



STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION

450 N STREET, SACRAMENTO, CALIFORNIA
(PO BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)
TELEPHONE (916) 323-7715
FAX (916) 323-3387

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Second District, Stockton

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Executive Director

March 6, 1997

Honorable David Peets
Alpine County Assessor
P.O. Box 155
Markleeville, CA 96120

Dear Mr. Peets:

This is in response to your February 5, 1997, letter wherein you set forth a real property assessment situation concerning property zoned as timberland production you have experienced and asked the following questions:

“Our problem started when a 480 acre parcel, of which 380 acres were zoned TPZ, was split into two parcels when a transfer occurred on 3/30/90. One parcel, consisting of 40 acres all in TPZ zoning, was retained by the original owner, and 440 acres of which 340 acres were in TPZ zoning, was sold to Trust For Public Lands, a non-profit organization. In my opinion, this created a violation of the TPZ zoning regulations. Starting with the 1991-92 assessment year, the valuation method used for arriving at the assessed value was Prop 13 base year plus the appropriate indexing. This method was used up through the 1996-97 assessment year. One 3/14/91, the U.S.F.S. purchased 40 acres from the 440 acres owned by Trust For Public Lands, 30 acres of which was zoned TPZ, and 10 acres of non-TPZ zoned property. As of today’s date, we have not received a joint timber harvest plan, nor has Alpine County notified the respective owners of possible zoning violations. One 11/25/96, the 40 acre parcel that was retained by the original owner was sold. The new owner came to our planning commission and requested a parcel split from one 40 acre parcel into two 20 acre parcels. At this point, Alpine County has not granted this request since we realize there are existing problems that need to be cured first. I would appreciate your opinion on the following questions.

- 1) Concerning the 3/30/90 transfer, did this document create a violation of the TPZ zoning regulations, and if it did, what steps should Alpine County have taken then or now to correct this problem?

- 2) Did the 3/14/91 transfer to the U.S.F.S. violate the TPZ zoning ordinance, and if so what steps need to be taken to correct this?
- 3) What are the responsibilities of the new owner of the 40 acre privately held parcel in dealing with these matters?"

Question 1. 3/30/90 Transfer to The Trust For Public Lands, 440 Acres of Which 340 Acres Were Zoned as Timberland Production

As you are aware, AB 1258/Statutes 1986, Chapter 176, changed the existing system of taxing timber and land on which timber is growing. Beginning with the 1977-78 fiscal year, privately owned land primarily devoted to and used for growing and harvesting timber is zoned for minimum ten-year periods as timberland production, and it is to be valued for property tax purposes, in general, on the basis of its use for growing and harvesting timber only. These changes were accomplished by additions to the Government Code, Sections 51100-51555, and by additions to the Revenue and Taxation Code, Section 431-437.

The zoning of parcels as timberland production pursuant to Government Code Sections 51110 et seq. results from the enactment of a zoning ordinance and completion of other zoning-related matters. The enactment of a zoning ordinance is solely a legislative act and a governmental function. As stated by the court in Tandy v. City of Oakland (1962) 208 Cal.App.2d 609:

“The determination of whether or not to enact a zoning ordinance and the determination of its provisions and terms are entirely within the discretion of the municipal legislative body or other zoning legislative authority, subject to such requirements as may exist relative to study and recommendation by zoning commissions, notices, hearings and initiative and referendum. Such municipal discretion will not be interfered with by the courts except for clear abuse of the discretion or excess of power, and in case of doubt or if the question is fairly debatable, a court cannot substitute its judgment for that of the municipality. In other words, a municipal corporation has a right to determine whether conditions or the public interests demand an exercise of the power to pass a zoning ordinance and to select the measures that are necessary for that purpose. A fortiori, the wisdom or good policy of a zoning ordinance is for a municipality to determine and the courts have nothing to do with it.”

Land zoned as timberland production is enforceably restricted within the meaning of Article XIII, Section 3(j) of the California Constitution, and the restriction is to be enforced by the city or county in a manner to accomplish the purposes of Sections 51110 et seq. and other related Government Code sections (Gov. Code. § 51118). Thus, such parcels are valued pursuant to Revenue and Taxation Code Sections 434.5 and 435; and there is no provision for valuing such parcels on any other basis. Accordingly, before and after the transfer of the 340 acres zoned as timberland production to The Trust For Public Lands, the 380 acres when owned by the original

owner and the 40 acres when owned by the original owner and the 340 acres when owned by The Trust For Public Lands should have been valued pursuant to Revenue and Taxation Code Sections 434.5 and 435.¹

With respect to the 100 acres of non-timberland production zoned property sold to The Trust For Public Lands, presumably, it had an Article XIII A factored base year value in the hands of the original owner, and it received a new Article XIII A base year value upon its acquisition by The Trust For Public Lands.

In your letter, you state that in your opinion, the sale of the 340 acres zoned as timberland production to The Trust For Public Lands while leaving only 40 acres zoned as timberland production with the original owner created a violation of the TPZ zoning regulations. You later state that as of this date, you "have not received a joint timber harvest plan, nor has Alpine County notified the respective owners of possible zoning violations."

Government Code Section 51119.5 states with regard to dividing parcels zoned as timberland production that "parcels zoned as timberland production under this chapter may not be divided into parcels containing less than 160 acres unless the original owner prepares a joint timber management plan prepared or approved as to content by a registered professional forester for the parcels to be created." It continues on to state: "The joint timber management plan shall provide for the management and harvesting of timber by the original and any subsequent owners, and shall be recorded with the county recorder as a deed restriction on all newly created parcels. The deed restriction shall run with the land rather than with the owners, and shall remain in force for a period of not less than 10 years from the date division is approved by the board or council. The division shall be approved only by a four-fifths vote of the full board or council, and only after recording of the deed restriction."

Although Section 51119.5 recognizes that parcels zoned as timberland production may be divided into parcels containing less than 160 acres, it requires that the original owner prepare a joint timber management plan before/when doing so, to be recorded as a deed restriction running with the land, and that the division shall be approved only by a four-fifths vote of the full board and only after recording of the deed restriction.

In those instances in which an original owner so divides his property and fails to prepare the required joint timber management plan, it would appear that the county could seek legal recourse to compel compliance with the statute. Government Code Section 51118 provides in this regard that land zoned as timberland production shall be enforceably restricted within the meaning of Article XIII, Section 3(j) of the California Constitution, and that the restriction shall be enforced and administered by the county in a manner to accomplish the purposes of Section 3(j) and of this chapter (Gov. Code Secs. 51100-51155). And Government Code Section 51116

¹ Another consideration, not addressed herein, is The Trust For Public Lands being an organization that qualifies for the welfare exemption from property taxation and the possibility that the property it acquired is eligible for the exemption. Rather, The Trust For Public Lands is considered herein as an entity whose property is subject to assessment and with respect to which what its assessment should be.

provides that the county may bring any action in court necessary to prohibit a use not permitted with respect to land zoned as timberland production including, but not limited to, an action to enforce the zoning restrictions by specific performance or injunction.

Where an original owner divides his property into parcels, at least one of which consists of less than 160 acres, and fails to prepare the required joint timber management plan, the requirements of Section 51119.5 have not been met. Further, such is an indicia of, or suggests possible use of the parcels, particularly the one or more parcels of less than 160 acres, for purposes other than purposes of timberland production.

Accordingly, when the original owner divided the property into two parcels and did not prepare and record a joint timber management plan as required by Section 51119.5, the board of supervisors should have requested that the original owner comply with Section 51119.5 and, absent such compliance, the county should have brought an action in court to compel such compliance. Alternatively, absent such compliance, the county should have brought an action in court to nullify and/or set aside the division of the property/sale because the division was never approved by the board of supervisors and the deed restriction requirement was not met.

As to what steps the county might take to correct the situation now, the county could still bring an action in court to seek to compel compliance with Section 51119.5 with respect to the preparation and recordation of a joint timber management plan. Or, the county could bring an action to nullify and/or set aside the division of the property/sale, and subsequent sales, because the division was never approved by the board of supervisors and the deed restriction requirement was not met. Given the fact that the original owner no longer has any interest in any of the properties he owned in 1990, perhaps the latter alternative would be preferable to the former.

Events occurring subsequent to 3/30/90 and other considerations, such as untimeliness in seeking to enforce the requirements of Section 51119.5; potential costs; the original owner's sale of his 40 acres to the new owner eliminating any interest in any of the properties he owned in 1990, the original owner's sale of the 340 acres zoned as timberland production to The Trust For Public Lands, and The Trust For Public Lands' sale of the 30 acres zoned as timberland production to the U.S.F.S.; the uncertainty of the outcome of a court action under the circumstances; and the unlikelihood that the new owner and The Trust For Public Lands intend to use their respective properties for timberland production may invite consideration of other possible resolution in this situation.

Included in Sections 51100-51155 are the various sections pursuant to which land zoned as timberland production may be removed therefrom/rezoned. Section 51121 is the primary section and the one by which a board of supervisors can rezone property which has been zoned as timberland production. Section 51120 pertains to rezoning at a landowner's request. Sections 51133 and 51134 pertain to immediate rezoning pursuant to a landowner's request, and section 51155 pertains to immediate rezoning upon acquisition by a public agency. Review of these sections will disclose results peculiar to each method of rezoning. However, these are the only methods the Legislature has provided for rezoning land zoned as timberland production; and

in our view, any attempt to rezone land zoned as timberland production other than as provided for in Sections 51120, 51121, 51133 and 51134 and 51155 is void and of no effect.

From the county's point of view, the most expeditious way to conclude the situation might be for the new owner and/or The Trust For Public Lands to request immediate rezoning of their respective parcels pursuant to Section 51131 and following. While this would subject the new owner and/or The Trust For Public Lands to payment of tax recoupment fees based upon the years in which the properties were held in timberland production zone (Government Code Sections 51142 and 51146), it would permit the new owner and/or The Trust For Public Lands to remove their respective properties from timberland production zoning and permit the county to obtain property taxes it had not collected in years past as the result of the properties having been zoned as timberland production. Of course, the requirements of Sections 51131 and following would have to be met.

Alternatively, the county might decide to conclude the situation by declining to extend the terms of zoning of the new owner's and/or The Trust For Public Lands' properties pursuant to Section 51121. This would have the effect of gradually bringing the properties of the new owner and/or The Trust For Public Lands out of the timberland production zoning over ten year periods. Similarly, however, the requirements of Section 51121 would have to be met for rezoning in this manner to occur.

In conclusion, as indicated above, Sections 51120, 51121, 51133 and 51134, and 51155 are the only methods the legislature has provided for rezoning land zoned as timberland production.

Question 2. 3/14/91 Transfer to the U.S.F.S.

In 1977, Sections 51150 through 51155 of the Government Code pertaining to eminent domain or other acquisition were added. Section 51155 provides, in part, that when land is acquired in lieu of eminent domain for a public agency, the parcel shall be deemed immediately rezoned (pursuant to Section 51130) as to the land actually being so acquired. It provides further that upon the termination of such a proceeding, the parcel shall be immediately rezoned for all land actually acquired, and that the land actually taken shall be removed from the timberland production zone.

With respect to the 30 acres zoned as timberland production purchased by the U.S.F.S. from The Trust For Public Lands, assuming no legal action by the County (see 1 above) that would produce a different result, the U.S.F.S. would be acquiring the acreage pursuant to Section 51155, in lieu of eminent domain and at the conclusion of which acquisition the acreage would, by statute, be immediately rezoned. In view of the facts that The Trust For Public Lands did not request any rezoning (Sec. 51131) and that upon acquisition by the U.S.F.S., The Trust For Public Lands was no longer the owner of the 30 acres, it is our view that The Trust For Public Lands is not liable for payment of any tax recoupment fees as the result of the acquisition by the U.S.F.S.

Neither would the U.S.F.S. be liable for payment of tax recoupment fees since the property in the hands of the U.S.F.S. is exempt from property tax pursuant to Article XIII, Section 1 of the Constitution:

“Unless otherwise provided by this Constitution or the laws of the United States.

(a) All property is taxable”

As stated in 51 Cal.Jur.3d, Property Taxes, section 15, Public Property :

”The constitution exempts from taxation property owned by the state....

“Thus, wherever the constitution and laws refer to the subject of taxing property they are to be understood as referring to private property and persons, and not including public property of the state.... Although provisions exempting private property from taxation are to be strictly construed, the rule is otherwise as to public property, which is to be taxed only if there is express authority therefor. . . .

* * *

“ All federal property is immune from taxation by the states, unless Congress has consented to taxation.”²

As Sections 51150-51155 specifically provide for government acquisitions of lands zoned as timberland production, in our view , the sale of the 30 acres to the U.S.F.S. did not violate the timberland production zoning provisions, whether or not the original owner had filed a joint timber management plan in 1990 in conjunction with the sale of the land zoned as timberland production to The Trust For Public Lands.

With respect to the 10 acres of non-timberland production zoned property purchased by the U.S.F.S. from The Trust For Public Lands, upon acquisition, that property also became exempt from property taxation pursuant to Article XIII, Section 1 of the Constitution. See Revenue and Taxation Code Sections 5081-5091 in this regard.

Question 3. 11/25/96 Transfer of 40 Acre Parcel Zoned as Timberland Production by Original Owner to New Owner.

Neither the original owner nor, apparently, the new owner has sought to have the 40 acres rezoned. Thus, assuming no legal action by the county (see 1, above) that would produce a different result, the new owner holds the acreage in timberland production zone, as the old owner did before. As you have indicated, however, since acquiring the 40 acres the new owner has requested a parcel split into two 20 acre parcels, suggesting that the acreage is not

² The source of this immunity is the supremacy doctrine as interpreted by *M’Culloch v. Maryland* (1819) 4 Wheat. 316, 4 L.Ed.. 579

being held and used for the growing and harvesting of timber, as Government Code Sections 51100 et seq. contemplate. Thus, the board of supervisors would proceed pursuant to Government Code Section 51121.

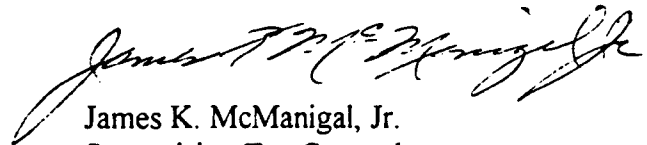
Presumably, a board of supervisors would not want to consider a parcel split under the circumstances until the new zone of the parcel would become effective, in 10 years or so (Section 51121(c) and (d)). Alternatively, the new owner might request immediate rezoning pursuant to Government Code Sections 51130 et seq., which, if successful, would significantly reduce the time necessary to remove the 40 acres from timberland production zone but which would also bring into operation the tax recoupment fee (Government Code Sections 51142 and 51146).

Accordingly, there do not appear to be any "responsibilities" of the new owner, who holds the 40 acres zoned as timberland production. If the county did not take legal action (1, above), and if the new owner desired to remove the 40 acres from timberland production zoning, he could seek immediate rezoning pursuant to Government Code Sections 51130 et seq. Alternatively, the county could seek rezoning pursuant to Government Code Section 51121. Until the matter of the zoning as timberland production is resolved, however, in our view, there is no basis for or reason for the board of supervisors to entertain any request by the new owner to split the 40 acre parcel.

Our opinion is, of course, advisory only and is not binding upon you or other county officials.

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

Yours very truly,



James K. McManigal, Jr.
Supervising Tax Counsel

JKM:sao
Enclosures

cc: Mr. James E. Speed, MIC: 63
Mr. William Jackson, MIC: 60
Ms. Jennifer Willis, MIC: 70
Mr. Larry Augusta, MIC: 82