

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

N. L. NEILSON,

Plaintiff and Appellant,

v.

CITY OF CALIFORNIA CITY,

Defendant and Respondent.

F053320

(Super. Ct. No. CV260509)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Lee Phillip Felice, Judge.

N. L. Neilson, in pro. per., for Plaintiff and Appellant.

Lemieux & O'Neill and W. Keith Lemieux for Defendant and Respondent.

-ooOoo-

Plaintiff N. L. Neilson, a self-representing litigant, challenged defendant City of California City's (California City) flat-rate parcel tax on the grounds the tax violated the equal protection clause of the United States Constitution. The superior court sustained a demurrer to plaintiff's complaint without leave to amend.

We conclude that the equal protection clause, as discussed by the United States Supreme Court in *Allegheny Pittsburgh Coal v. Webster County* (1989) 488 U.S. 336 (*Allegheny*) and elsewhere, does not require a parcel tax to be in proportion to the value

of the parcel. Consequently, plaintiff failed to state a cause of action and the superior court correctly sustained the demurrer.

The judgment will be affirmed.

FACTS AND PROCEEDINGS¹

The facts recited in this opinion are taken from plaintiff's complaint. As this action comes to us on demurrer, we assume the truth of the factual allegations contained in that pleading. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

Plaintiff is the owner of property within California City and that property is subject to the parcel tax challenged in this action. California City is located in Kern County and is a city duly organized and operating under the laws of California.

The Kern County Assessor's annual report for California City stated that the city contained 51,940 parcels of real estate valued at \$616,360,717. Consequently, the \$100 per parcel tax will result in the imposition of over \$5 million in taxes. If this tax burden had been imposed based on the assessed value of the parcels, then the tax collected on each \$1,000 of assessed property value would have increased approximately \$8.43.²

Implementation of the flat-rate parcel tax would mean that a parcel worth \$117 million and a parcel worth \$36 million would be assessed the same \$100 annual tax as a parcel worth \$1,976. As a result, the ratio between tax and value for the parcel worth

¹As background, we note that plaintiff's lawsuit is his second attempt to invalidate California City's use of a flat-rate parcel tax. His first attempt was unsuccessful. (See *Neilson v. City of California City* (2005) 133 Cal.App.4th 1296 [order sustaining demurrer to complaint affirmed on appeal].) The equal protection argument that plaintiff raises in this appeal is different from the equal protection argument raised in the first lawsuit. In the first lawsuit, plaintiff contended that the imposition of the flat-rate parcel tax violated the equal protection rights of nonresident landowners because they were not allowed to vote on the measure. (*Id.* at p. 1314.) We applied the rational basis test and held that the equal protection clause did not require California City to give nonresident landowners the right to vote on the measure that proposed the tax. (*Id.* at p. 1301.)

²That is, 51,940 parcels times \$100 per parcel equals \$5,194,000 in taxes; \$5,194,000 in taxes divided by \$616,360,717 in assessed property value equals 0.008427, or 0.8427 percent. This figure can be restated as \$8.43 in taxes per \$1,000 of assessed property value.

\$1,976 would be over 59,000 times greater than same ratio for the parcel worth \$117 million.

On December 5, 2006, the City Council of California City passed Resolution No. 12-06-2242, which called a municipal election for March 6, 2007, and directed voters be presented with a measure for a city-wide special tax of up to \$100 per lot or parcel for five fiscal years beginning July 1, 2007.

At the March 2007 election, the proposed parcel tax was presented to the voters of California City as Measure A. The stated purpose of the parcel tax was 30 percent for police services, 25 percent for fire services, 30 percent for street services, and 15 percent for parks and recreational purposes.

The registered voters in California City numbered 4,162, and 1,803 voted. Measure A passed by a vote of 1,225 (67.94 percent) to 578 (32.06 percent), which exceeded the two-thirds majority requirement.

Less than a month after the election, plaintiff filed a complaint for declaratory and injunctive relief to invalidate the \$100 flat-rate parcel tax. The complaint alleged (1) the tax was a “general tax” and not a “special tax” for purposes article XIII C of the California Constitution, (2) the tax supplemented the general fund, and (3) the tax violated the equal protection clause. Paragraph 15 of the complaint alleged that California City “has unconstitutionally imposed a property tax that is not taxed in proportion to its value, as is required by the Equal Protection Clause of the United States Constitution Amendment XIV Section 1 and the United States Supreme Court’s ruling in *Allegheny, supra*. The tax is triggered merely by the ownership of property.”

In May 2007, California City filed a demurrer that contended plaintiff’s complaint failed to state sufficient facts to support a cause of action.

After a hearing on June 12, 2007, the superior court took the matter under submission. It issued a written ruling on June 20, 2007, which stated, among other things, that there was no equal protection violation.

Judgment was entered in favor of California City. Plaintiff filed a timely notice of appeal.

DISCUSSION

I. Standard of Review for General Demurrers

Appellate courts review an order sustaining a general demurrer without leave to amend using the following standard:

“The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed ‘if any one of the several grounds of demurrer is well taken. [Citations.]’ [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. [Citation.]” (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967.)

Whether a complaint has stated a cause of action is a question of law. (*Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App.4th 1224, 1231.) We exercise our independent judgment when deciding this question of law—that is, we give no deference to the determination of the superior court. (*Holcomb v. Wells Fargo Bank, N.A.* (2007) 155 Cal.App.4th 490, 495.)

II. Issue on Appeal

The question here is whether plaintiff stated a cause of action for a violation of the equal protection clause.

III. Equal Protection and Property Taxes

A. General Principles of Equal Protection

“No State shall ... deny to any person within its jurisdiction the equal protection of the laws.” (U.S. Const., amend. XIV, § 1.) Similarly, article I, section 7, subdivision (a) of the California Constitution states in part: “A person may not be ... denied equal protection of the laws” The United States Supreme Court has described the equal

protection clause as “essentially a direction that all persons similarly situated should be treated alike.” (*Cleburne v. Cleburne Living Center, Inc.* (1985) 473 U.S. 432, 439.)

The California Supreme Court has addressed what must be established to prove an equal protection claim.

“‘The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.’ [Citations.] This initial inquiry is not whether persons are similarly situated for all purposes, but ‘whether they are similarly situated for purposes of the law challenged.’ [Citation.]” (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.)

When a showing has been made that two similarly situated groups are treated disparately, the next element of a meritorious equal protection claim concerns whether the government had a sufficient reason for distinguishing between the two groups. (*In re Brian J.* (2007) 150 Cal.App.4th 97, 125.)

Whether the government had a sufficient reason to subject the groups to different treatment is tested under one of three different standards. First, if the distinctions created by the statute, regulation or ordinance involve a suspect classification or affect a fundamental interest, the distinctions are subject to strict scrutiny and are upheld only if they are necessary to achieve a compelling state interest. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200.) Second, distinctions based on gender are subject to an intermediate level of review. (*Ibid.*) Third and most commonly, the challenged distinctions must bear a rational relationship to a legitimate state purpose. (*Ibid.*)

Under the rational basis test, a court will not overturn a law, regulation or ordinance “‘unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the court] can only conclude that the [people’s] actions were irrational.’” (*Gregory v. Ashcroft* (1991) 501 U.S. 452, 471 [mandatory retirement age for state judges reviewed and upheld under rational basis test].)

B. Principles Applicable to Taxes

Three and a half years after the United States Supreme Court decided *Allegheny*, it addressed whether article XIII A of the California Constitution violated the equal protection clause. (*Nordlinger v. Hahn* (1992) 505 U.S. 1, 10-17.) In that opinion, the court set forth some of the basic principles that apply when a tax is challenged on equal protection grounds.

“In general, the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, [citation], the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, [citation], and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational, [citation]. This standard is especially deferential in the context of classifications made by complex tax laws. ‘[I]n structuring internal taxation schemes “the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.”’ [Citations.]” (*Nordlinger v. Hahn, supra*, 505 U.S. at p. 11.)

C. Level of Scrutiny Applied in this Case

Based on the foregoing principles and plaintiff’s lack of an argument to the contrary, we conclude that the appropriate level of scrutiny for the flat-rate parcel tax is the rational basis test.

IV. Analysis

A. Plaintiff’s Contentions

An essential part of plaintiff’s argument that the flat-rate parcel tax is unconstitutional is the contention that the equal protection clause requires a property tax to be imposed in proportion to the property’s value.

If this contention is not true—that is, if the equal protection clause permits property taxes to be imposed based on something other than value—then plaintiff’s equal protection claim must fail.

B. Case Law

Plaintiff has relied on *Allegheny* for the idea that the burden of property taxes must be in proportion to value. In particular, plaintiff has quoted the following sentence from that decision: “But the fairness of one’s allocable share of the total property tax burden can only be meaningfully evaluated by comparison with the share of others similarly situated relative to their property holdings.” (*Allegheny, supra*, 488 U.S. at p. 346.)

The statement regarding the fairness of a property owner’s allocable share of the tax burden must be placed in context to be understood.

Allegheny involved a challenge to the way West Virginia’s property tax laws were being applied by a county assessor. (*Allegheny, supra*, 488 U.S. at p. 339.) The West Virginia Constitution guaranteed its citizens that, with certain exceptions, taxation would be equal and uniform throughout the state and all real property would be taxed in proportion to its value. (*Id.* at p. 338.) The tax assessor for Webster County based the appraised value of property on the declared consideration at which the property last sold with some adjustments for properties that had not been sold recently. (*Ibid.*) The adjustments, however, were small compared to the actual increase in property values. “This approach systematically produced dramatic differences in valuation between petitioners’ recently transferred property and otherwise comparable surrounding land. For the years 1976 through 1982, Allegheny was assessed and taxed at approximately 35 times the rate applied to owners of comparable properties.” (*Id.* at p. 341.) The court concluded that the relative undervaluation of comparable property resulting from the unequal assessment practice denied the petitioners the equal protection of the law. (*Id.* at p. 346.)

The case of *Nordlinger v. Hahn, supra*, 505 U.S. 1 helps explain the application of the decision in *Allegheny*. In *Nordlinger*, the petitioners challenged the acquisition-value assessment method contained in California Constitution article XIII A on equal protection grounds. The United States Supreme Court observed that article XIII A, like the assessment practice in *Allegheny*, “resulted in dramatic disparities in taxation of

properties of comparable value.” (*Nordlinger v. Hahn, supra*, at p. 14.) Nevertheless, the court concluded that there were rational or reasonable considerations that supported the system that resulted in these dramatic disparities. (*Id.* at pp. 12-13.) As a result, it ruled article XIII A did not violate the equal protection clause. (*Id.* at pp. 16-18.)

Addressing its previous opinion in *Allegheny*, the court noted “an obvious and critical factual difference[:] ... the absence of any indication in *Allegheny* ... that the policies underlying an acquisition-value taxation scheme could conceivably have been the purpose for the Webster County tax assessor’s unequal assessment scheme.” (*Nordlinger v. Hahn, supra*, 505 U.S. at pp. 14-15.) In *Allegheny*, in fact, the West Virginia Constitution and statutes “provide[d] that all property of the kind held by petitioners shall be taxed at a rate uniform throughout the State according to its estimated market value.” (*Allegheny, supra*, 488 U.S. at p. 345.) Thus, the underlying law provided that the petitioners were entitled to have their property taxed in proportion to its value. The county assessor violated the equal protection clause by failing to apply that law equally to all property holders.

C. Circumstances of This Case

In this case, plaintiff is not contending that Measure A is being unequally *applied*. Measure A provides that each parcel is to be taxed a flat rate of \$100 annually. Plaintiff’s allegations demonstrate that landowners are being required to pay \$100 per parcel owned. As a result, the tax measure is being applied equally. Instead, plaintiff is claiming the law itself, when applied as written, has denied him equal protection. The opinion upon which plaintiff relies, however, as described above, simply does not support plaintiff’s position.

To prevail on his claim that Measure A itself violates the equal protection clause, plaintiff must show that some law requires a parcel tax, such as one authorized by section 4 of article XIII A of the California Constitution, to be assessed in proportion to the value

of the property. There is no such law. Indeed, to comply with section 4 of article XIII A of the California Constitution, a special tax may not be an ad valorem tax.³

Furthermore, we will not read a substantive requirement into the equal protection clause by interpreting it to mean that all property taxes must be assessed in proportion to value. (See generally Cohen, *State Law in Equality Clothing: A Comment on Allegheny Pittsburgh Coal Company v. County Commission* (1990) 38 UCLA L.Rev. 87.) Such an interpretation is not consistent with the clause itself or the United States Supreme Court's application of the clause in *Allegheny* and *Nordlinger v. Hahn*.

In conclusion, plaintiff has based his equal protection claim on a legal theory that has not been recognized. Contrary to his contention, the equal protection clause does not require property taxes to be imposed based only on value. Consequently, plaintiff has failed to state an equal protection claim under a cognizable legal theory. The superior court correctly sustained the demurrer to plaintiff's complaint.

DISPOSITION

The judgment is affirmed. California City shall recover its costs on appeal.

DAWSON, J.

WE CONCUR:

Vartabedian, Acting P.J.

Levy, J.

³In *Neilson v. City of California City*, *supra*, 133 Cal.App.4th 1296, “we conclude[d] that a non-ad valorem tax may be imposed upon real property if the tax is a ‘special’ tax dedicated to specific purposes and approved ‘by a two-thirds vote of the qualified electors of’ the city, county, or special district imposing the tax. (Art. XIII A, § 4.)” (*Id.* at p. 1308.) We will not revisit that conclusion here.