

# Memorandum

To : Mr. Gene DuPaul

Date : January 13, 1989

From : Robert R. Keeling

Subject : City of Electrical System; Question of Possessory Interest

This is in response to your memorandum dated December 5, 1988. You attached copies of contract documents between the City of and E , Inc. (a subsidiary corporation of Co.) whereby E , Inc. (E ) contractually agreed to operate the electrical distribution system owned by the City of (City), all within the City's boundaries. You ask if this 1977 agreement and supplements thereto creates an assessable possessory interest to E .

A taxable possessory interest (PI) is a possessory interest in nontaxable publicly owned real property. A PI in such government property arises when the user has sufficient rights or interest in the use, possession and enjoyment of the property to elevate that interest to a proprietary right subject to assessment. Each case is decided on a case-by-case basis, but the general guiding rule in deciding whether a possessory interest becomes taxable is to weight the factors of exclusiveness, independence, durability and private benefit of the possessory rights against relative impermanence, subjection to control and public participation. Not all occupancies or uses of tax-exempt government-owned lands or improvements by private individuals are taxable as possessory interests. To give rise to a PI, the right of possession or occupancy must be more than a naked possession or use; it must carry with it either by express agreement or tacit understanding of the parties, the degree of exclusiveness necessary to give the occupier or user something more than a right in common with others, or in the case of employment, something more than the means for performing his employer's purpose, so that it can be said realistically that the occupancy or use substantially subserves an independent, private interest of the user or occupier.

As I understand the rights and duties of the contracting parties, the City has merely hired E to operate its electrical system. E agrees to keep the City's system in good operating condition, purchase and provide power to the system for use by the customers within the system, and bill and collect from such customers for a fee. All system property remains in the ownership of the City and

all monies collected are turned over to the City. E is not permitted any operational or entrepreneurial liberties except as described in the contract as is to be performed for the benefit of the City.

Such a contractual relationship is in the nature of a principal and agent relationship. The utilization of government-owned property by an agent for the benefit of the government principal does not establish a possessory interest in the agent (see Pacific Grove-Asilomar Operating Corporation v. County of Monterey, 43 Cal.App.3d 675) The use of such property by the agent is peculiarly necessary for the furtherance of the contract. For example, in 1943 the County of Los Angeles attempted to tax the interest Douglas Aircraft had in uncompleted aircraft owned by the U.S. Government. At the time of this assessment, it was not established that personal property was exempt from possessory interest taxation. (See General Dynamics v. Los Angeles County, 51 Cal.2d 59, wherein the court held that the Legislature had not defined personal property as including a right to its possession as it has real property.) In Douglas Aircraft Company v. Bryan (1943) 57 Cal.App.2d 311, the court found Douglas had no PI in the uncompleted aircraft because possession was not usufructuary. A usufructuary right is the right of using and enjoying the benefits of a thing belonging to another, without impairing the substance and is a property right. The use of the partially completed aircraft by Douglas was entirely for the benefit of the Government, not it. The fact Douglas was paid to build the aircraft made no difference. Douglas's compensation was not received because it made use of the aircraft but because it made use of the materials and aircraft for the Government's benefit.

Such is the case here with the City and E . The use of the City's system by E is for the City's benefit, not E 's. Absent a usufructuary right of E in the City's system, there can be no possessory interest. I conclude that E does not have a PI in the City's electrical system.

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