STATE BOARD OF EQUALIZATION
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October 22, 2010

Re: Parking Lot Easement and Appeal of Base Year Value
Assignment No. 10-070

Dear Mr. :

This is in response to your letter to of the Taxpayers' Rights Advocate Office. You requested a legal opinion on issues relating to the establishment of the base year value upon the purchase of a medical office building and parking lot, when a portion of the parking lot is subject to an easement for the benefit of the adjacent building.

This opinion is being requested in connection with a hearing before the County Assessment Appeals Board scheduled for October 27, 2010, involving the County Assessor (the Assessor). Both parties are aware that we will be issuing this opinion, have examined and/or provided the facts set forth herein, and were given an opportunity to provide additional information in connection with this letter. The parties anticipate that this opinion will be issued prior to the hearing.

Facts

On September 28, 2007, your client, , LLC, purchased the property Drive in the City of (City), APN Nos. -028 and -029 (herein Parcels 28 and 29, together, the Property).

Parcel 28 is improved with a 5,000 square foot medical office building plus outdoor street level parking in excess of the 4 spaces per 1,000 square foot gross floor area (GFA) required by local zoning. Parcel 28 is zoned under the city's zoning categories as Medical Facilities Zone, which is a designation that allows only for the construction of various types of medical facilities plus any structures and services supporting these primary medical uses. Adjoining Parcel 29 is improved with approximately 55-60 parking spaces only and no structures.

On August 22, 1997, the Property's prior owners entered into a Covenant and Agreement Regarding Maintenance of Off-Street Parking Space (the Agreement), pursuant to which the owners covenanted and agreed with the City to provide an off-site parking area of at least 76 parking spaces for the tenants of the adjacent building at the address Drive (the Adjacent Property). The Agreement was recorded in the County Recorder's

Office on October 9, 1997. The Agreement provided that it would run with the land and be binding on future owners, encumbrancers, successors, heirs or assignees, and would continue until released by the city. We assume the City has not discontinued the Agreement and that it remains in full force and effect.[1]

Based upon an escrow closing statement dated September 29, 2007, it appears that your client purchased the Property for $1,600,000. You assert that the transaction was arm's length. You assert that the Assessor established a base year value for the Property of $2,516,000 for Parcel 28 and $1,780,000 for Parcel 29. The combined base year value for the two parcels is $4,296,000. Your client has filed an appeal and this appeal is the subject of the upcoming hearing.

Law & Analysis

An easement is a nonpossessory right to enter and use land in the possession of another, which entitles the owner of the easement to a limited use or enjoyment of the other's land and requires the possessor not to interfere with the uses authorized by the easement. (Rest.3d, Property, Servitudes (2000) § 1.2.) It maybe created by grant or agreement, and may be express or implied. Because it is a nonpossessory interest in the land of another, it is not an estate in land. (See 12 Witkin Sum. Cal. Law Real Property § 382 (10th ed. 2010) (herein, Witkin).)

An easement may be *appurtenant* or *in gross*. An easement is *appurtenant* when it is attached to the land of the easement holder and therefore it benefits the holder as the owner or possessor of that land. (Civ. Code, § 801, Witkin, § 383.) Easements are property rights and where an easement is appurtenant, the right is transferable and descendible. (Witkin, § 420.) The land to which the easement is attached is called the "dominant tenement," and the land that bears the burden (the land that is subject to the easement and that will be used or enjoyed by the holder of the easement) is called the "servient tenement." (Civ. Code, § 803.) An easement is *in gross* when it is not attached to any particular land as dominant tenement, but instead benefits a specific person. (Civ. Code, § 802; Witkin, § 383.)

In Assessors' Handbook Section 501, we stated that a common example of an appurtenant easement is a parking lot easement that allocates a specific number of parking spaces in a shopping center parking lot to a restaurant tenant of the shopping center. (Assessor's Handbook Section 501, *Basic Appraisal* (January 2002), p. 33.).

California Government Code section 65871, subdivision (a) provides that the owner of real property may execute a covenant to a city or county to create an easement. The easement created by the covenant may be for parking. (*Id*.) The covenant must be recorded in the county where the property is located, and is effective when recorded. (Gov't Code, §§ 65871, subd. (b), and 65873.) Once the covenant is recorded, the burdens of it are binding on, and its benefits inure to, the successors in interest to the affected real property. (Gov't Code, § 65873.) The covenant may be enforced by the city, as well as the owners of the properties that are burdened by and benefit from the easement. (Gov't Code, § 65875.)

[1] On June 28, 2000, the prior owners of the Property and the owners of the Adjacent Property entered into an Agreement Regarding Payment Toward Maintenance Costs for Off-Street Parking Space (the Payment Agreement), pursuant to which the owners of the Adjacent Property agreed to pay the owners of the Property $800 per month toward the maintenance of the parking spaces provided pursuant to the terms of the Agreement so long as the Agreement was in effect.

In this matter, it is our opinion that the Agreement created an appurtenant easement pursuant to these provisions of the Government Code for a minimum of 76 usable and accessible parking spaces for the use by the tenants of the Adjacent Property. Pursuant to its express terms (and as with any appurtenant easement), this parking lot easement runs with the land, is binding on future owners of the Property, and will benefit future owners of the Adjacent Property. Under Government Code section 65875, the Agreement is enforceable by the City, as well as the owners of the Property and the Adjacent Property.

While most easements are not separate property interests, sometimes an appurtenant easement may become a component of the dominant tenement's taxable appraisal unit.[2] An appurtenant easement becomes a component of the dominant tenement's appraisal unit if its grant from the servient tenement constituted a change in ownership and reappraisal.

Neither the Revenue and Taxation Code nor the Property Tax Rules deal specifically with the question of whether a grant of an easement is a change in ownership for property tax purposes. Because there are no statutes or regulations specifically addressing the change in ownership treatment of easements, we have said that for the grant of an appurtenant easement to qualify as a change in ownership (and thereby become part of the appraisal unit of the dominant tenement), the grant must satisfy the three prong definition of a change in ownership set forth in Revenue and Taxation Code[3] section 60. (Assessors' Handbook Section 501 *Basic Appraisal* (January 2002), p. 33.) Section 60 defines a "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."

In Property Tax Annotation 220.0162 (December 6, 1985; November 24, 1981; and December 10, 1980), we acknowledged that while an easement is not an estate in real property, it is an interest in real property, and it also constitutes a present interest, thus satisfying the first prong of section 60. In addition, an easement holder will have the beneficial use of the property burdened by the easement, thus satisfying the test's second prong. Therefore, as long as an easement is perpetual, the only issue is whether the grant of the easement satisfies the third prong of section 60 -- that is, whether the easement is "substantially equal to the value of the fee interest." This must be analyzed on a case-by-case basis. (Annotation 220.0162, back-up letter dated December 10, 1980.)

In the back-up letter to Annotation 220.0162 dated December 6, 1985, the easement at issue was a grant from a parcel that faced a public road of nonexclusive right for ingress and egress to the adjacent parcel, which was landlocked. Because the easement was nonexclusive, the servient tenement owner could still use the property subject to the easement so long as it did not interfere with the dominant tenement's use. Because both the dominant and servient tenements share the use, we opined that the value of a nonexclusive easement for ingress and egress is not substantially equal to the value of the fee interest, and thus a grant of one would not constitute a change in ownership. (See also Annotation 220.0162 back-up letter dated November 24, 1981.)

In Annotation 220.0165 (July 19, 2005), we analyzed whether the grant of a parking easement in the context of a shared common lot constituted a change in ownership. In that case, a shopping mall owner sold a building site in the mall, and in the purchase agreement the mall

[2] Assessors' Handbook Section 501, *Basic Appraisal* (January 2002), p. 33.
[3] All section references are to the Revenue and Taxation Code, unless otherwise indicated.

owner granted to the buyer of the site an easement for parking for the buyer's customers and employees in a common parking lot to be shared with the other customers and employees of the mall. Since there were no minimum number of spaces that had to be made available to the buyer, the agreement only granted to the buyer a nonexclusive use of the parking lot. In addition, the agreement provided that in the event the mall's vacancy reaches a certain level, the mall owner had a right to redevelop the property and in that event the buyer would obtain an exclusive use of 650 parking spaces. We opined that this initial grant created only a nonexclusive easement that did not satisfy the third prong of section 60 because of its nonexclusivity. We also stated that in the event the contingency were satisfied and the buyer obtained the exclusive use of the 650 parking spaces, at that time the third prong would be satisfied.

In this case, the easement created in the Adjacent Property owner the right to use a minimum of 76 parking spaces on the Property. Because there are a fixed number of spaces that must be made available to the Adjacent Property, this case is distinguishable from the parking easements where the dominant and servient tenements merely have to share a common parking lot. In addition, because any use the Property owner were to make of the 76 parking spaces would necessarily interfere with those spaces being made available to the Adjacent Property, the easement is exclusive. Because the easement is perpetual in nature, is for a minimum of a fixed number of spaces, and is exclusive, in our opinion the easement satisfies the section 60 change in ownership test, including the third prong of section 60 -- that it, its value is substantially equal to the value of the fee interest.

Since the grant of the easement pursuant to the Agreement satisfied all three prongs of section 60, there was a change in ownership of 76 parking spaces on the Property when the Agreement was entered into on August 22, 1997. Accordingly, 76 spaces of the total parking spaces on the Property are a component of the Adjacent Property's appraisal unit, and must be assessed to the Adjacent Property.[4]

When your client purchased the Property on September 28, 2007, because those 76 parking spaces are not a component of your client's appraisal unit, and the easement for those spaces continued in the owner of the Adjacent Property owner, those spaces did not undergo a change in ownership, and should not be reassessed.

In determining the full cash value of the Property after your client's September 28, 2007 purchase, section 110, subdivision (a) provides that the full cash value means:

> [T]he amount of cash or its equivalent that property would bring if exposed for sale in the open market under conditions in which neither buyer nor seller could take advantage of the exigencies of the other, and both the buyer and the seller have knowledge of all of the uses and purposes to which the property is adapted

[4] If it were determined that the 76 parking spaces were not a component of the Adjacent Property's appraisal unit, and were considered part of the Property's appraisal unit, then section 402.1 would come into play. Section 402.1, subdivision (a)(2) provides that in assessing land, the assessor must consider the effect upon value of any enforceable restrictions, including recorded contracts with governmental agencies. In our opinion, the Agreement falls into this category. Because we have concluded that the parking spaces are part of the Adjacent Property's appraisal unit, we do not need to consider those spaces as being subject to an enforceable restriction. If they were part of the Property's appraisal unit, in valuing them the assessor would have to consider the impact of the easement on value.

and for which it is capable of being used, and of the enforceable restrictions upon those uses and purposes.

Section 110, subdivision (b) provides that the full cash value is the purchase price paid in the transaction unless it is established by a preponderance of the evidence that the Property would not have transferred for that amount in an open market transaction. The purchase price is rebuttably presumed to be the full cash value if the transaction was arm's length and both the seller and your client were knowledgeable and neither could take advance of the exigencies of the other. (*Id.*)

Here, as long as your client can establish that the purchase was an open market, arm's length transaction, the purchase price of $1,600,000 is presumed to be the full cash value of the Property. To establish a different full cash value, the Assessor would have to rebut that presumption by a preponderance of the evidence that the Property would not have transferred for that amount if exposed to the open market.

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,

/s/ Matthew F. Burke

Matthew F. Burke
Tax Counsel III (Specialist)

MB/yg
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cc: Honorable
County Assessor

Office of County Assessor (via email)
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Mr. David Gau MIC:63
Mr. Dean Kinnee MIC:64
Mr. Todd Gilman MIC:70