



Legislative Bill Analysis

[Senate Bill 320](#) (Skinner)

Date: February 6, 2023 (Introduced)

Program: Property Taxes

Revenue and Taxation Code 107.5

Effective: Immediately

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Summary: Provides that there is no independent possession or use of land or improvements if the possession or use is for a tenancy, as defined, in a residential unit, as defined, in a publicly owned housing project, as defined, that is part of a governmental assistance program and directly fulfills the governmental, public purpose of providing the housing, as described in the government assistance program.

Fiscal Impact Summary: The fiscal impact of this bill is estimated to be a revenue loss of at least \$3.1 million in property tax revenue to local governments. However, our estimate of revenue loss does not consider future developments, thus the loss of revenue could be much higher.

Existing Law: 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 property tax purposes. Revenue and Taxation Code (RTC) section 107 sets forth the three essential elements that must exist to find that a person's use of publicly owned tax-exempt property rises to a level of taxable possessory interest. Those elements are (1) independence, (2) durability, and (3) exclusivity.

Concerning the element of independence, RTC section 107(a)(1) defines "independent" to mean "the ability to exercise authority and exert control over the management or operation of the property or improvements, separate and apart from the policies, statutes, ordinances, rules, and regulations of the public owner of the property or improvements. A possession or use is independent if the possession or operation of the property is sufficiently autonomous to constitute more than a mere agency."¹

Relevant case law and Property Tax Rule 20 additionally require that a possessor derive "private benefit." "Private benefit" means "that the possessor has the opportunity to make a profit, or to use or be provided an amenity, or to pursue a private purpose in conjunction with its use of the possessory interest. The use should be of some private or economic benefit to the possessor that is not shared by the general public."

Health and Safety Code (HSC) section [50079.5](#) defines "lower-income households" as "persons and families whose income does not exceed the qualifying limits for lower-income families as established and amended from time to time pursuant to Section 8 of the United States Housing Act of 1937."

Section 3 of article XIII of the California Constitution allows publicly owned affordable housing projects to be exempt from property taxation.

¹ California Code of Regulations, Title 18, section 20. Property Tax Rule 20 specifies that "[t]o be sufficiently autonomous to constitute more than a mere agency, the possessor must have the right and ability to exercise significant authority and control over the management or operation of the real property, separate and apart from the policies, statutes, ordinances, rules, and regulations of the public owner of the real property."

This staff analysis is provided to address various administrative, cost, revenue, and policy issues; it is not to be construed to reflect or suggest the BOE's formal position.

In General: In certain instances, a property tax assessment may be levied when a person or entity uses publicly owned real property that, with respect to its public owner, is either immune or exempt from property taxation. These uses are commonly called "possessory interests" and are typically found where an individual or entity leases, rents, or uses federal, state, or local government facilities and/or land.

RTC section 107 establishes parameters within which Assessors and judicial authorities determine the existence of taxable possessory interests. Generally, those determinations are made according to the facts and circumstances in each case.

Proposed Law: This bill would add section 107.5 to the Revenue and Taxation Code. This section would state that there is no independent possession of the land or improvements if certain conditions are met specifying the use of the property as governmental housing assistance programs and/or associated management. Governmental housing programs that qualify include those for seniors, persons and families of low and moderate-income as defined in HSC section [50093](#), and students attending college or university. As a result of not having independent possession, there would not be a property tax billing for possessory interest.

RTC section 107.5 would also provide definitions for "Publicly owned housing project," "Residential unit," and "Tenancy."

Background: This law would exempt persons living in publicly owned housing projects and the associated management of those properties from receiving a possessory interest assessment. Without this exemption, persons living in these properties could face a financial burden that contradicts the concept of affordable housing for, as incurring property tax assessments would add a financial burden to the tenants. The BOE has had the long-standing opinion that low-income housing tenants should not be assessed for their possessory interest. This bill codifies that opinion and expands who may be eligible for the exemption.

This bill would create a state-mandated program, potentially creating a revenue loss for local governments, as no appropriations are allocated for any property tax losses.

Commentary:

1. **Unclear and Overbroad Language.** The operative provisions and definitions are unclear, difficult to administer, and potentially unenforceable. It arguably allows *any* tenant living in a publicly owned housing project, including those above low and median income, to benefit from the exclusion of their tenancy as a taxable possessory interest. For example, "enforceable restriction" is defined as restricting occupancy to "public beneficiaries". A "public beneficiary" means a person that is the beneficiary of a governmental assistance program available to the general public that offers housing in a publicly owned housing project. Thus, the mere fact of being offered occupancy in a publicly owned housing project could, itself, be "government assistance".
2. **Misstatements of Prior Board Opinions in Legislative Findings.** The bill makes several inaccurate and potentially misleading statements in its legislative findings regarding prior Board opinions. Prior board opinions stated only that possessory interest taxes should not be assessed against low-income tenants. They did not address any other type of tenant. Further, subdivision (m) of

section 1 of the bill is unclear as to the purpose and relevance of the cited case with amendments to section 107. Finally, the meaning of subdivision (o) of section 1 of the bill is unclear.

3. **Unlimited beneficiaries?** 107.5(b)(2) give three examples of public beneficiaries but makes clear that beneficiaries are not limited to those examples. The only limiting factor is the requirement that they are beneficiaries of “governmental assistance”. However, “governmental assistance” is undefined and could be understood to include the mere offer of occupancy in a publicly owned housing project.
4. **Exclusive to Tenants?** Would SB 320 apply to the administrator’s interest in the project notwithstanding the tenants’ interest? In other words, would this bill treat administrators of public housing projects the same as contractors of military housing pursuant to RTC section 107.4?
5. **Current tenants who do not qualify as low-income.** Would a possessory interest be calculated for these non-qualifying units? If so, which party would be responsible for the payment of tax?
6. **Backfill.** This bill currently contains no appropriations to reimburse local governments for the loss of property tax revenues. However, the California Constitution requires reimbursement to local governments for costs mandated for the state. This could cause a significant budgetary impact on local governments and schools.
7. **Senior housing.** What is the definition of a senior? What types of senior housing would qualify to be excluded under this bill? Would all seniors qualify regardless of income?
8. **Students.** What defines a student? Would all students qualify as public beneficiaries? Is there an enrollment requirement? Would there be income eligibility?

Costs: The costs for BOE implementation of this bill would be approximately \$57,608 the first year, \$55,300 the second year, and on-going costs of \$22,120 per year. These costs include staff costs for reviewing Letters To Assessors, interested parties’ meetings, and legal reviews.

Revenue Impact: In analyzing this proposal, staff concentrated on the low and moderate-income housing segment. A couple of assumptions became the foundation of the revenue estimate calculation. The California Statewide Communities Development Authority (CSCDA) website states they have acquired and converted more than 7,700 units for low- and middle-income tenants. Assuming rent of \$1,500 per month, average length of stay and expenses, the result in a possessory interest value of \$40,000.

To estimate the total existing low- and middle-income units exempted from possessory interest assessment, the above calculated \$40,000 value per unit was multiplied by the 7,700 units. Staff estimated the total exemption to be \$308 million ($\$40,000 \times 7,700$ units). At the one percent property tax rate, annual property tax revenue loss is estimated at \$3.1 million ($\308 million \times 1%).

Qualifying Remarks

In order to understand or gain insight into the revenue impact of this bill, staff used the CSCDA data as a starting point. The 7,700 units may not reflect the overall population; hence this revenue estimate may be understated.