# STATE BOARD OF EQUALIZATION
# STAFF LEGISLATIVE BILL ANALYSIS

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| Date Introduced | **01/05/99** | Bill No: | **AB 119** |
| Tax: | **Property** | Author: | **Ackerman** |
| Board Position: | **Support** | Related Bills: | **AB 1971 (1998)**<br>**SB 1903 (1996)**<br>**SB 657 (1995)** |

**BILL SUMMARY:**

This bill would, with respect to possessory interests, establish a bright-line test on durability of seven calendar days in a calendar year.

**ANALYSIS:**

Current Law:

Revenue and Taxation Code Section 107 sets forth the three essential elements which must exist to find that a person's use of publicly owned tax-exempt property rises to a level of a taxable possessory interest. Those elements are independence, durability and exclusivity.

With respect to the element of durability, current law defines "durable" to mean "for a determinable period with a reasonable certainty that the use, possession, or claim with respect to the property or improvements will continue for that period." Presently, there is no statutory or regulatory minimum time period a person must use or possess publicly owned tax-exempt property before their interest could be considered durable. The law only requires that the period of use or possession be "determinable."

Proposed Law:

This bill would establish a minimum period of use of seven calendar days in a calendar year before any interest or use of public property would be considered durable in determining whether a taxable possessory interest exists.

In General:

**Possessory Interests**

In certain instances a property tax assessment may be levied when a person or entity uses publicly owned real property that, with respect to its public owner, is either immune or exempt from property taxation. These uses are commonly referred to as "possessory interests" and are typically found where an individual or entity leases, rents or uses federal, state or local government facilities and/or land.

Revenue and Taxation Code Section 107 establishes parameters within which assessors and judicial authorities are to determine the existence of taxable possessory interests. Generally, those determinations are made according to the facts and circumstances in each individual case.

### Low Value Ordinances

Section 1(a) of Article XIII of the California Constitution provides that all property is taxable unless otherwise provided by that constitution or the laws of the United States. Section 7 of Article XIII provides that the Legislature, two-thirds of the membership of each house concurring, may authorize county boards of supervisors to exempt real property having a full value so low that, if not exempt, the total taxes and applicable subventions on the property would amount to less than the cost of assessing and collecting them.

Revenue and Taxation Code Section 155.20 provides the statutory implementation for this constitutional authorization. It provides that counties may exempt from property tax all real property with a base year value and all personal property with a full value so low that, if not exempt, the taxes and special assessments on the property would amount to less than the cost of assessing and collecting them. Except for certain kinds of possessory interests, the maximum value of property that may be exempted is $5,000. With respect to possessory interests in convention or cultural facilities and fairgrounds and fairground facilities the board of supervisors has the authority to exempt interests that have a value of $50,000 or less.

Background:

**Related Legislation**

This bill is identical to Assembly Bill 1971(Ackerman) of the 1998 legislative session. Although AB 1971 failed passage in the Assembly Appropriations Committee, it was selected as an item for consideration in the budget conference committee. (As introduced, AB 1971 would have amended §155.20 to increase from $50,000 to $100,000 the value of possessory interests in fairgrounds and convention or cultural centers that may be exempted under a low value ordinance adopted by the county board of supervisors.)

In 1995, Senate Bill 657 (Ch. 498, Stats. 1995; Maddy) proposed a rebuttable presumption that an interest is “durable” only if it exceeds a period of one year. This provision of the bill was amended out by April 15, 1995 amendments. In 1996, Senate Bill 1903 (Maddy) contained amendments that would have created, with respect to public transportation corridors, a rebuttable presumption that to be “durable” an interest in tax exempt property, along with any options to renew, must 1) be greater than 60 days and 2) not be subject to cancellation by the entity granting the interest during that time period. This measure failed.

The $50,000 low value ordinance for possessory interests was added to the Revenue and Taxation Code in 1996 by Senate Bill 1737 (Ch. 570, Stats. 1996; Alquist). The

City of San Jose sponsored this measure over a concern that the taxation of San Jose Convention Center users would place their convention center at a competitive disadvantage with other event holding venues. As enacted, the $50,000 exemption for possessory interests was limited to uses of publicly owned convention or cultural facilities. The following year, Senate Bill 33 (Ch. 106, Stats. 1997; Maddy) added possessory interests in fairgrounds to the type of possessory interests that could be exempted under a $50,000 low value ordinance.

**Related Litigation**

On September 25, 1997, the Sixth District Court of Appeals ruled in *City of San Jose* v. *Carlson*, 57 Cal.App. 4th 1348, that two-time, short term uses of convention facilities met the criteria of durability, independence, and exclusivity necessary to constitute a taxable possessory interest.

**Related Property Tax Rules**

The Board recently adopted Property Tax Rule 20, “Taxable Possessory Interests,” a general rule on possessory interests. In the rulemaking process, the subject of a bright line test on durability was an issue. Industry had sought to establish a 30 day minimum time period while assessors were opposed to setting any minimum time period. Ultimately, the rule adopted did not contain a minimum time period on durability.

**COMMENTS:**

1. **Sponsor and Purpose.** This bill is sponsored by the City of Anaheim which does not agree with the action of the county assessor in finding that short term uses of the Anaheim Convention Center are taxable interests in real property. The City believes that the taxation of convention center users could draw business away from their center. This bill would serve as a legislative vehicle to provide that short term users of the convention center are not subject to a property tax assessment.

2. **Court Suggests Establishment Of Bright Line Test.** This measure accepts the invitation made by the Sixth District Court of Appeals in *City of San Jose* v. *Carlson* (1997) 57 Cal.App. 4th 1348, to establish some statutory standards in measuring durability since past court rulings have diluted the definition of durability into “almost nonexistence.” In *City of San Jose* the court stated:

    > “Although we agree that the element of durability seems to have been ‘diluted to a degree of almost nonexistence’ (*United Airlines, Inc.* v, *County of San Diego* (1991) [cite omitted], the Legislature has not seen fit to reverse the growing trend toward finding taxable possessory interests in short-term uses, even in its most recent amendments to Section 107. If there is a sound basis for distinguishing between a second time user and a

third time user of government-owned property for purposes of identifying a taxable possessory interest, **it is within the province of the Legislature to clarify the parameters of that interest in terms of frequency, duration, and length of time between uses."** [Emphasis added.]

3. **Prior Constitutional Considerations.** Prior to the *City of San Jose* decision, legislation to establish durability standards in terms of a specific time period was argued to be an unconstitutional exemption of real property. Some may still believe this is a statutory exemption of real property beyond the Legislature's constitutional authority. However, in *City of San Jose,* the court acknowledged the appropriateness of Legislative action to set parameters on the element of durability.

4. **Provides Statewide Certainty.** There is a lack of consistency among county assessors in the taxation of possessory interests. A short term use of publicly owned property that is taxed in one county may not be taxed in another. Consequently, establishing a minimum time period would give both taxpayers and assessors a measure of certainty.

5. **Will Seven Days Be Gradually Increased To Two Weeks, Thirty Days, One Year?** Without a control mechanism or statement of legislative intent, once the precedent of a bright-line test on durability is established, opponents state that the threshold level will be periodically raised to a level where many possessory interests could become exempt from taxation under the guise of "durability."

6. **Low Value Ordinance Available.** Although there is existing statutory authority to exempt possessory interests under either the $5,000 or $50,000 low value ordinance provisions of Section 155.20, not all counties have adopted low value ordinances and to date, no county board of supervisors has adopted the higher $50,000 level for possessory interests in convention centers and fairgrounds.

7. **Implementation Considerations – Measuring Seven Days of Use**. As currently drafted, the "seven calendar days in a calendar year" standard raises various implementation issues. First, "seven days" could be interpreted as requiring a use of seven *consecutive* days. Secondly, a "day" could be interpreted as requiring a full 24 hour period of use. Whereas conventions generally last a number of consecutive days and the booths remain in place over a full 24 hour period, many other types of taxable possessory interests, such as cargo shipping companies use of docks at public ports or professional sports teams use of stadiums, are intermittent uses of property which occur for only a few hours of the day. To address these issues, as well as make other amendments for technical accuracy, the following language is suggested:

   "Durable" means for a determinable period with a reasonable certainty that the use, possession, or claim with respect to the property or improvements will continue for that period. Any interest or use of ~~public~~ property or improvements that is not more than seven calendar days, in whole or in part, in a calendar year lacks ~~the~~ durability. ~~necessary to constitute a possessory interest in real property~~. In determining whether an interest or use is not more than seven days, the number of days in a year shall be cumulated.

**COST ESTIMATE:**

The Board would incur some minor absorbable costs in informing and advising county assessors, public and staff of the law changes.

**REVENUE ESTIMATE:**

**Background, Methodology, and Assumptions**

Data supplied by eight counties that track short-term uses of public property (Alameda, Los Angeles, Orange, Sacramento, San Diego, San Francisco, San Mateo, and Santa Clara) indicate that possessory interests for uses of not more than seven days total $28.25 million in those counties. These uses include conventions and business and trade shows, annual sporting events, fairs and festivals, and concerts and other performing arts events.

Expanding the eight counties gives the following estimated assessed value of potentially affected possessory interest:

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| $28,250,000 | 8 counties' assessed value for affected possessory interests |
| ÷ .642 | 8 counties' portion of statewide locally assessed values total |
| $44,000,000 | estimated statewide assessed value potentially affected |

**Revenue Summary**

If short-term uses of public property of not more than seven days were not treated as possessory interests, this bill would reduce property tax revenues from the basic 1 percent property tax rate by about $440,000 annually.

**Qualifying Remarks**

This estimate has been prepared under the assumption that 1) the "seven day" standard is cumulative and 2) a "day" does not require a 24 hour period of use.

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*This staff analysis is provided to address various administrative, cost, revenue and policy issues; it is not to be construed to reflect or suggest the Board's formal position.*