KASS LEGAL GROUP, PLLC

Newsletter

A newsletter on general legal matters

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1031 EXCHANGES: WHY YOU SHOULD CONSIDER ONE

By: Brian L. Kass, Esq.

With few exceptions, owning real property is a safe and profitable investment. Especially in Washington, DC where the median home sales price has increased from $445,000 to $690,000 in the span of ten years.

Many people who own investment (rental) property are now looking to capitalize on these gains by selling their property and buying another one. The concern, however, is that the IRS also wants to enjoy the increase in equity by imposing a tax on the capital gain.

For 2021, long term capital gains are taxed at up to 20% depending on your income bracket. Generally speaking, this tax is imposed on the difference - - or the gain - - between your “basis” in the property (what you initially paid for the property including any real estate commissions, plus costs of improvements and less depreciation) and what you sell the property for (less any real estate commissions). As you can see, if the sale of your investment property results in a gain to you of $200,000, Uncle Sam could take up to $40,000 of that profit.

However, there is a way to re-invest that gain into another investment property and defer the capital gain taxes thereby allowing the increase in value of your investment to continue to grow for you. Named after the applicable IRS Code Section, this process is

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UPDATE ON THE COVID-19 PUBLIC HEALTH EMERGENCY IMPACT ON A LANDLORD’S INTEREST IN D.C. RENTAL PROPERTY

By: John E. Arness, II, Esq.

There has been a lot of emergency legislation advanced in connection with the novel coronavirus pandemic impacting both commercial and residential landlords and their property managers in the District of Columbia.

Despite purported efforts by the city council to update and revise legislation, there are still no reliable answers available to the questions of when a landlord to a delinquent tenant can get its property back or get itself in a position to enforce a right to collect rent. If landlords have not done so already, they should make sure that their tenants have been notified of their ability to apply to the landlord or management for a payment plan under which the unpaid rent arrearage can be paid over twelve months in equal monthly installments. *(Continued on page 3)*

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1031 EXCHANGES - WHY YOU SHOULD CONSIDER ONE

called a 1031 Exchange. It is also known as a "Starker Exchange", named after the gentleman who successfully convinced the courts that no tax should be paid at the time one investment property is "exchanged" for another, or a "like-kind exchange" because the process only applies to the sale and purchase of similar forms of property.

As you may imagine, the IRS has developed very specific rules for a 1031 Exchange, each of which must be strictly adhered to or the exchange will fail, resulting in all or some of the capital gain being taxed.

The basic elements of the 1031 Exchange are as follows. First, the taxpayer, or owner of the property to be sold or "relinquished" enters into an agreement with a middleman know as a "Qualified Intermediary" or "QI". The taxpayer then assigns to the QI all of his or her rights and obligations under the contract for the sale of their property. At settlement on the sale of the property, the QI takes control of the sales proceeds and places them in escrow. One of the most fundamental aspects of the 1031 Exchange is that the taxpayer must never have control or possession of the sales proceeds during the transaction.

After the sale of the relinquished property, the taxpayer has 45 days to identify in writing to the QI another property to "replace" the one they just sold. Up to three properties can be identified during this 45 days period. Once the replacement property(ies) are identified and under contract for purchase, the taxpayer again assigns their rights and obligations under that purchase contract to the QI.

The taxpayer, through the QI, must complete settlement on the purchase of the replacement property(ies) no later than 180 days following the sale of the relinquished property. During the settlement on the replacement property(ies), the QI signs the settlement statement and directs that the funds held in escrow are applied to the purchase. Although the QI is involved in the settlement, title to the replacement property goes directly into the name of the taxpayer. Any remaining funds in escrow are released by the QI to the taxpayer at the end of the 180 day period. Those remaining funds are called "boot" and may be subject to capital gains tax.

This is merely an overview of the standard or "delayed" 1031 Exchange process. There are other techniques such as simultaneous exchanges, reverse exchanges and construction or improvement exchanges. It is also important to know that while the properties being exchanged must be of "like-kind" (i.e., both real property), they need not be of the same type (i.e., single family, multi-unit, etc.) or located in the same city or state.

With the increase in property values, home sales of all types are also on the rise. If you are looking to exchange your investment property for another, the 1031 Exchange can be a very powerful tool to preserve that investment. If you are considering buying and selling investment property, please contact Kass Legal Group to discuss whether a 1031 Exchange could be beneficial to you.

This article is for informational purposes only. Please consult a professional tax advisor for any tax advice.

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UPDATE ON THE COVID-19 PUBLIC HEALTH EMERGENCY IMPACT ON A LANDLORD'S INTEREST IN D.C. RENTAL PROPERTY

Mayor Muriel Bowser has extended the public health emergency (PHE) until July 21, 2021, *at least*, and the DC City Council has prohibited the filing of any new cases for possession or collection of consumer debt until 60 days after the state of emergency is lifted. As noted in a previous article, there can be no notices to quit or to vacate issued until the state of emergency has been lifted.

In a severe blow to landlord interests, the city council also found it appropriate to legislate around a court order that held that a previous PHE related bar to the filing of a complaint for possession of rented property in the District of Columbia was unconstitutional. It did so by enacting legislation that retroactively voided a tenant's ability to waive the right to receive a notice to quit for non-payment of rent. The law now requires a landlord to issue a thirty (30) day notice to correct or vacate or a notice to quit as a precondition of filing a complaint for possession based upon non-payment of rent even if the tenant's lease contains a written waiver of that right that was previously allowed and enforceable. While it may be unconstitutional to bar a property owner from access to the courts for enforcement of contracts, the city council apparently believes it is not unconstitutional to impose new restrictions which condition or delay that same access. By adding on an additional thirty (30) days minimum to the time when a landlord can take action to bring a breach of lease before the court for resolution, the city council has decreased the chances that any landlord will be able to get relief from the court system in the 2021 calendar year.

Landlords should educate and inform themselves concerning the availability of emergency financial assistance programs for tenants behind on their rent. They should make sure their tenants are aware of them as well. While these programs require initiative and action on the part of the tenant, there is a least a possibility that funds would be approved and paid to landlords in full or partial satisfaction of delinquent rent owed. Information on one such program for residential properties and the eligibility and application requirements can be found at https://stay.dc.gov. There are links to other resources and information on the site as well. Landlords are advised to be as proactive as they can to encourage their tenants to pursue and take advantage of all rental assistance programs.

There would appear to be no good reason why a tenant would not want to apply for grant money to pay toward their financial obligations. There may be some who would prefer to drift without doing so for as long as they can however. Unfortunately, there are cases where tenants who can pay rent simply choose not to because there is no imminent consequence given a landlord's inability to obtain relief from a court of law.

A previous newsletter article identified the landlord's obligation to offer eligible tenants a payment plan for rents falling due during the PHE. This would be a precondition to eventually taking action to enforce a lease in default. Aside from the direct negotiation for payment plans and the search for public assistance or grant programs, landlords should prepare as best they can to get a place in line once the floodgates open for access to the Superior Court. No one knows exactly what this will look like, but several factors support a suspicion that landlords are still many, many months away from being able to reasonably expect an enforced remedy for breached leases.

First among these factors is the reality that the court has only recently begun to address matters that were pending or already ruled upon as of March of 2020. There were already substantial delays encountered by landlords hoping to schedule (and carry out) an eviction of non-performing tenants pre-Covid-19.

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UPDATE ON THE COVID-19 PUBLIC HEALTH EMERGENCY IMPACT ON A LANDLORD'S INTEREST IN D.C. RENTAL PROPERTY

Those delays are nothing compared to what is probably coming. There will now be another nineteen (19) months or more of backed up claims against tenants allegedly in breach of their leases. Those claims will have to be filed, served, and have hearings and/or trials set for them.

The court will not be scheduling hearings with the volume or density that hearings were set pre-Covid. While many hearings will be held remotely, there will not be one hundred matters scheduled for a single day as in the past. The risks of notice and technical issues paired with the customary generous latitude given to tenants suggest a good possibility of further delay in getting to a landlord's "day in court". Even after a judgment for possession might be obtained, evictions can only be carried out under the supervision of the U.S. Marshal's Office. Legislation now requires at least twenty-one (21) days' written notice to tenants of their eviction date, which can be given only after the marshal's office has advised the landlord of an available date. One delay begets another, and so on.

These factors only address a landlord's ability to "stop the bleeding" caused by occupancy without the payment of rent. The ability to collect on these obligations is another matter entirely.

The Take Away:

Landlords should educate and inform themselves concerning the availability of emergency financial assistance programs for tenants behind on their rent. Then they should educate and encourage their tenants to take advantage of those resources to mutually benefit the landlord and the tenant.

Parallel to that effort, landlords should ensure the accuracy and detail of their financial records and prepare for when they are once again allowed to seek enforcement of their legal contracts through the courts. All communications between landlord and tenant should be well documented. If you are a landlord, you would prefer not to be at the end of the line to get the court's attention focused on a long-standing breach. Even if a landlord is somewhat near the front of the line, however, delays should be expected. As the courts get closer to reopening and your case is scheduled, opportunities may arise to reach an agreement with tenants which either collects some money without the need to incur legal fees or restores the landlord to possession of the property without having to wait for an unknown eviction date assignment. It may not be that attractive of an opportunity, but it will be an opportunity.

This article seeks to inform generally and does not constitute legal advice or opinions of its author or Kass Legal Group. PLLC as to any individual claim or dispute. If you have concerns about the impact of PHE legislation and court policies related to the pandemic, you may wish to contact your council member or ANC representative to make them known.

We at Kass Legal Group, PLLC are available to assist with lease enforcement, dispute resolution, regulatory compliance or to evaluate policies, procedures, leases, or other documents should those services be desired. Please let us know if we can help you or your organization. John E. Arness, II can be contacted at arness@kasslegalgroup.com.

PROPERTY TITLE AND WHAT HAPPENS AFTER OWNER DIES

By: Laurie Pyne O'Reilly, Esq.

Property title is often referred to as a "bundle of rights" one receives upon becoming an owner of real property. Those rights depend on the form of ownership that is reflected on the property deed. Although a relatively simple concept, it is important to understand the various forms of ownership before taking title to property and how title affects what happens to the property after the owner's death.

Title generally falls into several categories:

Sole Ownership

Titling real property to be owned by a person individually simply requires the deed to reflect the owner's name as the grantee or transferee. A sole owner can freely sell, assign or mortgage the property. Upon the death of the owner, the property becomes an asset of the owner's probate estate and passes to the persons named in the owner's Last Will and Testament to receive the property, or in the absence of a Will, to the owner's heirs at law by intestate succession. So, for example, if a single individual with no children dies owning real property titled solely in her name, the property, after passing through probate, will be distributed to the beneficiaries named in her Will, or to her next of kin if she has no Will. Under District of Columbia law, her next of kin--also known as her heirs at law--would be her parents, if alive, or if not, her siblings or their children, if any siblings predeceased her. The personal representative appointed in a probate proceeding would distribute either the property or the property sales proceeds to her beneficiaries or heirs. If a sole owner intends for their property to go to someone other than their heirs upon death, it is critical that a Last Will and Testament be prepared and properly executed.

An entity, such as an LLC, can also take title to real property as sole owner. The entity's organizational documents–for example, the operating agreement in the case of an LLC--can limit how and under what circumstances the property may be sold or mortgaged. If an LLC member dies, the member's interest in the LLC rather than an interest in the property itself passes according to the member's Will or, if no Will, by intestate succession.

Co-Ownership

When property is owned by more than one person ("co-ownership"), there are several ways the owners may hold title: as 1) tenants in common; 2) joint tenants with right of survivorship; or 3) tenants by the entireties.

Tenants in common: Property held as tenants common is distinguished from other forms of co-ownership in that the property may be owned in equal or unequal percentages. Unless restricted by the terms of a co-ownership or equity share agreement entered into by the owners, a tenant in common may sell their interest in the property without the consent of the other owners. For practical purposes, however, a part interest in real property is generally not marketable, or at least not based on its full value as a percentage of the market value of the whole property. A tenant in common has the right to bring a partition suit to ask the court to order that the property be sold so that the tenant wishing to dispose of his interest can receive its full value.

Tenant in common ownership is also distinguished in that when an owner dies, his or her interest does not automatically pass to the surviving owner(s), but must go through probate to be distributed to the beneficiaries under that owner's

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Will, or if none, to their heirs. If a deed titled in the name of two or more persons doesn't specify which way title is held, the law in many states and in the District of Columbia provides for ownership to be as tenants in common by default.

Joint Tenants: Property titled in the owners' names as joint tenants with right of survivorship--simply called "joint tenants" in DC and Maryland, but requiring the words "with right of survivorship in Virginia--is different from tenants in common in that when an owner dies, the surviving owner or owners automatically receive the deceased owner's share of the property by operation of law. Each surviving owner receives an equal portion of the deceased owner's interest in the property. Probate is not required and the surviving owners do not need to do anything to perfect their interest, but may file a "confirmatory deed" with the local land records to reflect the surviving owners' names. While it is a good practice to record a confirmatory deed, ownership passes to the survivors even without such a deed being recorded. It is important to understand when taking title as joint tenants that your Will is ineffective in directing how the property will be distributed after your death.

To establish a joint tenancy with right of survivorship four "unities" must be present: the unities of time, title, interest, and possession. The unities of time and title mean that the owners must acquire title and their interests in the property at the same time, that is, by the same deed. The unity of interest means that each owner has the same percentage interest in the property. A property deed that recites that the owners have unequal interests will not create a joint tenancy with right of survivorship, but will default to tenants in common, even if the deed states that ownership is with right of survivorship. The unity of possession means that all owners have equal right to possession of the property. In addition, while one joint tenant may transfer or sell their interest in the property, a deed by one joint tenant destroys the unities and ownership in the property converts to tenancy in common.

Tenants by the Entirety: This form of property ownership is similar to joint tenancy but is only available to married couples, and in the District of Columbia, to couples who are registered domestic partners. In order to create a tenancy by the entirety, the four above-mentioned "unities" must also be present. An important feature of property titled as tenants by the entireties is creditor protection from claims against one of the owners. When property is held as tenants by the entireties, the property is shielded from attachment by a judgment creditor of just one of the owners. A creditor's judgment must be against both owners in order to place a valid lien on the property.

Additionally, a tenancy by the entirety is different from a joint tenancy in that with the former, one owner (spouse) may not terminate it. A tenancy by the entirety may only be terminated by the joint action of both parties or by a court, generally in connection with a divorce proceeding. Once a divorce occurs, a property held as tenants by the entirety automatically becomes tenants in common property by operation of law even without a court order.

Title held in Trust

Property title may also be held in the name of a trust or the trustee of the trust. A common example is where an owner has established a revocable living trust for estate planning purposes

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and titles their assets in the name of the trust. In such a case, probate of the property is not required upon the death of the owner (grantor of the trust) and the terms of the trust determine how the property will be held and distributed. In Maryland and Virginia, where spouses are the grantors of a revocable trust and have deeded their property held as tenants by the entireties into the trust, creditor protection from the claims against one of the spouses continues even after title changes to the name of the trust. There is legislation currently pending in the District of Columbia to add such protection to trust property formerly held as tenants by the entireties.

Each form of property title comes with its own bundle of rights. It is important to know which rights you are and are not receiving when you take title to real property.

SERVICE ANIMALS VS. EMOTIONAL SUPPORT ANIMALS IN A NO-PET COMMUNITY

By: Michelle L. LaRue, Esq.

Even though an association may have a "no-pet policy" in place, a board may have to make exceptions to allow service animals and/or emotional support animals as long as the appropriate evidence and documentation is provided by the resident. The protected individual may be an owner, a tenant, or guest. While a board may request additional information, the board may not ask for information regarding diagnoses, medical records, etc. To do otherwise may cost the association a lot of money if a resident chooses to litigate.

Service Animals

A service animal is covered by the Americans with Disabilities Act ("ADA"), and requires these animals (not necessarily a dog) to be individually trained to do work or perform tasks for the benefit of an individual with a disability. The disability may include physical, sensory, psychiatric, intellectual, or other mental disability. The individual must have a record of this impairment and must be regarded as having such an impairment. If it is not obvious what service an animal provides, the board may only ask the following two questions: (1) is the animal a service animal required because of a disability? (2) what task has the animal been trained to perform? The board may not ask for information regarding diagnoses, medical records, etc.

It is important for a community association to understand that the ADA only applies to a place of public accommodation. Generally, if a community has space that is open to the public, than it must comply with the ADA in that portion of the community. An example is a condominium that allows the public to access its pool. The ADA does not apply if no part of the community is a place of public accommodation.

Emotional Support Animals

An emotional support animal ("ESA") is one that assists an individual who requires either emotional or psychological support, and is protected by the Federal Fair Housing Act. The Fair Housing Act requires that condominium associations provide "reasonable accommodations" when such accommodations may be necessary for a person with a disability. This includes an ESA, and is not necessarily a dog. A letter from a medical professional, usually

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SERVICE ANIMALS VS. EMOTIONAL SUPPORT ANIMALS IN A NO-PET COMMUNITY

from one who specializes in mental health, often satisfies this requirement. However, be aware that it is very simple to pay a small fee for an online physician to draw up a letter supporting an ESA without ever actually treating that individual. So, a board should do its due diligence before agreeing to allow the animal into the building.

With regard to both types of animals, the association may impose reasonable requirements such as: the animal must be (1) registered; (2) licensed; and (3) on a leash at all times in the common areas. Copies of the animal's registration and license should be provided to the board (or management). The registration and license should be obtained directly from the District of Columbia Animal Services Program. See the following link: https://dchealth.dc.gov/dog-licensing.

Of course, if the animal otherwise violates association rules and regulations, such as acts as a nuisance, the board may hold a hearing and issue a fine(s), if appropriate.

Schedule Your Complimentary Estate Planning Consultation Today!

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