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August 12, 1988

Attention

Subject: Possessory Interest in Boat Dock Easement

Dear

This is in response to your letter of June 14, 1988 to Mr. Richard H. Ochsner in which you request our opinion as to whether a taxable possessory interest was created as a result of the following facts concerning a subdivision in the city of Oxnard.

The subdivision is the latest addition to the Mandalay Bay development which is located just north of Channel Islands Harbor. The development consists of waterfront homes constructed around a manmade marina. In exchange for the right to construct the homes the developer, who was the fee owner, has deeded all of the waterways to the City of Oxnard. The developer retained and easement to construct boat docks. The homes that were previously constructed in Mandalay Bay each had their own boat dock or slip. However, in this most project the homes do not have their own boat docks. The developer is constructing a small marina in the project in which he will lease boat slip spaces. The developer does not have a written agreement with the city regarding the easement and does not pay any rent. Although, we have not been provided with a copy of the deed in this matter, we assume for purposes of our analysis that the interest you describe as an easement. Since an easement is, by definition, an interest in the land of another (4 Witkin, Summary of Cal. Law (9th ed. 1987) p. 614), we also assume the City of Oxford and not the developer is the owner of the fee simple estate in the land in which the easement was retained.

As indicated in your letter, the question here is whether a taxable possessory interest was created as a result of the retention of the easement described above.

Property Tax Rule 21(b) defines "taxable possessory interest" in relevant part as a possessory interest in nontaxable publicly owned real property" Rule 21(a), in turn, defines "possessory interest" to mean "an interest in real property which exists as a result of possession, exclusive use, or a right to possession or exclusive use of land and/or improvements unaccompanied by the ownership of a fee simple or life estate in the property. Such an interest may exist as the result of:

"(1) A grant of a leasehold estate, an easement, a profit prendre, or any other legal or equitable interest of less than freehold, regardless of how the interest is identified in the document by which it was created, provided the grant confers a right of possession or exclusive

use which is independent, durable, and exclusive of rights held by others in the property.” (Emphasis added.)

In addition to the factors of independence, durability and exclusiveness, the courts also require that the user or possessor of publicly owned real property also receive a private benefit as a result of such use or possession. (Cox Cable San Diego, Inc. v. County of San Diego (1986) 185 Cal. App.3d 368, 377 and cases cited therein.) As pointed out by the court in Cox Cable, an easement holder may have a possessory interest provided the elements of exclusiveness, durability, independence and private benefit are present. (Cox Cable, supra, at p. 377.)

Exclusiveness

The test for exclusiveness is not exclusive possession against all the world including the owner. (Wells Nat. Services Corp. v. County of Santa Clara (1976) 54 Cal.App.3d 579. The right of use, however, must carry with it the degree of exclusiveness necessary to give the user something more than a right in common with others. (United States of America v. County of Fresno (1975) 50 Cal. App.3d 633, 638.) To be exclusive, such use “must not be one shared by the general public and, at least until cancelled, must be enforceable against the public entity which permits the use.” (Freeman v. County of Fresno (1981) 126 Cal.App.3d 459, 463, 464; see also Property Tax Rule 21(e).)

Durability

To satisfy the requirement of durability, the agreement must confer use for a determinable period and the use has to be reasonably certain to last for that period. (Kaiser v. Reid (1947) 30 Cal.2d 160.)

Independence

To qualify as a possessory interest, the right to use property must be sufficiently exclusive, durable and independent of the public owner to constitute more than an agency. (Pacific Grove-Asilomar Operating Corp. v. County of Monterey (1974) 43 Cal.App.3d 675, 684.) “If, in practical effect, one of the parties has the right to exercise complete control over the operation, an agency relationship exists; . . .” (Nichols v. Arthur Murray, Inc. (1967) 248 Cal.App.2d 610, 613.) As a general proposition, if exclusiveness and private benefit are present, the other requirements (durability and independence) are usually found to exist as well. (See Freeman v. County of Fresno, supra, at p. 463.)

Private Benefit

The requirement of private benefit is met if there is an opportunity for the holder of the interest to make a profit. (Wells Nat. Services Corp. v. County of Santa Clara, supra, at p. 585.)

Although we have not seen the deed or other instrument which created the easement we assume from the fact that the developer “is constructing a small marina in the project in which he will lease boat slip spaces” that the elements of exclusiveness, durability, independence and private benefit are present.

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In Lucas v. County of Monterey (1977) 65 Cal.App.3d 947, the plaintiff had an agreement with a tax exempt harbor district permitting him to berth his boat in a designated slip. Under the terms of the agreement, plaintiff could not assign his slip without the harbor district's permission, and if plaintiff was absent, the district could reassign the slip to another boat. The agreement was revocable by the district without notice but it was understood that the district would not revoke as long as the slip was being fully utilized.

The slip itself was an area outlined by a floating dock which was affixed to the harbor floor by pilings. Plaintiff was entitled to attach mooring lines to fixtures on the dock and had the right to use the dock space adjacent to his boat for storage. Plaintiff was also entitled to use fresh water which was piped into the dock area and electrical power which was connected to it.

The court of appeal concluded that the rights conferred on plaintiff by the agreement resulted in a taxable possessory interest.

From the limited facts provided here, it appears that the rights of the developer in this case are similar to and at least as substantial as those in the Lucas case. Accordingly, based on the facts provided and the forgoing discussion, we are of the opinion that the retention of the easement in question created a taxable possessory interest.

Having concluded that a taxable possessory interest was created, the question arises whether a change in ownership has occurred which will permit reappraisal of the retained interest. Although Revenue and Taxation Code section 61(b) and Property Tax Rule 462(e) provide that the creation of a taxable possessory interest for any term is a change in ownership, Rule 462(e) provides an exception "when the interest, whether an estate for years or an estate for life, is created by a reservation in an instrument deeding the property to a tax exempt public entity."

In our view, this language is equally applicable where a possessory interest is created by the retention of an easement in an instrument deeding the property to the tax exempt public entity. It therefore follows that no change in ownership occurred as a result of the creation of a possessory interest in this case. As a result, that portion of the enrolled taxable value which is attributable to the easement should continue to be assessed to the developer without reappraisal. This conclusion, however, assumes that a conveyance was made by the developer of all his rights in the property except his interest as an easement holder. If the conveyance was in reality a grant of the entire fee from the developer to the City of Oxnard and a grant of the easement from the City of Oxnard back to the developer, there would be a change in ownership under section 61(b) and Rule 462(e). (See Letter to Assessors No. 85/128 dated December 5, 1985.)

If you have further questions regarding this matter, please let us know.

Very Truly Yours,

Eric F. Eisenlauer
Tax Counsel

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