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August 6, 2003

Honorable Tom Bordonaro
San Luis Obispo County Assessor
Attn: Barbara Edginton
1050 Monterey Street, Room 100
San Luis Obispo, CA 93408-2070

RE: *Conservation Easement and Other Restrictive Easements*

Dear Mr. Bordonaro:

This letter is in reply to correspondence addressed to the Board's Legal Department dated July 11, 2001. In that letter your staff asked us to review certain conservation easements and other restrictive easements and to advise your office of the proper change in ownership and valuation treatment of those easements.

During our research into your staff's request, we determined that the issues presented in your staff's letter were similar, in relevant part, to the situation presented by the East Bay Municipal Utility District's purchase of a conservation easement in Calaveras County. Since that transaction was the subject of an Application for Review, Change of Assessment, Equalization, or Adjustment before the Board of Equalization, we necessarily postponed our response pending the Board's decision in that matter. With the Board's recent resolution of that matter, we now respond to your staff's inquiries.

For the reasons explained herein, it is our opinion that the grant of the conservation easement and other restrictive easements presented in your letter do not create taxable possessory interests and are not changes in ownership under section 60 of the Revenue and Taxation Code. In addition, we note that your office is required to consider conservation easements as "enforceable restrictions" when calculating the assessed value of real property subject to those easements, as required by Revenue and Taxation Code section 402.1.

Questions Presented

1. **Certain property along our coast was owned by the Trust for Public Lands. It granted a conservation easement to the Land Conservancy, a California nonprofit public benefit corporation. The Trust for Public Lands then granted the property to the State of California, Department of Parks and Recreation, subject to the conservation easement. Copies of the documents are enclosed for your review.**

A. **Does the conservation easement create a possessory interest for the Land Conservancy?**

No. The Conservation Easement Deed, dated March 3, 2000, did not create a taxable possessory interest, as defined in Revenue and Taxation Code section 107 and Property Tax Rule 20.

As you are aware, Article XIII, section 1, of the California Constitution requires that all property be taxed unless otherwise provided by the California Constitution or the laws of the United States. Possessory interests in real property are deemed to be real property for tax purposes. (*Forster Shipbuilding Co. v. County of Los Angeles* (1960) 54 Cal.2d 450, 455.)

Section 107 defines "possessory interests" in pertinent part as "[p]ossession of, claim to, or right to the possession of land or improvements, except when coupled with ownership of the land or improvements in the same person." Property Tax Rule 20, the Board's interpretation of section 107, provides in part:

(a) POSSESSORY INTERESTS. "Possessory interests" are interests in real property that exist as a result of:

(1) A possession of real property that is independent, durable, and exclusive of rights held by others in the real property, and that provides a private benefit to the possessor, except when coupled with ownership of a fee simple or life estate in the real property in the same person . . .

To constitute a "taxable possessory interest" it is not enough to merely possess tax-exempt government-owned real property. Such a possession must also be independent, durable, exclusive, and confer a private benefit on the possessor not available to the general public. Should a private possession of government-owned property fail to meet any one of these four requirements, no taxable possessory interest exists.

The following statement by the Court of Appeal summarizes the approach taken by the courts when analyzing taxable possessory interests:

In light of the decisional law which more than a century ago recognized the concept of a possessory interest tax, coupled with the broad statutory language defining possessory interests, a valuable and taxable possessory interest may be found in virtually any situation where a private citizen is allowed to use public property for personal gain. *Scott-Free River Expeditions, Inc. v. County of El Dorado* (1988) 203 Cal.App.3d, 896, 903.

When determining the existence of a taxable possessory interest under a written instrument, an objective standard rather than the literal language of the written instrument controls in ascertaining the nature of the relationship established.¹ Because of the variety of interests that may be created by written instruments, the question of whether a taxable possessory interest has been created must be decided on a case-by-case basis by weighing the factors of durability, exclusiveness, independence, and private benefit. *Pacific Grove-Asilomar v. County of Monterey* (1974) 43 Cal. App. 3d 675, at 692.

In each case, judgment is to be made by an examination of the writing in its entirety to determine whether the requisite elements are present. (*Stadium Concessions, Inc. v. City of Los Angeles* (1976) 60 Cal.App.3d 215; *Wells National Services Corp. v. County of Santa Clara* (1976) 54 Cal.App.3d 579; *Mattson v. County of Contra Costa* (1968) 258 Cal.App.2d 205; see also Property Tax Rule 20, *supra*).

Analyzing the rights obtained by the Land Conservancy (hereafter "LC"), in light of the standards set forth above, will determine whether the grant of this conservation easement has created a taxable possessory interest.

Possession

Before analyzing the elements of independence, durability, exclusivity, and private benefit, it is first necessary to evaluate whether the LC obtains "possession" of the real property subject to the conservation easement. Assessors' Handbook Section 510, *Assessment of Taxable Possessory Interests*, December 2002 (hereafter "AH 510"), citing Property Tax Rule 20, provides the following guidance:

Possession. Rule 20 defines "possession" as meaning actual physical occupation. Thus, possession requires more than incidental benefit from the public property; it requires actual physical occupation of the property pursuant to rights not granted to the general public. The rule further defines "right to the possession" or "a claim to a right to the possession" as meaning a right to or a claim to a right to actual physical occupation.²

Thus, to have a "possession" of tax-exempt government-owned real property sufficient to warrant enrollment as a taxable possessory interest, that possession must result in actual physical occupation, or the claim to a right of actual physical occupation. However, looking solely within the four-corners of the Conservation Easement Deed, there is insufficient evidence of "actual physical occupation," or "a claim to a right to actual physical occupation" of the real property, upon which to base enrolling a taxable possessory interest. Paragraph 4 of the Conservation Easement Deed provides, in part:

To accomplish the Purpose of this Easement, the following rights and obligations are conveyed by Grantor to Grantee by this Easement and Grantee accepts and assumes the same: . . .(b) To enter upon and inspect the Property for purposes of monitoring (1) the actual uses and activities occurring on the Property to

¹ Assessors' Handbook Section 510, *Assessment of Taxable Possessory Interests*, December 2002, page 6.

² AH 510, page 8.

determine whether they are consistent with this easement; and (2) Grantor's substantial compliance with the terms of this Easement.

Here the facts show that the LC obtains merely the right to enter upon the property to monitor compliance with the terms of the conservation easement. Acquiring the right of entry does not confer actual physical occupation of a property, nor a claim to a right of actual physical occupation. In other words, since the State of California, Department of Parks and Recreation retains actual physical possession of the property, the mere fact that the LC may enter the property to monitor compliance with the conservation easement does not place the LC in possession of the property, as defined in subdivision (c)(2) of Property Tax Rule 20.

Without actual physical occupation, or the claim to a right of actual physical occupation, the LC does not have a taxable possessory interest in the property subject to the conservation easement.

Private Benefit

In addition to the CLC's lack of possession described above, it is our opinion that the LC does not obtain a private benefit from the conservation easement. When determining whether or not a possessory interest confers a private benefit on the possessor, the courts have indicated that if there is an opportunity for the holder of the interest to make a profit, the requirement is met. *Wells Nat. Service Corp. v. County of Santa Clara, supra*, 54 Cal.App.3d at p. 585.

However, the absence of an opportunity for the holder of the interest to make a profit does not necessarily mean that the use or possession confers no private benefit. For example, in *Rand Corp. v. County of Los Angeles* (1966) 241 Cal.App.2d 585, the taxpayer, a nonprofit corporation, suggested that it should be excused from taxation on its possessory rights in tax-immune federally-owned improvements because of its status as a nonprofit corporation. The Court of Appeal disagreed stating that "[t]he people who compose Rand have a purpose in making use of government property and the opportunity to accomplish that purpose could well be worth more to them than mere financial gain." *Rand, supra*, at p. 590; see also *McCaslin v. DeCamp* (1967) 248 Cal.App.2d 13.

Based on our understanding of the facts, this Conservation Easement Deed is distinguishable from the facts in *Rand*. Where the Rand Corporation was making use of government property to further its own interests, conservation easements benefit the public at large. The Legislature's findings and declarations, as codified in Civil Code section 815, provide:

The Legislature finds and declares that the preservation of land in its natural, scenic, agricultural, historical, forested, or open-space condition is among the most important environmental assets of California. The Legislature further finds and declares it to be the public policy and in the public interest of this state to encourage the voluntary conveyance of conservation easements to qualified nonprofit organizations.

Thus, when the LC acquired this conservation easement, it supplied a service that was "in the public interest of this state." For that reason, we believe the element of private benefit is not satisfied, since the Conservation Easement Deed conferred a benefit on the general public instead of the LC. Without deriving a private benefit from the conservation easement the LC does not have a taxable possessory interest in the real property subject to the easement.

A private user of tax-exempt government-owned real property obtains a taxable possessory interest if that user's possession is independent, durable, exclusive, and provides a private benefit for the possessor. However, when the LC was granted this conservation easement it obtained neither the right of possession nor a private benefit. Without obtaining both possession and a private benefit, the conservation easement does not create a taxable possessory interest.

B. How should we determine what value might exist for the easement?

It is unnecessary to determine a value for the easement since the easement did not create a taxable possessory interest.

As mentioned above, the grant of this conservation easement did not create a taxable possessory interest. Upon reaching that conclusion, it would be improper to value and separately assess the rights transferred under this easement for property tax purposes.

C. If it does create a possessory interest, and if there is a value associated with that easement, is there any exemption available to the Land Conservancy?

Since the grant of this conservation easement did not create a taxable possessory interest, the LC does not require an exemption.

Again, as stated in our answer to question No. 1A above, the Conservation Easement Deed did not create a taxable possessory interest in the LC; it is unnecessary to determine whether the LC may qualify for any exemptions.

D. If this easement does not create a possessory interest, could there be an instance where a conservation easement would create a possessory interest? If so, what circumstances would create such an instance.

The grant of a conservation easement will create a taxable possessory interest only if that grant meets the definition of "taxable possessory interest" contained in Property Tax Rule 20.

In order for the grant of a conservation easement to create a taxable possessory interest, that grant must: (1) confer on the easement holder actual physical occupation, or the claim to a right of physical occupation; and, (2) meet the elements of independence, durability, exclusivity, and private benefit. Any grant that does not meet the definition of "taxable possessory interest" contained in Property Tax Rule 20 will not create a taxable possessory interest.

2. **The Foundation ("Foundation") owns certain property. Assume that the property is not eligible for any exemption, and that the Foundation has owned the property for several years. They record a deed granting a conservation easement to the Land Conservancy of ("Conservancy").**

A. **Is the grant of the easement a change in ownership of a real property interest such that it could create a supplemental assessment?**

This Deed of Conservation Easement, dated June 7, 2001, 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 this Deed of 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 the Conservancy obtained an interest in real property upon accepting the conservation easement from the Foundation.

Furthermore, the Deed of Conservation Easement made it a present interest when it immediately conveyed that interest to the Conservancy:

NOW, THEREFORE, in consideration of the above and the mutual covenants, terms, conditions, and restrictions contained herein, and pursuant to the laws of the State of California and in particular Civil Code Sections 815 et.seq., Grantor hereby voluntarily grants and conveys to Grantee a conservation easement in gross in perpetuity over the Property of the nature and character and to the extent hereinafter set forth ("Easement"). (Deed of Conservation Easement, page 2.)

Pursuant to Civil Code section 815, it is unquestioned that the Conservancy obtained an interest in real property upon accepting the conservation easement from the Foundation. In addition, when the Deed of Conservation Easement immediately conveyed that real property interest in the Conservancy, 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, when the Foundation executed the Deed of Conservation Easement, the Conservancy obtained primarily negative covenants, the right of entry to the property for the purposes of monitoring those covenants, and the right to legally enforce those covenants. The following list summarizes the rights obtained by the Conservancy upon execution of the Deed of Conservation Easement:

1. The Conservancy received the rights to prohibit the following:
 - (a) Residential uses of the property;
 - (b) Subdivision of the Property;
 - (c) Filling of ponds and wetlands or removal of wetland vegetation, without Grantee's prior approval; and,
 - (d) Removal of oak trees, without Grantee's prior approval.³
2. To monitor compliance with the conservation easement, paragraph (3)(b) grants the Conservancy the right of entry onto the property.
3. All of the Conservancy's rights in the property both positive and negative, are legally enforceable (Deed of Conservation Easement, paragraph 6) 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. (Deed of Conservation Easement, paragraph 10)

In contrast, the Foundation—by express reservation—retained the following beneficial uses in the property:

- (a) Exclusive access to the property, subject to the Conservancy's right of entry to monitor compliance with the terms of the Easement (Deed of Conservation Easement, page 5, paragraph 7);
- (b) Right to prohibit public access to the property subject to the conservation easement (Deed of Conservation Easement, page 5, paragraph 7);

³ Deed of Conservation Easement, paragraph 4.

- (c) Continue permitted agricultural activities (Deed of Conservation Easement, page 3, paragraphs 2 and 5(a)-(d));
- (d) Right to maintain/build improvements on the Property, not to exceed 10,000 square feet (Deed of Conservation Easement, page 4, paragraph 5.1).

Those rights enumerated above constitute a reservation of the incidents of beneficial ownership not inconsistent with the easement. Furthermore, the mere right to enforce restrictions (negative covenants), as set forth in the Deed of Conservation Easement, is not a "beneficial use" of this real property. Because the Conservancy did not obtain beneficial use of the real property subject to the easement, this Deed of Conservation Easement did not result in a change in ownership.

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 grants, 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 analyzing an agricultural conservation easement, an easement 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).

Subject to rare exceptions, our long-held position is summarized on page 6 of Assessors' Handbook Section 502, *Advanced Appraisal*, December 1998 (hereafter "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*, January 2002 (hereafter "AH 501"), 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 execution of the Deed of Conservation Easement, the Conservancy acquired primarily negative rights. After reviewing the language contained in this Deed, it is apparent to us that it did not effectively transfer a value equivalent to the value of the underlying fee interest to the Conservancy. Thus, we conclude that the grant of these negative rights does not fall within the exception described above.

Since the grant of this conservation easement did not transfer to the Conservancy 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.

B. If so, to which entity should the supplemental be billed (or refunded)?

No supplemental assessments should be enrolled since no change in ownership occurred. Neither tax bills nor refunds should be issued to any entity as a result of this transfer.

Assessors are required to enroll supplemental assessments following changes in ownership and new construction events that result in new base year values (Revenue and Taxation code section 75 et. seq.). However, as described in the answer to question No. 2A above, the grant of this conservation easement did not result in a change in ownership. Consequently, no supplemental assessment tax bills or refunds should be issued to any entity as a result of the grant of this conservation easement.

C. If not, and if the result of the easement creates a change in value for the real property, can we reflect such a change in value?

Yes, when calculating the assessed value of the Foundation's property, section 402.1 requires your office to consider the conservation easement's effect on value.

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

When assessing property subject to an enforceable restriction, subdivision (a) of section 402.1 requires your office to: ". . . consider the effect upon value of any enforceable restrictions to which the use of the land may be subjected." Furthermore, subdivision (d) of section 402.1 prohibits your office from considering sales of otherwise comparable land, not similarly restricted, when applying the comparable sales approach to value.

Thus, if the conservation easement has an effect on the value of the Foundation's real property, your office must consider the effects of the conservation easement when appraising the Foundation's real property subject to the easement.

D. Should it be considered similar to a reduction in value under Revenue and Taxation Code section 51?

Section 51 requires your office to annually value real property at the lesser of its factored base year value or fair market value as of the lien date. If the conservation easement results in a reduction of value below factored base year value then it must be enrolled at current fair market value.

In our answer to question No. 2B above we concluded your office may not reflect a reduction in value through supplemental assessments since the grant of this conservation easement did not result in a change in ownership. Consequently, the assessed value of the property encumbered by the easement can be reduced only in accordance with Revenue and Taxation Code section 51.

Section 51 requires you to annually enroll all real property at either: (1) its base year value factored for inflation; or (2) its market value as of the lien date (taking into account any factors causing a decline in value), whichever is lower. Since conservation easements constitute an enforceable restriction for purposes of Revenue and Taxation Code section 402.1, such easements may affect the fair market value of the real property so encumbered.

If, as of the lien date, the fair market value of the real property encumbered by the easement is less than the property's factored base year value, section 51 requires you to enroll that lesser amount.

E. If the Conservancy is an exempt organization, would it be eligible for any type of exemption?

Since the grant of this conservation easement did not result in a change in ownership, the Conservancy does not require an exemption.

Our answer to question No. 2A above concludes that the grant of this conservation easement did not result in a change in ownership; it is unnecessary to determine whether the Conservancy may qualify for any exemptions.

F. Is the opinion letter written January 7, 1982 still accurate?

Yes, our opinion letter dated January 7, 1982 reaches the correct conclusion, as applied to the facts presented in that letter.

In that opinion letter the Board's Legal staff concluded that the grant of a conservation easement resulted in a change in ownership. However, your office should limit its consideration of that opinion to the facts presented by that letter.

The grant of the conservation easement described in our 1/7/82 letter conveyed "all rights and interest in the property except legal title, exclusive in perpetuity, and running with and burdening title to the property." Based on those facts, it was our opinion that the grant was a change in ownership, as defined in Revenue and Taxation Code section 60. Such facts distinguish that conservation easement from the Deed of Conservation Easement analyzed above.

G. Would the grant of a [conservation] easement into perpetuity be considered the same as the grant of a long-term lease?

No. Leases differ from conservation easements in two aspects: (1) Leases confer possession of real property on the lessee; most conservation easements grant only the right of entry. (2) Conservation easements are enforceable restrictions for purposes of Revenue and Taxation Code section 402.1; long-term leases, on the other hand, are merely private encumbrances.

Leases differ from conservation easements in two important aspects: the right of possession and recognition for property tax purposes. Unlike conservation easements, leases confer the right of possession to real property on the lessee. AH 501 provides the following description of the rights obtained by a lessee:

The creation of a leasehold interest separates the full bundle of property rights into: (1) the leased fee interest, the interest retained by the lessor or landlord; and (2) the leasehold interest, the interest held by the lessee or tenant. *The lessee obtains the right to possession and use* while the lessor retains all other ownership rights, including the right to regain possession at the termination of the lease.⁴ [Emphasis added]

Most conservation easements, including the Deed of Conservation Easement analyzed in our answer to question No. 2A above, convey only the right to enter real property for the purpose of monitoring compliance with the easement. Obtaining the right of entry does not give the holder of a conservation easement the right to possess the real property subject to the easement.

In addition, the definition of "fair market value" found in Revenue and Taxation Code section 110 leads to a difference in how leases and conservation easements are treated for property tax purposes. Subdivision (a) of Revenue and Taxation Code section 110 defines "fair market value" as:

[T]he amount of cash or its equivalent that property would bring if exposed for sale in the open market under conditions in which neither buyer nor seller could take advantage of the exigencies of the other, and both the buyer and seller have knowledge of all the uses and purposes to which the property is adapted and for

⁴ AH 501, page 31.

which it is capable of being used, and of the enforceable restrictions upon those uses and purposes.

AH 501 offers the following guidance to assessors when applying section 110, subdivision (a), in the appraisal of real property for assessment purposes:

The property tax appraiser, with few exceptions, must estimate the fair market value of the unrestricted fee simple estate, unencumbered by liens or leases, based on the highest and best use of the property. In the vast majority of assignments, the property tax appraiser estimates the value of the full bundle of rights.⁵

The foregoing statutory provision requires assessors to appraise real property as though it were unencumbered or unrestricted by a lease, mortgage, or other private agreement even though the property may, in fact, be so encumbered. See *Clayton v. Los Angeles County* (1972) 26 Cal.App.3d 390; *Carlson v. Assessment Appeals Board No. 1* (1985) 167 Cal.App.3d 1004; *Dennis v. County of Santa Clara* (1989) 215 Cal.App.3d 1019; and, Assessors' Handbook Sections 501 and 502.

Revenue and Taxation Code section 402.1, on the other hand, requires your office to consider the effect that any enforceable restrictions may have on the value of taxable land. Section 402.1 provides in part:

402.1. Land use restrictions. (a) In 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. Those restrictions shall include, but are not limited, to all of the following: . . .

(8) 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.

Thus, pursuant to subdivision (a)(8) of section 402.1, your staff must consider the effect that conservation easements have upon the value of real property subject to such restrictions. However, AH 502 advises assessors to distinguish between enforceable restrictions and private encumbrances voluntarily entered into by the property owner:

As a general rule, private parties cannot reduce the taxable value of their property by imposing private encumbrances upon it; only enforceable government restrictions under section 402.1 are recognized as limiting the full fee simple interest.⁶

⁵ AH 501, page 34.

⁶ AH 502, page 6.

In summary, your staff is not permitted to consider the effect of private encumbrances, such as leases, when appraising taxable property. However, pursuant to subdivision (a)(8) of section 402.1, your staff is required to consider the effect of enforceable restrictions, such as conservation easements.

3. Certain individuals own property. They grant a conservation easement to a governmental agency.

A. If there is value associated with the easement, and the property is within the taxing jurisdiction of the governmental agency, what action should we take?

Real property interests acquired by a local government on land within its jurisdiction are exempt pursuant to section 3(b) of article XIII. Provided that the grant of the easement did not result in a change in ownership, treat the conservation easement as an enforceable restriction, as described in our answer to questions Nos. 2C and 2D above.

As you are aware, the California Constitution, in section 3, subdivision (b) of article XIII, generally exempts public property from taxation:

The following are exempt from property taxation: ... (b) Property owned by a local government, except as otherwise provided in Section 11[, subdivision](a).

Article XIII, section 3, exempts real property acquired by a local government from taxation, provided that the real property is located within the local government's jurisdiction. Even if the grant of a conservation easement results in a change in ownership, those property interests are exempt from taxation if they are granted to a local government on land within its jurisdiction.

With regard to the underlying fee interest, your staff should treat the conservation easement as an enforceable restriction. Please refer to our answers to questions Nos. 2C and 2D above.

B. If it is outside of the taxing jurisdiction of the governmental agency?

A conservation easement granted to a local government on land located outside its jurisdiction is taxable to the local government only if the grant of the easement was a change in ownership and the property was taxable when acquired.

Section 11(a) of Article XIII creates an exception to the public property exemption set forth in section 3(b)—and discussed in our answer to question No. 3A above—by providing that:

Lands owned by a local government that are outside its boundaries, including rights to use or divert water from surface or underground sources and any other interests in land, are taxable if . . . they are located outside Inyo or Mono County and were taxable when acquired by the local government. . . .

To the extent that it was taxable when acquired, real property owned by a local government in California and located outside its jurisdiction is taxable. However, your office must interpret the exception to the public property exemption set forth in section 11(a) of article

XIII in concert with other principles of property tax law, including the definition of "change in ownership" found in section 60 of the Revenue and Taxation Code.

If your staff finds that the grant of a conservation easement to a local government did not transfer a beneficial interest in real property—with a value that is substantially equal to the value of the fee interest—then that grant fails to meet the definition of a "change in ownership" found in section 60. Absent such a finding, the owner of the underlying fee interest remains the owner of the real property for property tax purposes and section 11(a) of article XIII does not apply.

C. Would it make a difference if the grant occurred at the same time as the sale of the property to other individuals? What differences would it make and what actions should we take?

Concurrent sales to others would have no affect on our answers. Each grant deed and deed of conservation easement requires a separate analysis to determine whether a change in ownership has occurred.

Concurrently executed grant deeds and conservation easements will not affect our answers to the questions posed above. As indicated in our answer to question No. 2A, the grant of a conservation easement will result in a change in ownership only if that grant meets the definition of "change in ownership" found in Revenue and Taxation Code section 60. Your staff must separately analyze each document to determine whether a change in ownership has occurred.

4. Property is owned by individual A, and the property is currently subject to a Williamson Act contract, and is being valued accordingly. The owner then grants a conservation easement in the property.

A. Would there be any situation where this might cause an additional change in value?

Yes, assuming that the California Land Conservation Act (CLCA) contract does not expressly prohibit assessment at fair market value—and the grant of a conservation easement did not result in a change in ownership—it is possible that the grant of a conservation easement may result in a current fair market value lower than the CLCA value.

California statutes recognize both CLCA contracts and conservation easements as enforceable restrictions that may reduce the assessable value of taxable real property. Government Code section 51243.6 provides, in part, that the Legislature finds and declares that the "enforceability of contracts" under the CLCA is necessary to permit preferential tax treatment pursuant to article XIII, section 8 of the California Constitution. In addition, Civil Code section 815.10 provides that a conservation easement constitutes an enforceable restriction for purposes of Revenue and Taxation Code section 402.1. Consequently, assessors must recognize both restrictions when valuing taxable real property.

As you are aware, Revenue and Taxation Code section 423 prescribes the valuation approach for land subject to a CLCA contract. Assessors' Handbook Section 521, *Assessment of Agricultural and Open-Space Properties*, September 1997 (hereafter "AH 521"), provides the following description of that approach:

Except for land under wildlife habitat and timberland contracts, the basic appraisal method applicable to the valuation of open-space land subject to an enforceable restriction is the income approach to value. Section 423 states the factors to be considered in the valuation and provides for an optional method of placing a ceiling upon the value to be enrolled. Under the limitations of subdivision (d), unless a party to the contract expressly prohibits such a valuation, the current taxable value cannot exceed the lowest of: (1) the current restricted value (determined via the income method for open-space properties); (2) the current fair market value calculated pursuant to section 110; or (3) the factored base year value, as if unrestricted, calculated pursuant to section 110.1.⁷

Assuming that the CLCA contract does not expressly prohibit such treatment, subdivision (d) of section 423 requires your office to enroll the lesser of three values—the restricted value prescribed in subdivision (c) of section 423, the current fair market value, or the property's factored base year value.

Even though the property in question was already subject to a CLCA contract, execution of a conservation easement will place additional, perpetual restrictions on the property. Depending on the extent and nature of those restrictions, your staff may find that those restrictions have caused the fair market value of the property to decline below the section 423 restricted value. Should that occur, section 51 requires your office to recognize that decline in value on the next lien date.

B. If so, when and how should the valuation be done?

Section 51 requires your office to annually value real property at the lesser of its factored base year value or fair market value as of the lien date.

Again, assuming that the grant of this conservation easement was not a change in ownership and resulted in a decline in value, section 51 authorizes you to reflect that decline in value on the next lien date. Please refer to our answer to question No. 2D above.

5. **A 1500-acre ranch is owned by _____, Inc. They grant an extremely restrictive conservation easement to the Nature Conservancy for \$4,000,000, and sell the fee to Ralph _____. Ralph reports the fee purchase at \$200,000 (based on a prior lease/option agreement minus the amount paid for the easement). The easement allows for up to five building envelopes in the future, at a location to be determined, if approved by both the Nature Conservancy and the County. The appraiser did not accept the \$200,000 fee purchase as indicative of value, and valued the property as if it were subject to a Williamson Act contract. He planned to value each building envelope, if and when completed as a "homesite."**

A. Was this correct?

Without copies of the documents described above, we are unable to determine whether the grant of this conservation easement resulted in a change in ownership. However,

⁷ AH 521, page II-5.

section 421.5 may no longer authorize assessment of the real property encumbered by this conservation easement at the section 423 restricted value.

To determine whether or not your staff correctly processed the transactions described above would require analysis of the purchase/sales option agreement, the conservation easement, and the agreement reducing the sales price. Without copies of those documents we cannot conclude whether the grant of "an extremely restrictive conservation easement to the Nature Conservancy" resulted in a change in ownership.

Despite that uncertainty, the Legislature has recently amended Revenue and Taxation Code section 421.5, effective January 1, 2003. Conservation easements granted under Civil Code section 815 et. seq. are no longer defined as "open-space land." As a result, the real property subject to this conservation easement may no longer qualify for the restricted value prescribed by Revenue and Taxation Code section 423.

If this conservation easement was granted under Civil Code section 815 et. seq., the real property subject to that easement did not qualify for assessment at the restricted value prescribed by section 423 for the 2003 lien date.

B. If we knew the location of the envelopes, would it be correct to assign them a separate parcel number, or to value them as "homesites."

Since the real property encumbered by this conservation easement may no longer be eligible for assessment at the restricted value prescribed by section 423, homesite treatment may no longer be appropriate.

Recent amendments to section 421.5 eliminated conservation easements granted under Civil Code section 815 et. seq. from those types of easements that qualify as "open-space land." As a result, treating building envelopes as "homesites" may no longer be appropriate.

However, assigning separate parcel numbers, even upon discovery of the exact locations of the building envelopes, should not affect the assessed value of the real property subject to the conservation easement. No new base year values should be established until the completion of new construction or the next change in ownership.

6. Enclosed are copies of an avigation easement, a view easement, a tree easement, and an open space easement. Please comment on what approach you believe we should take with respect to each for purposes of value, and for change in ownership.

A. Avigation Easement⁸

As a recorded contract between a landowner and a government agency, this avigation easement is an enforceable restriction for purposes of Revenue and Taxation Code section 402.1

⁸ According to *The American Heritage Dictionary of the English Language*, "avigation" means the airborne operation and navigation of aircraft. It was formed in a conflation of the words "aviation" and "navigation."

Here your staff asked us to review an "avigation easement" between a private landowner and the County of San Luis Obispo (County). This recorded easement conveyed certain airspace and other rights to the County, and gave the County the right to remedy those conditions on the real property that interfere with the airspace rights.

Proper treatment of land subject to an "avigation easement" requires a determination of whether such an easement is an "enforceable restriction" for purposes of Revenue and Taxation Code section 402.1. As noted in our answer to question No. 2G above, section 402.1 requires your office to consider the effect that any enforceable restrictions may have on the value of taxable land. Section 402.1 provides in part:

402.1. **Land use restrictions.** (a) In 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. Those restrictions shall include, but are not limited, to all of the following: . . .

(2) Recorded contracts with government agencies, other than those provided in Sections 422 and 422.5 . . .

Thus, as a recorded contract between the landowner and the County, subdivision (a)(2) of section 402.1 requires your staff to consider the effect that this avigation easement has upon the value of the real property subject to that restriction.

B. View Easement

No action required; this easement is a private encumbrance.

In our answer to No. 2G above, we describe how the Board has advised assessors to distinguish between enforceable restrictions and private encumbrances voluntarily entered into by property owners:

As a general rule, private parties cannot reduce the taxable value of their property by imposing private encumbrances upon it; only enforceable government restrictions under section 402.1 are recognized as limiting the full fee simple interest.⁹

From the facts contained in the view easement you provided, it appears that this easement represents a private agreement between adjacent landowners. Such agreements fall within the general rule that private encumbrances cannot reduce the taxable value of real property. We recommend that you disregard this easement when assessing either the property subject to the easement or the property that benefits from the easement.

⁹ AH 501, page 31.

C. Tree Conservation Easement

Like the avigation easement analyzed above, this tree conservation easement is a recorded contract between a landowner and a government agency; it is an enforceable restriction for purposes of Revenue and Taxation Code section 402.1.

In this situation your staff asked us to review a copy of a "Tree Conservation Easement" between a private landowner and the City of Atascadero (City). Here, the property owner—in a recorded easement—gave up the right to build, grade, or remove trees from the real property subject to the easement without express approval from the City.

As described in our answer to question No. 6A above, subdivision (a)(2) of section 402.1 defines an "enforceable restriction" to include recorded contracts between landowners and government agencies. Since this "tree conservation easement" is a recorded contract between the landowner and the City, subdivision (a)(2) of section 402.1, requires your staff to consider its effect upon the value of the landowner's real property.

D. Open Space Easement

Real property that is encumbered by an open-space easement granted under Government Code sections 51070-51097 must be appraised for assessment purposes using the restricted valuation approach prescribed by Revenue and Taxation Code section 423.

Your staff provided a copy of an easement granted to the County of San Luis Obispo (County) by _____ and _____, et. al. By the express terms of this easement, it was granted to the County pursuant to Government Code sections 51070-51097.

Subdivision (e) of Revenue and Taxation Code section 421 defines those easements that qualify as "open-space easements" for assessment purposes:

(e) "Open-space easement" means an open-space easement . . . granted to a county, city, or nonprofit organization pursuant to Chapter 6.6 (commencing with Section 51070) of Part 1 of Division 1 of Title 5 of the Government Code if the easement is acquired after January 1, 1975 . . .

Since this easement was granted to a county pursuant to Government Code section 51070, it meets the requirements for an "open-space easement." Revenue and Taxation Code section 422 further provides that real property subject to an open-space easement is "enforceably restricted" for purposes of section 8 of article XIII of the California Constitution.

When assessing "enforceably restricted" open-space land, AH 521 provides assessors with the following guidance:

When any of these restrictions are in effect, the land must be valued by the capitalization of income method specified in section 423, previously described in regard to farmlands under open-space contracts. The values derived are also subject to the same limitations as farmlands in that the capitalized income value

cannot exceed the lesser of the current market value or the unrestricted factored base year value of the property.

The primary problem in valuing these lands is the determination of the income to be capitalized. Since many properties subject to these forms of enforceable restriction do not actually produce any income, the appraiser must estimate an economic rent based on the highest permitted open-space use for which the land can reasonably be used. For the most part, such lands are at least suitable for livestock grazing, and economic rents can be estimated from nearby lands actually used for this purpose.

Thus, as "enforceably restricted open-space land," your staff is required to assess land encumbered by this open-space easement using the valuation approach prescribed in Revenue and Taxation Code section 423.

Conclusions

Conservation easements will create taxable possessory interests in government-owned land only if they confer actual physical occupation or the right to actual physical occupation on the holder of the easement, and meet the requirements of independence, exclusivity, durability, and private benefit, as defined in Property Tax Rule 20. In addition, the grant of a conservation easement will result in a change in ownership only if that grant meets definition of a "change in ownership" found in Revenue and Taxation Code section 60. When appraising real property for assessment purposes section 402.1 requires your office to consider conservation easements as "enforceable restrictions."

Section 3 of article XIII of the California Constitution, exempts conservation easements owned by a local government agency on land within its jurisdiction. Such an easement, when held by a local government agency on land outside its jurisdiction, would be taxable pursuant to article XIII, section 11, if the grant of that easement resulted in a change in ownership and the property was taxable when the easement was acquired.

Assuming that a CLCA contract does not expressly prohibit assessment at fair market value—and that the grant of a conservation easement did not result in a change in ownership—it is possible that the grant of a conservation easement may result in a current fair market value lower than the section 423 restricted value. Section 51 authorizes your office reflect that decline in value on the next lien date.

Conservation easements granted under Civil Code section 815 et. seq. are no longer defined as "open-space land." As a result, the real property subject to such conservation easements no longer qualify for the restricted value prescribed by section 423.

Section 402.1 recognizes recorded contracts between private landowners and government agencies as enforceable restrictions, e.g., avigation easements and tree easements. Typical view easements between private, unrelated landowners are private restrictions that should be disregarded in the assessment of real property. Open-space easements, on the other hand, qualify for assessment at the section 423 restricted value.

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 by K. Cazadd

Michael Lebeau
Tax Counsel

Enclosures

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cc: Ms. Kristine Cazadd, MIC:82
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