

916-323-7715

February 16, 1984

Dear Mr. (Redacted):

This is in response to your February 3, 1984, letter wherein you enclosed copies of a December 7, 1983, letter from (Redacted) to County Counsel (Redacted), state and federal income tax exemption letters issued to Marin (Redacted) Agricultural Land Trust, the Deed of Conservation Easement utilized by the Trust, and the Trust's Articles of Incorporation and By-Laws, and you asked that we review the documents and advise as to whether we agree with Mr. (Redacted) conclusion that conservation easement(s) obtained by the Trust pursuant to such Deeds to it are not changes in ownership as defined by Revenue and Taxation Code Section 60.

Such Deeds of Conservation Easement follow from Civil Code Section 815 et seq. which provide for the conveyance of conservation easements to certain nonprofit organizations. Summarizing the Whereas Clauses of the Trust's Deed, because of a property's agricultural attributes and aesthetic values and the desire of the owner of the property and the Trust to retain such attributes and values, the owner/grantor is willing to donate a conservation easement over the property, thereby restricting and limiting the uses of the property in certain respects, and the grantee Trust agrees to preserve and protect in perpetuity such attributes and values. Specific rights conveyed by the Paragraph 2 of the Deed to the Trust are the following:

"(a) To identify, to preserve and to protect in perpetuity natural, open space, scenic, agricultural and aesthetic attributes in the soil and water quality of the property.

"(b) To enter upon the property and to inspect, observe, study and make scientific observations of and upon on the property, for the sole purpose of determining that Grantors' uses of the property are consistent with the terms and conditions of this Conservation Easement. Such inspection shall be permitted and made at least once a year, upon prior notice to Grantors, and shall be made in a manner that will not unreasonably interfere with the proper uses of the property.

"(c) To enforce the rights herein granted."

Specific uses and practices upon the property prohibited by Paragraph 4 of the Deed are:

"(a) The change, disturbance, alteration, or impairment of the natural, scenic, open space, agricultural and aesthetic features of the property, except as otherwise provided herein.

"(b) The establishment of any commercial or industrial uses or the construction, placing, or erection of any signs or billboards;....

February 16, 1984

"(c) The construction, reconstruction, or replacement of any structure except....

"(d) The division, subdivision, or de facto subdivision of the property; provided....

"(e) The use of motorized vehicles, except for ranch management purposes, off existing roadways or roadways the construction of which is authorized herein, which would in any way result in the degradation of the natural, scenic, open space, agricultural aesthetic quality of the property.

"(f) The establishment or maintenance of any commercial feedlot.

"(g) The commercial harvesting of timber, provided, however, that Grantors shall have the right to collect firewood for the heating of ranch and residential facilities, and to cut trees as necessary or desirable for agricultural purposes, for the construction of fences, and for the repair and construction of such buildings or other improvements on the property as are allowed hereunder.

"(h) The construction of any new roadway; provided,....

"(i) The dumping or other disposal of noncompostible refuse on the property, except....

"(j) Ranching, agricultural or other uses, otherwise permitted under this Easement, which result in degradation of topsoil quality,...."

The owner/grantor, however, retains exclusive access to and use of the property, except as expressly provided in the Deed, (Paragraph 2), the right to deny access to the public (Paragraph 9), and the right to pursue the following uses and practices upon the property (Paragraph 3):

"(a) To continue historical ranching and farming activity compatible with the purposes of this Easement, including the purchase, pasturing, grazing, feeding, care and sale of livestock and the planting, raising, harvesting, and sale of agricultural crops of every nature and description; Provided, however, that (i) such ranching or agricultural activity shall not result in overgrazing, soil degradation, or the pollution or degradation of any surface or subsurface waters (as shall be determined by a person or persons qualified by education and training to determine proper grazing practices, soil quality, or water quality, as the case may be), and that (ii) the pastoral, scenic and open space quality of the property shall be maintained in a condition at least as favorable as that existing as of the date of the grant of this Easement, as established by the baseline study provided for in paragraph 5 hereof.

"(b) To maintain and repair existing structures, fences, corrals, ditches, and other improvements on the property. Additional nonresidential structures, facilities and fencing reasonably necessary to the ranching and agricultural activities contemplated by this Easement (including solar energy, biogas, and other energy efficient facilities) shall be permitted, provided....

"(c) To build, maintain, and repair once built, no more than (Reacted) residences on the property, located as provided in Exhibit B attached hereto and made a part hereof by

reference; to provide access and utilities to said references in a manner consistent with the purposes of this Easement; to use such natural materials found on the property in the construction of such residences as Grantors shall deem necessary or convenient; provided,....

"(d) To develop and maintain such water resources on the property as are necessary or convenient for ranching, agricultural, irrigation, and residential uses; provided,....

"(e) To use agrichemicals, including, but not limited to, fertilizers and biocides, but only in those amounts and with that frequency of application necessary to accomplish reasonable grazing and agricultural purposes....

"(f) To control predatory and problem animals by the use of selected control techniques....

"(g) To utilize the property for hunting by Grantors, their heirs, licensees, and assigns, to the extent that harvesting of game from the property is not detrimental to wildlife balance.

"(h) To utilize the property for recreational or educational purposes, including, but not limited to, hiking, horseback riding, fishing, and nature studies.

"(i) To engage in the production of food and fiber products and by-products derivative from the ranching and agricultural activities conducted on the property; provided,....

"(j) Grantors specifically retain (i) all right, title, and interest in and to all tributary and non-tributary water, water rights, and related interests in, on, under, or appurtenant to the land; and (ii) all right, title, and interest to subsurface oil, gas, and other minerals; provided, however, that exploration for, and extraction of any minerals shall be undertaken only with the prior approval of Grantee and any exploration and/or extraction shall be undertaken in a manner designed to insure the protection of the natural, scenic, open space, agricultural and aesthetic attributes of the property, and only by a subsurface method consistent with the provisions of Section 170 (h) of the Internal Revenue Code....

"(k) To maintain a cemetery plot on the property for the interment of Grantors, their lineal descendants, and spouses of their lineal descendants, at a location to be agreed upon between Grantors and Grantee.

"(l) If desired by Grantors, to bury or otherwise camouflage all utility systems or extensions of existing utility systems constructed in the future."

As pointed out by Mr. (Redacted) Revenue and Taxation Code Section 60 provides that "change in ownership" means a transfer of a present interest in real property, including the beneficial use thereof, the value of which is substantially equal to the value of the fee interest. Since easements conveyed to the Trust pursuant to its Deed of Conservation Easement are negative easements, easements which present the owners/grantors from making and engaging in the above-mentioned uses and practices, since the owners/grantors retain exclusive access to and use of the their properties, and since every incident of ownership not consistent with an easement is reserved to

February 16, 1984

the owners/grantors, (*Dolske v. Gormley*, 58 Cal. 2d 513, and *Dierssen v. McCormack*, 28 Cal. App. 2d 164), we agree with Mr. (Redacted) conclusion that the creation of such an easement does not constitute a transfer of the beneficial use of a present interest in real property for purposes of Section 60. Since the value of the interest transferred is not substantially equal to the value of the property, we also agree with Mr. (Redacted) conclusion that the "substantially equal" requirement of Section 60 is not met. We do, however, believe that the creation of such an easement results in a transfer of a present interest in real property since easements, however they may be classified, have been defined as interest in land. See *Eastman v. Piper*, 68 Cal. App. 554, and *City of Hayward v. Mohr*, 160 Cal. App. 2d 427.

In sum, since not all the requirements of Section 60 are met, we agree that no change in ownership occurs upon the execution of the Deed of Conservation Easement utilized by the Trust. It follows that no separately assessable real property interest would result upon the execution of such Deed.

Very truly yours,

James K. McManigal, Jr.
Tax Counsel

JKM:fr

Background and Facts

Your letter and accompanying "Grant Deed of Conservation Easement" provided the following facts for purposes of our analysis:

1. On December 24, 2001 _____ Ranch (SR) conveyed a conservation easement on approximately 4,221 acres of land located in Yuba County to the _____ Association (CWA).
2. As described in your letter, CWA provided no consideration to obtain the conservation easement; SR donated the easement to CWA.
3. As conveyed to CWA, the easement conforms to the requirements for a "conservation easement" set forth in Civil Code section 815.1.
4. The easement granted to CWA was recited and conveyed by deed; and it was executed by and transferred from the fee owners/grantors of the land subject to the easement.
5. One recorded document memorializes the transaction as a "Grant Deed of Conservation Easement" (hereafter "Grant Deed").
6. The instruments conveying the easement were recorded on December 28, 2001 in the office of the Yuba County Recorder, as required by Civil Code section 815.5.
7. The easement is permanent, from the date executed on December 24, 2001 into perpetuity. It conveys to the Grantee "a perpetual Conservation Easement" as defined by Civil Code section 815. (Grant Deed, paragraph 1)
8. Pursuant to paragraph 33 of the Grant Deed, "this Easement shall be of perpetual duration . . . it being the express intent of the parties that this easement not be extinguished by, or merged into, any other interest or estate in the property now, or hereafter held by the Grantee."
9. As required by subdivision (a) of Civil Code section 815.3, CWA is a "tax-exempt nonprofit organization qualified under Sections 501(c)(3), 509(a)(2) and 170(h) of the Internal Revenue Code." (Grant Deed, paragraph B)
10. The Grantor and Grantee intend for "this Easement to maintain the rural, agricultural and natural qualities of the Property by retention of significant open space for a variety of uses, including wildlife habitat, recreation, agriculture, education, research and monitoring." (Grant Deed, paragraph E)
11. The purpose of maintaining "the rural, agricultural and natural qualities of the Property" is one of the permitted purposes set forth in Civil Code section 815.1.

12. The easement conveyed to CWA expressly created a present interest in real property. Paragraph 1 of the Grant Deed states: "Grantee hereby voluntarily accepts, a perpetual Conservation Easement, an immediately vested interest in real property . . ."
13. The property interests conveyed by the easement are assignable, i.e., capable of being transferred to any entity qualified under Civil Code section 815.3 to hold a conservation easement. (Grant Deed, paragraph 20)
14. Paragraph 24 of the Grant Deed authorizes SR and CWA to recover the value of their respective property interests if any part of the easement area is taken under eminent domain (or in lieu of condemnation) so as to terminate it.
15. The property interests conveyed to CWA via the easement include both positive rights, e.g., "development rights," and negative rights, e.g., restrictions and limitations on Grantor's use of the property.
16. Positive rights obtained by CWA include:
 - (a) The right to enter upon the property for inspecting compliance with the terms of the Easement. (Grant Deed, paragraph 19)
 - (b) The right to bring an action in equity to enjoin violations of the easement, to obtain money damages for the loss of the conservation values, and restoration of the property to its condition prior to any violation. (Grant Deed, paragraph 19)
17. Pursuant to paragraphs 9 through 24 of the Grant Deed, CWA received the following negative rights:
 - (a) Under paragraph 17 of the Grant Deed, CWA extinguished development rights on the property, subject to the limited exceptions specifically listed in paragraph 8.
 - (b) Paragraph 12 of the Grant Deed prohibits Grantor from any subdivision of the property, apart from limited exceptions.
 - (c) CWA prohibits Grantor from surface mining any minerals and/or hydrocarbons on the property. (Grant Deed, paragraph 14)
 - (d) CWA prohibits the Grantor from dumping, storing, burning, or processing any trash, refuse, or derelict farm equipment. (Grant Deed, paragraph 15)
 - (e) CWA prohibits the Grantor from making any industrial or commercial uses of the property except those permitted under paragraphs 4 and/or 6. (Grant Deed, paragraph 9)

18. All of CWA's rights in the property both positive and negative, are legally enforceable (Grant Deed, paragraph 19) and transferable to any public agency authorized to hold a conservation easement or to any private nonprofit organization qualified under subdivision (h) of I.R.C. Section 170. (Grant Deed, paragraph 20)
19. The property rights retained by the Grantor are, among other things, the following:
 - (a) The right to use the property for agricultural production and the right to permit others to use it for agricultural production. (Grant Deed, paragraph 4 (a)-(g))
 - (b) The rights to use the property for noncommercial and recreational purposes and commercially lease the right to hunt on the Property. (Grant Deed, paragraph 6)
 - (c) The rights to repair, reasonably enlarge, and replace currently existing improvements. (Grant Deed, paragraph 8(a))
 - (d) The right to construct additional improvements, including structures for agricultural purposes and residences not to exceed an aggregate of 20,000 square feet over the entire property. (Grant Deed, paragraph 8(b)(i))
 - (e) The right to erect fences and bridges. (Grant Deed, paragraph 8(e) and (f))
 - (f) The rights to use, sell, lease, and transfer water rights. (Grant Deed, paragraph 11)
20. Grantor's other retained interests are by express reservation "... Grantor reserves all customary rights and privileges of ownership . . . as well as any other rights consistent with the Statement of Purpose set forth in Paragraph 2 above and not specifically prohibited or limited by this Easement." (Grant Deed, paragraph 3)
21. The Grantor's primary negative rights are the right to privacy and the right to exclude any member of the public from trespassing on the property. (Grant Deed, paragraph 5)

Analysis

1. How should this transfer (change in ownership) be processed in accordance with law for property tax purposes?

Grant of this conservation easement did not result in a change in ownership since it fails to meet the three-part test found in Revenue and Taxation Code section 60.

As you are aware, Revenue and Taxation Code section 60 provides the statutory definition of a "change in ownership," in terms of three elements. For a transaction to be a "change in ownership," it must:

- (1) transfer a present interest in real property;

(2) including the beneficial use thereof; and,

(3) the value of the interest is substantially equal to the value of the fee interest.

If a transaction fails to meet all three parts of this test, it does not qualify as a change in ownership and no reappraisal should occur.

Transfer of a Present Interest in Real Property

To determine whether the grant of this conservation easement resulted in a transfer of a present interest in real property we must examine both interest transferred and whether that interest immediately vested in the grantee.

Subdivision (a) of Civil Code section 815.2 defines the type of interest transferred under a conservation easement as: ". . . an interest in real property voluntarily created and freely transferable in whole or in part." By statutory definition CWA obtained an interest in real property upon accepting the conservation easement from SR.

Furthermore, the Grant Deed transferring this conservation easement made that interest a present interest when it immediately vested that interest in the applicant:

Grantor hereby voluntarily grants and conveys to Grantee, and Grantee hereby voluntarily accepts, a perpetual Conservation Easement, an immediately vested interest in real property defined by California Civil Code Section 815, of the nature and character described herein. (Grant Deed, paragraph 1.)

Pursuant to Civil Code section 815, it is unquestioned that CWA obtained an interest in real property upon accepting the conservation easement from SR. In addition, when the Grant Deed immediately vested that real property interest in CWA, that interest became a present interest. Thus, the first element of change in ownership test is met.

Beneficial Use Thereof

To result in a "change in ownership," a transfer of a present interest in real property must also include the beneficial use of that real property. However, under the Grant Deed, CWA obtained primarily negative covenants and the right of access to the property for the purposes of enforcing those covenants. In contrast, SR—by express reservation—retained the following beneficial uses in the property:

- (a) Exclusive access to the property subject to the conservation easement (subject to CWA's right of entry to monitor for compliance with the terms of the Easement);
- (b) Right to prohibit public access to the property subject to the conservation easement;

- (c) Continue permitted agricultural activities;
- (d) Development, usage, and transfer of all water rights associated with the easement area; and,
- (e) Subsurface mining for gravel, ore, rock or other minerals;
- (f) The right to perform "any act not specifically prohibited or limited by the Conservation Easement."

Those rights enumerated above constitute a reservation of every incident of beneficial ownership not inconsistent with the easement. Furthermore, the mere right to enforce restrictions (negative covenants) granted to the CWA, as set forth in the Grant Deed, is not a "beneficial use" of this real property. Thus, the transfer did not result in a change in ownership because the CWA did not obtain beneficial use of the real property when it received this conservation easement.

Value Substantially Equal to that of the Fee Interest

Almost since the adoption of Article XIII A and the enactment of section 60, the Board's Legal staff has expressed the opinion that the grant of an easement does not constitute a change in ownership of the real property involved. Although an easement is an interest in real property, its value is seldom "substantially equal to the value of the fee interest." See Annotation No. 220.0162 (Eisenlauer 12/6/85 letter, enclosed, citing a November 1981 legal opinion). An exception to this rule occurs when an easement granted, perpetually and exclusively, all rights and interest in real property except legal title. See Annotation No. 220.0160 (McManigal 1/7/82 letter, enclosed).

In fact, in an 1984 opinion regarding an agricultural conservation easement, an easement remarkably similar to the one at issue here, we concluded that: "[T]he creation of such an easement does not constitute a transfer of the beneficial use of a present interest in real property for purposes of Section 60. Since the value of the interest transferred is not substantially equal to the value of the property, [the requirements] of Section 60 [are] not met." Annotation No. 220.0163 (McManigal 2/16/84 letter, enclosed).

Thus, subject to rare exceptions, our long-held position is summarized on page 6 of Assessors' Handbook Section 502, *Advanced Appraisal* (AH 502):

An easement is the right of use over the property of another for a specific purpose. Most easements are not separately recognized for property tax purposes. An exception occurs when the language contained in the grant of the easement effectively transfers an interest "substantially equivalent to the value of the fee," thus giving rise to a change in ownership under section 60. In this case, the easement should be appraised and assessed to the grantee, and the property

subject to the easement should be reappraised in a manner that recognizes the effect of the easement.

Similarly, at page 50 of Assessors' Handbook Section 501, *Basic Appraisal*, it is stated:

There are no change in ownership statutes or rules dealing specifically with the private grant of an easement or right of way from one landowner to another. Although an easement or right of way generally does not constitute "a transfer of value substantially equivalent to the fee" to the benefited person . . . courts have determined that a recorded permanent transfer of a present beneficial property right from one parcel to another can be a reassessable event [citation omitted]. Where the agreement between the property owners documents a recorded permanent grant of an appurtenant easement that includes present beneficial interests in that property described that are in fact substantially equivalent to the value of the fee, it qualifies as a change in ownership of the easement transferred, per section 60. *Most easements do not meet the change in ownership test in section 60 and therefore remain taxable to the property owner;* however, they may need to be considered when determining the legally permissible highest and best use for appraisal purposes. [Emphasis added]

Upon receiving this conservation easement, CWA acquired primarily negative rights. After reviewing the language contained in this grant it is apparent to us that it did not effectively transfer the value of the underlying fee interest. We conclude that the grant of these negative rights does not fall within the exception described above. Under the circumstances presented here, the transfer of negative rights does not constitute a "transfer of value substantially equivalent to the fee" to CWA.

Since the grant of this conservation easement did not transfer to CWA a beneficial interest in real property with a value that is substantially equal to the value of the fee interest, it fails to meet the "change in ownership" definition contained in section 60 of the Revenue and Taxation Code. Thus, the grant of this conservation easement was not a change in ownership.

2. Does the conservation easement transferred to the Association, which consists of certain property rights, an interest in real property, constitute taxable property?

As stated above, the grant of the conservation easement did not result in a change in ownership causing a revaluation of those rights. However, those rights transferred under the easement grant remain taxable to the extent that they are already reflected in SR's factored base year value. Nevertheless, section 402.1 requires your office to consider the conservation easement an enforceable restriction when calculating the assessed value of SR's property.

As mentioned above, most easements are not separately recognized for property tax purposes. In fact, page 6 of the AH 502 describes the limited exception when easements are separately recognized for property tax purposes:

An exception occurs when the language contained in the grant of the easement effectively transfers an interest "substantially equal to the value of the fee interest," thus giving rise to a change in ownership under section 60.

Thus, an easement is separately recognized for property tax purposes only when the grant of that easement meets the definition of a "change in ownership". Since we concluded that the grant of this conservation easement to CWA did not result in a change in ownership, it would be improper to separately assess the rights transferred under this easement for property tax purposes.

That conclusion, however, does not mean the rights transferred under the easement are not taxable property interests. Rather, they remain taxable to the extent that they are already reflected in SR's factored base year values. Since the transfer of those rights did not trigger a change in ownership, the value of those rights remains a portion of SR's factored base year values.

In addition, Civil Code section 815.10 provides that the conservation easement constitutes an "enforceable restriction" for purposes of Revenue and Taxation Code section 402.1.

As a general rule, private landowners cannot ordinarily reduce the value of their own property for property tax purposes. However, conservation easements are one of the few exceptions to this general rule. Subdivision (a) of section 402.1 provides, in part, that "[i]n the assessment of land, the assessor shall consider the effect upon value of any enforceable restrictions to which the use of the land may be subjected." Subdivision (a)(8) lists conservation easements as one of those enforceable restrictions that your office must consider when determining the assessed values of land:

A recorded conservation, trail, or scenic easement, as described in Section 815.1 of the Civil Code, that is granted in favor of a public agency, or in favor of a nonprofit corporation organized pursuant to Section 501(c)(3) of the Internal Revenue Code that has as its primary purpose the preservation, protection, or enhancement of land in its natural, scenic, historical, agricultural, forested, or open-space condition or use.

Although the value of those rights transferred under the conservation easement remain a part of SR's factored base year values, subdivision (d) of section 402.1 prohibits your office from considering sales of otherwise comparable land not similarly restricted—unless the restrictions have a demonstrably minimal effect upon value—when applying the comparable sales approach

to value. Thus, your office must consider the effects of the conservation easement when calculating the assessed value of SR's real property.

Conclusion

SR's grant of this conservation easement did not transfer to CWA a beneficial interest in real property with a value that is substantially equal to the value of the fee interest. Consequently, that grant fails to meet the "change in ownership" definition contained in section 60 of the Revenue and Taxation Code. To the extent that those rights transferred under the grant of this conservation easement are already reflected in SR's factored base year value, those rights are taxable. However, section 402.1 requires you to consider the conservation easement as an enforceable restriction when calculating the assessed value of SR's real property.

The views expressed in this letter are only advisory in nature. They represent the analysis of the Board's Legal Department staff based on the present law and facts set forth herein, and are not binding on any person or entity.

Sincerely,

/s/ Michael Lebeau

Michael Lebeau
Tax Counsel

Enclosures [Annotations 220.0160 (C 1/7/82), 220.0162 (C 12/6/85), 220.0163 (C 2/16/84)]

MTL:eb

Prop/prec/Rest/03/03ml.doc

cc: Mr. Dean Kinnee, MIC:64
Mr. Mark Nisson, MIC:64
Ms. Glenna Schultz, MIC:64
Ms. Kristine Cazadd, MIC:82