GPP eNews
Office of Global Public Policy
ICSC Legislative News, Events & Resources

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Carried Interest Back in the News
Last week federal lawmakers turned back to issues related to the federal budget. Once again President Barack Obama and Congressional Democrats are looking to increase the tax on a general partner's carried interest as a key piece of their budget related plans. For the last six years ICSC has fought against proposed legislation to tax the general partner's "promote" as ordinary income instead of as capital gains. This would represent a more than 100% tax increase that would disproportionately impact the real estate industry.

Ways and Means Ranking Member Sander Levin (D-MI) and Senator Carl Levin (D-MI) have both said that they would like to see Congress consider cutting tax benefits and loopholes -- such as the exemption of taxation on municipal bonds and the preferential tax treatment of financial gains known as "carried interest" -- to provide revenue to offset the sequester, further shrinking the number of tax carve-outs that could be traded away for lower rates.

In a CBS interview on Sunday, President Barack Obama reaffirmed that he would also seek new revenue to help bring down the deficit and specifically mentioned the carried interest rate paid by private equity and hedge fund executives. Democrats and even some Republicans view carried interest as an unfair loophole that applies a lower 15% rate on what they describe as ordinary, not investment, income. "There is no doubt we need additional revenue, coupled with smart spending reductions, in order to bring down our deficit. And we can do it in a gradual way so that it doesn't have a huge impact," Obama said.

Court Rejects White House Recess Appointments
On January 25, 2013 the U.S. Court of Appeals for the District of Columbia decided an important labor case for business. In contesting a National Labor Relations Board (NLRB) decision requiring Noel Canning, a Washington state-based soda-bottling company, to enter a collective bargaining agreement, Canning alleged that that the NLRB's decision was invalid because the majority of the NLRB's board was not legally appointed. Those supporting Canning in amicus briefs included the U.S. Chamber of Commerce as well as Senate Minority Leader Mitch McConnell (R-KY), 41 other Republican Senators and House Speaker John Boehner (R-OH). The Court ruled that President Obama violated the Constitution when he bypassed the Senate to fill three NLRB vacancies with recess appointments. This means the NLRB lost its quorum when former NLRB Member Craig Becker's term expired on Jan 3, 2012.

The ruling also may impact those decisions and rules involving recess appointee Becker. Becker's appointment was not during an intersession recess of Congress. So any cases where he was one of three members on a decision may be subject to challenge. This also means the Board may have lost its quorum when former Chair Wilma Leibman left the Board on August 27, 2011. The result does provide the business community with additional grounds to challenge the ambush elections rule, as it was issued after Leibman left the Board.

The Noel Canning decision, if upheld, could also serve as grounds for invalidating numerous decisions made last year by the NLRB. Anyone facing an adverse decision issued by the NLRB since that time may appeal the ruling to the DC Circuit. However, the Court has stayed its decision pending rehearing or en banc consideration and the government is likely to appeal. While the Jan. 25 decision could be a critical stepping stone, separate cases would have to be decided in order to void individual NLRB rules, rulings or regulations promulgated over the last year.

Overturning nearly 100 years of legal opinions by the Office of the Attorney General, the Obama

Administration took the view that because no official business was being conducted during these pro forma sessions, the Senate was in recess despite its failure to recess officially. In a nutshell, the Court found the recess appointment clause only permits recess appointments for vacancies that arise during an "intersession" recess (intersession recesses are those that occur between sessions of Congress rather than "intrasession" recesses within Congressional sessions) and the recess appointment must be done in the same intersession recess in which the vacancy arose. ICSC will continue to keep you in the loop on the implications of this decision on recent NLRB cases.

January Brings Governors' Budget and Tax Proposals
As Governors seek to put their states budgets on stable footing, the ideas on what tax plans are best for each state are coalescing along party lines. While tax and spending perspectives have traditionally been easy to identify by political party, some recent budget proposals are out of sync with those historical positions.

The two types of tax changes proposed can be broadly defined as increases in sales taxes with lower income taxes or decreases in income taxes with increases in sales taxes. Another common twist is to add "services" to the list of transactions that are taxable. Services range from haircuts to attorneys' fees and often impact the commercial real estate industry.

For the retail real estate industry, each tax shift creates concerns. For example in Virginia, Governor Bob McDonnell (R) is moving his plan to eliminate the state's tax on gas (not including diesel) in exchange for an increase in the state's sales tax rate. Overall, McDonnell says the plan would raise $3.2 billion in additional funding over the next five years. In Louisiana, Governor Bobby Jindal (R) is seeking a repeal of personal and corporate income taxes. It is also reported that Jindal will seek an increase in the state's sales tax rate as a way to pay for the repeal. Nebraska Governor Dave Heineman (R) is asking for a similar shift. Governor Sam Brownback (R) of Kansas, in turn, has proposed to leave a temporary sales tax increase in place as a way to lower and eventually end that state's income tax.

However, in Massachusetts Governor Deval Patrick (D) has proposed to increase the state income tax rate while lowering the state sales tax and gradually increasing the gas tax, tolls and public transportation fares. His proposals are estimated to raise almost $2 billion in additional revenue. Minnesota Governor Mark Dayton (D), proposed a budget that seeks to lower the sales tax rate, but in doing so he is seeking an expansion of the sales tax to a long list of services and to articles of clothing priced over $100. Dayton also proposes to raise the income tax rate for the top tier of Minnesota's earners.

Every Governor's budget plan must now navigate the waters of their state's Legislature and will certainly change along the way. For more information, contact Lorin Alusic, State and Local Government Relations Manager at lalusic@icsc.org.

CO: New Session Signals New Legislation
The 120-day Colorado legislative session kicked off in January. The divided chamber of the past two years is no more, as the Democrats took over control of the House and maintained control of the Senate. Of the bills being introduced, the following are of the most interest to our industry:

HB 1090, this year's "prompt-pay/retainage" bill, requires that both owner and contractor make regular progress payments approximately every 30 days to contractors and subcontractors for work actually performed, and limits retainage to 5%. It applies to both public and private construction contracts. ICSC is working with a large coalition of public and private owners and some contractors in opposition to this bill.

HB 1113 creates a pilot program for the City and County of Denver to streamline property tax appeals. ICSC is working with the Denver property tax administrator on the language of this bill in the hopes of working out a system that truly does streamline the process, thereby benefiting both property owners and the City/County.

ICSC is also working in support of SB 52, which gives contractors/developers the right to repair construction defects in transit oriented development. This is very limited and unfortunately unlikely to pass, however we expect construction defect legislation to be introduced later in the session that we will oppose – legislation to increase the caps to include attorneys' fees and lengthen the statute of limitations. Construction defects laws in Colorado are already having a chilling impact on development, particularly condominium development, which is common at transit-oriented development. At a minimum this bill will draw attention to the issue. For more information, contact Lorin Alusic, State and Local Government Relations Manager at lalusic@icsc.org.

Upcoming Days at the Capitol

- February 5-6 - Tallahassee, Florida
- February 6 - Annapolis, Maryland
- February 12 - Olympia, Washington
- March 5 - Austin, Texas
- March 21 - Denver, Colorado

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.

2013 Strategic Leadership Summit

For more than 20 years the shopping center industry has assembled in Washington, DC to deliver its legislative agenda to Capitol Hill. ICSC will hold the 2013 Strategic Leadership Summit on April 9-10. Make your voice heard on legislation ranging from tax reform to the environment to workforce matters. SLS provides an opportunity to have face-to-face meetings with Members of Congress or their staff where you can articulate your views on issues of importance to your company and the shopping center industry. **Click here for more information.**

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