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(916) 323-7713

August 9, 1991

Mr. Tom Moran
Assistant Assessor - Valuation
MARIN COUNTY ASSESSOR'S OFFICE
Civic Center, P. O. Box C
San Rafael, CA 94913

Re: Si - Condominiums
Shared Appreciation Agreement

Dear Mr. Moran:

This is in response to your letter dated June 21, 1991. You ask if a Si condominium purchaser over the age of 55 years may transfer his or her original property base year value to this condominium replacement dwelling if such purchaser agrees to purchase under a shared appreciation agreement, which gives the grantor the right to fifty percent of the net appreciation in value of the replacement property upon the property's first sale after purchase.

You also ask whether it would be appropriate to assess all dwellings, when sold, at their purchase prices plus an additional 10% thereof, the 10% being the amount a purchaser can pay to avoid the shared appreciation provision, whether or not the purchasers actually elect to pay the 10%.

We received an opinion request on these same subjects from attorney Graham Maloney of Greene, Radovsky, Maloney and Share. In addition, Mr. Maloney forwarded copies of the Department of Real Estate Final Subdivision Report, the Si Residential Real Estate Purchase Agreement, the Declaration of Covenants, Conditions and Restrictions, an exemplary Title Insurance Policy and his analysis to support his conclusions that Si condominium purchasers are entitled to transfer their original property base year values to their replacement dwellings and that the replacement purchase prices are the actual purchase prices paid, whether or not the shared appreciation provision is in effect. We are responding to Mr. Maloney's inquiry by providing him with a copy of this letter.

Prop 13/60
Base

Facts

1. Seller sells condominium units under a purchase agreement that reserves to the seller a 50% interest in the increased value, if any, of the condominium unit over the purchase price paid for the unit plus the cost of owner improvements. The arrangement for the reserved interest, called a "shared appreciation agreement", provides, in part, that the grantor excepts from the grant of the property to the grantee a share of the increase in the value of the property upon the terms set forth in the agreement. The description of the grantor's share provides that the grantee shall pay to the grantor an amount equal to 50% of the net appreciated value upon the first transfer of the property by the grantee, due and payable upon the closing of the sale or transfer. (Sections 2.01 and 2.02.) The shared appreciation agreement is incorporated by reference in the grant deed and recorded with it.
2. The buyer is given the option to buy out the shared appreciation provision by paying a 10% premium on the purchase price.
3. Each purchaser receives a fee title to a specified condominium unit and an undivided fee simple interest as tenant-in-common in the condominium building in which the unit is located.
4. The shared appreciation agreement provides that it shall not be deemed or construed to create a partnership, tenancy-in-common, joint tenancy, joint venture or co-ownership by or between the grantor and grantee. (Section 3.02.)
5. The seller reserves no beneficial use of the property and all right to transfer the property resides in the purchaser.
6. The purchaser is not restricted in his or her ability to alienate the full fee title to the property.

Law and Analysis

The second paragraph of section 2 of Article XIII A of the California Constitution provides for the transfer of the base year value of an original property to a replacement dwelling under described circumstances:

". . . the Legislature may provide that under

appropriate circumstances and pursuant to definitions and procedures established by the Legislature, any person over the age of 55 years who resides in property which is eligible for the homeowner's exemption . . . may transfer the base year value of the property entitled to exemption . . . to any replacement dwelling of equal or lesser value . . ."

The Legislature exercised that authority by adopting section 69.5 of the Revenue and Taxation Code to provide that any person over the age of 55 years who resides in property eligible for the homeowner's exemption may transfer "subject to the conditions and limitations provided in this section" the base year value of that property to any replacement dwelling of equal or lesser value, etc. This language makes it clear that the conditions and limitations contained in section 69.5 are controlling for purposes of the benefit granted by this section.

Subdivision (g) contains a number of terms which are defined for purposes of section 69.5. It is important to note that subdivision (g) expressly provides that these definitions are "for purposes of this section". Thus, it is clear that the definitions are not limited to some portion of this section, but apply to the entire section.

Subdivisions (g)(3) and (4) define the terms "replacement dwelling" and "original property" in substantially the same terms. "Replacement dwelling" means a building, structure, or other shelter constituting a place of abode, whether real property or personal property, which 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. Similarly, "original property" means a building structure or other shelter constituting a place of abode, whether real property or personal property, which 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. These definitions evidence a legislative intent to apply the benefit of the section to the full fee simple interest in the property and not to just some fractional interest. Subdivision (g)(5) defines "equal or lesser value" to mean that the amount of full cash value of a replacement dwelling does not exceed 100%, 105%, or 110% of the amount of the full cash value of the original property depending upon certain conditions set forth therein. Again, this comparison demonstrates a whole property to whole property approach.

Consistent with the above, it has been our position that section 69.5 does not apply when only a partial interest in the

replacement dwelling is transferred. As indicated, the section refers to replacement property, original property, and equal or lesser value in terms of a total living unit of property. Nothing in the section supports the conclusion that it is intended to apply when only a fractional interest in the replacement dwelling, rather than a full fee interest, is transferred.

We now turn to examining the property purchases here at issue to see if the replacement dwellings qualify for the transfer of base year value provisions of section 69.5. For the reasons set forth below, we conclude that title to the replacement dwellings is taken by the purchasers in fee, such that the provisions of section 69.5 are applicable, and that the shared appreciation provision does not constitute co-ownership of the dwellings by the seller and purchasers. In our view, the shared appreciation agreement does not represent a retained interest in the real property transferred. Rather, it appears to be a form of additional non-cash consideration furnished by the purchasers.

The grant deed transfers the real property interest from seller to purchaser. Where, as here, the deed provides (via the incorporated shared appreciation agreement) that the "grantor excepts from the grant of the property to the grantee" an interest as further defined, there is a strong inference that less than the full fee interest in the real property is being transferred. The express terms of the deed appear to carve out and retain in the grantor an interest in the property. Despite the appearance of these provisions, our review of the full terms of the shared appreciation agreement and other related information leads us to conclude that, while the issue may not be entirely free of doubt, the grantor has in fact transferred the full fee interest.

The Department of Real Estate Final Subdivision Report describes the physical and legal aspects of the property for potential purchasers. Page 8 thereof, under "Interest to be Conveyed", states that each purchaser will receive:

- "(a) fee title to a specified condominium unit;
- (b) an undivided fee simple interest as tenant in common in the condominium building in which the building is located . . ."

Thus, the Department of Real Estate considers the property interest to be conveyed to be a statutory condominium in which fee title is transferred, not a co-tenancy or co-ownership interest. Had these conveyances created a co-tenancy or a co-ownership interest, the Department of Real Estate would most

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certainly have called this to potential purchasers' attention in its report.

Consistent therewith is the fact that the shared appreciation agreement states, in part:

"Grantor and Grantee intend that nothing contained in this Exception, including without limitation, Grantor's right to receive Grantor's Share, shall be deemed or construed to create a partnership, tenancy-in-common, joint tenancy, joint venture or co-ownership by or between Grantor and Grantee." .
(Section 3.02)

The grant deed grants to a purchaser a fee ownership of the condominium unit subject only to the Declaration of Covenants, Conditions and Restrictions and the shared appreciation agreement. The Declaration of Covenants, Conditions and Restrictions and the title insurance policy are consistent with the above-mentioned documents.

Most important are the terms of the shared appreciation agreement. Although it is titled "Exception From Grant Of Property" and purports to be an exception from the grant of the real property to the grantee, nothing in its terms gives or reserves in the grantor any interest in the real property conveyed by the deed. The grantor retains no right to own, use or enjoy the real property; to control or restrict the grantee's right to dispose of it; or to claim any part of the proceeds of sale. The agreement merely provides that the grantee shall pay the grantor an amount equal to 50% of the net appreciated value of the property, as defined in the agreement. This obligation is due and payable upon the first transfer of the property at the close of the sale or transfer. The agreement imposes an unsecured contingent unliquidated liability on the grantee to make a future payment to the grantor. Nothing in the terms of the agreement supports the conclusion that the so-called "Grantor's Share" is either real property or an interest in real property.

Accordingly, the purchaser of the dwelling acquires all the incidents of ownership, all the benefits and liabilities of ownership, and the seller retains only the contingent right to receive a payment from the purchaser on the transfer of the dwelling under the shared appreciation agreement. The purchaser acquires the "full bundle of rights" in the dwelling, and he or she is not restricted in his or her ability to alienate the full fee title to the property whatsoever.

You also ask whether it would be appropriate to assess all dwellings at the (10%) higher price, whether or not the

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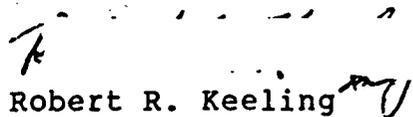
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purchaser elected that option. As you know, the assessor is required to value real property at its full cash value on the date it changes ownership and the assessor has full discretion to select the most appropriate method or methods for determining full cash value.

Revenue and Taxation Code section 110(a) defines "full cash value" as the amount of cash which property would bring if exposed for sale in the open market. Subdivision (b) establishes a rebuttable presumption that in an arms-length, open-market transaction, the purchase price paid (valued in money) is the full cash value. The assessor is, presumably, entitled to rely upon this presumption in the case of the sales of the Sr units. In determining the purchase price for purposes of the presumption, subdivision (b) requires that the total consideration provided by the purchaser, whether paid in money or otherwise, be valued in money. The total consideration provided by the purchaser would include, of course, the purchaser's agreement to share future appreciation in the value of the property with the seller. This would be non-cash consideration which the assessor would need to convert to a cash value. Conversion of a shared appreciation agreement to a cash value would depend upon the assessor's judgment as to what value the market place would place on such an obligation. We have no basis for determining what that might be. Mr. Maloney's letter suggests that the value should be less than the 10% option price because only a few purchasers have elected to pay the additional amount. He may be correct. On the other hand, a purchaser's decision on whether to pay the additional 10% may be influenced by non-price comparison considerations. Purchasers may simply wish to keep their capital expenditure as low as possible for a variety of reasons even though they believe the 10% option offers an attractive price. Some purchasers may see the shared appreciation arrangement as a means of passing a part of the purchase price on to their heirs. Whatever the case may be, the determination of the cash value of the shared appreciation rests on the appraisal judgment of the assessor.

In conclusion, our intention is to provide timely, courteous and helpful responses to inquiries such as yours. Suggestions that help us to accomplish this goal are appreciated.

Very truly yours


Robert R. Keeling
Tax Counsel

RRK:ta/3364D

cc: Mr. Graham Maloney

Mr. James Dal Bon
Marin County Assessor
Mr. Verne Walton
Mr. Dick Johnson