

**December 2, 2011**

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### **Congressional Hearing on Sales Tax Fairness; ICSC on Capitol Hill**

On November 30, 2011, the House Judiciary Committee held a hearing on Constitutional Limitations on States' Authority to Collect Sales Taxes in E-Commerce. At press time, Congressman Steve Womack (R-AR), sponsor of H.R. 3179, the Marketplace Equity Act, Texas State Senator John Otto and various members of the retail and online retail community were expected to testify on the issue and possible federal solutions to address the collection issue.

Also in Washington that day, ICSC Chairman David Henry and Simon Property Group CEO David Simon met with various Senate and House members to encourage cosponsorship of sales tax fairness legislation. In addition to H.R. 3179, a bipartisan group of Senators led by Senators Lamar Alexander (R-TN), Mike Enzi (R-WY) and Dick Durbin (D-IL) introduced S.1832, the Marketplace Fairness Act, in that chamber. Both proposals empower states to enforce existing laws by requiring online retailers and other remote sellers to collect sales taxes.

"ICSC commends these Congressional leaders for crafting a bipartisan solution that will enable states to close the online sales tax loophole," said David B. Henry, chairman of ICSC and president & CEO of Kimco Realty Corporation. "It's an issue that hits home for consumers, businesses and local governments in red states, blue states, and everywhere in between. Every day, brick-and-mortar retailers of all sizes do their duty to collect and remit sales taxes, putting them at a significant competitive disadvantage to online and catalogue retailers who continue to reap the benefits from an antiquated and unfair system. It's time Congress took action to level the playing field, close this loophole, and help states and communities across the country."

"Most consumers are unaware that they are already responsible for paying sales tax on online purchases, even when the online retailer does not collect the tax," said Michael Kercheval, president and CEO of ICSC. "The Marketplace Fairness Act will remove the burden from consumers of remitting sales tax on online purchases and correct an artificial disruption in the retail marketplace. The bill will allow all retailers to thrive on equal footing, and reflects the realities of the 21st century marketplace."

ICSC has promoted sales tax fairness for over a decade, advocating that a "sale is a sale" regardless of whether the purchase takes place on Main Street, at a shopping center, via mail-order or over the Internet.

### **NY: ICSC Testifies on Living Wage Bill**

The New York City Council's Committee on Contracts held its second hearing on Intro 251-B, the Fair Wages for New York Act (wage mandate bill) on November 22. G. Lamont Blackstone (Principal, G. L. Blackstone & Associates, LLC) provided testimony on behalf of ICSC.

Intro 251-B has been modestly revised from its original version to require "covered employers" to pay a wage of \$10/hour with benefits or \$11.50 without benefits. Covered employers are defined as not only the owner/developer or recipient of financial assistance, but the tenants, sub-tenants, contractors, subcontractors and all future occupiers of the property for the duration of the requirement.

The wage requirement, which is indexed to inflation, would remain in effect for a minimum of ten years (previously 30 years) from the time a financially assisted project opens. The legislation also imposes unprecedented compliance and reporting requirements on both financial assistance recipients and covered employers.

The requirements of Intro 251-B apply when any combination of local, state and/or federal financial assistance reaches a threshold of \$1 million (previously \$100,000).

While no vote was taken at the hearing, the ultimate fate of this bill remains unclear. Currently 29 out of 51 Council Members have signed onto the bill, which is only six votes shy of a veto-proof majority. The Council will face pressure to act sometime before the 2013 elections.

### **Government Relations Leadership Meeting**

In November, ICSC members convened in Atlanta, Georgia for the annual Government Relations Leadership Meeting. Approximately 100 members attended the event, which featured updates on new and ongoing legislation impacting the shopping center industry.

As part of the event, the inaugural ICSC William M. Sulzbacher Government Relations Leadership Award was presented to G. Lamont Blackstone (Principal, G. L. Blackstone & Associates, LLC). In the spirit of Mr. Sulzbacher, the award recognizes an outstanding ICSC Government Relations Volunteer who demonstrates great capacity for compassion, integrity and service.

The next annual Government Relations event will be the 2011 Strategic Leadership Summit on March 27 - 28 in Washington, DC. The summit serves as ICSC's "Day at the Capitol" event and gives members the unique opportunity to visit Congress to lobby on behalf of the industry.



G. Lamont Blackstone (left) is presented the William M. Sulzbacher Government Relations Leadership Award by ICSC President and CEO Michael P. Kercheval.

### **FL: Tenant Improvements Sales Tax Proposal Withdrawn**

ICSC worked with other commercial property organizations to successfully oppose a Florida Department of Revenue rule proposal to impose the state's sales tax on tenant improvements. The ICSC Florida Government Relations Committee testified in opposition to the proposed rule. The department-generated proposal was characterized as double taxation because the state already applies the sales tax to the improvement materials, property tax on the improved property, and a 6% sales tax on all commercial leases.

### **Supercommittee on Deficit Reduction Fails; Tax Issues Remain on Radar Screen**

This fall ICSC has been closely monitoring the Joint Committee on Deficit Reduction for potential movement on several issues, but most critically the carried interest tax increase that ICSC has strongly opposed for the past four years. During the last few months, ICSC has focused on educating members of the committee and their staff on carried interest and the potential impact of an almost triple-fold tax increase (15% capital gains rate to 44% ordinary income in 2013) on commercial real estate and communities. While ICSC is disappointed that the committee was unable to come to an agreement that would address the Federal deficit, the real estate community is relieved that the carried interest tax was not addressed.

Congress still has a significant checklist of matters to deal with before it adjourns for the holidays: expiring tax provisions, temporary policies that are sunseting (unemployment insurance, Medicare reimbursement rate for physicians, Alternative Minimum Tax patch, payroll tax cuts) and the FY 2012 budget. With only three weeks to accomplish this task, carried interest continues to be considered by some as an easy solution to offset the cost of any of these items.

Looking to next year, ICSC will be scrutinizing various tax reform proposals that may be introduced. The ICSC Economic Policy Committee is starting to identify various real estate tax provisions that may be considered as part of a Congressional effort to broaden the base in order to bring down corporate tax rates. Commercial real estate items that are most at risk include: (1) Carried interest (2) Section 1031 like-kind exchanges (particularly deferred exchanges and the use of Tenancy In Common Assets); (3) Changing the 25% depreciation recapture rate to an ordinary income recapture rate; (4) Potential attacks to tax-motivated structures such as "private REITs;" and (5) Certain tax-favored items such as accelerated depreciation on leasehold improvement or moving the 27.5-year depreciation life for apartments to the 39-year life that exists for other real estate.

## **Wetlands Guidance Document Opposed**

The U.S. Senate is expected to vote sometime after Thanksgiving on an amendment being offered by Senators John Barrasso (R-WY) and Dean Heller (R-NV) to the fiscal 2012 Energy-Water appropriations bill (HR 2354). The amendment would bar the U.S. Environmental Protection Agency and the Army Corps of Engineers from implementing a controversial "Guidance" document that was released in draft form in May 2011. At issue is whether or not federal permits (over and above state permits) will be required for a larger class of private and municipally owned properties. The U.S. Supreme Court has been critical of Agency efforts to designate areas as federally jurisdictional "wetlands" such as isolated waters, ephemeral streams and even manmade ditches. Obviously, the expense and time required to obtain additional federal permits is driving much of the opposition to the new Guidance. ICSC supports efforts to slow down any effort to expand federal jurisdiction so that more impacted entities will be able to analyze the proposal and to provide feedback before such rules become effective. ICSC also supports efforts to make Congress aware of exactly what EPA and the Corps are planning to do and to convince Congress to become directly involved.

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