

KEVIN D. CARUNCHIO  
County Administrative Officer



TEL: (760) 878-0292  
FAX: (760) 878-2241  
E-mail: kcarunchio@inyocounty.us

## COUNTY OF INYO

ADMINISTRATOR'S OFFICE  
P. O. Drawer N  
INDEPENDENCE, CALIFORNIA 93526

February 16, 2012

Via Electronic & U.S. Mail  
[sherrie.kinkle@boe.ca.gov](mailto:sherrie.kinkle@boe.ca.gov)

Sherrie Kinkle, Esq.  
State Board of Equalization  
Property and Special Tax Department  
450 N Street  
P.O. Box 942879  
Sacramento, CA 94279-0064

RE: Guidelines for Active Solar Energy Systems – New Construction Exclusion

Dear Ms. Kinkle:

The County of Inyo thanks you for the opportunity to submit the following comments to the proposed Guidelines for Active Solar Energy Systems – New Construction Exclusion (“Guidelines”). As explained below, the County of Inyo is requesting that the State Board of Equalization (“Board”) adopt the proposed Guidelines as issued on October 13, 2011, without the modifications or augmentations urged by representatives of the large-scale solar industry.

As currently proposed, the Guidelines stay true to the purpose of Proposition 7 when adopted by the voters of California in 1980 to encourage investment in distributed solar energy. The expansion urged by a segment of the solar industry not only exceeds the intent of Proposition 7, it will serve to rob California counties of critical property tax revenues needed, in part, to fund local government programs and services impacted by utility scale solar power plants. Before the Board issues Guidelines which expand the benefits of Proposition 7 to unintended beneficiaries, a thorough legal analysis is necessary. Inyo County believes that such analysis will result in a finding that any expansion of Proposition 7 must be presented and approved by the voters. Until such time, Revenue and Taxation Code section 73 must be limited to those individuals the voters intended to benefit from the Constitutional amendment. Utility-scale commercial solar power plant operators were not one of those intended beneficiaries.

Revenue and Taxation Code section 73 was initially enacted as enabling legislation conditioned upon the adoption by the voters of Proposition 7 in the 1980 General Election. The Constitutional amendment proposed in Proposition 7 could only be adopted with voter approval. The voters did in fact adopt Proposition 7 and Revenue and Taxation Code section 73 became effective. Proposition 7 amended Article XIII A, Section 2 of the Constitution. Proposition 7 identified the beneficiaries of the proposed tax exemption as homeowners and businesses who elected to utilize

Sherrie Kinkle, Esq.  
State Board of Equalization  
Property and Special Tax Department  
February 16, 2012  
Page 2

solar energy to offset their energy expenses. The voters were told that the need for Proposition 7 arose from the fact that savings resulting from solar energy usage were often times offset by increases in property taxes. Nothing in Proposition 7 or Revenue and Taxation Code section 73, as approved prior to the 1980 General Election, suggested the exemption applied to commercial power plants. Importantly, subsequent expansion of the scope of Proposition 7 would have had to have been approved by the voters and could not have been effectuated by simple legislative acts. I have attached our County's analysis of Proposition 7 and Revenue and Taxation Code section 73, which support the County's position that the proposed Guidelines as issued on October 13, 2011 are appropriate and consistent with the purpose and intent of the voters.

During the Interested Parties Meeting held January 26, 2012, I inquired as to whether the Board's staff had determined that Revenue and Taxation Code section 73 applied to utility-scale commercial solar power plants. The response I received was "yes," and reference was made by both staff and industry representatives that a letter existed which outlined the Board's analysis of the issue. You kindly agreed to provide a copy of the letter, which you have since done. Again, thank you for providing the September 17, 2008 letter from the Board. However, the factual scenario presented by that letter addressed distributive generation in which the tax payer was using solar to off-set its energy costs. That scenario differs greatly than those presented by utility-scale commercial solar power plants and is consistent with the purpose and intent of Proposition 7. Therefore, if the September 17, 2008 letter is the only analysis, it does not appear that the State Board of Equalization has formally analyzed the issue now put before it.

Again, I thank you for providing the County of Inyo the opportunity to comment on the proposed Guidelines for Active Solar Energy Systems – New Construction Exclusion issued October 11, 2011. The County urges the State Board of Equalization to adopt the proposed Guidelines in the manner proposed, without incorporating the comments, suggestions and innuendos proposed by the solar industry which would result in an unconstitutional expansion of Proposition 7 without approval of the voters. Please do not perpetuate the myth that the citizens of California, by adopting Proposition 7, intended to subsidize utility-scale commercial solar power plants by providing a substantial exemption from property taxes.

Sincerely,



Kevin D. Carunchio  
County Administrative Officer  
County of Inyo

KDC/dg  
Enclosures  
dg/BOE Letter – RT73 Guidelines.docx

## **ANALYSIS OF PROPOSITION 7 AND REVENUE AND TAXATION CODE SECTION 73 AND THE APPLICABILITY TO LARGE SCALE SOLAR PROJECTS**

### **INTRODUCTION**

The following is an analysis supporting the contention that Revenue and Taxation Code section 73 is inapplicable to commercial solar power plants and that such plants are subject to full assessment and taxation by the County Assessor.<sup>1</sup>

### **HISTORY OF THE CONSTITUTIONAL AMENDMENT ENACTED BY PROPOSITION SEVEN**

#### **THE VOTERS' PURPOSE WAS LIMITED TO ENCOURAGING DISTRIBUTED SOLAR ENERGY BY EXEMPTING ONLY DISTRIBUTED SOLAR ENERGY SYSTEMS FROM REASSESSMENT**

Proposition 7 was adopted by the voters of California on November 4, 1980. Proposition 7 was a Senate sponsored proposition. The text of Proposition 7 reads as follows:

**PROPOSED AMENDMENT TO ARTICLE XIII A, SECTION 2 (c)** *For purposes of subdivision (a), the Legislature may provide that the term "newly constructed" shall not include the construction or addition of any active solar energy system.*

In determining the intent of the voters, it is appropriate to review the ballot materials, including the voters' pamphlet. See, *California Institute of Technology v. Johnson* (1942) 55 Cal.App.2d 856; *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4<sup>th</sup> 1243. The Ballot Pamphlet and other printed materials considered by the voters in support of the Proposition clearly identified the types of taxpayers who would benefit from the Constitutional amendment and these taxpayers did not include large scale commercial solar power plants.

The arguments in favor of Proposition 7, offered by Senator Alfred Alquist, Assemblyman Phil Wyman and Mayor Tom Bradley included in the Ballot Pamphlet, made clear that the intent of the proposed amendment was to offset savings realized by homeowners and businesses that employed solar technology in a distributive generation fashion. According to the arguments, the amendment was necessary as "many homeowners are interested in, or have installed, complete solar space and water heating systems, only to find out that the property tax collector has taken a large bite out of the expected savings which would be derived by using solar." The arguments in favor further claimed that "[w]hen a business or individual employs solar technology, energy from conventional sources is freed for consumption by others and our vulnerability to foreign energy supply interruptions is decreased." The arguments concluded by noting that the State Public Utilities Commission's program to retrofit 80

---

<sup>1</sup> Solar energy does not produce energy from a conventional source and, therefore, commercial solar energy systems are not state assessed. Instead, solar energy systems, including large scale commercial solar energy systems, are locally assessed.

percent of all "residential water heaters" would not be attained "so long as solar energy is beyond the financial reach of the average taxpayer. Proposition 7 will help reduce that cost and will provide *all* taxpayers with an incentive in solar energy".

The Rebuttal to Argument Against Proposition 7, when addressing the claim that Proposition 7 would interfere with Proposition 13, again highlighted the purpose of Proposition 7: "By exempting investments in active solar energy systems from consideration as new construction, Proposition 7 assures that businesses and individuals will not pay higher property taxes simply because they seek to improve energy efficiency by employing solar technology. . . . The threat of reassessment currently places a powerful disincentive against investment in solar systems. At present, businesses and homeowners who make solar investments may see their entire energy savings disappear through higher property taxes." See, *California Ballot Pamphlet, General Election November 4, 1980, California Secretary of State.*

**THE LEGISLATURE'S PURPOSE WAS LIMITED TO ENCOURAGING DISTRIBUTED SOLAR ENERGY BY EXEMPTING ONLY DISTRIBUTED SOLAR ENERGY SYSTEMS FROM REASSESSMENT**

On September 28, 1980, the Governor signed Senate Bill 1306, which enacted Revenue and Taxation Code section 73<sup>2</sup>, conditioned on adoption by the voters of Proposition 7. Section 73 read, in part, as follows:

For purposes of subdivision (a) of Section 2 of Article XIII A of the Constitution, the term "newly constructed" shall not include the construction or addition of any solar energy system, as defined in subparagraph (A) of paragraph (6) of subdivision (h) of Section 17052.5.<sup>3</sup>

Section 17052.5 defined "solar energy system" as follows:

(i)(6)(A) "Solar energy system" means the use of solar devices for the individual function of:

- (i) Domestic, recreational, therapeutic, or service water heating;
- (ii) Space conditioning;
- (iii) Production of electricity;
- (iv) Process heat;
- (v) Solar mechanical energy; and
- (vi) Wind energy for the production of electricity or mechanical work.

The term "solar energy system" shall include, but is not limited to, passive thermal systems, semipassive thermal systems, active thermal systems, photovoltaic systems and wind-driven systems.

---

<sup>2</sup> All statutory sections are in reference to the Revenue and Taxation Code unless otherwise specified.

<sup>3</sup> The statutory reference to section 17052.5 is incorrect, incorrectly citing subdivision (h) when the definition was found in subdivision (i). The citation error does not affect this analysis.

(h)(6)(B) Eligible solar energy systems shall have a useful life of not less than three years.

(h)(7) "Solar device" means the equipment associated with the collection, transfer, distribution, storage or control of solar energy. In the case of a solar device associated with two or more solar energy systems, the credit allowed for the solar device may be taken for any one of the systems, or divided equally between them.

(h)(8) "Passive thermal system" means a system which utilizes the structural elements of the building, and is not augmented by mechanical components, to provide for collection, storage, or distribution of solar energy for heating or cooling.

(h)(9) "Active thermal system" means a system which utilizes solar devices thermally isolated from the living space to provide for collection, storage, or distribution of solar energy for heating or cooling.

The remaining provisions of Section 17052.5 addressed certain tax credits available to taxpayers for the installation of solar energy systems. Section 17052.5 fell within Part 10, Personal Income Tax, of Division 2 of the Revenue and Taxation Code. By definition, the tax credits offered by Section 17052.5 were available to "individuals, fiduciaries, estates or trusts subject to any tax imposed by this part or any partnership." See, R&T Section 17004. Corporations were not included in the definition of "taxpayer" as that term was used in Part 10. Instead, solar tax credits for corporations were governed, in part, by Section 23601, which included the same definition of "solar energy system" as Section 17052.5, and which was found in Part 11, Corporate Tax Law, of Division 2. Section 73 did not reference nor incorporate any portion of Section 23601.

#### **THE ONLY PURPOSE OF PROPOSITION 7 WAS TO ENCOURAGE DISTRIBUTED SOLAR ENERGY SYSTEMS**

In summary, whether commercial solar energy systems are exempt from taxation under Article XIII, Section 1 depends upon the interpretation of Proposition 7 and the scope of its enacting legislation, Section 73. As noted above, when the voters approved Proposition 7, the ballot arguments contended the exemption was necessary in order to allow homeowners and businesses to realize the savings caused by using solar energy systems instead of having those savings eliminated by increased property taxes. In addition, enacting legislation, adopted before the voters approved Proposition 7, incorporated the definition of "solar energy systems" included in Section 17052.5, a section benefiting the same class of taxpayers, homeowners and small businesses, specifically identified by the proponents of Proposition 7. At the time of its adoption, Proposition 7 was intended to afford the exemption to homeowners and businesses who installed solar energy systems to offset their usage of conventional energy. Including commercial solar power plants was not contemplated when the voters approved Proposition 7 nor were such facilities included in the definition of solar energy system used in Section 73. See, *Perry v. Industrial Accident Commission* (1919) 180 Cal. 497, 501 (Constitutional terms must be construed in light of their meaning at the time of adoption).

"In the case of a voters' initiative statute, too, we may not properly interpret the measure in a way that the electorate did not contemplate: *the voters should get what they enacted, not more and not less.*" *Hodges v. Superior Court* (1999) 21 Cal.4<sup>th</sup> 109 (emphasis added).

## **ANALYSIS OF LEGISLATIVE EXPANSION OF SECTION 73**

### **THE CONSTITUTION REQUIRES ALL PROPERTY TO BE TAXED AT THE SAME RATE**

Article 13, Section 1 of the California Constitution provides that, unless otherwise provided by the Constitution or the laws of the United States, all property is taxable and shall be assessed at the same percentage of fair market value. See, Article XIII, Section 1; see also, *In re South Bay Expressway L.P.* 2011 WL 2650195. Therefore, absent an exclusion provided for in the Constitution, commercial solar power plants are subject to assessment and taxation.

### **THE CONSTITUTION MUST BE AMENDED BY THE VOTERS TO EXEMPT PROPERTY FROM TAXATION**

Given that the intent of Proposition 7 was limited to protecting home and business owners from increased assessments, and that further Constitutional amendments have not been promulgated, the extension of the reassessment exemption provided by Proposition 7 to commercial scale solar energy systems would have to have been a product of legislative action. The question then becomes whether the legislature would have had the authority to extend the exemption.

As a Constitutional amendment, enacted by the voters, Proposition 7 cannot be amended or expanded without voter approval. Article XVIII, Section 1 permits the legislature to place before the voters a proposed amendment to the Constitution. Such act is not a legislative act, but one granted by the Constitution. See, *Oakland Paving Co. v. Hilton* (1886) 69 Cal. 479. When interpreting those amendments, courts must carry out the intent of the voters, which can be evidenced by the printed materials, such as voters' pamphlets, supporting the amendment. By virtue of being an amendment to the Constitution, the legislature lacks the authority to change the amendment unless the voters approve an amendment to the Constitution proposed by the legislature.<sup>4</sup>

Proposition 7 amended the Constitution to authorize the Legislature to exempt from new construction active solar energy systems, intending to include only distributed solar energy installations on or around occupied buildings. The Ballot Pamphlet and other printed materials considered by the voters in support of the Proposition clearly identified the types of taxpayers who would benefit from the Constitutional amendment, homeowners and small businesses which installed solar energy systems to offset their energy costs. This definition was consistent with the definition contained in Section 73, as it existed when the voters considered Proposition 7 at the polls. Therefore, because of the definition of

---

<sup>4</sup> Proposition 7, a senate sponsored Constitutional Amendment, is governed by Article XVIII, Sections 1 & 4. The legislature is prohibited from further amending the Constitution without voter approval. However, Proposition 7 amended Proposition 13, which was a voter approved initiative, which is governed by Article II, section 10. Section 10 specifically prohibits the legislature from amending an initiative statute enacted by the voters. Given the various layers of voter approved amendments and initiatives, coupled with the line of cases found within both Articles interpreting amendments and initiatives consistent with the voters' intended purpose, any expansion or amendment to Proposition 7 must be submitted to and approved by the voters.

“active solar energy system” at the time of the enactment of Proposition 7, the Legislature cannot expand the definition to include industrial solar power plants without approval of the electors.<sup>5</sup>

### **CONCLUSION**

The intent of the electorate when it adopted Proposition 7 was clear. The voters intended the benefits offered by Proposition 7 to act as an incentive to small businesses and homeowners to employ solar energy technology to offset their consumption of electricity from conventional sources. Any expansion of that benefit to large scale commercial scale solar energy systems without voter approval not only violates the intent of the voters, it violates the California Constitution.

---

<sup>5</sup> Section 73 has been amended six times since its adoption in 1980. None of the amendments specifically provide for its application to commercial solar energy plants. In fact, if anything, the amendments reinforced the intent of the Amendment by changing the term “thermally isolated” used in Section 73 to read “thermally isolated *“from living space or where the energy is used”*”. On the other hand, the legislative history is inconsistent as to the intent to expand the application of Section 73 to commercial solar plants, but no legislative history can justify an unconstitutional reading of Section 73.