STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION
450 N STREET, SACRAMENTO, CALIFORNIA
PO BOX 942879, SACRAMENTO, CALIFORNIA 94279-0082
TELEPHONE (916) 324-6593
FAX (916) 323-3387
www.boe.ca.gov

June 20, 2000

Honorable Lawrence E. Stone
Office of the County Assessor
County Government Center, East Wing
70 West Hedding Street
San Jose, CA 95110-1771

Attn: David Turner
Chief of Assessment Standards and Services

Dear Mr. Turner:

This is in response to your letter to the Legal Division of the State Board of Equalization, requesting our advice as to the change in ownership consequences of two deeds concerning a certain property in Santa Clara County.

The first deed reflects the purchase of the residence. It purports to convey the property to Mr. C and Ms. Z, husband and wife, as to an undivided 62% interest, and to "Foundation" as to an undivided 38% interest, all as tenants in common. Recorded nearly four years later, the second deed reflects the conveyance of Foundation's interest in the property to C and Z. At all times, the property was occupied by C and Z as their residence.

Your analysis indicates, based on the transfer tax on the deeds, that Foundation contributed $300,000 and took a 38% proportional interest in the property when it was purchased for $785,000. At the time of the second deed, C paid Foundation $383,000 for its interest subsequent to a refinancing of his loan, evidenced by a new deed of trust recorded consecutively with the deed from Foundation to C and Z.

Accompanying the second deed was a Preliminary Change in Ownership Report, with the line checked indicating that the transfer was "recorded only as a requirement for financing purposes or to create, terminate or reconvey a security interest." You enclose with your letter, a letter from C's attorney, asserting that the arrangement between C and Foundation "really amounts to a financing agreement to allow [C] to purchase the house he wished in this market we have here in Santa Clara County. . . . The Agreement [is] termed 'Tenants-In-Common Agreement' but if you look at it, it has all the earmarks of a shared appreciation loan." C contends that, as such, the transfer of Foundation's 38% interest to C and Z is not a reappraisable change in ownership, but a reconveyance of a security interest.

You enclose a copy of the subject Tenants-In-Common Agreement, and ask whether, in our opinion, Foundation's interest as defined by the agreement was a security interest, the reconveyance of which would not be reappraisable, or an ownership interest, the transfer of which is reappraisable. For the reasons set forth below, it is our opinion that there is a strong presumption that Foundation's interest was an ownership interest, and that the transfer of that interest was a change in ownership necessitating a reassessment of the interest.

Foundation is associated with C's employer, and, according to the agreement between them, "regularly provides assistance and financial support to" such employer. C recently became the president of the employer, and desired to purchase a residence "suitable for such entertaining as desired by [C] and which would be in the best interests of the [employer]. To enable [C] to acquire the Residence, Foundation and [C] agree to *acquire the Residence as tenants-in-common* subject to the provisions hereinafter set forth." (Emphasis added.) The agreement speaks throughout of Foundation and C "acquiring" the Residence, and provides specifically at Paragraph 2 that "[t]itle to the Residence shall be held as tenants-in-common in the name of the Foundation on the one hand, and [C] and should he so desire, his wife, [Z], on the other."

Paragraph 2 further provides that Foundation shall contribute one-half (1/2) of the total Purchase Price or Three Hundred Thousand Dollars ($300,000), whichever is less. "Foundation's percentage of *ownership interest* as a tenant-in-common shall be determined by the relationship of its financial contribution to the purchase of the Residence as compared to the total purchase price . . ." (Emphasis added.) Consistent therewith, as indicated by your analysis discussed above, Foundation did contribute $300,000 towards the purchase price of the subject residence, and received a 38% proportional tenancy-in-common interest therein.

There are no indications in the agreement that it is anything other than a co-ownership agreement, or that it was intended to be a loan, shared equity or otherwise. There are no provisions in the agreement for periodic payments by C to Foundation, nor is there any provision for the payment or accumulation of interest on Foundation's contribution to the purchase price. The only provisions for the return of Foundation's contribution are upon either the sale of Foundation's interest to C, or the sale of the property to a third person upon the termination of the agreement (either at the end of its stated ten year term or upon C's default under the agreement to, for example, make payments as required under the loan secured by the property). Upon sale of the property, after the payment of costs and repayment of any "mutually approved mortgage", "all remaining net proceeds shall be divided proportionately between Foundation and [C] as their interests are defined in paragraph 2." Para.16e. Indeed, Foundation is not guaranteed a return of its investment. Subdivision b of Paragraph 16 of the agreement specifically anticipates Foundation participating proportionally in any loss of equity:

> "To the extent that the Sales Price is less than the Purchase Price, then for purposes of determining how much of the Foundation's Contribution shall be repaid, and how much of [C's] Contribution shall be repaid, the negative difference between the Purchase Price and the Sales Price shall be shared between Foundation and [C] according to their respective ownership interests established pursuant to paragraph 2. . . ."[1]

[1] We do not know if the parties intended a different result in the event of a purchase of Foundation's interest by C after a loss of equity. We note that on a purchase, the price to be paid by C to Foundation for its interest in the

All of the above, together with the method of holding title set forth in the deed itself, is consistent with Foundation owning an ownership interest in the real property, and is not consistent with an intended loan.

Assessors and assessment appeals boards are permitted to rely upon the record state of title to real property. With respect to the issue of the nature of the ownership interests transferred in a particular real property transaction, Property Tax Rule 462.200 (18 Cal. Code of Regs. §462.200) authorizes assessors to rely on the deed presumption and provides:

> **"(b) DEED PRESUMPTION.** When more than one person's name appears on a deed, there is a rebuttable presumption that all persons listed on the deed have ownership interests in property, unless an exclusion from change in ownership applies.
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> In overcoming this presumption, consideration may be given to, but not limited to, the following factors:
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> (1) The existence of a written document executed prior to or at the time of the conveyance in which all parties agree that one or more of the parties do not have equitable ownership interests.
>
> (2) The monetary contribution of each party. The best evidence of the existence of any factor shall be an adjudication of the existence of the factor reflected in a final judicial finding, order, or judgment. Proof may also be made by declarations under penalty of perjury (or affidavits) accompanied by such written evidence as may reasonably be available, such as written agreements, canceled checks, insurance policies, and tax returns."

Consistently with the above, Evidence Code section 662 provides:

> "The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof."

Clear and convincing proof has been defined as:

> "clear, explicit and unequivocal", "so clear as to leave no doubt," and "sufficiently strong to command the unhesitating assent of every reasonable mind." (1 Witkin, *Calif. Evid.* (3d ed. 1986) §160, p. 137)

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residence, ownership interest according to paragraph 2, shall be the greater of (i) Foundation's Contribution or (ii) Foundation's share of the fair market value of the residence. A loss of equity is not specifically addressed. Para.18. See also Paragraph 15. However, presumably, if the property value fell significantly, C would not elect to pay Foundation more than its interest was worth, and the result would be no transaction or a sale to a third party, in which Foundation would share in the loss.

In *Toney v. Nolder* (1985) 173 Cal.App.3d 791, the plaintiff claimed an interest in real property based on his contention that he and the defendant had an oral partnership agreement. The court held that there is no exception to the standard set forth in Evidence Code section 662 and the plaintiff was required to meet the clear and convincing evidence standard. Under these legal principles, the names appearing on a deed are presumed to own not only legal title to the real property but also beneficial ownership. This presumption can be overcome only by proof that is clear and convincing, that is, evidence that is explicit, unequivocal and leaves no doubt.

Property Tax Rule 462.200(a) specifically addresses the situation in which a transaction may be interpreted to be either a conveyance of the property or a mere security interest therein:

> **"(a) SECURITY TRANSACTIONS.** There are transactions that may be interpreted to be either a conveyance of the property or a mere security interest therein, depending on the facts. There is a rebuttable presumption under Civil Code Section 1105 and Evidence Code Section 662 that a grant of title to real property is a transfer of a present interest in the real property, including the beneficial use thereof, equal to a fee interest. In overcoming this presumption, consideration may be given to, but not limited to, the following factors:
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> (1) The existence of a debt or promise to pay.
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> (2) The principal amount to be paid for reconveyance is the same, or substantially the same, as the amount paid for the original deed.
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> (3) A great inequality between the value of the property and the price alleged to have been paid.
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> (4) The grantor remaining in possession with the right to reconveyance on payment of the debt; and
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> (5) A written agreement between the parties to reconvey the property upon payment of the debt. The best evidence of the existence of any factor shall be an adjudication of the existence of the factor reflected in a final judicial finding, order, or judgment. Proof may also be made by declarations under penalty of perjury (or affidavits) accompanied by such written evidence as may reasonably be available, such as written agreements, canceled checks, insurance policies, and tax returns."

As summarized above, there was a written agreement between the parties, but it makes no mention of a "debt or promise to pay", except as to the proportional return of both parties' contributions to the purchase price upon sale of the property, or the purchase of Foundation's interest by C. The agreement consistently refers to Foundation's interest in the property as an ownership interest. There is simply no indication in the agreement that Foundation's contribution toward the purchase price in exchange for a proportional ownership interest in the property was a loan.

It is true that the fact that C and Z exclusively took possession of the property could be argued to be a factor pointing toward a lender/borrower relationship between Foundation and C. Rule 462.200(a)(4). Pursuant to the agreement, in exchange for this possession, C agreed to be solely responsible for the payment of all insurance premiums, property taxes/assessments, utilities, repairs and maintenance with respect to the property. Para.10. However, as noted above, the agreement specifically recites that C's possession of the property and use of it for entertaining was in the best interests of C's employer, and therefore, since Foundation's function is to support that employer, in the best interests of Foundation. It is significant that, not only is C *permitted* by the agreement to reside in the property, he is *required* by that agreement to do so. Para. 9.

In any case, it is our view that this possession and C's current contention that Foundation's interest has been that of a lien holder holding, essentially, bare legal title as security for a loan, does not even approach the clear and convincing evidence necessary to overcome the clear provisions of the initial acquisition deed and the Tenants-in-Common Agreement entered into by the parties. To the contrary, the evidence appears overwhelming that Foundation's interest was one of ownership. Foundation may well have entered into this transaction with the motivation of assisting C in purchasing the residence, but the almost irrefutable evidence is that it did so as a co-owner, not as a lender.

For these reasons, it is our opinion that the deed from Foundation to C and Z represents a transfer of an ownership interest in the property, it constitutes a change in ownership, and, no exclusions being apparent, it requires a reassessment to the extent of the interest transferred.

The views expressed in this letter are advisory only; 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,

Daniel G. Nauman
Senior Tax Counsel

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