

Attachment B

“DE NOVO REVIEW” FOR INTERIM APPEALS OF TOT PENALTY DECISIONS

A “de novo” standard of review allows the reviewing body the ability to exercise an independent review of the evidence forming the basis of an appeal, and not be bound by the determinations made by the initial authority. It does not necessarily mean that new evidence may be introduced, and the reviewing body, of course, is to be guided by established determinations of law.

Generally, new evidence may be introduced only when it could not have been presented at the time the determination was originally made. However, based upon past practice when acting upon land use decisions, the Board could allow any evidence to be submitted as of the time of the appeal.

As noted in the prior discussion, California law provides that waivers of tax penalties be based on findings that:

- (a) Failure to make a timely payment is due to reasonable cause and circumstances beyond the taxpayer’s control, and occurred notwithstanding the exercise of ordinary care in the absence of willful neglect...
- (b) There was an inadvertent error in the amount of payment made by the taxpayer, provided the principal payment for the proper amount of the tax due is made within 10 days after the notice of shortage is mailed by the tax collector.”

Revenue & Taxation Code § 4985.2.

Cases interpreting this provision have found that a “reasonable cause and circumstances beyond the taxpayer’s control” is not any simple, innocent or trivial mistake or cause, or simple neglect, and that reasonable control and oversight mechanisms need to be in place to ensure timely and accurate payments. For example, in *Avalon Bay Communities, Inc. v. County of Los Angeles* (2011) 197 Cal.App.4th 890, the taxpayer was held responsible for the processing mistakes and errors of its employees. The taxpayer failed to institute proper control mechanisms, which could have prevented the late payment. In *First American Commercial Real Estate Services, Inc. v. County of San Diego* (2011) 196 Cal.App.4th 218, the appellant was a sophisticated business entity and the Court ruled in part that “the tax services company was not entitled to relief ...because the error was within the company’s control and could have been avoided”. (And see *ZC Real Estate Tax Solutions Ltd. v. Ford* (2010) 191 Cal.App.4th 378;petitioner, a professional business entity, had the burden of a higher level of care and failed to establish that it had an adequate system in place to prevent and timely discover its own clerical mistake.)

Because the current appellants did not have notice that an appeal to the Board would be based on the recommended “abuse of discretion” standard, County Counsel is recommending that the Board use “de novo review” as an interim procedure until the TOT Ordinance is amended. The “de novo” review standard provides the maximum amount of flexibility and ability of an appellant to re-argue its position. While this standard is not recommended going forward, its use now is advised to avoid any procedural challenges by an appellant to the Board’s ultimate decision.