



March 29, 2023

TO:

Eastern Region Real Estate Services	Olympic Region Real Estate Services
Mega Projects Real Estate Services	South Central Region Real Estate Services
North Central Region Real Estate Services	Southwest Region Real Estate Services
Northwest Region Real Estate Services	Headquarters Real Estate Services

FROM: Kevin Workman, Real Estate Services Director *JKW*

SUBJECT: Non-Monetary or In-Kind Rent - WSDOT Leasing

To help address one of the most frequently asked questions to the Assistant Attorney General Office (AGO), Headquarter Real Estate Services worked with the AGO to develop the following guidance.

Background. The 18th Amendment requires that Motor Vehicle Funds and the assets acquired with those funds be used “exclusively for highway purposes.” WAC 468-30-110(9)(a) requires any non-highway use of the state highway right of way requires payment of “economic rent.” Economic rent is the same as fair market value rent. Typically, economic rent is a monetary payment; however, in **limited** circumstances, the economic rent may be offset when the property is used for a highway purpose or when the proposed use benefits the motoring public, and the value of such use is documented. The use of a non-monetary rent credit to offset economic rent should be the **exception** rather than the rule. Also, the question of whether the non-monetary rent consideration is appropriate can be very complicated, fact specific, and must be closely scrutinized.

Non-Monetary/In-Kind Rent Credit. It is difficult to provide black and white examples since most situations are unique to the tenant as well as to the leased premises, but there are a few categories where it **might** be appropriate to consider rent credits:

- 1) **Permanent Improvements to the Lease Premises.** Permanent improvements made by a tenant that will become WSDOT property at termination of the lease may be considered a “highway benefit” in some cases. A **possible** example of these may be fencing, drainage, or lighting. It is important to understand that **none of these are automatically eligible for rent offsets**. There needs to be a cost/benefit analysis to determine the appropriate rent offsets. For example:
 - a. If it is an improvement WSDOT would have been compelled to install itself, then the appropriate rent offset in most cases would be the depreciated value of the improvement at the end of the lease since during the term of the lease, any improvements would typically benefit the tenant, not WSDOT.

- b. If it's an improvement WSDOT would not have necessarily installed but could be shown to offset some costs that WSDOT would have incurred otherwise, then the value of the rent offset would be the cost savings realized by WSDOT, not the cost of the improvement itself, depreciated or not.
- c. In some rare cases, improvements that enhance the value of property may be considered, but only to the extent of how it contributes to the overall value of the property, not the cost of the improvement itself.

2) **Performance of Extraordinary Maintenance on the Lease Premises.** The performance of ordinary maintenance on the leased premises is a standard condition of every lease and such services are not a "highway benefit." However, if a tenant performs "extraordinary maintenance" on the leased premises, those services **may** be considered a "highway benefit." Extraordinary maintenance is maintenance that is not considered routine or typical to the leased premises. Maintenance services on the leased premises such as litter control, sweeping, landscaping, basic building and site maintenance, etc. are **not** extraordinary maintenance. The determination of whether a maintenance service is extraordinary must be made on a case-by-case basis based on the circumstances of the leased premises and should be made in consultation with HQ Real Estate Services. It also requires a cost/benefit analysis like those that were listed in the previous example(s) above.

Documenting Non-Monetary Rent Credit. It is essential to document the basis for applying a non-monetary or in-kind rent credit. Generally, this would include the appropriate regional maintenance division providing a detailed written assessment of the maintenance cost of a subject property and/or the need for permanent improvements (if applicable), a cost/benefit analysis, and an appraisal or value memo determining the appropriate value of the proposed offset considering the results of the cost/benefit analysis. The final determination as to whether a non-monetary rent credit shall be applied to offset economic rent and the amount of the rent credit (if any) shall be made by HQ Real Estate Services.

Additional information:

Leasehold Excise Tax (LET) **cannot** be waived, even if the tenant receives a non-monetary/in-kind rent credit. The LET is calculated based off the economic rent and is still charged to the tenant per RCW 82.29A.

*The IRIS calculator **MUST** be used to calculate LET; it is located on the right side of the Lease Payment screen, above the Schedule Sequence. Seek guidance from the region PM Supervisor and/or HQ PM for additional details.