State of California **880.0155.005**

M e m o r a n d u m

To: Mr. Dean Kinnee (MIC:64)
Chief, County Assessed Properties Division

Date: March 20, 2013

From: Richard Moon
Tax Counsel IV

Subject: ***Payment in Lieu of Taxes Agreements***
Assignment No. 13-044

This is in response to questions raised regarding whether a low-income housing developer (developer or claimant) subject to a payment in lieu of taxes (PILOT) agreement with a local government can properly make the certification required by Revenue and Taxation Code[1] section 214, subdivision (g)(2)(B) (hereafter Section 214(g)(2)(B)). As you know, Section 214(g)(2)(B) requires that property tax savings be used to "maintain the affordability of" or "reduce rents otherwise necessary for" the low-income housing units.[2] As discussed below, as long as the developer has maintained rents in accord with those required by section 214, subdivision (g)(2)(A) (hereafter Section 214(g)(2)(A)) and has a reasonable belief that its PILOT payments will be used to support or benefit the low income housing development, in our view, such developer can make the Section 214(g)(2)(B) certification in good faith.

This memorandum sets forth the Legal Department's opinion and clarifies all prior opinions or memoranda on this issue, including the opinion reflected by Property Tax Annotation 880.0155 and an opinion letter issued on December 14, 2011. Those prior opinions were of a more general nature and implicitly assumed that, under the facts analyzed, local assessors could establish that developers had not made the required certifications discussed below in good faith (i.e., that the certifications could not, in fact, be verified). To the extent inferences contrary to the specific guidance provided herein can be drawn from those prior opinions, such inferences are expressly disapproved and must be disregarded.[3]

Law & Analysis

Article XIII, section 1 of the California Constitution provides that all property in this state is taxable unless exempted by law. Subdivision (b) of section 4 of article XIII of the California Constitution gives the Legislature authority to exempt from property taxation property used exclusively for religious, hospital, or charitable purposes. The Legislature has implemented this authority by enacting section 214, subdivision (a), the welfare exemption. The welfare

[1] All further statutory references are to the Revenue and Taxation Code, unless otherwise specified.
[2] While specific PILOT agreements may be worded differently, they generally appear to require a payment from the developer that is "in lieu" of property tax savings the development receives. Typically, if the development does not receive the welfare exemption, no payment in lieu is required. If the development receives the welfare exemption, the payment in lieu is measured by the property tax savings received.
[3] To avoid the potential for confusion, we advise that Annotation 880.0155 be deleted and that this more comprehensive memorandum be annotated in its place.

exemption is made applicable to certain low-income housing properties under section 214, subdivision (g). Amongst a number of requirements, section 214, subdivision (g)(2) requires the owner of the low-income housing property to make two certifications. First, Section 214(g)(2)(A) requires, in relevant part, that:

> For any claim filed for the 2000-01 fiscal year or any fiscal year thereafter, certify and ensure … *that there is an enforceable and verifiable agreement* with a public agency, a recorded deed restriction, or other legal document *that restricts the project's usage and that provides that the units designated for use by lower income households are continuously available to or occupied by lower income households at rents that do not exceed those prescribed by Section 50053 of the Health and Safety Code* . . . . (Emphasis added.)

This requirement is clear that, in order to be eligible for the welfare exemption, the property owner (claimant) must certify a proper enforceable and verifiable agreement restricting the development to appropriate usage and rents exists.

Second, Section 214(g)(2)(B) requires the claimant to certify that:

> The funds that would have been necessary to pay property taxes are used to *maintain the affordability of, or reduce rents* otherwise necessary for, the units occupied by lower income households.[4] (Emphasis added.)

Section 214, subdivision (g) was enacted by Assembly Bill Number 2144 (1987-1988 Reg. Sess.) (AB 2144) to expand the welfare exemption to certain rental housing and related facilities. During its passage, AB 2144 was amended to require the subdivision (g)(2)(B) certification. Prior to the certification requirement, AB 2144 had required a claimant *demonstrate* that the property tax savings were used to maintain the affordability of or reduce rents for the lower-income-household occupied units. It appears this amendment was made in part in response to the Board of Equalization's (BOE's) concerns regarding a "demonstration" requirement. The BOE's September 9, 1987 legislative analysis of AB 2144 stated:

> It is not clear how the owner of the property could demonstrate that this requirement is satisfied. If the owner of the property receives rents in excess of the amounts required to pay out-of-pocket expenses, it may be difficult or impossible for the owner to satisfactorily demonstrate that this requirement is satisfied. Further, how can the owner demonstrate that the property tax benefit has not been reflected in lower rents for those households which do not qualify as lower-income? This requirement would also add administrative complications for the agencies administering the exemption. *The vagueness of the standard suggested that it may be subject to varying interpretations*. (Emphasis added.)

That legislative analysis also pointed out a difficulty with the certification requirement, stating:

> The certification requirements appear to have doubtful value since eligibility depends on whether or not the owner has made the certification not on whether the facts certified are actually true.

[4] This requirement is reiterated in substantially the same form in Property Tax Rule 140.2, subdivision (c)(3).

In spite of the concern expressed in the legislative analysis, and although the demonstration requirement was changed to a certification requirement, of course, a mere certification is insufficient if the facts which are being certified are not true. In other words, even if a claimant certifies that the requirements of section 214, subdivision (g)(2) are met, at some point, a claimant may need to demonstrate that the certification was properly made. This leads, however, to the difficulty pointed out with the demonstration requirement: it is vague and subject to varying interpretations. This is true especially since, on its face, the Section 214(g)(2)(B) requirement is ambiguous, and there is no definition in section 214 of "maintain the affordability" or "reduce rents."

We do note, however, that BOE staff, in a letter to Interested Parties for Rulemaking for Property Tax Rules 140-143[5] was asked, and answered, the following question with respect to the meaning of "reduce rents":

> **Issue 8:** Whether section 214, subd. (g)(2)(B) requires owners to charge lower rents than those prescribe by statute (Health and Safety Code) or the regulatory agreement for the property.
>
> **Staff Position:** Projects are eligible for exemption when operated in consistency with the regulatory agreement regarding rent levels for the property and/or when operated within Health and Safety Code rent level requirements. Staff does not construe section 214, subd. (g)(2)(B) to require lower rents than those required by the regulatory agreement or the Health and Safety Code.

Therefore, the requirement to "reduce rents" should not be taken to mean that rents must be reduced below what is required in either the Health and Safety Code or what is agreed to in the regulatory agreement or other document.

With respect to "maintaining affordability," there are significant issues in determining whether the existence of a PILOT agreement negates the ability of a developer to make the Section 214(g)(2)(B) certification. First, since property tax savings would mean more available funds overall, it would be difficult, if not impossible, to determine that a particular dollar in property tax savings was used for a specific expense. Because cash is fungible, the fact that property tax savings were received means that the developer has more funds from which *any* expenses could be paid. A dollar-for-dollar tracking would be nearly impossible to demonstrate. For example, if $5,000 in property tax savings were received, how could it be determined that that $5,000 in savings went directly to maintenance and repairs of the development and not to limited partners as their distributive share of profits or to the manager as a management fee? Or, as pointed out in the September 9, 1987 legislative analysis, how can an owner demonstrate that the property tax savings have not been reflected in lower rents for units that are not low-income units?

Second, even if a dollar-for-dollar tracking could be done, another significant issue in determining whether property tax savings were used to "*maintain the affordability of* . . . the units occupied by lower income households" is what expenses do and do not qualify. In any low-income housing development there are numerous fees and expenses that must be paid in

[5] Dated February 24, 2005.

order for the housing to be built, some of which, it could be argued, go to or do not go to "maintain affordability."[6]

It is undisputed that in developing low-income housing, local governments incur expenses directly related to the development. For example, expenses such as added police and fire protection, sewer and water systems, roads and sidewalks. If payments in lieu of tax were made to local governments for these purposes, there would be little doubt that they go directly to maintaining the affordability of the low-income housing since, without them, the costs might fall directly on the development. Thus, even when it appears that a PILOT agreement requires that the property tax savings (or a portion thereof) go directly to the local government, and thus appears not to be used to "maintain the affordability" of the lower-income-household units, it is possible that the city uses funds received as a PILOT payment to defray costs incurred as a result of supporting the development.[7]

This is especially important when considering that in the development of low-incoming housing, various state agencies are often involved from the planning stages and make determinations as to the "financial feasibility" of the development, which encompasses a determination of whether a project is "affordable" for low-income households. For example, many low-income housing projects would not be developed without the receipt of low-incoming housing tax credits (LIHTC) administered by the California Tax Credit Allocation Committee (CTCAC). In making its determination as to the grant of LIHTCs, CTCAC must consider the following legislative finding:

> Federal law requires that the credit dollar amount allocated to a project not exceed the amount necessary for the financial feasibility of the project and its *viability as a qualified low-income housing project throughout the credit period. This analysis shall include a determination of the reasonableness of developmental and operational costs*. (Emphasis added.)

(Health & Saf. Code, § 50199.4, subd. (e).)

Furthermore, to receive LIHTCs, a credit applicant must demonstrate to CTCAC:

> the amount of tax credit that is necessary for the financial feasibility of the project and its viability as a qualified low-income housing project throughout the extended use period, taking into account operating expenses, supportable debt service, reserves, funds set aside for rental subsidies, and required equity, and a development fee that does not exceed a specified percentage of the eligible basis of the project prior to inclusion of the development fee in the basis, as determined by the committee.

(Health & Saf. Code, § 50199.14, subd. (c)(1)(G).)

---

[6] Examples of typical expenses include management fees, development fees, advertising, salaries and legal, audit and impact fees.

[7] This memorandum expresses no opinion on the authority of local governments to enter into a PILOT agreement. If such agreements were disapproved by the courts or the Legislature, our opinion may be different.

CTCAC performs a feasibility analysis for each project at least three times: at application, allocation, and when placed in service. After approval CTCAC monitors compliance, including requiring an annual certification that, among other things, the project met all the terms of its Regulatory Agreement, including, of course, affordability restrictions. (See Cal. Code Regs., tit. 4, § 10337, subds. (b) & (c)(3).)

In addition to CTCAC, a number of other housing agencies also look at affordability in making determinations as to whether developers are eligible for its programs to help low-income housing get built. For example, such agencies include the California Department of Housing and Community Development,[8] the California Housing Finance Agency,[9] and the California Debt Allocation Limit Committee (CDLAC).[10]

Thus, while there is no definition of what it means to "maintain affordability" in section 214, other California state agencies look at "affordability" in determining whether a developer is eligible for its programs. For their purposes, "affordability" is tied directly to the rent restrictions agreed to in the regulatory agreements. We are not aware of any instance in which a PILOT provision has been determined to be an unreasonable or illegal expense such that it affects the affordability determination.

For all of the above reasons, we are of the opinion that if the Section 214(g)(2)(B) requirement was interpreted to mean that a dollar-for-dollar tracking was required and that all funds could only be used for certain, specific, enumerated purposes, it would be nearly impossible for *any* low-income-housing development to make the required certification. However, such an interpretation is not consistent with the purpose for which section 214, subdivision (g) was enacted.

The July 15, 1987 Senate Revenue and Taxation Committee report on AB 2144 states the purpose of the bill as follows:

> The bill is intended to exempt nonprofit low[-]income housing from property tax. The justification for the exemption would be that the funds which are currently paid in property taxes could better be used in furtherance of the goals of providing low[-]income housing.
>
> Also, it may be that some prospective low[-]income projects may not "pencil out" without the property tax exemption.[11]

---

[8] The Multifamily Housing Project (MPH) administered by the California Department of Housing and Community Development (HCD) loans funds to developers to assist in the new construction of rental units for lower-income households. To be eligible for funds under the MHP, rents must be established as affordable pursuant to regulations promulgated by HCD. (See Cal. Code Regs., tit. 25, §§ 7301, subd. (a), 7312; see also Cal. Code Regs., tit. 25, §7320, subd. (a).)

[9] The California Housing Finance Agency's Multifamily Programs provide permanent financing for the acquisition, rehabilitation and preservation, or new construction of, rental housing that includes affordable rents for lower-income households. Restrictions on rents that may be charged by developers are found in Health and Safety Code section 51335.

[10] CDLAC administers the tax-exempt private activity bond program. (See Cal. Code Regs., tit. 4, §§ 5192, 5220 [providing income and rent restrictions for qualified residential rental projects and compliance monitoring standards, respectively].)

[11] "Pencil out" refers to the need for the welfare exemption to make the development financially feasible.

Thus, the legislature intended the welfare exemption to be available to increase the development of low-income housing by making it easier to finance its construction. An interpretation of the certification requirement that is ambiguous and overly restrictive frustrates this goal.[12]

Therefore, in our view, given the legislative history of section 214, subdivision (g) and the extreme difficulty of doing a dollar-for-dollar tracking of property tax savings to determine whether property tax savings are used to "maintain affordability" of lower-income-household units, where a PILOT agreement exists with local government, the Section 214(g)(2)(B) certification requirement can be made in good faith if rents *actually meet or are lower than* the restrictions set forth in the agreement referred to in Section 214(g)(2)(A), and if the developer has a reasonable belief that its PILOT payment will go directly to support or benefit the low-income-household units.

As long as the above are true, the certification required on Form BOE-277-L1, *Claim for Supplemental Clearance Certificate for Limited Partnership, Low-Income Housing Property – Welfare Exemption*, and on Form BOE-267-L1, *Welfare Exemption Supplemental Affidavit Low Income Housing Property of Limited Partnership*, (i.e., that property tax savings are used to "maintain affordability" or "reduce rents" of the low-income-housing units) can be made in good faith.[13] This, of course, does not preclude an assessor from requiring a developer to verify that such is the case.

RM:yg
J:/Prop/Prec/Welexqal/2013/13-044.doc

cc: Mr. David Gau MIC:63
Mr. Todd Gilman MIC:70

[12] We also note that this goal is consistent with the Legislature's stated intent that the provision of affordable housing is a statewide policy goal. (See Health & Saf. Code, § 50000 et seq.)
[13] This certification is made on Section 4, Item C of Form BOE-277-L1, and on Section 3, Item B of Form BOE-267-L1.