



STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION

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September 21, 1995

General Partner

BURTON W. OLIVER
Executive Director

Dear Ms. :

This is in response to your January 17, 1995 and January 23, 1995 letters to Arnold Fong, Assessment Standards Division, State Board of Equalization. We apologize for the delay in this response; our workload was such that we were unable to respond earlier. Your inquiry of January 23 relates to the preferential valuation for two parcels identified as "restricted historical property" pursuant to Revenue and Taxation Code sections 439-439.4; you seek a refund for fiscal years 1987/88, 1988/89 and 1989/90 for the property known as the Granary (A.P.N.) and for fiscal year 1989/90 for the property known as the Warehouse (A.P.N.). Your inquiry of January 17 relates to those two properties and to the Garage (A.P.N.) for the fiscal years 1991/92 and 1992/93.

You present the following fact situation. Since 1987, you have been attempting to have a number of parcels identified as restricted historical properties. You state that the City of requested various delays and that you were assured by City representatives that these delays would not be to your detriment, that you would eventually receive all financial benefits to which you were originally entitled. We do not have any verification of these assurances but accept them for the purposes of this discussion. A conservation easement for the Granary was signed on December 26, 1985; another conservation easement was signed on the same day for the premises known as the "Buildings". We will assume for the purposes of this discussion that the

¹ All references to code sections are to the Revenue and Taxation Code unless otherwise specified.

"Buildings" include the Warehouse, the Granary and the Garage and that these were among the properties placed on the National Register of Historical Places on January 13, 1986.²

You submitted two historical property contracts made pursuant to Government Code sections 50280-50290 and signed on June 24, 1994. These contracts relate to the Granary and Warehouse and appear to meet the criteria of historical property contracts as set forth in sections 439-439.4. A critical issue herein is that those documents provide that the contract terms relate back to fiscal years prior to the date of signing. It is the county assessor's position that these contracts are not effective for either the 1989/90 fiscal year or for fiscal years prior to 1989/90.

Another critical issue herein is that pursuant to section 5097, claims for refund of property taxes paid must be filed within four years of payment; therefore, claims for refund filed in 1994 are generally barred for the fiscal year 1989/90 and for prior years if those taxes were paid on time. To avoid being barred on the basis of untimeliness, you ask that the doctrine of equitable tolling be applied and that the claims for refund for those years not be barred pursuant to section 5097. ((For the years within the four year statutory period (1991/92 and 1992/93), you argue that the 1994 contracts should relate back to the fiscal years at issue.))

In addition to the information you have provided, staff communication with the County Assessor's Office indicates that a total of seven properties were part of a historical property contract recorded in County in February 1993, and that all seven properties were valued as provided by section 439 as of March 1, 1993. We assume that the properties under consideration herein were also subject to the February 1993 contract. However, as your letters and argument are premised upon the 1994 contracts, we will limit consideration of the 1993 contracts for the purposes of this discussion.

Finally, you requested that you be allowed to meet with us to discuss this matter before the issuance of our opinion letter. In your letter of June 7, 1995, you ask that we schedule a "hearing". Please note that the Board of Equalization does not conduct hearings for assessment matters of the kind at issue herein. On rare occasion, our staff may meet with taxpayers and/or their representatives to discuss a case prior to the

² Certain stated assumptions are made for the purposes of this discussion. As hereinafter indicated, it is the county assessor who has authority to make a determination in this matter; thus, it will be necessary to document all facts and provide necessary documents as requested to him.

issuance of an opinion letter. However, our workload is such that such meetings are very rare and are scheduled only for those cases where, perhaps because of the complexity of the matter, it is not feasible for us to obtain a clear understanding of the facts any other way. In this case, you have not shown in your letter of June 7, 1995 why a meeting is necessary. You have communicated your position clearly and have provided documentation including the 1994 contracts. Thus, it does not appear that a meeting prior to the issuance of this opinion letter would be productive.

LAW AND ANALYSIS

Background

In 1972, Senate Bill No. 357 relating to the taxation of property of historical significance was enacted as Stats. 1972, Ch. 1442, p. 3159. As a result, Government Code sections 50280-50290 and Revenue and Taxation Code sections 439-439.4 were enacted.³ In effect, the Legislature has established special valuation rules for qualified historical property. To qualify for the special valuation, property must first meet certain historical value criteria and the owner must enter into a contract with the city or county for the preservation of the property.

Section 439 provides:

For the purposes of this article and within the meaning of Section 8 of Article XIII of the Constitution, property is "enforceably restricted" if it is subject to an historical property contract executed pursuant to Article 12 (commencing with Section 50280) . . . of the Government Code.

Section 439.1 provides:

For purposes of this article "restricted historical property" means qualified historical property, as defined in Section 50280.1 of the Government Code, which is subject to a historical property contract executed pursuant to Article 12 (commencing with Section 50280) . . . of the Government Code. . . .

As further background for this legal analysis, we note that section 402.1 recognizes that there are a number of other enforceable restrictions which affect the assessment of land. It appears that the 1985 conservation easements herein would, at the least, fall within section 402.1 which in 1985 enumerated some

³ The applicable Revenue and Taxation Code sections were originally numbered 1161-1162.

restrictions but also provided that its enumeration was not inclusive; that section provided in pertinent part in subdivision (a) that:

In the assessment of land, the assessor shall consider the effect upon value of any enforceable restrictions to which the use of the land may be subjected. These restrictions shall include, but are not limited to, all of the following:

. . .

Presumably, some consideration of the 1985 conservation easements was made by the assessor in the valuation of the properties at issue for the appropriate fiscal years pursuant to section 402.1.

A 1993 amendment specifically adds conservation easements to the list of enforceable restrictions to which the use of the land may be subjected; section 402.1, subdivision (a)(8) provides:

A recorded conservation, trail, or scenic easement, as described in Section 815.1 of the Civil Code, that is granted in favor of a public agency, or in favor of a nonprofit corporation organized pursuant to Section 501(c) (3) of the Internal Revenue Code that has as its primary purpose the preservation, protection, or enhancement of land in its natural, scenic, historical, agricultural, forested, or open-space condition or use.

Under the 1993 amendment to section 402.1, enforceable restrictions specifically included conservation easements based on historical factors. However, even without the amendment, properties subject to conservation easements were considered to have been subject to enforceable restrictions.

Valuation pursuant to section 402.1

Based on section 402.1, consideration of the conservation easements in the valuation of the properties prior to the signing of the contracts in 1993 and 1994 was proper. The question herein is whether those properties were subject to a historical property contract(s) pursuant to sections 439 et seq. prior to 1993 or 1994, thus entitling them to the valuation method used to value section 439 historical properties.

Section 439 - effective date/retroactive application

As of March 1, 1993, according to the County Assessor's office, all seven properties were valued pursuant to section 439. Presumably, all seven properties were valued pursuant to section 439 in 1994 and in 1995 also.

You request that the section 439 historical property status for the properties relate back to a time prior to the signing of the 1994 and 1993 contracts. The 1994 contract for the Granary (A.P.N.) provides that:

The term of this contract shall be ten (10) years, commencing with the tax year 1987-1988.⁴

A parallel clause in the contract for the Warehouse (A.P.N.) commences with the fiscal year 1989-90.

Section 439.4, however, provides:

No property shall be valued pursuant to this article unless an enforceable restriction meeting the requirement of Section 439 is signed, accepted and recorded on or before the lien date for the fiscal year in which the valuation would apply.

Based on section 439.4, we see no basis for the contracts to relate back to a period prior to the date of the 1993 signing, acceptance and recordation. Under section 439.4, no property can be valued thereunder unless the requirements of that section have been met.

Section 439 contracts compared to conservation easements

You contend that the effective dates of commencement of section 439 historical property status are set out in the 1994 contracts, that the method of valuation set out in section 439.2 should be applied to the years at issue and a refund given. You argue that documents signed in 1985 identified as "Conservation Easements" or, in the alternative, the conservation easements when taken together with the 1994 "Supplemental Contracts", met the criteria of historical property contracts. You ask that we consider substance over form and agree with your own conclusion that the properties at issue have in fact met all significant criteria of sections 439 et seq. notwithstanding that there was no signing, acceptance, and recordation on or before the respective lien dates.

We note that the statutory provisions related to conservation easements are separate and distinct from the statutes related to historical property contracts. Historical properties are addressed in sections 439 - 439.4 and Government Code sections 50280 - 50290 and conservation easements are addressed in section 402.1 and in Civil Code section 815.1. The 1993 amendment to section 402.1 to specifically include conservation easements reinforces the distinction.

⁴ It is assumed herein that "tax year" means "fiscal year".

Conservation easements are similar to the historical property contracts in some ways. The Warehouse was apparently placed on the National Register of Historic Places on January 13, 1986 and thus is a "qualified historical property" within the meaning of Government Code section 50280.1. Also, the terms of the conservation easements are for more than ten years and are binding upon all successors in interest of the owner as required by Government Code section 50281.

However, the conservation easements are not as extensive as the requirements set out in the Government Code. The conservation easements are limited to the "facades of the buildings"; the owners (grantors) contracted not to make any change in the facades of the buildings. This is a lesser requirement than historical property contracts pursuant to which, under Government Code section 50280, governmental legislative bodies may contract with property owners to restrict the uses of the properties to carry out the purposes of the related statutes. Government Code section 50281, subdivision (b)(1) at the time of signing of the 1985 conservation easements provided:

Where applicable, the contract shall provide:

- (1) For the preservation of the qualified historical property and, when necessary, to restore and rehabilitate such property to conform to the rules and regulations of the Department of Parks and Recreation.
- (2) For reasonable public access to the property, including visual observation of the exterior. If the interior of the premises relates to the property's eligibility as a qualified historical property, the owner shall also agree to public access to the interior of the premises, at least to the extent of allowing tours on a limited basis.
- (3) For reasonable access to the interior and exterior of the premises to students of history, architecture, landscape architecture, interior design, archaeology, and similar disciplines, and to representatives of local, state, and federal government conducting recording and survey programs.
- (4) For such periodic examinations of the interior and exterior of the premises by the assessor, the Department of Parks and Recreation, and the State Board of Equalization as may be necessary to determine the owner's compliance with the contract.

In addition, Government Code section 50282 relates to the extension or nonrenewal of a contract. Subdivision (a) of this

section provides that either party (the grantor/property owner or the legislative body receiving the property/City of) shall have the right to not renew the contract with proper notice. As the conservation easements at issue are in perpetuity, they do not have such clauses. Thus, the conservation easements do not meet this requirement of Government Code section 50282. Further, the conservation easements do not meet the important requirements set out in section 439.4 that the enforceable restriction meeting the requirement of section 439 be signed, accepted and recorded prior to the lien date for the fiscal year in which the valuation would apply.

Based on the above, we conclude that the conservation easements signed in 1985 differ not only in form but also in substance from the section 439 contracts and do not meet the requirements of the Government Code pertaining to historical properties.

1994 contracts and 1985 contracts-contract principles

You argue that the 1994 contracts "supplement" the 1985 conservation easements and therefore, the 1985 conservation easements meet the historical properties requirements as set out in the Government Code and sections 439 et seq. You note that the 1994 contracts themselves provide for some relation back, as evidenced by the retroactive clauses wherein the commencement date of the contract precedes the signing of the contract by a number of years.

In terms of contract law, we note that it is the county assessor who has the responsibility to assess your property. The county assessor was not a party to the 1985 or 1994 contracts and, pursuant to general contract law principles, is not bound by their terms. Thus, that you and the City of agreed that the 1994 contract "commence" prior to its signing does not limit the county assessor in his independent determination of the applicable facts, applicable law and application of the applicable law to the facts for the years at issue.

Because sections 439 et seq. do not allow for retroactive application, it is our opinion that the valuation standards set out in section 439.2 may not be applied prior to the date of the signing, acceptance and recordation of the historical property contracts pursuant to Government Code section 50280 et seq. and section 439.4.

Untimely filing for refunds for fiscal years 1987/88, 1988/89 and 1989/90 for the Granary and 1989/90 for Warehouse

A further basis for denying the refund of property taxes for these years, assuming taxes were paid in a timely manner, is section 5097, subdivision (a) which provides:

No order for a refund under this article shall be made, except on a claim:

. . .

(2) Filed within four years after making the payment sought to be refunded . . .

Applying that section to the facts of this case, we note that property taxes for fiscal year 1989/90 were due by December 10, 1989 and April 10, 1990 and we assume, paid by those dates. A claim for refund filed after June 1994 is filed more than four years from those payment dates. Thus, it would be barred by section 5097. Similarly, claims for refund for the prior fiscal years at issue would also be barred as they were not filed within four years after making the payments sought to be refunded.

Doctrine of equitable tolling

You argue that section 5097 should not apply; that the four year statute should be tolled pursuant to the doctrine of equitable tolling because the owners were waiting for contract approval from the City of _____ and could not pursue a request for refund until the historical property contract was signed. Further, you argue that the approval process was delayed by the City of _____ and that the delays were substantial.

The doctrine of equitable tolling is an equitable remedy outside the authority of administrative agencies. In seeking application of this doctrine, you are in effect seeking an exemption or waiver from the four year limitation set forth in section 5097. There is no statutory basis for such exemption or waiver. A local county assessor lacks authority to not administer or not enforce a statute absent an appellate court decision on point declaring the statute to be unconstitutional. See Section 3.5, Article III of the California Constitution. Also, a local county assessor does not have equitable jurisdiction; county superior courts have jurisdiction in most cases in equity. See Section 10, Article VI of the California Constitution. Thus, it is only in the courts that this equitable doctrine can be applied.

IN SUMMARY

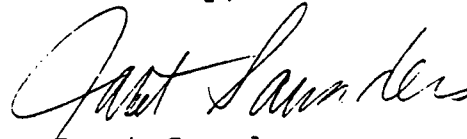
It is our opinion that refunds should not be paid for the following reasons: some of the claims are untimely and application of the doctrine of equitable tolling is not a remedy within the authority of the county assessor; while the conservation easements meet some of the criteria of historical property set out in sections 439 et seq. and the Government Code sections cited above, there are critical differences and there is no basis to waive the requirement of signing, acceptance and recordation which section 439.4 specifically requires; lastly,

the contracts between the city and the grantors are not binding on the county assessor who is obliged to make an independent determination based on applicable facts and law.

The views expressed in this letter are, of course, only advisory in nature. They are not binding upon the assessor of any county. You may wish to consult the County Assessor in order to confirm that the described property will be assessed in a manner consistent with the conclusions stated above.

Our intention is to provide courteous and helpful responses to inquiries such as yours. Suggestions that help us to accomplish this goal are appreciated.

Sincerely,



Janet Saunders
Tax Counsel

JS:jd

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cc:

Mr. John Hagerty, MIC:62
Mr. Richard Johnson, MIC:64
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