

**COPY**

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

PINGHUA ZHAO,

Appellant,

Court of Appeals No. 30172

v.

Case No. D-202-CV-2008-12444

KAREN L. MONTOYA,  
BERNALILLO COUNTY ASSESSOR,

Appellee;

COURT OF APPEALS OF NEW MEXICO  
ALBUQUERQUE  
FILED

SEP 13 2010



Consolidated with

GREGG VANCE FALLICK and  
JANET M. FALLICK,

Appellants,

v.

Case No. D-202-CV-2009-13302

KAREN L. MONTOYA,  
BERNALILLO COUNTY ASSESSOR,

Appellee.

**APPELLEE'S ANSWER BRIEF**

On Certification by the Second Judicial District Court  
Bernalillo County, New Mexico, the Honorable Theresa Baca,  
of an Appeal from the Bernalillo County Valuation Protest Board

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## INTRODUCTION

The issue presented in this appeal as certified by the district court is:

“Whether Subsections (A)(3)(a), Subsection (B), and Subsection (E) of NMSA §7-36-21.2 (2001) violate the New Mexico Constitution, Article VIII, §1 (as amended 1998), because the Subsections create a classification based on when the property was acquired, not on the constitutionally permissible classifications of owner-occupancy, age or income.” Record Proper (“RP.”) at 67. In this appeal, the Appellants contend §7-36-21.2 NMSA (2001) violates Article 8, §1 of the New Mexico Constitution in two ways. Their reasoning, however, improperly interprets constitutional provisions and employs an erroneous interpretation to argue the unconstitutionality of the relevant statute. This Court should, therefore, uphold the Decision and Order of the Bernalillo County Protest Board.

Appellants first contend that §7-36-21.2's purported classification of, and distinction between, taxpayers whose residential properties have recently changed ownership and those whose properties have not changed ownership violates Article 8, §1.B of the New Mexico Constitution. Second, Appellants argue §7-36-21.2's provision that the value of residential properties which have changed ownership within the prior year be increased to their current and correct value, while the value of residential properties that have not changed ownership is

increased at no more than three percent of their value in the prior tax year violates Article 8, Section 1.A's requirement that "taxes shall be equal and uniform among subjects of taxation of the same class." N.M. Const. Art. 8, §1.A; Appellants' Brief in Chief at 5.

The Appellants' arguments are not well taken for four reasons. First, §7-36-21.2 does not, as Appellants contend, restrict the Legislature's authority to impose different limits on the annual increases in the assessed value of residential properties to only three classes of taxpayers based on the taxpayer's age, income or owner-occupier status. Second, Appellants' argument is not well taken because §7-36-21.2 does not create classes of *taxpayers*. Rather, this statute creates two classes of residential *properties*. Third, §7-36-21.2 does not conflict with Article 8, §1.B.'s mandate that annual increases in the valuation of residential properties be limited. Finally, the Legislature's classification of and discrimination between two classes of residential property for taxation purposes does not violate Article 8, §1.A's equal and uniform requirement because there is a rational basis for that classification and because there is a substantial difference between these legislatively drawn categories. Section 7-36-21.2 therefore does not violate the equal and uniform clause of Article 8, §1.A of the New Mexico Constitution. For the reasons set forth below, the taxation classification scheme established by §7-

36-21.2 does not conflict with either Article 8, §1.A or §1.B of the New Mexico Constitution and is therefore constitutional.

**THE CONSTITUTIONAL AND STATUTORY PROVISIONS  
AT ISSUE AND APPLICABLE STANDARDS  
OF CONSTRUCTION**

Article 8, Section 1 of the New Mexico Constitution provides in pertinent part:

- A. *Except as provided in Subsection B of this section, taxes levied upon tangible property shall be in proportion to the value thereof, and taxes shall be equal and uniform upon subjects of taxation of the same class. Different methods may be provided by law to determine value of different kinds of property, but the percentage of value against which tax rates are assessed shall not exceed thirty-three and one-third percent.*
  
- B. The legislature shall provide by law for the valuation of residential property for property taxation purposes in a manner which limits annual increases in valuation of residential property. The limitation may be applied to classes of property taxpayers based on owner-occupancy, age or income. . . .

N.M. Const. Art. 8, §1 (emphasis supplied).

The statutory provisions addressing limitations on annual increases in the valuation of residential properties which the Appellants contend violate Article 8, §1 of the New Mexico Constitution provide in pertinent part:

- A. Residential property shall be valued at its current and correct value in accordance with the provisions of the Property Tax Code; provided that for the 2001 and subsequent tax years, the value of a property in any tax year shall

not exceed the higher of one hundred three percent of the value in the tax year prior to the tax year in which the property is being valued or one hundred six and one-tenth percent of the value in the tax year two years prior to the tax year in which the property is being valued. This limitation on increases in value does not apply to:

...  
(3) valuation of a residential property in any tax year in which:

(a) a change in ownership of the property occurred in the year immediately prior to the tax year for which the value of the property for property taxation purposes is being determined . . . .

B. If a change in ownership of residential property occurred in the year immediately prior to the tax year for which the value of the property for property taxation purposes is being determined, the value of the property shall be its current and correct value as determined pursuant to the general valuation provisions of the Property Tax Code.

...

E. As used in this section . . . “change of ownership” means a transfer to a transferee by a transferor of all or part of the transferor’s legal or equitable ownership interest in residential property . . . .

§7-36-21.2 NMSA 2001. This statute represents the Legislature’s attempt to limit annual increases in the valuation of residential properties in accordance with the mandate of Article 8, §1.B of the New Mexico Constitution. The statute classifies residential properties into two types: residential properties that have changed ownership in the immediately prior tax year and those that have not. It then provides that the value of residential properties that have not changed ownership



in an immediately prior tax year shall be increased by no more than three percent above the value ascribed to them in the prior tax year, while the value of residential properties that have changed ownership in the immediately prior tax year shall be increased to their current and correct value, and thereafter on an annual basis, to no more than three percent of that value.

In determining whether §7-36-21.2(B) NMSA 2001 conflicts with Article 8, §1 of the New Mexico Constitution, this Court must read both sections of Article 8 as a whole and in conjunction with one another, and attempt to harmonize all related provisions. *Block v. Vigil-Giron*, 2004-NMSC-003, ¶ 9, 135 N.M. 24; *In Re Generic Investigation into Cable Television Services in State of New Mexico*, 103 N.M. 345, 349, 707 P.2d 1155 (1988)(constitutional provisions should not be considered in isolation, but rather should be construed as a whole). In addition, principles governing the interpretation of statutes apply equally to the interpretation of the Constitution. *Postal Finance Co. v. Sisneros*, 84 N.M. 724, 725, 507 P.2d 785 (1973). Accordingly, this Court must first look to the plain language of both the constitutional and statutory provisions at issue and give their “words their ordinary meaning, unless the Legislature indicates a different one was intended.” *Marbob Energy Corp. v. N.M. Oil Conservation Comm’n.*, 2009 NMSC 13, ¶ 9, 146 N.M. 24. Moreover, “[i]t must be presumed that the people

know the meaning of the words they use in constitutional provisions, and that they use them according to their plain, natural and usual signification and import. . . and with understanding of the general rules of construction as to the provisions of Constitutions”. *Flaska v. State*, 51 N.M. 13, 22, 177 P.2d 174 (1946). Before addressing the Appellants’ arguments an initial look at the language of the constitutional provisions might assist the Court.

Section 1.A of Article 8 of the New Mexico Constitution establishes two mandates which apply to all taxes levied on property in the State of New Mexico. The first clause of the first sentence of Section 1.A requires that property taxes be levied in proportion to the value of that property. The second clause of that sentence mandates that property taxes be equal and uniform upon all properties within the same class. These two provisions are separable, *see, Bowman v. Continental Oil, Co.*, 256 U.S. 642, 649 (1921), and both mandates are subject to the exceptions set forth in Section 1.B.

Article 8, Section 1.B creates two exceptions to the mandates of section 1.A. The first sentence of subsection B provides that the legislature must limit annual increases in the valuation of residential properties. This sentence creates an exception to Article 8, §1.A’s mandate that taxes be levied in proportion to the value of the property being taxed. Limiting annual increases in valuation

necessarily means that taxes levied on the basis of such valuations will not, at least at some point in time, be levied in proportion to the value of the property, since the current values of residential properties do not uniformly increase at a rate of 3% a year or at any other uniform percentage rate.

The second sentence of subsection B provides that the legislature “may” apply limitations on the annual increases in valuation to “classes of property *taxpayers* based on owner-occupancy, age or income.” N.M. Const. Article 8, §1.B (emphasis supplied). This sentence creates an exception to subsection A’s mandate that taxes be equal and uniform “upon subjects of taxation of the same class.”

Section 1.A requires the Legislature to ensure that any property taxes it imposes are equal and uniform among members of each class of taxable property the Legislature chooses to create. The second sentence of Article 8, §1.B allows the Legislature to deviate from this requirement when it comes to the valuation of residential property for taxation purposes by permitting it to impose different limits on valuation increases which are equal and uniform upon certain classes of *taxpayers*, rather than upon classes of taxable *property* as mandated by Article 8, §1.A.

## ARGUMENT

### I. **ARTICLE 8, § 1.B DOES NOT RESTRICT THE LEGISLATURE'S AUTHORITY TO IMPOSE DIFFERENT LIMITS ON THE RATE OF ANNUAL INCREASES IN THE VALUATION OF RESIDENTIAL PROPERTIES UPON ONLY THREE CLASSES OF TAXPAYERS**

The Appellants contend the second sentence of Section 1.B limits the Legislature's power to impose different limits on the annual increases in residential property valuation. Specifically, the Appellants contend that this section limits the Legislature's power to impose different rates of increase in the values of residential properties on three and only three classes of taxpayers based on their age, income or owner-occupier status. The Appellants' argument tracks the reasoning of two prior lower court opinions in the *Wang* and *Dzur* cases which addressed the issue of whether §7-36-21.2 violated Article 8, §1 of the New Mexico Constitution. See, RP. at 69-83.

In *Wang*, RP. at 78-83, the district court stated the second sentence of Article 8, §1.B "allows three exceptions to the annual increase limitation" mandated by the first sentence of Section 1.B, "based on whether the owner occupies the home, their age, or the homeowner's income." RP. at 80. The *Dzur* court formulated the same conclusion differently and stated that the second sentence of Article 8, §1.B creates "categorical exceptions for the application of

limitation in annual valuation increases based on whether the property is owner-occupied, the age of the taxpayers, or the income of the taxpayers.” RP. at 75.

In essence, both the Appellants and the two lower courts read the second sentence of Article 8, §1.B as restricting the Legislature’s power to limit annual increases in the valuation of residential properties. Appellants construe this provision to prohibit the Legislature from imposing different rates of increase except on three and only three classes of taxpayers based on their age, income or owner-occupant status. Based on this construction of section 1.B, the Appellants and the *Dzur* and *Wang* courts, conclude that whether the taxpayer recently acquired their home “is not listed as a basis under Article 8, §1B. for differential application of the annual increase”, RP. at 82, and therefore, that §7-36-21.2 violates Article 8, §1.B. The Appellants, as well as the *Wang* and *Dzur* courts, err in their construction of Article 8,§1.B.

The second sentence of Article 8, §1.B does not create “exceptions” to the application of limits on the annual increase in the valuation of residential property. The first sentence of Article 1, §1.B unequivocally mandates that the Legislature place limits on the increase in the annual valuation of *all* residential properties. The second sentence of section 1.B does not create any exceptions to this mandate with respect to residential *properties*. Rather, it provides that such limits may be

applied among classes of *taxpayers* based on their age, income or owner-occupier status and in doing so creates an exception to Article 8, 1.A's mandate that the taxes be equal and uniform "upon subjects of taxation of the same class."

The use of the word "taxpayers" in the second sentence of Article 8, §1.B is significant. Section 1.A of Article 8 does not use that term or refer to taxpayers or property owners in any manner. Rather, Section 1.A talks about "property". It says that taxes on property must be levied in proportion to the value of the property being taxed and it requires that the taxes levied on property must be equal and uniform among all members of the same class of taxable property. It further provides that different methods may be used to determine the value of different classes of taxable property. Article 8, §1.A never refers to or addresses taxpayers or property owners. By contrast, the second sentence of Article 8, §1.B refers to *taxpayers* for the first time in this constitutional provision. It does so by permitting the Legislature to differentiate and discriminate amongst classes of taxpayers when it comes to imposing limits on the annual valuation increase of residential properties.

The Appellants interpret §1.B. as a limitation on the Legislature's authority to discriminate between classes of property when levying taxes on property. However, the language of §1.B does not do that. The second sentence of Section

1.B states “[t]he limitation [on annual valuation increases] *may* be applied to classes of property taxpayers based on owner-occupancy, age or income.” N.M. Const. Art. 8, §1.B. The language of this sentence is therefore permissive rather than mandatory, See, *Montano v. Los Alamos County*, 1996 NMCA 108, ¶ 5, 122 N.M. 454 (term “may” is permissive or directory); see also, §12-2A-4.B NMSA (2005)(the term “may” confers a power, authority, privilege or right). This sentence therefore permits the Legislature to apply different limitations on the annual increase in the valuation of residential property that are equal and uniform upon classes of taxpayers, but it does not require the Legislature to do so.

The Legislature’s inherent authority and discretion to exercise the State’s power of taxation is plenary “except insofar as limited by the Constitution . . .”. *Edmunds v. Bureau of Revenue*, 64 N.M. 454, 458-59, 330 P.2d 131 (1958), quoting *Asplund v. Alarid*, 29 N.M. 129, 219 P.2d 786 (1923). The Legislature may enact any law regarding taxation that is not expressly or inferentially prohibited by the state or federal Constitutions. *AMAFCA v. Swinburne*, 74 N.M. 487, 494-95, 392 P.2d. 998 (1964). The second sentence of Article 8,§1.B does not limit the Legislature’s plenary power to impose different rates of tax increases that are equal and uniform among different classes of taxable property.

Under its plenary authority, the Legislature may impose different rates of

valuation increases in any manner its sees fit, except insofar as its authority to do so is limited by the state or federal constitutions. The only limit on the Legislature's authority in this regard contained in the New Mexico Constitution is set forth in Article 8, §1.A's mandate that taxes resulting from assessments be "equal and uniform among subjects of taxation of the same class." N.M. Const. Article 8, §1.A. This provision limits the Legislature's plenary authority to impose different rates of taxation by requiring that any such taxes be equal and uniform among classes of taxable property. No other constitutional provisions limit the Legislature's plenary authority.

Nothing in the plain language of Article 8, §1.B divests the Legislature of its authority to levy taxes that are equal and uniform among classes of taxable property. Rather, when it comes to the assessment and taxation of residential properties, Article 8, §1.B permits the Legislature to impose different rates of assessment among different classes of *taxpayers*, rather than solely among classes of taxable *property*.<sup>1</sup> The Legislature still has the authority under Article 8, §1.A to discriminate among classes of taxable property when it comes to levying taxes,

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<sup>1</sup> Article 8, §1.A mandates that taxes *levied* on property must be equal and uniform among classes of taxable property, while Article 8, §1.B talks about the valuation of properties. Properties are valued for the purposes of assessing taxes. See, Art. 8, §1. N.M. Const.. Property taxes are levied based on the valuation of the taxed property. See, §7-37-1 to 3 NMSA 2001.



as well as limiting increases on taxes that will be levied. The permission granted by Article 8, §1.B to discriminate among certain classes of taxpayers does not limit this authority. The Appellants' argument to the contrary, and the conclusions of the two prior district courts, turn Article 8, §1 on its head. This Court should therefore uphold the constitutionality of §7-36-21.2.

**II. SECTION 7-36-21.2 CREATES CLASSES OF RESIDENTIAL PROPERTIES NOT CLASSES OF TAXPAYERS AND THEREFORE DOES NOT VIOLATE ARTICLE 8, §1.B**

The Appellants argue, and two prior district courts concluded, that §7-36-21.2 creates classes of taxpayers which are not based on the taxpayer's age, income or owner-occupier status, and therefore, this statute violates the second sentence of Article 8, §1.B. The Appellants' argument is not well taken because the premise of this argument, that §7-36-21.2 creates classes of taxpayers, is inaccurate. Section 7-36-21.2 does not create classes of taxpayers. It creates classes of residential property.

The New Mexico Legislature enacted §7-36-21.2 of the New Mexico Property Tax Code in 2001. This statute establishes the method by which residential property is valuated for tax assessment purposes, and the manner in which annual increases in the valuation of residential properties are limited as required by Article 8, §1.B of the New Mexico Constitution.

Section 7-36-21.2 provides in pertinent part:

A. Residential property shall be valued at its current and correct value in accordance with the provisions of the Property Tax Code; provided that for the 2001 and subsequent tax years, the value of a property in any tax years shall not exceed the higher of one hundred three percent of the value in the tax year prior to the tax year in which the property is being valued or one hundred six and one-tenth percent of the value in the tax year two years prior to the tax year in which the property is being valued. This limitation on increases in value does not apply to:

...

(3) valuation of a residential property in any tax year in which:

(a) a change in ownership of the property occurred in the year immediately prior to the tax year for which the value of the property for property taxation purposes is being determined . . . .

B. If a change in ownership of residential property occurred in the year immediately prior to the tax year for which the value of the property for property taxation purposes is being determined, the value of the property shall be its current and correct value as determined pursuant to the general valuation provisions of the Property Tax Code.

...

E. As used in this section . . . “change of ownership” means a transfer to a transferee by a transferor of all or part of the transferor’s legal or equitable ownership interest in residential property . . . .

§7-36-21.2 NMSA 2001. The plain language of this statute is clear and unambiguous. The Legislature was addressing and classifying residential *properties*, and was not intending to classify residential property *taxpayers*.

The first sentence of this subsection states “*Residential property* shall be

valued at its current and correct value . . .”, and “the value of *a property* in any tax year shall not exceed the higher of one hundred three percent of the value in the tax year prior to the tax year in which *the property* is being valued . . .”.

Subsection 1.A(3) goes on to provide that the three percent limitation on increases in the value of residential property does not apply to the “valuation of *residential property*” if “a change in ownership of *the property* occurred in the year immediately prior to the tax year for which the value of *the property* for property taxation purposes is being determined . . .” . §7-36-21.2 NMSA 2001 (emphasis supplied). Similarly, subsection 7-36-21.2.B addresses residential properties and not taxpayers. It states” [i]f a change in ownership of *residential property* occurred . . . “, then the value of *the property* shall be its current and correct value . . .”. §7-36-21.2.B NMSA 2001 (emphasis supplied).

Nowhere in this statute is the term “taxpayer” used. Nowhere does this statute refer to property owners.<sup>2</sup> The statute’s multiple references to property and

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<sup>2</sup>While section 7-36-21.2.E does refer to a change of ownership, the context of that reference makes clear that the statute is referring to a change of ownership of *property*. That subsection provides “‘change of ownership’ means a transfer to a transferee by a transferor of all or any part of the transferor’s legal or equitable ownership interest *in residential property*.” §7-36-21.2(E)(emphasis supplied). Appellants’ argument that this statute creates subclasses of taxpayers is misplaced because this statute merely defines the phrase ‘change of ownership’ as used in §7-36-21.2 NMSA 2001 and enumerates exceptions to that definition. The Legislature clearly has the authority to both select subjects of taxation and grant exemptions from taxation. *Lougee v. N.M. Bureau of Rev.*, 42 N.M. 115, 134, 76 P.2d. 6 (1938.)

the lack of any references to taxpayers makes it clear that this statute distinguishes between classes of property and not classes of taxpayers. “It must be presumed that the people know the meaning of the words they use in constitutional provisions, and that they use them according to their plain, natural and significant signification and import. . .”. *Flaska v. State*, 51 N.M. 13, 22, 177 P.2d 174 (1946).

Other sections of the Property Tax Code, §7-35-1 through 7-38-1 et seq. NMSA 2001, make it clear that the Legislature was aware of the distinction between property and taxpayers and chose its words carefully when enacting §7-36-21.2. In other sections of the Property Tax Code, the Legislature specifically addressed classes of property owners and taxpayers, as opposed to classes of property. For example, in §7-36-21.3, the Legislature, exercising its discretion under Article 8, §1.B to impose limits on valuation increases for residential properties among *taxpayers*, provided for different limits on properties owned and occupied by low income and elderly individuals. That statute expressly refers to property owners. Similarly, §§7-37-4 and §7-37-5.1 provide for property tax exemptions for properties owned and occupied by certain type of persons such as heads of household and disabled veterans. These statutory provisions show the Legislature was aware of the distinction between classes of properties and classes

of taxpayers.

The Appellants' argument that this statute unconstitutionally creates classes of taxpayers is not supported by the plain language of the statute. Section 7-36-21.2 does not create classes of taxpayers, and it therefore does not conflict with the language of Article 8, §1.B.

**III. SECTION 7-36-21.2 DOES NOT CONFLICT WITH ARTICLE 8, §1.B'S MANDATE THAT ANNUAL INCREASES IN THE VALUATION OF RESIDENTIAL PROPERTY BE LIMITED**

Article 8, §1.B. provides in pertinent part:

The legislature shall provide by law for the valuation of residential property for property taxation purposes in a manner which limits annual increases in valuation of residential property.

Section 7-36-21.2A satisfies this constitutional requirement of limiting annual increases in valuation of residential property.

This statute limits annual increases in the value of residential properties that *have not* changed ownership to a maximum increase of three percent a year over its previously assessed value. This statute limits annual increases on residential properties that *have* changed ownership within the last year to a one time increase to its current and correct value upon a change of ownership, and thereafter to an annual three percent increase over its previously assessed value. This statute therefore satisfies Article 8, §1.B's requirement that "[t]he legislature shall

provide by law for the valuation of residential property for property taxation purposes in a manner which limits annual increases in valuation of residential property.”

The fact that this statute does not treat the members of both classes of *property* in the same manner or that it discriminates in favor of a certain class does not render it unconstitutional because the discrimination is founded upon a reasonable distinction<sup>3</sup> and because members of each class are treated the same. See e.g. *Gruschus v. Bureau of Revenue*, 74 N.M. 775, 777, 399 P.2d. 105 (1965). (“the State may select its subjects of taxation, and as long as the tax is equal and uniform on all subjects of a class and the classifications for taxation are reasonable....”). “So long as the classification for taxation is reasonable, and the tax is uniform and equal on all subjects of a class, the statute is unconstitutional.” *Anaconda Co. v. Property Tax Dept.*, 94 N.M. 202, 210, 608 P.2d 514 (Ct. App 1979). Moreover, even if this court disagrees with the Legislature’s decision to create different classes of residential property and to tax them differently, it may not substitute its judgment for that of the Legislature or inquire into the wisdom, policy or justness of the legislation. *Maloof v. Bureau of Revenue*, 80 N.M. 485,

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<sup>3</sup>The reasonableness of the Legislature’s classification of residential properties into two classes, those that have changed ownership and those that have not, is addressed in Section IV of this brief.

486, 458 P.2d 89 (1969); *Gruschus* at 106. As the New Mexico Supreme Court in *Edmunds v. Bureau of Revenue*, 64 N.M. 454, 330 P.2d 131 (1958) stated, “[a]ppellants remedy for any irregularities which may exist as to him by reason of exemptions appearing in the Compensating Tax Act lies not before this court but with the legislature.” *Id.* at 459. The same is true as to § 7-36-21.2. Appellants’ dislike of § 7-36-21.2 should be addressed to the Legislature, not to this Court.

**IV. SECTION 7-36-21.2 DOES NOT VIOLATE ARTICLE 8, §1.A'S REQUIREMENT THAT TAXES BE EQUAL AND UNIFORM AMONG SUBJECTS OF TAXATION OF THE SAME CLASS**

The Appellants contend that §7-36-21.2 violates the equal and uniform clause of Article 8,§1.A because it discriminates between residential properties that have recently changed ownership and those that have not. They argue that the discrimination results in the imposition of different taxation rates on those two classes of residential property. According to the Appellants, the different rates of increases in valuation imposed by §7-36-21.2 violate the New Mexico Constitution’s requirement that taxes levied be equal and uniform among subjects of the same class. Appellants’ argument is not well taken.

In New Mexico, the tests for whether a legislative classification scheme violates Article 8, §1's equal and uniform requirement “are the same as those used in determining a violation of the equal protection clause.” *Anaconda Co. v.*

*Property Tax Dept.*, 94 N.M. 202, 210, 608 P.2d 514 (1980). In *Anaconda*, the New Mexico Supreme Court enunciated the principles that are used to guide this analysis. They are:

1. There must be a rational basis for the classification;
2. There must be a substantial difference between the legislatively drawn categories;
3. Every presumption is to be indulged in favor of the constitutionality of the tax;
4. So long as the classification for taxation is reasonable, and the tax is uniform and equal on all subjects of a class, the statute is constitutional; and
5. The burden is on the party attacking the constitutionality of the tax to negate every conceivable basis which might support the classification.

*Anaconda* at 210 (citations omitted).

The New Mexico Supreme Court has recognized that the Legislature has near plenary authority to establish different classes of property for taxation purposes. “In the field of taxation, more than any other field, the legislature possesses the greatest freedom in classification. . . .” *Maloof v. Bureau of Revenue*, 80 N.M. 485, 486, 458 P.2d 89 (1969), citing *Madden v Kentucky*, 309 U.S. 83 (1940). “[T]he legislature of a state has necessarily a wide range of discrimination in distinguishing, selecting, and classifying” for property taxation purposes. *Davy v. McNeill*, 31 N.M. 7, 11, 240 P.2d 482 (1925).

Classification is the division of properties into different classes on some



basis or principle that affords a reasonable and just ground for different treatment of classes. *Michigan C.R. Co. v. Powers*, 201 U.S. 245, 1906 U.S. Lexis 1789 at 32 (1906). A classification of property for taxation purposes will not be set aside by the courts, “if any state of facts reasonably may be conceived to justify it”, *Anaconda* at 210, citing *McGowan v Maryland*, 366 U.S. 420, 425 (1961), and will be upheld if it is practical and not palpably arbitrary. *Davy v. McNeill*, 31 N.M. 7, 11, 240 P.2d 482 (1925). A statute will not be declared unconstitutional unless the court is satisfied beyond a reasonable doubt that the Legislature went outside the constitution in enacting the challenged legislation.” *City of Raton v. Sproule*, 78 N.M. 138, 142, 429 P.2d 336, (1967). Appellants’ challenge to the constitutionality of § 7-316-21.2 fall well below the high standards imposed by the courts for a successful constitutional challenge to a statute.

Sections 7-36-21.2 creates two classes of residential property. One class consists of all residential property that has changed ownership in the year preceding the year in which that property is valued for taxation purposes. §7-36-21.2.A(3)(a) NMSA (2001). The second class of residential property created by this statute is comprised of properties that have not changed ownership in the year preceding the year in which the property is valued for taxation purposes. §7-36-21.2.A.

A number of New Mexico appellate cases have considered the issue of whether particular legislative classifications for taxation purposes are proper. These cases make it clear the Legislature was clearly within its authority to create these two classes of residential property. For example, in *Anaconda Co. v. Property Tax. Dept.*, 94 N.M. 202, 608 P.2d 514 (Ct. App. 1979), the legislature created two sub-classes of uranium mines, underground and above-ground, and imposed different tax rates on those classes of mines. The Supreme Court upheld this classification scheme because the classification scheme had a rational basis in fact; i.e, the difference in the cost of producing and bringing uranium ore to the surface in the two types of mines. *Id* at 210. In *Edmunds v. Bureau of Revenue*, 64 N.M.454, 330 P.2d 131 (1958), the Supreme Court upheld the legislature's distinction between, and differential treatment of, in-state vendors and out-of-state vendors. In that case, the legislature had imposed different tax rates on sellers of chemical reagents used in the processing of uranium ore, and taxed in-state vendors at a higher rate than out-of-state vendors. This legislative classification passed constitutional scrutiny under the equal and uniform clause of Article 8, §1.A of the New Mexico Constitution.

Similarly, in *Property Appraisal Dept. v. Ransom*, 84 N.M. 637, 506 P.2d 794 (Ct. App. 1973), this Court upheld the Legislature's creation and differential

tax treatment of a subclass of agricultural properties. The classes at issue in *Property Appraisal Dept.* consisted of subdivided and unsubdivided agricultural land. In upholding this classification scheme, the court stated

The Legislature possesses great freedom in classification for taxation purposes. Accordingly, we cannot say that in enacting the 'Green Belt' law the classification of unsubdivided agricultural land was improper. This classification distinguishes unsubdivided agricultural land from subdivided agricultural land and has the result of valuing agricultural land at market value and unsubdivided agricultural land on its capacity to produce agricultural products. This distinction, based on the difference in agricultural land which has been divided into building lots and agricultural land which has not been so divided, has a rational basis and does not offend the Constitution.

*Id.* at 640 (citations omitted).<sup>4</sup> See also, *Davy v. McNeil*, 31 N.M. 7, 240 P. 482 (1925)(distinction between irrigation projects established prior to 1909 and those established afterwards constitutional); *Gruschus v. Bureau of Revenue*, 74 N.M. 775, 399 P.2d 105 (1965)(distinction between lump sum and unit price contracts, and all other types of contracts upheld); *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 509 (1937) (legislative distinction between and different taxes imposed on employers with 7 versus 8 employees upheld).

Section 7-36-21.2's classification scheme based on the distinction between

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<sup>4</sup>The above-cited cases also recognize the well established principles that the equal and uniform clause of Article 8, §1.A of the New Mexico Constitution does not require precise equality in taxation, *Edmunds v. Bureau of Revenue*, 64 N.M. 454, 459, 330 P.2d 131 (1958), and that a taxation scheme is constitutional even if inequalities result from the imposition of that scheme. *Anaconda* at 211.

two classes of residential properties clearly passes muster under the applicable principles. A very similar taxation classification scheme was considered by the United States Supreme Court in *Nordlinger v. Hahn*, 112 S. Ct. 2326 (1992). In *Nordlinger*, California’s legislature enacted a taxation scheme which required that the value of residential property be re-determined whenever that property changed ownership<sup>5</sup>. Property owners challenged the constitutionality of that scheme alleging it violated the equal protection clause.<sup>6</sup> In *Nordlinger*, the Supreme Court stated that it had “no difficulty in ascertaining at least two rational or reasonable considerations of difference or policy” that justified the different classifications of property under California’s property tax scheme. *Id.* at 2333.

One rational basis for such a classification was that the State has a legitimate interest in neighborhood preservation, and the classification between newer and older owners could further that interest by discouraging the rapid turnover in the ownership of homes within neighborhoods by imposing significantly higher taxes on newer owners. *Id.* The Supreme Court found that

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<sup>5</sup>California’s taxation scheme also required a re-determination of a property’s value for taxation purposes if that property was “newly constructed”. *Nordlinger* at 2329.

<sup>6</sup>Since the tests for determining whether a classification scheme violates the equal and uniform clause of Article 8, §1.A are the same as those under an equal protection analysis, *Anaconda*, the Appellant’s contention that the Supreme Court’s decision in *Nordlinger* is “not relevant to the issues on appeal” is misplaced. See Brief-in-Chief at 18.

another possible rational basis for the differential treatment of the two classes of property based on when that property changed ownership could be that “the State could legitimately conclude that a new owner at the time of acquiring his property does not have the same reliance interest warranting protection against higher taxes as does an existing owner.” *Id.* Similar concerns may have prompted the New Mexico legislature to make the policy decision to exercise its plenary authority in the manner reflected in § 7-36-21.2. It is clear therefore that the taxation classification scheme established by §7-36-21.2 has a rational basis, and that the classification established by §7-36-21.2 is therefore reasonable. *Gruschus*. The Appellants have offered no evidence or argument to negate these conceivable bases for the classification scheme and has therefore failed to meet their burden. *Anaconda* at 210.

The Appellants’ further argue that “the fundamental, dispositive, distinction between California’s ‘acquisition value system” [upheld in *Nordlinger*] and New Mexico’s lies in the authority for their existence.” Brief-in-Chief at 19. The Appellants argue that California’s valuation system was created by that State’s Constitution, while New Mexico’s valuation scheme was created by statute. Based on that distinction, Appellants conclude that since New Mexico’s Constitution does not expressly permit the Legislature to create an “acquisition value system”,

the New Mexico Legislature's enactment of §7-36-21.2 is unconstitutional.

This argument is not well taken because it mistakenly asserts that the Legislature must be expressly granted authority under a state's constitution to create certain classifications or enact certain valuation schemes for taxation purposes. Instead, the opposite is true. The Legislature may enact any law regarding taxation that is not expressly or inferentially prohibited by the state or federal Constitutions. *AMAFCA v. Swinburne*, 74 N.M. 487, 494-95, 392 P.2d. 998 (1964). "In the field of taxation, more than any other field, the legislature possesses the greatest freedom in classification. . . ." *Maloof v. Bureau of Revenue*, 80 N.M. 485, 486, 458 P.2d 89 (1969). The Appellants' argument turns these principles on their head and would require that any legislative enactment be based on a specific constitutional authorization. This is simply not the case.

In addition, the classification scheme established by §7-36-21.2 does not violate the equal and uniform clause of Article 8, §1.A because there is a substantial difference between the two classes of properties established by §7-36-21.2. Under equal protection analysis, there is a substantial difference between classes if the classification rests "upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike". *McGeehan v. Bunch*, 88 N.M. 308, 310, 540

P.2d 238 (1975), quoting *Reed v. Reed*, 404 U.S. 71, 75-76 (1971). In this case, the object of §7-36-21.2 is to establish a method for valuating residential properties for tax assessment purposes and limit annual increases in those valuations. The statute's creation of two classes of residential properties for valuation purposes is substantially related to the valuation of residential properties for tax assessment purposes. Its differentiation between two classes of residential properties is substantially related to the object of establishing limits on the increase in annual valuations of residential property. There is therefore a substantial difference between the classes created by §7-36-21.2.

Furthermore, all members of each class created under the classification scheme established by §7-36-21.2 are treated alike as required by Article 8, §1.A. Subjects of the class of residential properties that have not changed ownership are treated uniformly. All properties within this class are valued at three percent more than their assessed value in the previous tax year. The taxes levied on the basis of this assessment are equal and uniform among all members of this class of taxable property. All subjects within the class of properties that have changed ownership are also treated uniformly under §7-36-21.2. All properties within this class are assessed at their current and correct value, and the increases in the values of these properties are thereafter limited to a three percent per year increase. The taxes

levied on the basis of this assessment are equal and uniform among all members of this class of taxable property.

The fact that inequities may arise from the implementation of this taxation scheme does not render this statute unconstitutional or in violation of Article 8, § 1.A's equal and uniform clause. *Anaconda* at 211. All the equal and uniform clause of Article, § 1 requires that taxes levied be equal and uniform "upon subjects of taxation of the same class". N.M. Const. Art. 8, § 1. Based on these respective valuations, the taxes levied on all subjects within these classes of residential properties are equal and uniform among all subjects within each class. Section 7-36-21.2 therefore complies with the uniformity requirement of Article 8, §1.A. of the New Mexico Constitution and the Appellants' argument to the contrary should be rejected.

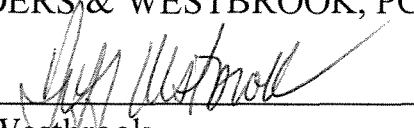
### **CONCLUSION**

For the foregoing reasons, Appellee respectfully requests this Court enter an Order finding that §7-36-21.2 NMSA 2001 does not violate or conflict with Article 8, §1.A of the New Mexico Constitution and is constitutional, upholding the Decision and Order of the Bernalillo County Protest Board, and remanding this matter back to the Second Judicial District Court for further proceedings consistent with this Court's decision.



Respectfully submitted,

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CERTIFICATE OF SERVICE

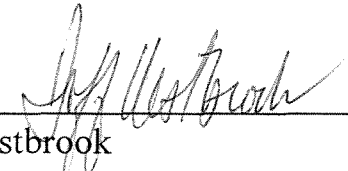
I hereby certify that a true and correct copy of the foregoing pleading was forwarded to the following counsel by United States First Class Mail on this 13<sup>th</sup> day of September, 2010:

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