TSSA Legal Update

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Liability Risks Associated with Improper Forms

by Connie Heyer, Niemann & Heyer, LLP

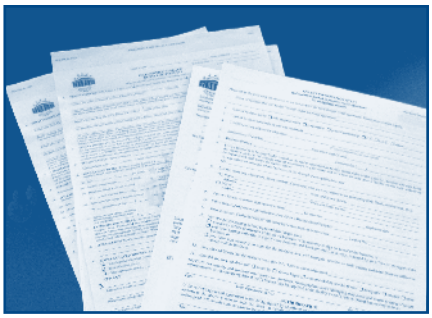
The Texas Self Storage Association is one of the foremost organizations in the industry in many areas, not the least of which is providing the lease and other forms for the use of our members. The TSSA lease is generally considered to be the best in the industry. It is reviewed with a fine-toothed comb at least yearly, updated in response to needs that arise over time, and kept up-to-date with recent legislation. So, other than those compelling reasons, why should you use TSSA forms?

Many members do not realize that TSSA forms also provide significant liability protection. Conversely, incorrect forms can subject facilities to significant liability.

"Magic language" Requirements

Texas statutes have certain mandatory language requirements. For example, certain language must be included in a self-storage lease in order to have lien and foreclosure rights. This mandatory language must be in your lease, and must be in conspicuous print (underlined, in bold type, etc.). You can be sure if you are utilizing the TSSA lease that it complies with all of the "magic language" requirements of Texas statute.

There has been at least one TSSA member who was involved in a lawsuit that would not have been filed had the member been using the TSSA lease. The member foreclosed on a unit, and the tenant sued for wrongful foreclosure. The facility owner called the TSSA staff, who referred the member to me. The member had not been using the TSSA lease. TSSA legal counsel reviewed the "generic" lease the facility was using, and informed the member, that unfortunately, it did not contain the lien language required by statute, so the facility had no legal right to foreclose. TSSA legal counsel advised the member to settle the case as soon as possible.



Liability Protection

The TSSA lease also provides liability protection in the form of release language. For example, in the bottom left-hand corner of the first page of the TSSA lease, the tenant separately initials a release, making it (very!) clear that the facility is not responsible for leaks, theft, vermin, etc. In general, lessors cannot waive away responsibility for negligence in a consumer contract. However, negligence is relatively rare in self-storage situations. Much more common are roof leaks that the owner had no

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Inside TSSA Legal Update

by Connie Heyer, TSSA Legal Counsel
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Q: *I operate a self-storage facility and would like to add an "office" component to the facility. I see more and more facilities offering "office/storage" combined use. What are some basic considerations I need to take into account before offering office in conjunction with storage use?*

A: Office/storage is an entirely different "ballgame" than "pure" self storage. Chapter 59 of the Texas Property Code (the self-storage lien statute) does not apply to any office uses. Chapter 59 only applies to "self-service storage facilities," which are defined as "real property that is rented to be used exclusively for storage of property and is cared for and controlled by the tenant." If part of the property is being used for offices, it is not used "exclusively for storage," and thus Chapter 59 does not apply. The TSSA lease (both the "Standard" TSSA lease and the TSSA RV/boat lease) is appropriate for use only in "pure" self-storage settings.

So, one of the first things you need is a lease appropriate for office use. TSSA does not publish an office lease. Some TSSA members have had their own attorneys draft office leases for their use. Some members have entered into license agreements with TSSA, allowing the TSSA lease to be converted to a form appropriate for office leasing, and paying for my time in tailoring the TSSA lease to the member's specific needs. This cannot be done without a license agreement with TSSA.

Another consideration is your property's zoning. It may depend on the particular jurisdiction you are in, but "pure" self storage may be allowed under your particular zoning category, whereas office use may not be. Before you take any steps toward offering office space, check your zoning category and make sure that it allows office use.

Q: *I have a customer who is two months behind on rent. He has his own lock on the unit, and the unit is full. But, in the last few days, he has also been piling belongings outside of his unit, right in front of the unit's door. Can I have someone clean these items up and haul them away?*

A: It would make sense to try to contact the owner and let him know that you will be discarding anything left in the common area, and document that contact or attempted contact. It is both a courtesy and an "insurance policy." You do not want the tenant to later claim,"Your manager told me that I could put my stuff there temporarily, but you threw it away, I'm going to sue." Tenants have been known to make up stories like this. (I realize this comes as a shock to you!)

But from a legal perspective, anything left in the common area (outside a unit) is subject to being thrown away by you, or obviously, picked up by other tenants. Your tenant has only leased the unit, not the common area. The TSSA lease (paragraph 36(f)(7)) requires the tenant to pay for the costs of removing any trash in the common area left by the tenant. Also, lease paragraph 37(b)(3) prohibits the tenant from leaving any items unattended in the common area of the facility.

Q: *I have a tenant who has leased a unit from us and placed a jet ski in it. He has not paid for the last two months. After doing some checking on the owner of the jet ski, I found that the tenant is not the registered owner. I found the registered owner, and he said that he sold the jet ski, but he and the buyer never changed the ownership papers. The (former, but still legal) owner wants to pay back rent and take possession of the jet ski. Can he do this legally if he sold the jet ski to my delinquent tenant? If not, to whom do I send the notice of claim?*

A: Under Chapter 70 of the Texas Property Code (which must also be followed in addition to Chapter 59, in a foreclosure on a jet ski), lienholders and owners of record have a 31-day right of redemption, which starts the day you mail the notice of intent to sell (in a "special" foreclosure, the notice of claim is mailed first; then you wait 30 days, and then you mail the notice of intent to sell.) So, technically since he is still the owner of record according to Texas Parks and Wildlife Department records, he has the right to come in within this second waiting period, pay all amounts due, and take possession of the jet ski. This is his legal right as the registered owner. However, it would seem that this registered owner, if he has legally sold the jet ski,

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might have a potential legal problem with the tenant if he attempts this.

As far as who to send the notice of claim to, per the statute the notice of claim is sent to the tenant (in situations involving a vehicle, the notice of claim must also be sent to any owners and lienholders of record. In situations involving a jet ski/boat, the notice of claim need only be sent to the tenant).

Q: *What are the rules, if any, regarding foreclosure on Portable On Demand units (PODs)? I have a tenant who leased a parking space and used it to store a POD. He is now delinquent. Is foreclosure an option?*

A: Yes. Chapter 59 of the Texas Property Code gives you a lien on "all property" in self storage.

"All property" would include the POD itself. In the future you may wish to insert in your special provisions or facility rules that only vehicles, trailers, boats, etc. may be stored in a parking space. However, if you needed to foreclose on a POD, you would use the regular foreclosure procedures (unless the POD contained a vehicle, boat, etc.) In my opinion it would be perfectly legal to inspect the contents of the POD, and you would actually need to do so, prior to publishing a newspaper notice of the sale. Hopefully there is a way to overlock the POD or deny the tenant access to the facility by invalidating his access card or code, so that you may seize the POD in preparation for the sale, subsequently send a notice of claim, and start the foreclosure process.

Q: *When a person other than a tenant comes in to pay with cash, is it acceptable to give this non-tenant a receipt that shows the tenant's name, address, unit number, and how payment was allocated? If not, then what is acceptable on the receipt for a non-tenant?*

A: I would suggest giving them a receipt without the tenant address or unit number on it. This could be someone "fishing" to try and find out, for example, an estranged boyfriend's unit number so she can steal from or vandalize his unit.

The receipt could say something like: "This is to document that _____ [name of person paying] on October __, 2009 paid $_____ cash and requested that the payment be made toward amounts due on a unit or units rented by _____ [name of tenant], and the funds will be applied to this account."

Q: *Is it permissible under Chapter 59 for items to be sold in a "garage sale" type format, or does it have to be an auction?*

A: The statute does not address this question specifically, but requires a "public sale." A public sale has over the years widely been interpreted to mean a sale at an auction. I would not recommend any sale unless it has a "live" auction component. Under the terms of the TSSA lease, items can be sold item by item, or in "batches"—you need not sell the entire contents of the unit in one sale. You can sell one item separately, another item separately, etc. You can supplement a live auction with sealed bids. There may be a particularly valuable item for which you take sealed bids prior to the auction, in which case you would announce in your terms of sale at the beginning of the auction that sealed bids will be opened after the conclusion of live bidding, and the highest bid will win.

Q: *We rented a unit to a medical clinic and they put their medical records in the unit, plus a few odds and ends. They paid their rent in a timely manner, but about a year ago the doctor who owned the clinic sold the clinic to another doctor. They did not change the name and we were never informed that the ownership had changed.*

The clinic closed and is now more than 90 days delinquent on rent. The unit is full of medical records with no value. Because these records presumably contain personal information on tenants, including Social Security numbers, I am hesitant to throw these records away or sell them. What should I do?

A: This is always a tricky situation. I always recommend that, if at all possible, when renting to a law firm, a medical office, etc. you know is going to be storing little except for records, try and get a deposit to cover shredding costs or disposal costs, exactly because of cases like this. The medical clinic whose records you have is the one legally responsible for seeing that they are properly disposed of. However, if anyone buys the records (presumably they would be buying the file cabinets, but the records would come with them) at a foreclosure sale, then arguably that buyer would inherit the responsibility to dispose of the records properly. You may wish to condition any foreclosure sale on the purchaser shredding the documents, or relinquishing the documents to you so that you can shred them or dispose of them carefully.

Again, in my legal opinion it is not your duty to shred the documents, but as a practical matter it is not a good idea to have these documents sitting in your dumpster or any dumpster. Owners have been known to sell units like this (as a practical matter, sell the file cabinets) under the condition that all of the files be thrown away, but not thrown away until the morning the property's dumpster is emptied (that way at least you know that the dumpster divers won't get to the files).

If the medical clinic is in bankruptcy, I would recommend that you call the bankruptcy trustee and tell them of your plans to auction the unit and throw away all the contents, and tell them there is potential significant liability for the bankrupt doctors in failing to dispose of their own records in accordance with state law.

Questions? Contact TSSA:
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Access Rights

Repossessions: Must You/May You Allow Access?

Especially with the recent downturn in the economy, repossessions are unfortunately becoming more and more common. How should you handle a situation where a repossession company arrives at your office, demanding access to a car, or a unit with financed furniture in it, because he says that his company has financed this item and that he is repossessing it?

For starters, it is important to remember that your self-storage lien is superior to any other lien. Under Chapter 59 of the Property Code, Section 59.021: "A lessor has a lien on all property in self-storage facility for the payment of charges that are due and unpaid by the tenant." Section 59.006 also says: "The lien takes priority over all other liens on the same property."

So, the first thing to say to the "repo man" is that even if you were legally able to allow him access to the unit (or the car, etc.), if the tenant is delinquent, your lien takes priority.

Second of all, without (1) a court order directed specifically at your facility, or (2) the tenant's permission (preferably in writing), you have no legal authority to allow anyone other than those listed in the TSSA lease as "additional access" persons access to the unit or outdoor storage item. (In limited situations described in the TSSA lease, you are also authorized to allow access to anyone the tenant listed as an "emergency contact" person.) You may inform the person trying to repossess the item that they may pay the balance in full and put off any upcoming foreclosure sale, but that he will have to make arrangements with the tenant for access. A court order directed specifically at your facility would be very unusual. It is recommended that you contact your attorney immediately upon receiving such an order to ensure the authenticity of the paperwork.

There is also third a exception to this "no access" general rule in the case of a foreclosure action on a vehicle, trailer, outboard motor, or boat. In these cases, the owners and lienholders of record have a period in which they have a statutory right to redeem the item (pay you all amounts due and repossess the item). This redemption period is a 31-day period beginning the day you send the owner and lienholder of record a notice of intent to sell. The notice of intent to sell is the second of two notices in the "special" (vehicle/boat) foreclosure process, the first being the notice of claim. So, if the repo company wants to take a vehicle for example, and that vehicle is in the foreclosure process for non-payment of rent, you may wish to inform the person attempting to repo the vehicle that if he is a lienholder of record, he will have 31 days from the date you mail the notice of intent to sell to pay all amounts due and lawfully redeem the vehicle.

TSSA Form of the Month

Form L-5, Affidavit and Indemnification Agreement (Redeeming Lienholder)

Purpose

The purpose of this form is to assist you in allowing a lienholder of a vehicle, trailer, boat, or outboard motor to redeem property prior to a foreclosure sale. Under the special foreclosure procedure for motor vehicles, boats, trailers, and outboard motors, the facility owner must send a notice of intent to sell, which is sent at least 30 days after your notice of claim is sent, to the owner of record and all lienholders as required by Texas Property Code Section 70.006. Lienholders or owners of record to whom you send this notice have a statutory right to obtain possession of the motor vehicle, trailer, boat, or outboard motor by paying all charges owed to you by your tenant within 31 days of the date you mailed the notice.

Form # L-5

AFFIDAVIT AND INDEMNIFICATION AGREEMENT OF NON-TENANT WHO CLAIMS OWNERSHIP OR LIEN OF VEHICLE, TRAILER, BOAT, OR OUTBOARD MOTOR

To: _____ (name of self-storage facility)

After being duly sworn, Affiant, _____ (who is the person signing below) hereby states under oath on behalf of the Claimant (the person or firm named below which is claiming ownership or lien) that the following is true and correct.

Claimant's name is _____ and street address is _____ City_____ ZIP Code_____ and telephone number is (_____) _____.

Affiant's name (if different than claimant) is _____ and home street address is _____ City_____ ZIP Code_____ and telephone number is (_____) _____.

Claimant requests possession of the personal property described and listed in the attached exhibit.

Such property is *[check one]* ☐ owned by Claimant, or ☐ subject to a lien held by Claimant.
Claimant's title or lien is registered with *[check one]* ☐ Texas Dept. of Transportation, or ☐ Texas Parks & Wildlife Dept.
A copy of claimant's registered title or lien is attached to this affidavit.

Affiant acknowledges that any misrepresentation or falsehood in this affidavit is a violation of the Texas Penal Code, Section 32.32, for which Affiant can be fined between $500 and $10,000 and imprisoned. Claimant and Affiant further agree to indemnify the owner and the management company of the self-storage facility named above for any damages and attorneys fees incurred by them for transferring possession of such property to Claimant in the event of false statements in this affidavit.

Printed name of Claimant (name of owner or lienholder claiming property described in attached registered title)

Printed name of Affiant (person signing this affidavit)

Signature of Affiant

Title of Affiant

Date

STATE OF TEXAS
COUNTY OF _____

Before me the undersigned authority this day appeared _____ who, after being duly sworn, stated upon oath that the foregoing was true and correct. Sworn to before me this _____ day of _____, _____.

Notary Public for the State of Texas
Printed name of notary _____
My commission expires _____

Exhibit:
Copy of ☐ registered title, or ☐ registered lien. This affidavit plus the attached exhibit are a total of _____ pages.

If you have an owner or lienholder (you will discover this information when you do your TXDOT or Texas Parks and Wildlife Department inquiry) who wishes to redeem the property within 31 days of the mailing of this notice, you may have the owner or lienholder sign this form. By signing this form they affirm that they are the owner or have a lien, and agree to indemnify you for any damages that come about as a result of the tenant claiming that they should not have been allowed to redeem. Damages are probably quite unlikely, as the lienholders and third party owners have a statutory right to redeem during this 31-day period, but having the lienholders sign the form is a good precaution.

When to Use

This form should be used when you are performing a Chapter 59 foreclosure on a vehicle, trailer, boat, or outboard motor, and a registered owner or lienholder wants to redeem the property within 31 days of your mailing of the notice of intent to sell.

Tips for Use

You should make sure that any person or entity claiming to be a third party owner or lienholder is, in fact, an owner or lienholder according to TXDOT or Texas Parks and Wildlife Department records. You can ask for identification if you wish. If someone is claiming to be a representative of a company (for example, if a company is the lienholder), you would be well served to make sure that he is a duly authorized representative (get something in writing from an officer of the company stating that he has the authority to act for the company). Also, if the lienholder is an entity, make sure that the legal name of the lienholder is printed in the signature line and that the person signing on behalf of the entity signs as an agent of the entity. This document should be notarized as well, as an extra precaution.

There is no legal requirement for the redeeming owner or lienholder to sign this form, but it can give you "insurance" and peace of mind that the redeeming lienholder is who he says he is, and that he will indemnify you for damages claimed by the tenant (however unlikely a claim like this would be).

As a practical matter it would be unusual for someone to "impersonate" a lienholder and attempt to redeem the property. The only ones who know about the sale—the only ones who have received your notice of intent to sell—are the tenant himself, and the owners and lienholders of record.

Liability Risks

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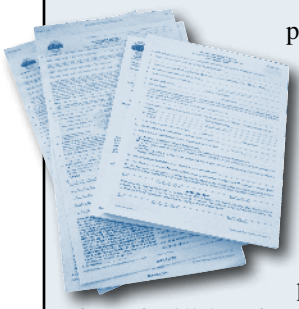

prior knowledge of, and random acts of crime, theft, etc. The TSSA lease provides strong protection for facilities from tenant attempts to hold the facility responsible for damage to contents caused by leaks, theft, vermin, casualty, and other such items.

One Size Does Not Fit All

Be very wary in using lease forms that purport to be suitable for use nationwide. There is no such thing. Some states may have no self-storage laws, and these "generic" forms may be suitable for use in those states. However, in states like Texas, where there are state-specific statutes, your lease and lease forms simply must be drafted specifically for Texas use, to comply with Texas law.

Summary

Consider using TSSA lease forms if you are not currently using them at your facility. If you have "inherited" non-TSSA lease forms at a facility you have acquired or at which you have recently taken over management, consider asking, or requiring, your tenants to switch to the TSSA lease. See the TSSA legal article titled "Switching from a Non-TSSA lease to a TSSA Lease," behind the "Legal Articles" tab in the TSSA *Goldbook*©, for recommended procedure for getting tenants on non-TSSA leases to switch to TSSA leases. If you are not currently using TSSA forms and do not wish to, you would be well served to have your attorney review all forms to make sure they comply with Texas law.

Self-Storage Kiosks

Self-Storage Kiosks: Are They Right for Your Facility?

Self-storage "kiosks" are being used by more and more of our members. This article will summarize what services a typical kiosk provides, and provide information to help you in your determination of whether a kiosk might be a good fit for your facility.

What is a Kiosk?

A kiosk is normally either a wall-mounted or freestanding machine, somewhat similar to an ATM. They are typically installed outside of a facility's perimeter fence. Depending on the model of kiosk you select, the kiosk can lease new units, accept monthly rent payments, dispense locks and soon will even perform background checks on new tenants, if desired.

What Does it Cost?

Costs range from about $9,000 for the basic models, to $18,000 for the top-of-the-line model. With any purchase, there is normally an additional set-up, training, and customization fee of approximately $1,250, and monthly maintenance and warranty fees ranging from about $125-$250/month, which includes technical support six days a week, constant system monitoring, all new software enhancements, and a comprehensive repair/replace warranty for all electrical components.

What Are the Potential Advantages?

Efficiency and Customer Service

The TSSA-member kiosk users interviewed for this article overwhelmingly cited increased customer service and convenience as the primary advantage to kiosks. One owner reported that at a 400+ unit facility, approximately 60 tenants per month use the kiosk to pay rent. OpenTech Alliance reported that their kiosks rented over 9,000 units in 2008.

Late Fee Collection

Owners have reported that the kiosks assist in late fee collection. If a tenant is delinquent and his access code has been disabled, it cannot be reactivated unless he pays in full, including any late fees. Embarrassed customers do not have to talk to a manager; they can simply make all payments to the kiosk, including late fees. Many managers waive the initial late fee upon request of a customer who is standing in their office. There is no such conversation with the kiosk, the late fee is paid, or access *continues* to be denied.

Time Saving

Most of the kiosk users interviewed for this article stated that in their experience, the kiosk is not a substitute for personnel, but a good enhancement. With the exception of one smaller

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Self-Storage Kiosks Continued

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facility that is experimenting with a kiosk only (no on-site manager at all), all facility owners interviewed use a kiosk as a supplement to, not a replacement for, an on-site manager. Some said they have, however, been able to cut back on their employee hours since installing the kiosk. Most interviewed said that they did not see a kiosk as a realistic way to replace employees, but more as a supplement to existing employees, and as a customer convenience.

Increased Security

Depending on the model used, the kiosk offers many security services. For example: video recording of all kiosk users, drivers' license and credit card scans, fingerprint scans, and soon background checks on tenants.

TSSA Lease Forms

TSSA has entered into a licensing agreement with OpenTech Alliance, which markets the INSOMNIAC™ self-storage kiosks. OpenTech is one of the most widely-used kiosk systems in the industry. Under this licensing agreement, for so long as the agreement is in effect, the OpenTech kiosks can utilize the TSSA lease, generated by Blue Moon software, when new tenants rent a unit. Of course the facility must be a TSSA member and subscribe to the TSSA Blue Moon software package at all times. TSSA does not endorse OpenTech or any individual vendors, but more information is available on the OpenTech website at www.opentechalliance.com.

After-Hours Use

If desired, kiosks can be used to allow units to be rented 24 hours a day. Your facility may be able to obtain rentals after hours that it otherwise would not have had. Kiosks can also be programmed to only allow new rentals during office or gate hours, but allow payments 24 hours a day.

Potential Drawbacks

Lack of Oversight

Especially if after-hours access is available through the kiosk, there is no one on site to be "nosy" when a tenant moves in. Except for properties with surveillance cameras, it would be impossible to know, for example, whether a tenant renting a ground floor unit put a vehicle in it.

Unlocked Units

If owners are allowed to rent a unit using the kiosk during hours where a manager is not on-site, units must normally be left unlocked. This creates a risk of unauthorized entry by "squatters" or a tenant simply confused about which unit he rented.

Most facilities use the plastic tear-off locks on units made available for rental through the kiosks. In these cases, using daily kiosk rental records and performing a daily walk-through will enable owners to identify quickly any units that anyone may have entered and locked with their own lock, but for which there was no lease signed.

Certain kiosk models can also limit the available "stock" of rental units (make only one of each size of unit available via the kiosk, for example). So, you can lock up the rest of your vacant units until you need that inventory available on the kiosk.

Operators can also put an inexpensive combination lock on each unit, rentable from the kiosk. Then, when the tenant rents a unit they get the lock combination printed on their receipt. Ultimately the tenant should use his own lock so that the facility will have no knowledge of the combination and the tenant could not accuse the manager of entering the unit and taking things.

Lastly, if your facility is equipped with this technology, a kiosk can work with your electronic locking equipment, so that a unit stays locked until it is rented at the kiosk, at which time it automatically unlocks.

Demographics

The facility owners interviewed for this article noted that older tenants were much less likely to use the kiosk than younger tenants.

Summary

There are many potential advantages and efficiencies to be gained in using a kiosk system at your facility. This article can serve as a starting point for owners interested in exploring whether kiosk technology is a good fit for their facility.

Frequently Asked Questions

Must you allow 24-hour access if you use a kiosk?

No. You may offer 24-hour access, but in limited-access facilities, kiosks can give out access codes for new tenants, but codes will work only during gate hours.

How can the tenant sign the lease?

The kiosk uses either a digital signature pad or a touch-screen to capture a signature for lease acceptance (state law affirms that electronic signatures are binding).

Can I limit the number and location of units offered through the kiosk?

Yes. You do not have to make your whole inventory available through the kiosk. You can limit the number of available units in each size category.

What kind of payments does the kiosk take? Does it give change?

Depending on the model, kiosks may have the technology to accept cash, checks, or credit cards. However, they can be programmed to accept only the types of payment you desire to accept. The kiosks do not give change, but inform the tenant that any over-payment will be applied as a credit to his account. You can also restrict what types of payments are acceptable depending on the number of days late a tenant is in making their payment.

What about special promotions?

Some kiosks allow the flexibility for facilities to offer customized pricing and promotions through the kiosk depending upon the specific property management software being used at the facility.

Will it work with my software?

Kiosks interface with most popular industry software programs.

What if my customer has questions?

Most kiosks allow the option of letting users be automatically connected to a customer-service agent. OpenTech now also offers a new service whereby they will take calls from your kiosk and assist your customers in renting a unit or making a payment.

Property And Franchise Tax Reform In The 2009 Texas Legislative Session

There were significant tax reforms passed in the 2009 Texas Legislative Session, particularly with regard to property (ad valorem) taxes and franchise (margins) taxes. This article summarizes the reforms with the most potential to affect TSSA members.

Franchise (Margins) Tax Reform:

- The "small business" exemption to the franchise/margins tax is temporarily increased from the current $300,000 in gross revenue to $1 million for the next two years and permanently increased to $600,000 in subsequent years. This should provide much-needed tax relief for many members. HB 4765, effective 1/1/10.

Property Tax Reform:

- **Constitutional Amendment**. A bill was passed to put the following issue on the state-wide ballot for vote on November 3, 2009: Allowing the state to oversee the property tax system to establish greater uniformity of standards and procedures throughout the system. HJR 36
- **Truth in Taxation Statement.** Provides a "truth in taxation" statement of by what percentage the proposed tax rate exceeds the effective tax rate. Section 26.05, HB 2291, effective: 6/19/09.

Taxpayer Rights and Remedies

- **Filing Deadline Extended.** The deadline for filing a lawsuit is extended to 60 days (from 45 days) after issuance of an appraisal review board (ARB) order. HB 986, effective 6/19/09.
- **Good Cause Postponement.** A taxpayer may obtain a postponement of an ARB hearing for "good" rather than "reasonable" cause. "Good" cause is defined as a mistake that was not intentional or the result of conscious indifference, and which will not cause undue delay. HB 1030, effective 1/1/10.
- **Limited Alternate Appeals Process Established.** A three-year "pilot" program in Bexar, Cameron, El Paso, Harris, Tarrant, and Travis counties established. The program would allow commercial property owners with property valued at over $1 million the option of appealing any ARB decisions to a new "state office of administrative hearings" (SOAH) at a relatively minimal cost compared to an appeal in district court. The "loser" pays the cost of the appeal. HB 3612, effective 1/1/10.
- **One Appeal Deposit Required for Two Tracts.** In an arbitration appeal, only one deposit is required for two or more contiguous tracts of land. HB 4412, effective 9/1/09.
- **Attorneys Fees for Error.** In a petition for a correction of an error in the appraisal roll, a prevailing taxpayer is now entitled to receive attorneys fees. (Under law that already exists, a prevailing taxpayer is entitled to receive attorneys fees for a protest of tax valuation but not a correction of error). HB 1030, effective 6/19/09.
- **Signature Other Than Tax Consultant Required.** Designation of an agent (a property tax consultant helping you with your protest, for example) must now be on a form from the Comptroller's office and must be signed by a person other than the person being designated. The agent designation may be filed at or before the ARB hearing. HB 1203, effective 5/26/09.

Appraisal Review Board Matters

- **Notice of Hearing to Taxing Unit.** In a motion to determine compliance with the payment requirements of Tax Code Section 42.08, the party filing the motion must provide notice of the compliance hearing to each taxing unit that imposes taxes on the property. The notice(s) must be sent via certified mail, return receipt requested. Also, the taxing unit may intervene in the hearing, whether or not it received notice of the hearing, for the limited purpose of determining compliance with Section 42.08 requirements. SB 1359, effective 6/19/09.
  Additional note about Section 42.08, regarding the duty to pay taxes when you are protesting: *Tax Code Section 42.08 details the amount of tax that must initially be paid when a taxpayer is protesting a tax valuation. Filing a timely protest does not delay the deadline for payment of taxes. Unless an oath of inability to pay is filed and a specific finding made, a taxpayer filing a protest (appeal) must pay taxes on the property that is subject to appeal in a timely manner.* The taxes paid must be the lesser of either:
  (1) The amount of tax due on the portion of the taxable value of the property that is not in dispute (taxes would be calculated based on what the owner believes the correct valuation to be on the improvement, for example); or (2) The amount of tax due on the property under the order from which the appeal is taken (in other words, the amount you were billed). "Overpaying" does not affect your right to a refund should you be successful in your protest.
- **Business Personal Property for Income-Producing Real Estate.** Business personal property used in the production of income on income-producing real estate must be appraised as part of the real property under the income approach and not separately appraised as business personal property. SB 771, effective 1/1/10.
- **Proof of Valuation Required.** Appraisal districts will be required to use property-specific information provided by the owner's tax consultant or the owner in the process of valuing the owner's property. Appraisal districts must also demonstrate "substantial evidence" to warrant an increase in the property's value in the year subsequent to a successful protest. A sale used for comparison must be within 24 months of the valuation date to be considered comparable unless there are insufficient sales. Criteria have also been set forth for determining whether a property is comparable. SB 771, effective 1/1/10.
- **Training for ARB Members.** Appraisal review board members are required to receive training from an independent source. The new law specifies topics that must be covered in the training. HB 2317, effective 9/1/09.
- **TDLR Now Responsible for Licensing and Regulation of Appraisal District Employees.** The Board of Tax Professional Examiners is eliminated and the responsibility for regulating and licensing employees of appraisal districts, and tax assessor-collectors is moved to the Texas Department of Licensing and Regulation. HB 2447, effective 9/1/09.

Comptroller Reforms

- **Property Study and Audits Every Two Years.** The Texas Comptroller's previously annual property value study is now required to be a biennial study. The Comptroller's authority for audits is expanded to mandate a biennial audit of all appraisal district operations and methodologies, hopefully helping to bring more consistency throughout the state to appraisal methods used by various appraisal districts. HB 8, effective 1/1/10.

Condemnation of Self-Storage Facilities

When Roadways and Buildings Cross Paths

By: Christopher J. Oddo, Mcginnis, Lochridge & Kilgore, LLP

Location, location, location—certainly one of the key elements of a successful self-storage facility. Most self-storage businesses are located on major thoroughfares and roadways so that access is easy for clients and visibility is high for potential clients. What makes for a great business site for you, however, also means your business could be affected at some point by a condemnation proceeding.

As the population of Texas grows each year, the transportation system that services our expanding populace must also increase to meet the needs of our mobile society. In short, old roads are being widened and new ones are being built. If the government comes looking for your land for a roadway expansion, it will be important that you understand how to protect your rights and how to navigate the condemnation process to guarantee that you receive adequate compensation.

After roadway routes are finally determined, the government will begin negotiations with you to purchase all or a portion of your land. The government may want just a partial taking of your land next to the roadway. But, for the unlucky few, the government may seek not only the land on which your storage facility is constructed, but also part of your facility itself. While the government must make a good faith attempt to negotiate with you to come to an agreed amount of compensation owed, if the negotiations fail, the government ultimately has the power of eminent domain under Texas law and can take your private property for public use. Condemnation is the process by which the government exercises its eminent domain power.

There is no need to be afraid of the condemnation process or refusing to accept a less than fair offer if you follow the statutory procedures. Landowners have inherent legal protection in condemnation matters because the Texas Constitution prohibits the condemnation of your property without "adequate compensation" being made for taking your property. In condemnation matters for highway and roadway construction, the issue is usually not whether the government can take your property, but what you are ultimately paid for your land and the destruction of some or all of your facility. Therefore, the main goal for a self-storage facility in a condemnation case is to ensure receipt of full and adequate compensation for the damages caused by the property being taken.

"There is no need to be afraid of the condemnation process or refusing to accept a less than fair offer if you follow the statutory procedures."

In general, the overall compensation landowners may be entitled to depends on numerous factors that affect the value of the part taken, as well as the damage to the remainder as a result of the taking. Determining the totality of damages caused by a condemnation, and thus what you are entitled to receive as adequate compensation, will most likely need to be done by a professional appraiser.

For most self-storage facilities, the location of the business is one of the crucial characteristics which most determines the business' bottom-line. If your land is going to be condemned by the government, you should be protected and get the adequate compensation to which you are entitled. The headache that condemnation can cause landowners will be much more bearable when you are prepared and have the right team on your side.

About the author: Christopher J. Oddo is a partner with the law firm of McGinnis, Lochridge & Kilgore, LLP in Austin and advises clients on numerous issues including eminent domain and right-of-way claims.

With the exception of guest authors, all articles in the TSSA *Legal Update* are authored by Connie Heyer. Heyer is a partner in the law firm of Niemann & Heyer, LLP in Austin and serves as legal counsel for the Texas Self Storage Association. She is co-author of the TSSA *Goldbook*©, a comprehensive guide to laws and regulations affecting self-storage professionals in Texas. Niemann & Heyer, LLP is also the author of the current TSSA Rental Agreement and official forms.