


STATE BOARD OF EQUALIZATION

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July 19, 2005

Re: *Change in Ownership Reassessment of Common Area Parking in a Shopping Center*

Dear Mr. _____ :

This letter is in response to your correspondence addressed to Chief Counsel Kristine Cazadd, dated June 22, 2005. In that letter you made an inquiry regarding the County Assessor's change in ownership reappraisal of a parking easement granted to _____, Inc. Based on our prior advice on this topic, you assert that the grant of this parking easement does not result in a change in ownership. For the reasons hereinafter set forth, it is our opinion that the easement granting _____, Inc. use of common area parking facilities does not, at present, result in a change in ownership.

Background and Facts

As described in your letter and copies of the recorded documents related to this transaction, the following facts are relevant to this analysis:

1. The _____, L.P. ("Mall") sold a building site at its shopping mall in _____, CA., to _____, Inc. (H).
2. The agreement between the Mall and H included easements for utilities, drainage, vehicular and pedestrian access, and parking.
3. The agreement further provides that the Mall shall provide an easement for parking by H's customers and employees in common with the customers and employees of the Mall.
4. To implement that portion of the Agreement, the Mall granted to H an easement covering the Mall's "Common Area", including the parking areas adjacent to the building pad.

5. At present, the agreement grants to H a nonexclusive use of those parking spaces—a right in common with the Mall and its customers and employees—and passes through common area maintenance charges imposed by the Mall to H.
6. If the Mall's vacancy ever reaches 50 percent, the owner of the Mall Parcel has the right to redevelop that Parcel. Should that occur, H would obtain exclusive use of 650 parking spaces adjacent to its site and would then be required to assume full responsibility for maintaining those spaces.
7. To aid in our review of the transaction, you attached to your letter a copy of the "Restriction Agreement and Grant of Easements for the Mall" (Agreement) dated November 3, 2000.

Law and Analysis

Did the parking easement granted to H result in a change in ownership of the parking areas encumbered by the easement?

Since this easement does not meet the definition of "change in ownership" prescribed by Revenue and Taxation Code section 60, no change in ownership occurred.

Revenue and Taxation Code section 60 defines "change in ownership" as "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."¹

Subdivision (b) of section 65.1 states with respect to a change in ownership of properties that contain common areas or facilities:

If a unit or lot within a cooperative housing corporation, community apartment project, condominium, planned unit development, shopping center, industrial park, or other residential, commercial, or industrial land subdivision complex with common areas or facilities is purchased or changes ownership, *then only the unit or lot transferred and the share in the common area reserved as an appurtenance of such unit or lot shall be reappraised.* [Emphasis added.]

Based upon these provisions, we have taken the position that a change in ownership of a unit or lot in a shopping center or office park does not necessarily result in a change in ownership and reassessment of an adjacent parking lot or other common areas. However, we must determine whether H acquired a sufficient property interest in a parking lot or common area such that the change in ownership of the building pad it purchased also resulted in a change in ownership of the parking lot or common area.

The process for answering this question is found in subdivision (b) of section 65.1. This statute is the only authority in property tax law that permits the reassessment of common areas in conjunction with changes in ownership of non-common areas. Furthermore, this section establishes a definable standard, consistent with change in ownership law, that there must be

¹ All statutory references are to the Revenue and Taxation Code, unless noted otherwise.

evidence that a common area or a share thereof is an appurtenance or is "substantially equal to the value of the fee" in order for it to be reappraised as part of the non-common area.

By providing specific examples of types of property where a portion of such real property might be subject to reappraisal, the language of section 65.1 embodies the Legislature's distinction between those transfers that result in a "change in ownership" of "common areas and facilities" and those transfers that do not. A change in ownership of "common areas or facilities" is intentionally limited to "a unit or lot within a . . . shopping center, industrial park, or other residential, commercial, or industrial land subdivision complex," indicating that this provision expressed the applicable rationale for all the common areas of these types of properties.

Moreover, the "appurtenance" language of section 65.1, subdivision (b) supports the principle that only the interest or portion of a parking lot or other common area property actually transferred should undergo a change in ownership and be reappraised. Thus, common areas of designated types of properties are subject to reappraisal only if those common areas are an appurtenance of such property. The term "appurtenance" has been defined as:

That which belongs to something else; an adjunct; an appendage. Something annexed to another thing more worthy as principal, and which passes as incident to it, as a right of way or other easement to land. . . . (*Black's Law Dictionary*, 6th edition 1990, p. 103.)

In applying the appurtenance concept under section 65.1, subdivision (b), certain factors must be examined to determine what portion of a common area is "appurtenant" or "annexed" to a non-common parcel. These factors are consistent with those in the three-part definition of "change in ownership" found in section 60.

As stated in the Report of the Task Force on Property Tax Administration dated January 22, 1979, "the general definition of change in ownership should control all transfers . . . and specific statutory examples be consistent with the general test." In other words, for one property to be considered appurtenant to another, for purposes of change in ownership, the document effecting the transfer must embody, in all cases, the following three characteristics of a change in ownership:

- (1) A transfer of a present interest in real property;
- (2) A transfer of the beneficial use of the property; and
- (3) The property rights transferred are substantially equivalent in value to the value of the fee interest.

Applying this test to the H's situation, if the easement embodied in the Agreement transfers interests in the parking lot substantially equivalent to the fee, then a change in ownership of those areas occurred. In other words, if H received rights of way and easements "substantially equivalent to the fee" in the parking lot, then such portion(s) of the parking lot are clearly an "appurtenance of" the H's pad site and is subject to a change in ownership reappraisal. Conversely, if H did not obtain an interest substantially equivalent to the "fee" interest in the parking lot, no change in ownership occurred.

Section 3.1 of the Agreement provides, in part, that:

Each owner, as grantor, hereby grants to the other Owners and their respective permittees for the benefit of each Parcel belonging to the other Owners, as grantees, a nonexclusive easement for ingress and egress by vehicular and pedestrian traffic and vehicular parking upon, over and across that portion of the Common Area located on the grantor's parcels

Thus, the Mall granted to H a nonexclusive parking easement over the "Common Area" on the Mall's property. The term "Common Area" is defined on pages 1-2 of the Agreement to include:

All those areas on each Parcel which are not Building Area, together with those portions of the Building Area on each Parcel which are not from time to time actually covered by a Building or which cannot under the terms of this Agreement be used for Buildings

Since the parking lots are not areas of the Parcel covered by buildings, those areas would be included in the above definition of "Common Area." Furthermore, the Agreement requires H to pay "CAM Costs" for the maintenance of the Common Area. Section 11.2 of the Agreement provides:

[H] shall pay the sum of One Hundred Forty Thousand Dollars (\$140,000.00) as its annual contribution ("[H]'s Annual Fee") as [H]'s share of the CAM Costs for the Shopping Center. [H]'s Annual Fee shall be paid in equal quarterly installments on February 1, May 1, August 1 and October 1 of each calendar year.

Based upon our reading of the Agreement, it does not appear that H received property rights equivalent to a fee interest in any portions of the parking lot upon conveyance of the easement. According to the Agreement, the Mall retained all present rights and duties in and to the common area parking lot, including the right to pass through common area maintenance charges to H. Obtaining a nonexclusive easement to the parking lot, in common with the Mall and its customers, H is merely permitted to use the common areas.

Under the Agreement, H does not gain a present legal right to possess and use the parking lot to the exclusion of all others, as would a person acquiring fee ownership of such property. Moreover, the fact that H receives the benefits of a nonexclusive easement over the parking area does not mean that it is at present "reserved as an appurtenance" to the pad site, as required by subdivision (b) of section 65.1. Since these easement rights are nonexclusive, such rights are not "substantially equal to the value of the fee interest." Thus, in our opinion, neither H—nor the Mall—may be currently reassessed for a change in ownership of the property defined in the parking easement. Please note, that subdivision (b) of section 65.1 and our conclusion do not preclude the H's pad site, upon the change in ownership, from being valued to reflect the amenities and the enhancement afforded by the Common Area, including the parking lot.

However, as noted above, the terms of the Agreement also convey to H a contingent interest in the 650 parking spaces adjacent to its building site. Section 2.7(d) of the Agreement provides:

Notwithstanding anything in this Agreement to the contrary, if at least fifty percent (50%) or more of the leaseable retail area in the Shopping Center (excluding the [H] parcel . . .) is vacant, then the Owner of the Mall Parcel may redevelop the Mall Parcel and/or any of the Outparcels . . . subject to the following conditions and restrictions:

* * *

(ii) 650 parking spaces (the "Exclusive [H] Parking Spaces") identified on the site plan as the "Primary Parking Area" shall be released from any and all easements, licenses, or other agreements of record or otherwise giving anyone other than the Owner of the [H] Parcel and its Permittees the right to park in such Exclusive [H] Parking Spaces. . . . Developer acknowledges and agrees that [H] shall have sole and exclusive control of the Exclusive [H] Parking Spaces, and if [H] so desires, [H] shall implement such procedures it reasonably requires to protect its exclusive rights with respect to such parking spaces.

Thus, under the terms of the Agreement, if the Mall's vacancy rate ever reaches 50 percent AND the owner of the Mall chooses to redevelop the Mall Parcel, H would then obtain the right to possession and exclusive use of 650 parking spaces. Although such an interest would ordinarily be substantially equal to the fee interest in that real property, it is *merely* contingent until the Mall achieves the required vacancy rate AND the Mall owner chooses to redevelop. This interest remains contingent, notwithstanding the use of the term "Exclusive [H] Parking Spaces" in the Agreement.

For a transfer of an interest in real property to meet the definition of "change in ownership" found in section 60, that transfer must convey a present interest in such real property. Here, H's right to exclusive use remains contingent unless and until the Mall's vacancy rate reaches 50 percent and the owner of the Mall chooses to redevelop the property. Since contingent interests are future interests, they do not transfer a present interest in real property. Consequently, it is our opinion that this Agreement does not result in a change in ownership of the 650 parking spaces.

Conclusion

Revenue and Taxation Code section 65.1 authorizes the assessor to enroll a change in ownership in common areas provided that the interests transferred meet the definition of a change in ownership and those areas are an appurtenance to other real property. However, we believe that the parking easement presented in this case did not meet the three-part change in ownership test found in section 60. Since H obtained only a nonexclusive use of the parking areas, its interest in those areas is not substantially equivalent to the fee interest. Furthermore, even though H may obtain an exclusive use of those parking areas under the express terms of the Agreement, that interest is merely contingent and does not represent a present interest in real property.

July 19, 2005

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.

Sincerely,

A handwritten signature in black ink that reads "Michael Lebeau". The signature is written in a cursive style with a long horizontal stroke at the end.

Michael Lebeau
Senior Tax Counsel

ML:jlh

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Prec/ASTANDIV/05/408ML.doc

cc:

Mr. David Gau, MIC:63

Mr. Dean Kinnee, MIC:64

Ms. Mickie Stuckey, MIC:62

Mr. Todd Gilman, MIC:70