

Now Effective: New REET Exemption Available in Washington for Property to Be Used to Provide Affordable Housing

Legal Alert
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As of January 1, 2023, providers of affordable housing in Washington State have access to a new exemption from the excise tax on real estate sales (also known as the real estate excise tax, or “REET”). This new exemption, codified at [RCW 82.45.010\(3\)\(v\)](#), is intended to provide an incentive for transfers of real property for use as affordable housing by reducing the transaction costs.

Unless an exemption applies, REET must be paid in connection with any “sale” of real property in Washington State (the “State”), including a lease containing an option to purchase, and a transfer of the controlling interest in an entity that own real property. Under the new exemption, a sale or transfer of real property to a qualifying grantee that uses the property to provide housing for low-income persons *and* receives or qualifies for one of certain existing exemptions from property taxes is also eligible for an exemption from REET.

Qualifying Grantee. To be eligible for the new REET exemption, the sale or transfer of real property must be to a “qualifying grantee.” A “qualifying grantee” includes:

- a nonprofit entity as defined in RCW 84.36.560, including:
 - a 501(c)(3) organization
 - a limited partnership in which a 501(c)(3) organization, public corporation, or housing authority is a general partner
 - a limited liability company in which a 501(c)(3) organization, public corporation, or housing authority is a managing member

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- a mobile home park cooperative or manufactured housing cooperative
- a housing authority created under RCW 35.82.030 or a joint housing authority created under RCW 35.82.300
- a public corporation established under RCW 35.21.660 or 35.21.730
- a county or municipal corporation; provided that the county or municipal corporation must record a covenant at the time of transfer that prohibits using the property for any purpose other than low-income housing for at least ten years.

Exemption from Annual Real Property Taxes. In order to utilize the new exemption from REET, a qualifying grantee must also receive or qualify for an exemption from annual property taxes under one of the following existing exemptions (collectively, the “Listed Property Tax Exemptions”):

- RCW 84.36.560, which provides an exemption from property taxation for real and personal property owned or used by a “nonprofit entity” that provides rental housing to very low-income households (at or below 60% of area median income, adjusted for household size);
- RCW 84.36.049, which provides an exemption from property taxation for real property owned by a “nonprofit entity” or “qualified cooperative association” for the purpose of developing or redeveloping one or more residences to be sold to low-income households (less than 80% of area median income, adjusted for family size);
- RCW 35.82.210, which exempts property of a housing authority from all state and local taxes;
- RCW 35.21.755, which exempts certain property of a public corporation created pursuant to RCW 35.21.660 or 35.21.730 from property taxation; or
- RCW 84.36.100, which provides that property belonging to the United States, the State, or any county or municipal corporation is exempt from taxation.

Use of Property as Housing for Low-Income Persons. In order to be eligible for the new REET exemption, a qualifying grantee also must use the property as housing for low-income persons. For this purpose, “low-income” has the same meaning set forth in RCW 82.45.010(3)(u) for sales by an affordable homeownership facilitator of self-help housing to a low-income household. The statute providing the REET exemption for self-help housing defines “low-income” to mean household income as defined by the Washington State Department of Revenue (“DOR”); not to exceed 80% of median household income, adjusted for household size, for the county in which the property is located. Although DOR has not yet promulgated regulations regarding the meaning of the phrase “low-income” for purposes of the REET exemption for self-help housing, a [DOR Special Notice](#) released on October 9, 2019, indicates

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that for purposes of the self-help housing REET exemption, a qualified low-income household means “individuals and families whose adjusted household income, [sic] does not exceed 80% of area median income, adjusted for household size, as most recently determined by the federal department of housing and urban development for the county in which the dwelling is located.”

Timelines for Compliance. The statute creating the new REET exemption imposes deadlines by which a qualifying grantee must receive or qualify for a Listed Property Tax Exemption and begin operating the property as housing for low-income persons. A qualifying grantee must satisfy the requirements for the REET exemption:

- **within one year** of the sale or transfer, if the qualifying grantee intends to operate **existing housing** on the property;
- **within three years** of the sale or transfer, if the qualifying grantee intends to **substantially rehabilitate** the premises; or
- **within five years** of the sale or transfer, if the qualifying grantee intends to develop **new housing** on the site.

Affidavit/Proof of Satisfaction of Requirements. To be eligible for the new REET exemption, a grantee must complete an affidavit at the time of transfer, declaring that the grantee is a qualifying grantee, that it will receive or qualify to receive a Listed Property Tax Exemption within the applicable time period, that it intends to use the property to provide housing for low-income persons, and, if applicable, that it intends to substantially rehabilitate and/or develop new housing on the property. DOR provides separate forms of affidavit for the operation of existing housing ([Form 84 0019](#)), substantial rehabilitation ([Form 84 0021](#)), and development of new housing ([Form 84 0020](#)).

In addition, proof of eligibility for the REET exemption must be provided to DOR after the requirements for the REET exemption have been satisfied (*i.e.*, after the grantee has qualified for or received a Listed Property Tax Exemption and the property is being used as housing for low-income persons).

Subsequent Transfers. The statute creating the new REET exemption contemplates the possibility that property may be transferred from one qualifying transferee to another during the original timeline for compliance (discussed above). A transfer from one qualifying transferee to another does not require the payment of REET, so long as the new qualifying transferee satisfies the requirements for the REET exemption within the original timeline established in connection with the initial transfer.

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Failures to Comply. If the qualifying grantee fails to qualify for or receive a Listed Property Tax Exemption or fails to use the property as housing for low-income persons within the applicable timeline, the qualifying grantee must pay the REET that would otherwise have been due at the time of transfer, with interest.

Requirements for Exemption from Property Taxes Under RCW 84.36.560 for Property Owned or Used by a “Nonprofit Entity” that Provides Rental Housing to Very Low-Income

Households. As discussed above, in order to be eligible for the new REET exemption, a qualified transferee also must receive or qualify for a Listed Property Tax Exemption. Non-governmental housing providers will likely find that the Listed Property Tax Exemption provided by RCW 84.36.560 (for property owned or used by a “nonprofit entity” to provide housing for very low-income households) is the exemption most likely to be available. RCW 84.36.560 provides an exemption from property taxation for real and personal property owned or used by a “nonprofit entity” if:

- the benefit of the exemption inures to the nonprofit entity;
- dwelling units in the rental housing are occupied by a qualifying household (beginning July 1, 2021, a household whose income is at or below 60% of area median income, adjusted for family size);
- the rental housing is insured, financed, or assisted in whole or in part through certain specified sources (including a federal or state housing program administered by the Washington State Department of Commerce, a federal housing program administered by a city or county government, an affordable housing levy authorized under RCW 84.52.105, the affordable housing for all recording surcharge authorized by RCW 36.22.178, the recording surcharge for local homeless housing and assistance authorized by 36.22.170, any of the surcharges authorized in chapter 43.185C, or the Washington State Housing Finance Commission if the financing is for a mobile home park, manufactured housing cooperative or nonprofit entity); and
- the property is used exclusively for the purposes for which the exemption is granted.

RCW 84.36.560 provides options for both full and partial exemptions – if at least 75% of the occupied units in a project are occupied by qualifying households, a total exemption on the property used to provide housing is available; or, if less than 75% of the occupied units in the project are occupied by a qualifying household, a partial exemption may be available.

The RCW 84.36.560 exemption from property taxes requires an initial application, as well as renewal declarations every third year.

Potential Ambiguity Regarding Application of the New REET Exemption.

In the absence of regulations, published opinions, or other guidance interpreting RCW 82.45.010(3)(v), providers of affordable housing hoping to utilize the new REET exemption may encounter some ambiguity. Potential questions regarding the application of the new REET exemption could include:

- Does an expected partial exemption from real property taxes under RCW 84.36.560 satisfy the requirement that the qualifying grantee receive or otherwise qualify for an exemption under that statute, or is a full exemption from real property taxes under RCW 84.36.560 required in order to qualify for the new REET exemption? The answer to this question will be material for those properties where less than 75% of the units are expected to be occupied by very low-income households (i.e., at or below 60% of area median income).
- Does the requirement in RCW 82.45.010(3)(v) that the property be used as housing for low-income persons require that 100% of the units be occupied by low-income households in order to qualify for the REET exemption? Must a manager's unit (if any) also be occupied by a low-income household?
- Is the requirement that property be used as housing for low-income persons to be tested only at a single point in time (such as when proof of satisfaction of the requirements for REET exemption is provided to DOR)?
- Is there any continuing requirement to redetermine a household's income after the date of initial occupancy? If so, how will a household's income growth be treated for purposes of the requirement that the property be used as housing for low-income persons? For instance, if a household qualified as low-income upon initial occupancy, and their income subsequently increases, will that portion of the property continue to be treated as being used as housing for low-income persons?
- Are mixed-use properties that are used primarily to provide housing for low-income persons eligible for the REET exemption (for instance, multifamily residential properties with ground floor retail space)?

Given the potential questions regarding the application of the new REET exemption, and the uncertainty associated with the requirement for future performance within the specified timelines, sellers of property may require that qualified transferees utilizing this REET exemption provide indemnification and/or other protection against the possibility that all or a portion of the REET that would otherwise have been due at closing becomes payable in the future.

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Reminder Regarding Existing REET Exemptions for Governmental Transfers, Gifts, and Transfers of LIHTC Properties. While the addition of the new REET exemption, codified at RCW 82.45.010(3)(v), is significant, housing providers should be aware of other available REET exemptions. For instance, neither a transfer by gift, nor a sale by the State, a political subdivision of the State, or a municipal corporation of the State is treated as a “sale” for purposes of REET. In addition, in 2018, the State legislature added an exemption from REET for transfers of certain qualified low-income housing developments (or controlling interests therein). For purposes of this exemption, a “qualified low-income housing development” means real property and improvements in respect to which the seller or, in the case of a transfer of a controlling interest, the owner or beneficial owner, was allocated federal low-income housing tax credits (“LIHTCs”) authorized under 26 U.S.C. Sec. 42 or successor statute, by the Washington State Housing Finance Commission or successor state-authorized tax credit allocating agency. In order to utilize this exemption, the seller must not be subject to LIHTC recapture within the four years prior to the date of transfer, and the transfer must occur prior to July 1, 2035.

Reminder Regarding Broad Authority of Local Governments to Assist with the Development of Housing. Existing State law provides a number of opportunities for local governments to assist with the development and preservation of affordable housing. For instance, the Housing Cooperation Law (chapter 35.83 RCW) provides broad authority for any city, town, county, municipal corporation, commission, district, authority, or other subdivision or public body of the State to cooperate with a housing authority. Both counties (RCW 36.32.415) and cities (RCW 35.21.685) are authorized to provide loans or grants to owners or developers of low income housing. Further, any municipality or political subdivision with the authority to dispose of surplus public property may transfer property to a governmental or private entity for use as affordable housing for low-income and very low-income households (RCW 39.33.015).