

# Nonprofits and the Property Tax

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LEGISLATIVE ANALYST'S OFFICE

Presented to:

Assembly Local Government Committee

Hon. Katcho Achadjian, Chair

Assembly Housing and Community Development Committee

Hon. Ed Chau, Chair

Assembly Revenue and Taxation Committee

Hon. Raul Bocanegra, Chair





## Nonprofits and the Property Tax

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- Major Revenue Source for Local Governments.** Property taxes are collected at the county level and distributed to local governments—cities, counties, schools, community colleges, and special districts. Revenue allocated to schools and community colleges generally offsets state spending on education.
- Annual 1 Percent Tax.** The property tax is levied on the assessed value of real property (land and buildings) as well as personal property (primarily business equipment).
- Most Property Is Subject to the Property Tax.** All California property is subject to the property tax unless exempted. The State Constitution authorizes the Legislature to exempt certain property, including property owned by charitable nonprofits.
- Nonprofits Exempt From Ad Valorem Property Taxes...** Universities, hospitals, churches, affordable housing, and other nonprofits are exempt from most taxes on property they own and use for charitable purposes. In particular, they are exempt from taxes based on the property's value, known as ad valorem taxes, including Proposition 13's 1 percent rate and additional rates used to repay locally approved infrastructure bonds. Nonprofits that rent or lease property are not eligible for the exemption, nor are properties owned by nonprofits but held for investment purposes.
- ... But Are Not Exempt From Other Taxes and Charges Levied by Local Governments.** Some local governments levy property taxes and charges in addition to the statewide property tax. These taxes and charges—primarily assessments, parcel taxes, and Mello-Roos taxes—are based on factors other than property value, such as the cost of government services provided to the property or its parcel size. Charitable nonprofits are not exempt from paying these taxes and charges.



## Why Exempt Nonprofits?

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- States Exempt Nonprofits Because They Provide Public Benefits.*** In exchange for providing charitable services, nonprofit property is exempt from property taxes.
- Some Nonprofits Provide More Local Benefits Than Others.*** A nonprofit hospital provides benefits primarily to local residents while an international disaster relief nonprofit provides benefits overseas. Under state law, both are eligible for the same tax exemption.
- Some Nonprofits Benefit From the Exemption More Than Others.*** The exemption tends to benefit nonprofits that have valuable landholdings more than other nonprofits. Smaller nonprofits are more likely to rent or lease property and therefore do not benefit from the exemption. Nationally, two-thirds of all nonprofit organizations rent or lease their property.
- Nonprofits Exempt From Property Taxes in All 50 States.*** All states exempt property owned by nonprofits. Many states, however, set stringent eligibility requirements. One state, for example, requires that a majority of a nonprofit's revenue come from donations (as opposed to foundation grants or user fees), while another state mandates that one-half of a nonprofit's spending benefit in-state residents.



## California's Nonprofit Property Tax Exemption

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- State Constitution Allows Legislature to Exempt Nonprofits.*** The California Legislature has authority to exempt charitable organizations from the property tax. California's exemption is known as the *welfare exemption*.
- Welfare Exemption Is the Largest Property Tax Exemption.*** Except for government property—which is not subject to taxes—the welfare exemption is the state's largest property tax exemption. Amounting to \$122 billion in exempt property value—or about 3 percent of all taxable property value in California—the exemption represents more than \$1 billion in foregone local government revenue.
- Value of Welfare Exemption Varies by County.*** In most counties, the welfare exemption accounts for between 2 percent and 5 percent of countywide taxable property value. Counties with large nonprofit sectors—hospitals, private universities, and nonprofit headquarters, for example—have higher shares than counties with fewer nonprofits.
- Affordable Housing Does Not Appear to Be Large Component.*** Although comprehensive data are unavailable, affordable housing developments likely account for only a small portion of value exempt under the state's welfare exemption.



## What Property Is Eligible?

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### ***Most Nonprofits Must Meet Two Requirements.***

- ***Ownership.*** The property must be owned by a nonprofit organization.
- ***Use.*** The property must be used exclusively for charitable purposes.



### ***Housing Developments Must Meet Additional Requirements.***

- ***Rent Limitations.*** Rents must be affordable for low-income households.
- ***Property Tax Savings.*** Developers must certify that property tax savings from the exemption are used to “maintain the affordability of, or reduce rents otherwise necessary for, the units occupied by lower income households.”



## What Are Payments In-Lieu of Taxes (PILOTs)?

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- PILOTs Are Payments Made to Local Governments as a Substitute for Property Taxes.***
  
- PILOTs Typically Equal Portion of Property Taxes Exempted.*** PILOTs typically equal the portion of property taxes allocated to that local government were it not for the welfare exemption. If, for example, a city would have received 17 percent of the nonprofit's property taxes were it not exempt, a PILOT between the two would equal 17 percent of the nonprofit's tax exemption.
  
- Do Not Appear Common in California.*** Local governments in some states operate standard PILOT systems, in which all tax-exempt nonprofits that meet certain criteria—based on size, nonprofit type, or revenue composition—make PILOTs. California PILOTs instead appear to be less common and typically negotiated on a case-by-case basis as part of the land use approval process.



## Recent Developments

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- Recent Events Test Whether PILOTs Are Compatible With Welfare Exemption.*** In 2013, the Ventura County Assessor's Office revoked the welfare exemption for several nonprofit housing developments that make PILOTs. According to the assessor, the exemption is invalid because developers use some of the property tax savings from the exemption to make PILOTs instead of lowering rents or otherwise improving affordability.
  
- Updated Board of Equalization (BOE) Legal Opinion Finds PILOTs Compatible With Exemption.*** The BOE finds that a housing developer making PILOTs qualifies for the welfare exemption as long as it has a reasonable belief that its PILOT payments will be used to benefit the housing development. An earlier opinion found one PILOT to be unconstitutional and warned that nonprofits making similar PILOTs could lose their welfare exemption.



## Key Policy Questions

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- Do PILOTs conflict with the legislative intent of the welfare exemption?
- Could local governments without land use approval authority—for example, school districts—also impose PILOTs?
- Could restrictions on PILOTs (1) affect local governments' willingness to approve development of affordable housing projects or (2) lead to local governments levying other charges?
- Should existing PILOTs be exempt from restrictions?



## Memorandum

**To:** Mr. Dean Kinnee (MIC:64)  
Chief, County Assessed Properties Division

**Date:** March 20, 2013

**From:** Richard Moon  
Tax Counsel IV

**Subject:** *Payment in Lieu of Taxes Agreements  
Assignment No. 13-044*

This is in response to questions raised regarding whether a low-income housing developer (developer or claimant) subject to a payment in lieu of taxes (PILOT) agreement with a local government can properly make the certification required by Revenue and Taxation Code<sup>1</sup> section 214, subdivision (g)(2)(B) (hereafter Section 214(g)(2)(B)). As you know, Section 214(g)(2)(B) requires that property tax savings be used to "maintain the affordability of" or "reduce rents otherwise necessary for" the low-income housing units.<sup>2</sup> As discussed below, as long as the developer has maintained rents in accord with those required by section 214, subdivision (g)(2)(A) (hereafter Section 214(g)(2)(A)) and has a reasonable belief that its PILOT payments will be used to support or benefit the low income housing development, in our view, such developer can make the Section 214(g)(2)(B) certification in good faith.

This memorandum sets forth the Legal Department's opinion and clarifies all prior opinions or memoranda on this issue, including the opinion reflected by Property Tax Annotation 880.0155 and an opinion letter issued on December 14, 2011. Those prior opinions were of a more general nature and implicitly assumed that, under the facts analyzed, local assessors could establish that developers had not made the required certifications discussed below in good faith (i.e., that the certifications could not, in fact, be verified). To the extent inferences contrary to the specific guidance provided herein can be drawn from those prior opinions, such inferences are expressly disapproved and must be disregarded.<sup>3</sup>

### Law & Analysis

Article XIII, section 1 of the California Constitution provides that all property in this state is taxable unless exempted by law. Subdivision (b) of section 4 of article XIII of the California Constitution gives the Legislature authority to exempt from property taxation property used exclusively for religious, hospital, or charitable purposes. The Legislature has implemented this authority by enacting section 214, subdivision (a), the welfare exemption. The welfare

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<sup>1</sup> All further statutory references are to the Revenue and Taxation Code, unless otherwise specified.

<sup>2</sup> While specific PILOT agreements may be worded differently, they generally appear to require a payment from the developer that is "in lieu" of property tax savings the development receives. Typically, if the development does not receive the welfare exemption, no payment in lieu is required. If the development receives the welfare exemption, the payment in lieu is measured by the property tax savings received.

<sup>3</sup> To avoid the potential for confusion, we advise that Annotation 880.0155 be deleted and that this more comprehensive memorandum be annotated in its place.

exemption is made applicable to certain low-income housing properties under section 214, subdivision (g). Amongst a number of requirements, section 214, subdivision (g)(2) requires the owner of the low-income housing property to make two certifications. First, Section 214(g)(2)(A) requires, in relevant part, that:

For any claim filed for the 2000-01 fiscal year or any fiscal year thereafter, certify and ensure ... *that there is an enforceable and verifiable agreement with a public agency, a recorded deed restriction, or other legal document that restricts the project's usage and that provides that the units designated for use by lower income households are continuously available to or occupied by lower income households at rents that do not exceed those prescribed by Section 50053 of the Health and Safety Code . . . .* (Emphasis added.)

This requirement is clear that, in order to be eligible for the welfare exemption, the property owner (claimant) must certify a proper enforceable and verifiable agreement restricting the development to appropriate usage and rents exists.

Second, Section 214(g)(2)(B) requires the claimant to certify that:

The funds that would have been necessary to pay property taxes are used to *maintain the affordability of, or reduce rents* otherwise necessary for, the units occupied by lower income households.<sup>4</sup> (Emphasis added.)

Section 214, subdivision (g) was enacted by Assembly Bill Number 2144 (1987-1988 Reg. Sess.) (AB 2144) to expand the welfare exemption to certain rental housing and related facilities. During its passage, AB 2144 was amended to require the subdivision (g)(2)(B) certification. Prior to the certification requirement, AB 2144 had required a claimant *demonstrate* that the property tax savings were used to maintain the affordability of or reduce rents for the lower-income-household occupied units. It appears this amendment was made in part in response to the Board of Equalization's (BOE's) concerns regarding a "demonstration" requirement. The BOE's September 9, 1987 legislative analysis of AB 2144 stated:

It is not clear how the owner of the property could demonstrate that this requirement is satisfied. If the owner of the property receives rents in excess of the amounts required to pay out-of-pocket expenses, it may be difficult or impossible for the owner to satisfactorily demonstrate that this requirement is satisfied. Further, how can the owner demonstrate that the property tax benefit has not been reflected in lower rents for those households which do not qualify as lower-income? This requirement would also add administrative complications for the agencies administering the exemption. *The vagueness of the standard suggested that it may be subject to varying interpretations.* (Emphasis added.)

That legislative analysis also pointed out a difficulty with the certification requirement, stating:

The certification requirements appear to have doubtful value since eligibility depends on whether or not the owner has made the certification not on whether the facts certified are actually true.

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<sup>4</sup> This requirement is reiterated in substantially the same form in Property Tax Rule 140.2, subdivision (c)(3).

In spite of the concern expressed in the legislative analysis, and although the demonstration requirement was changed to a certification requirement, of course, a mere certification is insufficient if the facts which are being certified are not true. In other words, even if a claimant certifies that the requirements of section 214, subdivision (g)(2) are met, at some point, a claimant may need to demonstrate that the certification was properly made. This leads, however, to the difficulty pointed out with the demonstration requirement: it is vague and subject to varying interpretations. This is true especially since, on its face, the Section 214(g)(2)(B) requirement is ambiguous, and there is no definition in section 214 of "maintain the affordability" or "reduce rents."

We do note, however, that BOE staff, in a letter to Interested Parties for Rulemaking for Property Tax Rules 140-143<sup>5</sup> was asked, and answered, the following question with respect to the meaning of "reduce rents":

**Issue 8:** Whether section 214, subd. (g)(2)(B) requires owners to charge lower rents than those prescribe by statute (Health and Safety Code) or the regulatory agreement for the property.

**Staff Position:** Projects are eligible for exemption when operated in consistency with the regulatory agreement regarding rent levels for the property and/or when operated within Health and Safety Code rent level requirements. Staff does not construe section 214, subd. (g)(2)(B) to require lower rents than those required by the regulatory agreement or the Health and Safety Code.

Therefore, the requirement to "reduce rents" should not be taken to mean that rents must be reduced below what is required in either the Health and Safety Code or what is agreed to in the regulatory agreement or other document.

With respect to "maintaining affordability," there are significant issues in determining whether the existence of a PILOT agreement negates the ability of a developer to make the Section 214(g)(2)(B) certification. First, since property tax savings would mean more available funds overall, it would be difficult, if not impossible, to determine that a particular dollar in property tax savings was used for a specific expense. Because cash is fungible, the fact that property tax savings were received means that the developer has more funds from which *any* expenses could be paid. A dollar-for-dollar tracking would be nearly impossible to demonstrate. For example, if \$5,000 in property tax savings were received, how could it be determined that that \$5,000 in savings went directly to maintenance and repairs of the development and not to limited partners as their distributive share of profits or to the manager as a management fee? Or, as pointed out in the September 9, 1987 legislative analysis, how can an owner demonstrate that the property tax savings have not been reflected in lower rents for units that are not low-income units?

Second, even if a dollar-for-dollar tracking could be done, another significant issue in determining whether property tax savings were used to "*maintain the affordability of . . . the units occupied by lower income households*" is what expenses do and do not qualify. In any low-income housing development there are numerous fees and expenses that must be paid in

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<sup>5</sup> Dated February 24, 2005.

order for the housing to be built, some of which, it could be argued, go to or do not go to "maintain affordability."<sup>6</sup>

It is undisputed that in developing low-income housing, local governments incur expenses directly related to the development. For example, expenses such as added police and fire protection, sewer and water systems, roads and sidewalks. If payments in lieu of tax were made to local governments for these purposes, there would be little doubt that they go directly to maintaining the affordability of the low-income housing since, without them, the costs might fall directly on the development. Thus, even when it appears that a PILOT agreement requires that the property tax savings (or a portion thereof) go directly to the local government, and thus appears not to be used to "maintain the affordability" of the lower-income-household units, it is possible that the city uses funds received as a PILOT payment to defray costs incurred as a result of supporting the development.<sup>7</sup>

This is especially important when considering that in the development of low-incoming housing, various state agencies are often involved from the planning stages and make determinations as to the "financial feasibility" of the development, which encompasses a determination of whether a project is "affordable" for low-income households. For example, many low-income housing projects would not be developed without the receipt of low-incoming housing tax credits (LIHTC) administered by the California Tax Credit Allocation Committee (CTCAC). In making its determination as to the grant of LIHTCs, CTCAC must consider the following legislative finding:

Federal law requires that the credit dollar amount allocated to a project not exceed the amount necessary for the financial feasibility of the project and its *viability as a qualified low-income housing project throughout the credit period. This analysis shall include a determination of the reasonableness of developmental and operational costs.* (Emphasis added.)

(Health & Saf. Code, § 50199.4, subd. (e).)

Furthermore, to receive LIHTCs, a credit applicant must demonstrate to CTCAC:

the amount of tax credit that is necessary for the financial feasibility of the project and its viability as a qualified low-income housing project throughout the extended use period, taking into account operating expenses, supportable debt service, reserves, funds set aside for rental subsidies, and required equity, and a development fee that does not exceed a specified percentage of the eligible basis of the project prior to inclusion of the development fee in the basis, as determined by the committee.

(Health & Saf. Code, § 50199.14, subd. (c)(1)(G).)

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<sup>6</sup> Examples of typical expenses include management fees, development fees, advertising, salaries and legal, audit and impact fees.

<sup>7</sup> This memorandum expresses no opinion on the authority of local governments to enter into a PILOT agreement. If such agreements were disapproved by the courts or the Legislature, our opinion may be different.

CTCAC performs a feasibility analysis for each project at least three times: at application, allocation, and when placed in service. After approval CTCAC monitors compliance, including requiring an annual certification that, among other things, the project met all the terms of its Regulatory Agreement, including, of course, affordability restrictions. (See Cal. Code Regs., tit. 4, § 10337, subds. (b) & (c)(3).)

In addition to CTCAC, a number of other housing agencies also look at affordability in making determinations as to whether developers are eligible for its programs to help low-income housing get built. For example, such agencies include the California Department of Housing and Community Development,<sup>8</sup> the California Housing Finance Agency,<sup>9</sup> and the California Debt Allocation Limit Committee (CDLAC).<sup>10</sup>

Thus, while there is no definition of what it means to "maintain affordability" in section 214, other California state agencies look at "affordability" in determining whether a developer is eligible for its programs. For their purposes, "affordability" is tied directly to the rent restrictions agreed to in the regulatory agreements. We are not aware of any instance in which a PILOT provision has been determined to be an unreasonable or illegal expense such that it affects the affordability determination.

For all of the above reasons, we are of the opinion that if the Section 214(g)(2)(B) requirement was interpreted to mean that a dollar-for-dollar tracking was required and that all funds could only be used for certain, specific, enumerated purposes, it would be nearly impossible for *any* low-income-housing development to make the required certification. However, such an interpretation is not consistent with the purpose for which section 214, subdivision (g) was enacted.

The July 15, 1987 Senate Revenue and Taxation Committee report on AB 2144 states the purpose of the bill as follows:

The bill is intended to exempt nonprofit low[-]income housing from property tax. The justification for the exemption would be that the funds which are currently paid in property taxes could better be used in furtherance of the goals of providing low[-]income housing.

Also, it may be that some prospective low[-]income projects may not "pencil out" without the property tax exemption.<sup>11</sup>

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<sup>8</sup> The Multifamily Housing Project (MPH) administered by the California Department of Housing and Community Development (HCD) loans funds to developers to assist in the new construction of rental units for lower-income households. To be eligible for funds under the MHP, rents must be established as affordable pursuant to regulations promulgated by HCD. (See Cal. Code Regs., tit. 25, §§ 7301, subd. (a), 7312; see also Cal. Code Regs., tit. 25, §7320, subd. (a).)

<sup>9</sup> The California Housing Finance Agency's Multifamily Programs provide permanent financing for the acquisition, rehabilitation and preservation, or new construction of, rental housing that includes affordable rents for lower-income households. Restrictions on rents that may be charged by developers are found in Health and Safety Code section 51335.

<sup>10</sup> CDLAC administers the tax-exempt private activity bond program. (See Cal. Code Regs., tit. 4, §§ 5192, 5220 [providing income and rent restrictions for qualified residential rental projects and compliance monitoring standards, respectively].)

<sup>11</sup> "Pencil out" refers to the need for the welfare exemption to make the development financially feasible.

Thus, the legislature intended the welfare exemption to be available to increase the development of low-income housing by making it easier to finance its construction. An interpretation of the certification requirement that is ambiguous and overly restrictive frustrates this goal.<sup>12</sup>

Therefore, in our view, given the legislative history of section 214, subdivision (g) and the extreme difficulty of doing a dollar-for-dollar tracking of property tax savings to determine whether property tax savings are used to "maintain affordability" of lower-income-household units, where a PILOT agreement exists with local government, the Section 214(g)(2)(B) certification requirement can be made in good faith if rents *actually meet or are lower than* the restrictions set forth in the agreement referred to in Section 214(g)(2)(A), and if the developer has a reasonable belief that its PILOT payment will go directly to support or benefit the low-income-household units.

As long as the above are true, the certification required on Form BOE-277-L1, *Claim for Supplemental Clearance Certificate for Limited Partnership, Low-Income Housing Property – Welfare Exemption*, and on Form BOE-267-L1, *Welfare Exemption Supplemental Affidavit Low Income Housing Property of Limited Partnership*, (i.e., that property tax savings are used to "maintain affordability" or "reduce rents" of the low-income-housing units) can be made in good faith.<sup>13</sup> This, of course, does not preclude an assessor from requiring a developer to verify that such is the case.

RM:yg

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cc: Mr. David Gau MIC:63  
Mr. Todd Gilman MIC:70

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<sup>12</sup> We also note that this goal is consistent with the Legislature's stated intent that the provision of affordable housing is a statewide policy goal. (See Health & Saf. Code, § 50000 et seq.)

<sup>13</sup> This certification is made on Section 4, Item C of Form BOE-277-L1, and on Section 3, Item B of Form BOE-267-L1.



STATE BOARD OF EQUALIZATION  
PROPERTY AND SPECIAL TAXES DEPARTMENT  
450 N STREET, SACRAMENTO, CALIFORNIA  
PO BOX 942879, SACRAMENTO, CALIFORNIA 94279-0064  
1-916-274-3350 • FAX 1-916-285-0134  
[www.boe.ca.gov](http://www.boe.ca.gov)

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April 3, 2013

TO: INTERESTED PARTIES

Enclosed is a copy of Current Legal Digest (CLD) number 2013-1 for your information and review. The annotations included in this CLD are new proposed annotations (underlined) and/or suggested revisions or deletion of existing annotations (indicated by ~~strikeout~~ and underline). After review, please submit any questions, comments, or suggestions for changes *in writing* by **Friday, May 3, 2013**. These may be sent by e-mail using the "Comments Form" on the Board's website ([www.boe.ca.gov/proptaxes/cld.htm](http://www.boe.ca.gov/proptaxes/cld.htm)), fax or mail. The mailing address is:

State Board of Equalization  
County-Assessed Properties Division  
ATTN: Annotation Coordinator  
PO Box 942879, MIC 64  
Sacramento, CA 94279-0064

Please note, the new annotations and/or suggested revisions of existing annotations contained in the enclosed CLD are *drafts* and may not accurately reflect the Board's official position on certain issues nor reflect the language that will be used in the final annotation, if formally adopted.

CLDs are circulated for 30 days, at which time any questions are addressed and/or suggested modifications are taken into consideration. After approval of the final version by the Board's Legal Department, the changes will be posted to the Board's website under "Annotations" ([www.boe.ca.gov/proptaxes/annocont.htm](http://www.boe.ca.gov/proptaxes/annocont.htm)). After all proposed changes have been resolved, the CLD will become obsolete and deleted from the website.

This CLD is posted on the Board's website at [www.boe.ca.gov/proptaxes/cld.htm](http://www.boe.ca.gov/proptaxes/cld.htm). Copies of the backup correspondence are linked to each annotation via the annotation number. If a link does not work, please let us know by using the "Comments Form" on the Board's website ([www.boe.ca.gov/proptaxes/cld.htm](http://www.boe.ca.gov/proptaxes/cld.htm)). If you have any questions, please contact Glenna Schultz at 1-916-274-3362.

Sincerely,

/s/ Louie Feletto for

David J. Gau  
Deputy Director  
Property and Special Taxes Department

DJG/grs  
Enclosure

Corporation because the separate identity of legal entities is respected for property tax purposes. C 12/13/2011.

## **625.0000 PARENT-CHILD TRANSFER**

**625.0011 Adoption.** Revenue and Taxation Code section 63.1(a)(3)(D) provides that "child" includes any child adopted by the parent or parents pursuant to statute, other than an individual adopted after reaching the age of 18 years. The status of adoption as established by a foreign jurisdiction must be recognized in California under principles of comity and full faith and credit. Based on case law, a child adopted in another state or country before the age of 18 is considered to be an adopted child pursuant to statute under California law and is eligible for the parent-child exclusion on property received from the adopting parent. The assessor may require that the taxpayer provide documentation proving the validity of the adoption. C 1/25/2012.

## **880.0001(a) WELFARE EXEMPTION – IN GENERAL**

**880.0062 Construction in Progress.** The demolition of the building on the parcel with the intent to replace it with low-income housing, facilities to be used exclusively for charitable purposes, constitutes "facilities in the course of construction" for purposes of Revenue and Taxation Code section 214.2(a). Absent evidence to indicate that construction would not be ongoing as of a particular lien date, the parcel would be eligible for the welfare exemption for that fiscal year, assuming a complete and timely claim for the exemption was filed and was followed by commencement of a new building or improvement. Such commencement may be evidenced by trenching or definite onsite physical activity. While there is no statutory timeframe within which commencement of a new building or improvement must take place after demolition, we are of the opinion that, absent any other evidence to the contrary, commencement of a building or improvement on a parcel within a year of demolition meets the definition of "facilities in the course of construction." C 1/3/2012.

~~**880.0155 Low Income Housing.** A proposed Payment In Lieu of Tax (PILOT) Agreement between a county and an owner of a low income housing project that qualifies for the welfare exemption is invalid because it is not authorized by the California Constitution or any statute. The PILOT agreement specifies that the payment is a tax and, therefore, constitutes a waiver of the welfare exemption. The agreement would also disqualify the property for the exemption as the owner would not be able to satisfy the certification required by Revenue and Taxation Code section 214(g)(2)(B) because the payment would be made pursuant to the PILOT agreement. Thus, no funds would be used to maintain the affordability of, or reduce rents otherwise necessary for, the units occupied by lower income households. C 9/29/2003. Comments received – Deletion of annotation on hold.~~

*Delete – This opinion is of a more general nature and implicitly assumed that, under the facts analyzed, local assessors could establish that developers had not made the required certifications in good faith (i.e., that the certifications could not, in fact, be verified). Thus, this opinion is being replaced with the opinion annotated as 880.0155.005.*

**880.0155.005 Low-Income Housing.** Revenue and Taxation Code section 214(g)(2)(B) requires a developer to certify that property tax savings be used to "maintain the affordability of" or "reduce rents otherwise necessary for" low-income housing units. A Payment In Lieu of Tax (PILOT) Agreement between a local government and an owner of a low-income housing project does not disqualify a developer from making the certification if rents have been maintained in accord with those required by section 214(g)(2)(A), and the developer has a reasonable belief that the PILOT payment will be used to support or benefit the low income housing development. C 3/20/2013. Comments received – annotation on hold.



## FEE DEFERRAL AGREEMENT

This Fee Deferral Agreement ("Agreement"), dated as of November 7, 2012 (the "Effective Date"), is entered into by and between the CITY OF OROVILLE, a California municipal corporation ("City") and PETALUMA ECUMENICAL PROPERTIES, a non-profit corporation ("Developer"), each a "Party" and collectively the "Parties," on the following terms and conditions:

### *RECITALS*

A. Developer is developing an affordable senior housing project to be known as Orange Tree Senior Apartments (the "Project") on that certain real property designated as APN 012-141-004, located at 1511 Robinson Street, in the City of Oroville, California.

B. The City has established a regular program of imposing the payment of specified fees on the construction of new development projects within the City. These fees are typically payable to the City at the time the project applicant submits an application to the City for the requisite permits and approvals.

C. As part of the approval of the Project, the City has imposed, and the Developer has agreed to pay, an impact fee for emergency services due to the increased demand that will be placed on the City as a result of construction of the Project and the seniors that may be in need of emergency services.

D. In certain instances the City acknowledges that it may be to the public's benefit to defer the payment of certain fees until a specified time after the issuance of the permit or approval.

E. Developer has requested that the Project be considered eligible for deferral of the fee for emergency services. Based on the designation of the Project for affordable housing and difficulty of financing the fee at this time and the desire to ensure the construction of the Project, the City has agreed to a deferral under the terms and conditions of this Agreement.

### *AGREEMENT*

NOW, THEREFORE, in consideration of the mutual promises and covenants made by the parties and contained herein and other consideration, the value and adequacy of which are hereby acknowledged, the parties agree as follows:

1. Deferral and Payment. The City agrees that Developer may defer payment of the Emergency Services Fee, as defined below, to City as provided herein. Developer shall pay an impact fee amount equal to Five Hundred Five Thousand Dollars (\$505,000.00) (the "Emergency Services Fee") upon the earlier of: (a) the date of closing on the permanent financing for the Project; or (b) the date which is four (4) years from commencement of construction of the Project. City Administrator may in his or her sole discretion extend the outside date for payment by up to one (1) additional year upon Developer's demonstration that it is exercising all diligent efforts to put permanent financing in place. Developer agrees to timely

pay all other City fees, including processing fees, as required by the City, as such other fees are not subject to deferral pursuant to this Agreement. Developer, at its option, may pre-pay all or a portion of the Emergency Services Fee. There shall be no penalty for pre-payment.

2. Default. Either Party's failure to perform any term or provision of this Agreement constitutes a Default of this Agreement. In the event of a Default, the non-defaulting Party shall give written "Notice of Default" to the defaulting party, specifying the Default. Delay in giving such notice shall not constitute a waiver of the Default. If the defaulting Party fails to cure the Default within thirty (30) days after receipt of a notice specifying the Default, or, if the Default is of a nature that cannot be cured within thirty (30) days, the defaulting Party fails to commence to cure the Default within said thirty (30) days and thereafter diligently prosecute such cure to completion, then the defaulting Party shall be liable to the injured Party for any and all actual damages caused by such Default, unless otherwise provided for by this Agreement.

3. No Waiver. Failure to insist on any one occasion upon strict compliance with any of the terms, covenants or conditions hereof shall not be deemed a waiver of such term, covenant or condition, nor shall any waiver or relinquishment of any rights or powers hereunder at any one time or more times be deemed a waiver or relinquishment of such other right or power at any other time or times.

4. Legal Actions. In addition to any other rights and remedies, any party may institute a legal action to require the cure of any default and to recover actual damages for any default, or to obtain any other remedy consistent with the purpose of this Agreement.

5. Jurisdiction and Venue. Legal actions must be instituted and maintained in the Superior Court of Butte County, California, or in the United States District Court, Eastern District of California.

6. Applicable Law. The laws of the State of California shall govern the interpretation and enforcement of this Agreement, without reference to its choice of laws principles.

7. Rights and Remedies Are Cumulative. The rights and remedies of the Parties are cumulative, and the exercise by a Party of one or more of its rights or remedies shall not preclude the exercise by it, at the same or different time, of any other rights or remedies for the same Default or any other Default by another Party.

8. No Third Party Beneficiaries. This Agreement is for the sole and exclusive benefit of the City and Developer. No other parties or entities are intended to be, or shall be considered, a beneficiary of the performance of either of the Parties' obligations under this Agreement.

9. Titles and Captions. Titles and captions are for convenience of reference only and do not define, describe or limit the scope or the intent of this Agreement or any of its terms. Reference to section numbers are to sections in this Agreement unless expressly stated otherwise.

10. Interpretation. The City and Developer acknowledge that this Agreement is the product of mutual arms-length negotiation and drafting and each represents and warrants to the

other that it has been represented by legal counsel in the negotiation and drafting of this Agreement. Accordingly, the rule of construction which provides the ambiguities in a document shall be construed against the drafter of that document shall have no application to the interpretation and enforcement of this Agreement.

11. Severability. Each provision, term, condition, covenant, and/or restriction, in whole and in part, in this Agreement shall be considered severable. In the event any provision, term, condition, covenant, and/or restriction, in whole and/or in part, in this Agreement is declared invalid, unconstitutional, or void for any reason, such provision or part thereof shall be severed from this Agreement and shall not affect any other provision, term, condition, covenant, and/or restriction, of this Agreement and the remainder of the Agreement shall continue in full force and effect.

12. Amendments to Agreement. Any amendments to this Agreement must be in writing and signed by the appropriate authorities of the City and Developer.

13. Notices, Demands and Communications Between the Parties. Formal notices, demands and communications between the parties shall be given in writing and personally served or dispatched by certified mail, postage prepaid, return receipt requested, or by overnight express mail to the principal offices of the parties, as designated in this Section. Such written notices, demands, and communications may be sent in the same manner to such other addresses as either party may from time to time designate by notice as provided in this Section. Any such notice shall be deemed to have been received (i) upon the date personal service is affected, if given by personal service, (ii) on the date received, if sent by overnight express mail, or (iii) upon the expiration of three (3) business days after mailing, if given by certified mail, return receipt requested, postage prepaid.

If notice is to be made to the City:

City of Oroville  
Attn: City Administrator  
1735 Montgomery Street  
Oroville, CA 95965  
Tel: (530) 538-2535

If notice is to be made to Developer:

Petaluma Ecumenical Properties  
Attention: Executive Director  
951 Petaluma Blvd South  
Petaluma, CA 94952  
Tel: (707) 762-2336

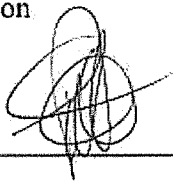
14. Authority. The individuals executing this Agreement on behalf of Developer represent and warrant that they have the legal power, right and actual authority to bind Developer to the terms and conditions hereof.

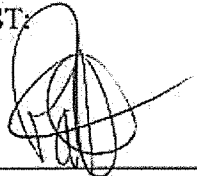
15. Counterpart Originals. This Agreement may be executed in duplicate original counterparts, each of which is deemed to be an original.

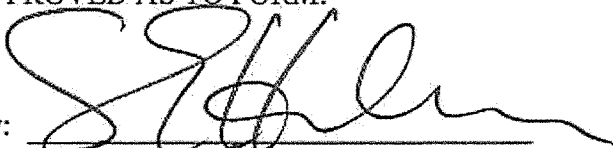
IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the Effective Date..

CITY:

CITY OF OROVILLE, a municipal corporation

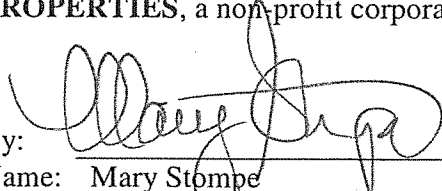
By:   
Name: \_\_\_\_\_  
Its: City Administrator

ATTEST:  
  
By: \_\_\_\_\_, City Clerk

APPROVED AS TO FORM:  
  
By: \_\_\_\_\_  
Scott Huber, City Attorney

**DEVELOPER:**

**PETALUMA ECUMENICAL  
PROPERTIES, a non-profit corporation**

By:   
Name: Mary Stompe  
Its: Executive Director

**RECORDING REQUESTED BY:**

**City of Oroville**

**WHEN RECORDED MAIL TO:**

**City of Oroville  
1735 Montgomery Street  
Oroville, CA 95965**

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**AGREEMENT REGARDING PAYMENT IN LIEU OF TAXES**  
**AND**  
**COVENANT RUNNING WITH THE LAND**

THIS AGREEMENT AND DECLARATION (“Agreement”), made this \_\_ day of August 2011, by, between and among \_\_\_\_\_, \_\_\_\_\_ (“Owner”) and the City of Oroville, California and the Oroville Redevelopment Agency (“City”)

WHEREAS, Owner is the owner of that certain parcel of real property legally described in Exhibit A attached hereto (the “Subject Property”); and

WHEREAS, Owner intends to claim a welfare property tax exemption which will exempt Owner from paying real estate taxes on the Subject Property and any related improvements thereon; and

WHEREAS, Owner agrees to hold harmless City regarding the City’s loss of revenue from its general fund or the Oroville Redevelopment Agency which would result from the above described exemption.

NOW, THEREFORE, Owner and City declare and agree that the Subject Property shall be held, transferred, encumbered, used, sold, conveyed, leased, and occupied, subject to the covenants and restrictions hereinafter set forth expressly and exclusively for the use and benefit of the property and of each and every person or entity who now or in the future owns any portion or portions of the Subject Property.

1. In each year in which the Owner or the Subject Property qualifies for and receives a welfare property tax exemption, Owner shall pay to City a payment in lieu of taxes. No payment in lieu of taxes shall be made for any year in which no property tax exemption is secured. City will not request or require the payment of any money by Owner to Butte County or any other entity. The amount of the payment for any given year shall be calculated as set forth in Exhibit “B” but in no event shall exceed \_\_\_\_\_ (\$\_\_\_\_\_) with a 2% annual escalator per year.

2. Of the principal payment due for each year, one-half of the payment shall be made on or before December 10 and the remaining principal shall be paid on or before April 10 of the following year. In the event that said payment dates fall on the weekend or national holiday, payments required hereunder shall be due the next business day.
3. The obligations of the Owner of the Subject Property to make the principal tax in lieu installment payments shall be secured by a lien against the Subject Property and the lien may be foreclosed upon by City in the event of delinquency.
4. In addition to the principal amount calculated in accordance with the methodology outlined in Exhibit "B" attached hereto, the City is authorized and entitled to penalties equaling five percent (5%) of any outstanding delinquent amount, and additional interest of one percent (1%) per month which commences from the date immediately following the principal payment due date until the date that all principal, penalties and interest are paid in full. Additionally, Owner shall be responsible for any administrative costs, fees or other charges, including reasonable attorney's fee and costs, as well as all other charges pertaining to the enforcement of the provisions of this Agreement.
6. The covenants contained in this Agreement shall run with the land and shall be binding on the parties, their assigns and successors in interest and all persons claiming an interest in the Subject Property until such time as the Subject Property is no longer eligible for a welfare exemption or similar exemption from the payment of real property taxes.
7. Enforcement will be proceedings at law or in equity against any person or persons violating or attempting to violate any covenant either to restrain violation or to recover damages.
8. This Agreement shall be recorded in the Official Records of Butte County, State of California.

(Remainder of this Page Intentionally Left Blank – Signature Page to Follow

**IN WITNESS WHEREOF**, Owner and City execute this Agreement on the date first written above.

\_\_\_\_\_  
\_\_\_\_\_

City of Oroville  
OROVILLE REDEVELOPMENT  
AGENCY

By: \_\_\_\_\_

By: \_\_\_\_\_  
G. Harold Duffey

Its: \_\_\_\_\_

Its: City Administrator

By: \_\_\_\_\_

Its:



Exhibit A  
Legal Description

Exhibit B

Methodology for Calculating Payment-In-Lieu of Taxes (PILOT)

- Step 1: Calculate the Subject Property Value: The calculation shall be as follows using the prior year’s audit: Gross Income less Operating Expenses (Operating Expenses do not include depreciation, amortization, debt interest or operating reserves) divided by an 8% cap rate.
- Step 2: Calculate the Total Tax: Without regard to any welfare tax exemption that may be available to the Subject Property, the Subject Property Value shall be multiplied by 1% with the resulting amount specified as the “Total Tax”. The Subject Property shall not be exempt from any special assessments that are in excess of the 1% tax rate.
- Step 3: Calculate the City’s Share of the Total Tax: The 1% tax rate may be further divided among the County, a City Redevelopment Agency or another agency. Whatever percentage of the 1% tax rate that currently is allocated to the City or the City Redevelopment Agency for the Subject Property, that percentage shall be multiplied by the Total Tax. Similarly, if the City or the City Redevelopment Agency receives an additional percentage of the Total Tax as a result of the improved value of the Subject Property, such additional percentage shall also be paid to the City.

Sample Calculation Only: (the values below are for sample purposes only and do not represent actual values)

Sample Subject Property Value from Step 1 above: \$\_\_\_\_\_

Allocation of 1% Tax Rate:

- City of Oroville - .8%
- City of Oroville Redevelopment Agency - .1%
- County of Butte - .1%

Subject Property Value of \$\_\_\_\_\_ multiplied by 1% equals Total Tax of \$\_\_\_\_\_ multiplied by 90% equals \$\_\_\_\_\_. \$\_\_\_\_\_ shall be the payment-in-lieu of taxes.

(The 90% figure is calculated by taking .8% City share + .1% City RDA share equals .9% total City share divided by 1% equals 90%)



STATE BOARD OF EQUALIZATION  
PROPERTY AND SPECIAL TAXES DEPARTMENT  
450 N STREET, SACRAMENTO, CALIFORNIA  
PO BOX 942879, SACRAMENTO, CALIFORNIA 94279-0064  
1-916-274-3350 • FAX 1-916-285-0134  
[www.boe.ca.gov](http://www.boe.ca.gov)

BETTY T. YEE  
First District, San Francisco  
SEN. GEORGE RUNNER (RET.)  
Second District, Lancaster  
MICHELLE STEEL  
Third District, Orange County  
JEROME E. HORTON  
Fourth District, Los Angeles  
JOHN CHIANG  
State Controller  
CYNTHIA BRIDGES  
Executive Director

April 3, 2013

TO: INTERESTED PARTIES

Enclosed is a copy of Current Legal Digest (CLD) number 2013-1 for your information and review. The annotations included in this CLD are new proposed annotations (underlined) and/or suggested revisions or deletion of existing annotations (indicated by ~~strikeout~~ and underline). After review, please submit any questions, comments, or suggestions for changes *in writing* by **Friday, May 3, 2013**. These may be sent by e-mail using the "Comments Form" on the Board's website ([www.boe.ca.gov/proptaxes/cld.htm](http://www.boe.ca.gov/proptaxes/cld.htm)), fax or mail. The mailing address is:

State Board of Equalization  
County-Assessed Properties Division  
ATTN: Annotation Coordinator  
PO Box 942879, MIC 64  
Sacramento, CA 94279-0064

Please note, the new annotations and/or suggested revisions of existing annotations contained in the enclosed CLD are *drafts* and may not accurately reflect the Board's official position on certain issues nor reflect the language that will be used in the final annotation, if formally adopted.

CLDs are circulated for 30 days, at which time any questions are addressed and/or suggested modifications are taken into consideration. After approval of the final version by the Board's Legal Department, the changes will be posted to the Board's website under "Annotations" ([www.boe.ca.gov/proptaxes/annocont.htm](http://www.boe.ca.gov/proptaxes/annocont.htm)). After all proposed changes have been resolved, the CLD will become obsolete and deleted from the website.

This CLD is posted on the Board's website at [www.boe.ca.gov/proptaxes/cld.htm](http://www.boe.ca.gov/proptaxes/cld.htm). Copies of the backup correspondence are linked to each annotation via the annotation number. If a link does not work, please let us know by using the "Comments Form" on the Board's website ([www.boe.ca.gov/proptaxes/cld.htm](http://www.boe.ca.gov/proptaxes/cld.htm)). If you have any questions, please contact Glenna Schultz at 1-916-274-3362.

Sincerely,

/s/ Louie Feletto for

David J. Gau  
Deputy Director  
Property and Special Taxes Department

DJG/grs  
Enclosure

Corporation because the separate identity of legal entities is respected for property tax purposes. C 12/13/2011.

## **625.0000 PARENT-CHILD TRANSFER**

**625.0011 Adoption.** Revenue and Taxation Code section 63.1(a)(3)(D) provides that "child" includes any child adopted by the parent or parents pursuant to statute, other than an individual adopted after reaching the age of 18 years. The status of adoption as established by a foreign jurisdiction must be recognized in California under principles of comity and full faith and credit. Based on case law, a child adopted in another state or country before the age of 18 is considered to be an adopted child pursuant to statute under California law and is eligible for the parent-child exclusion on property received from the adopting parent. The assessor may require that the taxpayer provide documentation proving the validity of the adoption. C 1/25/2012.

## **880.0001(a) WELFARE EXEMPTION – IN GENERAL**

**880.0062 Construction in Progress.** The demolition of the building on the parcel with the intent to replace it with low-income housing, facilities to be used exclusively for charitable purposes, constitutes "facilities in the course of construction" for purposes of Revenue and Taxation Code section 214.2(a). Absent evidence to indicate that construction would not be ongoing as of a particular lien date, the parcel would be eligible for the welfare exemption for that fiscal year, assuming a complete and timely claim for the exemption was filed and was followed by commencement of a new building or improvement. Such commencement may be evidenced by trenching or definite onsite physical activity. While there is no statutory timeframe within which commencement of a new building or improvement must take place after demolition, we are of the opinion that, absent any other evidence to the contrary, commencement of a building or improvement on a parcel within a year of demolition meets the definition of "facilities in the course of construction." C 1/3/2012.

~~**880.0155 Low Income Housing.** A proposed Payment In Lieu of Tax (PILOT) Agreement between a county and an owner of a low income housing project that qualifies for the welfare exemption is invalid because it is not authorized by the California Constitution or any statute. The PILOT agreement specifies that the payment is a tax and, therefore, constitutes a waiver of the welfare exemption. The agreement would also disqualify the property for the exemption as the owner would not be able to satisfy the certification required by Revenue and Taxation Code section 214(g)(2)(B) because the payment would be made pursuant to the PILOT agreement. Thus, no funds would be used to maintain the affordability of, or reduce rents otherwise necessary for, the units occupied by lower income households. C 9/29/2003. Comments received – Deletion of annotation on hold.~~

*Delete – This opinion is of a more general nature and implicitly assumed that, under the facts analyzed, local assessors could establish that developers had not made the required certifications in good faith (i.e., that the certifications could not, in fact, be verified). Thus, this opinion is being replaced with the opinion annotated as 880.0155.005.*

**880.0155.005 Low-Income Housing.** Revenue and Taxation Code section 214(g)(2)(B) requires a developer to certify that property tax savings be used to "maintain the affordability of" or "reduce rents otherwise necessary for" low-income housing units. A Payment In Lieu of Tax (PILOT) Agreement between a local government and an owner of a low-income housing project does not disqualify a developer from making the certification if rents have been maintained in accord with those required by section 214(g)(2)(A), and the developer has a reasonable belief that the PILOT payment will be used to support or benefit the low income housing development. C 3/20/2013. Comments received – annotation on hold.