June 23, 2020

Chair Autumn Burke
Assembly Revenue and Taxation Committee
Assembly Local Government Committee
State Capitol
Sacramento, CA 95814

Re: SB 364 (Mitchell) - Support

Dear Chair Burke,

The Large-scale Solar Association (LSA) and Solar Energy Industries Association (SEIA) write in support of SB 364 (Mitchell) which maintains in statute the state's constitutional partial property tax exclusion for utility-scale and commercial solar projects.

Since 1980, commercial and utility-scale solar projects have been partially excluded from annual property tax assessments per voter-approved Proposition 7. As drafted, the Schools and Communities First Initiative – Proposition 15 on the November 2020 ballot – has been interpreted by some commentators as inadvertently overriding the solar tax exclusion, making utility-scale and commercial solar systems taxable at their full fair market value as of January 1, 2022.

Solar's current tax treatment for commercial and utility-scale projects incentivizes CA's transition to renewable energy by lowering projects' costs to ratepayers. The tax exclusion for solar is passed through to ratepayers in direct cost savings, reducing the cost of meeting state clean energy goals. Should this exclusion be impacted by passage of Proposition 15, solar projects would face uncertainty about future costs and delays in both new and existing projects, adding to the challenge of meeting our clean energy and climate goals.

SB 364 remedies this by doing the following:

1. Classifying *non-residential* active solar energy systems as personal property instead of real property.
2. Exempting non-residential active solar energy systems completed prior to 1/1/25 from taxation unless they experience a change in ownership.
3. Precluding non-residential active solar energy systems completed after 1/1/25 to take advantage of the tax exemption.
4. Defining change of ownership/control to reflect consistency with current law.
5. Precluding projects that have already changed ownership and are currently paying property taxes from recapturing the exemption through this legislation.
4. Makes the new rules contingent upon the passage of Proposition 15.

SB 364 is an effort to sustain an existing tax exclusion, which the voters approved by a 2-1 margin and upon which the state and its ratepayers have relied for 40 years. We understand there are concerns raised by the California Tax Assessors Association regarding constitutionality and precedent. After analysis, we have found the concerns to be unfounded. The attached document outlines our findings in this regard.

We thank you for your consideration of our views. If you would like further information, contact Shannon Eddy at 415-819-4285.

Sincerely,

Shannon Eddy
Large-scale Solar Association

Rick Umoff
Solar Energy Industries Association

Cc:

Committee members, Assembly Revenue and Taxation and Assembly Local Government Committees

Senator Holly Mitchell
Assembly Member Phil Ting

Founded in 2008, LSA is a non-partisan, solar advocacy association supporting advancement of utility-scale solar technologies through progressive policy mechanisms. Member companies in the LSA are leaders in the utility-scale solar industry who share a common understanding of and concern about the issues facing the state due to climate change and the critical need for greenhouse gas emissions reductions. LSA has helped set the policy environment for all utility-scale solar projects operating in the state.

The Solar Energy Industries Association® (SEIA) is leading the transformation to a clean energy economy, creating the framework for solar to achieve 20% of U.S. electricity generation by 2030. SEIA works with its 1,000 member companies and other strategic partners to fight for policies that create jobs in every community and shape fair market rules that promote competition and the growth of reliable, low-cost solar power. Founded in 1974, SEIA is a national trade association building a comprehensive vision for the Solar+ Decade through research, education and advocacy.

Addressing Concerns Raised by the California Assessors Association

The purpose of Proposition 7, stated by its supporters was to "promote the commercialization of new and promising alternative energy technologies"—a goal that is all the more important today, as the State battles climate change. (See Voter Information Guide, Gen. Elec. (Nov. 4, 1980) argument in favor of Prop. 7, p. 30.)

In furtherance of these policies, the Legislature enacted Revenue and Taxation Code section 73, which it has subsequently reenacted on several occasions. As a result of the enactment of that statute, land underlying solar energy systems is not reassessed at the time the system is constructed, but only at such time as there is a change in ownership, and the systems themselves "are not considered, for property tax purposes, to be improvements that add value." (*Luz Solar Partners Ltd., III v. San Bernardino County* (2017) 15 Cal.App.5th 962, 964.)

SB 364 is designed to further the voters' important purposes in adopting Proposition 7.[1]

SB 364 Is Not Unconstitutional

The Assessors contend that SB 364 is unconstitutional. That is not the case. SB 364 addresses a matter properly within the Legislature's broad authority to classify property and also clarifies potential ambiguities.

The fundamental premise of the Assessors' letter is that active solar systems are unambiguously real property and not personal property, and that this classification cannot be legislatively altered. But, first, it is well-established that the Legislature "enjoy[s] wide latitude in the classification of property and the granting of partial or total exemptions upon grounds of policy." (*Strong v. Board of Equalization* (2007) 155 Cal.App.4th 1182, 1194; see also *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 234 [same].) "'If there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action. Such restrictions and limitations [imposed by the Constitution] are to be construed strictly, and are not to be extended to include matters not covered by the language used.'" (*Strong, supra*, 155 Cal.App.4th at p. 1193, quoting *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168.)

[1] The Assessors claim that this measure is enacted as an end-run around the Schools and Communities First Initiative, due to be voted on this November as Proposition 15, because that measure would require active solar energy systems to "be assessed at their fair market value like all other commercial and industrial property not excluded under the initiative." It is not clear that is the case. The Initiative provides, "the 'full cash value' of commercial and industrial real *property that is not otherwise exempt under the Constitution* is the fair market value of such real property as of that date as determined by the county assessor of the county in which such real property is located, except as provided by the Legislature pursuant to subdivision (b)." (Proposition 15, § 6 [adding Article XIII A, § 2.5], emphasis added.) New active solar energy systems are exempt from reassessment pursuant to an express grant of legislative authority in Article XIII A, § 2, subd. (c)(1). Proposition 15 does not repeal that exemption and makes no mention of solar energy systems. Given the highlighted language, even if Proposition 15 passes, it should be read *in pari materia*, rather than as an implied repeal. (See, e.g., *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2009) 173 Cal.App.4th 13.) We also note that the sponsors of Proposition 15 support SB 364. However, because some opponents of Proposition 15 have raised the spectre that new solar energy systems, the clarity sought by SB 364 is warranted to resolve any possible ambiguity. (But see *Legislature v. Eu* (1991) 54 Cal.3d 492, 505 ["We are mindful of the fact that ballot measure opponents frequently overstate the adverse effects of the challenged measure, and that their 'fears and doubts' are not highly authoritative in construing the measure."].)

The proper application of these principles, and the breadth of the Legislature's authority in this area, are illustrated by *Strong*. Not long after Proposition 13 was adopted, the Legislature defined "change in ownership" for purposes of reassessment under Proposition 13 to exclude, inter alia, interspousal transfers and transfers between parents and children. (Rev. & Tax. Code, § 63.) Shortly thereafter, Proposition 58 was adopted, which placed these exclusions in the Constitution. (Cal. Const., art. XIII A, § 2, subds. (g)-(h).) In 2005, the Legislature subsequently amended the Revenue & Taxation Code to further exclude transfers between domestic partners from a "change in ownership." (*Strong, supra,* 155 Cal.App.4th at p. 1188.) In rejecting an argument that the new "exemption" was unconstitutional, the court noted the Legislature's broad authority and held, "[f]or policy reasons, the Legislature has exempted various transfers from the definition …The Legislature has authority to do so. 'In the field of taxation, the states enjoy wide 'latitude…in the classification of property…and the granting of partial or total exemptions upon grounds of policy.'" (*Id*. at p. 1194.)

Second, exercise of the Legislature's authority is particularly warranted here, because the current classification of solar systems as real property is not nearly so clear-cut as the Assessors would have this body believe. "[A]lthough the property tax system distinguishes between real and personal property … the two classification systems overlap." (*Bd. of Supervisors v. Lonergan* (1980) 27 Cal.3d 855, 861.) That is especially true with respect to interests in property other than land.

Solar systems can be *either* real *or* personal property, depending on whether they are categorized as "fixtures." While, under the current Revenue and Taxation Code, "fixtures" are generally treated as real property for property tax purposes (see Rev. & Tax. Code § 105, subd. (a)), whether a given solar system is presently categorized as a fixture, and therefore real property, turns on a fact-specific inquiry focusing primarily on the intent of the constructor.[2]

The purposes of Proposition 7 would be better served by a clear-cut rule in this context, rather than a multi-factor analysis. The courts have recognized that "'What difficulty there has been with the development of a satisfactorily clear and just 'law of fixtures' has largely been due to the attempt to resolve far too many kinds of legal problems by determining nothing more than whether a particular tangible physical object has become a 'fixture.'. . ." (*Standard Oil Co. v. State Bd. of Equalization* (1965) 232 Cal.App.2d 91, 98, quoting Horowitz, *The Law of Fixtures in California, A Critical Analysis* (1952) 26 So.Cal.L.Rev., 21, 22.)

The Legislature need not allow this state of affairs to continue. With respect to property taxation, the Legislature has the power to supplant this common law multi-factor test with a clear rule. (*Pacific Southwest Realty Co. v. County of Los Angeles* (1991) 1 Cal.4th 155, 163, fn. 3 ["[T]he definitions of property embodied in the Revenue and Taxation Code prevail for tax purposes even if they are inconsistent with the common law definitions."].) That is what SB 364 legitimately does.

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[2] *See Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 887; State Board of Equalization, Property Tax Annotation No. 610.0088; Letter from SBE to Redacted Recipient, "Section 73 Exemption from New Construction for Active Solar Energy Systems Assignment No. 08-091, Sept. 17, 2008, *available online at* https://www.boe.ca.gov/proptaxes/pdf/610_0088.pdf (last visited July 7, 2020).

That it does so only with respect to a certain category of property makes the exercise of legislative power no less appropriate. "'A legislature may address a problem "one step at a time," or even "select one phase of one field and apply a remedy there, neglecting the others." (*People v. Silva* (1994) 27 Cal.App.4th 1160, 1170, quoting *Jefferson v. Hackney* (1972) 406 U.S. 535, 546-547.)

Finally, *Lucas v. County of Monterey* (1977) 65 Cal.App.3d 947, the primary case upon which the Assessors rely, is not on point. In that case, the Court struck down former Revenue & Taxation Code § 107.4, which defined "possessory interest" to exclude possession of a "berth, wharf, dock, pier, or similar harbor facility owned by a city, city and county, county, or harbor or port district, if such possession, claim, or right is granted for nonexclusive use of such berth, wharf, dock, pier, or similar harbor facility." In so doing, the Legislature redefined these possessory interests "*so that they are no longer considered property* and are therefore exempt from taxation," in contravention of the requirement of Article XIII, § 1, that all property is taxable. (*Id*. at p. 954; emphasis added.)

Here, SB 364 is not attempting to define property as non-property. Rather, it is clarifying the classification of a particular type of property in the service of legitimate public policy goals approved by the State's voters and exercising the Legislature's express, constitutionally based power to adopt an exemption, found in Article XIII, § 2. That is within the Legislature's power.

In short, SB 364 is constitutional.

<u>SB 364 Does Not Set A Bad Precedent</u>

There is also no merit to the Assessors' claim that SB 364 sets a bad precedent. They claim that "any interest group with enough political influence could get a complete exemption of their real property." But this exemption is different. It is grounded in a constitutionally authorized policy, adopted by the voters, and serves merely to clarify ambiguities.

As for the contention that "the primary beneficiaries will be corporations or other businesses," SB 364 simply follows the change of ownership rules that the Legislature has already adopted—this is no innovation. And, in fact, the primary beneficiaries will be the citizens of California who will benefit from ongoing investment in solar energy systems, the better to serve the important public policy of combatting dangerous greenhouse gases.

Finally, as to the purported technical "issues" that the Assessors identify:

- We believe that the proper reading is that the solar energy system retains its status as personal property following a change of ownership, consistent with the clarification advanced by that bill.

- The concern regarding projects that have undergone prior change of ownership 'recapturing' the exemption has been addressed in this version of SB 364.