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JAMES E. SPEED
Executive Director

January 8, 2001

RE: ***Change in Ownership Regarding the Reassessment of Common Area Parking in a Shopping Center.***

Dear Mr. :

This is in reply to your letter to Mr. Richard Johnson, Deputy Director for Property Taxes, dated September 28, 2000, regarding a change in ownership issue in the lease of a department store pad site and the inclusion of common area parking in the reassessment of the property. I apologize for the delay in responding to your request.

As discussed further below, upon review of portions of the lease agreement submitted, it is our opinion that the Tenant holds a nonexclusive easement over the common area and does not have a legal right to possess and use the common area of the shopping center, including the parking lot and parking structures to the exclusion of all others. Thus, when the Tenant leases a building pad for a term of 35 years or more, there is no change in ownership of the parking lot and parking structures. However, this does not preclude the Tenant's pad site from being valued to reflect the amenities and the enhancement afforded by the common areas, including the parking lot and parking structures, upon the creation of the leasehold for a term of 35 years or more.

Factual Background

As detailed in your letter, a department store ("Tenant") has signed a lease with the owner of a shopping center ("Landlord") for a 2.8-acre pad site. The terms of the lease provide for an initial 20-year term, with eight successive options to each extend the lease for an additional ten-year period (for a total of 100 years). The lease includes ingress and egress to and from the parking structures and parking areas and non-exclusive parking in the parking structures and parking areas. You state that when reappraising the Tenant's parcel, the assessor included a value of a portion of the shopping center's parking area (i.e., 320,000 square feet or 7.35 acres), in the value of the Tenant's pad site.

Law and Analysis

Revenue and Taxation Code section 60[1] defines "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."

Section 65.1(b) states with respect to a change in ownership of properties which contain common areas or facilities:

> If a unit or lot within a cooperative housing corporation, community apartment project, condominium, planned unit development, shopping center, industrial park, or other residential, commercial, or industrial land subdivision complex with common areas or facilities is purchased or changes ownership, then only the unit or lot transferred and the share in the common area reserved as an appurtenance of such unit or lot shall be reappraised. [Emphasis added.]

Based upon these provisions, we have taken the position that a change in ownership of a unit or lot in a shopping center or office park does not necessarily trigger a change in ownership and reassessment of an adjacent parking lot or other common areas. The real question is: when does a sufficient property interest exist in a parking lot or common area such that a change in ownership of a building or lot in a shopping center (or office park) triggers a change in ownership of the parking lot or common area.

The criterion for answering this question is found in section 65.1(b). This section is the only authority in property tax law which permits the reassessment of common areas in conjunction with changes in ownership of non-common areas. Furthermore, this section establishes a definable standard, consistent with change in ownership law, that there must be evidence that a common area or a share thereof is an appurtenance or is "substantially equal to the value of the fee" in order for it to be reappraised as part of the non-common area.

The language of section 65.1(b) embodies the Legislature's distinction between "changes" and "non-changes" in ownership of "common areas and facilities" real property, by providing specific examples of types of property where a portion of such real property might be transferred with only that portion of the property subject to reappraisal. A change in ownership reassessment of "common areas or facilities" is intentionally limited to "a unit or lot within a . . . shopping center, industrial park, or other residential, commercial, or industrial land subdivision complex," indicating that this provision expressed the applicable rationale for all the common areas of these types of properties.

Moreover, the "appurtenance" language of section 65.1(b) supports the principle that only the interest or portion of a parking lot or other common area property actually transferred should undergo a change in ownership and be reappraised. Thus, common areas of designated types of

[1] Unless otherwise indicated, all statutory references are to the Revenue and Taxation Code.

properties are subject to reappraisal only if the common areas are an appurtenance of such property. The term "appurtenance" has been defined as:

> That which belongs to something else; an adjunct; an appendage. Something annexed to another thing more worthy as principal, and which passes as incident to it, as a right of way or other easement to land; . . . (Black's Law Dictionary, 6th edition 1990, p. 103.)

In applying the appurtenance concept under section 65.1(b), certain factors must be examined to determine what portion of a common area is "appurtenant" or "annexed" to a non-common parcel. These factors are consistent with those in the three-part definition for determining "change in ownership" under section 60. In other words, for one property to be considered appurtenant to another, for purposes of change in ownership, the property must embody, in all cases, the following three characteristics of change in ownership:

(1) The property transfers a present interest in real property;
(2) The property transfers the beneficial use of the property; and
(3) The property rights transferred are substantially equivalent in value to the value of the fee interest.

As stated in the Report of the Task Force on Property Tax Administration dated January 22, 1979, "the general definition of change in ownership should control all transfers . . . and specific statutory examples be consistent with the general test."

Applying this test to the Tenant's situation, if the easements embodied in the lease agreement establish that the Landlord transferred interests in the parking lot and parking structures substantially equivalent to the fee, then a change in ownership of those areas occurred. In other words, if the Tenant received rights of way and easements "substantially equivalent to the fee" in the parking lot and parking structures, then such portion(s) of the parking lot and parking structures is clearly an "appurtenance of" the Tenant's pad site and is subject to a change in ownership reappraisal.

Article II A of the lease provides in part that the lease shall include

(i) The Tenant Tract;
(ii) All appurtenances, rights, interests, easements and privileges in any manner appertaining to the Tenant Tract including any other rights and interests herein granted by Landlord to Tenant or arising out of covenants on the part of Landlord herein contained, including easements for . . . (2) ingress and egress to and from, and parking in the Parking Structures and parking areas within the Total Development Tract . . .
(iii) . . .
(iv) . . .

The Tenant Tract, the Tenant Building, and all such appurtenances and easements are referred to as the "Leased Premises." Article III A of the lease, on page 27, describes in part the *nonexclusive* easements the Tenant receives in the Common Area:

> NONEXCLUSIVE EASEMENTS FOR USE OF COMMON AREA. Tenant hereby grants to Landlord, and Landlord hereby grants to Tenant, for their respective use, and for the use of their respective Permittees, in common with all others entitled to use the same, nonexclusive easements over the Common Area of its respective Tract(s), for ingress to and egress from their respective Tracts, for the passage and accommodation of pedestrians, on such respective portions of such Common Area as are set aside, maintained and authorized for such use pursuant to the terms of this Lease, and for the doing of such other things as are authorized or required to be done on said Common Area pursuant to this Lease. Landlord further reserves to itself the right to grant such non-exclusive easements over the Common Area of its Tract(s), for the purposes hereinabove enumerated, to other Occupants of portions of the Total Development Tract, or their Permittees.

The term "Common Area" is defined on pages 3-4 of the lease to include "Automobile Parking Area owned by Landlord," aisles, sidewalks, access roads, etc. "Automobile Parking Area" is defined in the lease as "the above ground Parking Structures and all ground surface Common Area used for the parking of automobiles . . . ." Specifically excluded from the "Common Area" however, in Article I D is

> . . . truck parking, turn-around and dock areas, the depressed portions of truck tunnels or ramps exclusively serving any Store or rest rooms, emergency exit corridors, stairs, elevators and similar areas contained within any area exclusively appropriated for the use of any single Occupant. The Common Area shall include the Truck and Service access driveway and loading areas shown on Exhibit B except for the truck parking areas designated exclusively as "[Tenant]" truck parking areas on Exhibit B. [Adjusted.]

Based upon our reading of the lease, it does not appear that the Tenant's pad site received property rights equivalent to a fee interest in any portions of the parking lot or parking structures with the exception of Tenant's truck parking, turn-around and dock areas, etc. as described above with regard to Article I D. According to the "Nonexclusive Easements for Use of Common Area" (Article III A of the lease), the Landlord retained all present rights and duties in and to the Common Area. The Tenant is merely a permittee to the common area of the shopping center, retaining a nonexclusive easement to the parking lot and parking structures.

Under the lease terms, the Tenant does not have a legal right to possess and use the Common Area, including the parking lot and parking structure, to the exclusion of all others as would a person acquiring fee ownership of such property.[2] Moreover, the fact that the Tenant receives the benefits of a nonexclusive easement over the Common Area does not mean that portions of the Common Area are "reserved as an appurtenance" to the pad site as required by section 65.1(b). Since easement rights are nonexclusive, such rights are not "substantially equal to the value of the fee interest." Thus, in our opinion, the Tenant may not be reassessed for a change in ownership of the property defined as the "Common Area" or the "Automobile Parking Area," or

[2] Pursuant to Article I D, the Tenant's pad site apparently does include, however, the truck parking, turn-around and dock areas, etc. which would be subject to reassessment at the time of the creation of the lease.

the "Parking Structures" of the shopping center, except for the truck parking, turn-around and dock areas, and depressed portions of the truck tunnels or ramps described in Article I D of the lease.

Please note, however, that section 65.1(b) and our conclusion do not preclude the Tenant's pad site, upon the change in ownership, from being valued to reflect the amenities and the enhancement afforded by the Common Area, including the parking lot and parking structure.[3] Nor do section 65.1(b) and our conclusion prevent the parking lot and common areas from being reassessed to the Landlord for the value of new improvements. Therefore, in response to the question in your December 21, 2000 letter, value physically located on the Landlord's parcel should not be added to the Tenant's parcel per section 65.1(b). However, as mentioned above, upon the reassessment of the Tenant's pad site, the value should reflect the amenities and enhancement afforded by all common areas of the shopping center.

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. You may wish to contact the San Diego County Assessor's Office to ascertain whether it is in agreement with the analysis and conclusions set forth herein.

Very truly yours,

/s/ Anthony S. Epolite

Anthony S. Epolite
Tax Counsel

Attachment: AH 502, pages 30-33. [December 1998]

Cc:

Mr. Richard Johnson, MIC: 63
Mr. David Gau, MIC: 64
Mr. Dean Kinnee, MIC: 64
Mr. Charlie Knudsen, MIC: 62
Ms. Jennifer Willis, MIC: 70

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[3] See Assessors' Handbook 502, *Advanced Appraisal*, pages 30-33, attached.