WSR 10-13-064
EXPEDITED RULES
DEPARTMENT OF REVENUE
[Filed June 11, 2010, 10:03 a.m.]

Title of Rule and Other Identifying Information: WAC 458-20-143 Publishers of newspapers, magazines, periodicals, explains the application of the business and occupation (B&O), retail sales, and use taxes to publishers of newspapers, magazines, periodicals, and other printed materials.

NOTICE

THIS RULE IS BEING PROPOSED UNDER AN EXPEDITED RULE-MAKING PROCESS THAT WILL ELIMINATE THE NEED FOR THE AGENCY TO HOLD PUBLIC HEARINGS, PREPARE A SMALL BUSINESS ECONOMIC IMPACT STATEMENT, OR PROVIDE RESPONSES TO THE CRITERIA FOR A SIGNIFICANT LEGISLATIVE RULE. IF YOU OBJECT TO THIS USE OF THE EXPEDITED RULE-MAKING PROCESS, YOU MUST EXPRESS YOUR OBJECTIONS IN WRITING AND THEY MUST BE SENT TO Richard Cason, Department of Revenue, P.O. Box 47453, Olympia, WA 98504-7453, e-mail RichardC@dor.wa.gov, AND RECEIVED BY August 23, 2010.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The department is proposing to amend WAC 458-20-143 to reflect several recent legislative changes:

- EHB 2122 (chapter 461, Laws of 2009) provides a preferential B&O tax rate for newspaper publishers. This legislation also requires such newspaper publishers to file tax returns electronically and filing annual reports;
- ESHB 2075 (chapter 535, Laws of 2009) explains the application of the retail sales tax and use tax on the sale of magazines and periodicals that are transferred to the buyer electronically;
- SB 6173 (chapter 563, Laws of 2009) changes the use of a resale certificate to a resellers permit to document a wholesale sale; and
- SHB 2585 (chapter 273, Laws of 2008) provides amended definitions of "newspaper" and "supplement."

The department is also proposing to incorporate:

- The statutory definition of "periodical or magazine" provided in RCW 82.04.280; and
- The sales tax and use tax exemptions for computer equipment used in printing or publishing of printed material provided by RCW 82.08.806 and 82.12.806.

Reasons Supporting Proposal: To recognize current statutory language, and to reformat the rule.

Copies of draft rules are available for viewing and printing on our web site at http://dor.wa.gov/content/FindALawOrRule/RuleMaking/agenda.aspx.

Statutory Authority for Adoption: RCW 82.32.300 and 82.01.060(2).

Statute Being Implemented: RCW 82.04.280 and other statutes in chapters 82.04, 82.08, and 82.12 RCW that apply to publishers of newspapers, magazines, and periodicals.

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: Department of revenue, governmental.

Name of Agency Personnel Responsible for Drafting: Richard Cason, 1025 Union Avenue S.E., Suite #544, Olympia, WA, (360) 664-0331; Implementation: Alan R. Lynn, 1025 Union Avenue S.E., Suite #544, Olympia, WA, (360) 570-6125; and Enforcement: Gilbert Brewer, 1025 Union Avenue S.E., Suite #544, Olympia, WA, (360) 570-6147.

June 11, 2010
Alan R. Lynn
Rules Coordinator

AMENDATORY SECTION (Amending Order ET 83-5, filed 8/1/83)

WAC 458-20-143 Printers and publishers of newspapers, magazines, and periodicals.

((~~**Business and Occupation Tax**~~

~~**Printing and publishing.** Publishers of newspapers, magazines and periodicals are taxable under the printing and publishing classification upon the gross income derived from the publishing business.~~

~~Persons~~)) (1) **Introduction.** This section explains the application of the business and occupation (B&O), retail sales, and use taxes to printers and/or publishers of newspapers, magazines, periodicals, and other printed materials. The department of revenue (department) has adopted other sections providing tax reporting information to persons printing, publishing, or selling these publications and other printed materials.

• Persons selling newspapers, magazines, and periodicals that are not printed and/or published by the seller should also refer to WAC 458-20-127;

• For information regarding the printing industry in general, see WAC 458-20-144;

• For information regarding the tax-reporting responsibilities of persons selling direct mail or engaging in business as a mailing bureau, see WAC 458-20-141;

• For information regarding the tax-reporting responsibilities of persons duplicating printed materials for others, see WAC 458-20-141;

• For information regarding potential litter tax liability, see WAC 458-20-243.

(2) **Definitions.** The following definitions apply throughout this section:

(a) **"Newspaper."**

(i) Effective July 1, 2008, "newspaper" means a publication issued regularly at stated intervals at least twice a month and printed on newsprint in tabloid or broadsheet format folded loosely together without stapling, glue, or any other binding of any kind, including any supplement of a printed newspaper; and an electronic version of a printed newspaper that:

• Shares content with the printed newspaper; and

• Is prominently identified by the same name as the printed newspaper or otherwise conspicuously indicates that it is a complement to the printed newspaper. See RCW 82.04.214.

(ii) Prior to July 1, 2008, "newspaper" means a publication issued regularly at stated intervals at least twice a month and printed on newsprint in tabloid or broadsheet format folded loosely together without stapling, glue, or any other binding of any kind.

(b) **"Supplement"** means a printed publication, including a magazine or advertising section, that is:

(i) Labeled and identified as part of the printed newspaper; and

(ii) Circulated or distributed:

• As an insert or attachment to the printed newspaper; or

• Separate and apart from the printed newspaper so long as the distribution is within the general circulation area of the newspaper.

(c) **"Periodical or magazine"** means a printed publication, other than a newspaper, issued regularly at stated interval at least once every three months, including any supplement or special edition of the publication.

(d) For purposes of this section, **"other printed material"** refers to printed materials other than newspapers, magazines, or periodicals.

(3) **General tax guidance.**

(a) **Publishing newspapers.** Effective July 1, 2009, publishers of newspapers are taxable under the publication of newspapers classification of the B&O tax upon the gross income (including advertising income) derived from publishing newspapers. See RCW 82.04.260(14). Prior to July 1, 2009, publishers of newspapers are taxable under the printing and publishing classification of the B&O tax upon the gross income (including advertising income) derived from publishing newspapers.

Persons reporting income under the publication of newspapers classification of the B&O tax must file a complete annual report with the department. In addition, such persons must electronically file with the department all surveys, reports, returns, and any other forms. Refer to RCW 82.32.600 and WAC 458-20-267 for the specific guidelines and requirements.

Retail sales of newspapers, whether by publishers or others, are exempt from retail sales tax. See RCW 82.08.0253.

(b) **Publishing periodicals or magazines.** Publishers of periodicals or magazines are taxable under the printing and publishing classification of the B&O tax upon the gross income (including advertising income) derived from publishing periodicals or magazines. See RCW 82.04.280(1).

Retail sales of printed magazines and periodicals are subject to retail sales tax. Magazines and periodicals transferred electronically to the end user are also subject to the retail sales tax regardless of how they are accessed. For more information on the sale of digital products, refer to RCW 82.04.050, 82.04.192, and 82.04.257.

(c) **Publishing other printed materials.** Retail and wholesale sales of other printed materials by persons who both print and publish ((~~books, music, circulars, etc., or any other~~)) the items, are ((~~likewise~~)) taxable under the printing and publishing classification. ((~~However,~~)) Persons((~~, other than publishers of newspapers, magazines or periodicals,~~)) who publish ((~~such things and~~)) but do not print ((~~the same~~)) other printed materials, are ((~~taxable under either~~)) subject to:

• Either the wholesaling or retailing ((~~classification~~)) B&O tax, measured by gross sales((~~,~~)) of the other printed materials; and ((~~taxable under~~))

• The service ((~~classification~~)) and other activities B&O tax, measured by the gross income received from advertising.

((**~~Retail Sales Tax~~**

~~Sales of newspapers, whether by publishers or others, are specifically exempt from the retail sales tax.~~

~~However, sales of magazines, periodicals, and all publications other than newspapers are subject to the retail sales tax when made to consumers.~~

~~"Newspaper" defined.~~ ~~The word "newspaper" means a publication of general circulation bearing a title, issued regularly at stated intervals of at least once every two weeks, and formed of printed paper sheets without substantial binding. It must be of general interest, containing information of current events. The word does not include publications devoted solely to a specialized field. It shall include school newspapers, regardless of the frequency of publication, where such newspapers are distributed regularly to a paid subscription list.~~))

(d) **Wholesale sales of printed materials.** Sales of magazines, periodicals, and other printed materials by the publisher to newsstands, book stores, department stores, and others who resell such items are wholesale sales. Such sales are not subject to retail sales tax when the buyer provides a resale certificate (WAC 458-20-102A) for sales made before January 1, 2010, or a reseller permit (WAC 458-20-102) for sales made on or after January 1, 2010, to the seller.

(4) **Sales to publishers.**

(a) Sales to newspaper((~~s~~)), magazine and periodical publishers of paper and printers ink which become a part of the publications sold, and sales by printers of printed publications to publishers for sale, are wholesale sales ((~~for resale~~)) and are not subject to the retail sales tax when the buyer provides a resale certificate (WAC 458-20-102A) for sales made before January 1, 2010, or a reseller permit (WAC 458-20-102) for sales made on or after January 1, 2010, to the seller.

(b) With respect to community newspapers which are distributed free of charge, where the publisher has a contract with his advertisers to distribute the newspaper to the subscriber in consideration for the payments made by the advertisers, it will be construed that the publisher sells the newspaper to the advertiser, and, therefore, the retail sales tax will not apply with respect to the charge made by the printer to the publisher for printing the newspaper or with respect to the purchase of ink and paper when the publisher prints his own newspaper.

(c) Sales to newspaper, magazine or periodical publishers of equipment and of supplies and materials which do not become a part of the finished publication ((~~which~~)) that is sold are subject to the retail sales tax unless specifically exempt (see subsection (5) of this section). This includes, among others, sales of ((~~engravings,~~)) fuel, furniture, lubricants, ((~~machinery, negatives and plates used in offset printing, photographs, stationery~~)) and ((~~writing ink. Sales of~~

~~engravings to publishers are subject to the retail sales tax unless the publisher resells such engravings without intervening use~~)) office supplies.

(d) Sales to newspaper, magazine or periodical publishers of baseball bats, bicycles, dolls and other articles of tangible personal property which are to be distributed by the publisher as gifts, premiums or prizes are sales for consumption and subject to the retail sales tax.

((~~So called "sales"~~)) (e) Sales by authors and artists to publishers of the right to publish scripts, paintings, illustrations and cartoons are mere licenses to use, not sales of tangible personal property and((~~, therefore,~~)) are not subject to the retail sales tax.

(5) **Exemption for sales of computer equipment to printers and/or publishers.** RCW 82.08.806 and 82.12.806 provide printers and publishers retail sales and use tax exemptions for computer equipment that is used primarily in the printing or publishing of any printed material. The exemption includes repair parts and replacement parts for such equipment and sales of or charges made for labor and services rendered in respect to installing, repairing, cleaning, altering, or improving the computer equipment. The exemption also includes maintenance agreements (service contracts), as defined in WAC 458-20-257, on such equipment. This exemption applies only to computer equipment not otherwise exempt under RCW 82.08.02565.

(6) **Use tax.** Publishers of newspapers, magazines and periodicals are subject to tax upon the value of articles printed or produced for use in conducting such business. Tax also applies to materials, supplies, and other items which do not become part of the finished publication or which are not resold. Where retail sales tax is not paid, the publisher must remit the retail sales tax (commonly referred to as "deferred sales tax") or use tax directly to the department unless specifically exempt by law. Deferred sales or use tax should be reported on the use tax line of the buyer's excise tax return. For detailed information about use tax, refer to WAC 458-20-178, Use tax.

WSR 10-13-065

EXPEDITED RULES

DEPARTMENT OF REVENUE

[Filed June 11, 2010, 10:42 a.m.]

Title of Rule and Other Identifying Information:

- WAC 458-29A-100 Leasehold excise tax—Overview and definitions, provides a brief overview of the leasehold excise tax program and definitions used throughout chapter 458-29A WAC;
- WAC 458-29A-200 Leasehold excise tax—Taxable rent and contract rent, explains the exclusions of certain moneys and other property received by or on behalf of a lessor from the measure of contract rent, and the conditions under which the department is authorized to establish a taxable rent different from the contract rent;
- WAC 458-29A-400 Leasehold excise tax—Exemptions, identifies the leasehold excise tax exemptions; and
- WAC 458-29A-500 Leasehold excise tax—Liability, explains the lessor's responsibility to collect and remit tax.

NOTICE

THIS RULE IS BEING PROPOSED UNDER AN EXPEDITED RULE-MAKING PROCESS THAT WILL ELIMINATE THE NEED FOR THE AGENCY TO HOLD PUBLIC HEARINGS, PREPARE A SMALL BUSINESS ECONOMIC IMPACT STATEMENT, OR PROVIDE RESPONSES TO THE CRITERIA FOR A SIGNIFICANT LEGISLATIVE RULE. IF YOU OBJECT TO THIS USE OF THE EXPEDITED RULE-MAKING PROCESS, YOU MUST EXPRESS YOUR OBJECTIONS IN WRITING AND THEY MUST BE SENT TO Marilou Rickert, Department of Revenue, P.O. Box 47453, Olympia, WA 98504-7453, e-mail MarilouR@dor.wa.gov, AND RECEIVED BY August 23, 2010.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The department proposes to amend these rules to recognize provisions of SB 6855, chapter 281, Laws of 2010, which exempts community centers from property taxation and imposes leasehold excise tax on such property. This legislation defines "community center" to be property, including a building or buildings, determined to be surplus to the needs of a district by a local school board, and purchased or acquired by a nonprofit organization for the purpose of conversion into community facilities for the delivery of nonresidential coordinated services for community members.

Copies of draft rules are available for viewing and printing on our web site at http://dor.wa.gov/content/FindALawOrRule/RuleMaking/agenda.aspx.

Reasons Supporting Proposal: To recognize provisions of chapter 281, Laws of 2010.

Statutory Authority for Adoption: RCW 82.29A.140.

Statute Being Implemented: RCW 82.29A.100, 82.29A.200, 82.29A.400, and 82.29A.500.

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: Department of revenue, governmental.

Name of Agency Personnel Responsible for Drafting: Marilou Rickert, 1025 Union Avenue S.E., Suite #544, Olympia, WA, (360) 570-6115; Implementation: Alan R. Lynn, 1025 Union Avenue S.E., Suite #544, Olympia, WA, (360) 570-6125; and Enforcement: Gilbert Brewer, 1025 Union Avenue S.E., Suite #544, Olympia, WA, (360) 570-6147.

June 11, 2010

Alan R. Lynn

Rules Coordinator

AMENDATORY SECTION (Amending WSR 99-20-053, filed 10/1/99, effective 11/1/99)

WAC 458-29A-100 Leasehold excise tax—Overview and definitions. (1) **Introduction.** Chapter 82.29A RCW establishes an excise tax on the act or privilege of occupying or using publicly owned real or personal property or property of a community center which is exempt from property tax through a leasehold interest. The intent of the law is to ensure that lessees of property owned by public entities bear their fair share of the cost of governmental services when the property is rented to someone who would be subject to property taxes if the lessee were the owner of the property. The tax is an excise tax triggered by the private use and possession of the public property or property of a community center which is exempt from property tax. RCW 82.29A.030.

(2) **Definitions.** For the purposes of chapter 458-29A WAC, the following definitions apply unless the context requires otherwise.

(a) "Department" means the department of revenue.

(b) "Community center which is exempt from property tax" means a community center as defined in RCW 84.36.010 (2)(a) that is exempt from property tax under RCW 84.36.010(1).

(c) "Concession" means the right to operate a business in an area of public property or property of a community center which is exempt from property tax.

(((~~c~~))) (d) "Contract rent" means that portion of the payment made by a lessee (including a sublessee) to a ((~~public~~)) lessor (or to a third party for the benefit of that lessor) for a leasehold interest in land and improvements or tangible personal property.

(((~~d~~))) (e) "Franchise" means a right granted by a public entity or community center which is exempt from property tax to a person to do certain things that the person could not otherwise do. A franchise is distinguishable from a leasehold interest even when its exercise and value is inherently dependent upon the use and possession of publicly owned property or property of a community center which is exempt from property tax.

(((~~e~~))) (f) "Improvement" means a modification to real property, resulting in an actual change in the nature of the property or an increase in the value of the property. It is distinguishable from routine repair and maintenance, which are activities resulting from normal wear and tear associated with the use of property, and which do not result in a change in the nature or value of the property itself. For example, replacing worn boards in a stairway is repair and maintenance; removing the stairway and replacing it with an elevator or a ramp is an improvement.

(((~~f~~))) (g) "Leasehold interest" means an interest granting the right to possession and use of publicly owned real or personal property or real or personal property of a community center which is exempt from property tax as a result of any form of agreement, written or oral, without regard to whether the agreement is labeled a lease, license, or permit.

(i) Regardless of what term is used to label an agreement providing for the use and possession of public property or property of a community center which is exempt from property tax by a private party, it is necessary to look to the actual substantive arrangement between the parties in order to determine whether a leasehold interest has been created.

(ii) Both possession and use are required to create a leasehold interest, and the lessee must have some identifiable dominion and control over a defined area to satisfy the possession element. The defined area does not have to be specified in the agreement but can be determined by the practice of the parties. This requirement distinguishes a taxable leasehold interest from a mere franchise, license, or permit.

For example, Sam sells hot dogs from his own trailer at varying sites within a county fairgrounds during events. Sam is not assigned a particular place to set up his trailer nor does he store his trailer on the fairground between events. Sam's right to sell and his use of the property is considered a franchise and not a leasehold interest. The necessary element of possession, involving a greater degree of dominion and control over a more defined area, is lacking.

(iii) The use or occupancy of public property or property of a community center which is exempt from property tax where the purpose of such use or occupancy is to render services to the public owner or community center which is exempt from property tax does not create a leasehold interest. The lessee's possession and use of the property is in furtherance of the purposes of the public ((~~owner's purposes~~)) owner or community center which is exempt from property tax, and it is the public owner ((~~who~~)) or community center which is exempt from property tax which benefits from the governmental services rendered in respect to the property.

For example, Contractor A operates a snack bar at a publicly owned facility where food and beverages are sold to members of the public, and derives a profit from the proceeds of the snack bar sales. Contractor B operates a cafeteria where food is provided at no charge to persons with appropriate I.D., and is reimbursed on a cost-plus basis. Contractor A is engaged in a business enterprise the same as any other restaurateur. Contractor A is using the public property for a private purpose, and has a taxable leasehold interest on the premises. Contractor B is merely providing a service to government personnel that the government agency would otherwise provide. Contractor B is using public property for a public purpose, and does not have a taxable leasehold interest.

(iv) "Leasehold interest" includes the use and occupancy by a private party of property that is owned in fee simple, held in trust, or controlled by a public corporation, commission, or authority created under RCW 35.21.730 or 35.21.660 if:

(A) The property is within a special review district established by ordinance after January 1, 1976; or

(B) The property is listed on, or is within a district listed on, any federal or state register of historical sites in existence after January 1, 1987.

(v) "Leasehold interest" does not include:

(A) Road or utility easements;

(B) Rights of access, occupancy, or use granted solely for the purpose of removing materials or products purchased from a public owner or community center which is exempt from property tax or the lessee of a public owner or community center which is exempt from property tax, including permits to graze livestock, cut brush, pick wild mushrooms, or mine ore; and

(C) Any right to use personal property (excluding land or buildings) owned by the United States (as a trustee or otherwise), or by a foreign government, when the right to use the property is granted by a contract solely to manufacture or produce articles for sale to the United States or the foreign government.

(((~~g~~))) (h) "Lessee" means a private person or entity with a leasehold interest in public property ((~~who~~)) or property of a community center which is exempt from property tax which would be subject to property tax if the person or entity owned the property in fee.

(((~~h~~))) (i) "Lessor" ((~~or "public lessor"~~)) means an entity exempted from property tax obligations pursuant to Article 7, section 1 of the state Constitution or, for the property tax exempt period of forty years after acquisition, a community center as defined by RCW 84.36.010 (2)(a) that is exempt from property tax under RCW 84.36.010(1) that grants a leasehold interest in public property or property of a community center which is exempt from property tax to a private person or entity.

(((~~i~~))) (j) "License" means permission to enter on land for some purpose, without conferring any rights to the land upon the person granted the permission. For example, a permit to enter federal lands to launch rafts into the water for the purpose of conducting whitewater river rafting tours is a license, not a leasehold interest.

(((~~j~~))) (k) "Management agreement" means a written agency agreement between a public property owner or community center which is exempt from property tax and a private person or entity for the use and possession of public property or community center which is exempt from property tax under the following circumstances:

(i) The public property owner or community center which is exempt from property tax retains all liability for payment of business operating costs and business related damages (other than costs and damages attributable to the activities of the private party);

(ii) The public property owner or community center which is exempt from property tax has title and ownership of all receipts from sales of services or products relating to the management agreement (whether such amounts are collected by the private party on behalf of the public owner or community center which is exempt from property tax or whether the public owner or community center which is exempt from property tax permits the private party to retain a portion of the receipts as payment for services rendered by the private party), and the full discretion of whether to eliminate, reduce or expand the business activity conducted on the property; and

(iii) The public property owner or community center which is exempt from property tax has full control of the prices to be charged for the goods or services provided in the course of use of the property.

If each of these criteria is met, the arrangement between the parties is considered a "true" management agreement which does not, by itself, create a taxable leasehold interest in the property.

(((~~k~~))) (l) "Permit" means a written document creating a license to enter land for a specific purpose.

(((~~l~~))) (m) "Product lease" means a lease of public property or property of a community center which is exempt from property tax which will be used to produce agricultural or marine products (aquaculture) wherein the lease or agreement requires that:

(i) The leasehold payment be made by delivering a stated percentage of the agricultural or marine products to the credit of the lessor; or

(ii) The lessor be paid a stated percentage of the proceeds from the sale of the agricultural or marine products.

(((~~m~~))) (n) "Public property" means all property owned by an entity exempted from property tax obligations pursuant to Article 7, section 1 of the state Constitution (and, in some instances, property held in trust by the United States).

(((~~n~~))) (o) "Renegotiated" means a change in the leasehold agreement, other than one specifically required by the terms of the agreement itself, which alters:

(i) The agreed time of possession and use of the property;

(ii) The restrictions on the manner in which the property may be used; or

(iii) The rate of cash rental or other consideration paid by the lessee to or for the benefit of the lessor.

The term also includes the continued possession of the property by the lessee beyond the original date when, according to the terms of the agreement, the lessee had the right to vacate the premises without incurring further liability to the lessor.

(((~~o~~))) (p) "Taxable rent" means the amount of rent upon which the measure of leasehold excise tax is based. It is either the contract rent or an amount established by the department in accordance with the procedures set forth in RCW 82.29A.020(2). (See also WAC 458-29A-200.)

(((~~p~~))) (q) "Utility easement" means the right to use publicly owned land or land owned by a community center which is exempt from property tax for the purpose of providing access or installation of publicly regulated utilities.

AMENDATORY SECTION (Amending WSR 99-20-053, filed 10/1/99, effective 11/1/99)

WAC 458-29A-200 Leasehold excise tax—Taxable rent and contract rent. (1) **Introduction.** Ordinarily, the amount of taxable rent is the amount of contract rent paid by a lessee for a taxable leasehold interest. The law does authorize the department to establish a taxable rent different from the contract rent in certain cases. This rule explains the exclusions of certain moneys and other property received by or on behalf of a lessor from the measure of contract rent. It also explains the conditions under which the department is authorized to establish a taxable rent different from the contract rent.

(2) **Contract rent exclusions.** Even when a leasehold interest is present, not all payments made to a lessor constitute taxable contract rent. For example, payments made to or on behalf of the lessor for actual utility charges, janitorial services, security services, repairs and maintenance, and for special assessments such as storm water impact fees attributable to the lessee's space or prorated among multiple lessees, are not included in the measure of contract rent, if the actual

charges are separately stated and billed to the lessee(s). "Utility charges" means charges for services provided by a public service business subject to the public utility tax under chapter 82.16 RCW, and, for the purpose of this section only, also includes water, sewer, and garbage services and cable television services.

In some circumstances a private lessee that is occupying or using public property or property of a community center which is exempt from property tax may collect fees from third parties and remit them to the ((~~public~~)) lessor. In those situations where:

(a) The fee structure, rate, or amount collected by the private party is established by or subject to the review and approval of the ((~~public~~)) lessor or other public entity; and

(b) The amounts received by the private entity from third parties are remitted entirely to the public lessor or credited to the account of the ((~~public~~)) lessor, those amounts are not considered part of the contract rent under this chapter, provided that nothing in this section shall preclude or prevent the imposition of tax, as appropriate, under any other chapter of Title 82 RCW on any amounts retained by or paid to the private entity as consideration for services provided to the public property owner or the community center which is exempt from property tax.

Notwithstanding the provisions of this subsection, if such deductions are determined by the department to reduce the amount of contract rent to a level below market value, the department may establish a taxable rent in accordance with ((~~section~~)) subsection (6) ((~~below~~)) of this section.

For example, Dan leases retail space in a building owned by the Port of Whistler. He pays $800 per month for the space, which includes building security services. Additionally, he is assessed monthly for his pro rata share of actual janitorial and utility services provided by the Port. The Port determines Dan's share of these charges in the following manner: The average annual amount actually paid by the Port for utilities in the prior year is divided by 12. Dan's space within the building is approximately ten percent of the total space in the building, so the averaged monthly charge is multiplied by .10 (Dan's pro rata share based upon the amount of space he leases), and that amount is added to Dan's monthly statement as a line item charge for utilities, separate from the lease payment. The charges for janitorial services are treated in the same manner. In this case, Dan's payment for utilities and janitorial services are not included in the measure of contract rent. His payments for security services are included in the measure of contract rent, and subject to the leasehold excise tax, because they are not calculated and charged separately from the lease payments.

Contract rent also does not include:

(a) Expenditures made by the lessee for which the lease agreement requires the lessor to reimburse the lessee;

(b) Expenditures made by the lessee for improvements and protection if the lease or agreement requires the improved property to be open to the general public (e.g., a public boat launch) and prohibits the lessee from enjoying any profit directly from the lease;

(c) Expenditures made by the lessee to replace or repair the facilities due to fire or other catastrophic event including, but not necessarily limited to, payments:

(i) For insurance to reimburse losses;

(ii) To a public or private entity to protect the property from damage or loss; or

(iii) To a public or private entity for alterations or additions made necessary by an action of government which occurred after the date the lease agreement was executed.

(d) Improvements added to public property or property of a community center which is exempt from property tax if the improvements are taxed as any person's personal property.

(3) **Combined payments.** When the payment for a leasehold interest is made in combination with payment for concession, franchise or other rights granted by the ((~~public~~)) lessor, only that part of the payment which represents consideration for the leasehold interest is considered part of the contract rent. For example, if the payment made by the lessee to the ((~~public~~)) lessor exceeds the fair market rental value for comparable property with similar use, the excess is generally attributable to payment for a concession or other right.

(4) **Lease payments based on a percentage of sales.** The measure of contract rent subject to the leasehold excise tax may be based upon a lease which provides that the rent shall be a percentage of business proceeds. The manner in which the rent is calculated does not, in itself, determine the character of the underlying right or interest for which the payment is made.

(5) **Expenditures for improvements.** Expenditures by the lessee for nonexcludable improvements (see WAC 458-29A-200(2)) with a useful life of more than one year will be treated as prepaid contract rent if the expenditures were intended by the parties to be included as part of the contract rent. Such intention may be demonstrated by a contract provision granting ownership or possession and use to the public owner of the underlying property or the community center which is exempt from property tax that owns the underlying property and/or by the conduct of the parties. These expenditures should be prorated over the useful life of the improvement, or over the remaining term of the lease or agreement if the useful life of the improvement exceeds that term. If the lessee vacates prior to the end of the lease without the agreement of the lessor, thereby defaulting on the lease, no additional LET is due for the term remaining pursuant to the contract between the lessor and that lessee.

(6) **Department's authority to establish taxable rent.** RCW 82.29A.020(2) authorizes the department to establish a "taxable rent" that is different from contract rent in some situations.

(a) If the department determines that a lessee has a leasehold interest in publicly owned property or property of a community center which is exempt from property tax and that such leasehold interest has not been established through competitive bidding, or negotiated in accordance with statutory requirements regarding the rent payable, or negotiated under circumstances, established by public record, clearly showing that the contract rent was the maximum attainable by the lessor, the department may establish a taxable rent computation for use in determining the tax payable under authority granted under chapter 82.29A RCW. The department shall base its computation on the following criteria:

(i) Consideration shall be given to rent being paid to other lessors by lessees of similar property for similar purposes over similar periods of time; or

(ii) Consideration shall be given to what would be considered a fair rate of return on the market value of the property leased less reasonable deductions for any restrictions on use, special operating requirements or provisions for concurrent use by the lessor, another person or the general public.

(b) If the department establishes taxable rent pursuant to RCW 82.29A.020(2), and the contract rent was established in accordance with the procedures set forth in that section, but the lease is ten or more years old and has not been renegotiated, the taxable rent for leasehold excise tax purposes shall be prospective only. However, if upon examination the department determines that the contract rent was not set in accordance with the statutory provisions of RCW 82.29A.020(2) and the rent is below fair market rate, the department may (and in most instances, will) apply the taxable rental rate retroactively for purposes of determining the leasehold excise tax, subject to the provisions of RCW 82.32.050(3).

(c) The department will not establish taxable rent if one of the following four situations apply:

(i) The leasehold interest has been established or renegotiated through competitive bidding;

(ii) The rent was set or renegotiated according to statutory requirements;

(iii) Public records demonstrate that the rent was the maximum attainable; or

(iv) A lease properly established or renegotiated in compliance with (6)(c)(i), (ii), or (iii) has been in effect for ten years or less without renegotiation.

(d) Where the contract rent has been established in accordance with one of the first three criteria set forth above, and the lease agreement has not been in effect for ten years or more, or has been properly renegotiated within the past ten years, the taxable rent is deemed to be the stated contract rent.

(e) If land on the Hanford reservation is subleased to a private or public entity by the state of Washington, "taxable rent" means only the annual cash rental payment made by the sublessee to the state and specifically referred to as rent in the sublease agreement.

Reviser's note: The typographical error in the above section occurred in the copy filed by the agency and appears in the Register pursuant to the requirements of RCW 34.08.040.

AMENDATORY SECTION (Amending WSR 10-07-039, filed 3/10/10, effective 4/10/10)

WAC 458-29A-400 Leasehold excise tax—Exemptions. (1) **Introduction.** This rule explains the exemptions from leasehold excise tax provided by RCW 82.29A.130, 82.29A.132, 82.29A.134, and 82.29A.136. To be exempt from the leasehold excise tax, the property subject to the leasehold interest must be used exclusively for the purposes for which the exemption is granted.

(2) **Operating properties of a public utility.** All leasehold interests that are part of the operating properties of a public utility are exempt from leasehold excise tax if the leasehold interest is assessed and taxed as part of the operating property of a public utility under chapter 84.12 RCW.

For example, tracks leased to a railroad company at the Port of Seaside are exempt from leasehold excise tax because the railroad is a public utility assessed and taxed under chapter 84.12 RCW and the tracks are part of the railroad's operating properties.

(3) **Student housing at public and nonprofit schools and colleges.** All leasehold interests in facilities owned or used by a school, college, or university which leasehold provides housing to students are exempt from leasehold excise tax if the student housing is exempt from property tax under RCW 84.36.010 and 84.36.050.

For example, the leasehold interest associated with a building used as a dormitory for Public University students is exempt from the leasehold excise tax.

(4) **Subsidized housing.** All leasehold interests of subsidized housing are exempt from leasehold excise tax if the property is owned in fee simple by the United States, the state of Washington or any of its political subdivisions, and residents of the housing are subject to specific income qualification requirements.

For example, a leasehold interest in an apartment house that is subsidized by the United States Department of Housing and Urban Development is exempt from leasehold excise tax if the property is owned by the state of Washington and residents are subject to income qualification requirements.

(5) **Nonprofit fair associations.** All leasehold interests used for fair purposes of a nonprofit fair association are exempt from leasehold excise tax if the fair association sponsors or conducts a fair or fairs supported by revenues collected under RCW 67.16.100 and allocated by the director of the department of agriculture. The property must be owned in fee simple by the United States, the state of Washington or any of its political subdivisions. However, if a nonprofit association subleases exempt property to a third party, the sublease is a taxable leasehold interest.

For example, a leasehold interest held by the Local Nonprofit Fair Association is considered exempt from leasehold excise tax. However, if buildings on the fairgrounds are rented to private parties for storage during the winter, these rentals may be subject to the leasehold excise tax.

(6) **Public employee housing.** All leasehold interests in public property or property of a community center which is exempt from property tax used as a residence by an employee of the public owner or the owner of the community center which is exempt from property tax are exempt from leasehold excise tax if the employee is required to live on the public property or community center which is exempt from property tax as a condition of his or her employment. The "condition of employment" requirement is met only when the employee is required to accept the lodging in order to enable the employee to properly perform the duties of his or her employment. However, the "condition of employment" requirement can be met even if the employer does not compel an employee to reside in a publicly owned residence or residence owned by a community center which is exempt from property tax.

The following examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The status of each situation must be determined after a review of all of the facts and circumstances.

(a) A park ranger employed by the National Park Service, an agency of the United States government, resides in a house furnished by the agency at a national park. The ranger is required to be on call twenty-four hours a day to respond to requests for assistance from park visitors staying at an adjacent overnight campground. The use of the house is exempt from leasehold excise tax because the lodging enables the ranger to properly perform her duties.

(b) An employee of the Washington department of fish and wildlife resides in a house furnished by the agency at a fish hatchery although, under the terms of a collective bargaining agreement, the agency may not compel the employee to live in the residence as a condition of employment. In exchange for receiving use of the housing provided by the agency, the employee is required to perform additional duties, including regularly monitoring certain equipment at the hatchery during nights and on weekends and escorting public visitors on tours of the hatchery on weekends. The use of the house is exempt from leasehold excise tax because the lodging enables the employee to properly perform the duties of his employment. The use is exempt even though the employee would continue to be employed by the agency if the additional duties were not performed and even though state employees of an equal job classification are not required to perform the additional duties.

(c) A professor employed by State University is given the choice of residing in university-owned campus housing free of charge or of residing elsewhere and receiving a cash allowance in addition to her regular salary. If she elects to reside in the campus housing free of charge, the value of the lodging furnished to the professor would be subject to leasehold excise tax because her residence on campus is not required for her to perform properly the duties of her employment.

(7) **Interests held by enrolled Indians.** Leasehold interests held by enrolled Indians are exempt from leasehold excise tax if the lands are owned or held by any Indian or Indian tribe, and the fee ownership of the land is vested in or held in trust by the United States, unless the leasehold interests are subleased to a lessee which would not qualify under chapter 82.29A RCW, RCW 84.36.451 and 84.40.175 and the tax on the lessee is not preempted due to the balancing test (see WAC 458-20-192).

Any leasehold interest held by an enrolled Indian or a tribe, where the leasehold is located within the boundaries of an Indian reservation, on trust land, on Indian country, or is associated with the treaty fishery or some other treaty right, is not subject to leasehold excise tax. For example, if an enrolled member of the Puyallup Tribe leases port land at which the member keeps his or her boat, and the boat is used in a treaty fishery, the leasehold interest is exempt from the leasehold tax. For more information on excise tax issues related to enrolled Indians, see WAC 458-20-192 (Indians—Indian country).

(8) **Leases on Indian lands to non-Indians.** Leasehold interests held by non-Indians (not otherwise exempt from tax due to the application of the balancing test described in WAC 458-20-192) in any real property of any Indian or Indian tribe, band, or community that is held in trust by the United States or subject to a restriction against alienation imposed by the United States are exempt from leasehold excise tax if the amount of contract rent paid is greater than or equal to ninety percent of fair market rental value. In determining whether the contract rent of such lands meets the required level of ninety percent of market value, the department will use the same criteria used to establish taxable rent under RCW 82.29A.020 (2)(b) and WAC 458-29A-200.

For example, Harry leases land held in trust by the United States for the Yakama Nation for the sum of $900 per month. The fair market value for similar lands used for similar purposes is $975 per month. The lease is exempt from the leasehold excise tax because Harry pays at least ninety percent of the fair market value for the qualified lands. For more information on the preemption analysis and other tax issues related to Indians, see WAC 458-20-192.

(9) **Annual taxable rent is less than two hundred fifty dollars.** Leasehold interests for which the taxable rent is less than $250 per year are exempt from leasehold excise tax. For the purposes of this exemption, if the same lessee has a leasehold interest in two or more contiguous parcels of property owned by the same ((~~public~~)) lessor, the taxable rent for each contiguous parcel will be combined and the combined taxable rent will determine whether the threshold established by this exemption has been met. To be considered contiguous, the parcels must be in closer proximity than merely within the boundaries of one piece of property. When determining the annual leasehold rent, the department will rely upon the actual substantive agreement between the parties. Rent payable pursuant to successive leases between the same parties for the same property within a twelve-month period will be combined to determine annual rent; however, a single lease for a period of less than one year will not be projected on an annual basis.

The following examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The status of each situation must be determined after a review of all of the facts and circumstances.

(a) The yacht club rents property from the Port of Bay City for its clubhouse and moorage. It also rents a parking stall for its commodore. The parking stall is separated from the clubhouse only by a common walkway. The parking stall lease is a part of the clubhouse lease because it is contiguous to the clubhouse, separated only by a necessary walkway.

(b) Ace Flying Club rents hangars, tie downs, and ramps from the Port of Desert City. It has separate leases for several parcels. The hangars are separated from the tie down space by a row of other hangars, each of which is leased to a different party. Common ramps and roadways also separate the club's hangars from its tie-downs. The hangars, because they are adjacent to one another, create a single leasehold interest. The tie downs are a separate taxable leasehold interest because they are not contiguous with the hangars used by Ace Flying Club.

(c) Grace leases a lot from the City of Flora, from which she sells crafts at different times throughout the year. She pays $50 per month for the lot, and has a separate lease for each season during which she sells. She has one lease from May through September, and a separate lease for the time between Thanksgiving and Christmas, which might run thirty to forty days, depending on the year. The leases will be com-

bined for the purposes of determining the leasehold excise tax. They relate to the same piece of property, for the same activity by the same lessee, and occur within the same year.

(d) Elizabeth owns a Christmas tree farm. Every year she rents a small lot from the Port of Capital City, adjacent to its airport, to sell Christmas trees. She pays $125 to the port to rent the lot for 6 weeks. It is the only time during the year that she rents the lot. Her lease is exempt from the leasehold excise tax, because it does not exceed $250 per year in taxable rent.

(10) **Leases for a continuous period of less than thirty days.** Leasehold interests that provide use and possession of public property or property of a community center which is exempt from property tax for a continuous period of less than thirty days are exempt from leasehold excise tax. In determining the duration of the lease, the department will rely upon the actual agreement and/or practice between the parties. If a single lessee is given successive leases or lease renewals of the same property, the arrangement is considered a continuous use and possession of the property by the same lessee. A leasehold interest does not give use and possession for a period of less than thirty days based solely on the fact that the ((~~public~~)) lessor has reserved the right to use the property or to allow third parties to use the property on an occasional, temporary basis.

(11) **Month-to-month leases in residential units to be demolished or removed.** Leasehold interests in properties rented for residential purposes on a month-to-month basis pending destruction or removal for construction of a public highway or public building are exempt from the leasehold excise tax. Thus, if the state or other public entity has acquired private property for purposes of building or expanding a highway, or for the construction of public buildings at an airport, the capitol campus, or some other public facility, and the public entity rents the property for residential purposes on a month-to-month basis pending destruction or removal for construction, these leases do not create taxable leasehold interests. This exemption does not require evidence of imminent removal of the residential units; the term "pending" merely means "while awaiting." The exemption is based upon the purpose for which the public entity holds the units.

For example, State University has obtained capital development funding for the construction of new campus buildings, and has purchased a block of residential property adjacent to campus for the sole purpose of expansion. Jim leases these houses from State University pursuant to a month-to-month rental agreement and rents them to students. Construction of the new buildings is not scheduled to begin for two years. Jim is not subject to the leasehold excise tax, because State University is holding the residential properties for the sole purpose of expanding its facilities, and Jim is leasing them pending their certain, if not imminent, destruction.

(12) **Public works contracts.** Leasehold interests in publicly owned real or personal property held by a contractor solely for the purpose of a public improvements contract or work to be executed under the public works statutes of Washington state or the United States are exempt from leasehold excise tax. To receive this exemption, the contracting parties must be the public owner of the property and the contractor that performs the work under the public works statutes.

For example, during construction of a second deck on the Nisqually Bridge pursuant to a public works contract between the state of Washington and Tinker Construction, any leasehold interest in real or personal property created for Tinker solely for the purpose of performing the work necessary under the terms of the contract is exempt from leasehold excise tax.

(13) **Correctional industries in state adult correctional facilities.** Leasehold interests for the use and possession of state adult correctional facilities for the operation of correctional industries under RCW 72.09.100 are exempt from leasehold excise tax.

For example, a profit or nonprofit organization operating and managing a business within a state prison under an agreement between it and the department of corrections is exempt from leasehold excise tax for its use and possession of state property.

(14) **Camp facilities for persons with disabilities.** Leasehold interests in a camp facility are exempt from leasehold excise tax if the property is used to provide organized and supervised recreational activities for persons with disabilities of all ages, and for public recreational purposes, by a nonprofit organization, association, or corporation which would be exempt from property tax under RCW 84.36.030(1) if it owned the property.

For example, a county park with camping facilities leased to a nonprofit charitable organization is exempt from leasehold excise tax if the nonprofit allows the property to be used by the general public for recreational activities throughout the year, and to be used as a camp for disabled persons for two weeks during the summer.

(15) **Public or entertainment areas of certain baseball stadiums.** Leasehold interests in public or entertainment areas of a baseball stadium with natural turf and a retractable roof or canopy, located in a county with a population of over one million people, with a seating capacity of over forty thousand, and constructed on or after January 1, 1995, are exempt from leasehold excise tax.

"Public or entertainment areas" for the purposes of this exemption include ticket sales areas, ramps and stairs, lobbies and concourses, parking areas, concession areas, restaurants, hospitality and stadium club areas, kitchens or other work areas primarily servicing other public areas, public rest rooms, press and media areas, control booths, broadcast and production areas, retail sales areas, museum and exhibit areas, scoreboards or other public displays, storage areas, loading, staging, and servicing areas, seating areas and suites, the playing field, and any other areas to which the public has access or that are used for the production of the entertainment event or other public usage, and any other personal property used for such purposes. "Public or entertainment areas" does not include locker rooms or private offices used exclusively by the lessee.

(16) **Public or entertainment areas of certain football stadiums and exhibition centers.** Leasehold interests in the public or entertainment areas of an open-air stadium suitable for national football league football and for Olympic and world cup soccer, with adjacent exhibition facilities, parking

facilities, and other ancillary facilities constructed on or after January 1, 1998, are exempt from leasehold excise tax. For the purpose of this exemption, the term "public and entertainment areas" has the same meaning as set forth in subsection (15) above.

(17) **Public facilities districts.** All leasehold interests in public facilities districts, as provided in chapter 36.100 or 35.57 RCW are exempt from leasehold excise tax.

(18) **State route 16 corridor transportation systems.** All leasehold interests in the state route number 16 corridor transportation systems and facilities constructed and operated under chapter 47.46 RCW are exempt from leasehold excise tax. RCW 82.29A.132.

(19) **Sales/leasebacks by regional transit authorities.** All leasehold interests in property of a regional transit authority or public corporation created under RCW 81.112.320 under an agreement under RCW 81.112.300 are exempt from leasehold excise tax. This exemption is effective July 28, 2000. RCW 82.29A.134.

(20) **Interests consisting of three thousand or more residential and recreational lots.** All leasehold interests consisting of three thousand or more residential and recreational lots that are or may be subleased for residential and recreational purposes are exempt from leasehold excise tax. Any combination of residential and recreational lots totaling at least three thousand satisfies the requirement of this exemption. This exemption is effective January 1, 2002. RCW 82.29A.136.

(21) **Historic sites owned by the United States government or municipal corporations.** All leasehold interests in property ((~~that~~)) listed on any federal or state register of historical sites are exempt from leasehold excise tax if the property is:

(a) Owned by the United States government or a municipal corporation; and

(b) ((~~Listed on any federal or state register of historical sites; and~~

~~(c)~~)) Wholly contained within a designated national historic reserve under 16 U.S.C. Sec. 461.

(22) **Amphitheaters.** All leasehold interests in the public or entertainment areas of an amphitheater are exempt from leasehold excise tax if a private entity is responsible for one hundred percent of the cost of constructing the amphitheater which is not reimbursed by the public owner, both the public owner and the private lessee sponsor events at the facility on a regular basis, the lessee is responsible under the lease or agreement to operate and maintain the facility, and the amphitheater has a seating capacity of over seventeen thousand reserved and general admission seats and is in a county that had a population of over three hundred fifty thousand, but less than four hundred twenty-five thousand when the amphitheater first opened to the public.

For the purposes of this subsection, "public or entertainment areas" include box offices or other ticket sales areas, entrance gates, ramps and stairs, lobbies and concourses, parking areas, concession areas, restaurants, hospitality areas, kitchens or other work areas primarily servicing other public or entertainment areas, public rest room areas, press and media areas, control booths, broadcast and production areas, retail sales areas, museum and exhibit areas, scoreboards or other public displays, storage areas, loading, staging, and servicing areas, seating areas including lawn seating areas and suites, stages, and any other areas to which the public has access or which are used for the production of the entertainment event or other public usage, and any other personal property used for these purposes. "Public or entertainment areas" ((~~does~~)) do not include office areas used predominately by the lessee.

(23) **Military housing.** All leasehold interests in real property used for the placement of housing that consists of military housing units and ancillary supporting facilities((~~,~~)) are exempt from leasehold excise tax if the property is situated on land owned in fee by the United States, is used for the housing of military personnel and their families, and is a development project awarded under the military housing privatization initiative of 1996, 10 U.S.C. Sec. 2885, as existing on June 12, 2008.

For the purposes of this subsection, "ancillary supporting facilities" means facilities related to military housing units, including facilities to provide or support elementary or secondary education, child care centers, day care centers, child development centers, tot lots, community centers, housing offices, dining facilities, unit offices, and other similar facilities for the support of military housing.

AMENDATORY SECTION (Amending WSR 99-20-053, filed 10/1/99, effective 11/1/99)

WAC 458-29A-500 Leasehold excise tax—Liability. (1) **Introduction.** The event triggering a leasehold excise tax liability is the use by a private person or entity of publicly owned, tax-exempt property or property of a community center which is exempt from property tax.

Where a lessee is also a tax-exempt government entity, the tax will apply against a private sublessee, even though no contractual arrangement exists between the sublessee and the ((~~public~~)) lessor.

(2) **Lessor's responsibility to collect and remit tax.** The ((~~public~~)) lessor is responsible for collecting and remitting the leasehold excise tax from its private lessees. If the ((~~public~~)) lessor collects the leasehold excise tax but fails to remit it to the department, the ((~~public~~)) lessor is liable for the tax.

(a) Where the ((~~public~~)) lessor has attempted to collect the tax, but has received neither contract rent nor leasehold excise tax from the lessee, the department will proceed directly against the lessee for payment of the tax and the lessee shall be solely liable for the tax, provided, the lessor notifies the department in writing when the lessor is unable to collect rent and/or taxes, and the amount of the leasehold excise tax arrearage is $1000 or greater. If the lessor fails to notify the department, the department may, in its discretion, look to the ((~~public~~)) lessor for payment of the tax.

(b) If, upon examining all of the facts and circumstances, the department determines that the ((~~public~~)) lessor in good faith believed the lessee to be exempt from all or part of the leasehold excise tax, the department will look to the ((~~public~~)) lessor for assistance in collection of the tax due, but will not hold the ((~~public~~)) lessor personally liable for payment of such tax. To satisfy the requirement of "good faith" the

((~~public~~)) lessor must have acted with reasonable diligence and prudence to determine whether the leasehold excise tax was due from the lessee.

(3) The following examples, while not exhaustive, illustrate some of the circumstances in which a ((~~public~~)) lessor may or may not be held liable for the leasehold excise tax. These examples should be used only as a general guide. The status of each situation must be determined after a review of all of the facts and circumstances.

(a) Doug has been newly hired in the accounting department at City Port and is assigned the responsibility for its rental accounts. He is unaware of the leasehold excise tax laws and fails to bill new tenants for the leasehold excise tax. In this situation, City Port does not avoid possible liability for the tax. Accounting errors and lack of knowledge regarding City Port's responsibility to collect and remit the leasehold excise tax do not qualify as reasonable diligence and prudence.

(b) Sybil rents an apartment in a building owned by State University but she is not a student of the University and the building is not used for student housing. She pays $900 per month in rent. The terms of the lease require her to give at least thirty days' notice of intent to vacate. In the month of March, she fails to pay her rent, and State University serves her with a notice to pay or quit the premises. On April 1, she sends a check to State University for $20l6 (two months' rent, plus leasehold excise tax). The bank does not honor the check, and Sybil abandons the premises in mid-April without notice. When State University discovers that she has left, it timely notifies the department of the unpaid rent and leasehold excise tax. State University has acted with reasonable prudence and diligence and will not be held liable for the unpaid leasehold excise tax. In serving Sybil with a notice to pay or quit when she first defaulted, State University attempted to mitigate the amount of rent and taxes which were unpaid, and it complied with all other requirements regarding its duty to report the arrearages to the department.

(c) Sonata City owns several houses on property which may be used in the future for office buildings, a fire station, or perhaps a park, depending on its future needs. The city leases the houses on six-month terms, mainly to students who attend the local college. Over the past four years that the city has rented the properties, it has not collected leasehold excise tax from the tenants, because city officials believed the property to be exempt since they planned someday to use the property for a public purpose. Following an audit, it is determined that there is no definite plan for destruction of the houses nor any funds allocated for construction of public buildings on the site. Further, the houses were not rented on a month-to-month basis. Therefore, leasehold excise tax is due. Most of the prior tenants have left the area, and there is no convenient way for the city to collect the unpaid leasehold tax. Sonata City is liable for the tax because although its managers did not believe the tax was due, the lack of knowledge regarding the city's responsibility to collect and remit the leasehold excise tax does not qualify as reasonable diligence and prudence. Sonata City had a duty to make a good faith effort to determine its obligations under the applicable leasehold excise tax statutes and rules.

WSR 10-13-096
EXPEDITED RULES
DEPARTMENT OF HEALTH
[Filed June 16, 2010, 5:13 p.m.]

Title of Rule and Other Identifying Information: WAC 246-810-010 Definitions and 246-810-016 Agencies and facilities that can employ agency affiliated counselors (AAC), the definition of agency is amended to include counties, giving them the authority to employ ACCs.

NOTICE

THIS RULE IS BEING PROPOSED UNDER AN EXPEDITED RULE-MAKING PROCESS THAT WILL ELIMINATE THE NEED FOR THE AGENCY TO HOLD PUBLIC HEARINGS, PREPARE A SMALL BUSINESS ECONOMIC IMPACT STATEMENT, OR PROVIDE RESPONSES TO THE CRITERIA FOR A SIGNIFICANT LEGISLATIVE RULE. IF YOU OBJECT TO THIS USE OF THE EXPEDITED RULE-MAKING PROCESS, YOU MUST EXPRESS YOUR OBJECTIONS IN WRITING AND THEY MUST BE SENT TO Leann Yount, Program Manager, Department of Health, Agency Affiliated Counselor Program, P.O. Box 47852, Olympia, WA 98504-7852, AND RECEIVED BY August 23, 2010.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The 2010 legislature passed SSB 6884 (chapter 20, Laws of 2010) that changed the definition of an agency to include counties. The definition of an AAC was also amended to include certain county juvenile court employees. These individuals who are engaged in counseling services can become a registered AAC.

Reasons Supporting Proposal: The rules must be amended to include counties as an agency eligible to hire AACs so their juvenile court employees that engage in counseling services will be able to become registered AACs. This will provide the public greater access to counseling care. The expedited rule-making process is appropriate because the content adopts without material change a state statute.

Statutory Authority for Adoption: RCW 18.19.050.

Statute Being Implemented: RCW 18.19.020.

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: Department of health, governmental.

Name of Agency Personnel Responsible for Drafting, Implementation and Enforcement: Leann Yount, Program Manager, 310 Israel Road S.E., Tumwater, WA 98501, (360) 236-4856.

June 16, 2010
Mary C. Selecky
Secretary of Health

AMENDATORY SECTION (Amending WSR 09-15-041, filed 7/8/09, effective 7/8/09)

WAC 246-810-010 Definitions. The definitions in this section apply throughout this chapter unless the content clearly requires otherwise.

(1) "Agency" means:

(a) An agency or facility operated, licensed, or certified by the state of Washington to provide a specific counseling service or services; or

(b) A county as listed in chapter 36.04 RCW.

(2) "Agency affiliated counselor" means a person registered under chapter 18.19 RCW, and this chapter, who is engaged in counseling and employed by an agency listed in WAC 246-810-016 or an agency recognized under WAC 246-810-017 to provide a specific counseling service or services.

(3) "Certified adviser" means a person certified under chapter 18.19 RCW, and this chapter, who is engaged in private practice counseling to the extent authorized in WAC 246-810-021.

(4) "Certified counselor" means a person certified under chapter 18.19 RCW, and this chapter, who is engaged in private practice counseling to the extent authorized in WAC 246-810-0201.

(5) "Client" means an individual who receives or participates in counseling or group counseling.

(6) "Consultation" means the professional assistance and practice guidance that a certified counselor receives from a counseling-related professional credentialed under chapter 18.130 RCW. This may include:

(a) Helping the certified counselor focus on counseling practice objectives;

(b) Refining counseling modalities;

(c) Providing support to progress in difficult or sensitive cases;

(d) Expanding the available decision-making resources; and

(e) Assisting in discovering alternative approaches.

(7) "Counseling" means employing any therapeutic techniques including, but not limited to, social work, mental health counseling, marriage and family therapy, and hypnotherapy, for a fee that offer, assist, or attempt to assist, an individual or individuals in the amelioration or adjustment of mental, emotional, or behavioral problems, and includes therapeutic techniques to achieve sensitivity and awareness of self and others and the development of human potential. For the purpose of this chapter, nothing may be construed to imply that the practice of hypnotherapy is necessarily limited to counseling.

(8) "Counselor" means an individual who engages in the practice of counseling to the public for a fee, including for the purposes of this chapter, agency affiliated counselors, certified counselors, certified advisers, hypnotherapists, and until July 1, 2010, registered counselors.

(9) "Department" means the Washington state department of health.

(10) "Fee" as referred to in RCW 18.19.030 means compensation received by the counselor for counseling services provided, regardless of the source.

(11) "Hypnotherapist" means a person registered under chapter 18.19 RCW, and this chapter, who is practicing hypnosis as a modality.

(12) "Licensed healthcare practitioner" means a licensed practitioner under the following chapters:

(a) Physician licensed under chapter 18.71 RCW.

(b) Osteopathic physician licensed under chapter 18.57 RCW.

(c) Psychiatric registered nurse practitioner licensed under chapter 18.79 RCW.

(d) Naturopathic physician licensed under chapter 18.36A RCW.

(e) Psychologist licensed under chapter 18.83 RCW.

(f) Independent clinical social worker, marriage and family therapist, or advanced social worker licensed under chapter 18.225 RCW.

(13) "Private practice counseling" means the practice of counseling by a certified counselor or certified adviser as specified in WAC 246-810-0201 or 246-810-021.

(14) "Psychotherapy" means the practice of counseling using diagnosis of mental disorders according to the fourth edition of the *Diagnostic and Statistical Manual of Mental Disorders*, and the development of treatment plans for counseling based on diagnosis of mental disorders in accordance with established practice standards.

(15) "Recognized" means acknowledged or formally accepted by the secretary.

(16) "Recognized agency or facility" means an agency or facility that has requested and been recognized under WAC 246-810-017 to employ agency affiliated counselors to perform a specific counseling service, or services for those purposes only.

(17) "Secretary" means the secretary of the department of health or the secretary's designee.

(18) "Supervision" means the oversight that a counseling-related professional credentialed under chapter 18.130 RCW provides.

(19) "Unprofessional conduct" means the conduct described in RCW 18.130.180.

AMENDATORY SECTION (Amending WSR 09-15-041, filed 7/8/09, effective 7/8/09)

WAC 246-810-016 Agencies ((~~or~~)), facilities, or counties that can employ agency affiliated counselors. Agencies or facilities that may employ an agency affiliated counselor are:

(1) Washington state departments and agencies listed in the Agency, Commission & Organization Directory available on the state of Washington web site.

(2) Counties as listed in chapter 36.04 RCW.

(3) Community and technical colleges governed by the Washington state board for community and technical colleges.

(((~~(3)~~))) (4) Colleges and universities governed by the Washington state higher education coordinating board.

(((~~(4)~~))) (5) Hospitals licensed under chapter 70.41 RCW.

(((~~(5)~~))) (6) Home health care agencies, home care agencies, and hospice care agencies licensed under chapter 70.127 RCW.

(((~~(6)~~))) (7) Agencies and facilities licensed or certified under chapters 71.05 or 71.24 RCW.

(((~~(7)~~))) (8) Psychiatric hospitals, residential treatment facilities, hospitals, and alcohol and chemical dependency entities licensed under chapter 71.12 RCW.

(((~~(8)~~))) (9) Other agencies or facilities recognized by the secretary as provided in WAC 246-810-017.

WSR 10-13-183
EXPEDITED RULES
BUILDING CODE COUNCIL
[Filed June 23, 2010, 12:00 p.m.]

Title of Rule and Other Identifying Information: Chapter 51-54 [51-51] WAC, State Building Code adoption and amendment of the 2009 edition of the International Residential Code.

NOTICE

THIS RULE IS BEING PROPOSED UNDER AN EXPEDITED RULE-MAKING PROCESS THAT WILL ELIMINATE THE NEED FOR THE AGENCY TO HOLD PUBLIC HEARINGS, PREPARE A SMALL BUSINESS ECONOMIC IMPACT STATEMENT, OR PROVIDE RESPONSES TO THE CRITERIA FOR A SIGNIFICANT LEGISLATIVE RULE. IF YOU OBJECT TO THIS USE OF THE EXPEDITED RULE-MAKING PROCESS, YOU MUST EXPRESS YOUR OBJECTIONS IN WRITING AND THEY MUST BE SENT TO Tim Nogler, State Building Code Council, 128 10th Avenue S.W., Olympia, WA 98504-2525, AND RECEIVED BY August 23, 2010.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: To correct numerical citations.

WAC 51-51-0313, corrects numerical citation.

WAC 51-51-0325, corrects cross reference citations.

WAC 51-51-0602, deletes misplaced section title.

WAC 51-51-0612, corrects cross reference citations.

Reasons Supporting Proposal: Full public hearings were held on these issues during the rule adoption process; these editorial changes will clarify the rules, resulting in consistent enforcement.

Statutory Authority for Adoption: Chapter 19.27 RCW.

Statute Being Implemented: Chapter 19.27A RCW.

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: State building code council, governmental.

Name of Agency Personnel Responsible for Drafting: Joanne T. McCaughan, 128 10th Avenue S.W., Olympia, WA 98504-2525, (360) 725-2970.

June 23, 2010
John C. Cochran
Chair

AMENDATORY SECTION (Amending WSR 10-03-098, filed 1/20/10, effective 7/1/10)

WAC 51-51-0313 Section R313—Automatic fire sprinkler systems.

((**~~R313.1 Automatic Fire Sprinkler Systems.~~**)) This section ((~~is~~)) not adopted.

AMENDATORY SECTION (Amending WSR 09-04-023, filed 1/27/09, effective 7/1/10)

WAC 51-51-0325 Section R325—Adult family homes.

SECTION R325
ADULT FAMILY HOMES

R325.1 General. This section shall apply to all newly constructed adult family homes and all existing single family homes being converted to adult family homes. This section shall not apply to those adult family homes licensed by the state of Washington department of social and health services prior to July 1, 2001.

R325.2 Submittal Standards. In addition to those requirements in Section 106.1, the submittal shall identify the project as a Group R-3 Adult Family Home Occupancy. A floor plan shall be submitted identifying the means of egress and the components in the means of egress such as stairs, ramps, platform lifts and elevators. The plans shall indicate the rooms used for clients and the sleeping room classification of each room.

R325.3 Sleeping Room Classification. Each sleeping room in an adult family home shall be classified as:

1. Type S - where the means of egress contains stairs, elevators or platform lifts.

2. Type NS1 - where one means of egress is at grade level or a ramp constructed in accordance with R325.9 is provided.

3. Type NS2 - where two means of egress are at grade level or ramps constructed in accordance with R325.9 are provided.

R325.4 Types of Locking Devices. All bedroom and bathroom doors shall be openable from the outside when locked.

Every closet shall be readily openable from the inside.

Operable parts of door handles, pulls, latches, locks and other devices installed in adult family homes shall be operable with one hand and shall not require tight grasping, pinching or twisting of the wrist. The force required to activate operable parts shall be 5.0 pounds (22.2 N) maximum. Exit doors shall have no additional locking devices.

R325.5 Smoke Alarm Requirements. All adult family homes shall be equipped with smoke alarms installed as required in Section ((~~R313~~)) R314. Alarms shall be installed in such a manner so that the fire warning may be audible in all parts of the dwelling upon activation of a single device.

R325.6 Escape Windows and Doors. Every sleeping room shall be provided with emergency escape and rescue windows as required by Section R310. No alternatives to the sill height such as steps, raised platforms or other devices placed by the openings will be approved as meeting this requirement.

R325.7 Fire Apparatus Access Roads and Water Supply for Fire Protection. Adult family homes shall be served by fire apparatus access roads and water supplies meeting the requirements of the local jurisdiction.

R325.8 Grab Bars. Grab bars shall be installed for all water closets and bathtubs and showers. The grab bars shall comply with ICC/ANSI A117.1 Sections 604.5 and 607.4 and 608.3.

EXCEPTION: Grab bars are not required for water closets and bathtubs and showers used exclusively by staff of the adult family home.

R325.9 Ramps. All interior and exterior ramps, when provided, shall be constructed in accordance with Section ((~~R311.6~~)) R311.8 with a maximum slope of 1 vertical to 12 horizontal. The exception to ((~~R311.6.1~~)) R311.8.1 is not allowed for adult family homes. Handrails shall be installed in accordance with R325.9.1.

R325.9.1 Handrails for Ramps. Handrails shall be installed on both sides of ramps between the slope of 1 vertical to 12 horizontal and 1 vertical and 20 horizontal in accordance with R311.6.3.1 through R311.6.3.3.

R325.10 Stair Treads and Risers. Stair treads and risers shall be constructed in accordance with ((~~R311.5.3.2~~)) R311.7.4. Handrails shall be installed in accordance with R325.10.1.

R325.10.1 Handrails for Treads and Risers. Handrails shall be installed on both sides of treads and risers numbering from one riser to multiple risers. Handrails shall be installed in accordance with ((~~R311.5.6.1~~)) R311.7.7 through ((~~R311.5.6.3~~)) R311.7.7.4.

AMENDATORY SECTION (Amending WSR 10-03-098, filed 1/20/10, effective 7/1/10)

WAC 51-51-0408 Section R408—Under-floor space.

R408.1 Ventilation. The under-floor space between the bottom of the floor joists and the earth under any building (except space occupied by a basement) shall have ventilation openings through foundation walls or exterior walls.

R408.2 Openings for under-floor ventilation. The minimum net area of ventilation openings shall not be less than 1 square foot (0.0929 m^2) for each 300 square feet (28 m^2) of under-floor area. One ventilating opening shall be within 3 feet (914 mm) of each corner of the building, except one side of the building shall be permitted to have no ventilation openings. Ventilation openings shall be covered for their height and width with any of the following materials provided that the least dimension of the covering shall not exceed 1/4 inch (6.4 mm):

1. Perforated sheet metal plates not less than 0.070 inch (1.8 mm) thick.

2. Expanded sheet metal plates not less than 0.047 inch (1.2 mm) thick.

3. Cast-iron grill or grating.

4. Extruded load-bearing brick vents.

5. Hardware cloth of 0.035 inch (0.89 mm) wire or heavier.

6. Corrosion-resistant wire mesh, with the least dimension being 1/8 inch (3.2 mm).

EXCEPTION: The total area of ventilation openings shall be permitted to be reduced to 1/1,500 of the under-floor area where the ground surface is covered with an approved Class I vapor retarder material and the required openings are placed to provide cross ventilation of the space. The installation of operable louvers shall not be prohibited. If the installed ventilation is less than 1/300, or if operable louvers are installed, a radon vent shall be installed to originate from a point between the ground cover and soil. The radon vent shall be installed in accordance with the requirements of Appendix F (Radon) of this code.

R408.3 Unvented crawl space. Ventilation openings in under-floor spaces specified in Sections R408.1 and R408.2 shall not be required where:

1. Exposed earth is covered with a continuous Class I vapor retarder. Joints of the vapor retarder shall overlap by 6 inches (152 mm) and shall be sealed or taped. The edges of the vapor retarder shall extend at least 6 inches (152 mm) up the stem wall and shall be attached and sealed to the stem wall; and a radon system shall be installed that meets the requirements of Appendix F (Radon) of this code.

2. Continuously operated mechanical exhaust ventilation is provided at a rate equal to 1 cubic foot per minute (0.47 L/s) for each 50 square feet (4.7 m^2) of crawlspace floor area. Exhaust ventilation shall terminate to the exterior.

EXCEPTION: Plenum in existing structures complying with Section ((~~M1601.4~~)) M1601.5, if under-floor space is used as a plenum.

AMENDATORY SECTION (Amending WSR 10-03-098, filed 1/20/10, effective 7/1/10)

WAC 51-51-0602 Section R602—Wood wall framing.

R602.9 Foundation cripple walls. Foundation cripple walls shall be framed of studs not smaller than the studding above. When exceeding 4 feet (1219 mm) in height, such walls shall be framed of studs having the size required for an additional story.

Cripple walls supporting bearing walls or exterior walls or interior braced wall panels as required in Sections R403.1.2 and R602.10.7.1 with a stud height less than 14 inches (356 mm) shall be sheathed on at least one side with a wood structural panel that is fastened to both the top and bottom plates in accordance with Table R602.3(1), or the cripple walls shall be constructed of solid blocking. Cripple walls shall be supported on continuous footings or foundations.

EXCEPTION: Footings supporting cripple walls used to support interior braced wall panels as required in Sections R403.1.2 and R602.10.7.1 shall be continuous for the required length of the cripple wall and constructed beyond the cripple wall for a minimum distance of 4 inches and a maximum distance of the footing thickness. The footings extension is not required at intersections with other footings.

R602.10.1.2 Length of bracing. The length of bracing along each braced wall line shall be the greater of that required by the design wind speed and braced wall line spacing in accordance with Table R602.10.1.2(1) as adjusted by the factors in the footnotes or the Seismic Design Category and braced wall line length in accordance with Table R602.10.1.2(2) as adjusted by the factors in Table R602.10.1.2(3). Braced wall panel locations shall comply with the requirements of Section R602.10.1.4. Only walls that are parallel to the braced wall

line shall be counted toward the bracing requirement of that line, except angled walls shall be counted in accordance with Section R602.10.1.3. In no case shall the minimum total length of bracing in a braced wall line, after all adjustments have been taken, be less than 48 inches (1219 mm) total.

R602.10.1.5 Braced wall line spacing for Seismic Design Categories D_0, D_1 and D_2. Spacing between braced wall lines in each story shall not exceed 25 feet (7620 mm) on center in both the longitudinal and transverse directions.

EXCEPTION: In one-story and two-story buildings, spacing between two adjacent braced wall lines shall not exceed 35 feet (10,668 mm) on center in order to accommodate one single room not exceeding 900 square feet (84 m^2) in each dwelling unit or accessory structure. Spacing between all other braced wall lines shall not exceed 25 feet (7 620 mm). A spacing of 35 feet (10,668 mm) or less shall be permitted between braced wall lines where the length of wall bracing required by Table R602.10.1.2(2) is multiplied by the appropriate adjustment factor from Table R602.10.1.5, the length-to-width ratio for the floor/roof diaphragm does not exceed 3:1, and the top plate lap splice face nailing is twelve 16d nails on each side of the splice.

((~~R602.10.2 Cripple wall bracing.~~))

R602.10.2.3 Redesignation of cripple walls. In any Seismic Design Category, cripple walls are permitted to be redesignated as the first story walls for purposes of determining wall bracing requirements. If the cripple walls are redesignated, the stories above the redesignated story shall be counted as the second and third stories, respectively.

R602.10.7.1 Braced wall panel support for Seismic Design Category D_2. In one-story buildings located in Seismic Design Category D_2, braced wall panels shall be supported on continuous foundations at intervals not exceeding 50 feet (15,240 mm). In two-story buildings located in Seismic Design Category D_2, all braced wall panels shall be supported on continuous foundations.

R602.10.9 Cripple wall bracing. In Seismic Design Categories other than D_2, cripple walls supporting bearing walls or exterior walls or interior braced wall panels as required in R403.1.2 and R602.10.7.1 shall be braced with a length and type of bracing as required for the wall above in accordance with Tables R602.10.1.2(1) and R602.10.1.2(2) with the following modifications for cripple wall bracing:

1. The length of bracing as determined from Tables R602.10.1.2(1) and R602.10.1.2(2) shall be multiplied by a factor of 1.15, and

2. The wall panel spacing shall be decreased to 18 feet (5486 mm) instead of 25 feet (7620 mm).

R602.10.9.1 Cripple wall bracing in Seismic Design Categories D_0, D_1 and D_2. In addition to the requirements of Section R602.10.9, where braced wall lines at interior walls occur without a continuous foundation below, the length of parallel exterior cripple wall bracing shall be 1 1/2 times the length required by Tables R602.10.1.2(1) and R602.10.1.2(2). Where cripple walls braced using Method WSP of Section R602.10.2 cannot provide this additional length, the capacity of the sheathing shall be increased by reducing the spacing of fasteners along the perimeter of each piece of sheathing to 4 inches (102 mm) on center.

In Seismic Design Category D_2, cripple walls supporting bearing walls or exterior walls or interior braced wall panels as required in Sections R403.1.2 and R602.10.7.1 shall be braced in accordance with Tables R602.10.1.2(1) and R602.10.1.2(2).

AMENDATORY SECTION (Amending WSR 10-03-098, filed 1/20/10, effective 7/1/10.)

WAC 51-51-0612 Section R612—Exterior windows and glass doors.

R612.6 Testing and labeling. Exterior windows and sliding doors shall be tested by an approved independent laboratory, and bear a label identifying manufacturer, performance characteristics and approved inspection agency to indicated compliance with AAMA/WDMA/CSA 101/I.S.2/A440. Exterior side-hinged doors shall be tested and labeled as conforming to AAMA/WDMA/CSA 101/I.S.2/A440 or comply with Section ((~~R613.6~~)) R612.6.

EXCEPTIONS: 1. Decorative glazed openings.
2. Custom exterior windows and doors manufactured by a small business shall be exempt from all testing requirements in Section ((~~R 613~~)) R612 of the International Residential Code provided they meet the applicable provisions of Chapter 24 of the International Building Code.