STATE OF CALIFORNIA

610.0004.010

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December 13, 2011

Honorable Tom J. Bordonaro, Jr.
San Luis Obispo County Assessor
Attn:
County Government Center
1055 Monterey St., Ste. 360D
San Luis Obispo, CA 93408

Re: Automatic Builder's Exclusion
Assignment No.: 11-078

Dear Ms. :

This is in response to your letter to the Board of Equalization's Legal Department wherein you requested guidance as to the application of Revenue and Taxation Code[1] section 75.12, the builder's exclusion. Your letter poses several different hypothetical situations which are set forth below followed by our responses.

Law & Analysis

A reassessment of property occurs upon the date of a change in ownership or the date of completion of new construction. (Cal. Const. art. XIII A, § 2; see also Rev. & Tax. Code, §§ 60 and 70 et seq.) Section 75.12, subdivision (a)(1)(A) (Subdivision (a)(1)(A)) provides an exclusion from reassessment for new construction that the owner does not intend to use or occupy even though the new construction is complete. In order for the exclusion to apply, the owner must provide the assessor notice of his intent not to use or occupy the property prior to or within 30 days of the commencement of construction. Section 75.12, subdivision (a)(1)(B) (Subdivision (a)(1)(B)) provides that the exclusion is automatic and no notice is required if all three of the following conditions are met:

1. The property is subdivided into five or more parcels in accordance with the Subdivision Map Act (Division 2 (commencing with section 66410) of Title 7 of the Government Code), or any successor to that law;

2. A map describing the parcels has been recorded; and

3. Zoning regulations that are applicable to the parcels or building permits for the parcels require that, except for parcels dedicated for public use, single-family residences will be constructed on the parcels. (Rev. & Tax. Code, § 75.12, subd. (a)(1)(B)(i) through (a)(1)(B)(iii).)

[1] All section references are to the Revenue and Taxation Code unless otherwise specified.

Failure to qualify for this exclusion either automatically or by providing notice to the assessor will result in a reassessment of the property on the date the construction is completed.

With regard to subsequent owners of new construction, it has long been the Legal Department's opinion that Subdivision (a)(1)(A) requires each subsequent owner to qualify for the new construction exclusion. (See Letter to Assessors (LTA) 83/132; Property Tax Annotations[2] (Annotations) 610.0003 and 610.0004.005.) The test for the automatic exclusion under Subdivision (a)(1)(B) must be applied to each subsequent owner. Therefore, if any owner fails to qualify for the automatic exclusion, he must provide notice to the assessor as required under Subdivision (a)(1)(A).

The hypothetical situations you posed in your letter are quoted below followed by our responses.

> 1. One of the conditions, set forth in R&T 75.12(a)(1)(B)(i), states:
>
> > The property is subdivided into five or more parcels in accordance with the Subdivision Map Act (Division 2 (commencing with section 66410) of Title 7 of the Government Code), or any successor to that law.
>
> What is the effective date of this section? I know that the Subdivision Map Act was removed from the Business and Professions Code and moved to the Government Code in 1975, but I don't know if that is the effective date we need to look for, Also, would the exclusion look back to subdivisions created prior to the date the Subdivision Map Act was moved to the Government Code?

Section 75.12, subdivision (a)(1)(B)(i) requires that the property be subdivided in accordance with the Subdivision Map Act, commencing with Government Code section 66410 or its successors. Section 30 of Statutes of 1975, Chapter 24 expressly provides that the Subdivision Map Act does not apply to any map which was approved prior to March 1, 1975. Therefore, properties subdivided by maps approved prior to March 1, 1975 were not subdivided in accordance with the Subdivision Map Act as required by section 75.12, subdivision (a)(1)(B)(i) and the owner of such properties is not eligible for the automatic exclusion.

> 2. Suppose that property has been subdivided into 12 lots. A purchases Lots 1 through 6 in October 2009. On March 12, 2010, he starts construction on Lots 1 and 2. Since A is eligible for the automatic exclusion, he does not notify the assessor. On August 2, 2010, A sells Lots 2, 4, and 6 to B. Since A no longer owns 5 lots, and he is more than 30 days past the date when construction started on Lot 1, is A still eligible for the exclusion based on the facts when he started the new construction? Or is A not eligible for the exclusion, since he can meet neither R&T 75.13(a)(1)(A) nor 75.12(a)(1)(B) when the new construction has been completed? What if, after selling three Lots to B, and before the construction was completed on Lot 1, A purchased Lots 8 and 9?

[2] Property Tax Annotations are summaries of the conclusions reached in selected legal rulings of Board legal counsel published in the Board's Property Tax Law Guide and on the Board's website. See Cal. Code Regs., tit. 18, § 5700 for more information regarding annotations.

Subdivision (a)(1)(A) requires a builder/owner to notify the assessor within 30 days of the commencement of construction of his intent not to use or occupy the property. Property Tax Rule[3] 463.500, subdivision (c)(3) provides, "where a property has been subdivided into separate lots, the commencement of construction shall be determined on the basis of the activities occurring on each separate lot." Therefore, in a subdivision, each individual residence will have its own date of commencement of construction, and, within 30 days of each date of commencement of construction, the builder/owner must determine if he is required to give notice pursuant to Subdivision (a)(1)(A) or if, on the other hand, the automatic exclusions applies. It is our opinion that, for the builder/owner to make an informed decision about whether or not to give notice, the automatic exclusion will apply if the builder/owner meets the requirements of Subdivision (a)(1)(B) on the date of commencement of construction of each individual residence.

In your scenario, when A commenced construction of residences on Lot 1 and Lot 2 on March 12, 2010, he met the requirements of Subdivision (a)(1)(B) and therefore was not required to notify the assessor of his intention to not occupy or use the property. The fact that A subsequently sells Lots 2, 4 and 6 to B is not relevant, despite the fact that after the sales, A does not own five lots. As explained above, section 75.12 requires that the builder/owner meet the requirements of Subdivision (a)(1)(B) *at the commencement of construction*. There is no requirement that the builder/owner continue to meet the requirements of Subdivision (a)(1)(B) throughout their ownership of the property. Of course, if the builder/owner does occupy or use the property in contradiction to section 75.12, then the exclusion is lost. (Rev. & Tax. Code, § 75.12, subd. (e); LTA 83/132, Question 3.)

After selling the three lots to B, if A begins construction on any of the other lots, he will be required to give notice under Subdivision (a)(1)(A) since he does not own five or more parcels. When A purchases Lots 8 and 9 he will again have five parcels and will qualify for the automatic exclusion if he commences construction on any of those lots.

> 3. Suppose A owned Lots 1 through 5. A constructs a house on Lot 1, and receives the exclusion. After the house on Lot 1 is completed, but before he sells it, A starts construction of a house on Lot 2. Since there is now a completed residence on Lot 1, does this mean that A is no longer eligible for the automatic exclusion for the house on Lot 2? (This appears to be what Question 3 in Annotation [610.0004.005] is saying, except that the house on Lot 1 did not exist when A purchased the lots.)
>
> What would happen if A starts the construction of the house on Lot 1 on March 1, 2010, and the construction is completed on November 1, 2010. A starts construction of a house on Lot 2 on August 1, 2010 and construction is completed on February 1, 2011. A starts construction of a house on Lot 3 on December 15, 2010, and the construction is completed on April 1, 2011. A starts construction of a house on Lot 4 on January 1, 2011, and the construction is completed on August 1, 2011. A sells Lot 5 on July 15, 2011. Which houses, if any, are eligible under the automatic exclusion, and which will not qualify for any exclusion?

[3] Cal. Code Regs., tit. 18, § 463.500. All Rule references are sections to title 18 of the California Code of Regulations.

Only lots on which "single-family residences will be constructed" qualify for the automatic exclusion. (Rev. & Tax. Code, § 75.12, subd. (a)(1)(B)(iii).) Therefore, parcels containing existing residences do not count towards the five parcel minimum needed to qualify under Subdivision (a)(1)(B).

In your first paragraph, at the time A started construction on the house on Lot 2, A had already completed the house on Lot 1. Therefore, at the commencement of construction of the house on Lot 2, A owned only four lots without existing residences and Subdivision (a)(1)(B) would not apply.

In your second paragraph, at the time A started construction on the house on Lot 2, A had not yet completed the house on Lot 1. Therefore, there was no existing residence on any of the five lots and Subdivision (a)(1)(B) would apply. By the time A started construction on the house on Lot 3, A had already completed the house on Lot 1. Therefore, at the commencement of construction of the house on Lot 3, A owned only four lots without existing residence and, Subdivision (a)(1)(B) would not apply. For the same reasons, the house on Lot 4 would be ineligible for the automatic exclusion.

> 4. What is the definition of "owner" in R&T 75.12(a)? Does it matter how A is holding title, or in what percentage A has an interest in order to determine if A is an owner? Suppose that A purchased 2 lots as an individual and as the sole owner on March 15, 2010. On July 20, 2010, A, B, C, and D purchased 2 lots as joint tenants in the same subdivision. On August 6, 2010, X Corp. (wholly owned by A) purchased 2 lots in the same subdivision. Is A now eligible for an automatic exclusion under R&T 75.12(a)(1)(B)?

Subdivision (a)(1)(A) requires that an "owner" notify the assessor if he or she "does not intend to occupy or use the property" but does not further define who is an "owner". Principles of statutory construction dictate that, in the absence of a more specific definition, the ordinary and usual meaning of the language expresses the legislative intent of the provision. (See *Central Pathology Service Medical Clinic, Inc. v. Superior Court* (1992) 3 Cal.4th 181, 186-187.) For purposes of establishing ownership, Evidence Code section 662 creates a rebuttable presumption that beneficial title follows legal title. That section states: "The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof." Accordingly, an "owner" for purposes of subdivision (a) of section 75.12 is presumed to be the holder of the legal title to the property unless it is demonstrated by clear and convincing evidence that another person holds beneficial title. Therefore, A would be considered the owner of the lots he owned as an individual. He would also be an owner of the lots in which he held joint tenancy interests, since he would presumably be on the deed for those properties. However, A would not be considered the owner of the lots owned by X Corp., despite the fact that A owns 100 percent of the interests in X Corp because A is not a record owner of these lots and because the separate identity of legal entities is respected for property tax purposes. Since A only had an ownership interest in four lots, he would not be eligible for the automatic exclusion of Subdivision (a)(1)(B).

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

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cc:	Mr. David Gau	MIC:63
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