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OTTEN JOHNSON ALERT

2019 Colorado Legislative Update for Real Estate Professionals

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As of February 27, 381 bills have been introduced in the Colorado General Assembly. This client alert focuses on proposed legislation in four areas of interest to real estate professionals—special districts, oil and gas development, tenants’ rights, and conservation easements—because bills in these areas appear to be gaining traction in this legislative session.

In case you haven’t caught the news since Halloween, Democrats regained control of the state Senate, retained the governorship, and expanded their majority in the state House in last November’s midterm election. We’re 8 weeks into the 17-week legislation session, and not surprisingly, bills that reflect the majority’s policy priorities are advancing.

Special Districts

Quasi-governmental districts provide infrastructure and public services in Colorado including roads, water and sewer lines, parks, fire protection, and health services. For a host of reasons, these districts have become an increasingly popular mechanism to finance the construction and maintenance of infrastructure and to provide services that were formerly supported by traditional municipal governments or private property owners’ associations. These districts include Title 32 “special” districts governed by the Special District Act, and other, non-Title 32 districts such as public and business

improvement districts (BIDs). Over the past 25 years, the number of Title 32 districts has increased by over 150% at a time when the state's population has grown by less than 50%.

Some special districts are governed by city councilors or county commissioners acting as an ex officio board of directors. Others are governed by an independently elected boards of directors. [HB19-1108](#) would allow a natural person who owns taxable property situated within the boundaries of a special district, but who is not a resident of Colorado, to vote in special district elections and serve as a nonvoting director on the special district's board. Former Governor Hickenlooper vetoed the same bill in 2018, citing equal protection and logistical concerns. The Colorado County Clerks Association, Special District Association, and Homebuilders Association oppose this bill, but on February 19, it passed the state House on a 34-28 bipartisan vote and now moves on to the state Senate where it passed 19-16 last year.

Under current state law, a metropolitan district, which is a type of special district that provides two or more services, can only levy a sales tax for certain transported-related improvements. [HB19-1047](#) would allow a metropolitan district to levy a sales tax to provide fire protection. On January 31, this bill passed the state House by a 44-18 vote and has been assigned to the state Senate's Committee on Local Government.

The Special Districts Association has been working to introduce legislation that would allow business improvement districts, which are not Title 32 special districts, to cross municipal boundaries, consolidate, and include new territory by election. This legislation would better align BIDs with the powers vested in their Title 32 counterparts.

Oil & Gas Regulation

We're not an oil and gas firm, but owners and developers of real property in certain parts of Colorado frequently confront issues involving mineral rights ownership and oil and gas extraction. Some property owners benefit from royalties derived from their ownership of mineral rights. Others are burdened by a legal duty to allow "reasonable access" to the owner of subsurface minerals.

In response to the defeat of Initiative 66 last November and this year's ruling from the Colorado Supreme Court in *Martinez v. Colorado Oil & Gas Conservation Commission*, Democratic lawmakers plan to introduce a bill in the near future that would redefine the mandate of the Colorado Oil and Gas Conservation Commission to prioritize public health, safety, and welfare over the development of oil and gas resources.

The legislation may also shift some regulatory authority from the Commission to municipal governments, which would be able to regulate oil and gas development under their zoning authority. In 2016, the Colorado Supreme Court held that the Commission's regulations preempt local regulation of oil and gas.

Governor Polis has signaled an openness to this proposal. Industry leaders and Republican lawmakers are wary.

Tenants' Rights

Democratic lawmakers have been trying (without success) to pass various bills aimed at protecting residential tenants for the past couple of legislative sessions. Now that they control the state Senate, passage of these bills seems more likely.

[HB19-1106](#) would prohibit a landlord from charging a prospective tenant a rental application fee unless the landlord uses the entire amount of the fee to cover the landlord's costs in processing the rental application. This bill would further require a landlord to provide prospective tenants with either a disclosure of the landlord's anticipated expenses for which the fee will be used, or a receipt that itemizes actual expenses, as well as a written notice of the landlord's tenant selection criteria and the grounds upon which a rental application may be denied. HB 1106 passed the state House on February 21 on a 40–23 vote.

[HB19-1118](#) would require that a landlord provide a tenant with 14 days to cure a lease violation for unpaid rent or other non-“substantial” violation before the landlord can initiate eviction proceedings. Current Colorado law requires that a landlord provide only 3 days to cure a non-substantial violation. HB 1118 is scheduled for a hearing before the House Transportation and Local Government Committee on February 27.

In 2008, Colorado became the second-to-last state in the country to enact an implied warranty of habitability for residential leases. Under the implied warranty, a landlord warrants that the premises are fit for human habitation. Compared to the implied warranty of habitability in other states, “fit for human habitation” is a low bar in Colorado. [HB19-1170](#) would expand the warranty to cover mold and certain appliances. It also defines time periods during which a landlord must address certain dangerous conditions. On February 26, the state House voted to approve the bill 40–23.

Other unintroduced proposals in this area include a ban on source-of-income discrimination (Denver passed a similar law last year) and possible changes to the state's rental control prohibition statute.

Conservation Easements

A conservation easement is a voluntary agreement to permanently preserve land for certain public benefits, including scenic open space, wildlife habitat, recreation, and historic preservation. Both the federal government and the State of Colorado offer tax incentives to encourage landowners to grant conservation easements to government or

nonprofit entities that then enforce conservation restrictions on the land. Since Congress enacted the tax incentive in 1976, more than 56 million acres (an area slightly larger than the state of Minnesota) has been conserved nationwide. Colorado has issued more than \$1 billion in tax credits since it began its conservation easement tax credit program in 2000.

While these tax incentive programs have been successful, they have been troubled by abusive transactions. At the federal level, “bad actors” have attempted to profit from conservation easement donations. The Charitable Conservation Easement Program Integrity Act of 2019, [Senate bill S.170](#), has been introduced in the U.S. Senate to prevent abuse of the federal tax incentive.

In Colorado, the Department of Revenue began requiring pre-approval of the tax credits in 2013. This process has largely eliminated fraud in the Colorado tax credit program.

To continue to protect the Colorado tax credit program, legislation will be introduced later this session to extend for an additional 7 years the Conservation Easement Oversight Commission and the Certified Holder components of Colorado’s program. Along with the extension of these program components, the legislation will likely include substantive policy adjustments aimed at improving the transparency, efficiency, and effectiveness of the program. We’ll provide analysis of that bill when it becomes public.

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