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March 7, 2007

TO COUNTY ASSESSORS AND INTERESTED PARTIES:

No. 2007/015

PUBLIC SCHOOL CONCESSIONS

Board staff has initiated a project to develop Assessors' Handbook Section 260, *General Exemptions* (AH 260). This new handbook section will discuss property tax exemptions, except those exemptions covered in Assessors' Handbook Section 267, *Welfare, Church, and Religious Exemptions*.

During the course of drafting AH 260, issues surfaced regarding taxable possessory interests associated with public school concessions and whether they are eligible for the public school exemption. In order to solicit information relative to these properties, staff developed a survey questionnaire and disseminated it to county assessors' offices. The responses to the survey questionnaire did not present a uniform method of assessment procedures among the various counties. Subsequently, a section of AH 260 was drafted pertaining to public school concessions. A copy of that draft is enclosed.

Board staff will seek direction from the Board on this issue prior to releasing the first draft of AH 260. Interested parties may submit proposed revisions or additions to the language presented in the enclosed draft. Revisions/suggestions should be submitted to Ms. Sherrie Kinkle at sherrie.kinkle@boe.ca.gov by April 2, 2007.

It is anticipated that this project will proceed as follows:

- April 2007 – Staff will hold an interested parties meeting to discuss the draft language.
- May 31, 2007 – The Board's Property Tax Committee will hear discussions regarding any outstanding issues.

All documents pertaining to this project will be posted on the Board's website at www.boe.ca.gov/proptaxes/ptcwplan07.htm. If you have questions regarding this project, you may contact Ms. Kinkle at 916-322-2921.

Sincerely,

/s/David J. Gau

David J. Gau
Deputy Director
Property and Special Taxes Department

DJG:sk
Enclosure

2 **Public School Concessions**

3 **Possessory Interests**

4 A taxable possessory interest may be created when a lease, contract, permit, or other
5 government authorization allows a private right to the possession and use of publicly
6 owned real property for a period of time. Under most circumstances, there are no taxable
7 possessory interests in personal property.¹ Like other taxable property, possessory
8 interests may be eligible for exemption, depending upon their use. Taxable possessory
9 interests may qualify for the public school exemption if the property is used exclusively
10 for public school purposes. Where a taxable possessory interest is included in the
11 following discussions, it is assumed that the property in question meets the criteria of a
12 taxable possessory interest in that the possession of, claim to, or right to the possession of
13 the property is:

- 14 1. Independent,
15 2. Durable,
16 3. Exclusive of rights held by others, and
17 4. Provides a private benefit to the possessor.

18 The criterion for whether the public school exemption is available is that the taxable
19 possessory interest must be used exclusively for a public school use. The courts have held
20 that the term *used exclusively* does not mean that the property exempted must be used
21 *solely* for the purposes stated, to the exclusion of any other uses. The property may also
22 be used for certain types of incidental uses as well. However, the courts have also
23 concluded that "such incidental use must be directly connected with, essential to, and in
24 furtherance of, the primary use."²

25 Court cases have given public schools fairly wide discretion as to what property is
26 considered necessary to fulfill the functions of a complete, modern college or university.³
27 As such, presumption may be made that those taxable possessory interests located on a
28 campus fulfill a necessary function of the public school by virtue of their location, and,
29 conversely, that those located off campus do not fulfill a necessary school function.
30 However, these presumptions can be overcome. Therefore, the county assessor must

¹ Revenue and Taxation Code section 201.5 provides that a taxable possessory interest exists in property owned by the California Pollution Control Financing Authority, whether real or personal.

² *Cedars of Lebanon v. County of Los Angeles* (1950) 35 Cal.2d 729, 736; *Honeywell Information Systems v. County of Sonoma* (1974) 44 Cal.App.3d 23, 28.

³ *Mann v. County of Alameda* (1978) 85 Cal.App.3d 505, 508.

1 examine the facts and circumstances for each taxable possessory interest to determine
2 eligibility for the public school exemption.

3 **Vending Machines**

4 Public school officials have historically contracted with profit-making vending machine
5 companies to put their machines on school grounds or campuses whereby the school will
6 benefit from a portion of the sales. The vending machines are easily movable and
7 generally are classified as personal property. Pursuant to Revenue and Taxation Code
8 section 202.6,⁴ personal property is exempt if it is used exclusively in the performance of
9 activities by a student body organization authorized by sections 76060 et seq. of the
10 Education Code.

11 One of the activities authorized by the Education Code is a student body organization
12 selling food on school grounds.⁵ Consequently, vending machines located on public
13 school property are themselves eligible for the public school exemption under the
14 following circumstances:

- 15 • The vending machine dispenses items that can be classified as food.
- 16 • The student body organization receives a portion of the receipts from the vending
17 machine service.

18 In addition, the public school exemption provisions contained in section 202(a)(3)⁶
19 allows for the exemption of any property used exclusively for a public school, regardless
20 of ownership. Therefore, vending machines owned by a for-profit business are eligible
21 for the exemption as long as the property is being used by public schools. (See below for
22 a discussion regarding the taxable possessory interest created in the public school real
23 property upon which vending machines sit.)

24 The Education Code authorizes school districts to furnish food service. Therefore,
25 vending machines dispensing food items are a service that is directly related to, and in
26 furtherance of, a primary purpose of the school district. Furthermore, the court in
27 *California School Employees Assoc. v. Sequoia Union High. School Dis.*⁷ held that
28 providing food to students in secondary schools is an educational activity within the
29 provisions of the Education Code. Thus, such vending machines are exempt from
30 taxation.

⁴ All section references are to the Revenue and Taxation Code unless otherwise designated.

⁵ Education Code section 48931.

⁶ For ease of reference in this manual, we may refer to subdivisions as, for example, section 202(a)(3).

⁷ *California School Employees Assoc. v. Sequoia Union High. School Dis.* (1969) 272 Cal.App.2d 98.

Private Food Concessionaires

Real and personal property used for low-cost food facilities that primarily serve students and faculty and are operated by a school, an auxiliary nonprofit corporation, or a student body organization are exempt. Typically, there is little confusion as to the exempt nature of property associated with residence dining halls, on-campus eateries, or snack bars.

Further, it is not uncommon for private concessionaires to have contracts with public schools, community colleges, state colleges, state universities, and the University of California to provide food service to students on school properties. A taxable possessory interest may be created when such concessionaires occupy and/or lease space on public school property. However, since such property normally is used exclusively for public schools, it is exempt from property taxation under article XIII, section 3(d) of the Constitution. This constitutional provision does not require that the public school own the property, only that the property is exclusively used for public school purposes.

Private non-profit or for-profit concessionaires—such as fast food restaurants, coffee shops, or individually owned food stands—are eligible for exemption as long as they are located on the campus. On-campus sites may include areas such as recreational facilities, dining halls, or food courts. Concessionaires that are on public school-owned property that is located off campus are generally not eligible for the exemption.⁸

Other Exempt Possessory Interests

Other examples of taxable possessory interests that may be eligible for the public school exemption include:

- ***Real Property Occupied by Vending Machines***—Where vending machines are exempt from personal property taxation when used for public school purposes, the county assessor should also look at the actual physical location of the vending machines on the public school property. If the vending machine is located on property owned by the public school, then taxable possessory interests may be created. However, similar to the exempt status of vending machines, the taxable possessory interest in the real property may also be exempt as property used exclusively for public school purposes (article XIII, section 3(d) of the California Constitution; Revenue and Taxation Code section 202(a)(3)).
- ***Bookstores***—Leases of retail space located on public university campuses for bookstores where the patrons are primarily students, faculty, and staff of the college typically are exempt. Such bookstores generally sell items such as course textbooks, student supplies, and occasionally personal computers. Bookstore property is deemed to be used exclusively for public school purposes, and, thus, is exempt from possessory interest taxation, regardless of the for-profit status of the owner.

⁸ Education Code section 48931.

- 1 • ***Student Housing Leasehold Interest***—Students' and faculty's leasehold interests in
2 apartments or other housing owned by a public school are exempt. In *Mann v. County*
3 *of Alameda*,⁹ the court ruled that public university-owned housing available to full-
4 time students who are married, or full-time single students with children, is property
5 used exclusively for public school purposes. Such housing furthers the primary
6 educational purposes of a university or college and is considered property that is
7 *reasonably necessary* for the fulfillment of a generally recognized function of a
8 complete modern college or university.¹⁰
- 9 • ***Land and Improvements for Student Housing***—Land leased from a public university
10 by a master lessee is exempt from possessory interest taxation if the apartments to be
11 developed on the land are to be used for student housing, regardless of the for-profit
12 nature of the lessee. In such a situation, taxable possessory interests also may be
13 created on the lessee's interest in the government-owned improvements because the
14 improvements constitute taxable improvements on tax-exempt land. Nonetheless, if
15 used for student housing, the taxable possessory interest will be exempt from property
16 taxation. Further, if the sublease of an individual unit in an apartment project creates a
17 taxable possessory interest,¹¹ all possessory interests in this scenario still may be
18 exempt as property used exclusively for the public university within the meaning of
19 article XIII, section 3(d) of the California Constitution.

20 In determining whether or not a lessee qualifies for the public school exemption on its
21 possessory interest, the key determination is that it:

- 22 • Provides a convenience to the students and faculty;
- 23 • Is located on public school property; and
- 24 • Is used for public school purposes.

25 The public school exemption may be eligible to food concessionaires, ATM machines,
26 bookstores, student housing, etc.

27 **Possessory Interests Not Exempt**

28 Public school districts, community colleges, state colleges, state universities, and the
29 University of California may also own property located off school premises or campuses.
30 When such property is leased to others and is used in a manner that is not exclusively for
31 public school purposes, the possessory interest is taxable.

32 Examples of taxable possessory interests include:

⁹ *Mann v. County of Alameda, supra.*

¹⁰ *Connolly v. County of Orange* (1992) 1 Cal.4th 1105, 1127, where the California Supreme Court held that housing privately owned, as distinguished from here where the students and faculty leased from the university, are not considered to be exclusively used for the benefit of the school.

¹¹ This assumes that the sublease is for a period greater than half of the remaining term of the master lease.

1 • **Off-Campus Businesses**—Restaurants or other food services and retail stores that
2 lease property owned by a public school, but are located off campus, are subject to
3 possessory interest taxation. Although it can be argued that such businesses in close
4 proximity to the campus provide conveniences to the students and that a large
5 percentage of the business is generated from the students, such establishments are not
6 exclusively used for public school purposes.

7 • **Privately Owned Residences**—A lessee of a public university property that uses the
8 property as a site for a privately owned residence creates a taxable possessory
9 interest. In *Connolly v. County of Orange*,¹² the California Supreme Court considered
10 the case of faculty members and employees of the University of California who built
11 their privately owned homes on land owned by the university. The Supreme Court
12 held that such use of university property does not fulfill the public purpose
13 contemplated by article XIII, section 3(d) of the California Constitution, and that
14 granting a tax exemption to a faculty member's private long-term leasehold interest
15 would clearly extend the constitutional provision exemption beyond its intended
16 reach.

17 In denying the exemption, the court stated that if the faculty's leasehold interests in
18 the property on which the privately owned homes were situated were entitled to an
19 exemption merely because the homes were being used for faculty housing, then there
20 would never be a basis to deny an exemption to the faculty member's property interest
21 in the homes themselves, which would be beyond the scope of the constitutional
22 exemption. In other words, if the use of property for faculty housing is an exclusive
23 use of property for public school purposes under section 3(d) of the California
24 Constitution, then even a faculty member who bought a home on private land and
25 used it as his or her family residence could also claim an entitlement to an exemption
26 because that property too would be property used for faculty housing.

27 • **Leased Unimproved Land**—When a school district (lessor) leases its tax-exempt
28 unimproved land to a corporation (lessee), even when the corporation is a public
29 facilities corporation solely owned by the district, a taxable possessory interest may
30 be created that is assessable to the lessee.¹³

31 • If such a public facilities corporation subsequently subleases the unimproved land
32 back to the tax-exempt school district, then such a leaseback to the lessor does not
33 affect the lessee's taxable possessory interest because, after the sublease, the
34 lessee would still have constructive possession. *Constructive possession* is when
35 "a person, although he is not in actual possession of land or improvements, has a
36 right to possession and no person occupies the property in opposition to such

¹² *Connolly et al, v. County of Orange, supra.*

¹³ *City of Desert Hot Springs v. County of Riverside* (1979) 91 Cal.App.3d 441.

1 right."¹⁴ The courts have held that the sublessee's lease is pursuant to, and
2 subordinate to, the rights of the lessee.

- 3 • If the public facilities corporation acquires unimproved property and leases it to a
4 tax-exempt school district, even if the term is in excess of 35 years, the property is
5 taxable and cannot be exempt as property owned by the school district. An
6 exception occurs when property that is owned by the public facilities corporation
7 (or any other private person or entity) is leased to a school district and then used
8 for public school purposes. In this instance, the property would be eligible for the
9 public school exemption.

¹⁴ *City of Desert Hot Springs v. County of Riverside, supra.*