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2009 Real Estate Legislative Update

In the early morning hours of July 1, 2009, the Arizona Legislature adjourned the First Regular Session of the Forty-Ninth Legislature. This session was perhaps the most difficult in Arizona's history given the state's \$3.5 billion budget deficit (Arizona's total budget is approximately \$10 billion). In fact, Arizona is still without a balanced budget despite the Legislature sending two complete budget proposals to Governor Brewer. Because the state's budget remains unbalanced, there is a possibility that a fourth special session will be called some time this fall to address the situation. Of the 1,133 bills introduced this session, 191 were ultimately signed into law by Governor Brewer.

The regular effective date for new laws passed this session will be September 30, 2009, unless the legislation included appropriation, fee increase, tax change or emergency clauses. Following below are summaries of the legislation introduced this session with an explanation of how such legislation may affect the real estate industry.

Anti-Deficiency Statute / Trustee Sales (Enacted and Repealed)

By Daniel J. Holwerda

Under Arizona's current anti-deficiency law (Arizona Revised Statutes § 33-814), if a lender forecloses a deed of trust by trustee's sale on residential property that is 2½ acres or less in size, the lender may not sue the owner individually to recover any deficiency resulting from the trustee's sale. The Forty-Ninth Legislature took Arizona's anti-deficiency law on a bumpy ride this year, though ultimately to no effect.

Senate Bill 1271, which was enacted by the Legislature and signed by the Governor, added new requirements for an owner of residential property to qualify for protection under Arizona's anti-deficiency statute, including that the owner must have "utilized" (lived in) the home for at least six consecutive (6) months. The practical effect of this requirement would be that upon the trustee's sale of an investor-owned residential property, the lender could sue the owner personally to collect any resulting deficiency.

The legislation was enacted without much attention from the local real estate industry. However, after it was signed into law, the bill was vehemently opposed by many in the real estate industry, including the Realtors Association of Arizona. Opponents of the new law claimed it would deter investment in the state's housing market, that it would have unintended negative impacts on part-time residents who own second homes in Arizona, that it would force homeowners to file for bankruptcy to protect their assets from lenders, and that the new requirements would encourage more lenders to foreclose instead of trying to work out loan modifications with borrowers.

In response to the opposition, the Legislature enacted and the Governor signed House Bill 2008 (one of the budget bills), which repealed Senate Bill 1271. House Bill 2008 was made retroactive to the effective date of Senate Bill 1271. As a result, the provisions of Senate Bill 1271 (including the six-month residency requirement) will not become law this year. It is possible that the Legislature will reconsider revising the anti-deficiency statutes during its next legislative session in January, but any proposed changes likely will be scrutinized more closely by the real estate industry prior to being enacted into law.

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State Trust Land

By Kerry K. Patterson

Appraisals of State Land (HB 2419)

House Bill 2419 establishes procedures for the Arizona State Land Department to follow when conducting mass appraisals of state land to determine rental rates for leasing of state land. This legislation was introduced as a result of mass appraisals that were conducted in 2006 and 2007 that resulted in rental rate increases of over 300%. House Bill 2419 requires, among other things, that (i) the State Land Department provide notice of the mass appraisal to those affected; (ii) those affected be allowed to provide information including comparables and other relevant information; and (iii) those affected have an appeal right. Although the State Land Department acknowledged that written procedures would be helpful, it expressed concern that the new procedures will significantly slow down the lease process.

Trust Land Reform (Not Enacted)

Again this year, legislation was introduced to reform Arizona's state trust land process, and the proposed reform legislation failed again. The legislation was vigorously opposed by conservation groups and several municipalities and was not enacted into law. It can be expected to be reintroduced but will likely continue to face significant opposition.

Real Estate Development

By James Bond

Deed Restrictions: For Sale Signs (SB 1148)

The Legislature continued its trend of imposing boundaries on the power of owners associations to restrict certain activities in common interest communities. Senate Bill 1148 provides that no covenant, restriction or condition contained in a deed, contract, or similar instrument affecting the transfer of real property may prohibit the display of a "For Sale" sign and a sign rider by the property owner. The legislation requires the "For Sale" signs and sign riders to be of standard industry sizes. Timeshare properties and timeshare interests are exempted from the legislation. As a result, owners associations and condominium associations will no longer be able to enforce prohibitions relating to the display of "For Sale" signs and sign riders by a property owner, unless the signs or sign riders do not conform with industry size standards. The legislation does not address "For Rent" signs.

Moratorium on New and Increased Development Fees (HB 2008)

Arizona law currently allows municipalities to assess development fees to offset costs to the municipality associated with providing public services and infrastructure to a development. House Bill 2008 (one of the budget bills) imposes a moratorium on the imposition of any new development fees and on any increases in existing development fees by municipalities (not by counties). The moratorium runs for two years, beginning (retroactively) on June 30, 2009 and ending on June 30, 2011.

Exchange of Property by Municipalities (HB 2014)

Arizona law currently provides that a municipality may only exchange a parcel of real property for a different parcel of real property located within the same municipality, and the parcels must be of substantially equal value. House Bill 2014 provides that a municipality may now exchange a parcel of real property owned by that municipality for a different parcel of real property located inside or outside of the municipality's boundaries. The requirement that the parcels be of substantially equal value remains part of the law.

Energy

By Margaret Olek Esler

Renewable Energy Incentive Districts

House Bill 2336 authorizes counties and municipalities to designate renewable energy incentive districts to facilitate renewable energy use as part of an effort to meet Arizona's Renewable Energy Standard and Tariff Rules, which require affected utilities in the state to obtain 15% of their energy from renewable energy resources by 2025. The districts may be established in any unincorporated area of the county or in any municipality where there are vacant or underused parcels and where construction of renewable energy facilities is not incompatible with the surrounding property. Certain procedures must be observed in establishing such a district, including providing notice and holding at least one public hearing.

The county or municipality will adopt a renewable energy incentive plan to encourage construction and operation of renewable energy equipment in the new district by providing incentives to companies that operate or engage in construction within the district's boundaries. These incentives may include, among other things, expedited zoning procedures, expedited processing of plans and permits, and waiver of fees, development standards and procedural requirements.

Renewable Energy Tax Incentives

House Bill 1403 establishes a tax incentive program for renewable energy businesses. The program will begin on January 1, 2010 and end on January 1, 2016. To be eligible for the program, a renewable energy business must submit an application to the Arizona Department of Commerce, along with specific information about the business and records of expenditures for any qualifying renewable energy investments.

If an application by a renewable energy business is approved, the business may qualify for individual and corporate income tax credits, and/or property tax incentives. The legislation gives the Department of Commerce and the Department of Revenue considerable oversight power to ensure that businesses deemed eligible for either tax credits or property tax incentives remain in compliance with the law.

Property Taxes

By Sean M. Sabo

Government Property Lease Excise Tax Reform (Not Enacted)

Among the more significant pieces of proposed legislation that did not pass this legislative session was an attempt to amend the existing Government Property Lease Excise Tax (GPLET) laws. The GPLET laws were originally enacted as a mechanism for the City of Phoenix and other municipalities to attract businesses into certain development areas identified for commercial and industrial use. By leasing government-owned properties in these areas, businesses have been able to lower their property tax burden by abating and paying local excise taxes based upon a formula related to the square footage of their buildings (as opposed to assessed property values).

Attempts have been made in recent years to amend the GPLET laws to increase the property taxes that may be captured by municipalities. In order to secure additional tax revenue, Senate Bill 1399 would have significantly modified the existing excise tax calculation formulas and established new leasing requirements for those businesses seeking the tax benefits currently afforded by the GPLET laws. Although the bill was ultimately defeated, the current budgetary difficulties confronting Arizona likely ensure that GPLET reform will continue to be a hot topic of discussion in the near future.

Equalization Property Tax Repeal (Not Enacted)

Arizona's equalization property tax allows counties to raise revenues based on the assessed values of residential and commercial properties. These revenues are apportioned among school districts. The equalization property tax rate has been set at zero for the previous three years, but is scheduled to return to scheduled rates for 2009. The Legislature enacted House Bill 2073 to permanently repeal the state's equalization property tax rate. However, the repeal was vetoed by the Governor. As a result, property will be taxed at regularly scheduled rates based on the values assessed by the county, which will have the effect of increasing real estate taxes on residential and commercial properties. The proposed repeal likely will be considered again by the Legislature next year.



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