration (DFA) noted that current SLO practice is to derive revenues from improvements on commercial leases not considered tangible additions to real property. These improvements include master plans and entitlements known as "improvement value credits". The SLO typically appraises land before and after the term of a lease, includes improvement value credits in the appraisals and splits the difference of the appraisals with the lessee once the land is sold. The DFA also pointed out that such practices could result in the loss of millions of dollars to beneficiaries, including higher education institutions and hospitals.

6. Section 19.2.22.19, concerning concurrent leases, does not delineate what criteria the commissioner should use in determining whether to issue a concurrent lease, nor does it define, limit or explain what constitutes a concurrent lease. At what point does a current planning and development lease warrant modification or replacement by another lease? It also appears under Subparagraph C that the compensation for losses should be a factor considered beforehand when the SLO approves concurrent leases.

7. Nowhere in the rule does it refer to recent legislation, which is now law, requiring "competitive bidding"; rather, the rule seems to be counter to the competitive bidding process. The proposed rule becomes further objectionable without such a reference.

8. Attorney General Opinion No. 08-02 states:

> The pertinent statutes, Section 19-7-14 and Section 19-7-15, that authorize payment for a lesees's improvements must be read together and construed in a manner that adheres to the prescribed statutory method. See *Fernandez v. Espanola Public Schools*, 2005-NMSC-026, 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, 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 material). 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. (08-02 Op. N.M. Att'y, p5)

This entire rule appears to legitimize past leases that included compensation for intangible improvements without regard to statute. I conclude that it will have a negative impact on beneficiaries under the Enabling Act and will not be in the best interest of New Mexico's children to adopt the proposed rule.

Sincerely,

NATHAN P. COTE, Ed.D.
State Representative, District 53