

Case No.

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

N.L. NEILSON,

Plaintiff and Appellant

v.

CITY OF CALIFORNIA CITY,

Defendant and Respondent.

Court of Appeal Case No. F053320
Fifth Appellate District

Kern County Superior Court Case No. CV260509
Hon. Lee P. Felice, Judge

PETITION FOR REVIEW

N.L. Neilson
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Plaintiff, Appellant and Petitioner

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QUESTION PRESENTED

Is the great disparities in one's allocable share of the total tax burden relative to their property holdings in the flat-rate parcel tax of this case a violation of the Equal Protection Clause of the 14th amendment of the United States Constitution?

GROUND S FOR REVIEW UNDER RULE 28(b).

The Supreme Court may order review of a Court of Appeal decision when necessary to secure uniformity of decision or to settle an important question of law.

1. Secure Uniformity of Decision

The Court of Appeal s decision is in conflict with the U.S. Supreme Court decision in *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*, 488 U.S. 336 (1989), (*Allegheny*) and related cases.

2. Settle Important Questions of Law

The flat-rate parcel tax scheme in this case changes how a tax on the mere ownership of real property is changed from a system where one's allocable share of the total property tax burden is determined at a rate in proportion to the value or value standard of their property holdings.

This violates the U.S. Equal Protection Clause as well as this States s Constitution and laws.

A dispute over the meaning of a constitutional provision presents a[n important] question of law. (*Citizens for Hatton Canyon v. Dept. of Transportation* (2004) 112 Cal.App.4th 838, 843.)

PETITION FOR REHEARING IN THE COURT OF APPEAL

A petition for rehearing was filed in the Court of Appeal on 7/17/2008 pursuant to Rule 8.25 and the order denying the rehearing petition was filed on 7/21/2008.

INTRODUCTION

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 a city duly organized and located in Kern County.

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.

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 \$1,976 would be over 59,000 times greater than the 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 only to the registered 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 67.94 percent.

On April 3, 2007, Plaintiff filed a complaint to invalidate the \$100 annual real property tax and for declaratory and injunctive relief. The complaint's first cause of action was "The 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." The second cause of action was "For Declaratory and Injunctive relief ."

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

On June 12, 2007, after a hearing 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.

On June 12, 2008, the Court of Appeal for the Fifth Appellate District heard oral argument and the case was submitted.

On July 1, 2008, the Opinion was filed that the judgment was affirmed.

ARGUMENT

A. U.S. Equal Protection Clause

In this case an instance is given where the tax burden relative to property holdings is 59,000 to one. The flat-rate parcel tax systematically and intentionally discriminates against property owners of lesser valued property in favor of owners with property holdings of much greater value. The flat-rate parcel tax is in violation of the U.S. Equal Protection Clause.

The U.S. Supreme Court has held that disparate taxation is "intentional and systematic" -- and thus in violation of the Fourteenth Amendment -- when clearly disparate assessments are "made pursuant to a deliberately adopted system," and result not from possible errors of judgment but from the system itself. *Cumberland Coal Co. v. Board of Revision*, 284 U.S. 23, 25 (1931). (*Cumberland*)

The discrimination resulting from the City's deliberately adopted policy, the flat-rate parcel tax on the mere ownership of real property, is of historic magnitude.

The U.S. Supreme Court has struck down discriminatory practices that taxed the complainants' property at twice the level of comparable property. *Cumberland Coal, supra*; *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923). Other courts, properly applying this Court's principles, have struck down state taxing schemes yielding even smaller disparities. See, e.g., *Louisville & Nashville R.R. v. Public Service Comm'n*, 631 F.2d 426 (6th Cir. 1980) (complainant taxed at 158 percent level of comparables), cert. denied, 450 U.S. 959 (1981); *Weissinger v. Boswell*, 330 F. Supp. 615 (M.D. Ala. 1971) (177 percent); *Savage v. State Tax Comm'n*, 722 S.W.2d 72, 79 (Mo. 1986) (en banc) (160 percent disparity "so grossly excessive as to be entirely inconsistent with an honest exercise of judgment");

The flat-rate parcel tax that is \$100 for each parcel regardless of any value or value standard is in conflict with U.S. Case Law.

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 Pittsburgh Coal Co. v. County Commission of Webster County*, 488 U.S. 336, 346 (1989), (*Allegheny*). (emph. added)

In *Nordlinger v. Hahn* (1992) 505 U.S. 1, 4

In this litigation, we consider a challenge under the Equal Protection Clause of the Fourteenth Amendment to the manner in which real property now is assessed under the California Constitution.

The City's tax is distinguished from *Nordlinger* since it is not a challenge to the way property is assessed. The flat-rate parcel tax is \$100 for every parcel regardless of the assessed value. A parcel assessed at \$117,000,000 (\$117 million) has a tax burden of \$100. A parcel assessed at \$1,976 (.001976 million) has a tax burden of \$100. Using these figures the tax burden relative to property holdings is about 59,000 to 1. The flat-rate parcel tax conflicts with *Allegheny, supra* 488 U.S. 336, 346 ... tax burden ... relative to their property holdings.

The flat-rate parcel tax is the City's deliberately adopted system by Resolution No. 12-06-2242 and conflicts with *Cumberland, supra* 284 U.S. 23, 25 ... disparate taxation is ... in violation of the Fourteenth Amendment -- when clearly disparate assessments are "made pursuant to a deliberately adopted system,"

The CA's Opinion p 6 has *Nordlinger, supra* 505 U.S. at p. 11.

"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 decision maker, [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.]" [Citations.]"

That Court failed to address the first sentence.

"In general, the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification ...

The City has made no classification so there can be no plausible policy reason for a classification that does not exist. There has to be a classification that is reasonable to justify the disparate taxation.

B. State Law

The issue in this case at the Trial Court, the Court of Appeal and this Court is whether the tax unconstitutional under the U.S. Equal Protection Clause. The State Laws must be considered.

1. Article XIII §1

Article XIII §1 of the California Constitution provides that all property is taxable and shall be assessed at the same percentage" of fair market value or an authorized "value standard other than fair market value." The clear import of this language, as well as the history of property taxation in this state, leads to the conclusion that a property tax must be ad valorem. Since its admission into the union, California has required uniformity of property taxation.

ARTICLE 13 TAXATION SEC. 1. Unless otherwise provided by this Constitution or the laws of the United States:

(a) All property is taxable and shall be assessed at the same percentage of fair market value. When a value standard other than fair market value is prescribed by this Constitution or by statute authorized by this Constitution, the same percentage shall be applied to determine the assessed value. The value to which the percentage is applied, whether it be the fair market value or not, shall be known for property tax purposes as the full value.

(b) All property so assessed shall be taxed in proportion to its full value.

2. *Thomas and Digre*

In the case of *Thomas v. City of East Palo Alto*, (1997)
53 Cal.App.4th 1084, 1086

In this appeal, we conclude the trial court correctly ruled that the City of East Palo Alto (the City) had unconstitutionally imposed and collected a property tax not apportioned according to value, as is required by article XIII, section 1 of the California Constitution (section 1).

In *Thomas* the tax was called an excise tax, Cal City has called theirs a special tax, it is a real property tax on the mere ownership of property the same as in *Thomas*.

The flat-rate parcel tax is a property tax whose imposition is triggered merely by the ownership of property. (*City of Huntington Beach v. Superior Court* (1978) 78 Cal. App. 3d 333, 340 ["Real property taxes are imposed on the ownership of property as such"])

In *Thomas, supra*, 53 Cal.App.4th 1084, 1092

We can conceive of flat fee parcel taxes which might arguably pass constitutional muster under section 1. For instance, a flat fee of \$ 100 per parcel for the transfer or rezoning of a parcel, assessed at the time of the transfer or application for rezoning, would not violate section 1, because it would be a valid excise tax based upon the use of the parcel; and its practical effect would not be to tax the ownership of the parcel, but instead to tax its use.

The City s flat-rate parcel tax is the same as in *Thomas* where the practical effect is to tax the ownership of the parcels and not taxing the use of the property.

The City s flat-rate parcel tax is also similar to that in the case of *City of Oakland v. Digre* (1988) 205 Cal.App.3d 99 where the flat-fee "parcel tax" designed to raise revenue for the support of municipal services was a

non-ad valorem general property tax prohibited by Art XIII §1.

Digre, *supra*, 205 Cal.App.3d 99, 109

As a property tax, Measure M violates article XIII, section 1 of the California Constitution. That section provides that "[all] property is taxable and shall be assessed at the same percentage" of fair market value or an authorized "value standard other than fair market value." The clear import of this language, as well as the history of property taxation in this state, leads to the conclusion that a property tax must be ad valorem. "Since its admission into the union, California has required uniformity of property taxation . . . [It] is apparent that the mandated uniformity of taxation can be achieved only by applying to all property the same fraction or percentage of market value." (*Safeway Stores, Inc. v. County of Alameda* (1975) 51 Cal.App.3d 783, 786 [124 Cal.Rptr. 503]; see generally, *English v. County of Alameda* (1977) 70 Cal.App.3d 226, 234 [138 Cal.Rptr. 634]; 1 Ehrman & Flavin, *op. cit. supra*, § § 1:02-1:15, pp. 4-25.) A non-ad valorem property tax would destroy the uniformity scheme, and must be considered in violation of California Constitution, article XIII, section 1. Both the Attorney General and the legislative counsel have reached a similar conclusion. (70 Ops.Cal.Atty.Gen. 153, 156-157 (1987); Ops. Cal. Legis. Counsel, No. 8471 (1987) School District: Taxation.)

[It] is apparent that the mandated uniformity of taxation can be achieved only by applying to all property the same fraction or percentage of market value." It should be apparent to the City also.

In *Digre* the tax was levied on the mere ownership of real property, and not on any **separate incident** to property ownership. The City's flat-rate parcel tax is on the mere ownership of real property, the same as in *Digre*.

Thomas and *Digre* did not determine whether a special tax passed by two-thirds vote, based upon mere ownership of real property, was unconstitutional if not apportioned according to value as is required by Art. XIII § 1. A case that touches on this and relied on by the City as case

law to justify the tax is *Heckendorn v. City of San Marino* (1986)
42 Cal.3d 481, 488 (*Heckendorn*)

We regard this legislative construction of special tax to have "very persuasive significance" in our analysis of article XIII A. (*Delaney v. Lowery* (1944) 25 Cal.2d 561, 569 [154 P.2d 674].) In addition, we interpret "parcel" in this statute broadly to allow a graduated tax based on the size of a parcel as in the City's ordinance. To construe the term parcel otherwise would lead to the unjust result that any special tax imposed on a parcel basis under this statute would have to be equal for a lot of 9,000 square feet and an estate the size of Huntington Library. (Cf. *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259-260 [104 Cal.Rptr. 761, 502 P.2d 1049] [statutory language should be construed to best attain the statute's purpose in order to avoid absurdity or to prevent injustice].)

Heckendorn only decided that a parcel tax based on lot size rather than value was not an ad valorem tax.

Digre, supra 205 Cal.App.3d 99, 110

Oakland, however, again relies on *Heckendorn* and claims that non-ad valorem property taxes are permitted, and have always been permitted, by article XIII, section 1. *Heckendorn*, however, is not direct authority for Oakland's contention because of the limited nature of its holding. The opinion never mentions article XIII, section 1 or the validity of a general non-ad valorem property tax. Cases are not authority for propositions they do not consider. (*In re Tartar* (1959) 52 Cal.2d 250, 258 [339 P.2d 553].)

The City's flat-rate parcel tax is on the mere ownership of property, the tax burden is not apportioned according to value and is in violation of this State's Article XIII §1 (b) or a value standard pursuant to Article XIII §1(a).

3. Article XIII A §4

From Proposition 13

CALIFORNIA CONSTITUTION

ARTICLE 13A (TAX LIMITATION)

Section 4. Cities, Counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district.

The City is interpreting except ad valorem taxes on real property to mean ANY tax on real property that receives a two thirds vote that is not ad valorem is a legal tax. This is in violation of the U.S. Equal Protection Clause, *Cumberland, Allegheny, Nordlinger* and this States Article XIII §1.

From a previous case between the same parties as this case that was primarily on the voting issue *Neilson v. City of California City* (2005)133 Cal.App.4th 1296, 1305-1306

The principle that clear language does not need construction, however, is subject to the exception that the literal language of a constitutional amendment may be disregarded to avoid absurd results and to give effect to the apparent intent of the voters. (*Provigo Corp. v. Alcoholic Beverage Control Appeals Bd.* (1994) 7 Cal.4th 561, 567; *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.)

It is clear that the intent of the voters this was a to be a TAX LIMITATION and not a loop hole for taxing agencies. That Court also relied on a utility users tax case which has little if any bearing on a tax on the mere ownership of property. *Neilson, supra*, 133 Cal.App.4th 1296, 1309-1310

The Roseville court then determined that a utility user's tax, which generated revenues solely for police, fire, parks and recreation, and library services, was a "special tax" because it was imposed for specific purposes. (*Howard Jarvis Taxpayers Assn. v. City of Roseville, supra*, 106 Cal.App.4th at pp. 1183, 1186.)

4. Article III §3

Neither the separation of powers nor property owner consent justifies allowing a local legislative body or property owners (both bound by the state Constitution) to usurp the judicial function of interpreting and applying the constitutional provisions that now govern assessments. Voter consent cannot convert an unconstitutional legislative assessment into a constitutional one.

If a taxing agency violates a constitutional right it is up to the Courts to invalidate the tax. The constitutional separation of powers provision has the purpose of preventing another branch of government from violating the Constitution.

Their sources of revenue derived from real property, however, are restricted. Public entities may not resolve their revenue shortfalls through the subterfuge of enacting taxes on real property which violate those constitutional restrictions by labeling such taxes something they are not. We are required to uphold such constitutional provisions and invalidate such efforts to evade them, regardless of the merit of the goals for which such tax revenue is sought.

Thomas, supra, 53 Cal.App.4th 1084, 1091

The City as a legislative body does not have a right to impose a tax that is in violation of the State Constitution and surely not the U.S. Constitution. "There is a clear limitation, however, upon the power of the Legislature to regulate the exercise of a constitutional right." (*Hale v. Bohannon* (1952) 38 Cal.2d 458, 471.) "[A]ll such legislation must be subordinate to the constitutional provision, and in furtherance of its purpose, and must not in any particular attempt to narrow or embarrass it." (*Ibid.*) Thus, a local agency acting in a legislative capacity has no authority to exercise its discretion in a way that violates constitutional provisions or

undermines their effect.

The Courts "must . . . enforce the provisions of our Constitution and 'may not lightly disregard or blink at . . . a clear constitutional mandate." (*State Personnel Bd. v. Department of Personnel Admin.* (2005) 37 Cal.4th 512, 523.)

The Courts are obligated to construe constitutional amendments in a manner that effectuates the voters' purpose in adopting the law. (*Howard Jarvis Taxpayers Assn. v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1355.)

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

August 6, 2008

N.L. Neilson

Plaintiff, Appellant, Petitioner pro per

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CERTIFICATE OF WORD COUNT

Pursuant Pursuant to Rule 14(c)(Pursuant to Rule 14(c)(1) oPursuant to Rule 14(c)(1)
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August 6, 2008

N.L. Neilson
Plaintiff, Appellant, Petitioner pro per

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