STATE OF CALIFORNIA

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September 1, 2016

County Counsel, County of San Mateo
Hall of Justice and Records, 6th Floor
400 County Center
Redwood City, CA 94063-1662

Re: Base Year Value Transfer – Change in Ownership
Assignment No.: 16-027

Dear Mr. :

This is in response to your request for our opinion regarding base year value transfers under section[1] 68 of the Revenue and Taxation Code as raised in a pending appeal before the San Mateo County Assessment Appeals Board (AAB).[2] Specifically, you ask whether a taxpayer may rely on an "ostensible agency" theory to establish an agency relationship between a public entity and the private purchaser of property such that the purchase of the property is an "acquisition by a public entity" qualifying for the section 68 exclusion from change in ownership. As explained below, if it is demonstrated that an ostensible agency existed between the private purchaser and the public entity, an assessor should recognize that relationship as one that makes the purchase an "acquisition by a public entity" for purposes of section 68.

Facts

Based on the information from the parties, it is our understanding that Applicant owned an office building (Former Property), in an area which the City of (City) planned for redevelopment (the Project).[3] In February 2011, a private party developer (Developer) acquired a purchase option from Applicant for his Former Property. More than one year later, in May 2012, the City selected Developer over other competitors to negotiate a potential disposition and development of the Project. In December 2012, Developer exercised its purchase option on Applicant's Former Property. Applicant then purchased a new property and applied to the Assessor to have the base year value of his Former Property transferred to the new property pursuant to section 68, which the Assessor denied. This appeal then followed.

We understand that there are several issues being considered as part of the appeal; however the only issue you have asked us to address is whether Developer's purchase of Applicant's Former Property should be regarded as an "acquisition by a public entity," even

[1] All further statutory references are to the Revenue and Taxation Code unless otherwise indicated.
[2] You indicated that the property owner involved in the appeal (Applicant) has requested that you seek an opinion from us, and the San Mateo County Assessor's Office (Assessor) does not object. You also provided us copies of each party's brief filed in the pending AAB appeal.
[3] As the issues presented to us are purely legal in nature, we have omitted other facts or background, such as the litigation history between City and Applicant relating to the Project.

though it was not directly purchased by the City.[4] Applicant relies on an "ostensible agency" theory to assert that Developer was acting as City's agent; however, the assessor asserts that there is no evidence of any agency relationship between City and Developer.

Law and Analysis

Article XIII A, section 2 of the California Constitution requires the reassessment of real property upon a "change in ownership," unless an exclusion applies. Article XIII A, section 2, subdivision (d), added in 1982 and implemented by section 68 excludes from the definition of "change in ownership":

> [T]he acquisition of real property as a replacement for comparable property if the person acquiring the real property has been displaced from property in this state by eminent domain proceedings, by acquisition by a public entity, or by governmental action which has resulted in a judgment of inverse condemnation.

(Cal Const., art. XIII A, § 2, subd. (d); Rev. & Tax Code, § 68; Property Tax Rule[5] 462.500.)

In Letter to Assessors (LTA) 2005/007, we have previously stated that, where a government entity designates an actual agent to acquire property on behalf of that public entity in lieu of eminent domain, such "a designated agent of a public entity authorized to acquire property in lieu of eminent domain may be considered to be the public entity within the meaning of Rule 462.500 if sufficient proof is provided to the assessor." [Emphasis added] (LTA 2005/007, p. 6.)

In contrast to a designated or actual agency, an ostensible agency is created, "when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." (Civ. Code, §2300, emphasis added.) An agent has such authority as the principal, actually or ostensibly, confers upon him. (Civ. Code, § 2315.) And an agent represents his principal for all purposes within the scope of his actual or ostensible authority, and all the rights and liabilities which would accrue to the agent from transactions within such limit, if they had been entered into on his own account, accrue to the principal. (Civ. Code, § 2330.) "A principal is bound by acts of his agent, under a merely ostensible authority, to those persons only who have in good faith, and without want of ordinary care, incurred a liability or parted with value, upon the faith thereof." (Civ. Code, § 2334.)

Although ostensible agency differs from actual agency in that it "rests on the principle of estoppel" (3 Witkin, Summary 10th (2005) Agency, § 96, p. 143), an agent's authority to represent the principal and ability to bind the principal are identical in both actual and ostensible agency. (See Civ. Code, §§ 2315 & 2330.) More specifically, just as an actual agent has the actual authority of the principal to acquire property on its behalf, an ostensible agent has such authority as a principal ostensibly conferred upon it to acquire property on the principal's behalf. (Civ. Code, § 2315.) Similarly, just as an actual agent who represents its principal within the

[4] We note that section 68 requires that a taxpayer be "displaced" by "acquisition by a public entity." "Displaced" is defined at Property Tax Rule 462.500, subdivision (b)(4) to include "acquisition by a public entity in lieu of instituting eminent domain proceedings." Because you have not asked, we do not discuss this issue.

[5] All references to Property Tax Rules or Rules are to sections of title 18 of the California Code of Regulations.

scope of its actual authority, an ostensible agent represents its principal for all purposes within the scope of its ostensible authority, and all the rights and liabilities which would accrue to the agent from transactions within such limit accrue to the principal. (Civ. Code, § 2330.) In view of an ostensible agent's authority to represent a principal within its ostensible authority and its ability to bind the principal with all the resulting rights and liabilities from its action, in our view, where the ostensible authority conferred is to acquire property on behalf of a public entity and the ostensible agent acts within the scope of such authority, the acquisition by the ostensible agent of such a public entity is deemed to be an "acquisition by a public entity" within the meaning of section 68, in the same way that an acquisition by an actual agent of a public entity can be regarded as an "acquisition by a public entity."[6] We believe this conclusion also comports best with the legislative history.

Article XIII A, section 2, subdivision (d) (and eventually section 68) was adopted because "the amount of compensation provided property owners displaced by governmental action is limited to the fair market value of the property plus certain other amounts, including relocation expenses," which "does not include any amount for increased property taxes that the owner must pay on a replacement property." (California June 8, 1982 Ballot Propositions, Analysis by the Legislative Analyst, p. 12.) As a result, according to the proponents of the law, as stated in the official ballot language,

> An inequity occurs when a <u>governmental agency forces</u> a property owner to relocate to make way for a public project through eminent domain proceedings or inverse condemnation. The displaced property owner is then faced with the double penalty of a tax increase after a <u>government-caused</u> relocation. [This amendment] would correct this disparity and ensure greater tax equity for all Californians.

(California June 8, 1982 Ballot Propositions, p.14, emphasis added.)

The above ballot language demonstrates that the legislature and the people of California desired to provide property tax relief when governmental action (often an eminent domain taking) caused an increase in property taxes for which compensation was not given. Because ostensible agency is predicated, as relevant here, on a public entity's action (or lack of ordinary care) in misleading a third party, when demonstrated an ostensible agency exists, the public entity itself (by its action or inaction) is the cause of the agency relationship through which the property was purchased and property taxes were increased. In other words, a taxpayer's relocation in an ostensible agency situation is "government-caused." In addition, such a government-caused relocation would similarly otherwise be without compensation for the resulting increase in property taxes, due to the taxpayer's misconception that the government entity was the actual purchaser.[7] Therefore, we believe the acquisition by an ostensible agent of a public entity falls within the scope of the legislative intent behind section 68.

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[6] We are not asked and thus do not offer any opinion here as to what kind of evidence may be generally sufficient to establish ostensible agency between a public entity and a private entity, or whether ostensible agency can be established based on the facts in this case.

[7] Since Civil Code section 2334 requires that a property owner "incurred a liability or parted with value" for a principal to be bound by the acts of its ostensible agent, if a relocated property owner obtained from the purchase price or otherwise adequate compensation for increased property tax and parted with no value, ostensible agency cannot be established under section 2334 to bind the principal, and, thus, section 68 would not apply to those situations.

With regard to your question regarding discovery available to an Applicant, we are not aware of any authorization for parties to engage in pre-hearing discovery-type activities. Section 408, 441, and 1606 involve "discovery" of valuation information between the assessor and the Applicant; however we are aware of no authority by which an AAB may order formal discovery. However, the statutes and property tax rules grant the AAB subpoena authority. Section 1609.4 states that "[o]n the hearing of the application, the county board may subpoena witnesses and books, records, maps, and documents and take evidence in relation to the inquiry," but [n]o subpoena to take depositions shall be issued nor shall depositions be considered for any purpose by the county board or the assessment appeals board." (Rev. & Tax Code, § 1609.4. See also Rule 322.) Furthermore, "[s]ubpoenas shall be restricted to compelling the appearance of a person or the production of things at the hearing and shall not be utilized for purposes of prehearing discovery." (Rule 322, subd. (e).) These rules apply equally to all AAB hearings and we are not aware of any different or more specific rule for an AAB hearing involving agency issues.

Applicant contends that relevant evidence establishing the agency relationship is held by City and Developer.[8] If that is the case, under section 1609.4, Applicant may apply to the AAB to have the AAB "subpoena witnesses and books, records, maps, and documents and take evidence in relation to the inquiry." But the law is very clear that no subpoena to take depositions shall be issued, and further, any subpoena for witnesses or records "shall be restricted to compelling the appearance of a person or the production of things at the hearing and shall not be utilized for purposes of prehearing discovery." (Rev. & Tax Code, § 1609.4; Rule 322, subd. (e).)

The views expressed in this letter are only advisory in nature. They represent the analysis of the legal staff of the Board based on present law and the facts set forth herein, and are not binding on any person or public entity. If you have any additional questions, please feel free to contact me.

Sincerely,

/s/ *Mengjun He*

Mengjun He
Tax Counsel III (Specialist)

MH: yg
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cc: Mr. Dean Kinnee MIC:63
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[8] We also note that the Applicant can make a request for information from the government agency under the Public Records Act. (See Gov. Code, § 6250, et. seq.)