

VA and Enhanced Use Leases – The Real Issue

Summary

There is inconsistent application and administration by individual VA areas across the U.S. regarding use of Enhanced Use Leases and other asset management tools. [As shown in VA's FY 2008 Asset Management Plan document (App. D – Enhanced Use Lease Projects), over 60 properties, 100 buildings and 150,000 sq ft were involved in EULs]

In many cases, local VSOs and community groups are not being appropriately involved in VA's EUL efforts, in disregard of VA's own stated policy.

EULs too often result in transfer of Veterans' VA land and buildings to non-VA third parties, without prior knowledge of VSOs and the local community; announcements are often made after the transfer has either already been made or is in a nearly non-reversible position.

[Note: EULs and other asset management tools can and are being appropriately handled by many individual VA administrations to the benefit of Veterans. However, this is not the case in many other individual VA locations and administrations, and Veterans have lost buildings and land without being appropriately involved in the decision process as a result.]

Suggested Remedy

Cause oversight and management steps to be taken requiring VA to consistently enforce its already existing asset (land, buildings) management policies, in particular but not limited to Enhanced Use Leases, at all VA administrative locations across the U.S. Such oversight may require revision of VA policy to ensure full involvement of local VSOs and community groups.

Background

1. VA's stated policy is to use Enhanced Use Leases as a tool to help VA manage real property assets to the benefit of the Veteran community it serves. Per VA's Asset Management Plan FY 2008, and Title 38 US Code:
 - a. **VA employs EULs only when VA has determined that the real property in question is no longer needed or wanted.**
 - b. VA derives benefit from EULs either from in-kind services or leased monies or both
 - c. VA can transfer real property under EUL to the third-party vendor at discretion of the VA Secretary, again for benefit of the Veterans' community via in-kind services, monies, etc.
 - d. VA's own Asset Management Plan FY 2008 (pg 47) specifically states, to wit:

“Transparency: A key component of the EU leasing program is close coordination with and involvement of the local government and community as full partners in the development process. Close collaboration with community leaders and interested stakeholders enables VA to address concerns early in the planning and development process.”
2. **VA has acted inconsistently and often contrary to stipulated policies and procedures regarding establishing and administering of Enhanced Use Leases of real property (land, buildings) under VA control across the United States.**
 - a. **VA adherence to its own stated policies and procedures covering EULs varies widely from area to area within the VA across the U.S.**
 - b. **This is particularly the case regarding involving local Veterans' Service Organizations (VSOs) and community groups in the areas where EULs are enacted.**
 - c. **EULs are often planned and negotiated with non-VA third parties and implemented, with leased real property later transferred to third parties, all without involvement of VSOs and local community groups;**
 - **Recent example: VA's Hines Medical Center (Northern Chicago) – see attached DVA press release announcement**
 - **85+ acres of land under Enhanced Use Lease since 2002 was transferred to non-VA leasee (private university)**
 - d. **VSOs and the community often learn that an EUL has been negotiated and put in place when the third-party vendor files a request for zoning variance with local government.**
 - e. **In many cases, EUL documents are not made available by VA to local VSOs and community groups; EULs often have to be obtained via the Freedom of Information Act and then, when received, the documents have often been heavily redacted or censored.**
3. **Findings from GAO Report 08-939 Sept. 2008 ('Federal Real Property: Progress Made in Reducing Unneeded Property):**

“What GAO Found:

“VA's use of various legal authorities such as enhanced-use leases and sharing agreements likely contributed to the overall reduction of underutilized space, but VA does not track the effect of these authorities. Their use provides VA with revenue and services

“...the lack of building-level information about the extent to which these authorities reduce underutilized or vacant space or provide benefits such as revenue or services means that VA cannot track, monitor, or evaluate their impact or determine which authorities have the greatest effect from year to year.”

Background

- **VA uses a tool termed an Enhanced Use Lease (EUL) to help manage real property assets (land, buildings).** The authority to use enhanced-use leasing was originally enacted in 1991 in Title 38 US Code (Part VI, Chapt. 81, SubChapt. V Enhanced Use Leases of Real Property, §8161). VA has authority to continue using this process until 2011.

§ 8161. Definitions: For the purposes of this subchapter:

- (1) The term "enhanced-use lease" means a written lease entered into by the Secretary under this subchapter

§ 8162. Enhanced-use leases

- (a) (1) The Secretary may in accordance with this subchapter enter into leases with respect to real property that is under the jurisdiction or control of the Secretary. Any such lease under this subchapter may be referred to as an "**enhanced-use lease**". **The Secretary may dispose of any such property that is leased to another party under this subchapter in accordance with section 8164 of this title.**

§ 8164. Authority for disposition of leased property

- (a) If, **during the term of an enhanced-use lease or within 30 days after the end of the term of the lease, the Secretary determines that the leased property is no longer needed by the Department, the Secretary may initiate action for the transfer to the lessee of all right, title, and interest of the United States in the property.**
- (b) A disposition under this section may be made for such consideration as the Secretary determines is in the best interest of the United States and upon such other terms and conditions as the Secretary considers appropriate.
- (c) Not less than 45 days before a disposition of property is made under this section, the Secretary shall notify the congressional veterans' affairs committees of the Secretary's intent to dispose of the property and shall publish notice of the proposed disposition in the Federal Register. The notice shall describe the background of, rationale for, and economic factors in support of, the proposed disposition (including a cost-benefit analysis summary) and the method, terms, and conditions of the proposed disposition.

- **VA's FY 2008 Asset Management Plan covers VA policy (the following are direct citations from the FY 2008 document)**

Executive Summary

Make Prudent Investments

Pg 3 – Disposal: When a real property asset is recommended for disposal, other VA entities are given the opportunity to express interest in it. If there is no internal VA interest in the asset, other disposal modalities may be considered in the priority order: enhanced-use leasing, sharing, out-leasing, licenses, permits, easements and transfers (i.e., disposal via enhanced-use leasing authority, Capital Asset Fund, the State Veterans Home program, and GSA authority) and like-kind exchanges.

Chapt. 1: Governance of VA Capital Management

Pg 12: VA strives to meet the needs of the Nation's veterans and their families today and tomorrow by:

- Fostering partnerships with veterans' service organizations, the Department of Defense and other Federal agencies, state and local veterans organizations, and other stakeholders to leverage resources and enhance the quality of services provided to veterans.

Chapt. 2: VA's Capital Assets

Pg 16 – 4. Agreements

- Enhanced-Use Leasing: Leasing underutilized VA property on a long-term basis to non-VA users for uses compatible with VA's mission. The Department is able to obtain facilities, services, money, or other in-kind consideration for VA requirements that would otherwise be unavailable or unaffordable.

Chapt. 5: Disposal (pgs 43-47) outlines the VA's policy for administering Enhanced Use Leases, to wit:

The disposal stage is not just an afterthought for the Department, as VA must include an exit strategy early in the formulation of the project and it is one of the sub-criteria found in the capital investment business model.

VA's Disposal Authority (pg 43)

Public Law 108-422, signed in November 2004, authorized VA [independent of the General Services Administration (GSA)] to dispose of real property and to deposit proceeds from the sale, transfer or exchange of VA assets into the Capital Asset Fund (CAF). The public law provides VA with much needed incentive by making it economically attractive to pursue disposal activities.

VA uses a unique capital asset management tool, i.e., enhanced-use (EU) leasing which is codified in sections 8161 through 8169 of title 38, United States Code (USC). The authority allows VA to lease land or building to public, private and/or non-profit sector up to 75 years. Under section 8164, 38 USC, if the Secretary determines during the term of an EU lease or within 30 days of its expiration, that the leased property is no longer needed by the Department, the Secretary may initiate action to transfer all rights, title, and interest in the property to the lessee.

**VA's FY 2008 Asset Management Plan
Chapt. 5: Disposal (cont'd)**

VA's Disposal Policy (pg 44)

Other disposal modalities are also evaluated in priority order including enhanced-use leasing, sharing, out-leasing, licenses, permits, easements and transfers (i.e., disposal via Enhanced-Use Leasing Authority, Capital Asset Fund, State Veterans Home, and GSA Authority) as well as like-kind exchanges.

Some examples

1. VA Hines Medical Center (Northern Chicago) – Press release by VA

VA Transferring 85.4 Acres from North Chicago VA Medical Center

June 11, 2009

<http://www1.va.gov/opa/pressrel/pressrelease.cfm?id=1700>

WASHINGTON -- The Department of Veterans Affairs (VA) has announced plans to transfer 85.4 acres of land from the North Chicago VA Medical Center to the Rosalind Franklin University of Medicine and Science.

“Savings resulting from the transfer of land will enable VA to support its ongoing efforts to improve health care services to Veterans in the Chicago area by better aligning facilities and assets,” said Dr. Gerald M. Cross, VA’s Acting Under Secretary for Health.

The university has agreed to use the land solely for the purpose of educating students in the health sciences, a significant part of VA’s mission. Since 2002, the university has been using the property under an enhanced-use lease agreement with VA. The Secretary of Veterans Affairs recently determined that the majority of the land leased to the university would not be needed by VA in the future.

The transfer agreement also facilitates the use of 8.5 acres to be used for the planned Joint Federal Health Care Facility to be shared by VA and the Navy. The transfer will save VA the cost of maintaining property it no longer needs.

The property has been most recently used as a staging area for construction of the Captain James A. Lovell Federal Health Care Center, a joint VA and Department of Defense medical facility scheduled to open in late 2010.

**2. VA Sepulveda Ambulatory Care Center(San Fernando Valley, CA)
EULs signed in 2002 for two (2) buildings and 7+ acres**

- No local VSO or community involvement
 - Local American Legion (20th Dist., Dept. of CA), VFW, DAV and other VSOs had not been contacted or involved in the development of the two EULs signed in 2002
 - Local American Legion (20th Dist., Dept. of CA) and community groups only became aware that EULs had been signed when the third-party lessee applied to the City of Los Angeles for a zoning variance for the 7+ acres and two (2) buildings specified in the leases
 - City of Los Angeles denied the zoning variance request, citing the fact that the City had no standing regarding control of Federal property – that the VA could choose to do what it wanted, regardless LA City’s zoning regulations
- EUL documents involving Sepulveda VA had to be obtained via Freedom of Information Act (FoIA)
 - Neither VA or third-party lessee would provide EUL documents despite multiple requests by local American Legion (VSO) and community groups (Los Angeles’ North Hills West Neighborhood Council, et al) that they do so;
 - Resulting EUL documents were significantly redacted (lines & sections blacked out)
- Lessee requesting HUD financing of \$40M (2007 dollars; would be \$48M in 2010)
 - Both VA and leasing third party attempting to make leases “Veterans Only”
 - HUD funds administered under the McKinney-Vento Act (1987)
 - Funds can not be used to discriminate
 - Veterans are not a protected class under non-discrimination rules
 - Leasing third party obtained letter from Fair Housing (subsidiary of HUD)
 - Letter states that Fair Housing would not cite lessee should they [choose to] make project “Veterans Only”
 - Local legal advise: Because lessee will use HUD funding, under the McKinney-Vento Act of 1987, it will take but a single law suit by a non-Veteran homeless person to cause the leases to allow and be used for non-Veterans.
- The Legion’s Dept. of CA, the DAV’s Dept. of CA and nine (9) of the local Neighborhood Councils in the San Fernando Valley area stand united against the two (2) EULs, and demand that the leases be revoked and the two (2) buildings involved be returned to active outpatient care delivery

Questions, please contact resolution author:

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