

IMPLEMENTATION MEASURES/STRATEGIES



# 6 IMPLEMENTATION MEASURES/STRATEGIES

## DEVELOPMENT STANDARDS

Based on the type and scale of recommended development for the Pine Nut Allotments, codified development standards and design criteria for the development of leased property were developed. The purpose of these Development Standards is to further define standards to be met for development of leased lands within the Pine Nut Allotments. They are intended as an aid in the submittal of plans for approval by providing detailed information on which to develop plans and to base a review of those plans.

The objectives of the Pine Nut Allotments Development Standards are to:

- Provide comprehensive, consistent and clear design criteria for allotment lessees, developers, and reviewing staff
- Promote site design that provides for the public health, safety, and welfare for residents and visitors alike.
- Promote sustainable development practices including considering LEED Certification for new construction
- Promote designs that will provide safe and convenient vehicular, pedestrian, and bicycle accessibility and circulation between and within developments
- Encourage sustainable and quality architectural design and building materials, which are aesthetically pleasing and provide human scale within commercial, industrial, institutional and residential developments
- Coordinate building design, signage, lighting, and landscape design to provide diversity, variety in building form and type, open spaces, and site features while maintaining a sense of design continuity throughout the site.
- Protect the scenic views and prevent unsightly developments
- Promote harmony between new and existing developments and encourage shared access and parking between adjacent compatible land uses
- Provide residential developments that promote neighborhood identity and neighborhood amenities
- Provide economic development opportunities in a well-planned, unique, and orderly manner
- Create opportunities for both tribal and non-tribal businesses to thrive

The Development Standards, which will apply to all leased lands within the Pine Nut Allotments, are intended to be used together with the applicable Douglas County Engineering Design Criteria and Improvements Standards Code (DCIS), the provisions of the International Building Code (IBC), and the International Fire Code as required. Applicable regulations are summarized in Table 6-1.

<b>Table 6-1 Applicable Regulations</b>		
<b>Authority</b>	<b>Nature of Action</b>	<b>Contact</b>
U.S. Bureau of Indian Affairs	Approval of Lease of Pine Nut Allotments Site and Design Approval Land Use Approval	Economic Development Director or designee
Douglas County Engineering Department	Roadway Standards Driveway Permits	Douglas County Public Works Director or designee
Douglas County Building Department	Building Permits Conventional Septic System Permit	Douglas County Building Official or designee
National Historic Preservation Act Section 106	Review and approval of all ground-disturbing activity prior to construction	Tribal Historic Preservation Officer
U.S. Environmental Protection Agency	Stormwater Pollution Prevention Plan prior to construction	Regional EPA Office
State of Nevada Department of Conservation & Natural Resources-Division of Water Resources	Review and approval of potable water source Review and approval of Specialized Septic System Permit	Director of Water Resources or designee

Based on each allotment's suitability for various types of development designated in this Plan, the Development Standards outline which uses are allowed, conditional, temporary or prohibited on leased lands within the Pine Nut Allotments. These are:

**Allowed Uses**

- Single family residential (requires proof of adequate provisions for potable water and sewage disposal)
- Agricultural use of the land
- Home occupations including in-home daycare
- Public parks and playgrounds
- Accessory uses

**Conditional Uses**

- Commercial uses
- Multi-family residential use

Professional office, clinics, or services  
Manufactured home park  
Assisted living or group care facility  
Public or municipal buildings  
Utility or telecommunication facilities  
Schools and educational facilities  
Commercial Recreational use  
Resort or overnight accommodation facilities  
Industrial use and facilities  
Grading for more than 500 cubic yards  
Off-premises signage

#### **Temporary Uses**

Emergency non-commercial telecommunications  
Temporary batch plants  
Temporary construction or sales offices  
Temporary dwelling units  
Seasonal sales lots

#### **Prohibited Uses**

Those uses that create noise, vibration, odor, heat and glare that are discernable from the parcel line and cannot be effectively mitigated. Also, no uses which involve the disposal of hazardous materials will be allowed.

All new developments and modifications of existing developments (except regular maintenance and repair) will require one of two types of review processes – Development Review Type I or Development Review Type II – Conditional Use Permit.

Development Review Type I is a non-discretionary or “ministerial” review conducted by the BIA through an administrative review process without a public hearing. It is for less complex developments and land uses that do not have significant design review issues, and it ensures compliance with the basic development standards such as building setbacks, lot coverage, maximum building height, and similar provisions. A Development Review Type I is required for all Allowed Uses listed above.

Development Review Type II (Conditional Use Permit) is a discretionary review conducted by the BIA through an administrative process and requires public notification of adjacent property owners. At the discretion of the BIA, the review may include a third party design professional. A Development Review Type II is required for all development uses except those specifically listed under Type I development or those deemed to be prohibited uses.

Detailed Development Standards, Design Criteria, and Type I and Type II application procedures and requirements for the development of leased property in the Pine Nut Allotments are presented in Appendix G.

## **LEASE RECOMMENDATIONS**

Under a land lease, the ground on which a proposed structure is to be built is leased to a builder/developer (Lessee) instead of being sold, meaning that the land and the structure(s) are owned independently. The most common reason for a land lease contract is that the property owner (Lessor) wants to retain ownership of the land but not take on the responsibilities for its development. That right

is contractually assigned to the builder/developer in exchange for lease payments that provide income to the owner.

The BIA has a great deal of experience in leasing Indian lands for grazing and for mineral extraction over many decades. However, leasing lands for urban develop is a more complex process and is a new experience for the BIA. This is particularly true in trying to accomplish urban development while still maintaining Indian ownership of the land over the long-term.

A combination of sources were studied in preparing the lease recommendations for the Pine Nut Allotments, including: the US Code, Title 25, Indians, as well as several examples of leases entered into by the BIA or individual Indians and/or Tribes; court cases involving disputes arising from some of those leases; municipal land leases; and best practices for private-sector commercial land leases.

Two key assumptions underlie the recommendations:

- The Pine Nut Allotments will remain in Trust status, and there will be no provisions for granting fee title to the land to any parties
- The leases are expected to return fair market value to the allotment owners over the periods of those leases

It was also assumed that:

- All developments will conform to standards written specifically for that purpose in lieu of County zoning ordinances or other regulations that do not apply on Trust lands
- Leases will be made to developers who can demonstrate capability to perform the projects for which the leases are written, including financial capability
- Provisions will be made to ensure specific performance of the accepted development proposals
- Remedies for default will protect the allotment holders to preserve the values and integrity of the land

There is no single format for writing land leases as each one has to be tailored to the specific property being leased, the uses that are proposed on it, and the unique interests of the parties entering the lease. The list below is a modified version of the Lease Provision Checklist provided by the American Society of Real Estate Counselors showing only those provisions that would normally apply to land leases.

Land Lease Provisions Checklist (American Society of Real Estate Counselors)

- |                                      |                                 |
|--------------------------------------|---------------------------------|
| A. Fundamental                       | C. Options                      |
| 1. Name and legal address of parties | 1. Renewal                      |
| 2. Description of property           | 2. Cancellation                 |
| 3. Term of agreement                 |                                 |
| 4. Rental and method of payment      | D. Special & Miscellaneous      |
|                                      | 1. Inducements                  |
| B. Desirable                         | 2. Postponement and/or holdover |
| 1. Use - limitations & restrictions  | 3. Subordination                |
| 2. Utilities                         | 4. Security                     |
| 3. Damages                           | 5. Escalator clauses            |
| 4. Indemnification                   | a. Rents                        |
| 5. Inspection                        | a. Taxes                        |
| 6. Notices                           | b. Insurance                    |
| 7. Assignment and/or subletting      | 6. Percentage rents             |
| 8. Ad valorem taxes                  | 7. Arbitration                  |
| 9. Remedies for Default              | 8. Applicable laws              |
| 10. Remedies in Bankruptcy           |                                 |

A summary of issues of particular importance for lease provisions for the Pine Nut Allotments, their potential implications, and recommendations for their resolution follows. A more detailed description is provided in Appendix H.

**Name and Legal Address of Parties (Ownership)** – Many of the Pine Nut Allotments are held in multiple ownerships, due in part to deaths and inheritances, marriages, and distribution through extended families. For those allotments not held in single ownerships, there needs to be an express provision designating who can sign the lease on behalf of the other owners. It may be desirable to have the multiple owners form an LLC or other legal entity to perform this function, or have the owners agree to a limited Power of Attorney assigning the responsibility to one individual.

**Term of Agreement** – Recognizing that the leases need to protect the allotment holders but still provide incentives for developers, the length of term of the leases has to be long enough to enable conventional financing of projects, probably through Deeds of Trust on the leasehold interests. The current policy of 50-year leases is adequate for a first conventional mortgage of 30 years, but it becomes a serious detriment to further financing as that term approaches. Any lender will want to be assured that sufficient time remains on the lease to ensure resale of the improvements if the original owner defaults. If only 20 years remain on the ground lease, it will be impossible to place a 30-year mortgage on the owned improvements. For that reason, the BIA should consider gaining legal authority to write leases for either a period extending to 99 years or with escalating terms. For example, if an original lessee should default, desire to sell, or die during the term of the lease, then the lease might have a provision that any second owner could obtain an extension of the lease sufficient to obtain a new 30-year mortgage on the owned improvements.

**Lease Renewal** – The Lessor may renew a lease as it approaches termination, usually at renegotiated amounts of rent; however, that is not automatic and therein lies one of the greatest difficulties in leasing land on which other parties are expected to make capital improvements. If the lease is not renewed, the standard practice is that any improvements made on the land revert to ownership by the Lessor. Other arrangements may include removal of those improvements by the Lessee, or a fixed-sum payment from the Lessor to the Lessee in lieu of removal.

For commercial developments, this provision affects the quality of the investment in terms of the Lessee's ability to finance, refinance, or sell the capital improvements. The primary recourse of a lender if the Lessee defaults is to take back ownership of the property and find some other party to cover the debt service obligations. The closer the default is to the end of the lease period, the more difficult it becomes to find a third party willing to assume that debt or to collateralize new financing. Anyone considering buying the property will likely expect a deeply discounted price to reflect the shortened period for recovering the purchase price.

Despite this concern, commercial projects are the most likely uses for land that is leased because of two factors: (1) the income stream that can be produced by renting facilities or space to subtenants; and (2) the substantial tax advantages that can be gained from depreciating income properties as well as deducting the interest payments. The investment in the project will be analyzed for its after-tax rate of return on equity capital and the decision to go forward will be based on the outcome of that analysis.

It is a different story for residential properties, especially those that are owner-occupied such as primary or second-home developments. In addition to the psychological aversion to giving up their homes at the end of the lease period, owner-occupants do not have the advantage of depreciating their investment although they can still deduct mortgage interest. They will not have income streams from their homes unless they rent them as income properties. Instead, they are more likely to consider their principal payments as wealth-building investments and value appreciation because an internal rate of return (IRR) analysis is not applicable. If the residence reverts to the landowner at the end of the lease term, then both the accrued principal payments and the appreciation also revert to the land owner.

**Lease Revenues** – This is a question of how the allotment lands should be valued to ensure that the lease revenues provide market rates of return over the full period of those leases. The standard method would be to obtain a qualified appraisal to set the current market value, then apply an escalator that assures the lease revenues at least match rates of inflation over the term of the lease. That could be the consumer price index (CPI) as calculated by the US Bureau of Labor Statistics (BLS). Specific guidelines are proved by the BLS on how to use the CPI to adjust contract terms over time.

A cash flow projection based on CPI adjustments may appear to end up with a net present value equal to the original market value, which will be less than the value of proceeds from a sale that are invested at above-CPI rates. However, there is a major difference in the analysis because the leasing model includes the return of the land at the end of the lease period, at the then current market value, to the allotment holder. That adds the full value of market appreciation into the net present value of the leasing cash flows. That adds another 6% to 7% of annual returns to the leasing model.

**Uses of the Property** – Leases often allow for flexibility in the development of properties to adjust for changing markets and other circumstances that are unforeseen when the lease is negotiated. However, the BIA should require having a general plan for development provided by the Lessee prior to the execution of the lease as described in Chapter 4. That can be accomplished with an option to lease that gives the Lessee the right to execute the lease when certain provisions have been satisfied, such as providing an acceptable development plan and showing financial capability to complete the development within a specified time frame. It is generally much simpler to work with an expired option than with a terminated lease. Even for a single family residence, it would be desirable to have an approved site plan and building plan showing elevations with square footage, materials, landscaping, or other provisions normally included in CC&Rs. One way to address this is to create standardized requirements for how properties need to be developed, similar to a zoning ordinance, along with a set of design standards such as those developed for this plan, which can then be referenced in the lease as required performance standards.

**Time and Expenditure for Improvements** – This is one of the most important items in the lease, especially the specified time period for improvements, because it is frequently the most common cause of disputes and/or defaults. Language needs to be included in all leases delineating timed benchmarks that must be met to ensure continuing progress toward the final full development. Equally important is language that clearly describes the rights of the Lessor in case the Lessee fails to meet the requirements of the lease. In general, the primary objective of the default provision should be to ensure specific performance, i.e., that the Lessor actually develops the property in the manner described by the general plan as well as the specific plans and designs. A description of “Remedies for Default” needs to be included, describing each potential default and the specific actions that may be taken by the Lessee to cure the default, or by the Secretary or Lessor to claim a remedy.

**Water Use and Facilities** – Many of the allotments will probably be served by wells, and perhaps by already existing wells owned by the Lessor. Water is an important issue in the Pine Nut Mountains and there needs to be flexible but clear language that describes how water will be provided to each allotment, who is responsible for providing it, what uses are allowed for that water (domestic, agricultural, recreational, commercial, etc.), what limitations are imposed, and how the water use will be monitored. There also needs to be language that states any remedies for violating the terms of this water agreement. The lease should include a disclaimer that groundwater may not be available over the life of the development, and that this provision should be incorporated into all subleases in the Pine Nut Allotments.

Overall, it is important for any lease to have specific provisions for performance and remedies for defaults, to obtain the Lessor’s approval for any changes in a lease through subletting, assignments, transfers of property, or other actions, and for the Lessor to perform due diligence into the qualifications, experience, track record, and financial capabilities of the Lessee before the lease agreement is signed.