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RE: HB 2364-5 Amendments to 90.846(1)

As the author of the amendment, I want to put on the record my specific intent relating to the good faith language being proposed to ORS 90.846(1): *“which includes a duty of the owner of the facility to consider in good faith any offer from the tenants or an entity formed by or associated with the tenants and to negotiate with the tenants or the entity in good faith.”* The law currently requires the parties to act in a commercially reasonable manner, and, because the law is a part of chapter 90, ORS 90.130 also currently imposes an obligation of good faith.

The purpose of the good faith language included in the amendment is to be explicit that facility owners are required to act in good faith when following the process laid out in statute. This amendment is not intended to give the tenants a “right of first refusal” nor to give tenants any special advantage over another third party purchaser in negotiation; rather, the purpose is to strengthen the requirement that facility owners give a fair chance to their tenants to compete to purchase a facility. I’ll note that any reference to “tenants” in this document includes an entity formed by or associated with the tenants.

Good faith on the part of the parties, both the tenants and any facility owner, is presumed. Evidence showing that a facility owner is unwilling to consider an offer from tenants, to negotiate with tenants, or to sell to tenants solely because they are tenants (and no other commercially reasonable factors exists), would violate the statute, as amended.

I want to be clear that this amendment does not affect the language in ORS 90.844(6)(a) that allows an owner of a facility to reject or counter an offer received from the tenants, so long as any rejection or counter is made in a commercially reasonable manner – meaning, there exists a commercially reasonable rationale by the owner of the facility for the rejection or the counter.

Based on the testimony received, and subsequent conversations with those familiar with the process of selling a facility and giving tenants an opportunity to compete to purchase, the following are specific examples of actions that may be taken by a facility owner that I intend to qualify as good faith. Every transaction is different, and by no means is the following an exhaustive list; however, as the drafter of the legislation, I intend the following to be examples of good faith by a facility owner:

1. After giving the notice required by ORS 90.842, the facility owner enters into a non-binding letter of intent with a third-party potential purchaser. That non-binding letter of intent references the facility owner's duty to consider, in good faith, any offer the tenants may make.
2. After receiving an offer from the tenants, the landlord rejects the offer because the material terms of the offer are outside of what the facility owner would consider. Material terms could include (but are not limited to): price; date of closing; amounts and timing of earnest money deposits; dates of due diligence and contingencies and possible effect on date of closing; and whether earnest money is "hard", or whether the earnest money will go hard; details of contingencies (including financing contingencies).
3. After receiving an offer from the tenants, the landlord rejects the offer because of other extenuating circumstances. Other extenuating circumstances could include (but are not limited to) the potential sale of a facility that would include other considerations besides cash (i.e. stock or property trades).
4. A landlord rejects an offer from the tenants and the landlord provides a rationale for the rejection that is true.
5. After receiving an offer from the tenants, the landlord makes a counteroffer that is commercially reasonable.

Sincerely,

Julie Fahey
State Representative
House District 14