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**STATE OF ALASKA RURAL AIRPORT SYSTEM**

**-- LEASING AIRPORT LAND --**

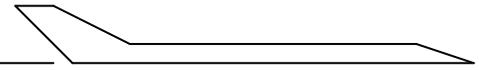
**A Tutorial for**

**Alaska Air Carrier Association Members**

**January 10, 2019**

**by**

**Steve Pavish**

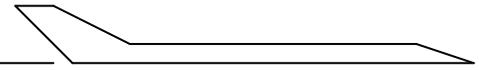


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## INTRODUCTION

### **Tutorial Scope**

The subject of this paper is leasing land on airports within the State of Alaska's rural airport system. The term "rural airport system" encompasses all state-operated airports, except the international airports at Anchorage and Fairbanks. The latter are operated under a separate set of regulations and are outside the scope of this paper.

Leasing state airport land can be a complicated affair, especially for air carriers based in rural locations where law firms and other professional assistance may not be locally available. Navigating the jungle of rural airport leasing agreements, policies, procedures, forms, and regulations, can be a nightmare for anyone trying to make a living in the flying business. I decided to write this tutorial in the hope that I might be able to bring some order out of this apparent chaos and make it a little easier for AACA members to coexist with the state's rural airport land leasing program.

### **Author's Professional Background**

My professional experience in Alaskan airports and aviation began when I signed on with the former Alaska Division of Aviation in 1973. From 1975 until my retirement from state service in 1999, I supervised the property leasing functions for state airports, including the rural airport system. From 1985 through retirement, I also managed projects to update airport regulations and airport user fees. From retirement until the present time, I have operated an aviation consulting firm, providing services to the AACA, air carriers, private pilots, hunting guides, municipalities, Alaska Native corporations, private sector law firms, the Alaska Department of Law, and the Alaska Department of Transportation & Public Facilities (DOT&PF). My principal areas of expertise are airport property leasing, airport operating regulations, and airport land use planning.

### **Citations of Law**

References to statutes and regulations in this paper are presented in legal citation format, as illustrated by the following examples:

- Alaska Statutes – "AS 02.15.090(a)" is the citation for "Alaska Statutes, Title 02, Chapter 15, Section 090, Subsection (a)"
- Alaska Administrative Code (regulations) – "17 AAC 45.105(a)" is the citation for "Title 17, Alaska Administrative Code, Chapter 45, Section 105, Subsection (a)".

### **Legal Advice Disclaimer**

This tutorial is intended for educational purposes only. References to the requirements of any lease provision or federal or state law, regulation, or policy are made on the basis of my working knowledge of these subjects. However, I am not an attorney and the contents of this tutorial are not offered as legal advice. AACA members are encouraged to obtain the assistance of an attorney in any question of law.



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## **BIG PICTURE SUBJECTS**

### **Lease Document Review**

Never sign a lease or lease amendment without first reading every word in it and understanding the potential impact of every provision on your business. A lease is a special form of contract. Once you sign a lease or lease amendment, your business becomes bound to every lawful requirement in it.

If you have signed a lease for rural airport property in the past, do not assume that the wording of a new lease is the same as the older one just because the new document has a similar appearance. DOT&PF has a history of changing the wording of provisions and of adding, deleting, and rearranging provisions in their “standard” form lease without notice to airport users. (Note: The law does *not* require DOT&PF to give notice of lease form changes). Therefore, even if the lease document you receive has a familiar appearance, *read every word!*

If you aren’t sure about the meaning of a lease provision, by all means, ask the DOT&PF Leasing office for clarification (in writing; see below). However, keep in mind that a staff explanation generally cannot be used as a defense in a dispute brought before a court. If you remain uncertain about a provision after hearing Leasing’s clarification, seek the advice of an attorney. *Do not sign* a lease document if you are uncertain about any part of it.

If, after you have reviewed the lease, you find a provision that you think will have an adverse impact on your business, ask DOT&PF Leasing for a revision. Better yet, write up your preferred revision and ask DOT&PF to substitute it for the offending provision. If you are persistent and reasonable, it is possible to obtain a revision of the adverse provision. This does not always work, but it’s certainly worth a try. Especially consider requesting changes to the problem provisions described in the *Troublesome Lease Provisions* section at the end of this tutorial.

If you are unsuccessful in obtaining a satisfactory revision to an adverse provision, you can pursue relief by reaching out to the DOT&PF Commissioner and / or the Governor’s office. This political appeal option seldom works because executive branch leadership has a tendency to support the decisions of their staff. However, this approach has occasionally been successful in the past, so it is worth trying if you consider the offending provision to be a major problem.

If your efforts to obtain a revision of an adverse lease provision fail, you have only two options:

1. Decline the lease offer and change your business plans to operate without a lease; or
2. Bite the bullet and sign the lease, as is, recognizing that the adverse provision may become a problem in the future. In this case, you should make it a priority to avoid situations under which the offending provision might be used against you.



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## **Communicate in Writing**

Except for trivial matters like scheduling a meeting or requesting a fax number, always communicate with DOT&PF personnel in writing (email or letter). This is especially important in disputes involving land leasing. Also, maintain a file of all written communication between you and the state.

As a practical matter, using written communications reduces the possibility of misunderstandings. More importantly, having copies of written communications can serve as a critical record if you find it necessary to appeal a DOT&PF decision.

No doubt about it, written communications can be tedious. When you're busy trying to make a living, there is a strong temptation to just pick up the phone to register a complaint or respond to a notice. But, resist the temptation, especially when a dispute or potential dispute is involved. Without a written record of your communications with DOT&PF, you may later find yourself in a poor position from which to successfully appeal a DOT&PF decision or claim against you.

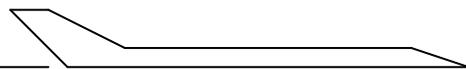
If DOT&PF personnel communicate an important matter to you orally by telephone or face-to-face, as soon as possible, repeat the statements to the person in writing by email or letter and ask them to confirm your understanding in writing. This creates a written record of the oral interaction.

When responding to a written demand or notice from DOT&PF, I recommend sending a letter by Certified Mail with a return receipt. This is particularly important when a response deadline date is involved because you need evidence of timely delivery. If the remaining response time is too short for mail, use in-person delivery or a delivery service that will provide delivery evidence. If your lease permits the use of a fax for notice responses, you can use that option, but ask the state office to acknowledge their receipt of the fax.

## **Be Alert for Deadlines**

Land leases and leasing regulations include all kinds of deadlines and performance time periods. These include rent due dates, building completion deadlines, default notice time periods, decision appeal limits, and other time critical actions. Overlooking a deadline date can have catastrophic consequences for your lease and business. To avoid making critical time-related errors, consider the following:

- Soon after signing a lease, go through it and calendar all of the performance due dates; things like rent, activity reports (which apply to fuel sales and concession operations), survey and construction deadlines, etc. Set up reminders to give you or your staff advance warning of critical dates. Renew the reminders every year. (Note: The DOT&PF Aviation Leasing offices will sometimes send out courtesy reminders of approaching performance deadlines. However, in most cases, they are not required to do this, so it's best not to rely on getting reminders from the state.)



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- Immediately open mail from DOT&PF, especially if arrives by Certified Mail. Likewise, promptly read email messages from the department. Take note of any response deadlines in the correspondence and promptly begin preparations for responding. Your response may be as simple as mailing a check for late rent or as complex as appealing an adverse decision. If you need professional help in responding to DOT&PF, obtain assistance without delay. The clock is ticking and it may not be possible to obtain a time extension.
- Read demand letters from the state carefully. Performance deadlines are not always presented in a month-day-year format. Often, the deadline is stated as a period of time from a certain date (as in “30 days from the date of this letter”). In the latter case, convert the statement into a specific calendar date when you first read the letter and mark it down as your performance deadline.

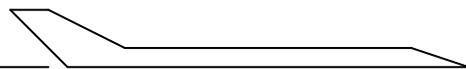
## **Responding to Adverse Decisions or Orders (Protests and Appeals)**

An adverse decision or order by DOT&PF related to your application, request, lease, or use of an airport is not necessarily the final conclusion of the matter. Most department decisions are appealable, so you don't have to give up if you receive an adverse decision or order. The rural airport regulations provide for a two-level process for seeking a reversal of an adverse decision: Protest and Appeal.

- **Protest (17 AAC 45.910)** – This is the first level response to an adverse decision or order. A protest must be submitted in writing within 30 days of the adverse decision or order, and include the factual and legal basis for the protest. (This does not apply to certain competitive award decisions where the response time period is seven calendar days). The protesting party must also include supplemental information, which is listed under 17 AAC 45.910(d). A protest, which is essentially a formal request for reconsideration, should be submitted to the DOT&PF official that signed the adverse decision or order.
- **Appeal (17 AAC 45.920)** – If DOT&PF denies your protest, you have the option to file an appeal with the DOT&PF commissioner. Appeal is a somewhat more formal procedure that can lead to an administrative hearing where the assistance of an attorney is recommended. An appeal must be received by the commissioner within 30 days following the adverse decision on the protest. The information required for submitting with an appeal is listed in 17 AAC 45.920(d).

The filing of a protest or appeal generally stops the clock on the adverse decision or order until DOT&PF makes a determination on the protest or appeal.

Time is of the essence in both these actions. A protest or appeal filed late is void and the adverse decision or order will stand. Therefore, immediately upon receiving an adverse action or decision from DOT&PF, it is critical to decide whether or not you will protest or appeal. If you decide to take action, promptly begin preparations, including arranging for legal or other professional assistance, in order to timely submit the protest or appeal. Don't waste precious



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time yelling at Leasing personnel or calling the Governor's office. Get your protest or appeal filed on time. Then, you can yell all you want.

The protest and appeal processes are administrative remedies available to aggrieved airport users. Generally speaking, a person must exhaust all available administrative remedies before they can appeal to the Alaska Court System. So, if you do not go through the DOT&PF protest / appeal process, you will have most likely forfeited your ability to later seek relief in the courts.

## **RURAL AIRPORT REGULATIONS**

### **Develop a General Understanding of Leasing Regulations**

In Alaska, regulations are state agency rules that are adopted to implement state statutes or to comply with applicable federal laws. For state airports, DOT&PF has adopted two different sets of regulations, one for the rural airports (17 AAC 45) and another for the international airports at Anchorage and Fairbanks (17 AAC 42).

For most people, reading regulations is either a great sleep-inducing activity or an updated version of medieval torture. It's not fun to read regulations. But, sometimes you must. Nearly everything about leasing airport land and operating a business on an airport is subject to airport regulations. The entire lease application process is covered in regulation. In addition, there is a provision in every state airport lease by which the leaseholder agrees to comply with all applicable laws and regulations. If you have to comply with airport regulations, it would be advisable for you to acquire at least a general knowledge of their content.

Although somewhat cumbersome to use, the official, up-to-date source for regulations ("Alaska Administrative Code") is the Legislature's web site – <http://www.legis.state.ak.us/basis/folio.asp>

Though not guaranteed to be absolutely always up to date, a more user friendly version of the rural airport regulations is available in PDF form on DOT&PF's Aviation Leasing web page - <http://dot.alaska.gov/stwdav/documents/17AAC-45-Final.pdf> This publication is particularly helpful because it also includes the airport-related state statutes and a table of contents for the regulations that includes page number references. The latter feature is extremely helpful when searching for particular topics.

The sections of the regulations of particular interest to air carrier leaseholders are: Article 1, Article 2, Article 3, Article 4, and Article 9.

### **Be Alert for Proposed Regulation Changes**

When DOT&PF changes an airport regulation, it can have a direct impact on your business. For this reason, it's wise to keep an eye out for regulation change notices. State statutes require agencies to give public notice before adopting new or amended regulations (AS 44.62.190). Although agencies usually allow more time when more complex regulation changes are being proposed, the minimum notice period required by law is 30 days. Whatever its length, the public notice period is your only opportunity to voice objections to a proposed regulation.



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Generally, the AACA office will learn of regulation changes early in the process and alert members to their opportunity to comment. When you become aware of proposed airport regulations, note the public comment deadline in the notice and be sure that any comments you have are received at the DOT&PF address before that date. Although a state agency is required by law to consider all public comments, they are only required to make a written record of their use or rejection of *written* comments. Oral testimony in a public hearing does not have to be recorded in this way. If a public hearing is scheduled in a notice of a proposed regulation, make an effort to influence decision makers by giving oral testimony. But, *always* submit written comments, as well. A state agency's record of its use or rejection of public comments is a public document, which you can review if you want to see how DOT&PF responded to your written comments on a proposed airport regulation.

Due to the adoption process defined in statute, there can be a delay of several months after a public notice comment deadline before a new regulation becomes effective. Only then will you know the exact form and wording of the final regulation.

### **Petition for Changing or Repealing Regulations**

Alaska Statutes (AS 44.62.220) provide a means whereby a person (including a business or organization) may petition a state agency to adopt, amend, or repeal a regulation. This is a rarely used process, but I have assisted the AACA in initiating regulation change petitions on three occasions (in 2002, 2008, and 2014) to change or repeal particularly onerous airport regulations. The statute requires the receiving state agency to, within 30 days, either deny the petition in writing or schedule the matter for public hearing.

If, while operating your business, you find an airport regulation to be especially onerous or unworkable, chances are it is having a similar negative impact on other air carriers. In that case, I recommend you communicate the information to the AACA and ask the association to pursue a regulation change or repeal petition.

### **APPLYING FOR A LEASE**

#### **Information Gathering & Application Filing**

Go to Aviation Leasing's web page - <http://dot.alaska.gov/stwdav/leasing.shtml> and determine which Leasing office is responsible for the airport in which you are interested. Take note of the requisite phone numbers and email addresses. On the same page, scroll down to "Airport Leasing Application" and copy or download the instructions and form. Read through the application form and the list of required attachments. If you're unclear about anything, give the appropriate Leasing office a call and ask for clarification. Even if you understand the requirements, contact Leasing to confirm that the land you'd like to lease is vacant and available for your planned use. Then complete the application, collect the required attachments, enclose a check for the application fee, and send it all in. If your proposal includes some unusual features that can't be described in the application form, include a letter providing more information.



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(NOTE: Be sure your application package is complete. Submitting an incomplete application or trying to shortcut some of the requirements will only delay the processing of your case.)

## **E-Leasing**

There is a digitized option for submitting an application called “E-Leasing”, which is available on Leasing’s web page. This option is worth checking out for more routine applications or renewals, but I don’t recommend using it for complex applications, especially those that involve supplemental drawings or documents.

## **Letter Applications**

DOT&PF’s lease application forms are adequate for most cases. However, they can be too cumbersome to use for a simple request, like adding flight instruction to the authorized uses of an existing air taxi lease or they can be too limiting to fully explain a complex lease development concept (multiple lots, combination of different use classes, phased building construction, etc.). In these cases, you can submit your request in the form of a letter. But, be careful to provide all the information, attachments, and fee payments that the application instructions require.

## **Application Processing Time**

You should file your application well in advance of the time you would like to occupy the property. DOT&PF’s application processing procedure involves internal reviews by planners, maintenance personnel, engineers, and sometimes the Department of Law. In addition, public notice must be given and any public comments or competing applications must be considered. As a result, it can be several months before you are informed of DOT&PF’s decision on your application. For all but simple lease amendments, I recommend filing your application at least six months before you want to begin using the land. Processing doesn’t always take that long, but it’s better to factor a longer time into your planning than to come up short.

## **LIVING WITH AN AIRPORT LEASE**

### **Periodically Review the Lease(s) You Have**

When a lease is finally signed, there is a tendency to breathe a sigh of relief, toss the lease in a file, and return to operating your business without a backward glance. The lease can remain more or less forgotten in the file drawer until a problem arises with the state. To avoid sudden surprises and costly defensive actions, it is a good business practice to do a brief review your lease(s) once a year. This annual refresher helps to keep the authorizations and limitations of the lease in a “top of mind” position. A good time to do this is when you are considering your business plan for the coming year. If the lease provisions are fresh in your mind when you plan business changes for the year ahead, you will be more likely to incorporate lease requirements in your plans and avoid contests with the state over violations.

### **Changes in Land Use**

As your business grows on leased property, opportunities for additional lines of business may come to your attention. Before you dive into a new opportunity, check your lease, as well as any amendments you may have signed, and confirm that the new opportunity is authorized



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and not prohibited by the lease. If the new business is not clearly authorized or is prohibited by a provision of your lease, *stop*. Before going further, submit an application to Leasing requesting a change to your lease that will allow the new venture to go forward. Proceeding without an appropriate lease change can result in a default of your lease and jeopardize your whole business at that location.

### **Construction on Leased Land**

If you plan to construct a building or other improvements on newly leased property or if your business on a lease lot outgrows your original building and you need to build an addition or other improvements, check your lease to be sure nothing in it would prohibit the construction you are considering. Assuming all is well with the lease, you will need to obtain an Airport Building Permit from Leasing before starting construction. The permit application form and instructions can be found by clicking the appropriate topic line near the bottom of Leasing's web page: <http://dot.alaska.gov/stwdav/leasing.shtml> . To avoid project delays, submit your building permit application well in advance of your desired construction start date. Depending on the complexity of your project, 30 days is a good minimum lead time to consider.

As you will see from the instructions, the attachments required for a building permit application can be extensive, depending on the size and scope of your project. Allow plenty of time to prepare site drawings and blueprints, and to gather all of the required agency approvals. Be sure your permit application is complete with all the required attachments when you submit it to Leasing. Doing otherwise will only delay the processing of your permit.

Doing construction on a lease lot without first obtaining an airport building permit is grounds for the state to terminate your lease, so don't do it.

### **Subleasing**

Allowing another person or business to occupy a portion of your lease lot or building, with or without rent, constitutes a sublease, which requires DOT&PF's prior written consent. Instructions for obtaining consent can be obtained by clicking the appropriate topic line near the bottom of Leasing's web page: <http://dot.alaska.gov/stwdav/leasing.shtml> .

NOTE: Some leases include a provision that allows the leaseholder to rent aircraft parking space without the state's consent (check your lease!)

### **Selling or Transferring Your Business and Leasehold Assets**

The permanent transfer of a lease from you to another business or person is called an "Assignment". As a leaseholder, you can sell your building and other improvements, but an assignment of the lease must be part of the transaction. An assignment requires DOT&PF's prior written consent. Instructions for obtaining consent can be found by clicking the appropriate topic line near the bottom of Leasing's web page: <http://dot.alaska.gov/stwdav/leasing.shtml> .



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## **Security Assignment**

A security assignment functions somewhat like a deed of trust to provide collateral for a lender financing the construction of improvements on a lease lot. A security assignment provides for the lease to transfer to the lender if the borrower / leaseholder defaults in making the loan payments. DOT&PF's written consent is required for all security assignments. Typically, the financial institution drafts the security assignment documents, but it is the leaseholder's responsibility to submit them to DOT&PF for consent. Instructions for obtaining consent can be found by clicking the appropriate topic line near the bottom of Leasing's web page: <http://dot.alaska.gov/stwdav/leasing.shtml> .

## **Leasing Office Review of Sublease or Assignment Documents Prior to Signing**

The Aviation Leasing office responsible for the airport where your lease is located will perform a courtesy review of your draft assignment or sublease documents (with no filing fee). I recommend you take advantage of this opportunity because it helps to speed up the consent process when you submit the fully signed documents and it helps to avoid the time consuming need to revise signed documents that have been rejected by Leasing.

## **LEASE TERM EXTENSIONS**

### **Term Extension Overview**

The rural airport regulations provide a number of possibilities for extending the term of a lease. The alternative that will apply to your situation depends on a number of variables. The provisions of the regulations relating to lease terms are lengthy and potentially confusing. Within the limited scope of this tutorial, it isn't possible to explore all of the term extension alternatives, so I'll just address those that most frequently apply.

Essentially, there are three situations when a leaseholder should be considering an extension of the lease term. One is after completing new improvements on the lease lot; the second is when the lease is nearing expiration; and the third is when you purchase improvements from a leaseholder as part of a lease assignment transaction.

### **Term Extension for Improvement Construction**

The initial term of a new lease is determined by the amount of money the leaseholder invests in buildings and permanent improvements on the lease lot. If later in the lease term, the leaseholder builds additional improvements, that investment can be used to add years to the term. For example, according to the term vs. investment chart in the airport regulations [17 AAC 45.225(j)], an initial investment in improvements of \$112,500 would result in the new lease being granted for a 20-year term. If in Year 10 of the initial term, the leaseholder spends \$90,000 on additional improvements, the lease would qualify under 17 AAC 45.225(f) for a 12-year extension of the term to a total of 32 years (from the beginning of the lease).

**CAUTION:** To obtain this kind of extension, the additional improvements must have been constructed under an Airport Building Permit approved by DOT&PF. In addition, the



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leaseholder must submit evidence of the investment to Leasing no later than 60 days following the expiration date of the building permit.

### **Term Extension at Lease Expiration**

During the last year leading up to the expiration of a lease, the leaseholder can apply for a term extension. Alaska Statute 02.15.090(a) limits the total term of an airport lease to 55 years, so the sum of the expiring term plus a term extension cannot exceed 55 years.

Subject to the 55-year limitation, the regulations allow an extension to be based on the fair market value of the leaseholder's improvements on the lot, as determined by a real estate appraiser, plus the amount of any new investment proposed by the leaseholder. Alternatively, an extension can be based on the remaining useful life of the leaseholder's principal improvement on the lot. The remaining useful life must be determined by an appraiser, architect, or engineer. NOTE: The all costs related to a market value appraisal or remaining useful life assessment are borne by the leaseholder.

If the lease extension you are seeking will cause the total lease term to exceed 55 years, an alternative would be to apply for a new lease (called a "successive lease" in the regulations). A new lease effectively restarts the 55-year limit clock. For example, you could not obtain a 20-year extension for a lease that has run 40 years because the total term under the existing lease would exceed 55 years ( $40 + 20 = 60$ ). But, you could apply for a new (successive) lease with a 20-year term.

### **Five-Year Term Extension**

The regulations also allow a 5-year extension to be granted without the requirement for an appraisal or useful life assessment. Although this is a cheap and easy way to get an extension, five years is also a very short term with which to secure your business. In most cases, I recommend that leaseholders obtain the longest possible term extension by spending the money for an appraisal or useful life assessment. A longer term provides more security for the continuation of your business on the site.

### **Lessee's Choice of Term Extension or New Lease**

The plain English of AS 02.15.090(c) allows a lessee with an expiring lease to choose a term extension or a new lease, subject to the 55-year limitation explained above. But, DOT&PF personnel don't always see it this way. Older leases may have somewhat more liberal, tenant-beneficial provisions than the lease form DOT&PF currently uses. With an older, more favorable lease, the lessee may prefer a term extension in order to continue his existing lease. However, Leasing may try to push a new lease onto the applicant because they prefer to use their current form. If you find yourself in a position like this, you need to know that the law allows you to reject the offer of a new lease and insist on an extension of your older lease.

### **Term Extension for the Purchase of Improvements**

If you buy a leaseholder's buildings or other improvements as part of a lease assignment transaction, the regulations allow you to obtain an extension of the lease term based on your purchase price. To obtain this kind of extension, you must submit written evidence of the



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amount you paid for the previous lessee's improvements. The evidence must be submitted within two years following the date of purchase. Only the amount spent to purchase improvements counts toward a term extension. The purchase price of such things as the former lessee's business, accounts receivable, aircraft, vehicles, and parts inventory must be excluded from the purchase price submitted to Leasing. The best way to obtain the required evidence is to include a Bill of Sale for the improvements in the closing documents for the lease assignment. The Bill of Sale must be signed by the buyer and seller, describe the permanent improvements being sold, and state the purchase price of the improvements. (The definition of "permanent improvement" is found in 17 AAC 45.990)

## **RENT ADJUSTMENTS**

### **Rent Changes**

With the possible rare exception of a few very old leases, every airport land lease is subject to periodic rent adjustment by the state. Typically, no rent adjustments can be made during the first five years of a new lease [17 AAC 45.295(b)]. Thereafter, DOT&PF can adjust the rent at intervals of not less than once every 12 months. To change your rent, the Leasing office must send a written notice to you at least 30 days in advance of the new rent effective date. When you receive a rent adjustment notice, check the regulations at 17 AAC 45.127 and confirm that the new rent conforms to the rental rates for your airport and land use. (Leasing personnel can make mistakes!) Also be aware the airport regulations [17 AAC 45.295(d)] limit rent increases to 10% per year since the previous rent adjustment. In addition, the adjusted rent must not exceed fair market rent. If you find an error, contact Leasing.

### **Rent Change Protest**

If you believe the new rent exceeds fair market rent, you can file a protest (under 17 AAC 45.297) to have the rent rolled back. However, a protest requires the submission of a current fair market rent appraisal of the premises that supports a lower rent figure. The cost of the appraisal is borne by the protesting leaseholder. Appraisals, especially for land at more remote airports can be expensive, so be sure to consider the cost of an appraisal compared to the potential rent savings before proceeding with a rent protest action.

## **TROUBLESOME LEASE PROVISIONS**

### **General Observations and Cautions**

DOT&PF land leases are written to heavily favor the state. To some extent, this is understandable since the state is the airport owner. However, the authors of lease provisions sometimes go overboard and the result is a lease that could be hazardous to the lease applicant's financial future. The old saying, "The devil is in the details" certainly applies here. Just a few words can make the difference between a lease you can live with and one you cannot. This is why it is important to read and understand every provision of a lease before you sign it. The land lease form DOT&PF has been using at rural airports during the past few years includes several troublesome provisions. Three of them are described below. If you find one or more of these in a new lease offered to you, I recommend you push back to obtain revisions.

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(NOTE: The provision citations given below are those used in the most recent DOT&PF lease form I've seen. The provision numbering in the standard form is subject to change, so if you don't find the troublesome provisions under the citations presented below, look for the topics elsewhere in the lease. There is also the happy prospect that, by the time you read this, DOT&PF will have corrected these problem provisions).

### **Lessee Obligated to Provide Security Fencing [Article V(B)(9)]**

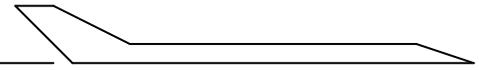
This provision has the lessee agreeing to build or modify a security fence "around the sides of the premises" constructed at the lessee's sole expense, whenever such a fence or fence modification is needed to conform to the airport's security plan. There are several problems with this provision. The first is that an airport security fence is never built "around the sides" of an aeronautical lease lot. How would aircraft get in and out?

The second problem is that the rural airport regulations state the exact opposite. 17 AAC 45.060(m) provides that the *state*, after coordination with the lessee, can build a security fence on the premises in a way that doesn't interfere with the lessee's operations. After the fence is completed, the lessee is responsible for repairing any damage done to the fence by the lessee or lessee's customers. Nowhere in the rural airport regulations is there a single provision that allows DOT&PF to require the lessee to build an airport security fence as a condition of the lease.

With respect to this provision, I recommend insisting on a revision that is consistent with the provisions of 17 AAC 45.060(m). A few of my clients have successfully done this, but they had to press pretty hard. If you're not successful in getting this change or you don't want to bother pushing for it, you might consider signing the lease (assuming everything else in the lease is satisfactory to you). Then, reject any future DOT&PF demand to build a fence on the premises if their demand is for a fence anywhere except on the four sides of the lot. That is the only place the lease provision says you have to build a fence and a fence completely encircling an aeronautical lease lot isn't likely to be proposed by DOT&PF or approved by the TSA.

### **State's Access for Environmental Assessment [Article IX(I)]**

This is another provision with language that's at odds with the airport regulations, specifically 17 AAC 45.045(e). The lease provision covers the state's right to conduct an environmental assessment on the leased premises. If the state performs an assessment on or near a lease lot, this lease provision only requires them to "minimize" interference with the lessee's operations. On the other hand, the regulations [17 AAC 45.045(e)] provide that while performing an assessment, the state "may not unreasonably interfere with the lessee's use of, or access to, the lessee's premises unless the lessee first expressly consents". The regulation goes on to clearly define "unreasonable interference" as a safety hazard to or a substantial disruption of, the lessee's use of, or access to, the lessee's premises [17 AAC 45.045(f)]. "Minimize", as used in the lease form, could mean anything the state wants it to mean and you could suffer substantial financial losses due to the state's assessment activities. The regulation is very clear and provides substantial protection for the lessee. I recommend insisting on a revision of this lease provision to make it consistent with the regulation.



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**State Veto of Lessee's Choice of Attorney [Article XI(A)(2)]**

This provision relates to lawsuits by third parties against the lessee and gives DOT&PF *and* the Department of Law veto authority over your choice of an attorney to provide for your defense. The Department of Law is not even a signatory to the lease, yet this provision gives the agency veto authority over your choice of an attorney. Nowhere in the airport regulations is this kind of overreach authorized. I recommend pushing back against DOT&PF to get this part of Article XI(A)(2) deleted. DOT&PF, much less the Department of Law, should have nothing to say about a lessee's choice of defense attorneys. Several of my clients have been successful in getting this deleted, but it has taken some effort to accomplish.