

Attachment A

CONSIDERATIONS FOR STANDARDS OF APPEAL OF TOT PENALTY DECISIONS

Chapter 5.40 of the County Code (TOT Ordinance) provides that operators “shall pay a penalty” for failure to timely remit, and provides for appeal of the Tax Collector’s decision, but is silent on any basis for waiver of penalty. As such, there is case law that says that such a penalty is “mandatory” and that the administrative body lacks authority to impose a lesser penalty. (*Sernko v. Bright* (1968) 263 Cal.App.2nd 682.) Other cases have held that review of the imposition of a penalty should not be disturbed unless there has been “a manifest abuse of discretion.” (*Cadilla v. Board of Medical Examiners* (1972) 81 Cal.App.4th 191; *Landau v. Superior Court* (2000) 81 Cal.App.4th 191.)

However, California Revenue & Taxation Code Section 4985.2, which governs cancellation of tax penalties generally, states in part, that “any penalty, costs, or other charges resulting from tax delinquency may be canceled by the auditor or the tax collector upon a finding of any of the following:

- (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.”

As a general rule, appealed decisions are presumed correct, and the appellant bears the burden of proving that an error has been made. This basic principle holds true regardless of the level of appellate review: from “abuse of discretion” to “de novo.” As noted, the determination of sanctions and penalties is usually governed by the “abuse of discretion” standard recommended by staff.

The Transient Occupancy Tax is an important component of the County’s non-program revenue stream, making up approximately 10% of such funds. Non-program revenue is the only revenue source over which the County has complete discretion. As of 2012, there were approximately 200 active hotel/motel/resort operators in Monterey County involved in the TOT program, ranging from very established and sophisticated operators to small bed and breakfast entities. It is important that all these operators be treated fairly and equally, and are clear to the standards of assessment and appeal with due regard to the importance of TOT revenue to the County and the capabilities of the operators.

The Tax Collector is an elected official who has been designated by the County Code to make determinations with respect to penalties on delinquent TOT. The amount of penalties is specified within the Code itself. While the Code does not expressly allow for waivers of penalties, the Tax Collector has exercised her discretion to allow waivers, guided by current case law.

Because payment of taxes is a straightforward administrative process, and evidentiary hearings are not necessary, it is therefore recommended that the Board review appeals to penalty

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determinations made by the Tax Collector under the “abuse of discretion” standard. This standard would uphold Tax Collector determinations unless the appellant could show that the imposition of the tax, penalty or interest assessed by the Code was arbitrary, clearly excessive or not impartial and guided by fixed legal principles.

The Board could use other criteria as standards of appeal including “de novo” and “substantial evidence.” Both these standards of review require that the Board conduct an essentially fact finding public hearing which could involve the same kind of “discovery” and examination of witnesses used for more complex issues such as land use and property assessment appeals. These alternative standards are considered by staff to be inappropriate in the context of the TOT Ordinance. The imposition of a penalty for delinquent payments does not affect policy matters in the same way that a decision affecting land uses might when the Board hears appeals affecting permits or subdivisions. With respect to the payment of taxes, the Board has already determined policy: taxes not paid when due are delinquent and a penalty is proper. Additionally, the practical impact of holding hearings to support either a “de novo” or “substantial evidence” review by the Board would likely generate a significant work load for the Board, and could actually discourage the prompt payment of taxes.