From: MAD
Sent: Tuesday, April 27, 2021 8:18 AM
To: Nanjo, Henry; Schultz, Glenna
Cc: Balf, Andrea
Subject: [External] Comments on proposed property tax rule 462.540

To Glenna Schulz and Henry Nanjo:

Last week I sent comments on proposed property tax rule 462.540. Recently I realized that my comments weren't framed around a specific suggestion to add or revise language in the proposed rule. Accordingly, I am providing here a suggested addition to 462.540, which is supported by the comments I submitted earlier.

Proposed lines to add:

For the purposes of this rule, and with reference to Section 2(a) of article XIII A of the California Constitution stating that a two-dwelling unit shall be considered as two separate single-family dwellings: a property with a single-family main dwelling and any "accessory structure," including an "accessory dwelling unit," as these terms are defined in Government code 65852.2, shall be considered to be one single family dwelling. An accessory dwelling unit is accessory and incidental to a single-family main dwelling, and therefore not a separate single-family dwelling on its own.

Additional commentary.

Much of the justification for this proposed addition is supplied in my original commentary, which I reproduce below. Here I add a few additional notes. First, while my original comments pertained to a newly constructed ADU on a replacement property, they apply to any ADU involved in a property-tax transfer, whether the ADU is newly constructed or not, and whether it is part of the original or the replacement main residence.

Second, my general impression is that since Proposition 60 was passed, counties have *not* consistently scrutinized property-tax transfer claims in order to exclude an ADU from the property-tax basis of the main/principal residence. By contrast, it appears that counties *do* treat each unit of a duplex separately, and not as a single main residence. This is sensible, because there is a bright line between, on the one hand, the two units of a duplex, and on the other hand, a single family residence with an accessory structure. Most importantly, each unit of a duplex is functionally separate from and equivalent to the other; neither unit is an accessory or incidental to the other. By contrast, an ADU is *defined* to accessory or "incidental" to the main residence. A duplex is much more likely than an ADU is to have two separate addresses and two separate utility services. A duplex is much more likely to house two independent, unrelated households, each paying market prices, either through rent or ownership. For these reasons, it does makes sense to treat a duplex as two separate units, but treat the ADU+single-residence compound as one single-family residence with an accessory structure.

Finally, I want to suggest that the new lines proposed above do not need to be backed by new legislation. The basic question is whether a structure that is *accessory* to another can also be a separate structure equal to the other, and this question must be answered one way or another in order to implement the proposed rule. I believe that my answer — that an accessory structure by definition can *not* also be a separate single-family dwelling — is coherent and logical. In light of this, and given that there seems to be no other language in the Constitution or in Statute that strongly disfavors my argument, there is no reason to require that the interpretation I propose be authorized by new legislation, but that the opposite interpretation (that a structure can be both "accessory" to yet separate from and equivalent to a main single family residence) does not require new legislation.

Thank you for considering my comments.

Best regards,

Mark Delucchi
890 Via Escondida
Novato, CA 94949

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Comments on proposed property tax rule 462.540

To: Glenna Schulz, Senior Specialist Property Appraiser, BOE

Henry Nanjo, Chief Counsel, BOE

From: Mark A. Delucchi

890 Via Escondida

Novato, California 94949

Re: proposed property tax rule 462.540

April 16, 2021

Dear Glenna and Henry,

My comments are concerned with an issue related to but not explicitly discussed in proposed property tax rule 462.540: whether, for the purpose of transferring the property-tax basis of an "original property" to a "replacement property," the value of an accessory dwelling unit (ADU), newly constructed within two years of the purchase of the "replacement property," may be counted as part of the value of the replacement property. I believe that the value of the ADU *should* be counted as part of the value of the replacement property, because the word "accessory" in "accessory dwelling unit" means that the ADU is an *accessory part* of the replacement property, not, for these purposes, an entirely separate and unrelated additional primary residence. In the following I elaborate on this.

Propositions 60 and 19 allow, under certain conditions, the transfer of the property-tax basis from one primary-residence "original" property to one primary-residence "replacement" property. The final property-tax basis for the replacement property depends on the value of the replacement property – including any new construction after the initial purchase of the replacement property, subject to certain conditions – relative to the value of the original property.

Importantly, one may *not* transfer the property-tax basis from one primary residence-property to *two* (or more) primary-residence replacement properties. On the other hand, as mentioned above, one *may* count the value of new construction, including, in general, new detached "accessory" structures, as part of the value of the replacement property.

With this background, the question here is straightforward to frame: is a newly constructed ADU the sort of "new construction" whose value can be added to the value of the replacement property, or is the newly constructed ADU a separate primary residence and hence *not* part of the value of the replacement property (for the purpose of the property-tax transfer)? Again, I believe the answer is clear: an ADU is *defined* to be an *accessory part* of the main primary residence, and hence *not* a separate primary residence on equal footing with the primary-residence replacement property.

Here are the relevant definitions:

Section 2 of the California constitution, section 69.5 of the revenue and taxation code, and proposed rule 462.540 all define replacement and original properties (or dwellings), as, in essence, "places of abode" owned and occupied as principal places of residence (1, 2). Section 65852.2 defines an ADU as a dwelling providing independent living facilities "located on a lot with a proposed or existing primary residence" (3). The same section also defines the more general category of "accessory structure," which subsumes ADUs, as "*a structure that is accessory and incidental to a dwelling located on the same lot."*

Apparently there is no further definition in the code or Constitution of what constitutes a "place of abode," but this is immaterial: we may agree that an ADU is an abode, in whatever sense a primary residence is an "abode" (as defined above), but this of course does not make an ADU a primary residence: a dog is a mammal, and a cat is a mammal, but a cat is not a dog.

The key here is not in the meaning of "abode" but rather in the meaning of "accessory": *a structure that is accessory and incidental to a dwelling located on the same lot.* That is, an accessory structure is an accessory to – *part and parcel of* – the other dwelling, which is the primary-residence replacement dwelling for the property-tax transfer. As a thing cannot be both a part of something else and *not* part of something else, an ADU cannot be part of another primary residence dwelling and, at the same time, be its own separate primary-residence dwelling. A dwelling (whether an ADU or a non-ADU accessory structure that is also a dwelling) is either an accessory to the replacement property, or its own separate primary-residence dwelling, unrelated to another primary-residence dwelling. An ADU, by definition, is the former.

Therefore, a property with an ADU has only one primary residence, and the prohibition against transferring the property tax basis from one primary residence to two primary residences does not apply.

Here are a couple of other observations that reinforce this conclusion. First, the distinction between an ADU and a dwelling that is not officially an ADU is, as the saying goes, one without a difference. One can build an accessory structure that is, by any understanding, a dwelling, or place of abode, but not an official ADU. (The difference, for those interested, could be as trivial as having cooking equipment that is *not* built-in.) There apparently is no (and has never been any) doubt that such a non-ADU accessory structure, even though a dwelling unit and a place of abode, is part and parcel of the principal residence.

Second, historically, it is virtually certain that, before the adoption of the relatively recent official definition of an ADU, *de facto* ADUs were newly constructed and included in the value of the replacement property, for the purpose of property-tax transfer, because there was no provision or basis to formally differentiate the types of new construction of accessory structures.

Third, the pertinent provisions regarding multi-unit dwellings – namely, that each unit in a multi-unit dwelling is a separate primary residence (3,4) – merely begs the original question as to whether an ADU is a unit separate from the replacement primary-residence property.

Finally, other language from 65852.2 reinforces the plain understanding of an ADU as part and parcel of the "main" dwelling (5).

In sum, the plain text of the provisions, our ordinary understanding of language, and incidental observations all say that, for the purpose of property-tax transfers, the value of a newly constructed ADU is part of the value of the replacement property.

NOTES:

(1) Definition of replacement dwelling, CA constitution section 2:

“replacement dwelling” means a building, structure, or other shelter constituting a place of abode, whether real property or personal property, and any land on which it may be situated. For purposes of this section, a two-dwelling unit shall be considered as two separate single-family dwellings.

(2) Definition of replacement dwelling and original property, from revenue and taxation code 69.5 (also cited in proposed rule 462.540):

“Replacement dwelling” means a building, structure, or other shelter constituting a place of abode, whether real property or personal property, that is owned and occupied by a claimant as his or her principal place of residence, and any land owned by the claimant on which the building, structure, or other shelter is situated.

“Original property” means a building, structure, or other shelter constituting a place of abode, whether real property or personal property, that is owned and occupied by a claimant as his or her principal place of residence, and any land owned by the claimant on which the building, structure, or other shelter is situated.

(3) Definition of accessory dwelling unit and accessory structure, from 65852.2:

(1) “Accessory dwelling unit” means an attached or a detached residential dwelling unit that provides complete independent living facilities for one or more persons and is located on a lot with a proposed or existing primary residence. It shall include permanent provisions for living, sleeping, eating, cooking, and sanitation on the same parcel as the single-family or multifamily dwelling is or will be situated.

(2) “Accessory structure” means a structure that is accessory and incidental to a dwelling located on the same lot.

(3) Regarding multi-unit dwellings, from revenue and taxation code 69.5:

Each unit of a multiunit dwelling shall be considered a separate replacement dwelling.

Each unit of a multiunit dwelling shall be considered a separate original property.

(4) Regarding multi-unit dwellings, from proposed rule 462.540:

(B) Each unit of a multiunit dwelling shall be considered a separate primary residence.

(5) Regarding accessory dwelling units (ADUs), from 65852.2:

An accessory dwelling unit shall not be considered by a local agency, special district, or water corporation to be a new residential use for purposes of calculating connection fees or capacity charges for utilities, including water and sewer service, unless the accessory dwelling unit was constructed with a new single-family dwelling.