BUSINESS BRIEFS

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First Quarter 2017

2017 Real Estate Legislative Update: Rent Control

By Alan Sorem

The Oregon legislature is back in session, and Oregon landlords are again a primary target for legislative reform. Last year, advocates for legislative intervention concerning the lack of affordable housing successfully repealed a 17-year-old statewide ban against inclusionary zoning. The prior statute prohibited zoning ordinances mandating affordable housing units as conditions to land use approvals and permits. The current law allows a mandate for affordable housing units for structures with 20 or more units and authorizes local governments to adopt a construction excise tax to further subsidize affordable housing. This year, the legislature is targeting the existing law that prohibits local governments from enacting rent control. The following is a summary of a selection of these bills currently pending before the legislature.

Rent Control

Speaker of the House Tina Kotek has introduced House Bill (HB) 2001. If enacted, it will create a moratorium on rent increases greater than five percent for residential leases. Higher rent increases may be permitted in some circumstances, such as if allowed under a local ordinance or in the case of an approved substantial renovation or for health and safety or habitability repairs. If a higher rent increase is allowed due to repair, the tenant would have the option to terminate the tenancy and receive three months' rent in relocation expenses from the landlord. Violation of these provisions subjects the landlord to liability for the tenant's attorney fees and the greater of five months' rent or the tenant's actual damages. The bill exempts landlords providing reduced rent to tenants under federal, state, or local governmental programs.

HB 2001 will likely be subject to proposed amendments as it moves through the legislative process. One issue with the proposed moratorium that will garner attention is the methodology for calculating rent increases. For example, will the final bill allow two or more rent increases of five percent within a given year? Additionally, the initial reaction of many landlords to this bill has been to increase rents now as a hedge against potential future restrictions on rent increases. However, the legislature might seek to include such raises within the scope of its obligations and civil penalties.

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Retroactive legislation and civil penalties are possible under the Oregon and United States Constitutions.

HB 2001 may also repeal ORS 91.225, which prohibits local ordinances regulating rent. This repeal will expressly permit cities or counties to adopt rent stabilization programs so long as those programs exempt owner-occupied duplexes and provide the landlord a process to increase rents in order to obtain "a fair rate of return. . . as determined by the city or county." Speaker Kotek has advocated that the ability to petition the regulating entity for rent increases distinguishes the proposed legislation from existing rent control provisions that are the subject of criticism from economists. Whether or not such a rent control program will result in more affordable housing remains to be determined.

Tenancy Termination

Several important bills have also been proposed affecting a landlord's ability to terminate tenancies. These restrictions on termination are intended to protect tenants from landlords who are attempting to avoid the rental increase restrictions created by HB 2001. These restrictions, if fully enacted, effectively end no-cause evictions, and they require a landlord to rent a unit to a tenant until the tenant desires to cease the tenancy.

HB 2004 prohibits landlords from terminating month-to-month tenancies without cause, subject to certain limited exceptions. Exceptions include conversion of the property to a non-residential use, demolition, uninhabitability, repair, or sale. Even if an exception applies, the landlord must give 90 days' notice and provide relocation expenses in the form of three months' rent and the return of any security deposit. Violation of the termination provisions subjects a landlord to liability for three months' rent and the tenant's actual damages. The bill would also mandate that a fixed-term tenancy becomes a month-to-month tenancy at its specified end date unless the tenant gives notice to renew or terminate. In the case of a fixed-term tenancy, the landlord would also be required to make a written offer to renew the tenancy for at least the same duration. HB 2004 would be effective immediately if enacted.

HB 2240 also prohibits landlords from terminating a month-to-month tenancy without cause. Unlike HB 2004, however, a landlord may give 90 days' notice of termination without cause, but must pay the tenant three months' rent in relocation expenses. HB 2240 also allows for termination subject to the same exceptions appearing in HB 2004, though under HB 2240 the landlord need not provide relocation assistance if an exception applies. This bill would also allow tenants to elect to renew their rental agreements at any time during the tenancy so long as the tenant has not received notice of termination from the landlord. Violation of the bill's provisions would subject a landlord to liability for three months' rent, actual damages, and the tenant's attorney fees. If enacted, the bill would be immediately effective and would apply to fixed term tenancies entered into or renewed after the bill's passage and existing month-to-month tenancies.

The session just started, and it is difficult to predict what legislation will be enacted and what the final product will be. We will continue to monitor these bills and others during the course of the session. If you have any questions or concerns, please contact one of our firm's real estate or litigation attorneys for advice.

Here We Go Again:
The Repeal of the Federal Estate Tax is Once Again on the Political Stump

By Jeff Moore

Some of you may recall how the federal estate tax was on the verge of repeal back in 2010. But the guessing game as to the final status of the estate tax started nearly a decade earlier in 2001. The Economic Growth

and Tax Relief Reconciliation Act of 2001 ("***2001 Tax Act***") raised the federal estate tax exemption from $600,000 to $675,000 with a gradual increase to $3.5 million starting in 2009, followed by a complete repeal of the estate tax in 2010. But because the Congressional Budget Office determined that the estate tax repeal would create a deficit only one year later in 2011, federal law required that the estate tax repeal would itself be repealed effective January 1, 2011 and the exemption drop back down to $1 million. In short, federal estate tax law was a heap of uncertainty.

The incredible uncertainty made for a wild, decade-long roller coaster ride. Would the repeal be reinstated come 2011 or would a higher exemption amount be made permanent? Would planning strategies implemented before 2011 be honored or would a retroactive "clawback" of taxes be imposed? The American Taxpayer Relief Act of 2012 (***"2012 Tax Act***") was passed to finally put a stop to the never-ending roller coaster ride. The 2012 Tax Act was touted as the new and *permanent* law to put all questions as to the future of the federal estate tax to rest. The 2012 Tax Act, which is today's prevailing law, made the following significant changes:

- Set the federal estate tax exemption at $5.25 million, but was indexed for inflation so as to account for fairness over all future years (e.g., the inflation-adjusted exemption as of January 1, 2017 is $5.49 million);

- The estate tax rate on any amount in excess of the federal exemption was made a flat rate of 40%, as opposed to the marginal 40% to 55% rate that we were heading towards prior to the passage of the 2012 Tax Act;

- The federal lifetime gift exemption amount was made the same as the federal estate tax exemption amount (i.e., any aggregate gifts during life that do not exceed the exemption amount—$5.49 million—will not trigger any payable gift taxes;

- Retained the inflation-adjusted annual exemption amount (which is currently $14,000 per donor per donee per year);

- The Generation-Skipping Transfer Tax exemption amount was also increased to match the federal estate tax exemption amount; and

- "Portability" was implemented to allow a surviving spouse to utilize a deceased spouse's unused federal estate tax exemption amount on the surviving spouse's own death (although this portability is not available for the Generation-Skipping Transfer Tax exemption).

With the passage of these "permanent" estate tax laws, clients finally had some fixed guideposts to help navigate their estate planning.

Well, so much for permanency. President Trump, even prior to the election, made his position clear that he intended to completely repeal the estate tax. His position has not changed since the election. However, what many do not hear beyond the "repeal the estate tax" headline is that President Trump's proposal also comes with a different type of tax—a capital gains tax.

Under current law, when a decedent passes away his or her assets receive an adjusted basis to the date of death value (other than assets not yet subjected to income tax, such as retirement accounts and IRAs). So if a decedent purchased real property for $100,000 during life, and the property was valued at $200,000 at the decedent's death, the basis would be adjusted to $200,000 upon the decedent's death. Although the real property would be subject to the estate tax under current law, the inherent capital gain of $100,000 would be washed away. That may no longer be the case if President Trump's proposal for the estate tax repeal is implemented.

It is certainly early in the political process, but President Trump's guidelines for the estate tax repeal reportedly include a limited basis adjustment. In other words, there would not be an estate tax but there would be a

built-in capital gains tax liability for the heirs once they sell their inherited assets. Using the same real property example from above, there would not be an estate tax on the $200,000 value; there would instead be no basis adjustment and a resulting capital gains tax on the $100,000 gain.

The proposals are, of course, merely proposals at this point. But with a Republican-controlled Congress the chances of an estate tax repeal under President Trump—along with any interesting tax turns that may come with such a repeal—is a more likely possibility than ever before. However, talk of repeal is not a partisan issue. On January 24, 2017, Rep. Kristi Noem (a Republican from South Dakota) and lead co-sponsor Rep. Sanford Bishop (a Democrat from Georgia) introduced legislation in the House (H.R. 631) that would fully repeal the federal estate tax. Sen. Thule (a Republican from South Dakota) introduced similar legislation in the Senate (S. 205). A Policy and Taxation Group blog recently stated that "the introduction of [Noem's/Bishop's] and Thule's legislation is an important signal that estate tax repeal is a top priority in Congress, and thus continues to build momentum for the repeal movement." We'll see.

Regardless of any ultimate changes in federal law, Oregon is not slated for any changes and would not be affected by changes to federal law in any event. So no matter how wild the federal estate tax ride becomes, the Oregon exemption will remain at $1 million and its estate tax rate will continue as a marginal rate of 10% to 16% on the excess. It is also important to remember, unlike federal law, that Oregon does not permit portability. All that said, estate taxes will remain an important estate-planning issue for us Oregonians, despite the federal roller coaster.

Oregon Sick Leave: One Year In

By Abby Fitts

The Oregon Sick Leave law went into effect one year ago, and after countless discussions, seminars, and drafted policies, we wanted to pass on some of the quirks and traps we have found to those who have not yet updated their policies and to those who think that they need to tweak things since last updating those policies.

Complying with the law can be tricky. By BOLI's own admission, the law was not written to mesh easily into existing state (much less federal) law. Those issues are combined with BOLI's new change of gears from education to enforcement (and penalties).

Let's take a look at some things you will want to consider as we enter the first year of enforcement:

- You can offer paid time off ("***PTO***") instead of sick leave, so long as you meet all the other requirements for sick leave—including granting time off for sick child and bereavement leave.

- Many employers have offered different leave to different employee groups. For example, part-time and seasonal employees may only get sick leave that accrues at the statutory minimum of one hour for every thirty hours worked. Full time employees may instead get a lump sum of PTO.

- As most companies know, employers with ten or more employees are required to offer PTO (except for in one oddball city where the threshold is six employees—ahem, Portland). While the statutes expressly exclude owners from the count, BOLI has said anyone receiving W-2 wages counts as an "employee" regardless of whether the person is an owner.

- For piece-rate or other production employees, you can pay them at minimum wage, but you

should have a written policy that states that this is your practice.

- Employees may use sick leave in increments of one hour or more. That is, of course, unless you have 25 or more employees and the leave is OFLA-qualifying (including sick child leave). In that case, you must allow the employee to use the smallest amount of time you track—usually not less than 15 minute increments.

- You can request medical verification (on your dime) if an employee has missed more than 3 consecutive scheduled work days, or if you suspect abuse of your policy. But, remember that you may be able to get verification under other leave laws, like OFLA/FMLA or the ADA. Contact a member of our employment team if you want to know more about verification under applicable laws.

If you are front-loading your leave, here are some things to keep in mind:

- Front-loading offers an option less administratively burdensome to employers, but places some risk on losing employees early in the year once all an employee's leave has been used up.

- You may require an employee to forfeit all unused leave at the end of each year.

If you follow the accrual method, there are some important things for you to know:

- What do you do with accrued but unused time at the end of the year? The law will not allow you to forfeit that leave. Rather, you may either carry over up to 40 hours of accrued but unused time, or offer a pay out of that time to employees. Employees cannot be forced to accept a payout, and the payout will be considered taxable income at the point the employee is eligible for it.

- Although your policy can limit leave to 40 hours a year, employers with 25 or more should keep in mind that employees can draw down on their leave banks for OFLA-qualifying reasons, regardless of policy limitation. For example, if an employee has 65 hours in his or her bank mid-year because the employee carried over 40 hours of last year's accrued but unused time, he or she can draw down all 65 hours for an OFLA-qualifying reason regardless of what the employer's policy says.

Remember, sick time is protected time. You can get sued if you deny, interfere with, restrain, retaliate or discriminate against the use of this time—or if an employee just thinks that you are.

Even if you believe that you have a generous policy that has worked for decades, double check to make sure that you are compliant with the Oregon Sick Leave law. And, if you are working on tweaking a policy to ensure compliance, run through the above traps to make sure you don't fall victim to one. As always, feel free to run your policy by one of our employment lawyers to make sure you are protected.

Oregon Legislators Consider Eliminating Property Tax Limitations

By Mitchell Emmert

Ambrose Bierce defined property as "[a]ny material thing, having no particular value, that may be held by *A* against the cupidity of *B*." While Bierce may have considered the value of property to be entirely subjective, property tax is the greatest source of revenue for Oregon's local governments and, as such, creating a fair system to value property for tax purposes is a subject that has frustrated policymakers and

taxpayers for decades. However, Senate Joint Resolution 3 ("***Resolution 3***") could simplify the Oregon property tax system at the cost of eliminating key protections relied on by property owners.

As a primer on Oregon's current methodology, owners of real property (e.g., land, homes, buildings, fixed machinery), manufactured homes, and personal property used in a business are subject to an annual property tax. The tax is based upon the *taxable assessed value* of their property determined as of January 1 of each year. The taxable assessed value is the lesser of the *real market value* of the property, as determined by a local assessor, and the *maximum assessed value,* which is simply the maximum assessed value of the property in the prior year plus 3%. This limitation was enshrined in the Oregon State Constitution by Oregon Measure 50, which was enacted in 1997 As a consequence, while arbitrary, the original assessment on which maximum assessed value figures are based is a property's real market value in 1996.

If this system sounds confusing, you are in good company. In 2015 *The Oregonian* reported that Mark Hass, the state senator who chairs the Oregon Senate Finance and Revenue Committee, appealed his property tax bill and won, but because the adjusted real market value of his home was still in excess of its maximum assessed value, his tax bill didn't change. Hass later admitted, "Here I am, the chairman of the revenue committee, and I was befuddled."

As with most controversial ideas in Oregon, Measure 50 traces its roots to California. In 1978, as a response to rapidly rising home values that led to skyrocketing property taxes, California taxpayers enacted Proposition 13, which limited increases to the assessed value of property to 2% annually. In Oregon, during the dotcom boom of the 1990s, property owners faced a similar frustration to that of California taxpayers prior to 1978. In response, Oregon tax activists, including Bill Sizemore, put forward Measure 47, which ultimately was enacted in a modified form as Measure 50.

The key difference between the property tax system in California versus Oregon is that while Proposition 13 allows property to be reassessed to the purchase price when it is sold, Measure 50 bars reassessment except where a property has been improved or developed (e.g., addition of structures, new subdivisions). As a result, Proposition 13 is routinely criticized for the disparate taxes paid by neighbors enjoying the same public benefits when one is a long-term owner and the other has recently purchased their home, sometimes at greater than ten times the cost and, thus, ten times the assessed value.

In contrast, Oregon neighbors with comparable homes are typically taxed similarly, though property taxes may be substantially greater for new developments than for neighborhoods developed prior to 1996. For example, similarly priced homes in recently developed areas are often taxed far greater than remodeled homes in rapidly gentrifying areas such as Northeast Portland. This disparity is due to the value of the older homes appreciating at a far greater rate than 3% per year, and the maximum assessed value of homes built in the last twenty years being based on the year they were built. In addressing this variance, Senator Hass commented that "[h]omes of equal value are paying vastly different property taxes, which is just a basic unfairness we have to remove."

Resolution 3 would eliminate the maximum assessed value limitation and instead provides that "each unit of property shall be assessed. . . at the real market value of the property." As a result, all taxpayers would be at the mercy of the current assessed value of their property, regardless of when it was developed and/or built.

While addressing injustice is a predictable justification for tax reform, taxpayers often consider their potential out-of-pocket costs to be much more salient. Based on the Oregon Department of Revenue's Property Tax Statistics for 2015–2016, the total real market value of taxable property within the state is approximately $508 billion, as compared to the assessed value of property of $371 billion. It follows that the passage of Resolution

3 as proposed would allow local governments to impose tax on an additional $137 billion of property values. This could result in a 37% increase in the amount of property taxes paid by Oregonians. Thus, it is fair to conclude that the Resolution 3 is more related to raising additional revenues than removing unfairness.

It should be noted that Resolution 3 does instruct the legislature to provide a homestead exemption which would exclude part of a taxpayer's residence from taxation. However, any exemption value is yet to be determined and would be up to the legislature's discretion, rather than a taxpayer vote. Resolution 3 is currently being discussed in the Senate. Should it pass the Oregon legislature (a similar resolution has been proposed at the Oregon House of Representatives), its fate will be determined by Oregon voters during the primary season in May 2018.

FIRM ANNOUNCEMENTS AND SEMINARS

On January 10, Saalfeld Griggs' Construction Industry Team proudly sponsored the **Marion County Home Builders Association** dinner, held at the Salem Convention Center.

On January 18, Saalfeld Griggs hosted its third-annual Law Student Open House for students from Willamette University and University of Oregon.

On January 20, the firm's Agri-Business Industry Team sponsored a table at the SAIF Agri-Business Banquet.

On January 25, the Saalfeld Griggs Health Law Team sponsored the **Marion-Polk Medical Society** annual general membership dinner at the Willamette Heritage Center.

On February 10, Attorneys Mark Shipman and David Briggs presented at the **Wells Fargo Ag Outlook** in Salem.

On February 14, Attorney Hunter Emerick presented as Co-Key Note Speaker at the **Salem Keizer School District Career/Technical Education Seminar.**

On February 15, Saalfeld Griggs' Attorneys attended the **SVN Economic Forum** at the Salem Convention Center.

On February 16, the firm's Agri-Business Team sponsored and attended an informational presentation put on by the **Ag Advisors of the Willamette Valley.**

On February 23, Saalfeld Griggs hosted the **Oregon Women Lawyers & Oregon New Lawyers Division Seminar: "How to Market Yourself."** Attorney Jennifer Paul was one of three panel speakers at this event.

On February 25, the firm proudly sponsored a table at the **18th Annual Salem Art Association Clay Bal**l.

This coming Spring, Saalfeld Griggs is once again partnering with our friends at **Columbia Bank** to host a three-part series of seminars for our mutual clients. Dates are: **February 28**, **April 25** and **June 6**. Contact Christy Hill for details on the upcoming seminars & for registration: chill@sglaw.com.

On March 2, the Firm's Agri-Business Industry Team sponsored a table at the **4th Annual SEDCOR Ag Breakfast.**

On March 16, Saalfeld Griggs will host a special St. Patrick's Day Edition Employment Law Breakfast: **Terminating Problem Employees . . . or "Best Practices for Hanging on to Your Pot 'O Gold."**

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