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TO COUNTY ASSESSORS:

JAMES E. SPEED
Executive Director

No. 2001/072

REVENUE AND TAXATION CODE SECTION 237
EXEMPTION FOR LOW-INCOME RENTAL HOUSING
OWNED BY INDIAN TRIBES
OR TRIBALLY DESIGNATED HOUSING ENTITIES

Senate Bill 1231, Chapter 941 of the Statutes of 1999, effective January 1, 2000, added section 237 to the Revenue and Taxation Code¹ to establish an exemption for low-income rental housing owned and operated by an Indian tribe or a housing entity designated by a tribe under certain conditions. Assembly Bill 659, Chapter 601 of the Statutes of 2000, an urgency statute effective September 24, 2000, amended section 237 to limit the exemption to that portion of the property which is continuously available to or occupied by lower income households, as defined, at rents that meet certain specified criteria, and to require that at least 30 percent of the units meet the same availability, occupation, and rent level criteria.

This letter discusses the background of the legislation, the differing requirements for the 2000-01 and 2001-02 years, including the ownership requirements, the occupancy requirements, the documentary requirements, and the filing deadlines. Since the legislation does not include any specific requirements or deadlines for filing claims with the assessor, other than the three documents required in subdivision (c), and we have not initiated the process of promulgating rules or prescribing forms, the recommendations and advice contained herein are advisory only.

Background

Review of the legislative history of section 237 indicates that the primary purpose of the legislation was to ensure the availability of federal low-income housing funding for California tribes. In 1996, Congress passed the Native American Housing Assistance and Self-Determination Act (NAHASDA) which provided funding to federally recognized tribes and their tribally designated housing entities to develop, maintain, and operate affordable housing for Indians on and off Indian trust lands. Funds designated for rental and lease-to-buy units are conditioned on a certification by the tribe or its housing entity that the property is eligible for exemption from property tax.

¹ All references herein are to the Revenue and Taxation Code unless otherwise indicated.

This legislation creates a new exemption based on subdivision (b) of section 4 of Article XIII of the California Constitution. Section 4(b) grants to the Legislature the discretionary authority to exempt property used exclusively for charitable purposes and owned and operated by entities that are organized and operated for charitable purposes, are non profit, and no part of whose earnings inure to the benefit of any private shareholder or individual. In our view, the bill represents the determination by the Legislature that federally recognized Indian tribes and tribally designated housing entities meet these criteria.

We note that this new exemption is not an extension of the welfare exemption, and none of the organizational and filing requirements of the welfare exemption, or any other existing exemption, apply to this new exemption. The new exemption was specifically enacted because the Indian tribes owning the properties in question could not meet both the requirements of the welfare exemption and the requirements of NAHASDA.

After passage of SB 1231 in 1999, it was discovered that the requirement of section 237 that 100 percent of the property be occupied by qualified tenants did not meet the needs of the tribes or the intent of the sponsors of the legislation. AB 659 was enacted as an urgency statute to provide that portions of the property meeting the requirements could be exempt and other portions taxable, but the entire project had to have at least 30 percent of the housing units continuously available to or occupied by lower income households, as defined, at qualifying rent levels. Thus, the requirements for exemption are different for the lien date 2000 than for the lien date 2001 as will be discussed more fully herein.

Ownership and Operation Requirements

On the lien dates, the property must be owned and operated by either (1) A federally recognized Indian tribe, or, (2) Its tribally designated housing entity.

Federally Designated Recognized Tribes As discussed below under "Document Requirements," the legislation requires the applicant tribe to provide documentation that the tribe is a federally "recognized" Indian tribe. While the statutory language is not consistent, as it uses both the terms "designated" and "recognized," we believe the requirement is to provide documentation that the tribe is federally "recognized." The Bureau of Indian Affairs (BIA) maintains a list of federally recognized tribes on its website (www.doi.gov/bia/tribes/entry.html), through which the assessor can verify the status of the tribe applying for exemption.

Tribally Designated Housing Entity To qualify, a housing entity must (1) be tribally designated by a federally recognized tribe, (2) be nonprofit, and, (3) have no part of its net earnings inure to the benefit of any private shareholder or individual. As will be discussed below, section 237 requires that an applicant that is a housing entity must provide a resolution from a federally recognized tribe designating it as a housing entity for the tribe.

There are no provisions in the statute regarding the standards or procedures for meeting requirements (2) and (3). We recommend that, if the assessee is a tribe, the assessor accept a letter from the Department of the Interior certifying its federal recognition or printout from the BIA's website showing the tribe on the list of federally recognized tribes. If the assessee is a housing authority, the assessor should accept a certified copy of a resolution by a federally recognized tribe, designating the housing authority as its housing entity. Articles of incorporation or bylaws drawn up under state corporate law or for purposes of federal tax exemption are not required.

Property Use and Partial Exemption

2000 Lien Date

To receive the exemption for the 2000 lien date, the *entire property* was required to be used exclusively and solely for the charitable purpose of providing rental housing and related facilities for tenants who are persons of low income.

2001 and Subsequent Lien Dates

The amendment in 2000 made provision for a partial exemption for multi-unit properties. Beginning with lien date 2001, the exemption extends to any *portion* of the property that meets the ownership and operation requirements if at least 30 percent of the property's housing units are continuously available to or occupied by lower income households.

For purposes of this exemption, "property" is the appraisal unit commonly used by the assessor for housing of the type and configuration of the housing at issue. In making this determination, we believe that consideration should be given to the purpose and intent of the exemption, which is to upgrade tribal housing.

Vacant Land and Housing Under Construction

- Vacant land not under construction does not qualify for the exemption because it is not being "used" for housing.
- Since the exemption is based on subdivision (b) of section 4 of Article XIII of the California Constitution, low-income housing under construction is eligible for the exemption provided by section 5 of Article XIII. Although section 214.15 does not technically apply to section 237, "under construction" should be defined as it is for the welfare exemption, requiring "definite onsite physical activity [on the lien date] connected with construction or rehabilitation of a new or existing building or improvement that results in changes visible to any person inspecting the site." (See also, *National Charity League, Inc. v. County of L. A.* (1958) 164 Cal.App.2d 241.) Low-income tenants do not have to be already living on the site for the exemption to apply, as long as construction is under way and the documents required by subdivision (c) are submitted, including a legally binding document restricting the property's use to low-income housing.

- A qualifying low-income unit that has been vacated should continue to receive the exemption, provided that the property is continuously made available to low-income tenants while being held for rental.

Document Requirements

2000 lien date Subdivision (c) of section 237 provides that the tribe or housing entity applying for an exemption shall provide the following documents to the assessor:

- Documents establishing that the tribe is federally recognized.
- Documents establishing that the housing entity has been designated by the tribe.
- Documents establishing that there is a deed restriction, agreement, or other legally binding document restricting the property's use to housing for low-income people, as defined by the Health and Safety Code, at rents that do not exceed those prescribed by section 50053 of the Health and Safety Code, or, to the extent that the terms of federal, state, or local financing or financial assistance conflict with that section, rents that do not exceed those prescribed by the terms of the financing agreements or financial assistance agreements.

2001 and Subsequent Lien Dates Although subdivision (c) was amended by AB 659, the only effective difference in documentary requirements derives from the fact that a partial exemption is now available for properties that have at least 30 percent of units occupied by low-income tenants. That means although the first two documents would be the same as for lien date 2000,² the "legally binding document" restricting the property use to low-income housing need only impose the restriction on 30 percent of the units. A claimant who is seeking a partial exemption starting on lien date 2001 will also need to provide the assessor with a list of the low-income units for which the exemption is claimed in order for the assessor to know which units to enroll and which ones to exempt.

"Other Legally Binding Agreements" A qualifying "legally binding agreement" restricting the use of the property to low-income housing can include a financing or regulatory agreement, a long-term lease, an agreement between tribes and their housing entities, or between the federal government and the tribes or housing entities, or a recorded certified tribal ordinance. The qualifying restriction should recite the language of section 237, subdivision (a)(2)(A), that is, that the property will be held continuously available to, or occupied by, lower income households at rents qualifying under subdivision (a)(2)(A).

² Except that the "designed" was corrected to read "designated."

With respect to low-income housing under subdivision (g) of section 214, the Board's Legal Division advised that an enforceable restriction on the use of property cannot be created unilaterally by a single landowner (LTA 2000/87). A covenant need not be enforceable against subsequent owners of the property but it must be enforceable against someone.

Verifying the Eligibility of Occupants

Section 237 contains no provisions for filing affidavits attesting to the fact that the tenants of the units for which the exemption is being claimed meet the income requirements and the rents charged meet the requirements of the applicable Health and Safety Code sections. The Board staff will be proposing "clean-up" legislation in the next session to apply the same affidavit requirements to tribal housing as already applies to other low-income exemption housing. Meanwhile, because verification of tenant eligibility for the housing is the responsibility of the tribes and tribally designated housing entities for projects funded by NAHASDA and most other housing assistance programs, most tribes and tribal housing entities will have tenant income verification records in their files. Until a new form is issued by the Board, we recommend the assessor modify the Supplemental Affidavit used for the Section 236 Exemption for Leased Low-Income Housing (Form BOE 236-A (S1F) and BOE 236-A (S2B)).

- **Affidavit to be filed by Claimant with Assessor.** An affidavit, modeled on BOE 236-A, should be filed by the claimant tribe or Tribally Designated Housing Entities (TDHE) with the assessor, listing each unit of housing for which exemption is being claimed, the number of individuals in each household on the lien date and the number of households in each unit, the rental charge for each unit, and certifying a maximum income level that each household did not exceed for a year ending during the previous calendar year. The household income figure cannot exceed the maximum allowable household income under Health and Safety Code section 50097.5 for lower income households, and rents charged cannot exceed maximum rental rates under the formula set forth in Health and Safety Code section 50053 or the applicable financing assistance program.
- **Affidavit to be Maintained by Claimant, Verifying Tenant Income.** An affidavit from the tenant should be filed on an annual basis with the claimant unless the claimant's records already include affidavits from tenants showing their household income for a year ending during the previous calendar year did not exceed the Health and Safety Code guidelines for a household of its size. This affidavit need not be filed with the assessor, but must be made available to the assessor for audit purposes.

Income limits for lower income households allowable under Health and Safety Code section 50097.5 are published annually by the state Department of Housing and Community Development on their website, <http://www.hcd.ca.gov>. If proposed legislation is enacted to include the low-income definitions of the applicable financing program, the claimant should have those figures available for audit.

Application for the Exemption

Subdivision (c) of section 237 contemplates that an application for exemption will be filed with the assessor, and shall include at least the documents specified in that section. Because the exemption is conditioned on continued qualifying "use" for low-income rental housing, an annual filing is required. (See *Scott v. SBE* (1996) 50 Cal.App.4th 1597.) An application form for section 237 is being developed. It is reasonable that, in addition to the three documents required in subdivision (c), assessors can require the following additional information:

- A description identifying the property for which the exemption is claimed, including the parcel number(s) and qualifying units.
- A copy of the financing or financial assistance agreement setting forth the maximum rents or rental formula that can be charged under the program.
- An affidavit from the claimant verifying that the occupants meet the income requirements. (As mentioned above, pending development of an application and affidavit form for section 237, we are recommending use of affidavits for the section 236 exemption.)

Filing Deadlines

Board staff will be proposing legislation in the next session to apply the same filing deadlines and relief from late filing as apply to other exemptions listed in section 254. It is therefore anticipated that the filing deadline for 2003-2004 will be February 15, 2003.

Because there was no statutory filing deadline for tax years 2000-2001, 2001-2002, and, presumably, 2002-2003, we would consider the end of the calendar year to be the filing deadline for the tax year in which it falls for purposes of the waiver provision in Article XIII, section 6 of the California Constitution. Therefore, a claimant would have to claim the exemption by December 31, 2001, in order to be eligible for the 2001-2002 tax year and by December 31, 2002, in order to be eligible for the 2002-2003 tax year.

Sincerely,

David J. Gau
Deputy Director
Property Taxes Department

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