



STATE BOARD OF EQUALIZATION

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 Executive Director

January 3, 2012

**Re: *Legal Opinion – Denial of Welfare Exemption for
 Development Corporation
 Assignment No.: 11-282***

Dear Mr. _____ :

This is in response to your October 25, 2011, letter concerning Development Corporation's (Corporation's) claim for the welfare exemption for real property in _____ County previously owned by the Corporation.¹

As explained in detail below, the demolition of a building or structure on a parcel with the intent to replace it with qualifying low-income housing constitutes "facilities in the course of construction" for purposes of Revenue and Taxation Code² section 214.2, subdivision (a). In our opinion, if, following demolition, construction of a new building or improvement has not commenced more than a year later, as evidenced by some definite onsite physical activity connected with the construction as required by section 214.1 and section 214.2, subdivision (b), a parcel is no longer eligible for the welfare exemption as property in the course of construction.

Facts

According to your letter, Corporation purchased improved property³ (the Property) in "as vacant" condition and arranged for the demolition of the Property's improvements with the intent to construct low-income housing. Instead of allowing the construction to proceed to completion, the City of _____ (City) threatened to take the Property under eminent domain to build a park.

The _____ County Assessor's Office denied Corporation's welfare exemption claim because the Property did "not qualify under Section 214 because it was not used exclusively for any qualifying purpose during the period of ownership by Corporation." We were also informed by the Assessor's Office that the site did not qualify because the low-income housing was never constructed. Your letter states:

¹ We note that as of January 1, 2004, the Board does not make decisions as to whether or not a property's use qualifies it for exemption under Revenue and Taxation Code section 214, the welfare exemption. That function is solely within the discretion of the county assessor. (See Rev. & Tax. Code, § 254.5.)

² All statutory references are to the Revenue and Taxation Code, unless otherwise specified.

³ Two properties consisting of four parcels.

1. Corporation was founded to provide low income housing for eligible families.
2. In May of 2006 Corporation acquired four parcels located at Avenue, in the City of .
3. To build 75 units of low income housing, Corporation proceeded to obtain engineering studies, an architectural firm, funding, and to begin making contacts with city officials for necessary approvals.
4. Alterations to the site during Corporation's ownership included demolition of the existing improvements and erecting a fence around the perimeter.
5. Before any additional construction could take place the City's Redevelopment Agency declared an intent to acquire the property for a redevelopment project.
6. The four parcels in question were eventually sold to the City in April 2008 under threat of acquisition of eminent domain.
7. The City constructed a park on the property which opened in 2011.

Prior Correspondence

In 2008, the Law Corporation (LC) filed a Claim for Organizational Clearance Certificate – Welfare Exemption on behalf of Corporation. Balance Sheets as of December 31, 2005, 2006, and 2007 submitted in support of the claim indicated "Fixed Assets: Land \$2,475,000." An income Statement as of December 31, 2006, indicated "Operating Expenses: Cleaning of Land \$22,000 and Fence \$5,000."

In October of 2008, the Board's Property and Special Taxes Department (PSTD) inquired concerning Corporation's financial statements and its activities. On November 7, 2008, LC responded and stated, in part:

The company had originally intended to acquire the property for the development of low income housing. . . . During the period the corporation owned the property, . . . the vacant land was provided free of charge to other 501(c)(3) organizations. . . .

In December of 2008, PSTD inquired concerning the properties:

. . . What developments were on the land? Was the land vacant? Please provide more information on the land in question and any improvements to the real property.

On January 15, 2009, LC referenced section 214.15 and responded, in part:

The Foundation [Corporation] originally acquired the properties for the specific purpose of developing 75 units of for sale, affordable family townhomes. . . . Soon after acquisition of the properties the Foundation [Corporation] discovered that the City of wished to acquire the properties as part of a

redevelopment project and had indicated that the City would be acquiring the properties under the threat of eminent domain. . . . Consequently the Foundation [Corporation] entered into two Agreements for Acquisition of Real Property for the parcels. . . . Each Purchase Agreement was entered into on April 7, 2008. . . .⁴

Finally, we understand from our client that while the original exemption application stated that the land was vacant there was a small building originally on the properties. . . .

In March of 2009, PSTD responded, reiterating the above as to the purchases and sales and inquiring as to the applicability of section 214.15.

On April 29, 2009, LC responded that the following correspondence evidenced plans for the affordable housing project:

1. Engineering proposal for services dated December 15, 2006;
2. Conceptual proposed site plan dated September 26, 2006;
3. preliminary site plan date[d] September 28, 2005;
4. Engineering current fees schedule dated December 15, 2006;
5. Proposal for planning and concept design from dated June 20, 2007;
6. Letter from Architecture dated July 6, 2007; and
7. E-mail dated March 7, 2007, from of Housing Fund, LLC stating, "We are very interested in providing the gap financing for this project as described when construction is ready to commence"

Reconciliation of Correspondence as to Demolition/Construction

The OCC claim appears to have related to vacant land based on the provided Balance Sheets and Income Statements. There was no indication of any improvements on the parcels until the January 15, 2009, LC letter referenced above, and later documents related to the claim appear to indicate that construction of the project contemplated never commenced.

On the other hand, your letter suggests that there had been multiple improvements on the parcels:

⁴ The Foundation [Corporation] was the seller and The Redevelopment Agency of the City of Long Beach was the buyer.

Corporation had purchased improved property (the "Property") in "as vacant" condition and arranged for the demolition of the Property's improvements with the intent to construct low-income housing. . . .

4. Alternations to the site during Corporation's ownership included demolition of the existing improvements and erecting a fence around the perimeter.

Your letter confirms that construction of the project did not occur.

In view of the factual discrepancies as to the number of improvements on the parcels and demolition thereof, our analysis below proceeds from the premise that there was one building on one of the parcels, that that building was demolished in 2006, and that the fencing that was constructed was in conjunction with the demolition of the existing building, not in conjunction with the commencement of a new building or improvement. In the event there were other buildings or improvements on other parcels, which buildings or improvements were also demolished, our analysis would similarly apply to those instances.

Legal Analysis

Section 214, subdivision (a)(3) requires that property be used for the actual operation of an exempt activity and not exceed an amount of property reasonably necessary to the accomplishment of the exempt purpose. Vacant, unused property, property held for future use, etc. is thus, not eligible for exemption. See *Fredericka Home For the Aged v. San Diego County* (1950) 35 Cal.2d 789; *First Baptist Church v. Los Angeles County* (1952) 113 Cal.App.2d 392; and *Christward Ministry v. San Diego County* (1969) 271 Cal.App.2d 805. Accordingly, those parcels purchased by Corporation that were vacant and unused and that were held for future use were not eligible for the welfare exemption.

As to the parcel acquired by Corporation with an existing building upon it that was demolished, section 214.1 states that:

As used in Section 214, "property used exclusively for religious, hospital or charitable purposes" shall include facilities in the course of construction on or after the first Monday of March, 1954, together with the land on which the facilities are located as may be required for their convenient use and occupation, to be used exclusively for religious, hospital or charitable purposes.

Subdivision (a) of section 214.2 extends the definition of "facilities in the course of construction" as follows:

As used in Section 214.1, "facilities in the course of construction" shall include the demolition or razing of a building with the intent to replace it with facilities to be used exclusively for religious, hospital or charitable purposes.

In our view, the demolition of the building on the parcel with the intent to replace it with low-income housing, facilities to be used exclusively for charitable purposes, constitutes "facilities in the course of construction" for purposes of section 214.2, subdivision (a). Absent evidence to indicate that construction would not be ongoing as of lien date 2007,⁵ the parcel would be eligible for the welfare exemption for the 2007-08 fiscal year, assuming a complete and timely claim for the exemption was filed and was followed by commencement of a new building or improvement. Such commencement may be evidenced by trenching or definite onsite physical activity. (See Rev. & Tax. Code, §§ 214.1 and 214.2, subd. (b).) While there is no statutory timeframe within which commencement of a new building or improvement must take place after demolition, we are of the opinion that, absent any other evidence to the contrary, commencement of a building or improvement on a parcel within a year of demolition meets the definition of "facilities in the course of construction".

Subdivision (b) of section 214.2 further extends the definition of "facilities in the course of construction" as follows:

As used in Section 214.1, "facilities in the course of construction" shall include definite onsite physical activity connected with construction or rehabilitation of a new or existing building or improvement, that results in changes visible to any person inspecting the site, where the building or improvement is to be used exclusively for religious, hospital, or charitable purposes. Activity as described in the preceding sentence having been commenced and not yet finished, unless abandoned, shall establish that a building or improvement is "under construction" for the purposes of Section 5 of Article XIII of the California Constitution. Construction shall not be considered "abandoned" if delayed due to reasonable causes and circumstances beyond the assessee's control, that occur notwithstanding the exercise of ordinary care and the absence of willful neglect.

As specifically stated therein and as construed in Property Tax Annotation No. 880.0061 and the August 23, 2001, letter upon which it is based, construction of a building must have commenced for these additional provisions of section 214.2, subdivision (b) to take effect:⁶

The statutory language allows a property to qualify for the exemption in a situation where construction has commenced and then has halted, provided that the claimant submits evidence that reasonable causes or circumstances beyond its control prevented the continuation of construction. (Prior to the 1991 amendments, the exemption had been suspended regardless of the claimant's reason for discontinuing construction.) There is in the new subsection, however, no specific provision for a situation, such as this one, in which circumstances beyond the claimant's control cause a delay in commencing the physical onsite activity. *Construction must have "commenced" for the reasonable abandonment provision to take effect.* (Emphasis added.)

⁵ The March 7, 2007, e-mail, the June 20, 2007, Proposal, and the July 6, 2007, letter suggest that construction was being contemplated on those dates.

⁶ The annotation and letter upon which it is based are available at: http://www.boe.ca.gov/proptaxes/pdf/880_a.pdf.

Such is also consistent with the court of appeal's finding in *National Charity League, Inc. v. Los Angeles County* (1958) 164 Cal.App.2d 241, that "commencement...of the building" was necessary.⁷

In this instance, it appears that demolition occurred in 2006 and that the parcel thereafter remained vacant and unused. Absent commencement of a building or improvement, evidenced by some onsite physical activity, the parcel was not eligible for exemption as the result of demolition that occurred in 2006. (Rev. & Tax. Code, §§ 214.1 and 214.2, subd. (b).) The reasons set forth in your letter for the failure to commence construction of a building or buildings on the parcel after demolition do not provide a statutorily-recognized basis for concluding that the parcel remained "in the course of construction" after demolition.

The views expressed in this letter are only advisory in nature. They represent the analysis of the legal staff of the Board based on present law and the facts set forth herein. Therefore, they are not binding on any office, or any person or public entity. You may wish to contact the

County Assessor's Office to ascertain whether it is in agreement with the analysis and conclusions set forth herein.

Sincerely,

/s/ J. K. McManigal, Jr.

J.K. McManigal, Jr.
Senior Tax Counsel

JKM:yg

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cc: Honorable
County Assessor

Mr. David Gau (MIC:63)
Mr. Dean Kinnee (MIC:64)
Mr. Todd Gilman (MIC:70)

⁷ In *National Charity League, Inc. v. Los Angeles County*, *supra*, the court of appeal found that the term "in the course of construction," as used in section 214.1, "refers to that period of time between the commencement and completion of the building." Proceeding from that premise, the court concluded that evidence that trenches ultimately used for a foundation had been dug on the premises was not, as a matter of law, insufficient to prove construction had commenced. Thus, while "facilities in the course of construction" includes trenching, demolition, and definite onsite physical activity connected with construction of a building, demolition is not the "commencement of a building." (Rev. & Tax. Code, §§ 214.1 and 214.2, subd. (b).)