STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION
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May 4, 1990

Mr. Bruce M. Cook
Deputy County Counsel
Office of the County Counsel
County of San Luis Obispo
County Government Center, Room 386
San Luis Obispo, CA 93408

Dear Mr. Cook:

This is in response to your letter of April 9, 1990, to Mr. Richard H. Ochsner in which you request our opinion concerning the assessability of possessory interests in parking spaces located on land owned by the County and used by County employees. The initial inquiry was made by the County Assessor in a memo to you dated March 15, 1990 in which the Assessor listed three factual scenarios. The Assessor recently expanded the list to the following five examples (see letter to Richard Ochsner dated April 13, 1990):

1. Certain spaces are assigned to individuals filling various positions. Example: parking spaces are assigned to Supervisor District One, Supervisor District Two, CAO, etc. These spaces are clearly designated for one individual, as only one individual serves in that capacity.

2. The Tax Collector is assigned several spaces. The Tax Collector utilizes one space and has assigned the other spaces to particular individuals in his office. Those spaces are used by those individuals.

3. The Assessor has been assigned 3 spaces. The Assessor utilizes one space, has assigned a second space to a particular employee and utilizes the third space as a reward for Employee of the Month.

4. The Auditor has been assigned several spaces. The Auditor assigns one space to himself, but historically has allowed employees to use that space approximately 90% of the time. One employee may use that space for several months and then abandon it to another employee who may only use it for a few weeks. Other spaces assigned to the Auditor are permanently occupied by particular individuals in that office.

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5. There may be some spaces that are assigned to a particular department, but they are used on a first come, first serve basis, with no particular individual having priority on that space although that remains totally discretionary on the part of the department head.

You suggest and we agree that the first circumstance is resolved by 62 Ops.Cal.Atty.Gen. 143 (1979) in which the Attorney General concluded that county officials may have a taxable possessory interest in a vehicle parking space assigned by the county and located on property owned by the county.

It is your view, however, that the remaining circumstances raise the following additional issues not covered by the Attorney General's Opinion.

1. Who is to be taxed in those cases where the spaces are assigned to a department rather than to specifically designated employees; and

2. Who is to be taxed in cases where a department or a designated employee are assigned spaces, and the department or employee elects not to utilize those spaces, and instead authorize other employees to use them.

We will answer these questions in the factual context in which they were raised, i.e., examples 2 through 5 of Mr. Frank's letter of April 13, 1990 to Mr. Richard Ochsner.

Revenue and Taxation Code section 107 defines "possessory interest" in relevant part as "[p]ossession of, claim to, or right to the possession of land or improvements, except when coupled with ownership of the land or improvements in the same person."

The Board has expanded on this definition in Property Tax Rule 21 in relevant part as follows:

> (a) "Possessory interest" means 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 a 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;

(2) Actual possession by one intending to use the property to the exclusion of any other interfering use, irrespective of any semblance of actual title or right.

(b) "Taxable possessory interest" means a possessory interest in nontaxable publicly owned real property, as such property is defined in section 104 of the Revenue and Taxation Code, and in taxable publicly owned real property subject to the provisions of sections 3(a), (b) and 11, Article XIII of the Constitution.

(c) "Possession" means:

(1) Actual possession, constituting the occupation of land or improvements with the intent of excluding any occupation by others that interferes with the possessor's rights, or

(2) Constructive possession, which occurs when a person, although he is not in actual possession of land or improvements, has a right to possession and no person occupies the property in opposition to such right.

(d) "Possessor" means the party in possession or having exclusive use.

(e) "Exclusive use" means the enjoyment of a beneficial use of land or improvements, together with the ability to exclude from occupancy by means of legal process others who interfere with that enjoyment. Co-tenants may each make such use of land or improvements without impairing the other's right to use the property, as this constitutes but a single use jointly enjoyed. Exclusive use is not destroyed by one or more of the following:

(1) Multiple use by persons making different uses of the same property in such a manner that they do not prevent the enjoyment of co-existing rights held by others, as, for example, the development of mineral resources by one person and the enjoyment of recreational uses by others;

(2) Concurrent use when the extent of each party's use is limited by the other party's right to use the property at the same time, as, for example, when two or more parties each have the independent right to graze cattle on same land;

(3) Alternating use when the duration of each party's use is limited, as, for example, the use of premises by a professional basketball team on certain days of each week and by a professional hockey team on certain other days;

(4) Persons lawfully passing over or taking things from the land;

(5) The existence of noninterfering easements, covenant rights, or servitudes in other persons or attached to other lands;

(6) Occasional trespassers.

The Attorney General's opinion at issue here provides in relevant part at page 145:

> "In the area of a government employer-employee relationship, two elements are necessary for establishing the employee's taxable possessory interest in the government's property. First, the employee must have more than a right in common with others; his or her use must not be subject to an unreasonably interfering use by others. (Citations omitted.) Second, the employee's use must substantially subserve an independent, private interest of the user. (Citations omitted.) The test, therefore, is whether the employee has a sufficiently 'exclusive' possession (to the exclusion of any unreasonably interfering use by others) and a 'valuable' use not subordinate to the primary interests of the employer. (Citations omitted.)"

For purposes of this opinion, we will assume that a department head, i.e., Tax Collector, Auditor or Assessor has the authority to assign spaces allocated to his or her department to any person employed by the department including himself or herself but that such department head can only make personal beneficial use of one such space. It is our understanding that similar spaces are rented for approximately $35 per month but that no charge is made for the spaces in question. Based on the foregoing, our conclusions are as follows:

2. The Tax Collector and each of the particular individuals to whom a space has been assigned by the Tax Collector clearly have a taxable possessory interest in one parking space under the guidelines described above. Each possessory interest is properly assessable to the person owning 1/, claiming, possessing or controlling such possessory interest on the lien date pursuant to Revenue and Taxation Code section 405(a).

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Fn. 1/ A possessory interest has been held to be property "owned" for purposes of the welfare exemption (Tri-Cities Children's Center, Inc. v. Board of Supervisors (1985) 166 Cal.App.3d 589).

3. The Assessor and the particular employee to whom a space has been assigned each have a taxable possessory interest which is assessable to each of them under section 405 as in No. 2 above.

Although the Employee of the Month has a right to exclusive use of a parking space for a period of only one month, it is clear under the standards described above that it can be argued that such use would nevertheless qualify as a taxable possessory interest. In that event, a new one-month possessory interest would be created and terminated each month. The Employee of the Month entitled to use the parking space on March 1 would, of course, be subject to assessment of his or her possessory interest on the regular roll. Also, since the creation of a taxable possessory interest is a change in ownership under section 61(b), a supplemental assessment would be required each month under section 75 et seq. In accordance with LTA 86/12 which is enclosed, the supplemental assessment each month would be the market value of the newly created one-month possessory interest.

Crucial to the determination of whether the Employee of the Month has a taxable possessory interest, however, is whether the second part of the two-part test set forth in 62 Ops.Cal.Atty.Gen. 143 has been satisfied. It must therefore be determined whether the employee has "a 'valuable' use not subordinate to the primary interests of the employer." This determination requires a comparison of the benefits to the employer with the benefits to the Employee of the Month resulting from use of the parking space. While the right to exclusive use of a parking space for one month may be de minimus and thus probably not a substantial enough interest to constitute real property, we believe the Assessor is best able to determine the relative benefits to the County and the user of the parking space under the Employee of the Month program. Accordingly, if the Assessor finds that such benefits favor the County, he can properly conclude that no taxable possessory interest exists on the ground that the employee's use is subordinate to the primary interests of the County.

4. With respect to the space assigned to the Auditor, the facts suggest that he has not assigned his space to any other person but simply informally permits other employees to use it 90 percent of the time. Although it is not completely clear, it appears that the Auditor has a right to possession of the space anytime he chooses to use it which is superior to the right of any employee who temporarily may be using the space. Accordingly, in our view, the Auditor has possession of the space under Rule 21(c)(2) and thus a taxable possessory

interest which is assessable to him under section 405. However, if the Auditor has assigned away his right to use the space to another person, then that other person would have a taxable possessory interest assessable to him or her.

5. With respect to spaces which are assigned to a particular department but which are used on a first come first served basis, we are of the opinion that the department head has a possessory interest in one space which is assessable to him or her as is the case with the Auditor as discussed above. With respect to the remaining spaces, there are insufficient facts to determine whether any employees have sufficient possession or exclusive use of a parking space to constitute a possessory interest under the guidelines of rule 21 and the above-referenced Attorney General's Opinion. However, if the number of employees authorized to use the spaces exceeds the number of spaces available, we doubt that any employee would be deemed to have a taxable possessory interest since no employee would "have more than a right in common with others" and the use of a space by any single employee could "be subject to an unreasonably interfering use by others."

The views expressed in this letter are, of course, advisory only and are not binding on either you or the County Assessor.

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

Very truly yours,

Eric F Eisenlauer

Eric F. Eisenlauer
Tax Counsel

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Attachment

cc: Ms. Cindy Rambo
Mr. E. Les Sorensen
Hon. Dick Frank
Mr. John W. Hagerty
Mr. Verne Walton

Opinion No. CV 78-125—March 20, 1979

**SUBJECT:** VEHICLE PARKING SPACE—A county official may have a taxable possessory interest in a vehicle parking space assigned by the county and located on property owned by the county if certain conditions are met.

**Requested by:** COUNTY COUNSEL, YUBA COUNTY

**Opinion by:** GEORGE DEUKMEJIAN, Attorney General
Rodney Lilyquist, Jr., Deputy

The Honorable Walter I. Colby, County Counsel of Yuba County, has requested an opinion on the following question:

May a county official have a taxable possessory interest in a vehicle parking space assigned by the county and located on property owned by the county?

The conclusion is:

A county official may have a taxable possessory interest in a vehicle parking space assigned by the county and located on property owned by the county if certain conditions are met; however, the tax ordinarily would not be imposed because the amount received would be less than the costs of collection.

## ANALYSIS

We are informed that the County of Yuba assigns vehicle parking spaces located in the basement garage of the county courthouse to various county officials and employees. An elected official is assigned one space upon assuming office, and

[2] In Ops. Cal. Atty. Gen. 9161 (1934), we discussed the general principle of sovereign immunity and the application of the exception to the rule where sovereign powers were not impaired. In Ops. Cal. Atty. Gen. NS 701 (1937), we merely stated the general sovereign immunity principle. In Ops. Cal. Atty. Gen. NS 701a (1938), we again stated the general rule without discussing the exception and incorrectly held that "Opinion No. 9161 [was] superseded by Opinion No. NS 701."

each county department is assigned one space for use of a department employee. No charge is made for the use of a space, and no spaces are available for the general public or for other county employees.

The question presented for analysis is whether the designated county officials and employees have taxable possessory interests in their assigned parking spaces so as to give rise to the imposition of an ad valorem property tax. We conclude that such a tax may be imposed for use of the spaces but that ordinarily the interests would be exempt from tax because the amount levied would be less than the cost of collection.

In California, the right to possess and use land or improvements, when not coupled with an ownership interest, is generally treated as a "possessory interest" subject to taxation. (Cal. Const., art. XIII, § 1; Rev. & Tax. Code, §§ 103, 104, 107, 201;[1] *United States of America* v. *County of Fresno* (1975) 50 Cal. App. 3d 633, 638; *Board of Supervisors* v. *Archer* (1971) 18 Cal. App. 3d 717, 724-725.)

Commonly, the taxable possessory interest will be in land that itself is exempt from property taxes because of ownership by the federal, state, or a local government. (*Kaiser Co.* v. *Reid* (1947) 30 Cal. 2d 610, 618; *English* v. *County of Alameda* (1977) 70 Cal. App. 3d 226, 238, 240, 242; *McCaslin* v. *DeCamp* (1967) 248 Cal. App. 2d 13, 16-17; Cal. Admin. Code, tit. 18, § 21, subd. (b).) In such circumstances, the possessory interest tax assessment is not made against the government or the government's interest in the property; the assessment is levied solely against the private citizen's right of use and enjoyment of the property. (*United States* v. *City of Detroit* (1958) 355 U.S. 466, 469-470; *General Dynamics Corp.* v. *County of L.A.* (1958) 51 Cal. 2d 59, 63; *United States of America* v. *County of Fresno, supra,* 50 Cal. App. 3d 633, 640.)

In the factual situation presented for analysis, the real property in question is owned by the County of Yuba, and its interest is constitutionally exempt from property taxation. (Cal. Const., art. XIII, § 3, subd. (b).) The purpose of the county's exemption, however, is not violated by refusing to extend the exemption to private persons who have obtained and enjoy a valuable possessory interest therein. (See *English* v. *County of Alameda, supra,* 70 Cal. App. 3d 226. 238-239.)

Taxable possessory interests in publicly owned land arise in a variety of circumstances, including the grazing of cattle on government land (*El Tejon Cattle Co.* v. *County of San Diego* (1966) 64 Cal. 2d 428; *Board of Supervisors* v. *Archer, supra,* 18 Cal. App. 3d 717), the occupying of residential housing on government land (*United States of America* v. *County of Fresno, supra,* 50 Cal. App. 3d 633, affd. (1977) 429 U.S. 452; *McCaslin* v. *DeCamp, supra,* 248 Cal. App. 2d 13), and the operating of a snack bar at a publicly owned golf course (*Mattson* v. *County of Contra Costa* (1968) 258 Cal. App. 2d 205).

[1] All unidentified section references hereinafter refer to the Revenue and Taxation Code.

However, not all private possession and use of public land is subject to property taxation. Numerous factors must be weighed and considered on a case-by-case basis. (See *Stadium Concessions, Inc.* v. *City of Los Angeles* (1976) 60 Cal. App. 3d 215, 223; *Wells Nat. Services Corp.* v. *County of Santa Clara* (1976) 54 Cal. App. 3d 579, 583; *Pacific Grove-Asilomar Operating Corp.* v. *County of Monterey* (1974) 43 Cal. App. 3d 675, 692.)

In the area of a government employer-employee relationship, two elements are necessary for establishing the employee's taxable possessory interest in the government's property. First, the employee must have more than a right in common with others; his or her use must not be subject to an unreasonably interfering use by others. (See *United States of America* v. *County of Fresno, supra,* 50 Cal. App. 3d 633, 638; *Sea-Land Service, Inc.* v. *County of Alameda* (1974) 36 Cal. App. 3d 837, 842; *Board of Supervisors* v. *Archer, supra,* 18 Cal. App. 3d 717, 725-727.) Second, the employee's use must substantially subserve an independent, private interest of the user. (See *United States* v. *County of Fresno* (1977) 429 U.S. 452, 465-467; *United States of America* v. *County of Fresno, supra,* 50 Cal. App. 3d 633, 638; Cal. Admin. Code, tit. 18, § 28, subd. (b).) The test, therefore, is whether the employee has a sufficiently "exclusive" possession (to the exclusion of any unreasonably interfering use by others) and a "valuable" use not subordinate to the primary interests of the employer. (See *United States* v. *County of Fresno, supra,* 429 U.S. 452, 466; *Kaiser Co.* v. *Reid, supra,* 30 Cal. 2d 610, 618-619; *Pacific Grove-Asilomar Operating Corp.* v. *County of Monterey, supra,* 43 Cal. App. 3d 675, 690-691, 694; *Mattson* v. *County of Contra Costa, supra,* 258 Cal. App. 2d 205, 212.)

Accordingly, even if a government employee's possession and custody of government property is on behalf of and for certain purposes of the government, he or she nevertheless may be taxed for the beneficial personal use of the property. (*United States* v. *County of Fresno, supra,* 429 U.S. 452, 467; *United States* v. *Allegheny County* (1944) 322 U.S. 174, 187-188.) Elements of control of the property, such as the use being nontransferable (*Kaiser Co.* v. *Reid, supra,* 30 Cal. 2d 610, 620; *Mattson* v. *County of Contra Costa, supra,* 258 Cal. App. 2d 205, 211), or temporary (*Board of Supervisors* v. *Archer, supra,* 18 Cal. App. 3d 717, 725), or terminable at the will of the government (*McCaslin* v. *DeCamp, supra,* 248 Cal. App. 2d 13, 18; *Rand Corp.* v. *County of Los Angeles* (1966) 241 Cal. App. 2d 585, 588) or to some extent shared with others (*Sea-Land Service, Inc.* v. *County of Alameda, supra,* 36 Cal. App. 3d 837, 841-842; *Board of Supervisors* v. *Archer, supra,* 18 Cal. App. 3d 717, 725-727), merely go to the *value* of the taxable possessory interest. (*Wells Nat. Services Corp.* v. *County of Santa Clara, supra,* 54 Cal. App. 3d 579, 584; *United States of America* v. *County of Fresno, supra,* 50 Cal. App. 3d 633, 639.)

In the circumstances presented, the parking spaces appear to be under sufficiently "exclusive" control of the officials and employees to meet the first requirement of a taxable possessory interest. Use of the spaces is not subject to interference by the general public or by other county employees; the basement garage is not a public parking lot. As for the second requirement, it would appear that the use of the spaces primarily benefits the officials and employees rather than the county and that such use is not essential in the performance of the county's business; the personal inconvenience and cost of parking elsewhere could be significant in comparison to the county's "benefit."

While it is possible that in some circumstances the use of an assigned parking space could be similar to a forest fighter's use of an ax or fire tower (see *United States* v. *County of Fresno, supra,* 429 U.S. 452, 466 fn. 15) or the use of a desk and office for performing employment responsibilities, it is more likely that a taxable possessory interest will be found in an assigned parking space. The various factors, however, must be considered on a case-by-case basis.

Two final observations are necessary in our discussion. If the use of an assigned parking space is provided by a written contract, a statement in the contract concerning the employee's taxable interest is necessary under section 107.6. More significantly, if the full value of the possessory interest in the parking space causes the total taxes, special assessments, and applicable subventions on the property, up to $400, to be less than the cost of collecting them, the county board of supervisors may exempt the parking space possessory interest from property taxation. (Cal. Const., art. XIII, § 7; § 155.20.) Since ordinarily the full value of a parking space possessory interest would be less than $400 and the collection costs would be more than the amount to be levied, it is apparent that the tax will be imposed only on rare occasion.

The conclusion to the question presented, therefore, is that a county official may have a taxable possessory interest in a vehicle parking space assigned by the county and located on property owned by the county if certain conditions are met; however, the tax ordinarily would not be imposed because the amount received would be less than the costs of collection.