"220.0162"

(916) 324-6594

December 6, 1985

Reassessment of Real Property
After Granting of Easement

Dear Mr.

In your letter to of October 28, you request our opinion of whether a change in ownership would occur as a result of granting an easement under the following facts described in your letter:

> "Parcel 1 fronts on a public road. Parcel 2 is landlocked. The owner of Parcel 1 grants to the owner of Parcel 2 a non-exclusive, twenty foot right of way for ingress and egress onto Parcel 2."

Neither the Revenue and Taxation Code nor the Property Tax rules promulgated by the Board deal specifically with the question of whether a grant of an easement is a change in ownership for proeprty tax purposes.

Revenue and Taxation Code* Section 60 does, however, define change in ownership to mean "a transfer of a present interest in real property, including the beneficial use thereof, the value of which is substantially equal to the value of the fee interest."

Although an easement is not an estate in real property because it is nonpossessory, it is an interest in real property. (Darr v. Lone Star Industries, Inc. (1979) 94 Cal.App.3d 895.) Under the facts described above, it also appears to be a present interest. Further, it is clear that the owner of the easement will have the beneficial use of the described real property for right-of-way purposes.

* Statutory references are to the Revenue and Taxation Code unless otherwise indicated.

Assuming the easement to be granted in this case is perpetual, the only question here is whether the value of the easement is substantially equal to the value of the fee interest (in the identically described land) considering the fact that the easement here is nonexclusive. When an easement is nonexclusive, the servient owner may use the easement as long as his use does not interfere with or impede the right of use of the easement owner. (Atchison, Topeka & Santa Fe Railroad Company v. Abar (1969) 275 Cal.App.2d 456.) Since the servient owner's use can't interfere with the easement owner's use as a right-of-way, the easement owner's use of the easement for right-of-way purposes is substantially equivalent to the use he could make of the twenty foot strip if he owned an exclusive easement or if he owned the twenty foot strip in fee simple. It could, therefore, be argued that the value of the nonexclusive easement in this case is substantially equal to the value of the fee interest. We have taken the opposite position, however, with respect to nonexclusive easements for ingress and egress as indicated by the enclosed copy of a memo of [illegible], formerly of our legal staff, dated November 24, 1981.

Accordingly, it is our opinion that the grant of the nonexclusive easement described above would not constitute a change in ownership as defined by Section 60.

The views expressed in this letter are, of course, only advisory in nature. They are not binding upon the assessor of any county. You may wish to consult the appropriate assessor(s) in order to confirm that the described property will be assessed in a manner consistent with the conclusions stated above.

Very truly yours,

Eric F. Eisenlauer
Tax Counsel

EFE:fr

Enclosure

November 24, 1981

Glenn L. Rigby

Item 182 -- Taxability of Easements

In your memo of September 17, 1981, you asked our opinion regarding the above-referenced subject. This sample item is the parking lot and a portion of the Shopping Center in . I had previously advised you that the sale/leaseback agreement between H , the developer, and the T con-stitutes a change in ownership requiring a reappraisal. The property was subject to "...certain non-exclusive easements for use ingress, egress, parking and utility purposes..." which were created when H sold adjoining parcels to J , S , and B two years previous when the land value was substantially less.

You ask if you should reappraise the entire property or, does the existence of the easements require only a partial reappraisal of the land and parking facilities?

The answer to your question depends on whether the easements in question constitute an interest in real property which is substantially equal to the fee interest. (Section 60 of the Revenue and Taxation Code.) If they are, then the ownership of such property was and remained in J , S , and B and that interest would not be subject to reappraisal when the sale and leaseback occurred. In regard to easements, I have attached a memorandum of Margaret Shedd's. You will note that she concluded that normally non-exclusive easements are not regarded as interests which are substantially equivalent to the fee interest.

Lacking any other evidence regarding the non-exclusive easement interests of J , etc., it is our opinion that the area subject to such easements would be considered to have undergone a change in ownership when the sale to T occurred.

GLR:jlh

for MSS

C10 - Easements

Mr. Glenn L. Rigby

Dec. 10, 1980

Margaret S. Shedd

Easements

This is in response to your recent request that I research the nature of the interest created by an easement in order to determine whether the transfer of an easement constitutes a change in ownership for property tax purposes. As you are aware, a change in ownership is generally defined in Section 60 of the Revenue and Taxation Code as "a transfer of a present interest in real property, including the beneficial use thereof, the value of which is substantially equal to the value of the fee interest." Section 61(a) of the Code specifically includes certain types of easements, i.e., mineral rights, as being substantially equal to the value of a fee interest. This section provides:

> 61. Except as otherwise provided in Section 62, change in ownership, as defined in Section 60, includes, but is not limited to:
>
> (a) The creation, renewal, sublease, assignment, or other transfer of the right to produce or extract oil, gas, or other minerals for so long as they can be produced or extracted in paying quantities. The balance of the property, other than mineral rights, shall not be reappraised pursuant to this section.

The issue has been raised of whether an additional section or sections are needed to clarify that other types of easements should be specifically addressed or whether the existing test provided in Section 60 is sufficient.

I. Easements Defined

An easement is an interest in the land of another, which entitles the owner of the easement to a limited use of enjoyment of the other's land. (Restatement of Property, Sec. 450; Eastman v. Piper, (1924) 68 Cal. App. 554, 560; Zlozower v. Lindenbaum, (1929) 100 Cal. App. 766, 770.)

Easements may be created by express words, by grant or reservation, usually by deed, by implication (Civ. Code, Sec. 1104) (usually involving division of land); by necessity; and by prescription (open and notorious use, continuous, hostile to owner, exclusive and under claim of rights). Cushman v. Davis, (1978) 80 Cal. App. 3d 731, 735.

Easements are divided into two categories, easements appurtenant and easements in gross. An easement is appurtenant when it is attached to the land of the easement owner, which is the dominant tenement, and burdens the land of another, the servient tenement. (3 Witkin, Summary of Cal. Law, Real Property, Sec. 341.) An easement in gross is a right in another's land not created for the benefit of any land owned by the easement holder; it is not attached to the land but is a personal right attached to the person of the easement holder. It is, however, as much an interest in another's land, i.e., the servient tenement, as an easement appurtenant. The important difference between an easement appurtenant and an easement in gross is that an easement appurtenant is attached to a dominant tenement and passes with its transfer, even though not specifically mentioned. An easement in gross, on the other hand, which exists without a dominant tenement, cannot pass as an appurtenance to land and must be expressly transferred. (Bowman, Ogden's Revised Cal. Real Property Law, V. 1, Sec. 13.7)

Section 801 of the Civil Code lists the following 18 easements as easements appurtenant:

1. The right of pasture;

2. The right of fishing;

3. The right of taking game;

4. The right-of-way;

5. The right of taking water, wood, minerals, and other things;

6. The right of transacting business upon land;

7. The right of conducting lawful sports upon land;

8. The right of receiving air, light, or heat from or over, or discharging the same upon or over land;

9. The right of receiving water from or discharging the same upon land;

10. The right of flooding land;

11. The right of having water flow without diminution or disturbance of any kind;

12. The right of using a wall as a party wall;

13. The right of receiving more than natural support from adjacent land or things affixed thereto;

14. The right of having the whole of a division fence maintained by a coterminous owner;

15. The right of having public conveyances stopped, or of stopping the same on land;

16. The right of a seat in church;

17. The right of burial;

18. The right of receiving sunlight upon or over land as specified in Section 801.5 (solar easements).

The following interests are deemed to be easements in gross pursuant to Section 802 of the Civil Code:

1. The right to pasture, and of fishing and taking game;

2. The right of a seat in Church;

3. The right of burial;

4. The right of taking rents and tolls;

5. The right of way;

6. The right of taking water, wood minerals, or other things.

It has been held that these listings in the Civil Code are not exclusive, and that the Code does not purport to state all the possible easements. (Jersey Farm Co. v. Atlanta Realty Co., (1912) 164 Cal. 412.) It should also be noted that in 1979, the Legislature added a new Chapter to the Civil Code, commencing with Section 815 for conservation easements conveyed to qualified nonprofit organizations.

II. Easements as Distinguished from Other Interests in Land

A. Estates

Although an easement is an interest in land which may be a perpetual right in fee, or one of lesser duration (3 Witkin, Summary of Cal. Law, Real Property, Sec. 340), it is not legally an estate in real property and, as such, may not act as the servient tenement for another easement (Hayward v. Mohr, (1958) 160 Cal. App. 2d 427).

The term estate is confined to those interests in land which are or may become possessory. The California Civil Code, Section 761, for example, lists four types of estates in real property, all of them possessory interests: 1. Estate of inheritance or perpetual estates; 2. Estates for life; 3. Estates for years, or 4. Estates at will. An easement is a nonpossessory interest in real property; the fact that it involves use of another's land evidences its nonpossessory character. As such, it cannot be an estate in real property. Powell states the rule succinctly: "While an easement is clearly an 'interest in land'...it is equally clearly never an 'estate in land.'" (3 Powell, Easements and Licenses, ch. 34, sec. 405) (See generally, Darr v. Lone Star Industries, Inc., (1979) 94 Cal. App. 3d 895, 900-901.)

It is possible, however, that an interest termed as an easement may, in fact, be an estate. In

this regard, the court in Raab v. Casper, (1975) 51 Cal. App. 3d, 866, 876-877, stated:

> "The former [exclusive easement] is a right to use property of another; every incident of ownership not inconsistent with enjoyment of the easement is reserved to the owner of the servient tenement; the latter [outright title] may make use of any of the property which does not unduly interfere with the easement. [Citation.] An exclusive interest labeled 'easement' may be so comprehensive as to supply the equivalent of an estate, i.e., ownership. In determining whether a conveyance creates an easement or estate, it is important to observe the extent to which the conveyance limits the uses available to the grantor; an estate entitles an owner to the exclusive occupation of a portion of the earth's surface. [Citations.] "'"If a conveyance purported to transfer to A an unlimited use or enjoyment of Blackacre, it would be in effect a conveyance of ownership to A, not of an easement."'" [Citations.]

B. Leaseholds (Estates for Years)

A leasehold vests exclusive possession of the property to the lessee, even against the owner of the fee (Von Goerlitz v. Turner, (1944) 65 Cal. App. 2d 425, 429) and is based on a privity of estate between lessor and lessee. (See Ellingson v. Walsh, O'Connor & Barneson, (1940) 15 Cal. 2d 673.)

By contrast, an easement does not divest the owner of its possession in the property. The owner of an easement (e.g., a right-of-way for ingress and egress over land) has only the control necessary to enable him to use the easement, and ordinarily he cannot exclude others from making any use of the land that does not interfere with his enjoyment of the easement. (Pasadena v. California-Michigan Land & Water Co., (1941) 17 Cal. 2d 576.)

Nor does the use of the words "leased for 2 years" transform an easement into a leasehold. An easement may be conveyed for any length of duration. The term "lease," like the terms "fee simple absolute" merely describes the length in duration of the interest conveyed. It does not describe the nature or quality of the interest conveyed. (Darr v. Lone Star Industries, Inc., (1979) 94 Cal. App. 3d 895, 900.)

Thus, the holder of an estate of less than fee may grant an easement within the term of his estate, but the easement ceases upon expiration of the lease. (Bowman, Odgen's Revised Cal. Real Property Law, V. 1, Sec. 13.20)

C. Easements Include Profits

A profit or profit a prendre is a right to take from the land of another either a part of the soil or something growing or subsisting in the soil. A familiar example is the right to take minerals, including oil and gas, from another's land. (Callahan v. Martin, (1935) 3 Cal. 2d 110, 121; Sehle v. Producing Props., Inc., (1963) 230 Cal. App. 2d 430) The owner of a profit does not own the physical substance in place, but he has the power to acquire ownership of it by severance and removal (Smith v. Cooley, (1884) 65 Cal. 46)

California courts have frequently stated that an easement is a privilege "without profit" (see, e.g., Gray v. McWilliams, (1893) 98 Cal. 157.) The codes, however, do not distinguish between easements and profits, and in fact enumerate typical profits as easements (Civ. Code, Sections 801-802, which lists as an easement the right to take "water, wood, minerals, and other things "from land).

III. Respective Rights of the Easement Owner and the Servient Owner

Generally, the rights of any person having an easement in the land of another is measured by the purpose and character of that easement. And the right to the use of the underlying land remains with the fee owner insofar as it is consistent with the purpose and character of the easement (Langazo v. San Joaquin Light & Power Co., (1939) 32 Cal. App. 2d 678) Thus, every incident of ownership not inconsistent with the easement and enjoyment of the same, is reserved to the grantor.

(Dierssen v. McCormack, (1938) 28 Cal. App. 2d 164, 170) Accordingly, the easement holder must exercise his right so as not to impose any unnecessary burden on the servient tenement, and the owner of the servient tenement may make any use of the property which does not unduly interfere with the easement. (Baker v. Pierce, (1950) 100 Cal. App. 2d 224, 226) Moreover, the fee owner may transfer to another the right to any use that he has retained and could exercise himself. (Guerra v. Packard, (1965) 236 Cal. App. 2d 272)

Following are examples of rights the courts have found to be held by the servient owner which did not obstruct or interfere with the normal use of the easement granted:

(1) The servient owner may use the land beneath a power line. (Lozano v. PG&E, (1945) 70 Cal. App. 2d 415) In Los Angeles v. Howard, (1966) 244 Cal. App. 2d 538, plaintiff city granted real property reserving a 150 foot wide easement for operating and repairing power lines. The court held that defendant servient owners were entitled to use part of the surface area for a parking lot for their restaurant.

(2) Servient owner may maintain a fence across a drainage canal when no interference with the use of canal results. (Bolsa Land Co. v. Burdick, (1976) 151 Cal. 254)

(3) Having granted an easement for a roadway across his land, the servient owner may use the road himself or grant the right of use to others if the easement owner's use is not interfered with. (Galletly v. Bockius, (1905) 1 Cal. App. 724)

(4) Servient owner may grant a pipeline easement over land covered by a previous grant of a similar esement to another. Until a point of irreconcilable conflict is reached, a concurrent use of the strip is permitted. (Pasadena v. California-Michigan Land & Water Co., (1941) 17 Cal. 2d 576)

(5) Servient owner grants easement to construct and maintain a ditch, reserving the right to take water on designated days for the irrigation of their lands. Servient owners were entitled to permit another person to take water on those days. (Dierssen v. McCormack, (1938) 28 Cal. App. 2d 164, 170)

IV. Conclusion

Based on the foregoing, and for the following reasons, it is my opinion that any specific statute defining easements (other than mineral rights) for purposes of determining whether a change in ownership has occurred would be extremely difficult to draft and would probably be unworkable:

1. Many of the easements listed in the Civil Code confer only nominal rights and are most likely not currently assessed for property tax purposes.

2. Easements appurtenant pass with the land to which they are attached and any value of the easement may be currently included when a change in ownership of that property occurs. Easements in gross, on the other hand, must be expressly transferred.

3. Since easements are legally not estates in fee or leaseholds, a determination of whether the creation of an easement has a value "which is substantially equal to the value of the fee interest" depends on the terms of the grant, the type and duration of the easement, the degree of exclusive use conferred, and the respective rights of the servient and dominant owners for each particular easement. This calls for a case-by-case evaluation.

MSS:fr

cc: Mr. Lawrence A. Augusta
Mr. Gordon P. Adelman
Mr. Robert H. Gustafson