

Memorandum

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

Date: January 23, 2008

From: Andrew Jacobson
Tax Counsel

Subject: *New Construction for Resale Exclusion*

This is in response to Ms. [redacted]'s June 11, 2007, e-mail to Bradley Heller, Tax Counsel III, by which she forwarded an earlier e-mail sent to her by Ms. G [redacted], Supervising Appraiser in the Contra Costa County Assessor's Office. In these e-mails, Ms. S [redacted] and Ms. G [redacted] asked several questions related to Revenue and Taxation Code¹ section 75.12, subdivision (a)(1)(A) (the new construction for resale exclusion) and section 75.12, subdivision (a)(1)(B) (the automatic new construction for resale exclusion).

Facts and Questions Presented

Ms. S [redacted]'s e-mail presented the following scenario. An owner (Developer 1) subdivides a parcel of property and qualifies for the automatic new construction for resale exclusion. Developer 1 sells a number of subdivided lots to a subsequent owner (Developer 2). Developer 2 finishes building on the lots purchased.

Ms. S [redacted] and Ms. G [redacted] raised the following questions:

1. If Developer 1 sells less than five lots to Developer 2, will the automatic new construction for resale exclusion apply?
2. If Developer 2 purchases three lots from Developer 1 and three lots from a different subdivision owned by Developer 1, will Developer 2 qualify for the automatic new construction for resale exclusion?
3. If a parcel with two existing residences is split into five parcels, with two of the parcels each containing one of the existing residences, will the owner of the five parcels qualify for the automatic new construction for resale exclusion?

¹ All statutory references are to the Revenue and Taxation Code unless otherwise indicated.

Law and Discussion

A reassessment of property occurs upon the date of a change in ownership or the date of completion of new construction. (Cal. Const. art. XIII A, § 2; see also Rev. & Tax. Code, §§ 60 and 70 et seq.) Section 75.12, subdivision (a)(1)(A) provides an exclusion from reassessment for new construction that the owner does not intend to use or occupy even though the new construction is available for use by the owner. However, in order for the exclusion to apply, the owner must provide the assessor notice of his intent not to use or occupy the property prior to or within 30 days of the commencement of construction. Section 75.12, subdivision (a)(1)(B) provides that the new construction for resale exclusion is automatic and no notice is required *if all three of the following conditions are met*:

1. The property is subdivided into five or more parcels in accordance with the Subdivision Map Act (Division 2 (commencing with section 66410) of Title 7 of the Government Code), or any successor to that law;
2. A map describing the parcels has been recorded; and
3. Zoning regulations that are applicable to the parcels or building permits for the parcels require that, except for parcels dedicated for public use, single-family residences will be constructed on the parcels. (Rev. & Tax. Code, § 75.12, subd. (a)(1)(B)(i) through (a)(1)(B)(iii).)

Failure to qualify for the new construction for resale exclusion either automatically or by providing notice to the assessor will result in a reassessment of the property on the date the construction is completed.

With regard to subsequent owners of new construction, it has long been the Legal Department's opinion that section 75.12, subdivision (a)(1)(A) requires *each* subsequent owner to qualify for the new construction exclusion. (See Letter to Assessors No. 83/132 and the attached letters dated May 20, 1993, and November 25, 1997.) Further, the test for the automatic exclusion under section 75.12, subdivision (a)(1)(B) must also be applied to each subsequent owner. Therefore, if any owner fails to qualify for the automatic exclusion, he must provide notice to the assessor as required under section 75.12, subdivision (a)(1)(A). Likewise, if any prior owner failed to qualify for the exclusion under section 75.12, subdivision (a)(1)(B), this does not affect the eligibility of any subsequent owner for the automatic exclusion. (See November 25, 1997 letter, p. 4.) There is neither any language in section 75.12, subdivision (a)(1)(B) nor any legislative history showing that the Legislature wished to create a one-time exclusion that would apply to all subsequent owners who do not occupy or use the property. Thus, the new construction for resale exclusion does not transfer with the parcels from one owner to another. Rather, the test for the automatic exclusion under section 75.12, subdivision (a)(1)(B) must be applied to each subsequent owner.

Question 1: If Developer 1 sells fewer than five lots to Developer 2, will the automatic new construction for resale exclusion apply?

Answer: No. Since each subsequent owner must qualify for the new construction exclusion separately, Developer 2 will not qualify for the automatic new construction for resale exclusion if he does not purchase five or more parcels.

As explained above, section 75.12 applies to each owner separately. Thus, if Developer 2 complies with subdivision (a)(1)(B)(i) of section 75.12 by purchasing five or more lots from Developer 1, then, assuming that the requirements of subdivisions (a)(1)(B)(ii) and (a)(1)(b)(iii) have been satisfied, Developer 2 does not need to notify the assessor that he does not intend to use or occupy the property. However, if Developer 2 purchases less than five lots from Developer 1, he must timely notify the assessor of his intent not to use or occupy the property in accordance with section 75.12, subdivision (a)(1)(A).

A related issue arises if Developer 2 initially purchases fewer than five lots from Developer 1, followed by another transaction in which Developer 2 purchases a second group of lots from the same subdivision, with the result that the Developer 2 now owns five or more lots from the same subdivision. Upon Developer 2's acquisition of the first group of lots, since Developer 2 initially acquired fewer than 5 lots, Developer 2 would have to provide notice to the assessor under section 75.12, subdivision (a)(1)(A) that he or she does not intend to occupy or use the property in order to avoid a reassessment on the date of completion. Thereafter, upon the acquisition of the second group of lots from the same subdivider, which increases Developer 2's total ownership to 5 or more lots, Developer 2 may qualify for the automatic exclusion for new construction for resale for the second group of lots provided that all other requirements of the exclusion are satisfied. Alternatively, if Developer 2 acquires the second group of lots prior to or within 30 days of the commencement of construction on the first group of lots, thereby increasing his total holdings to five or more lots, no notice would be required for either the first or the second group of lots.

Question 2: If Developer 2 purchases three lots from Developer 1 and three lots from a different subdivision owned by Developer 1, will Developer 2 qualify for the automatic new construction for resale exclusion?

Answer: No. The parcels must come from the same subdivision.

Under Government Code section 66424, "subdivision" means "the division, by any subdivider, of any unit or units of improved or unimproved land, or any portion thereof, shown on the latest equalized county assessment roll *as a unit or as contiguous units*, for the purpose of sale, lease or financing, whether immediate or future." (Emphasis added.) Therefore, a buyer cannot combine parcels from different subdivisions, even if they are located next to each other, in order to qualify for the automatic new construction for resale exclusion under section 75.12, subdivision (a)(1)(B).

Question 3: If a parcel with two existing residences is split into five parcels, with two of the parcels each containing one of the existing residences, will the owner of the five parcels qualify for the automatic new construction for resale exclusion?

Answer: No. Parcels containing existing residences do not count towards the five parcel minimum.

Only lots on which “single-family residences *will be* constructed” qualify for the automatic exclusion. (Emphasis added.) (Rev. & Tax. Code, § 75.12, subd. (a)(1)(B)(iii).) Therefore, parcels containing existing residences do not count towards the five parcel minimum needed to qualify under section 75.12, subdivision (a)(1)(B).

I hope I have been able to provide answers to all these questions. If you or Ms. S have any further questions, please do not hesitate to call me at 324-2579.

AJ/ef
Attachments

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cc: