

Sample Federal Law Update: A Tax Extender made permanent

Welcome to the 2016 NAIOP Colorado "Law Corner"!

As a part of Husch Blackwell's sponsorship package for 2016, we have been provided the opportunity to share with our NAIOP member's information regarding legal and legislative issues that are relevant to your activity in the commercial real estate market.

As a starter, let me share some initial updates with you impacting commercial real estate at the Federal, State and Local levels.

As many of you know, for more than a decade, NAIOP has been successful in securing tax extensions for 15-year leasehold depreciation. Though the extensions have been effective, we have long advocated the importance of its permanency.

Today, it is gratifying to share that we have achieved our goal, as the Protecting Americans from Tax Hikes (PATH) Act of 2015 makes 15-year qualified leasehold improvement depreciation permanent!

In addition to leasehold improvement, the bill also includes these significant provisions:

- Section 179 small business expensing – The bill permanently extends small business expensing limitations and phase-out amounts, and makes permanent the rules allowing for certain qualified leasehold improvements to be eligible for expensing. It increases the expensing limit to \$500,000 (with a phase-out at \$2 million) and indexes for inflation.
- Five-year extension for bonus depreciation – Extends bonus depreciation for property acquired and placed in service during 2015 through 2019. The bonus depreciation percentage is 50 percent for property placed in service during 2015, 2016 and 2017 and is reduced thereafter, to 40 percent in 2018, and 30 percent in 2019. Applies to qualified property with a recovery period of 20 years or less.
- Five-year extension for new markets tax credits – Authorizes the allocation of \$3.5 billion of New Markets Tax Credits for each year from 2015 through 2019.
- Two-year extension for the energy-efficient commercial buildings deduction – Extends the deduction for energy

-efficiency improvements for 2015 and through 2016, and updates the standards used to the ASHRAE 2007 code.

- Reforms the Foreign Interest in Real Property Tax Act (FIRPTA) – Increases the stake that a foreign investor can take in a real estate investment trust without triggering tax liability, and exempts qualified foreign pension funds from FIRPTA taxation.

Sample of State Law Updates:

A couple of matters that were addressed last year will likely be returning this year, including:

1. Construction Defect legislation – As a result of the Vallagio case in mid-2015, the Colorado Court of Appeals ruled that Declarants/Developers that have mandatory arbitration provisions in their declarations will be able to retain them and no amendment to the mandatory arbitration provisions will be effective without the Declarant's approval. This case has been appealed to the Colorado Supreme Court so final determination is yet unknown. There is a strong likelihood that the construction defect legislation that was introduced and failed in the 2015 session will return, possibly utilizing a different approach to address some of the concerns from last year. The passage by a dozen local jurisdictions in 2015 of ordinances addressing construction-defects will hopefully put pressure on the state legislators to create a uniform set of laws at the state level that address these issues in a manner to prevent the need to address differing and possibly inconsistent ordinances at the local level.

2. Urban Renewal – Because of the last-minute introduction and passage of an urban renewal bill by the counties in 2015, without any communication with the impacted industry, many of its provisions are in need of clarification at the least and hopefully modification to address some of the intended and unintended consequences of last year's bill. The bill addressed issues regarding representation of various additional governmental and quasi-governmental entities in the approval process for the formation of an urban renewal area and plan, as well as a formulaic approach to shared funding that defies the necessary

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flexibility required of these innovative redevelopment plans, the result of which seriously hampers the ability to utilize this valuable tool of last resort. But for this tool, the redevelopment of distressed properties to produce such projects as the Belmar mixed-use community in Lakewood, the Denver Dry complex (Retail, office, parking and affordable housing) in downtown Denver, the

Stapleton community infrastructure, and the Mercantile Square redevelopment that provided both the Tattered cover downtown bookstore and the adjacent employee housing property, to name just a few, would likely not have happened. Hopefully, this session will see modifications appropriate to maintain the flexibility needed with this important tool of last resort.

Local Update:

In addition to the above-referred-to local ordinances regarding construction defects, there has been activity through NAIOP Colorado to address current delays and internal inconsistencies in the local permitting process for projects in Denver and with regard to Xcel's process with developers and their projects. As a result of extremely long delays in these two permitting processes, NAIOP representatives, consisting of several members directly impacted by these delays, have met with both Xcel and, separately, with the City & Country of Denver.

With Xcel, the issues included both delays in processing that were months longer are reasonable, as well as inconsistencies between what is approved in the plans and how the field interprets them. As a result of several meetings between NAIOP and Xcel members, Xcel has commenced a "pilot program" utilizing projects submitted by NAIOP members that involves an "advocate" within Xcel who would work with the project developer to coordinate the process for and on behalf of the developer. Hopefully this advocacy representative will allow for more efficient and consistent processing of permits.

NAIOP members also have met with the Mayor's office (Evan Dreyer) and with a team of city representatives lead by Director of Planning and Development (Brad Buchanan) in the City & County of Denver. Brad's team brought the NAIOP delegation up to speed on the City's recent efforts to get a handle on the issues and there was an indication that the city may be restructuring the Development Services offices to allow for more responsiveness and consistency in commercial projects. The City indicated that they are now up to speed with regard to residential projects and hope to be current with commercial projects by the end of January. The NAIOP team will be further meeting with Brad's team at the end of January to assess how they are doing and what is being done going forward. There is an unanswered issue as to what is necessary to actually address the "silo" issues within the City's

departments that create some of the delays and inconsistencies, and this concern is being addressed also to the city.



For further information about the legal issues associated with tax extenders, contact James M. Mulligan at James.Mulligan@huschblackwell.com.

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