

ENCLOSURE FILED

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STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

Bill Jones
SECRETARY OF STATE

In re:)	
Request for Regulatory)	1999 OAL Determination No. 12
Determination filed by)	
CALIFORNIA TAXPAYERS')	[Docket No. 97-017]
ASSOCIATION concerning)	
County Assessor Letter)	May 7, 1999
No. 86/75 ("Airline)	
Possessory Interests in)	Determination Pursuant to
Government-Owned)	Government Code Section 11340.5;
Airports"), issued by the)	Title 1, California Code of
STATE BOARD OF)	Regulations, Chapter 1, Article 3
EQUALIZATION ¹)	

Determination by: CHARLENE G. MATHIAS, Deputy Director

HERBERT F. BOLZ, Supervising Attorney
Regulatory Determinations Program

SYNOPSIS

The Office of Administrative Law concludes that a 1986 Letter to Assessors issued by the Board of Equalization contains a "regulation" which was invalid because it should have been, but was not, adopted pursuant to the Administrative Procedure Act. The policy reflected in the 1986 Letter was rejected and superseded by 1998 legislation and by a duly adopted 1998 regulation. In January 1999, the Board formally rescinded the 1986 Letter.

DECISION^{2, 3, 4, 5, 6}

The Office of Administrative Law ("OAL") has been requested to determine whether or not County Assessor Letter No. 86/75 ("Letter 86/75" or "Letter"), issued by the State Board of Equalization ("Board") contains "regulations" which must be adopted pursuant to the APA.⁷ (The requester refers to these documents in general as County Assessor Letters ("CAL"); the Board refers to the same documents as Letters to Assessors ("LTA".))

The topic of Letter 86/75 is "Airline Possessory Interests in Government-Owned Airports." Letter 86/75 states that the value of an airline's possessory interest in airport facilities "must" include the right to use runways (also know as "landing rights"). The one-page Letter 86/75 is attached to this determination as Appendix "A," following the endnotes.

OAL has concluded that this requirement that the right to use runways (or landing rights) be deemed part of a taxable possessory interest is a "regulation," which should have been, but was not, adopted pursuant to the APA. Letter 86/75 was a "regulation" on the date the request for determination was filed (July 22, 1997) and remained a "regulation" until the date it was rescinded (January 27, 1999).

REASONS FOR DECISION

I. BACKGROUND

The State Board of Equalization ("Board") was created by former Article XIII, section 9 of the California Constitution of 1879. Language establishing the Board is currently found in California Constitution, Article XIII, section 17. The Board is charged with administering numerous tax programs, including the collection of property and sales tax, for the support of state and local governmental activities. The Board also has major responsibilities in adopting rules and regulations governing the Property Tax. As an appellate body, the Board hears appeals in a number of different areas, including Property Tax, Sales and Use Tax, Personal Income Tax, and Bank and Corporation Tax.

Government Code section 15606 grants to the Board authority to adopt rules and regulations governing the property tax. Section 15606 provides:

"The State Board of Equalization *shall* do all of the following:

".

"(c) *Prescribe rules and regulations to govern* local boards of equalization when equalizing, and *assessors when assessing*

"(d) *Prescribe and enforce* the use of all forms for the assessment of property for taxation, including forms to be used for the application for reduction in assessment.

"(e) *Prepare and issue instructions to assessors* designed to promote uniformity throughout the state and its local taxing jurisdictions in the assessment of property for the purposes of taxation. . . .

"(f) Subdivisions (c), (d) and (e) shall include, but are not limited to, rules, regulations, instructions, and forms relating to classifications of kinds of property and evaluation procedures.

"(g) *Prescribe rules and regulations to govern* local boards of equalization when equalizing and assessors when assessing with respect to the *assessment and equalization of possessory interests*.

"(h)

"*This section is mandatory.*" [Emphasis added.]

The final sentence of section 15606 makes clear that the section is mandatory; the Board thus *must* "prescribe rules and regulations to govern . . . assessors when assessing. . . . *possessory interests*." (Section 15606, subd. (g); emphasis added.)

Background: Relevant Constitutional, Statutory and Judge-made Law

Article XIII of the California Constitution, section 1 states in part:

"Unless otherwise provided by this Constitution or the laws of the United States:

(a) *All property is taxable*" [Emphasis added.]

Revenue and Taxation Code section 107 states in part that "possessory interests"

means the following:

“(a) Possession of, claim to, or right of possession of land or improvements that is *independent, durable, and exclusive of rights held by others* in the property, except when coupled with ownership of the land or improvements in the same person. . . .” [Emphasis added.]

The requester (the California Taxpayers’ Association or “Cal-Tax”) provided the following in the request for determination under the heading “facts.” (The exhibits mentioned are attached to the request for determination, but are not reproduced here.)

“Prior to 1986, neither the State Board of Equalization (‘Board’) nor its staff (‘staff’) had taken the position that the transitory use of a public airport’s runways and taxiways by general aviation or commercial airlines created a taxable property interest (a ‘possessory interest’) in the runways and taxiway. County assessors differed among themselves with respect to whether these airline landing rights were possessory interests that could be taxed under the property tax laws.

“On August 27, 1969, Howard M. Childs, Senior Property Appraiser, Assessment Standards Division advised the Kern County Assessor that the current position of the Division was that ‘landing rights do not constitute taxable property interests.’ (Exhibit 2.) That interpretation was reaffirmed in an internal memo of December 27, 1974 from Mr. John Knowles to Mr. William Jackson. (Exhibit 3.)

“While the Legal Department opined that no possessory interest existed in runways and taxiways because the brevity of takeoffs and landings ‘do not give rise to an interest of any substantial durability’ (Memorandum of July 2, 1984 from Mr. James Williams to Mr. Verne Walton, Exhibit 4),⁸ the Assessment Standards Division recommended that because of the lack of judicial guidance and the magnitude of the potential assessment the Board should ‘take the position that these rights are taxable and let the courts make the final determination at some later date.’ (Memorandum of July 5, 1984 from Mr. Verne Walton to Mr. James Williams, Exhibit 5.)

“By early 1985, uncertainty still existed amongst the Board staff as to the proper status of runways and taxiways. (Memorandum of March 18, 1985

from Mr. J.J. Delaney to Mr. Verne Walton, Exhibit 6.) On the first page of that memo, Mr. Delaney notes:

‘I am hesitant to conclude that an airline company has a possessory interest in a runway that it uses in common with all other airlines and private aircraft.’

“Mr. Delaney’s ‘solution’ was to suggest that the value of joint use facilities such as runways and taxiways be included in the calculation of the value of the possessory interests in property ‘exclusively used’ by airlines, such as ticket counters and gate areas.

“In 1985, as part of an Assessment Practices Survey entitled ‘A Report on The Assessment of Possessory Interests,’ the Assessments Standards Division stated that:

‘The Board of Equalization’s position is that landing fees should be considered as rent paid for the use of publicly owned land and improvements.’ (Exhibit 7, p. 13.)

“At the time this Survey was issued, some county assessors assessed commercial airlines on their landing rights, but as the Survey noted, these assessors were contemplating assessing private aircraft owners on their landing rights as well. In response to this possibility the Survey stated: ‘This issue [taxable interest of landing rights] could therefore also affect the assessments of tie downs and hanger spaces for private airplanes and public airports’ (Exhibit 7, p. 13.)

“On September 30, 1986 the Board issued County Assessor Letter 86/75 which concluded:

‘In summation, it is the Board’s position that airlines *clearly* have a taxable possessory in the airport facilities and that the value of that interest *must* be determined by reference to all rights that are incorporated in that interest. The offices, ticket areas, docking areas, repair facilities and runways are all used by the airlines and the value of all of these rights should be considered when appraising the airlines possessory interest. (Emphasis added by Cal-Tax.)’

“The Board’s letter was issued three months after the Office of Administrative Law’s June 25, 1986 determination that a County Assessors Letter by the Board purporting to shift the assessment of pipeline-related land or easements away from the county assessors to the Board was an unauthorized regulation. (*In re: Request for Regulatory Determination filed by the California Taxpayers’ Association, concerning County Assessors Letter No. 82/89 (‘Easements of Intercounty Pipelines’)* issued by the State Board of Equalization-1986 OAL Determination No. 4 [Docket No. 85-005] June 25, 1986.) (Exhibit 8.) Applying the same analysis found on pages 12 through 19 of that opinion, it is clear that CAL 86/75 is an unauthorized regulation.”

In its response, the Board did not rebut or deny any part of the quoted Cal-Tax statement. In its response to the request for determination, dated January 4, 1999, the Board stated:

“It has long been our position that the Board’s Letters to Assessors, issued pursuant to the authority of Government Code section 15606, subdivision (e) to promote uniformity throughout the state and its local taxing jurisdictions in the assessment of property for the purposes of taxation, are advisory only, and are not binding or enforceable. They are not rules or regulations promulgated by the Board pursuant to Government Code section 15606, subdivision (c). We remain of this view.

“As to Letter to Assessors No. 86/75 specifically, since the letter was issued, both statutes and property tax rules pertaining to the assessment of airport possessory interests have been added. See Revenue and Taxation Code Section 107.9 (Stats. 1998, Ch. 85(AB 2318) in effect June 30, 1998) and Property Tax Rule 20 (Adopted January 20, 1998, effective May 6, 1998). In view of the fact that Letter to Assessors No. 86/75 does not address these additions and is, as a result, outdated, *we have elected to withdraw the letter, without comment.* We will be sending you a copy of the withdrawal letter upon its issuance.”⁹ [Emphasis added.]

A January 27, 1999 letter “To County Assessors” announced that the Board was withdrawing the challenged letter. This communication stated in part:

“RECISION OF LETTER TO ASSESSORS NO. 86/75

...

“The above-referenced Letter to Assessors (LTA) No. 86/75 is obsolete and is hereby rescinded.

“The advice in LTA No. 86/75 asserted that the value of an airline’s taxable possessory interest in airport facilities must be determined by reference to all rights that are incorporated in that interest, including ‘offices, ticket areas, docking areas, repair facilities and runway.’ This advice has been superseded by:

1. The State Board of Equalization’s adoption of Property Tax Rule 20, Taxable Possessory Interests [Title 18, California Code of Regulations, section 20], effective May 6, 1998. The rule specifies that an airline’s use of an airport runway or taxiway is not sufficiently independent of government control to support a finding of possessory interest.
2. Enactment of Assembly Bills 1807 (Chapter 96, Statutes of 1998) and 2318 (Chapter 85, Statutes of 1998).”

II. IS THE APA GENERALLY APPLICABLE TO THE QUASI-LEGISLATIVE ENACTMENTS OF THE BOARD?

Government Code section 11000 states:

"As used in this title [Title 2. "Government of the State of California" (which title encompasses the APA)], ‘state agency’ includes every *state* office, officer, department, division, bureau, *board*, and commission." [Emphasis added.]

The APA narrows the definition of "state agency" from that in section 11000 by specifically excluding "an agency in the judicial or legislative departments of the state government."¹⁰ The Board is in neither the judicial nor legislative branch of state government. Clearly, the Board is a "state agency" within the meaning of the APA, and unless the Board is expressly exempted by statute from the APA,¹¹ the APA is generally applicable to the Board. Since no specific exemption has been enacted, the APA is generally applicable to the Board.¹²

III. DOES THE CHALLENGED LETTER CONTAIN "REGULATIONS" WITHIN THE MEANING OF GOVERNMENT CODE SECTION

11342?

Government Code section 11342, subdivision (g), defines "regulation" as:

". . . *every* rule, regulation, order, or standard of general application *or* the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by *any* state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure [Emphasis added.]"

Government Code section 11340.5, authorizing OAL to determine whether agency rules are "regulations," and thus subject to APA adoption requirements, provides in part:

"(a) *No* state agency shall issue, utilize, enforce, or attempt to enforce *any* guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (g) of Section 11342, *unless* the guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. [Emphasis added.]"

In *Grier v. Kizer*,¹³ the California Court of Appeal upheld OAL's two-part test¹⁴ as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g):

First, is the challenged rule either:

- a rule or standard of general application, *or*
- a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either:

- implement, interpret, or make specific the law enforced or administered by the agency, *or*
- govern the agency's procedure?

If an uncodified rule satisfies both parts of the two-part test, OAL must conclude that it is a “regulation” subject to the APA. In applying the two-part test, we are mindful of the admonition of the *Grier* court:

“. . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead*, . . . 22 Cal.3d at p. 204, 149 Cal.Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA’s requirements should be resolved in favor of the APA.*¹⁵ [Emphasis added.]”

Three California Court of Appeal cases provide additional guidance on the proper approach to take when determining whether an agency rule is subject to the APA.

According to *Engelmann v. State Board of Education* (1991), agencies need not adopt as regulations those rules contained in "a statutory scheme which the Legislature has [already] established. . . ." ¹⁶ But "to the extent [that] any of the [agency rules] depart from, or embellish upon, express statutory authorization and language, the [agency] will need to promulgate regulations. . . ." ¹⁷

Similarly, agency rules properly promulgated *as regulations* (i.e., California Code of Regulations (“CCR”) provisions) cannot legally be "embellished upon" in administrative bulletins. For example, *Union of American Physicians and Dentists v. Kizer* (1990)¹⁸ held that a terse 24-word definition of "intermediate physician service" in a Medi-Cal regulation could not legally be supplemented by a lengthy seven-paragraph passage in an administrative bulletin that went "far beyond" the text of the duly adopted regulation.¹⁹ Statutes may legally be amended only through the legislative process; duly adopted regulations--generally speaking--may legally be amended only through the APA rulemaking process.

The third case, *State Water Resources Control Board v. Office of Administrative Law (Bay Planning Commission)* (1993), made clear that reviewing authorities are to focus on the *content* of the challenged agency rule, not the *label* placed on the rule by the agency:

“. . . [The] Government Code . . . [is] careful to provide OAL authority over regulatory measures whether or not they are designated 'regulations' by the relevant agency. In other words, *if it looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated as a regulation whether or not the agency in question so labeled it.* . . .

[Emphasis added.]²⁰

A. DOES THE CHALLENGED LETTER CONSTITUTE A "STANDARD OF GENERAL APPLICATION"?

For an agency policy to be a "standard of general application," it need not apply to all citizens of the state. It is sufficient if the rule applies to members of a class, kind, or order.²¹

Cal-Tax argues that Letter 86/75 is on its face

“... clearly a ‘standard of general application’ meant to *apply to all country assessors* in guiding their assessment practices.” [Emphasis added.]²²

The Board has not specifically rebutted or denied this argument.²³

Reviewing the challenged letter, which is addressed “To Assessors,” we conclude that Cal-Tax is correct. The letter by its terms applies directly to all members of a class, that is, county assessors. The letter is thus a standard of general application. In addition, the letter obviously applies indirectly to all airlines having landing rights in government-owned airports.

Having concluded that Letter 86/75 is a standard of general application, OAL must consider whether it meets the second part of the two-part test.

B. DOES THE CHALLENGED LETTER IMPLEMENT, INTERPRET OR MAKE SPECIFIC THE LAW ENFORCED OR ADMINISTERED BY THE BOARD OR GOVERN THE BOARD'S PROCEDURE?

Cal-Tax argues:

“The Board has authority to issue such instructions [to assessors] (Government Code section 15606(c), to do so through instructions (Government Code section 15606(f)) and to enforce its interpretations of the law in a court of competent jurisdiction. (Government Code section 15606(h).) As noted above, the language of CAL 86/75 was mandatory: ‘... the value of that interest *must* be determined in reference to all rights that are incorporated in that interest.’ Thus, CAL 86/75 is a standard designed to ‘implement, interpret, or make specific the law enforced or

administered by it.’ Government Code section 11342(g).” [Emphasis in original.]²⁴

Cal-Tax also argues:

“The designation of landing rights as a taxable possessory interest is not merely an administrative interpretation of an existing legal requirement. As noted previously, for at least sixteen years prior to the issuance of CAL 86/75, the Board staff had interpreted the law as *not* treating landing rights as taxable possessory interests. Given this history and the internal debate over the taxability of landing rights, the statement in CAL 86/75 that the airlines ‘clearly have a taxable interest’ in landing rights cannot legitimately be interpreted as a statement that the law permits only one interpretation. . . .” [Emphasis in original.]

The Board does not specifically rebut or deny the quoted statements.

Reviewing Letter 86/75 and its history, we conclude that Cal-Tax is correct.

Curiously, however, neither Cal-Tax nor the Board²⁵ cited Revenue and Taxation Code section 15606, subdivision (g), which states that the Board shall:

“Prescribe rules and regulations to govern local boards of equalization when equalizing and assessors when assessing with respect to the assessment and equalization of possessory interests.” [Emphasis added.]

Two points should be made about subdivision (g). First, subdivision (g) clearly directs the Board to adopt regulations to govern assessors when assessing possessory interests. This directive undercuts the Board’s argument that it is free to issue regulatory material in the form of Letters to Assessors. (This Board argument is discussed in part IV.A of this determination.) Second, the challenged Letter clearly is a rule governing assessment of possessory interests, and thus implements subdivision (g).

Additionally, we note that Letter 86/75 interprets the “independent” element of the statutory definition of possessory interest. Revenue and Taxation Code section 107 states in part that “possessory interests” means the following:

“(a) Possession of, claim to, or right of possession of land or improvements

that is *independent*, durable, and exclusive of rights held by others in the property, except when coupled with ownership of the land or improvements in the same person. . . .” [Emphasis added.]

Revenue and Taxation Code section 107, subdivision (a)(1), goes on to define the term “independent” as follows:

“‘Independent’ means the ability to exercise authority and exert control over the management or operations of the property or improvements, separate and apart from the policies, statutes, ordinances, rules, and regulations of the public owner of the property or improvements. A possession or use is independent if the possession or operation of the property is sufficiently autonomous to constitute more than a mere agency.”

In order to find that an airline with landing rights at a particular airport had a taxable possessory interest in the runway, the challenged Letter necessarily concluded that the airline’s possession of the runway was “*independent*, durable, and exclusive of rights held by others in the property. . . .” (Section 107, subdivision (a); emphasis added.)

The Letter thus concluded in effect that an airline using a runway had the ability “to exercise authority and exert control over the management or operations of the property or improvements, *separate and apart from the policies, statutes, ordinances, rules, and regulations of the public owner* of the property or improvements.” (Section 107, subdivision (a)(1); emphasis added.) This is an interpretation of the term “independent.” A contrasting interpretation of the term “independent” is found in a regulation adopted by the Board in April 1998. Title 18, California Code of Regulations, section 20(b)(5) provides:

“‘Independent’ means a possession, or a right or claim to possession, if the possession or operation of the real property is sufficiently autonomous to constitute more than a mere agency. To be ‘sufficiently autonomous’ to constitute more than a mere agency, the possessor must have the right and ability to exercise significant authority and control over the management or operation of the real property, separate and apart from the policies, statutes, ordinances, rules, and regulations of the public owner of the public owner of the real property. *For example, the control of an airport runway or taxiway by the Federal Aviation Administration (FAA) or another government agency or its agent is so complete that it precludes the airlines from*

exercising sufficient authority and control over the management or operation of the runways or taxiway and does not constitute sufficient 'independence' to support a possessory interest.” [Emphasis added.]

OAL accordingly concludes that Letter 86/75 (1) is a standard of general application and (2) interprets, implements, and makes specific Revenue and Taxation Code sections 107 and 15606.

IV. DOES THE CHALLENGED LETTER, WHICH HAS BEEN FOUND TO BE A “REGULATION,” FALL WITHIN ANY RECOGNIZED EXEMPTION FROM APA REQUIREMENTS?

Generally, all “regulations” issued by state agencies are required to be adopted pursuant to the APA, unless expressly exempted by statute.²⁶ In *United Systems of Arkansas v. Stamison* (1998),²⁷ the California Court of Appeal rejected an argument by the Director of the Department of General Services that language in the Public Contract Code had the effect of exempting rules governing bid protests from the APA.

According to the *Stamison* Court:

“When the Legislature has intended to exempt regulations from the APA, it has done so by clear, unequivocal language. (See, e.g., Gov. Code, section 16487 [‘The State Controller may establish procedures for the purpose of carrying out the purposes set forth in Section 16485. These procedures are exempt from the Administrative Procedure Act.’]; Gov. Code, section 18211 [‘Regulations adopted by the State Personnel Board are exempt from the Administrative Procedure Act’]; Labor Code, section 1185 [orders of Industrial Welfare Commission ‘expressly exempted’ from the APA].) [Emphasis added.]”²⁸

Express statutory APA exemptions may be divided into two categories: special and general.²⁹ *Special* express statutory exemptions typically: (1) apply only to a portion of one agency’s “regulations” and (2) are found in that agency’s enabling act. *General* express statutory exemptions typically: (1) apply across the board to all state agencies and (2) are found in the APA. An example of an express *special* exemption is Penal Code section 5058, subdivision (d)(1), which exempts pilot programs of the Department of Corrections under specified conditions. An example of an express *general* exemption is Government Code section 11342,

subdivision (g), part of which exempts “internal management” regulations of all state agencies from the APA.

A. DOES THE CHALLENGED LETTER FALL WITHIN ANY *SPECIAL EXPRESS* APA EXEMPTION?

Cal-Tax argues that Letter 86/75 does *not* fall within the special express statutory exemption applying to legal rulings of counsel. Also, the Board in substance contends that there is a special statutory exemption which applies to instructions to assessors. We will discuss these arguments in turn.

LEGAL RULINGS OF COUNSEL

Government Code section 11342, subdivision (g), provides in part that the APA does not apply to certain statements issued by the State Board of Equalization:

“‘Regulation’ does not mean or include *legal rulings of counsel* issued by the . . . State Board of Equalization” [Emphasis added.]

Cal-Tax argues that:

“CAL 86/75 is . . . not excluded from the definition of a ‘regulation’ because it is not a ‘legal ruling of counsel’ issued by the Board of Equalization. Assessors letters are issued by the Assessment Standards Division with the Property Taxes Department of the Board of Equalization, not the Legal Department. . . .”³⁰

The Board did not rebut or reply to this argument.

We agree with Cal-Tax. Letter 86/75 does not fall within the scope of the rulings of counsel exception because it was not issued by Board counsel.

ALLEGED EXEMPTION COVERING INSTRUCTIONS TO ASSESSORS

In its response to the request for determination, the Board stated:

“It has long been our position that the Board’s Letters to Assessors, issued pursuant to the authority of Government Code section 15606, subdivision (e) to promote uniformity throughout the state and its local taxing

jurisdictions in the assessment of property for the purposes of taxation, are advisory only, and are not binding or enforceable. They are not rules or regulations promulgated by the Board pursuant to Government Code section 15606, subdivision (c). We remain of this view.”³¹

OAL analyzed a strikingly similar argument in 1990 OAL Determination No. 9,³² which concluded that part of the Board-issued “Assessors’ Handbook” violated the APA:

“In its Response, the Board argues that the challenged rule is contained in the Assessors’ Handbook which ‘merely instruct[s] county assessors in assessment matters,’ and therefore is not a ‘regulation.’ In support of its argument, the Board cites *Prudential Insurance Company v. City and County of San Francisco*,³³ which, concerning other provisions contained in two other Assessors’ Handbooks,³⁴ stated that ‘the handbooks do not contain the regulations, nor do they possess the force of law. They represent merely the opinions of the State Board staff, and [have] no binding legal effect on boards, assessors, or taxpayers.’ [Citation.]”³⁵

“We agree with the Board that the Assessors’ Handbook and its contents at issue here are not legally binding; however, whether a state agency rule constitutes a ‘regulation’ hinges upon its *effect and impact on the public*,³⁶ not on the agency’s characterization of the rule. The Handbook explains its purpose as

‘The purpose of this handbook is to present specific *criteria* which are to be used to distinguish from all of those organizations which apply for the exemption, those that are religious and charitable within the intent of the electorate when the [constitutional] amendment was adopted, and similarly *to identify religious and charitable uses* anticipated by the electorate.’³⁷

“Government Code section 11347.5, subdivision (a), prohibits the issuance or enforcement of ‘*any guideline, criterion, . . . instruction, . . . [or] standard of general application . . . which is a regulation as defined in subdivision (b) of section 11342 . . .*’ (Emphasis added.) Even though the challenged rule may be nonbinding, the use of the Handbook’s ‘criterion’ in determining whether a portion of religious property used for residential purposes is entitled to the welfare exemption can have a significant effect

and impact on the public. A taxpayer who wishes to challenge the granting or denial of the exemption would have to endure the ‘petition for hearing’ appeal process.³⁸ A criterion or rule having such a significant effect or impact on the public, which has not been adopted pursuant to the requirements of the APA, is just what the APA was intended to prohibit.

“We therefore *reject* the Board's argument, as we did in a prior determination concerning the Board,³⁹ that the challenged policy contained in the Assessors' Handbook is not a ‘regulation’ because it has no legally binding effect.” [Emphasis in original.]

In a sense, the Board argues in the matter currently before OAL that Government Code section 15606 constitutes an express statutory exemption from APA requirements. We reject this proposition. As illustrated in the “ruling of counsel” exemption and in the three examples quoted above by the California Court of Appeal, section 15606 *contains no express statutory exemption language*. Thus, the Board’s argument must fail. And, if section 15606 does not constitute an express statutory exemption, then that section cannot be used as the basis of an argument that Letters to Assessors are categorically exempt from the APA.

A 1993 Court of Appeal case involved a statute which, though lacking express exemption language, allegedly exempted an agency from the APA on the grounds that the statute’s procedural requirements could not be harmonized with the APA.⁴⁰ Even this argument fails here because there are no provisions in section 15606 that are inconsistent with the APA. True, the Board must send out instructions, but the Board can easily comply with that statutory mandate by adopting needed regulations in a timely fashion and then summarizing these regulations in the instructions. Instructions could also be very helpful even if limited to summarizing, i.e., restating without interpretation, recent legislation and court cases. As discussed in an earlier determination, the system works much better if new law is made with the benefit of public participation pursuant to the APA, and the new legal standards are then published in the CCR.

If assessors lack clear guidance in the Revenue and Taxation Code or in the CCR, then litigation will be necessary to determine what the law is. Legislation and regulations require frequent updating to deal with newly developing concerns and problems. If this updating does not occur, then taxpayers, county assessors, and the Board find themselves in time-consuming and expensive litigation, which may well result in the Court of Appeal serving by default as the critical law-making

entity.⁴¹ Reviewing this and prior determinations involving Letters to Assessors, it appears that considerable expense, uncertainty, and delay could have been avoided in both the public and private sector if the Board had early on invested a certain amount of time and money in developing appropriate regulations.

OAL concludes that Revenue and Taxation Code 15606, subdivision (e), does *not* have the effect of exempting Letters to Assessors from the APA, and that no special express statutory exemption applies to Letter 86/75 or to Letters to Assessors in general.

B. DOES THE CHALLENGED LETTER FALL WITHIN ANY GENERAL EXPRESS APA EXEMPTION?

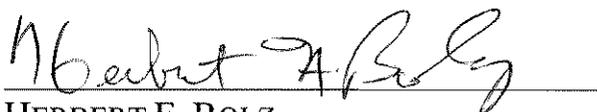
Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute.⁴² Rules concerning certain specified activities of state agencies are not subject to the procedural requirements of the APA.⁴³

Letter 86/75 does not fall within any general express statutory exemption from the APA. Accordingly, OAL concludes that the Letter was invalid because it was not adopted in compliance with the APA.

CONCLUSION

During the period of time it was in effect, Letter 86/75 was invalid because it should have been, but was not, adopted pursuant to the APA.

DATE: May 7, 1999


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ENDNOTES

1. This request for determination was filed by Larry McCarthy, President, California Taxpayers' Association, 921 Eleventh St., Suite 800, Sacramento, CA 95814, (916) 441-0490. The Board was represented by E. L. Sorensen, Jr., Executive Director, 450 N St., Sacramento, CA 95814, (916) 327-4975.

2. This determination may be cited as **"1999 OAL Determination No. 12 ."**

Pursuant to Title 1, CCR, section 127, this determination becomes effective on the 30th day after filing with the Secretary of State, which filing occurred on the date shown on the first page of this determination.

Government Code section 11340.5, subdivision (d), provides that:

"Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published [in the California Regulatory Notice Register]."

Determinations are ordinarily published in the Notice Register within two weeks of the date of filing with the Secretary of State.

3. If an uncodified agency rule is found to violate Government Code section 11340.5, subdivision (a), the rule in question may be validated by formal adoption "as a *regulation*" (Government Code section 11340.5, subd. (b); emphasis added) or by incorporation in a statutory or constitutional provision. See also *California Coastal Commission v. Quanta Investment Corporation* (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.) An agency rule found to violate the APA could also simply be rescinded.
4. OAL does not review alleged underground regulations for compliance with the APA's six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. However, in the event regulations were proposed by the Department under the APA, OAL would review the *proposed* regulations for compliance with the six statutory criteria. (Government Code sections 11349 & 11349.1.)
5. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), subsection 121 (a), provides:

"*Determination*' means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code section 11342(g), which is *invalid and unenforceable* unless

(1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,

(2) it has been exempted by statute from the requirements of the APA. [Emphasis added.]”

See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, review denied (finding that Department of Health Services' audit method was *invalid* because it was an underground regulation which should be adopted pursuant to the APA); and *Planned Parenthood Affiliates of California v. Swoap* (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 (now 11340.5) in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b)--now subd. (g)-- yet had not been adopted pursuant to the APA, was "*invalid*"). We note that a 1996 California Supreme Court case stated that it “disapproved” of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr. 2d 186, 198. *Grier*, however, is still authoritative, except as specified by the *Tidewater* court. *Tidewater* itself, in discussing which agency rules are subject to the APA, referred to “the two-part test of the Office of Administrative Law,” citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*.

6. *OAL Determinations Entitled to Great Weight in Court*

The California Court of Appeal has held that a statistical extrapolation rule utilized by the Department of Health Services in Medi-Cal audits must be adopted pursuant to the APA. *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, disapproved on other grounds in *Tidewater*. Prior to this court decision, OAL had been requested to determine whether or not this Medi-Cal audit rule met the definition of "regulation" as found in Government Code section 11342, subdivision (b) (now subd. (g)), and therefore was required to be adopted pursuant to the APA. Pursuant to Government Code section 11347.5 (now 11340.5), OAL issued a determination concluding that the audit rule met the definition of "regulation," and therefore was subject to APA requirements. **1987 OAL Determination No. 10**, CRNR 96, No. 8-Z, February 23, 1996, p. 293. The *Grier* court concurred with OAL's conclusion, stating that:

"Review of [the trial court's] decision is a question of law for this court's independent determination, namely, whether the Department's use of an audit method based on probability sampling and statistical extrapolation constitutes a regulation within the meaning of section 11342, subdivision (b) [now subd. (g)]. [Citations.]" (219 Cal.App.3d at p. 434, 268 Cal.Rptr. at p. 251.)

Concerning the treatment of **1987 OAL Determination No. 10**, which was submitted for its consideration in the case, the court further found:

"While the issue ultimately is one of law for this court, 'the contemporaneous

administrative construction of [a statute] by those charged with its enforcement and interpretation is *entitled to great weight*, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. [Citations.] [Citations.] [Par.] Because [Government Code] section 11347.5, [now 11340.5] subdivision (b), charges the OAL with interpreting whether an agency rule is a regulation as defined in [Government Code] section 11342, subdivision (b) [now subd. (g)], *we accord its determination due consideration.*[*Id.*; emphasis added.]"

See also *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886 (same holding) and note 5 of **1990 OAL Determination No. 4**, California Regulatory Notice Register 90, No. 10-Z, March 9, 1990, p. 384, at p. 391 (reasons for according due deference consideration to OAL determinations).

7. According to Government Code section 11370:

"*Chapter 3.5* (commencing with Section 11340), *Chapter 4* (commencing with Section 11370), *Chapter 4.5* (commencing with Section 11400, and *Chapter 5* (commencing with Section 11500) *constitute*, and may be cited as, *the Administrative Procedure Act*. [Emphasis added.]"

OAL refers to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Administrative Regulations and Rulemaking") of Division 3 of Title 2 of the Government Code, sections 11340 through 11359.

8. Mr. Williams also noted that it was his opinion that coupling the value of landing rights to the possessory interests airlines had in areas of the airport they used exclusively (ticket counters, gate areas, etc.) would be improper because "it would be discriminatory in relation to other private or commercial landings that do not require support with any permanent possession." [Endnote appears in the request for determination.]
9. Agency response, p. 1.
10. Government Code section 11342, subdivision (a).
11. Government Code section 11346; Title 1, CCR, section 121 (a)(2).
12. See *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126-128, 175 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of the APA when engaged in quasi-legislative activities); *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 942, 107 Cal.Rptr. 596, 603 (agency created by Legislature is subject to and must comply with APA).
13. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251. OAL notes that a 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577. *Grier*, however, is still

good law, except as specified by the *Tidewater* court. Courts may cite cases which have been disapproved on other grounds. For instance, in *Doe v. Wilson* (1997) 57 Cal.App.4th 296, 67 Cal.Rptr.2d 187, 197, the California Court of Appeal, First District, Division 5 cited *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596, on one point, even though *Poschman* had been expressly disapproved on another point nineteen years earlier by the California Supreme Court in *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204 n. 3, 149 Cal.Rptr. 1, 3 n. 3. Similarly, in *Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 67 Cal.Rptr.2d 323, 332, the California Court of Appeal, First District, Division 4, nine months after *Tidewater*, cited *Grier v. Kizer* as a distinguishable case on the issue of the futility exception to the exhaustion of administrative remedies requirement.

Tidewater itself, in discussing which agency rules are subject to the APA, referred to “the two-part test of the Office of Administrative Law,” citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*.

14. The *Grier* Court stated:

“The OAL’s analysis set forth a two-part test: ‘First, is the informal rule either a rule or standard of general application or a modification or supplement to such a rule? [Para.] Second, does the informal rule either implement, interpret, or make specific the law enforced by the agency or govern the agency’s procedure?’ (1987 OAL Determination No. 10, . . . slip op’n., at p. 8.) [*Grier*, disapproved on other grounds in *Tidewater*].”

OAL’s wording of the two-part test, drawn from Government Code section 11342, has been modified slightly over the years. The cited OAL opinion--**1987 OAL Determination No. 10**--was published in California Regulatory Notice Register 96, No. 8-Z, February 23, 1996, p. 292.

15. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253. The same point is made in *United Systems of Arkansas v. Stamison* (1998) 63 Cal.App.4th 1001, 1010, 74 Cal.Rptr.2d 407, 412, review denied.
16. 2 Cal.App.4th 47, 62, 3 Cal.Rptr.2d 264, 275, review denied.
17. *Id.*
18. 223 Cal.App.3d 490, 501, 272 Cal.Rptr. 886, 891.
19. *Id.*
20. (1993) 12 Cal.App.4th 697, 702, 16 Cal.Rptr.2d 25, 28.

21. *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).
22. Request for determination, p. 3.
23. The Board's general argument that letters to assessors can never constitute "regulations" is dealt with under part IV of this determination.
24. Request for determination, p. 3.
25. See the January 1999 statements quoted in part I of this determination.
26. Government Code section 11346.
27. 63 Cal.App.4th 1001, 1010, 74 Cal.Rptr.2d 407, 411-12, review denied.
28. 63 Cal.App.4th at 1010, 74 Cal.Rptr.2d at 411.
29. Cf. *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126, 174 Cal.Rptr. 744, 747 (exemptions found either in prevailing wage statute or in the APA itself).
30. Request for determination, p. 3.
31. Agency response, p. 1.
32. CRNR 90, No. 22-Z, June 1, 1990, p. 842, at p. ____.
33. (1987) 191 Cal.App.3d 1142, 236 Cal.Rptr. 869.
34. The issue in the case was the proper determination of a property's fair market value for tax assessment purposes. The two Assessors' Handbooks referred to in the case are entitled "General Appraisal Manual" and "Cash Equivalent Analysis."
35. *Id.*, 191 Cal.App.3d at 1155, 236 Cal.Rptr. at 877.
36. *Winzler & Kelly v. Department of Industrial Relations, supra.*
37. Assessors' Handbook, "Welfare Exemption," AH 267, December 1985, p. 1.
38. See Revenue and Taxation Code section 254.5 and Title 18, CCR, section 136 ("Welfare Exemption Claim Review Procedure").
39. See 1990 OAL Determination No. 7 (Board of Equalization, March 23, 1990, Docket No. 89-013), California Regulatory Notice Register 90, No. 14-Z, April 6, 1990, pp. 542, 549-550, typewritten version, pp. 186-189. In two other determinations, OAL also rejected the Board's argument that letters to assessors are not "regulations" because they are not

legally binding: (1) 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, pp. B-18--B-34, and (2) 1986 OAL Determination No. 4 (Board of Equalization, June 25, 1986, Docket No. 85-005), California Administrative Notice Register 86, No. 28-Z, July 11, 1986, pp. B-7--B-26.

40. *State Water Resources Control Board v. Office of Administrative Law (Bay Planning Commission)* (1993) 12 Cal.App.4th 697, 16 Cal.Rptr.2d 25.
41. See, for instance, *City of San Jose v. Carlson* (1997) 57 Cal.App.4th 1348, 1355, 67 Cal.Rptr.2d 719, 723 (court notes that the durability element of the statutory definition of possessory interest has been diluted by judicial interpretation "to a degree of almost nonexistence").
42. Government Code section 11346.
43. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:
 - a. Rules relating *only* to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (g).)
 - b. Forms prescribed by a state agency or any instructions relating to the use of the form, *except* where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (g).)
 - c. Rules that "[establish] or [fix], *rates, prices, or tariffs.*" (Gov. Code, sec. 11343, subd. (a)(1); emphasis added.)
 - d. Rules directed to a *specifically named* person or group of persons *and* which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
 - e. Legal rulings *of counsel* issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (g).)
 - f. There is weak authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. *City of San Joaquin v. State Board of Equalization* (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest). The most complete OAL analysis of the "contract defense" may be found in **1991 OAL Determination No. 6**, pp. 168-169, 175-177, CRNR 91, No. 43-Z, October 25, 1991, p. 1458-1459, 1461-1462. In *Grier v. Kizer* ((1990) 219 Cal.App.3d 422, 437-438, 268 Cal.Rptr. 244, 253), the court reached the same conclusion as OAL did in **1987 OAL Determination No. 10**, pp. 25-28 (summary published in California Administrative Notice Register 87, No. 34-Z, August 21, 1987, p. 63);

complete determination published on February 23, 1996, CRNR 96, No. 8-Z, p. 293, 304-305), rejecting the idea that *City of San Joaquin* (cited above) was still good law.

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STATE BOARD OF EQUALIZATION

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 Fourth District, Pasadena

KENNETH CORY
 Controller, Sacramento

DOUGLAS D. BELL
 Executive Secretary

September 30, 1986

No. 86/75

TO COUNTY ASSESSORS:

AIRLINE POSSESSORY INTERESTS IN
GOVERNMENT-OWNED AIRPORTS

When conducting our assessment practices surveys, we have noted a considerable difference of opinion among county assessors regarding the nature and extent of commercial airline possessory interests in government-owned airport facilities. While most assessors are assessing the airlines' rights to use exclusively held areas such as ticket counters, few are considering landing rights or the rights to use space held jointly with the airlines, such as baggage and parking areas, in their possessory interest appraisals.

Our analysis of several airline-airport agreements indicated that an airline's taxable possessory interest incorporates more than just the areas used exclusively by that airline. In the typical contract, charges are levied for both the exclusive and joint-use space, and landing fees are collected based upon the weight of each plane landed. All of these fees, regardless of how they are calculated, are payments for the operation of the airline at the government-owned facility. In addition, the fact that several parties are sharing the runways and other joint-use areas does not violate the test of exclusivity required of taxable possessory interests. In somewhat similar circumstances, i.e., the grazing of cattle by several owners on federal lands, the courts have held that the use was exclusive enough to warrant a possessory interest assessment for each of the several users.

In summation, it is the Board's position that airlines clearly have a taxable possessory interest in the airport facilities and that the value of that interest must be determined by reference to all rights that are incorporated in that interest. The offices, ticket areas, docking areas, repair facilities and runways are all used by the airlines and the value of all of these rights should be considered when appraising the airlines' possessory interest.

Sincerely,

Verne Walton, Chief
 Assessment Standards Division

VW:wpc
 AL-17-0042M

App. "A"