STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION
450 N STREET, SACRAMENTO, CALIFORNIA
(PO BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)
.EPHONE (916) 323-7713
.X (916) 323-3387

610.0033

JOHAN KLEHS
First District, Hayward

DEAN F. ANDAL
Second District, Stockton

ERNEST J. DRONENBURG, JR.
Third District, San Diego

KATHLEEN CONNELL
Controller, Sacramento

JOHN CHIANG
Acting Member
Fourth District, Los Angeles

E. L. SORENSEN, JR.
Executive Director

December 9, 1998

Attorney At Law

In Re: **Revised Opinion - New Construction of Encroaching Improvements - Change in Ownership of Appraisal Unit - Adverse Possession.**

Dear Mr.

This is in response to your faxed memorandum of November 19, 1998 and supercedes our response to your October 3, 1998 letter, in which you requested our opinion regarding the assessment of certain improvements which encroach on an adjacent lot, in , California, and whether the land underlying the "encroaching" improvements would have transferred to the encroacher upon either the completion of construction or on a subsequent change in ownership. As the "encroacher" and the "encroachee" are involved in litigation on this matter, the question of which property owner paid the property tax assessment on the land underlying the encroaching improvements may be highly relevant.

The following revised set of facts have been provided for purposes of this analysis, which revisions are indicated by the underlined text:

> 1. In 1983, Property Owner A constructed certain improvements consisting of a deck and spa and a retaining wall on his lot. The record sent to the assessor by Property Owner A in 1984, showed that the spa and retaining wall improvements were located entirely on Property A. (No information was reported to the assessor concerning the extension of the deck at this time.) Unbeknownst to the assessor, a small portion of the deck and the retaining wall apparently encroached on the adjacent lot owned by Property Owner B.
>
> 2. Based on the building records and information reported by Property Owner A, the assessor enrolled the following added amounts to the value of Property A: (1) in 1984, the assessor enrolled the amount of $2,370 to the land value, reflecting the reported cost of the retaining wall at $2,500; and

(2) in 1985, the assessor enrolled the amount of $7,500 to the improvement value of Property A, reflecting the reported cost of $7,500 for the spa.

3. In 1994, Property Owner A sold his entire property to Buyer. Buyer apparently discovered that the above-mentioned improvement encroached on the lot of Property Owner B, and made B aware of such encroachments, and alleges in litigation that Buyer (and his predecessor in interest) has continuously paid all taxes levied against the land underlying the encroachments - commencing either in 1983/84 upon completion of construction, and/or in 1994 upon the change in ownership.

Your questions are: 1) would the additional assessed value of the newly constructed property (retaining wall) in 1984 have included the land underlying the wall; and 2) would the change in ownership and reappraisal of the entire property in 1994 have included the land underlying any encroaching improvements. For the reasons hereinafter explained, the answer to both questions is no. Since statutory and regulatory law requires that only the value attributable to the newly constructed property will be added to the roll, and since the newly constructed deck and retaining wall here are properly classified as "improvements" rather than land (despite the fact that the retaining wall was apparently misclassified as "land"), the base year value of the underlying land, except for annual factoring for inflation, remains the same.

Legal Background

Assessed value based on time of acquisition.

On June 6, 1978, California voters adopted Proposition 13 which amended the California Constitution (adding Article XIII A) in a manner that "retired" the previous property tax system (based on annual reappraisal - current market value of property) and substituted the present system. Under the Proposition 13 system, the tax on real property would be "rolled back" to reflect the market value as of March 1, 1975, and then "frozen in place," except for annual factoring for inflation, unless and until the property changed ownership or new construction occurred. Thus, the *timing* for reappraisal of all real property changed dramatically, based entirely on the occurrence of an event, i.e., change in ownership or completion of new construction. In the event of either a change in the ownership or new construction, the assessor would be required to establish a new assessed value (base year value) determined by the sales price at the time of a purchase, or by the added value, often cost, of the improvements upon the completion of new construction.

Assessed values placed on assessment rolls.

Notwithstanding the changes resulting from the Proposition 13 system, the assessment *process,* has for the most part remained unchanged. In the recent Board-approved Assessors' Handbook 501, "Basic Appraisal," the assessment process is said to comprise functions, such as property discovery, property identification and situs, property classification, data collection and analysis, property valuation, preparation and certification of the assessment roll, etc.[1]

[1] See AH 501, pgs. 130-131.

In the roll preparation function, the assessor must enroll (by delivery of the assessment to the auditor) each year all taxable real property on the secured roll to the person owning, claiming, possessing it on the lien date. (Section 405 of the Revenue and Taxation Code[2].) In addition to the "regular roll" (referred to as the section "601 roll"), the assessor is also required to prepare the "supplemental roll" which provides for the immediate enrollment of changes in ownership and new construction.[3] Section 602 lists the information required to be shown on the regular rolls, which includes among other things, "the assessed value of real estate, except improvements," and "the assessed value of improvements on the real estate," and "the assessed value of improvements assessed to any person other than the owner of the land." (Section 602, (e), (f), and (g)), (See Section 75.40 for supplemental assessments roll information.) This is consistent with Section 607 and California Constitution, Article XIII, Section 13, whereby "land" and "improvements" must be separately assessed.

Classification of Land and Improvements

In applying this mandate to make *separate entries* of the assessed values of "land" and "improvements" on the roll, the discussion in AH 501, page 61, explains that "separate assessment" means an allocation of value between land and improvements, even though the property is appraised as a single appraisal unit.[4] Therefore, the distinction between "land" and "improvements" is an important one in the assessment process.

While not defined in the statutes, Property Tax Rule 121, *Land*, provides a rather comprehensive description. Included in the term "land" is following:

> "... Where there is a reshaping of land or an adding to land itself, that portion of the property relating to the reshaping or adding to the land is land. However, where a substantial amount of other materials, such as concrete, is added to an excavation, both the excavation and the added materials are improvements, except that whenever the addition of other materials is solely for the drainage of land to render it arable or for the drainage or reinforcement of land it render it amenable to being built upon, the land, together with the added materials, remains land."

"*Improvements*" are defined by both statute and Board regulation. Under Section 105 "'[i]mprovements' include all of the following:

> (a) All buildings, structures, fixtures, and *fences erected on or affixed to the land.*[5]

---

[2] All references are to the Revenue and taxation Code unless otherwise indicated.

[3] All references are to the Revenue and taxation Code unless otherwise indicated.

[3] SB 813 (Chpt. 498, Stats. 1983) added Chapter 3.5 to Part 0.5 of the Revenue and Taxation Code (Sections 75 et seq.) requiring immediate enrollment of changes in ownership and competed new construction of real property at the time they occur, and no longer waiting until the next lien date.

[4] Section 51 (d).

[5] Because of the express langauge in the statute, fences have historically been classified under Rule 122, Improvements, Infra, as improvements. In our view, a retaining wall has many of the attributes of a fence.

(b) All fruit, nut bearing, or ornamental trees and vines, not of natural growth, and not exempt from taxation, except date palms under eight years of age."

Where there is any question in determining whether particular property should be enrolled as "land" or as "improvements," the *test* to be used by the assessor is found in Rule 122, *Improvements.* To determine what constitutes an "improvement," the test is whether a substantial amount of foreign objects or materials is added to the land. The rule indicates that excavation of the land is not an improvement, unless a substantial amount of added materials, such as concrete, is included in the land excavated. The exception is for land owned by local government that is taxable, wherein fill that is added does constitute an improvement. Both Rule 122, *Improvements*, and Rule 124, *Examples*, draw a fine line between "land" and the definition of improvements.

Rule 124 provides typical examples of items normally classified as improvements. As stated in the rule, the classifications are to be applied to all assessments except in borderline or obscure cases. The assessor may choose not to follow it only when "there are persuasive distinguishing facts which warrant other classification." In a case such as the instant one, where there is no information indicating that the assessor received any "distinguishing facts" which would have justified classifying the retaining wall as *land* rather than an *improvement*, it appears that the enrollment of the amount for the retaining wall to the *land value* of Property A was a *misclassification.*

Determination of the Assessee

Once the assessor has made a determination that certain components of a property are "improvements," Section 608 sets forth *how* improvements are to be enrolled: "Improvements shall be assessed by the assessor by showing their value opposite the description of the parcel of land on which they are located, *if they are assessed to the same assessee*." Thus, the statute requires assessors to assess all of the improvements on a given parcel to the assessee of the land, providing that there is no information establishing that the improvements are owned by someone else. (If the has documentation showing that the improvements are owned by a person other than the landowner, then they are separately assessed to that person, generally on the unsecured roll, pursuant to Sections 2188-2190.2)

In regard to the enrollment of the "land," the assessor must enroll it to the in the name of the owner of the land as shown on the deed or similar written instrument.[6] Other assessees of the land may be added to the roll only under the provisions of Section 610. Where the assessor discovers land in which another person holds ownership interests that are not owned by the current assessee, Section 610 authorizes the assessor to assess all or a portion of the land to the person claiming ownership, when the method set forth in the statute has been followed.

Thus, any person claiming or desiring to be assessed for "land" may have his/her name inserted on the roll with that of the assessee, provided that one of the following supporting documents listed in subdivision (b) of Section 610, are submitted to the assessor indicating that person's claim of the right to be assessed for the land:

[6] Rule 462.200 (b) rebuttable presumption that all persons listed on a deed have ownership interests in the property.

"(1) A certified copy of a deed, judgment, or other instrument that creates or legally verifies that person's ownership interest in the property.

(2) A certified copy of a document creating that person's security interest in the property.

(3) His or her declaration, under penalty of perjury, that he or she currently has possession of the property and intends to be assessed for the property in order to perfect a claim in adverse possession."

Without such claim and supporting documents, the assessor has no authority to assess the land to another person when the name of the assessee is known. While Sections 2188 through 2190.2 also provide the procedures for the various owners of a single parcel of land (or appraisal unit) to apply to the tax collector for separate tax assessments, these sections require that the owners have deeds evidencing their respective interests as "assessees" in the same property.

Question 1. Would the assessment of the newly constructed retaining wall enrolled in 1983 have included the land underlying the wall? No.

Based on the foregoing provisions, the assessor should have added to the regular roll for the 1983/84 year, an assessment for the newly constructed retaining wall and the spa, as the result of its completion in 1983. The assessor could have also placed the assessment on the supplemental roll, although no information has been provided in this regard. According to the new facts submitted, the assessor did enroll a value of $2,370 for the retaining wall as "Land" in 1984, and a value of $7,500 for the spa as "Improvements" in 1985. Since the assessment roll constitutes the official record from which the auditor extends the taxes, and from which the tax collector calculates the amount of tax and ascertains the person to whom the taxes are billed,[7] the assessments for both the retaining wall and the spa were made in the name of the property owner who constructed it from this date forward. Thus, Property Owner A would have been paying the taxes on the retaining wall since 1984.

Notwithstanding the fact that Property Owner A was the taxpayer paying the taxes on the encroaching retaining wall, he was not the taxpayer on the land underlying the encroaching portion of the wall. Although it appears that the 1984 enrollment of $2,370 for the retaining wall to the *land value* of Property A was a *misclassification* (under statutory and rule requirements), it does not appear that the assessment of the retaining wall would have included the value of any of the underlying land for two reasons.

First, as explained above, the classification of any property as an "improvement, " (Section 105, Rules 122 and 124) means that there is no assessment of that property as "land." The fact

[7] Assessors' handbook No. 271, "Assessment Roll Procedures," pgs. 37-68.

that the assessor's office apparently made a clerical error in misclassifying the retaining wall as "land" rather than an "improvement" for enrollment purposes did not change the the base year value of Property A. The value added to the roll for Property A in 1984 represented the cost of the retaining wall. There is no evidence indicating that the $2,370 enrolled value represented some extensive excavation or alteration of the land, and not the retaining wall. Since a retaining wall is an "improvement" under the law, and since the amount of value added to the roll presumably reflects only the retaining wall cost, the base year value of the land remained the same (except for the 2% added for the inflation factor). Hence, the taxes paid on the $2,370 value added from 1984 to the present are for the retaining wall, not for the land under the retaining wall. (Clerical errors on the roll such as misclassification of improvements can be corrected under the procedures set forth in Sections 4831 et. seq.)

Secondly, the proposition 13 concept of "*new construction*" as defined in section 70, establishes a new base year full value for *only* that portion of the property which is newly constructed, and reads in pertinent part as follows:

> "(a) 'Newly constructed' and 'new construction' means:
>
> (1) Any addition to real property, whether land or improvements (including fixtures), since the last lien date; and
>
> (2) Any alteration of land or of any improvement (including fixtures), since the last lien date which constitutes a major rehabilitation thereof or which converts the property to a different use."

Property Tax Rule 463, *Newly Constructed Property*, provides a detailed treatment of specific types of newly constructed property and their proper valuation, explaining that land is not to be included in the assessment of a newly constructed addition. Relevant to the question here are subdivisions (a) and (b), which state in part as follows:

> "(a) When real property, or a portion thereof, is newly constructed after the 1975 lien date, the assessor shall ascertain the full value of such 'newly constructed property' as of the date of completion. This will establish a new base year full value for *only* that portion of the property which is newly constructed, whether it is an addition or an alteration. The taxable value on the total property shall be determined by adding the full value of new construction to the taxable value of preexisting property reduced to account for the taxable value of property removed during construction. The full value of new construction is only that value resulting from the new construction does not include the value increases not associated with the new construction."

Thus, subdivision (a) clearly states that "*only* that portion of the property which is newly constructed" as either an "addition" or an "alteration" can be assessed, given a new base year value, and enrolled. Subdivision (b)(1) defines and describes an *addition* which constitutes "newly constructed property" as follows:

> (1) Any substantial addition to land or improvements, including fixtures, such as, adding land fill, retaining walls, curbs, gutters, or sewer to land or constructing a new building or swimming pool or changing an existing improvement so as to add horizontally or vertically to its square footage or to incorporate an additional fixture, as that term is defined in this section.

Subdivision (b)(2) defines and describes an *alteration* which constitutes "newly constructed property" as follows:

> (2) Any substantial physical alteration of land which constitutes a major rehabilitation of the land or results in a change in the way the property is used."

Some examples of land "alterations" to be considered new construction, stated in the rule, are "site development of rural land for the purposes of establishing a residential subdivision ... preparing a vacant lot for use as a parking facility." Obviously, the application of residential subdivision (b)(1) requires that the construction of a retaining wall is properly classified as an "addition to the land," not an alteration of the land itself. Under subdivision (a), in the case of such an "addition," only the retaining wall itself is assessed and enrolled as newly contracted property. As stated in Assessment Practices Survey, 1982, page 6, "additions made to a property do not change the base year or the base value of the pre-existing portion of the property." Thus, a new base year value for *only* that retaining wall and not the underlying land was enrolled in 1984.

Question 2. Would the change in ownership and reappraisal of the entire property in 1994 have included the land underlying the deck and retaining wall? No.

Reappraisal of property as the result of a change in ownership under Section 60 does not alter the boundaries of the property. Rather, establishing the dimensions of the land in a given appraisal unit is an early step in the appraisal process and is known as property identification.[8] Identification of the property refers to a description of the property's physical location and boundaries, and a physical description of the land, improvements, and any personal property within the appraisal unit. The precise description of the property's location and boundaries is accomplished most frequently by reference to the street address and the assessor's parcel map location and number. Where the appraisal unit is a single-family home, it sells in the marketplace as a combination of land and improvements on the lot with the dimensions shown on the assessor's parcel map. Thus, the enrolled full cash value represents the taxable value for the appraisal unit, including the land indicated on the map.

When a change in ownership occurs, the assessor uses the same source data. (See AH 271, p. 68 and Assessors' Handbook 215, *"Standards for Assessors' Maps, Parcel Numbering and Tax-Rule Area Systems,"* pgs. 19-24. Assessors are advised to rely on the transfer documents (deeds, sales contracts, preliminary change in ownership statements) to obtain the data necessary to reappraise the property and establish a new base year value for the entire appraisal unit, land and improvements. If upon examining the deed, the conveyance is a "straight ownership transfer,"

[8] Assessors' Handbook 502, *Advanced Appraisal*, page 1. (September draft).

involving no redefinitions of property boundaries (i.e., no parcel splits or recombinations), then the assessor makes the property identification directly from the deed or other conveying instrument.

Since the facts described in the instant case indicate that the assessor was not even aware of the encroachment of the retaining wall (nor the extended deck), much less made aware of any documents establishing a boundary line adjustment, the 1994 base year value resulting from the conveyance of the encroaching property to Buyer must have been for the same "appraisal unit", land and improvements, already shown on the assessor's parcel map and assessment roll. Without any new source documents the 1994 reappraisal would have been based on the same property identification, description and dimensions already included in the assessor's files for that parcel.

Moreover, since in the performance of the assessor's duties in 1984, the $2,370 base year value added for the retaining wall did not include the underlying land, there was no change in the amount of land assessed. As such, the Buyer purchased, was subsequently assessed for, and paid taxes on Property Owner A's appraisal unit, land and improvements, including the deck and the retaining wall, excluding any land underlying the wall.

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

Sincerely,

Kristine Cazadd
Senior Tax Counsel

KEC:jd
h:/propertyprecednt/newconst/1998/98003.kec

Attachments

cc:

Mr. Richard Johnson, MIC:63
Mr. Rudy Bischof, MIC:64
Mr. David Gau, MIC:66
Ms. Jennifer Willis, MIC:70

Humboldt 105503-100

Annot. # 220.0001

STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION
1020 N STREET, SACRAMENTO, CALIFORNIA
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)
(916) 324-6592

WILLIAM M. BENNETT
First District, Kentfield
BRAD SHERMAN
Second District, Los Angeles
ERNEST J. DRONENBURG, JR.
Third District, San Diego
MATTHEW K. FONG
Fourth District, Los Angeles
GRAY DAVIS
Controller, Sacramento
BURTON W. OLIVER
Executive Director

October 30, 1991

lm

Re: Change in Ownership-Adverse Possession By Richard and Bonnie

Dear Mr.

This in in response to your letter of July 25, 1991, to Mr. Richard Ochsner, Assistant Chief Counsel, in which you request our opinion about the change in ownership implications of an apparent adverse possession that began more than 20 years ago. The facts given below are taken from your letter and subsequent phone conversation.

In 1965, Lillian sold a residence located at , Eureka, California, to Robert W. and Phylis G. by a grant deed. Two deeds of trust were created by the S in favor of Lillian

The Robert & Phylis separated and abandoned the property. They defaulted on their payments to Lillian and the property purchase money lender, Savings & Loan Association. No foreclosure action was taken.

During 1967, Lillian and other relatives arranged for Richard and Bonnie (Bonnie is related to Lillian to move into the subject property. They did so and immediately began making payments to the savings and loan association.

In 1991, you commenced a quiet title action on behalf of the Richard & Bonnie which is still pending. Also, was contacted, and she indicated that she and Mr. had remarried but that Mr. died several years ago. Mrs. executed an Affidavit of Death of Joint Tenant and a grant deed so that her apparent position in title could be eliminated.

You contend that the present and beneficial interest in the property transferred many years ago when they entered into the property, occupied it openly, notoriously, hostilely, for more than five years and adversely to the prior title, and assumed the entire financial obligation to the savings and loan association and payment of property taxes.

Section 60 of the Revenue and Taxation Code states that:

> A "change in ownership" means 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.

Property Tax Rule 462(a), which amplifies Section 60, states that:

> (1) There shall be a reappraisal of real property as of the date of a change in ownership of that property. The reappraisal will establish a new base year full value and will be enrolled on the lien date following the change in ownership.
>
> (2) A "change in ownership" in real property occurs when there is a transfer of a present interest in the property, and a transfer of the right to beneficial use thereof, the value of which is substantially equal to the value of the fee interest. Every transfer of property qualified as a "change in ownership" shall be so regarded whether the transfer is voluntary, involuntary, by operation of law, by grant, gift, devise, inheritance, trust, contract of sale, addition or deletion of an owner, property settlement (except as provided in (1) (3) for interspousal transfers), or any other means. A change in the name of an owner of property not involving a change in the right to beneficial use is excluded from the term "transfer" as used in this section.

Property Tax Rule 462(m)(1) states that the transfer of bare legal title does not constitute a change in ownership.

To establish title by adverse possession, the users must prove that they have satisfied each and all of the following five requirements:

(a) Possession was held either under a claim of right or color of title;

(b) Actual, open, notorious occupation of the premises in such a manner as to constitute reasonable notice to the record owner occurred;

(c) Occupation was both exclusive and hostile to the title of the true owner;

(d) Possession was uninterrupted and continued for at least five years; and

(e) All taxes levied against the property during such five-year period were paid by them. (Dimmick v. Dimmick (1962) 58 Cal. 2d 417 at p. 421).

A claim of right is an intention to claim land against all others. Possession with the intent to claim the fee exclusive of any other right and to hold it against all comers is sufficient to put the five year statute of limitations in motion, and, at the expiration of the five years, vest in the expropriator a right under the statute that is equivalent to title. (Code of Civil Procedure §325) The statutory period begins when the possession invades the rights of the owner of the property in such a way that the owner has a right of action against the occupant. (Code of Civil Procedure §312; Sorensen v. Costa (1948) 32 Cal 2d 453).

It is arguable from the information you have provided that the ay have established adverse possession by entering into the property more than 20 years ago and occupying it openly, notoriously, hostilely, and adversely to the S prior title, and by assuming the entire financial obligation to the savings and loan association and paying the property taxes on the residence. Obviously, that issue is currently before the ounty Superior Court in the form of the G quiet title action. We will not attempt to prejudge the issue.

There are no express provisions in either Revenue and Taxation Code Section 60, and following, or Property Tax Rule 462 which prescribe the change in ownership consequences of title acquired by an adverse possession. Further, there are no reported court decisions on this subject. Thus, our analysis must rest upon the basic principles set forth in section 60.

There must be a transfer of a present beneficial interest before a change in ownership occurs. The California courts have long held that an adverse possessor may establish fee title by proving the five requirements set forth above. We are satisfied that the acquisition of such a fee title constitutes a change in ownership under section 60. The question then is whether the fee title arises upon completion of the five year prescriptive period or at some other time.

In Cannon v. Stockmon (1869) 36 Cal. 535, 541, an action to recover land, the California Supreme Court stated:

> For when fee is once acquired by a five years' adverse possession it continues in the possessor till conveyed in the manner prescribed for the conveyance of titles acquired in other modes, or till lost by another adverse possession of five years. So, upon the same principle, if a fee has once vested by a five years' adverse possession, the mere fact that the party, who has thus acquired a title already perfect, afterward asserts title also under some other title subsequently acquired, would not defeat the good title already vested under the Statute of Limitations.

Thus, it appears that the courts have long held that the possessor acquires fee title upon completion of the five year period. Applying the reasoning in Cannon v. Stockmon, to the present case, if a change in ownership by adverse possession occurred, the change occurred in approximately 1972, five years after the G entered the property and when their beneficial fee interest vested. Thus, a 1991 action to quiet title and the 1991 execution of an Affidavit of Death of a Joint Tenant and a grant deed would, under the circumstances, only involve bare legal title and would not constitute another change in ownership.

The views expressed in this letter are, of course, advisory only and are not binding upon the assessor of any county. You may wish to consult the County Assessor in order to confirm that the property will be assessed in a manner consistent with the conclusion stated above.

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,

Carl J. Bessent

Carl J. Bessent
Tax Counsel

CJB:jd
4062H

cc: County Assesssor
Attn: Property Transfer Supervisor
Mr. John W. Hagerty
Mr. Verne Walton