2010 SPECIAL SESSION RESULTS

By Greg Hanon, NAIOP State Lobbyist

The legislature met for a one-day special session on December 10 to deal with a $1.1 billion shortfall in the current 2009-2011 biennium. In a rare bipartisan fashion they swiftly approved emergency budget cuts and money shifts that plug more than half of the state’s $1.1 billion budget hole through June.

Gov. Chris Gregoire is making an additional $110 million in across-the-board cuts, bringing the budget solution close to $700 million. The bill enjoyed rare bipartisan support, passing 86-6 in the House and 30-9 in the Senate.

The deal included $208 million in federal aid for public schools and a number of cuts, including $51 million from higher education, $50 million from K-12 education, $48 million from the Department of Corrections, and cuts to the Basic Health Plan and Disability Lifeline.

The legislature will address further changes to the current budget in the first few weeks of the 2011 session. The 11-13 biennium budget deficit appears to be as much as $6 billion.

$281 million is the loss of the tax revenue caused by passage of I-1107, the measure repealing taxes on soda, gum, candy, and bottled water.

SUPPORT NAIOP IN OLYMPIA

2011 is a very important legislative session for NAIOP. We are the founding member of the Jobs Investment Coalition that is promoting full-fledged tax increment financing legislation in Washington State. See the Washington Jobs Investment Act Fact Sheet on page 4 for more information.

Your presence is needed in Olympia to explain to your legislators how important this legislation is for jobs and economic development in our communities. Please sign up and join us in Olympia on Wednesday, February 9, 2011.

2011 NAIOP OLYMPIA DAY
February 9, 2011

11:00 AM - 1:30 PM Washington State Construction Industry Council - Columbia Room, Capitol Building - Industry and Legislative Briefings, Lunch
1:30 PM - 2:15 PM NAIOP Legislative Briefing (same location)
2:15 PM - 5:00 PM Meet with legislators / attend committee hearings
5:30 PM - 7:00 PM Reception with legislators and NAIOP members, Mercato’s Restaurant, 111 Market Street NE

Please let Jillanne know that you will attend the NAIOP Olympia Day. Please fill out the information below. We will need your confirmation by Wednesday, January 26.

Name ____________________________________________
Home Address with zip code ____________________________________________
(Where you vote)
Legislative District ____________________________________________
(If you know it, if not we will look it up from your address)
SELLER DISCLOSURE STATUTE NOW APPLIES TO COMMERCIAL PROPERTY

By Tim Giacometti, Bullivant Houser Bailey PC

Commercial property sellers always want to limit their liability post-closing, especially when faced with lower property values as they are today.

But doing so has been more difficult since June 2010 when the Substitute Senate Bill 6749 became effective.

That bill expanded the seller disclosure statute (RCW 64.06), which requires residential property sellers to provide buyers with a disclosure statement (commonly referred to as NWMLS Form 17), so as to apply to commercial property sales. Under the statute, a buyer may back out of a purchase within 3 business days of receiving the completed statement.

It’s hard to see how this expansion is of benefit to commercial owners and investors, who are as a general matter far more sophisticated in real estate matters than are homeowners. Commercial property investors perform due diligence and negotiate representations and warranties tailored to the transaction – and commercial property sellers are well aware of “AS IS” language. So, to the contrary, the statute amendment muddies the water.

That’s because case law governing post-closing claims by disgruntled homebuyers against sellers may now be relevant to commercial property transactions. Most residential buyers and sellers do not negotiate reps and warranties concerning the property. So such claims have been largely based on the seller’s responses in the disclosure statement.

For example, a buyer might claim that the seller should have known about prior water leaks even if the seller did not actually know about them. And these claims proceeded, notwithstanding language in the statute providing that the “seller disclosure statement shall be for disclosure only, and shall not be considered part of any written agreement between the buyer and seller.”

Sellers obtained some relief under a 2007 Washington Supreme Court decision (Alejandre v. Bull), in which the court rejected negligent misrepresentation claims based on the infamous “economic loss rule” (ELR).

The ELR is a legal rule that prohibits parties to a contract from asserting certain tort claims (e.g., negligence) against each other. Alas, a pending case (Jackowski v. Borchelt) may open a way around the ELR. Meanwhile, in a decision just issued (Eastwood v. Horse Harbor Foundation), the Supreme Court replaced the ELR with the “independent loss rule”. In short, it appears that buyers can once again bring negligent misrepresentation claims against sellers based on the disclosure statement.

In light of this, a commercial property seller’s likely first instinct would be to seek the buyer’s waiver of its right to receive a disclosure statement. That will go only so far because the statute does not allow a buyer to waive receipt of the “Environmental” section of the statement if any of the seller’s answers to questions in it are “yes”.

Those questions are broadly stated (e.g., “Are there any substances . . . that may be environmental concerns?”). So in addition to reps and warranties in the purchase agreement, commercial sellers will need to give special attention to their disclosure statement answers. Is a truly “AS IS” sale possible any more?

2011 SESSION NAIOP PRIORITY

By Greg Hanon, NAIOP State Lobbyist

NAIOP’s primary legislative goal for the 2011 session is to implement Tax Increment Financing (TIF) in Washington. Washington State is one of only two states that do not have this valuable infrastructure financing tool.

In 2011, NAIOP will join with cities, counties, other business organizations and the environmental community to form a coalition that will focus on passage of legislation authorizing TIF. The coalition is called the Jobs and Investment Act Coalition and includes as many as 50 organizations united in this message.

In addition to passing legislation, a constitutional amendment will also be necessary. This requires a 2/3 vote of the legislature, and a vote of the people at the ballot. If we are successful in the legislature, the next phase will be a ballot measure campaign in the summer and fall of 2011.

2010 ELECTION RECOUNT RESULTS

By Greg Hanon, NAIOP State Lobbyist

Three weeks after the November General Election, four state legislative races went to a recount, one a hand recount. In the end, Republicans prevailed in each of the close races.

The final election results mean that Republicans picked up 4 seats in the Senate (27-22) and 5 seats in the House (56-42). Legislative leadership remains the same in all four caucuses. (Frank Chopp; Speaker, Lisa Brown; Senate Majority Leader, Mike Hewitt; Senate Minority Leader, Richard DeBolt; House Minority Leader)

The 2011 legislative session begins on January 10 for a 105-day legislative session.
Another area that Glenn has provided leadership by example is by becoming a LEED Accredited Professional. At the time he passed the test, he was one of only three lawyers to do so in Washington state.

Glenn takes the initiative to communicate to committee members and the membership-at-large about legislative or regulatory issues that may affect the industry. He also makes himself readily available to contribute to and provide input on the quarterly Washington Government Affairs newsletter, The Voice.

During his busy day, he finds the time to monitor the various media sources and scan for news about real estate and development issues. When pertinent to our members, this information is distributed to the members of the Government Affairs Committee, which enables our chapter to quickly responds to real estate-related policy initiatives by state and local government officials.

Glenn is also a member of the Board of Trustees of Cornish College of the Arts and the Board of Directors for the Washington Research Council, which examines how public policy issues will affect business, government and the community.
WHAT IS THE WASHINGTON JOBS INVESTMENT ACT?
The Act will be introduced in the 2011 session of the Washington State Legislature. It is necessary to allow the use of Tax Increment Financing as a redevelopment tool in communities across our state. It will allow local governments to issue bonds to provide necessary public infrastructure to support a qualifying development in an area in need of revitalization. The increased property taxes resulting from the new development are then used to repay the bonds, thus spurring additional local investment by making possible projects that otherwise might be uneconomical.

WHAT ARE SOME OF THE BENEFITS OF THE WASHINGTON JOBS INVESTMENT ACT?
Passage of this legislation will provide a framework by which local governments and the private sector can work together to create new job opportunities for local residents, revitalize their communities and attract investment that otherwise could not take place.

WHY IS NOW THE TIME FOR THE WASHINGTON JOBS INVESTMENT ACT?
Washington’s economy remains mired in the deepest recession since the Great Depression. Across our state, communities are in need of new tools to attract investment and create new job opportunities for local citizens. Given these tough times, we need creative solutions to the economic challenges facing Washington’s families, employers and communities.

DO OTHER STATES ALLOW THIS TYPE OF FINANCING MECHANISM?
Yes. In fact, Washington is one of only two states in the nation that does not allow this type of public-private cooperation to spur job creation and community redevelopment. The Washington Jobs Investment Act will help level the economic development playing field and allow Washington to compete more effectively.

WHAT PROTECTIONS DOES THE ACT PROVIDE TO TAXPAYERS?
The Act sets forth criteria that a project must meet to qualify for Tax Increment Financing and defines what types of expenses can be financed with this mechanism. It requires a detailed fiscal analysis to ensure that the resulting property tax revenues will be sufficient to repay the bonds. A specific proposal must be developed and a public hearing conducted. Finally, the local government has the final say in approving the use of this investment mechanism.

WHAT IS THE WASHINGTON JOBS INVESTMENT COALITION?
The Coalition consists of a wide variety of public and private sector organizations that support the Washington Jobs Investment Act. The Coalition includes economic development experts, cities and counties, general business organizations, development and construction interests, organized labor and environmental advocates.

WASHINGTON JOBS INVESTMENT COALITION
(Website and phone # under development)