

Subject: ACQUISITION OF OWNED OR LEASED REAL PROPERTY

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24-04-00 AUTHORITY OF DHHS TO ACQUIRE REAL PROPERTY

- A. As noted in 24-03-10A, the Federal Government has the inherent power to acquire land. However, section 3736 of the Revised Statutes (41 U.S.C. 14) provides that land may be purchased for the United States only under a law authorizing such a purchase. Section 3733 of the Revised Statutes (41 U.S.C. 12) prohibits entering into any contract for the erection, repair, or furnishing of any public building which binds the Government to pay a larger sum than the amount specifically appropriated for the particular purpose. The Office of General Counsel should be involved in any acquisition of real property by the Department for the United States.
- B. The principal statutes authorizing the Department of Health and Human Services (DHHS) to acquire land and to provide space are the following:
  - o Section 304(b)(4) of the Public Health Service Act (42 U.S.C. 242b) authorizes the Secretary of DHHS to acquire, construct, improve, repair, operate, and maintain laboratory, research and other necessary facilities and equipment, and such other real or personal property as the Secretary deems necessary for health statistical activities and health services research, evaluation, and demonstrations.
  - o Section 321 of the Public Health Service Act (42 U.S.C. 248) authorizes the Secretary, with the approval of the President, to select sites for and to establish such institutions, hospitals, and stations as are necessary to enable the Public Health Service (PHS) to discharge its functions and duties. The President's authority to approve facilities has been delegated by him to the Director of the Office of Management and Budget (OMB).
  - o Section 404(b)(2) of the Public Health Service Act (42 U.S.C. 285(b)(2)) authorizes the Director of the National Cancer Institute (after consultation with the National Cancer Advisory Board) to acquire such real property and facilities and equipment as the Director deems necessary.

- o Section 413(a) of the Public Health Service Act (42 U.S.C. 287b) authorizes the Director of the National Heart, Lung, and Blood Institute (after consultation with the National Heart and Lung Advisory Council) to acquire such real property as may be necessary.
  - o Section 386 of the Public Health Service Act (42 U.S.C. 280) authorizes the Administrator of General Services to acquire suitable sites, selected by the Secretary of DHHS in accordance with the directions of the Board of Regents of the National Library of Medicine, and to erect thereon, furnish, and equip suitable and adequate buildings and facilities for the National Library of Medicine. It also authorizes appropriations for the erection and equipment of buildings and facilities for the use of the Library.
  - o Section 7 of Public Law 83-568 (known as the Indian Health Transfer Act) as amended (42 U.S.C. 2004a), authorizes the construction, improvement, or extension of sanitary facilities to serve Indians and the acquisition of lands, or rights or interests therein, including sites, rights-of-way, and easements for that purpose.
  - o Section 201(g) of the Social Security Act (42 U.S.C. 401(g)) authorizes the several trust funds to be made available in amounts authorized by Congress for certain costs of the administration of the Social Security Act. Various appropriations Acts have authorized the construction of facilities, including the acquisition of sites, for the Social Security Administration (SSA).
- C. Various statutes authorize the acceptance of gifts of real property (usually unconditional but sometimes conditional) by or on behalf of DHHS. Gifts are unconditional unless the applicable statute provides otherwise.
- o Section 501 of the Public Health Service Act (42 U.S.C. 219) authorizes the Secretary of DHHS to accept unconditional gifts or, if recommended by the Surgeon General, conditional gifts of real property for the benefit of the Public Health Service.
  - o Section 384 of the Public Health Service Act (42 U.S.C. 278) extends the authority under section 501, above, to the acceptance and administration of gifts of real property for the benefit of the National Library of Medicine.
  - o Section 409 of the Public Health Service Act (42 U.S.C. 286d) authorizes the Director of the National Cancer Institute (after consultation with the National Cancer Advisory Board) to accept unconditional gifts of real property, among other things.

- o Section 423 of the Public Health Service Act (42 U.S.C. 288b) authorizes the Surgeon General to recommend to the Secretary of DHHS the acceptance of conditional gifts, pursuant to section 501, for the National Institute of Dental Research.
- o Section 22 of the Occupational Safety and Health Act (29 U.S.C. 671) authorizes the Director of the National Institute of Occupational Safety and Health (NIOSH) to accept property, including real property, donated, bequeathed or devised without condition other than that it be used for the purposes of the Institute.

24-04-10 METHODS OF ACQUIRING REAL PROPERTY

- A. Purchase. This is the usual way of acquiring real property. This method can, however, no longer be used to acquire real property at a bargain price. Under Title III of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (P.L. 91-646 as amended), DHHS is required to make every reasonable effort to acquire real property expeditiously by negotiation. That Act also calls for the making of an offer to pay the owner not less than DHHS' approved appraisal of the fair market value of the property. Moreover, the owner is to be given an opportunity to accompany the appraiser on his/her inspection of the property and is to be given a written statement of, and summary of the basis for, the amount established as just compensation. Under section 355 of the Revised Statutes (40 U.S.C. 255), which was based upon an earlier statute enacted in 1841, no public money may be expended on the improvement of a site without a title approval by the Attorney General and, prior to February 1, 1940, the consent to the purchase by the legislature of the State in which the site is located. The consent requirement no longer prevails, but the title approval requirement is still in effect. The process of approving title has been vastly developed over the years, and the authority to make such an approval has been delegated to many agencies, but not to DHHS, which acquires only a relatively small amount of real property. The approval of title by the Attorney General calls for the submission by the acquiring agency of title evidence that conforms to Standards for the Preparation of Title Evidence in Land Acquisitions by the United States, issued by the Department of Justice. This often involves the procurement of a Policy of Title Insurance issued by a title company that has been approved specifically by the Department of Justice, together with a Certificate of Inspection and Possession by the acquiring agency, all as outlined in those standards.
- B. Eminent Domain. The power of the Federal Government to acquire land by eminent domain, i.e., by condemnation, was not fully settled by the U.S. Supreme Court until 1876. Condemnation can be exercised in the Federal Courts without the consent of the State, and this power extends even to property used by the State for its governmental purposes. Condemnation is

usually initiated by GSA on behalf of DHHS, and the proceedings are conducted in a Federal Court by the Department of Justice. The Department of Justice requires the procuring agency to produce the evidence of title and related papers. The judicial proceedings and court decree eliminate any need for a separate opinion of title by the Attorney General. If title is needed immediately without waiting for the termination of lengthy court proceedings on the value of the property, this can be done by the filing of a "declaration of taking" and a deposit into the court of the estimated amount of the just compensation for the land taken. The court may fix the time within which and the terms upon which possession shall pass to DHHS. The Office of General Counsel should be the point of contact for the Department with the Department of Justice for acquisition of real property by purchase or through the power of "eminent domain".

- C. Withdrawal from the Public Domain. Much of the original public domain has, in the past, been withdrawn and set aside for specific public uses by the President and later by the Secretary of the Interior under a delegation from the President. It is no longer a viable source of land for DHHS, and further withdrawals require an Act of Congress.
- D. Transfers from other Departments. Property that is excess to the needs of a constituent agency of DHHS may be transferred administratively to another constituent agency of DHHS. Property that is excess to the needs of another department or agency may be transferred to DHHS with the approval of GSA through the excess property procedures authorized under section 202(a) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 483). For details see GSA's Federal Property Management Regulations (FPMR). This does not preclude the temporary permitting of real property to DHHS by the agency having control and accountability.
  - o The so-called Indian Health Transfer Act (P.L. 83-568) transferring Indian health functions from the Bureau of Indian Affairs (BIA) to the Public Health Service provided for the transfer of properties relating primarily to health matters (42 U.S.C. 2001). Continuing adjustments in property holdings between the two agencies are made under a Memorandum of Understanding approved by the Administrator of General Services on May 3, 1961 and Delegation of Authority number 396 of May 3, 1961 (26 F.R. 4029) pursuant to the Federal Property and Administrative Services Act of 1949.
- E. Gifts or Donations of Real Property. A gift of real property to DHHS is not effective until accepted. The Attorney General has ruled (39 Ops. Atty. Gen. 373 (1939)) that there must be general authority for the acquisition of land for the purpose in question before a gift of land may be accepted. Statutory authority to accept gifts is preferred. Some of the statutory authorities authorize the acceptance of conditional gifts; all are subject to certain review requirements, reflecting the fact that some proposed gift deed conditions would commit DHHS to a course of action

that may later turn out to be undesirable. Finally, before any gift of land is accepted on behalf of the United States, an opinion of the Attorney General in favor of the validity of the title to the land should be obtained as provided for in section 355 of the Revised Statutes (40 U.S.C. 255).

24-04-20 LEASE OF SPACE BY DHHS

- A. The lease of space for DHHS is primarily done by GSA. For the most part, DHHS does not have the authority to lease for long periods. That is so because, without express authority in that regard, an agency cannot commit future appropriations, and leases are charged to the then current fiscal year of the lease rather than to the year of entering into the lease commitment. Thus, authority to enter into a 20-year lease, such as GSA has under 40 U.S.C. 490(h) is in effect an authority to commit future appropriations. Without that authority, a multi-year lease can only be regarded as a lease for the current year with successive options to renew the lease for one-year periods. Moreover, a March 3, 1877 statute (40 U.S.C. 34) provides that no building, or part of a building, may be rented in the District of Columbia until an appropriation therefor shall have been made in terms by Congress.

Section 304(b)(4) of the Public Health Service Act (42 U.S.C. 242b) authorizes the Secretary of DHHS to acquire, without regard to the Act of March 3, 1877 (40 U.S.C. 34), by lease or otherwise, through the Administrator of General Services, buildings or parts of buildings in the District of Columbia or adjacent communities for health statistical activities and health services research, evaluations, and demonstrations.

- C. Section 404(b)(2) of the Public Health Service Act (42 U.S.C. 285d(b)(2)) authorizes the Director of the National Cancer Institute to acquire, without regard to the Act of March 3, 1877 (40 U.S.C. 34), by lease or otherwise through the Administrator of General Services, buildings or parts of buildings in the District of Columbia or communities located adjacent to the District of Columbia for the use of the National Cancer Institute for a period not to exceed ten years.
- D. Section 413(c)(2) of the Public Health Service Act (42 U.S.C. 287b(c)(2)) authorizes the Director of the National Heart, Lung, and Blood Institute to acquire, without regard to the Act of March 3, 1877 (40 U.S.C. 34), by lease or otherwise, through the Administrator of General Services, buildings or parts of buildings in the District of Columbia or communities located adjacent to the District of Columbia for the use of the Institute for a period not to exceed ten years.

- E. Section 704 of the Indian Health Care Improvement Act of 1976 (P.L. 94-437) (25 U.S.C. 1674) authorizes the Secretary of DHHS to enter into leases with Indian tribes for periods not in excess of 20 years. This authority may be exercised independently of GSA. In addition, the statute authorizes the Secretary to reconstruct or renovate the leased property pursuant to an agreement with the Indian tribe.
- F. Section 524 of the Education Amendments of 1976 (P.L. 94-482) (20 U.S.C. 2564) authorizes the Secretary of DHHS to provide suitable space for day care centers for children of employees of DHHS. The Comptroller General has ruled that under that statute the Secretary may, if necessary, rent suitable space for that purpose. Also see P.L. 99-591, Section 101(m) Title VI, Section 616 (40 U.S.C. 490b).
- G. The FPMRs issued by GSA permit DHHS to lease space to be used for certain cases. This authority includes rentals at a nominal consideration, rentals under a specific case delegation, and rentals of not more than 2,500 square feet, for special purposes spaces, for a year with renewable options. See FPMR 101-18.

24-04-30 FACTORS GOVERNING ACQUISITION OF REAL PROPERTY

The mere existence of statutory authority to acquire real property is not by itself sufficient to justify an acquisition of real property. Such an acquisition is subject to a number of considerations. The primary consideration is epitomized in section 321 of the Public Health Service Act, which states that the acquisition must be "necessary to enable the Service to discharge its functions and duties." A number of other considerations are contained broadly in the following:

- A. Executive Order 11512 - Planning, Acquisition, and Management of Federal Space (March 3, 1970). The efficient performance of the missions and programs of the Department should give due regard to the convenience of the public served and the maintenance and improvement of safe and healthful working conditions for employees. Other considerations include the need for the development of areas, the maximum use of existing space, the cost of new facilities, the availability of low-rent housing, and the adequacy of housing.
- B. Executive Order 12372 - Intergovernmental Review of Federal Programs (July 14, 1982). This order establishes a new Federal policy for consultation and cooperation with state and local governments in the administration of Federal financial assistance and development programs. (Formerly contained in OMB Circular A-95).

- C. The National Environmental Policy Act of 1969 (P.L. 91-190 as amended). This is a very comprehensive statute that pervades all aspects of real estate actions and is aimed at restoring and maintaining the quality of our human environment. Rather than set forth specific requirements to be observed, the Act calls for a broad and comprehensive assessment by the agency itself of the effect of a proposed action, and the mere overlooking of one aspect may be fatal to a proposed action, if it is attacked. It is by no means limited to real estate actions, but applies with special force to any real property actions, whether acquisition, construction, or otherwise.
- D. The National Historic Preservation Act of 1966 (P.L. 89-665 as amended). This Act provides for the establishment of a National Register of Historic Places, and calls for an evaluation of the effect that a proposed action with respect to a facility will have on such Places, and calls for a prior notification to the Advisory Council on Historic Places. Each DHHS Operating Division (OPDIV) is responsible for nominating properties under its control for inclusion in the National Register.
- E. Executive Order 11296 - Unified National Program for Managing Flood Losses (August 11, 1966). This Order does not prohibit construction in areas having a history of flooding, but rather seeks to discourage uneconomic uses and development of flood plains and to lessen the risk of flood losses.
- F. Section 355 of the Revised Statutes (40 U.S.C. 255). This statute requires the approval of the Attorney General of title to land prior to the improvement of such land. It should be observed regardless of the method of acquisition, except that condemnation obviates any such need. See 24-04-10A.
- G. Uniform Relocation Assistance and Land Acquisition Policies Act of 1970 (P.L. 91-646 as amended). This Act is listed among the authorities to be considered in the case of real property acquisitions primarily because of its impact, sometimes substantial, on the cost of acquiring real property. It also imposes substantial administrative burdens and may delay the obtaining of possession of real property. Persons displaced by a project, including tenants, are entitled to moving expenses, dislocation allowances, payments for loss of earnings in a business or farm operation, and the additional costs of replacement housing. Moreover, DHHS must be satisfied that replacement housing is available before a person can be required to move. When DHHS's direct Federal activities cause the displacement of persons from property acquired for DHHS use, relocation activities will normally be carried out for DHHS by the Federal Highway Administration under government-wide regulations codified by the Department of Transportation at 49 CFR Part 24.

- H. Public Law 90-480 as amended. This Act requires that Federal facilities be so designed and constructed as to be accessible to, and usable by, handicapped persons, who are broadly defined. It applies to facilities designed, leased, or financed by the Federal Government. The Act is couched in very broad terms, but the applicable regulations are very specific. Facilities that do not comply may have to be altered. When facilities that are used only temporarily by the Federal Government, facilities that do comply are to be preferred over those that do not. The regulations governing DHHS are set forth in FPMR 101-19.6.
- I. Occupational Safety and Health Act of 1970 (P.L. 91-596 as amended). This Act calls for the Secretary of Labor to promulgate comprehensive safety and health regulations for the public. Section 19 of the Act (29 U.S.C. 668) requires the several agencies of the Federal Government to provide safe and healthful working places and conditions for their employees under standards not inconsistent with the standards set by the Secretary of Labor. DHHS Department Staff Manual - Safety Management adopts the Fire Codes promulgated by the National Fire Protection Association, including the well-known Life Safety Code (NFPA-101), which is specifically made applicable to eligible skilled nursing homes by section 1861(j)(13) of the Social Security Act.

In addition, there are a number of recent Federal statutes that subject Federal agencies to State, interstate, and local requirements (as well as Federal requirements) and to State procedural requirements such as the necessity of permits, as well as to substantive requirements. Such agencies are subject to State administrative authority and local courts.

#### 24-04-40 DHHS USE OF OTHER FEDERAL AGENCY SPACE

DHHS may acquire the right under a temporary permit to use the property of another Government agency or, conversely, to permit another Government agency to use DHHS property. Under the FPMR, it may acquire the right to use excess property prior to its declaration as surplus property or to use surplus property pending its disposal. In any event, DHHS assumes the responsibility for maintaining property while making use of it.