

VAOPGCPREC 9-97*Questions Presented*

1. Can the issuance of a supplemental statement of the case in response to evidence received within the one-year period following the mailing date of notification of the determination being appealed extend the time allowed to perfect an appeal beyond the expiration of that one-year period?

2. If a supplemental statement of the case is not or cannot be issued before the one-year period expires, does the appeal expire and must such evidence be considered an attempt to reopen a finally adjudicated claim?

Held

1. If a claimant has not yet perfected an appeal and VA issues a supplemental statement of the case in response to evidence received within the one-year period following the mailing date of notification of the determination being appealed, 38 U.S.C. 7105(d)(3) and 38 CFR 20.302(c) require VA to afford the claimant at least 60 days from the mailing date of the supplemental statement of the case to respond and perfect an appeal, even if the 60-day period would extend beyond the expiration of the one-year period. To the extent that 38 CFR 20.304 purports to provide otherwise, it is invalid and requires amendment.

2. If VA receives additional material evidence within the time permitted to perfect an appeal, 38 U.S.C. 7105(d)(3) requires VA to issue a supplemental statement of the case even if the one-year period following the mailing date of notification of the determination being appealed will expire before VA can issue the supplemental statement of the case. Furthermore, 38 CFR 3.156(b) requires that such evidence be considered in connection with the pending claim.

Effective Date: February 11, 1997.

VAOPGCPREC 10-97*Question Presented*

Does a \$1,100 cash distribution from an Alaska Native Corporation and a \$16,338 dividend distribution by the corporation to a settlement trust under the Alaska Native Claims Settlement Act, both of which were made in 1993, constitute income to a veteran for improved-pension purposes?

Held

Pursuant to VAOPGCPREC 12-89 and VAOPGCPREC 4-93, if the nontaxable portion of a cash distribution received by a veteran from an Alaska Native Corporation represents a distribution from the Alaska Native Fund, that

portion of the distribution and an interest in a settlement trust received by the veteran from the Native Corporation may be excluded from computation of income for improved-pension purposes under 38 U.S.C. 1503(a)(6) as compensation for relinquishment of an interest in property. If the taxable portion of the cash distribution received by the veteran was derived from revenues earned by a Native Corporation, that distribution constitutes income for improved-pension purposes. Section 506 of Pub. L. No. 103-446, 108 Stat. 4645, 4664 (1994), which excludes from income computation for improved-pension purposes cash distributions not exceeding \$2,000 per annum received by an individual from an Alaska Native Corporation, does not apply to computation of income for improved-pension purposes for periods prior to November 2, 1994, the date of its enactment.

Effective Date: February 21, 1997.

By Direction of the Secretary.

Mary Lou Keener,

General Counsel.

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Enhanced-Use Lease of Property at the Department of Veterans Affairs Medical Center in Atlanta, Georgia

AGENCY: Department of Veterans Affairs.

ACTION: Notice of Designation.

SUMMARY: The Secretary of the Department of Veterans Affairs is designating the Department of Veterans Affairs Medical Center in Atlanta, Georgia, for an Enhanced-Use lease development. The Department intends to enter into a long-term lease of real property at the Medical Center with the Development authority of DeKalb County for the purpose of collocating administrative office space for its Veteran Benefits Administration Regional Office onto such property and for other "in-kind" consideration.

FOR FURTHER INFORMATION CONTACT: Brian A. McDaniel, Office of Asset and Enterprise Development (189), Veterans Health Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC, 20420, (202) 565-4307.

SUPPLEMENTARY INFORMATION: 38 U.S.C. Sec 8161 *et seq.*, specifically provides that the Secretary may enter into an Enhanced-Use lease, if the Secretary determines that at least part of the use of the property under the lease will be to provide appropriate space for an

activity contributing to the mission of the Department; the lease will not be inconsistent with and will not adversely affect the mission of the Department; and the lease will enhance the property. This project meets these requirements.

Approved: March 21, 1997.

Jesse Brown,
Secretary.

Notice of Designation and Intent to Execute an Enhanced-Use Lease With the Development Authority of DeKalb County (Georgia) (Enhanced-Use Lease Report) for the Collocation of a VBA Regional Office at the VA Medical Center, Atlanta, Georgia

Notice

Pursuant to the provisions of 38 U.S.C. 8161, *et seq.*, "Enhanced Use Leases of Real Property," this serves as notice that the Secretary of the Department of Veterans Affairs ("the Department") intends to designate approximately six (6) acres ("the Parcel") and other property under the jurisdiction and control of the department on the campus of the Atlanta VA Medical Center for development under the terms of an Enhanced-Use lease. The Parcel is located in the northwest corner of Clairmont Road and Southern Lane, adjacent to the VA Medical Center, Atlanta, DeKalb County, Georgia.

Further, it is the Department's intent that after conclusion of successful negotiations with the Development Authority of DeKalb County ("Authority"), to enter into an Enhanced-Use lease of the Parcel with the Authority. Such lease will include a requirement for collocation of the Department's Veterans Benefits Administration Regional Office in Atlanta as well as potentially other VA and non-VA uses on the Parcel. The Authority, acting pursuant to its statutory responsibilities, may provide financing for the development and select a developer with the approval of the Department. The developer will construct and operate the development which will include both VA and non-VA uses.

This Notice and Report will be supplemented by a subsequent Report to be made not less than 30 days prior to the closing of a development agreement between the Department, the Enhanced-Use lessee (the Authority) and the developer. The Report will provide updated information with respect to the matters contained herein.

Background and Rationale

Under the provisions of 38 U.S.C. 8161, *et seq.*, the Secretary is authorized

to lease Department-controlled real property to private or other public entities over a term not to exceed 35 years, so that the property will, in part, provide space for an activity contributing to the mission of the Department. As consideration for the lease, the Secretary is authorized to accept facilities, services, money, or other "in-kind" consideration.

The Department intends to use its Enhanced-Use leasing authority as a means to obtain office space ("VARO Space") for its Regional Office activities in Atlanta, Georgia, as well as for other potential Department activities. The Regional Office is now located in a privately-owned office building leased by the General Services Administration. The currently occupied space is located approximately 7 miles from the VAMC Atlanta campus. By use of the Enhanced-Use lease, the Department would lease, on a long-term basis (35 years), all or a substantial portion of the Parcel to the Authority. The Authority, in turn, would competitively select a developer who will finance, design, construct, manage and operate a mixed-use office complex that would include the VARO Space requirement and non-VA uses. While such uses would need to be further defined, it is intended that both VA and non-VA uses will be developed and operated pursuant to local construction and land use development requirements, to the extent practicable. Any non-VA uses would also be required to be compatible with mission and operations of the VARO and the adjoining VA Medical Center. Depending on the value of the subject parcel and market opportunity for the non-VA uses, the developer would provide office space to the VARO at favorable terms, as well as other "in-kind" consideration.

Description of Enhanced-Use Lease Provisions

The Department proposes to lease the site through an "Enhanced-Use lease" to the Authority for a term consisting of up to thirty-five (35) years under such terms and conditions as authorized in the Department's Enhanced-Use leasing authority. The terms of the arrangement will generally be as follows:

Under the Enhanced-Use leasing authority, it is the Department's intent to lease, on a long-term basis (up to 35 years), the Parcel to the Authority, an instrumentality of DeKalb County. Participation by the Authority will permit the project to obtain lower cost financing than if financed through commercial sources. Under this arrangement, the Authority will lease the Parcel from the Department for the

purpose of selecting a developer and thereafter assigning its interest to such developer. The Authority may provide financing to the developer who would construct both VA and non-VA uses. Any provided financing would be through "revenue bonds" issued by the Authority. The Department shall retain approval of the selection of the developer and of the development plan. Should the Authority be subsequently unable or chooses not to participate, the Department intends to select a developer/lessee through a solicitation process.

The selected developer will be responsible for the development of the Parcel in accordance with the parameters in the Enhanced-Use lease and an approved development plan. In addition, the developer will be responsible for the financing, design, construction, operation and maintenance of the VARO Space. The VARO Space would then be provided for use by the Regional Office on a "lease-back" arrangement for a certain duration on such terms and conditions as agreed upon by the parties. Such terms will include provision of VARO Space including costs such as parking and the VARO Space tenant build-out will be reflected in the rent proposed by the developer.

In return for the development rights permitted under the Enhanced-Use lease and the lease-back of VARO Space, the developer will provide fair consideration to the Department. Such consideration may be in the form of cash, or in the form of in-kind consideration, such as a favorable lease-back rent, discounted operation and maintenance costs, or the provision of goods, services or benefits to the Department, including construction, repair, maintenance, remodeling, or other physical improvements of Department facilities, or the provision of office, storage, or other usable space. The amount and type of consideration to be provided by the developer will depend on the value of the land involved. The developer would be legally and financially responsible for the operation, maintenance, and repair of any properties and improvements placed under its control by reason of the Enhanced-Use lease.

In addition to the VARO Space, the Enhanced-Use lease will contain provisions allowing for a defined amount of non-VA development. Such development shall be constructed and operated at the developer's own risk and expense. Such additional development shall, to the extent practicable as determined by the Department, be required to comply with local laws and

other requirements pertaining to construction, use and occupancy. Further, any non-VA uses would also be required to be compatible (and not inconsistent) with the mission and operations of the VARO and the adjoining VA Medical Center. At the conclusion of the Enhanced Use lease, all of the improvements on the site will become the property of the Department.

Public Hearing

On September 9, 1996, a public hearing was held at The Pete Wheeler Auditorium on the campus of the Atlanta VA Medical Center. The public hearing began at 7:00 p.m. and concluded at approximately 9:00 p.m. Department representatives at the meeting included Mr. Gary Hickman, Director, VARO Atlanta; and Dr. Bailey Francis, Acting Director, VAMC Atlanta. The Department received very strong positive response from: Mr. Pete Wheeler, Commissioner Georgia Department of Veterans Affairs; Mr. John Gwisdak, State Veterans of Foreign Wars; Mr. Robert Morris, Georgia Department of Veterans Services, and other veterans on the basis that such proposal will result in VARO Space that will correct existing space deficiencies, as well as provide better access and parking for disabled veterans, compared to the existing VARO leased space or the new Atlanta Federal Center (AFC) controlled by the U.S. General Services Administration (GSA). These speakers noted that a VBA Regional Office move to the AFC would result in an inefficient and counterproductive VARO office layout, a corresponding substantial increase in VARO's payments to GSA, and inadequate parking and access for disabled veterans who would be visiting the VARO.

Benefits cited by these speakers with respect to the proposed collocation were the potential for improving timeliness in VARO claim-processing, and the potential for financial savings as a result of the "Enhanced-Use" of the Parcel, and the prospect for obtaining VARO Space at lower costs than by other methods thus, alleviating budget problems. Mr. David Chesnut, General Counsel to the Authority, expressed support for the project. Mr. Chesnut noted that such proposed collocation would result in increased employment within DeKalb County, will further the Authority's objectives for sustained, planned growth of economic opportunities within the County, as well as promote the general welfare of the local community and the State. Mr. Chesnut expressed the Authority's position that it was prepared to participate as an Enhanced-Use lessee.

Also speaking at the public hearing were members from adjacent and nearby neighborhood organizations. While some acknowledged the potential benefits of collocating VARO services to veterans, other speakers expressed concerns as to the potential size and intensity of the Enhanced-Use development and any corresponding adverse impacts on traffic, lighting, storm water run-off, as well as on other environmental and community issues or resources. The VARO Director provided assurances that the Department will undertake appropriate environmental reviews of any proposed development and that such development will, to the extent practicable, comply with local requirements pertaining to land use, construction and occupancy. In addition, the Director, VARO Atlanta, expressed a willingness to work with the organizations so that the local community can have input into the overall planning of the development.

Summary of Cost-Benefit and Other Economic Factors in Support of the Enhanced-Use Lease

In analyzing the cost-benefit and economic aspects of obtaining the VARO Space by means of an Enhanced-Use lease, the Department examined the life-cycle costs to the Government of this approach in comparison with leasing the subject space.

The analysis revealed that an Enhanced-Use lease with the Authority

appears to be the most cost-beneficial option. Input into this analysis for lease costs was derived using similar criteria from various sources. For instance, assessment of market opportunities was derived from an appraisal of the subject Parcel conducted by an independent appraiser; and private sector lease and construction costs were based on industry surveys.

Information received from the commercial sector supporting this analysis include: (1) the current upswing in the commercial leasing market in Atlanta makes commercial leasing with no residual value to VA economically unattractive; (2) demand and development costs for administrative office space and for other uses in the sub-market in which the Parcel is located; (3) non-VA use in the development will result in a broader allocation of development costs among its user/tenants, thus resulting in lower costs to the Department; and (4) access to lower cost financing through the Authority than what would be typically available through commercial sources will result in lower development expenses and corresponding charges passed to the users/tenants including the Department.

Description of How The Proposed Lease Will—

(1) Contribute cost-effectively to be consistent with and not adversely affect the mission of the Department.

The Department anticipates that, using an Enhanced Use lease, it would obtain its VARO Space at a lower cost and in a shorter time period than could be realized through "traditional" VA construction or commercial leasing.

The Enhanced-Use lease will be consistent with and not adversely affect the mission of the Department by providing both benefits and medical services on a single campus resulting in increased convenience to veterans receiving services from a Regional Office, as well as the VA Medical Center.

(2) Affect services to veterans.

The Enhanced-Use lease provides that the developer must design, construct, operate and maintain space for exclusive use by VBA on the Parcel, thus providing significantly enhanced service to veterans through the convenience of collocation with the VA Medical Center. In addition, development of the Parcel for VBA Space will provide for adequate parking and access for disabled veterans who would be visiting the VARO. Finally, any financial benefits gained as a result of lower lease-back rates for VBA Space and/or income stream from private non-VA development has the potential to fund services to veterans not currently provided and/or expanding services currently in existence.

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