

Law Offices Of

## Patrick R. Sabelhaus

Patrick R. Sabelhaus  
Joel A. Rice  
Stephen A. Strain

1006 Fourth Street, Sixth Floor  
Sacramento, California 95814

(916) 444-0286  
Fax (916) 444-3408

---

**January 16, 2015**

**Ms. Patricia Lumsden  
State Board of Equalization  
450 N. Street,  
Sacramento, California  
PO Box 942879  
Sacramento, California 94279-0064**

**Re: Proposed LTA post SB 1203 Enactment**

Ms. Lumsden:

Below is a summary of the history of the "PILOT" legislation and the resulting changes to Revenue & Taxation Code Section 214(g), et seq.. In response to the letter from Benjamin Tang for Dean R. Kinnee, dated December 29, 2014, we are accepting the invitation of interested parties to comment upon and make suggestions for language concerning the proposed "LTA" (Letter to Assessors) related to the valuation of property and other matters post enactment of SB 1203 which made changes to Revenue and Taxation Code Section 214(g) and related subsections as well as other related code sections as a result of considerable debate over the issue of "PILOT" fees in California.

Please accept our recommended language and thank you for the opportunity to participate in this BOE project. (The actual language we suggest is at the end of the next section).

---

BOE Forms Project -2015 and LTA

---

History:

Portions of Revenue & Taxation Code Section 214(g)(1), et seq. were recently modified (September 27, 2014--Senate Bill 1203--effective January 1, 2015), in response to some county assessors denying the Welfare Exemption to any low-income apartment development which paid a "PILOT" (payment in lieu of taxes) fee to a city. The rationale behind denial of the exemption was that if a PILOT fee were paid, the MGP could not successfully "certify" that the funds saved by not paying property tax were used to enhance affordable housing. [Rev. & Tax Sect. 214(g)(3)(C)] (because part of those funds went to the City in the form of the PILOT)

The above situation was clarified by the passage of SB 1203 whereupon the Board of Equalization ("BOE") responded SB 1203's enactment by drafting replacement BOE forms to replace 267-L and 267-L1, which have existed for many years (former versions) as "supplemental" forms filed by limited partnerships owning low-income housing.

The first (October 2014) BOE draft versions of these proposed forms were roundly criticized due primarily to an example given by BOE which indicated that if a 10 story building had commercial space on the ground floor, all land value associated with the entire building would be considered non-tax exempt (because of the ground floor commercial).

As discussed in our October 10, 2014 letter to BOE:

"BOE Forms 267-L and 267-L-1

One area of the proposed forms that "jumped out" at all of our reviewing group was the new "separation" of Sections "C" (Residential) & "D" (Mixed Use) on proposed BOE Forms 267-L & 267L-1.

BOE Forms 267L and 267L-1 "Instructions" under SECTION 4D both state the following in part:

"Land ineligible for exemption consists of any shared use of land by both commercial use and qualified residential housing use. For instance, if residential housing units sit atop a commercial use, the land on which the commercial development sits and any shared use of the land, such as a parking area, is not eligible for exemption. Calculation of land available for exemption may be computed by deducting the actual footprint of land in which commercial improvements sit plus any designated parking spaces, common areas, etc. for commercial tenants from the total land area."

Our suggested replacement language for the BOE instruction above is the following:

*"Land ineligible for exemption includes that which is designated for commercial (such as commercial parking spaces) located under a structure which is ground-floor commercial with housing above. The value of the land itself shall be apportioned prorata based on the total square footage of commercial space and commercial ancillary space such as parking spaces, ("Total Commercial") and the total square footage of low-income housing and related facilities. ("Housing") Calculation of land available for exemption may be computed by deducting the Total Commercial from the overall square footage of all building structures including Housing. For example there is 150,000 total square footage of improvements and 40,000 square footage of land, the fraction should have a denominator of 190,000 (150,000 + 40,000) and a numerator of 160,000 (135,000 plus 25,000) square feet for an exemption percentage of 84.21% and not 62.50% (see LAND calculation table Page 2, Section D of this form).*

---

"Related Facilities Definition"

Current Section 214(g)(3)(B) clearly defines "related facilities" as ..... "any manager's units and any and all common area spaces that are included within the physical boundaries of the rental housing development, including, but not limited to, common area space, walkways, balconies, patios, clubhouse space, meeting rooms, laundry facilities and parking areas, except any portions of the overall development that are nonexempt commercial space."

Therefore one of the first determinations and clarifications necessary is "what is considered commercial space"? The typical configuration is some combination of commercial space at street level along with a low-income housing development above the commercial in a multi-story configuration, often with underground parking due to limited space in an inner city setting.

Secondly; one additional observation at the time (October of 2014) was that BOE's focus on the terms "land and improvements" was in some senses in conflict with the statutory scheme as Section 214(g) refers throughout to "the property" without separating the property interests into land, improvements or personal property. Interpretive cases have held that this means the Legislature meant "all property"

---

BOE's understanding of the broader meaning of "property" is also clear when you look at the **BOE 267** Form under "**IDENTIFICATION OF PROPERTY**" there are several sub-categories, including (a) property, (b) real property, (c) land, (d) building or improvements and (e) personal property. (all of which can be tax exempt "property" under the Welfare Property Tax exemption if the proper tests are met).

---

*English v County of Alameda* ( 1977 ) 70 Cal. App. 3d 226  
(Assessors Handbook, page 16)

---

".....By statutory definition, "property" includes all matters and things, real, personal, and mixed, capable of private ownership (**Rev. Code, § 103**). "Real estate" or "real property" comprises inter alia the possession of, claim to, ownership of, or right to the possession of land and improvements (**Rev. Code, § 104, subs. (a) and (c)**). "Improvements" encompass buildings, structures, fixtures and fences erected on or affixed to the land (**Rev. Code, § 105, subd. (a)**). Possessory interests as defined by the statute mean: "(a) Possession 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. [¶] (b) Taxable improvements on tax-exempt land." (**Rev. Code, § 107.**)"

"...By employing the all-inclusive term of "property" without any limitation or restriction in Rev. Code, section 214, the Legislature expressed its intent that the tax exemption accorded charitable organizations should include not only parts or fractions, but the entirety of the property rights. ...." "...Additionally, it bears emphasis that one of the most important conditions of obtaining a welfare exempt status is that the property owned by the charitable institution be used exclusively for religious, hospital, scientific or charitable purposes (Const., art. XIII, § 4, subd. (b); Rev. Code, § 214). The courts have consistently held that "exclusive use"

includes any property of the charitable organization which is used exclusively for any facility which is incidental to and reasonably necessary for the accomplishment of the charitable purpose (Cedars of Lebanon Hosp. v. County of L. A., supra, 35 Cal. 2d 729, 736; Y. M. C. A. v. County of L. A., supra, 35 Cal. 2d 760, 767; Fredericka Home v. County of San Diego, supra, 35 Cal. 2d 789, 795; see also Serra Retreat v. County of L. A. (1950) 35 Cal. 2d 755.... ; Fifield Manor v. County of Los Angeles (1961) 188 Cal. App. 2d 1....).

[emphasis added above]

---

### COMMERCIAL PROPERTY

A search of available BOE publications reveals that other than some passing mention, there is no clear definition of "commercial property".

---

The term **commercial property** (also called **commercial real estate**, investment or income property) refers to buildings or land intended to generate a profit, either from capital gain or rental income.<sup>[1]</sup> [Wikipedia]

---

Real Estate and improvements thereon that the local government has specifically designated for business use. ....Commercial property usually has to comply with certain standards set by the municipality, for example, a city may set aside an area for commercial development so a business does not build a large factory next to personal homes. [Farlex Financial Dictionary. © 2012 Farlex, Inc. All Rights Reserved]

---

The above general definitions of commercial property are somewhat helpful but in the narrower universe of a "mixed use" California development consisting of ground-floor commercial space and upper floors of qualified low-income housing, they are not completely on point as what we mean as an industry is that even though the low-income housing component of such a development might otherwise fit the general "commercial" as it generates rental income, because of the multi-layered recorded regulatory agreements restricting the specific rental amounts to low-income tenants, we consider the housing component as "low-income rental housing" and confine the definition of "commercial" in this context to the non-restricted portions of the building which are sometimes "ground leased" from the building owner and sub-leased to individual commercial tenants, none of whom have any restrictions or regulatory agreements (other than local zoning or other laws) on their businesses or the profits they make or amounts they charge for goods or services.

Also a sub-set of this mixed form of development under the definition of commercial would be Any property used exclusively by the commercial tenants to the exclusion of the low-income tenants. As to sidewalks and other parts of the overall structure which might be used by both "commercial" and "residential/ low-income" tenants Section 214(g)(3)(B) includes as related facilities walkways, parking and other portions of such a structure which are used primarily by the housing tenants as property which should be viewed as "tax exempt".

---

SPECIFIC EXAMPLES FROM THE NEW LTA/ SUGGESTED ADDITIONS

---

"In valuing the nonexempt commercial portion of the property, care must be taken to ensure that the value includes all components of the property that contribute to the commercial use, including land and any common property, such as parking and walkways." However, it must also be remembered that "related facilities" means any manager's units and any and all common area spaces that are included within the physical boundaries of the rental housing development, including but not limited to, common area space, walkways, balconies, patios, clubhouse space, meeting rooms, laundry facilities and parking areas except portions of the overall development that are nonexempt commercial space. [Revenue & Taxation Code § 214(g)(3)(B)] If, for example, there are parking spaces designated for and used solely by the commercial portion of the development, those spaces would clearly be nonexempt. However, common areas, parking and walkways used primarily by the housing portion of the development should be treated as exempt property.

---

Thank you again for the opportunity to participate in this LTA project and we look forward to our further discussions with BOE on this important topic.

Thank you so much for your anticipated cooperation.

Sincerely,

Joel A. Rice

