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October 26, 1993

BURTON W. OLIVER
Executive Director

Ms.

FAX ()

In Re: Qualifying for Replacement Property under Prop 90
Out of Holding Agreement.

Dear Ms. :

This is in response to your telephone request on October 21, 1993, as to whether real property purchased to replace property taken through eminent domain proceedings would be excluded from change in ownership, when title to the replacement property is acquired indirectly through a "straw man" holding record title for the beneficial owner under Internal Revenue Code Section 1033.

Revenue and Taxation Code Section 68 and Property Tax Rule 462.5 (18 Cal. Code of Regulations Sec. 462.5) provide generally that change in ownership shall **not** include real property acquired to replace condemned property **if** the person acquiring the replacement property has been displaced by 1) eminent domain proceedings, 2) public entity acquisition, or 3) governmental action resulting in a judgement of inverse condemnation. With regard to the **ownership** requirement, subdivision (e) of Rule 462.5 states in pertinent part:

Only the owners or owners of the property taken, whether one or more individuals, partnerships, corporations, or other legal entities, or a combination thereof, shall receive property tax relief under this section. Relief under this section shall be granted to an owner(s) of replaced property obtaining title to replacement property: The acquisition of an ownership interest in a legal entity which, directly or

indirectly, owns real property is not an acquisition of comparable property.

Based on the foregoing, there is no definition of the term "owner" or other language which would address whether a "straw man" under IRC 1033, who holds record title, or whether the claimant who holds equitable/beneficial title, should be treated as the "owner" of the replacement property under Section 68. However, for change in ownership purposes, current law treats the person or entity who has a vested beneficial and equitable interest in the property as the "owner" rather than the person who merely holds legal title.

For example, Property Tax Rule 462(k)(3) makes it clear that a transfer from an entity holding title pursuant to a holding agreement to the principal is not a change in ownership:

Holding agreements. A holding agreement is an agreement between an owner of the property, hereafter called a principal, and another entity, usually a title company, that the principal will convey property to the other entity merely for the purposes of holding title. The entity receiving title can have no discretionary duties but must act only on explicit instructions of the principal. The transfer of property to the holder of title pursuant to a holding agreement is not a change in ownership. There shall be no change in ownership when the entity holding title pursuant to a holding agreement conveys the property back to the principal.

(A) There shall be a change in ownership for property subject to a holding agreement when there is a change of principals.

(B) There shall be a change in ownership of property subject to a holding agreement if the property is conveyed by the holder of title to a person or entity other than the principal.

The underlying rationale is that the beneficial use of the property remains in the principal and thus, is not included in the transfer of legal title to the principal.

In the case of Parkmerced Co. v. City and County of San Francisco (1983) 149 Cal.App.3d 1091, the plaintiff was a

partnership which was formed for the purpose of acquiring and operating specified real property. The general partners were two corporations. The partnership agreement provided that title to the property would be held by one of the corporations as nominee for the partnership. The corporation holding title was subsequently merged into another corporation both of which were wholly owned by the same person. The latter corporation, as successor by merger to the real property, later conveyed the property to the partnership. The court held that no change in ownership occurs "upon the transfer of bare legal title without a corresponding transfer of the beneficial use thereof," and that since the nominee corporation and its successor held no more than "bare legal title" to the property, the transfer to the partnership was not a change in ownership.

The court stated at page 1095:

"...Today it is not at all uncommon for individuals, or corporations such as title companies, to hold 'bare legal title' to property for the owner of its beneficial interest. Such a transaction is of the nature of a resulting trust which arises from a transfer of property under circumstances showing that the transferee was not intended to take the beneficial interest, and the transferee has no duty other than to deliver the property to the person entitled thereto, upon demand. ... And such a transfer, when made, will be of the property's 'bare legal title' to the person already entitled to its beneficial use."

Since subdivision (e) of Rule 462.5 addresses a specific type of exclusion from change in ownership, and since the sole purpose of the exclusion is to avoid what would otherwise be the effects of a change in ownership, we conclude that the term "owner" should be construed in a manner consistent with the other provisions of law applicable to change in ownership. Accordingly, although we have not been given the specific facts in your situation, if the transfer of title in the replacement property to the "straw man" did not include the transfer of any equitable or beneficial interest in the property, then the "straw man" or person holding bare legal title would not be considered the "owner" of the replacement property under Section 68, and there would be no change in ownership for property tax purposes.

Please be advised, however, that a taxpayer claiming the benefit of an exception or exclusion has the burden of

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establishing to the satisfaction of the assessor that he or she qualifies for the benefit. In cases where formal recorded documents, such as deeds, fail to contain complete information which is consistent with the taxpayer's claim, then the assessor is entitled to require that the taxpayer's representations be established by clear and convincing evidence. Therefore, the assessor may demand a variety of documents to establish that the normal incidents of the alleged "straw man" relationship were observed.

The views expressed in this letter are, of course, advisory only and are not binding on the assessor of any county. You may wish to consult with the appropriate assessor in order to confirm that the property involved will be assessed in a manner consistent with the conclusion stated hereinabove. Our intention is to provide timely, courteous and helpful responses to inquires such as yours. Suggestions that help us to accomplish this objective are appreciated.

Sincerely,

Kristine Cazadd
Staff Counsel

cc: Mr. Richard Ochsner

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