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January 25, 2011

Mr.
Senior Appraiser – Title Division
Riverside County Assessor Office
P.O. Box 12004
Riverside, CA 92502-2204

**Re: *Grant Deed with Power of Termination
Assignment No.: 10-261***

Dear Mr. _____ :

This is in response to your email dated October 19, 2010 to Acting Assistant Chief Counsel Christine Bisauta wherein you requested our opinion regarding the transfer of property subject to power of termination. As explained below, it is our opinion that the transfer of the property constituted a change in ownership. This opinion is being requested in connection with a hearing before the Riverside County Assessment Appeals Board (AAB). The parties are aware that we will be issuing this opinion, and were given an opportunity to provide additional information. The parties anticipate that this opinion will be issued prior to the hearing.

Factual Background

You ask our opinion regarding a transfer of a property from Grantor to Grantee by a deed entitled "Grant Deed Containing Covenant and Power of Termination" (the Grant Deed). The section of the Grant Deed regarding the power of termination states:

4. Power of Termination

- 4.1. This Grant Deed reserves to the Grantor a power of termination in the Property, as such powers are described in California Civil Code Section 885.010 et seq. The power of termination shall become enforceable upon each and every conveyance, assignment, lease, gift, transfer (with or without consideration) or other alienation (all of the foregoing actions, collectively, "Transfer") by Grantee of all or any portion of the Property (each such portion, the "Transferred Property") to the first person or entity (a "Transferee") other than Grantor or an Affiliate (as defined in the Agreement) of Grantee. The power of termination shall apply to each such portion of the Property so transferred and shall continue thereafter until the Commencement of Construction. At any time following the Commencement of Construction on the Transferred Property, Transferee may request that Grantor execute a document releasing its power of termination against such property (a "Release"). . . . 'Commencement of Construction' shall mean the commencement of pouring of foundations and the successful completion of the first building inspection related thereto for

structure(s) comprising at least fifty percent (50%) of the Proposed Square Footage on the Transferred Property, provided such inspection occurs promptly following a request therefor from Transferee.

In the event the Grantee transfers any portion of the property to a third party (Transferee), other than Grantor or an affiliate of Grantee, and the Transferee not commenced construction within three years of transfer of any portion of the property, the Grantor may exercise its power of termination except in the event of a "permitted delay" (as defined) or certain changed circumstances. (Grant Deed, sections 4.2, 4.3, and 4.6.) Upon the commencement of construction, the Grantor may be required to release such power on the Transferee's request. Each Transferee has the right, without the approval of the Grantor or Grantee, to encumber the property with a mortgage, deed of trust, or other security interest. (Grant Deed, section 4.5.)

Law & Analysis

County assessors are required to reappraise at fair market value property that changes ownership after the 1975 lien date. (Rev. & Tax. Code¹, §§ 110.1, subd. (a)(2).) A "change in ownership" is defined 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. (Rev. & Tax. Code, § 60.)

A transfer of real property can be subject to the happening of an event. (Civ. Code, § 707.) If the happening of an event begins a right in property, then it is a condition precedent. (Civ. Code, § 708.) If the happening of an event ends a right in property, then it is a condition subsequent. (*Ibid.*)

In this case, the Grant Deed gave the Grantor a power of termination in the property, "as such powers are described in California Civil Code Section 885.010 et seq." Pursuant to Civil Code section 885.010, the transfer of an interest in property subject to a power of termination creates an interest subject to a condition subsequent and the power of termination itself is an interest in real property. However, in this case the Grantor's power of termination does not arise until the Grantee transfers the property to a Transferee. Therefore, the Grant Deed transferred an interest in the property to the Grantee, and no interest has been transferred to any Transferee. If the interest includes the beneficial use of the property then a change in ownership has occurred.

The term beneficial use means the right to enjoy the benefits of a property and includes the right to occupy a property and the right to receive income produced by a property. (*Reilly v. City and County of San Francisco* (2006) 142 Cal.App.4th 480, 489; *Leckie v. County of Orange* (1998) 65 Cal.App.4th 334, 338-339; *Pacific Southwest Realty v. County of Los Angeles* (1991) 1 Cal.4th 155, 162.) Evidence Code, section 662 creates a presumption that the record owner of legal title to property is also the beneficial owner of such property and county assessors are entitled to rely upon this presumption unless it has been rebutted by clear and convincing proof (deed presumption). In this case, pursuant to the Grant Deed, the Grantee is the owner of record title of the property. To rebut the deed presumption, it must be shown by clear and convincing evidence that the Grantor and not the Grantee is the owner of the present beneficial interest in the property. The terms and conditions of the Grant Deed provide the best evidence of the intentions of the parties. (Property Tax Rule, 462.200, subd. (b).)

¹ All "section" references are to the California Revenue and Taxation Code, unless otherwise indicated.

The Grant Deed transferred the property to the Grantee, but placed restrictions on the use of the property. Most importantly, a Transferee must commence construction on the property within three years of a transfer to it or face forfeiture of the property. Also, the property may only be devoted to "permitted uses" as defined in the Memorandum of Disposition and Development Agreement, recorded February 11, 2002 (the "Agreement"), and may not be transferred to a tax exempt entity.

In our opinion, despite these restrictions a present interest in the property, including the beneficial use thereof, was transferred to the Grantee. We have previously advised that restrictions on the use of property, such as the requirement that the property be occupied by the owner, do not defeat beneficial use. (Property Tax Annotation (Annotation) 220.0369.) The nature of the "permitted uses" likely does not affect the Grantee's beneficial interest in the property;² in any event the Grantee may exercise all incidents of ownership not prohibited by the Grant Deed. For example, the Grantee may transfer its interest in the property (though not to a tax exempt agency) and encumber the property without seeking the approval of the Grantor. (Grant Deed, section 4.5.) Finally, the Grant Deed does not relieve the Grantee of the responsibilities of ownership of the property, such as tax and civil liability. Based on the foregoing, it is our opinion that the Grantee has a present beneficial interest in the property. Further, should the Grantee transfer the property to a Transferee, the Transferee would have the same rights regarding the property mentioned above; such a transfer would also result in change in ownership.

The only interest in the property that the Grantor retained is the power of termination, which has not arisen as of the time of the transfer to the Grantee. The Grantor may only exercise the power if the Grantee transfers the property to a Transferee and the Transferee has not commenced construction within three years of that transfer. Civil Code section 885.010, subdivision (b) states that a power of termination is an interest in real property; however, until exercised, the power of termination is a future, contingent interest in the property. Therefore, the creation or transfer of such an interest is not a change in ownership. (See Annotations 220.0165 and 220.0775.) However, if and when the Grantor does exercise the power of termination and the beneficial interest in the property is transferred to the Grantor, a change in ownership will result.

The views expressed in this letter are only advisory in nature. They represent the analysis of the legal staff of the Board based on present law and the facts set forth herein, and are not binding on any person or public entity.

Sincerely,

/s/ Daniel Paul

Daniel Paul
Tax Counsel

DP:mcb

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² We were not provided a copy of the Agreement which contained the definition of "permitted uses" so we are not able to comment conclusively on the effect of this clause in the Grant Deed.

Mr.

- 4 -

January 25, 2011

cc:

Law Group

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Mr. Dean Kinnee	MIC:64
Mr. Todd Gilman	MIC:70