

**April 12, 2013**

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#### **ICSC Members Lobby Congress on Key Industry Issues**

ICSC members turned out in force for the annual Strategic Leadership Summit in Washington, DC on April 9-10. This year nearly 200 members from 33 states met with more than 300 Congressional offices to discuss legislation impacting the retail real estate industry. While the primary focus of our Congressional visits was Marketplace Fairness Act (S. 336/H.R. 684), ICSC members also covered a proposed increase to the carried interest tax rate and Federal Stormwater Regulations as an example of EPA overreach.

#### **Update on FASB Activity**

As previously reported the Financial Accounting Standards Board (FASB) continues to struggle with any last minute changes to its next Exposure Draft, expected to be released in mid-May with a public comment period ending in September. Chairman Leslie Seidman (whose term ends in June) cast the deciding vote on April 10 in the 4-3 decision to move forward. Although she supports the current language of the Exposure Draft, she admits that FASB has not been completely successful in addressing the realities of the two major lease models.

In its efforts to harmonize accounting standards for business leases, FASB has been struggling with the distinctions between finance-type and rental-type leases. As ICSC and its coalition allies frequently have pointed out, some leases transfer ownership rights (and thus create a tangible asset) while other leases only transfer a right of use (for example, these leases are not "debt" in bankruptcy since they depend upon continued performance by both the lessor and lessee). Part of the problem for FASB is its goal of establishing a single, one-size-fits-all accounting standard for business leases that will not significantly disrupt business practices and settled corporate law.

ICSC will continue to monitor the progress, or lack thereof, in FASB's deliberations.

#### **CO: House Bill May Move State Closer to Marketplace Fairness**

Earlier this week the Colorado House introduced H.B.1295, which is designed to address minimum simplification requirements of the federal Marketplace Fairness Act in order for Colorado to be able to require remote sellers to collect sales tax on taxable sales made within the state. Colorado is not a party to the Streamlined Sales and Use Tax Agreement, as Colorado has a very strong tradition of local control and the home rule municipalities are very reluctant to give up control of their sales tax in any way, including collection of the sales tax. H.B. 1295 establishes remote sales as a part of existing sales tax laws, specifies that only the state's sales tax base and not a local sales tax base will apply to all remote sales, requires the state department of revenue to be responsible for all state and local sales tax administration of remote sales, and allows a home rule municipality to opt in to accept the state's administration and distribution of its local sales tax on remote sales. The bill also requires the state to provide information and software to remote sellers to facilitate calculation and payment of the sales tax.

Also recently introduced, H.B. 1288 requires the state department of revenue together with a nonprofit that represents local government taxing entities (the Colorado Municipal League) to gather information in order to recommend a uniform sales and use tax base that is revenue neutral to all local governments throughout the state. This is a complex undertaking that would undoubtedly simplify the sales tax system in the state. The municipal league and the state chamber of commerce are working with the bill sponsors to determine the best way to move forward with this plan.

#### **MD: Indemnity Deed of Trust Tax Repeal Passed by Legislature**

This week the Maryland legislature passed both H.B.1209 (Delegate C. William Frick, D) and S.B. 436 (Senator Douglas J. J. Peters, D). The two identical bills seek to return a long-used approach to avoid the current payment of mortgage

recording taxes on a commercial real estate loan. Rather than providing a direct deed of trust on the real estate to secure the loan, the property owner creates a related entity to act as borrower (usually a wholly owned subsidiary) and the property owner guarantees the loan, securing the guaranty with an indemnity deed of trust (IDOT). Last year's state budget created the recording tax on an IDOT.

ICSC, along with other groups, worked together to reverse the 2012 measure that eliminated the IDOT tax exemption. Upon presentation of the bill Governor Martin O'Malley (D) has 30 days to veto or sign the bill into law.

### **MI: Court Issues Cherryland Decision**

The 2011 Cherryland case that rocked the CMBS world may have finally been laid to rest by an April 9 court decision. The original Michigan Court Appeals Cherryland decision held that an SPE borrower's insolvency was sufficient to trigger full recourse to the carve-out guarantor. At the urging of commercial real estate interests, including ICSC, the Michigan legislature passed the Nonrecourse Mortgage Loan Act in early 2012 to neutralize the effects of that decision and make any "insolvency" carve-out unenforceable if the loan itself was otherwise considered a nonrecourse loan. The law was made retroactive to protect guarantors on existing underwater loans and any loan for which a lender could still seek a deficiency judgment. The Cherryland lender challenged the new law, arguing that it was unconstitutional to apply the law retroactively to strip it of its contract rights and the \$2.1 million judgment it fought so hard to obtain. In a 3-0 decision, the Michigan Court of Appeals upheld the retroactive application of the law. It held that Michigan had a substantial interest in protecting its economy from the fallout of insolvency being a recourse carve-out in Michigan. It found the industry testimony and evidence presented during legislative hearings very effective in demonstrating the harm of the Cherryland decision becoming binding precedent and found the retroactive application to be valid on that basis.

### **MN: New Tax Plans Under Consideration**

The Minnesota legislative session continues to pick up steam as Senate DFLers recently unveiled a plan to make big changes in the state's sales and corporate taxes. They called for extending sales taxes to a wide range of personal services while lowering the sales tax rate. They would not tax business-to-business services, such as legal, accounting and advertising but plan to propose income tax increases on top earners, an idea strongly supported by Governor Mark Dayton (D).

The plan would lower the state's corporate income tax rate to 9% from 9.8%, which is third-highest in the nation. To offset the lost revenue, they propose eliminating "loopholes" that provide tax breaks for foreign royalties and foreign operating corporations. Senate and the House tax committees will unveil their main tax bills over the next two weeks.

Many business leaders are pressing DFL legislative leaders and Gov. Dayton to focus on budget reductions rather than tax increases. Business leaders had previously persuaded Gov. Dayton to drop a major tax proposal that included billions of dollars in new business taxes.

A bill, proposed in the Minnesota House to help pay for the new Vikings stadium, would impose a 10% tax on gross receipts from wholesale sales of professional sports memorabilia (not collegiate) and would extend the state's sales tax to apply to seat licenses and to the rental of suites, box seats and similar seating at pro and college stadiums and arenas. No vote has been taken.

According to the latest revenue report, Minnesota collected \$145 million more than anticipated in February and March. The Department of Minnesota Management and Budget says receipts from each of the three major taxes -- income taxes, sales taxes and corporate taxes -- exceeded expectations.

## **Upcoming State GR Events**

- **CT Day at the Capitol:** 17 April, 2013; Hartford, CT
- **IL Day at the Capitol:** 1 May, 2013; Springfield, IL
- **CA Commercial Real Estate Summit & CBPA Annual Meeting:** 11-12 June, 2013; Sacramento, CA

For more information about participation in the ICSC Days at the State Capitols please contact Lorin Alusic, State and Local Government Relations, at [lalusic@icsc.org](mailto:lalusic@icsc.org).

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