

Memorandum

To: Mr. Dean Kinnee, Chief
County-Assessed Properties Division (MIC:64)

Date: December 29, 2009

From: Denise L. Riley
Tax Counsel

Subject: *Base Year Value Transfers -- Transfer of Original Property and Acquisition of Replacement Property on the Same Day (Sections 69, 69.3, 69.4 & 69.5)*
Assignment No. 09-068

Recently, your office requested our opinion regarding an email inquiry from the Santa Barbara County Assessor's Office concerning the timing and value threshold for base year value transfers of contaminated property under section 69.4 of the Revenue and Taxation Code.¹ Before the county was a case where the taxpayer sold the contaminated property (original property) and bought the replacement property on the same day, with the deed for the sale of the original property being recorded first with the County Recorder's office. At issue was whether the requirements set forth in the text of Annotation 200.0118 (C 9/1/87; C 8/19/87), which was written with respect to section 69.5 base year value transfers, apply to section 69.4 base year value transfers since both statutes use similar language in describing the relevant timing requirements. The text of Annotation 200.0118 requires that at least one day pass between the sale of the original property and the purchase of the replacement dwelling² in order for the more favorable 105 percent value of the original property to be used in the value comparison test for section 69.5 base year value transfers.

However, while section 69.5 allows the replacement property to be purchased *prior* to the date of sale or transfer of the original property (in which case, the full cash value of the replacement property cannot exceed 100 percent of the full cash value of the original property), section 69.4 does not contain a similar provision. Rather, section 69.4 only allows replacement property to qualify if it is purchased *after* the date of sale or transfer of the original property (in which case, the full cash value of the replacement property cannot exceed 105 percent of the full cash value of the original property—the same as replacement property acquired *after* the date of sale or transfer of original property under section 69.5). Annotation 200.0118, for purposes of section 69.5, requires that a purchase of replacement property must occur at least one day after the sale or transfer of the original property to meet the more favorable 105 percent value test. Thus, the problem arises that if the “at least one day after” requirement of Annotation 200.0118 is held to apply to section 69.4 base year value transfers, then a taxpayer's purchase of replacement property would not qualify for the base year value transfer under section 69.4 at all if such purchase occurs on the same day as the sale or transfer of the original property.

¹ All “section” references are to the Revenue and Taxation Code, unless otherwise indicated.

² We note that section 69.5 refers to “replacement dwelling;” however, for ease of discussion we may refer to such as “replacement property.”

In researching this issue, we found no persuasive authority for the requirement that one day must pass between the sale of the original property and the purchase of the replacement property for section 69.5 base year value transfers as stated in Annotation 200.0118. We also recognize that this issue is common to several base year value transfer provisions. Thus, we request that Annotation 200.0118 be deleted and be replaced with this memorandum, which will provide new written guidance on this subject.

LEGAL BACKGROUND

Under Proposition 13, county assessors are required to reassess property to its current fair market value when property is purchased, newly constructed, or a change in ownership occurs. (See Cal. Const., art. XIII A, § 1, subd. (a).) Since the passage of Proposition 13, there have been several propositions passed by California voters that have resulted in amendments to the California Constitution and enactments of implementing statutes and regulations that provide property tax relief by allowing, under certain specified conditions, the transfer of a property's factored base year value from an existing property to a replacement property, notwithstanding that the replacement property has changed ownership. The specified conditions are implemented by sections 69 (intra-county disaster relief), 69.3 (inter-county disaster relief), 69.4 (contaminated property), and 69.5 (principal residences owned by senior citizens or disabled persons). Each form of relief involves circumstances that require that a replacement property be purchased, newly constructed or otherwise acquired *after* the sale, damage, or destruction of the original property.³ For simplicity, we will generally refer to the events involved as the "sale or damage of the original property" and the "acquisition of the replacement property," unless a more specific reference is appropriate. We will discuss each of these sections in order below.

Section 69 (Intra-County Disaster Relief)

Section 69 provides for intra-county base year value transfers of property substantially destroyed by a governor-declared disaster if certain specified requirements are met. Section 69 implements the constitutional amendment that added subdivision (e) of section 2 of article XIII A of the California Constitution. This constitutional amendment provides, in relevant part, that:

...the Legislature shall provide that the base year value of property that is substantially damaged or destroyed by a disaster, as declared by the Governor, may be transferred to comparable property within the same county that is acquired or newly constructed as a replacement for the substantially damaged or destroyed property.

Unlike the constitutional amendments for providing base year value transfers for senior citizens and disabled persons, inter-county disaster relief, or contaminated property, discussed below, this constitutional amendment does not contain any provisions pertaining to the timing of the acquisition of replacement property. Rather, the timing requirement is found in section 69, which provides that:

...the base year value of property which is substantially damaged or destroyed by a disaster, as declared by the Governor, may be transferred to

³ However, section 69.5 also allows the replacement property to be purchased or newly constructed within two years *before* the sale or transfer of the original property.

comparable property within the same county which is acquired or newly constructed *within five years after* the disaster....as a replacement for the substantially damaged or destroyed property. (Emphasis added.)

Also, unlike the statutory provisions for providing base year value transfers for senior citizens and disabled persons, inter-county disaster relief, or contaminated property, section 69 does not contain an equal or lesser than value comparison test. Rather, it provides for a separate comparison test not relevant to this analysis.

Section 69.3 (Intercounty Disaster Relief)

Section 69.3 provides for the intercounty base year value transfers of property substantially destroyed by a governor-declared disaster if certain specified requirements are met. Section 69.3 implements Proposition 171, which added paragraph (3) to subdivision (e) of section 2 of article XIII A of the California Constitution. This constitutional amendment provides, in relevant part, that:

...the Legislature may authorize each county board of supervisors to adopt ... an ordinance allowing the transfer of the base year value of property that is located within another county in the State and is substantially damaged or destroyed by a disaster, as declared by the Governor, to comparable replacement property of equal or lesser value that is located within the adopting county and is acquired or newly constructed *within three years of* the substantial damage or destruction of the original property as a replacement for that property. (Emphasis added.)

This constitutional provision does not further define what is meant by “equal or lesser value” or “within three years of the substantial damage or destruction of the original property.” For purposes of determining the value of the original property to be used in the equal or lesser value comparison test, section 69.3, subdivision (b)(6)(A) provides that the value to be used is:

One hundred five percent of the amount of the full cash value of the original property if the replacement property is purchased or newly constructed *within the first year following* the date of the damage or destruction of the original property. (Emphasis added.)⁴

Unlike the statutory provisions for providing base year value transfers for senior citizens and disabled persons under section 69.5, there is no provision for acquisition of a replacement property prior to the substantial damage or destruction of the original property for intercounty disaster relief under section 69.3.

⁴ Subparagraphs (B) and (C) are identical except that they allow a five percent increase for each subsequent year that the replacement property is purchased or newly constructed following the date of the damage or destruction of the original property.

Section 69.4 (Contaminated Property)

Section 69.4 provides for base year value transfers of qualified contaminated property. Section 69.4 implements subdivision (i) of section 2 of article XIII A of the California Constitution. This constitutional provision provides, in relevant part, that:

... the Legislature shall provide with respect to a qualified contaminated property that ... :

(A) (i) Subject to the limitation of clause (ii), the base year value of the qualified contaminated property ... may be transferred to a replacement property that is acquired or newly constructed as a replacement for the qualified contaminated property, if the replacement real property has a fair market value that is equal to or less than the fair market value of the qualified contaminated property if that property were not contaminated....

(ii) This subparagraph applies only to replacement property that is acquired or newly constructed *within five years after* ownership in the qualified contaminated property is sold or otherwise transferred. (Emphasis added.)

Similar to the constitutional amendments providing base year value transfers for intercounty disaster relief, this constitutional provision does not specifically define what is meant by “equal or lesser value” or “within five years after ownership in the qualified contaminated property is sold or otherwise transferred.” Rather, the valuation and timing requirements are specified in the implementing statute, section 69.4, subdivisions (b) and (e)(2). For purposes of determining the value of the original property to be used in the equal or lesser value comparison test, section 69.4, subdivision (e)(2)(A) provides that the value to be used is:

One hundred five percent of the amount of the full cash value of the original property, if the replacement property is purchased or newly constructed *within the first year following* the date of the sale of the original property. (Emphasis added.)⁵

Section 69.5 (Principal Residences Owned by Persons Who are Over the Age of 55 or are Severely and Permanently Disabled)

Section 69.5 provides for the base year value transfers of principal residences owned by senior citizens or persons who are permanently or severely disabled if certain requirements are met. Section 69.5 implements Proposition 60, which added article XIII A, section 2, subdivision (a), paragraph (2) to the California Constitution. This constitutional provision provides, in relevant part, that the base year value of the original property may be transferred “to any replacement dwelling of equal or lesser value located within the same county and purchased or newly

⁵ Subparagraphs (B) through (E) are identical except that they allow a five percent increase for each subsequent year that the replacement property is purchased or newly constructed following the date of the sale of the original property.

constructed by that person as his or her principal residence *within two years of* the sale of the original property.” (Emphasis added.)

Like the other constitutional provisions, this constitutional provision does not further define what is meant by “within two years of the sale of the original property,” but has long been recognized as meaning that original property may be sold up to two years before or two years after the replacement dwelling is purchased. (Annots. 200.0119-200.0121.) For purposes of determining the value of the original property to be used in the “equal or lesser value” comparison test, section 69.5, subdivision (g)(5) states that:

(5) “Equal or lesser value” means that the amount of the full cash value of a replacement dwelling does not exceed one of the following:

(A) One hundred percent of the amount of the full cash value of the original property if the replacement dwelling is purchased or newly constructed *prior to* the date of the sale of the original property.

(B) One hundred and five percent of the amount of the full cash value of the original property if the replacement dwelling is purchased or newly constructed *within the first year following* the date of the sale of the original property.

(C) One hundred and ten percent of the amount of the full cash value of the original property if the replacement dwelling is purchased or newly constructed *within the second year following* the date of the sale of the original property.

(Emphasis added.)

The text of Annotation 200.0118, as discussed in more detail below, interprets the provisions of section 69.5 to require that, for the 105 percent value formula of section 69.5, subdivision (g)(5)(B) to apply, the evidence must indicate that the replacement property was purchased at least one day after the original property was sold.

Annotation 200.118

The issue in the back-up letter to Annotation 200.0118 concerned whether the 100 percent value comparison test (for replacement property purchased “*prior to the date*” that the original property is sold) or whether the 105 percent value comparison test (for replacement property purchased “*within the first year following*” the date of the sale of the original property) of section 69.5 should be applied for replacement property purchased on the same day as the sale of the original property. The Board’s Legal Department opined that, since the replacement dwelling was not being purchased prior to the date of the sale of the original property, the 100 percent value comparison test was not applicable. In determining whether the 105 percent value comparison test applied for replacement property acquired on the same day as the original property, we reasoned that:

...the 105 percent provision of subdivision (B) requires that the replacement property be purchased ‘within the first year *following* the date of the sale of the original property.’ This language seems to indicate that the replacement property must be purchased at least one day after the sale of the original property to qualify under subdivision (B). This interpretation, however, would result in ambiguity as to the applicability of section 69.5 in cases where the sale of the original property and the purchase of the replacement property occur on the same day. Since the replacement property is not to be purchased prior to the date of the sale of the original property, it is likely that the ambiguity would be resolved by a court in favor of the application of the more liberal 105 percent provision in cases such as this. In order to avoid the problem, however, it would be advisable to delay the closing of escrow and deed recordation on the replacement property until a few days after the sale of the original property has closed if that is possible. (Emphasis in original.)

Specifically, the text of Annotation 200.0118 states that:

In order to satisfy the requirements of Revenue and Taxation Code section 69.5(g)(5)(B) [“the equal or lesser” value test] that the replacement dwelling be ‘purchased ... within the first year following the date of the sale of the original property’, ... the following three events *must* occur at *least one day after* the recordation of the deed to the original property:

1. Recordation of the deed to the replacement property;
 2. Satisfaction of all escrow instructions relating to the replacement property; and
 3. The replacement property sales contract becomes specifically enforceable.
- (Emphasis added.)

These three conditions derive from Property Tax Rule 462.260, subdivision (a)(1), which provides rules for determining the date of change of ownership when real property is sold or otherwise transferred (except by lease or inheritance), and the transfer is evidenced by recordation of a deed.

Under Rule 462.260, subdivision (a)(1), the presumption that the date of recordation shall be rebuttably presumed to be the date of ownership change “may be rebutted by evidence proving a different date to be the date all parties’ instructions have been met in escrow or the date the agreement of the parties became specifically enforceable.” If evidence is presented that the parties intended a different date other than the recordation date to be the date a property changes ownership, then the assessor would be required to determine if this evidence is sufficient to overcome the presumption. If the evidence indicated that the change in ownership occurred upon the date the parties’ instructions were met in escrow, or on the date the contract became specifically enforceable, the recordation date would not be the date of change in ownership.

The text of Annotation 200.0118 applies Rule 462.260, subdivision (a)(1) for purposes of determining whether the 105 percent valuation formula of section 69.5 applies; and, in so doing, it requires that at least one day pass *after* the recordation of the deed evidencing the sale of the original property for not only the recordation of the deed evidencing the purchase of the replacement property, but also any of the other means of evidencing the purchase or acquisition of the replacement property.

ANALYSIS AND DISCUSSION

As an initial matter, we note that none of the constitutional provisions or implementing statutes clearly addresses the situation where a replacement property is acquired later on the same day as an original property is sold or damaged. The constitutional provisions for base year value transfers by senior citizens/severely and permanently disabled persons use the language “within X years of,” while the constitutional provisions for disaster relief and contaminated property use the language “within X years after” to describe the relevant timing requirements. They do not provide a specific time frame for the replacement property to be purchased after the original property is sold or damaged, and they certainly do not state, nor imply, that a replacement property must be acquired at least one day after an original property is sold or damaged. A reasonable reading of these constitutional provisions is that they only require that the replacement property be acquired some time *after* the original property is sold.

The statutory provisions are similarly constructed. Sections 69.3 and 69.5 use the language form “within the first year following,” while sections 69 and 69.4 use the language form “within X years after” to describe the relevant timing requirements. The legislative history for AB 3073 (Stats. 2004, Ch. 354), which added the “equal or lesser value” provisions to section 69.4, indicates that it was the Legislature’s intent in adopting similar language as that found in sections 69.3 and 69.5 to provide similar thresholds as those in sections 69.3 and 69.5, to step up the value for each year following acquisition of the replacement property so that property owners would be protected from disqualification due to inflation. In addition, AB 3073 made other amendments to section 69.4 to make it consistent with sections 69.3 and 69.5. (See attached Staff’s Legislative Enrolled Bill Analysis for AB 3073, pp. 5-6.)

There is no legislative history or authority for requiring one day (or for that matter, any specific quantum of time) to pass between the time that the original property is sold or damaged and the time that the replacement property is acquired. Such a requirement appears to be contrary to the constitutional language that each of these sections implements and the legislative intent behind each of these sections. In our opinion, the language in each constitutional provision and implementing statute is sufficiently similar such that all should be interpreted consistently with respect to sales of, or damage to, original property that occurs on the same day as the acquisition of replacement property. None of the statutes explicitly require at least one day to pass between the sale of or damage to the original property and the acquisition of the replacement property. Rather, the statutes simply state that the acquisition of the replacement property must occur after the “date” of the sale or damage of the original property. While it could be argued that the term “date” is ambiguous, it is well-settled law that statutes should be interpreted, if at all possible, so that they are harmonious with the state’s Constitution. (See *Parsons Brinckerhoff Quade & Douglas, Inc. v. Kern County Employees Retirement Assn.* (1992) 5 Cal.App.4th 1264, 1268, stating “... we must read the Constitution and the statute together; if the statute is reasonably capable of interpretation consistent with the Constitution, the statute will be given that meaning,

rather than another in conflict with the Constitution.”) In this case, since the constitutional provisions do not require any time to pass other than the replacement property must be acquired “after” the sale of or damage to the original property, a consistent and reasonable reading of these statutes is that the term “within the first year following” within the phrase “within the first year following the date” means “some point later in time,” including on the same day.

This interpretation is consistent with and supported by related areas of California law. It is the recorder's duty to record without delay any instrument authorized by law to be recorded, and endorse upon it the order in which it was deposited, as well as the year, month, *day, hour, and minute* of its reception. (Gov. Code, § 27320. (Emphasis added.)) Thus, if a deed for the sale of the original property is deposited for recording before the deed evidencing the acquisition of the replacement property, then we would presume that the replacement property was acquired after the sale of the original property, even though they were sold and purchased on the same day. (Of course, under Rule 462.260, subdivision (a)(1), the presumption with respect to either transaction can be rebutted by evidence that the escrow instructions were met or the contract became specifically enforceable at another date and time.) Because there are existing laws, rules, and procedures to determine the date and time of a transfer of real property for property tax purposes, there is no reason to require one day to pass between the sale of the original property and the acquisition of the replacement property in order to determine whether eligibility requirements have been met or which valuation formula applies.

Based upon the above analysis, it is our opinion that if a deed for the acquisition of replacement property is recorded any time after a deed evidencing the sale or transfer of original property is recorded, even if both are recorded on the same day, the acquisition of the replacement property is presumed to have occurred after the sale or transfer of the original property for purposes of sections 69, 69.3, 69.4, and 69.5 unless the taxpayer or the assessor has evidence sufficient to overcome the deed presumption. Similarly, if a situation arises where the date and time of a recorded deed are not found to evidence the date and time of a sale or acquisition, then existing rules should be applied to determine whether an acquisition of a replacement property occurred after the sale or transfer of an original property.

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Attachments

cc: Ms. Glenna Schultz MIC:64
Mr. David Gau MIC:63
Mr. Todd Gilman MIC:70