IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED
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PINGHUA ZHAO, Appellant

Court of Appeals No. 30172

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

KAREN L. MONTOYA,
BERNALILLO COUNTY ASSESSOR, Appellee;

Consolidated with

GREGG VANCE FALLICK and
JANET M. FALLICK, Appellants,

v.

KAREN L. MONTOYA,
BERNALILLO COUNTY ASSESSOR, Appellee.

APPELLANTS ZHAO AND FALLICK'S BRIEF IN CHIEF

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

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SUMMARY OF PROCEEDINGS

1. NATURE OF CASE

This appeal challenges the classification and discriminatory treatment of residential property taxpayers based upon a change of ownership of the taxpayers' residential property, a phenomenon that has come to be known as "Tax Lightning." Appellants allege the classification violates the New Mexico Constitution. Specifically, appellants allege that NMSA 1978, 7-36-21.2 Sections (A)(3)(a), (B) and (E) (2003, prior to amendments through 2010) of the Property Tax Code, which classify taxpayers based upon the time of acquisition of their properties, violate the New Mexico Constitution, Article VIII, § 1(B) (as amended 1998)'s mandate that the legislature shall provide by law for property tax valuation of residential property in a manner that limits annual increases except to the extent that the legislature may apply the limitation to classes of residential property owners based upon owner-occupancy age or income.

Appellants challenge the statutory creation and the Assessor's implementation of a fourth classification of taxpayers based solely upon the time of acquisition of residential property. This classification withholds the constitutionally mandated and statutorily implemented valuation limitation of 3% per year from a class of taxpayers based upon a change in ownership in the prior year. Taxpayers who did not incur a change of ownership of their residential

properties in the prior tax year have their residences assessed at no more than a 3% increase over the prior year's valuation regardless of market value, while taxpayers whose properties have undergone a change of ownership in the previous year (with some exceptions discussed in the argument section of this brief) receive assessments based upon the market value of their homes.

2. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT AND ADMINISTRATIVE AGENCY BELOW; FACTS RELEVANT TO THE ISSUES PRESENTED

a. ZHAO ADMINISTRATIVE PROCEEDINGS

Mr. Zhao purchased a residence located at 1330 White Rim Place, Albuquerque, Bernalillo County, New Mexico in 2007. [RP ZHAO 5, DAO ¶ 9]. The Assessor had assessed Mr. Zhao's property in 2007 at $243,786 [RP ZHAO 67, CO ¶ 5][1]. Mr. Zhao asserted that the correct valuation of his property for tax year 2008 should have been $251,100, [TR1 ZHAO 0:30][2] an amount representing a 3% increase over the value in the prior year. [TR3 ZHAO 0:45 to end]. The Assessor valued Mr. Zhao's property at $362,600. [RP ZHAO 4, DAO ¶ 5]. This amount was more than 40% higher than the Assessor/Appellee's prior year valuation of the same property. [RP ZHAO 5, DOB ¶ 8].

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[1] The Certification Order of the Bernalillo County District Court is cited as "CO".
[2] The transcript from the Bernalillo County Protests Board consists of an audio CD with three tracks for the Zhao hearing. "TR1 ZHAO", "TR2 ZHAO" and "TR3 ZHAO" are used to cite to the three tracks followed by a designation of the minutes and seconds at which the quote may be found. The Fallick transcript consists of a CD with one track, cited as: "TR FALLICK."

Mr. Zhao presented evidence of several properties in his neighborhood he characterized as being comparable, that were assessed at substantially lower values. [TR2 ZHAO 1:55 – 5:45, and Protestant's Exhibit 1, ZHAO Administrative Record Proper]. He complained that, "Even though there is a law there . . . the Assessor's office should not use that . . . to generate a category that increased . . . new home owners' properties 50 or 40 percent from the previous year." [TR2 ZHAO 9:20 – 9:45]. Mr. Zhao argued that he was entitled to the 3% limitation on increases in valuation applied to other taxpayers in his neighborhood who had not had a change of ownership in the prior year because the legislature could only classify residential property taxpayers based upon owner-occupancy, age or income, not based upon a change of ownership. [TR3 ZHAO 0:40 to end][3] David Ortiz, Chairman of the Bernalillo County Valuation Protests Board explained,

> "Mr. Zhao, you're aware that residential properties are limited to an increase of 3% unless they transfer, unless they sell. And when they sell that limitation goes away and the Assessor is allowed to value that property at market value. . . . You're entitled to disagree, that's fine, but that is what the Assessor is supposed to do, to value properties, actually increase them. If they're residential they're limited to that 3% cap and if the property happens to sell the cap goes away, that limitation goes away and they're allowed to value it at its market value. [TR2 ZHAO 21:00 – 21:48].

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[3] The Board incorrectly characterized Mr. Zhao's argument in its Decision and Order as suggesting that "state law limiting increases in valuation to 3% per year (Section 7-36-21.2) is not in conformance with the New Mexico Constitution." [Paragraph 13 Decision of Board, RP Zhao 6]. In actuality the argument was that the classification based on change of ownership was not in conformance with the New Mexico Constitution. [TR3 ZHAO 45].

It was not disputed that Mr. Zhao's increase in valuation was more than the 3% increase received by his neighbors and permitted by statute; the Board held, in its Decision and Order, that, "The assessed value of the subject property was increased by more than the 3% limitation of Section 7-36-21.2 because the property owners purchased the subject property during the 2007 tax year, and thus its value was raised to the market value as of January 1, 2008. See Section 7-38-7." [RP ZHAO 5, DAO ¶ 9]. The Board disagreed with Mr. Zhao's argument that he was entitled to the same 3% limitation as taxpayers who had not had a change in the ownership of their property in the prior year, and upheld the Assessor's valuation of his property. See, the Decision and Order of the Bernalillo County Protests Board. [RP ZHAO 7].

b. FALLICK ADMINISTRATIVE PROCEEDINGS

The residential property at issue in the Fallick Case is located in Bernalillo County, at 13408 Desert Zinnia Ct, NE, Albuquerque. [RP FALLICK 0015.] [Protestant's Exh. 3, RP FALLICK 0039.] The sole disputed issue before the Protest Board (which likewise was the sole issue presented by the parties to the district court and certified by that court for this Court's review) was the "tax lightning" issue. The Protest Board announced its determination at the outset of the protest hearing that it did not have the power to address this Constitutional issue, and therefore would not decide it. Rather, the Protest Board stated that it would apply

the statute as written, and defer to the Courts on the Constitutional issue. Accordingly, the County and the Fallicks each presented evidence to support their respective valuations under their conflicting legal theories, and ultimately neither party challenged the other parties' evidence. That is, the County presented evidence to support its $ 902,500 valuation based on the 2009 statutory "current and correct" market value of the home. The Fallicks disputed that valuation solely based on the contention that this application of the statute was unconstitutional. The Fallicks then presented evidence to support their $ 599,169 Constitutional valuation based on comparable assessed values in their neighborhood (and admittedly not the "current and correct" market values). The Fallicks relied to support their valuation on the "tax lightning" issue, and that the County's "current and correct" assessment violated the requirement under the New Mexico Constitution, Article VIII, § 1, that (subject to limited exceptions inapplicable here) assessments must be "equal and uniform." The County disputed that valuation solely based on its contention that the statute is Constitutional and should be applied as written.

At the protest hearing Mr. Fallick testified that his new home was unconstitutionally valued after "moving around the corner" from his prior residence, following a divorce and the sale of what had been the marital home. Based on these circumstances, Mr. Fallick stated, "I think we're, kind of

like, the poster child for tax lightning." The Board's decision and order, consistent with its announcement at the hearing, held that, "The Bernalillo County Assessor's office is mandated by state law to comply with 'current and correct' and assure that the property is assessed at fair market value." Accordingly, the Board upheld the Assessor's valuation of Mr. Fallick's property. [Decision of the Bernailillo County Protests Board, RP – Fallick – 4]

The issues were fully briefed by the parties in the trial court, and were ripe for decision in that court. Consistent with the proceedings before the Protest Board, the dispute addressed and preserved in the trial court was limited to the parties' competing views on whether the statute is unconstitutional. Accordingly, given the substantial public interest involved impacting on thousands of homeowners, the trial court consolidated the Fallicks' case with the Zhao matter in which the disputed legal issue was certified to this Court for an authoritative appellate determination. *See* Part 1(c), below.

c. DISTRICT COURT APPEAL, CONSOLIDATION AND CERTIFICATION

In Zhao v. Montoya, Second Judicial District Court, CV-2008-12444 (the "Zhao Case") and Fallick v. Montoya, Second Judicial District Court, CV-2009-13302 (the "Fallick Case"), appellants timely appealed to the Second Judicial District Court from the decisions and orders of the Bernalillo County Protests Board sustaining the Bernalillo County Assessor's valuation of their homes. [RP

ZHAO 0001-8; RP FALLICK 0001-6] The district court judge *sua sponte* consolidated the two cases. [RP ZHAO 0064-65.] The district court in the consolidated cases then certified the appeals to the Court of Appeals under N.M. Stat. Ann. § 39-3-1.1(F) (1999); Rule 12-608 NMRA. [RP ZHAO 00066-83.]

This matter comes before the Court of Appeals on a Certification Order from the Second Judicial District Court Judge, Theresa Baca. [RP ZHAO 66, CO][4] [5]. Certification is appropriate:

> Because the issue is recurring with significant frequency, with over two thousand homeowners filing cases individually and as a part of class actions in over four hundred cases, and because the issue had not been addressed through appellate opinion by the New Mexico Supreme Court or the New Mexico Court of Appeals, the Court believes that this matter involves an issue of substantial public interest. [RP ZHAO 67 CO ¶ 3].

The District Court's certification order stated that the underlying facts of the Zhao and Fallick cases were not in dispute. [RP ZHAO 67, ¶ 5]. The Court described the appellants' challenges as raising the same issue, and noted that there were hundreds of pending cases raising the same issue, "whether specific sections

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[4] The records proper are cited as "RP ZHAO" and "RP FALLICK" representing the two records proper filed in this appeal. The District Court filed the Record Proper from the Adminsitrative agency separately in both cases prior to the filing of the District Court's Record Proper. References to the Administrative Agency's Record Proper filed in the District Court and subsequently filed by the District Court with the Court of Appeals will be to "RP AGENCY ZHAO" or "RP AGENCY FALLICK."

[5] The Certification Order from the District Court is cited as "CO".

of the Property Tax Code are constitutional." [RP ZHAO 67, CO ¶ 3]. The court took judicial notice of two prior decisions on the "identical issue" in CV-2008-12410 (A ruling in favor of the taxpayer on an appeal from the Bernalillo County Protests Board alleging the "change of ownership" classification in the property tax code violated the New Mexico Constitution, Article VIII Section 1) and CV-2007-10109 (A second ruling in favor of the taxpayer on the identical issue). The District Court incorporated those decisions into the certification order of the consolidated cases by attaching them thereto. [RP ZHAO 0069-77 (Memorandum Opinion and Order in CV-2008-12410) and RP ZHAO 0078-83 (Memorandum Opinion and Order in CV-2007-10109].

While the Appellate Court will review these issues *de novo*, these memorandum opinions clearly articulate the issues and arguments that have been presented on the issue certified. Thus, this case is before the Court of Appeals on an issue of first impression and "substantial public interest" [RP ZHAO 67, CO ¶ 3] succinctly framed by the District Court, as follows:

> The Court certifies the following question: Whether subsection (A)(3)(a) Subsection (B), and Subsection (E) of NMSA 1978 § 7-36-21.2 (2003) violate the New Mexico Constitution, Article VIII § 1 (as amended 1998), because the Subsections create a classification based on when residential property was acquired, not on the constitutionally permissible classifications of owner-occupancy, age or income. [RP ZHAO 67, CO ¶ 4].

The District Court's Certification Order was accepted by this Court on April 9, 2010. [RP ZHAO 93].

ARGUMENT

1. STANDARD OF REVIEW AND PRESERVATION OF THE ISSUES APPLICABLE TO BOTH POINTS ON APPEAL

The Court may set aside and remand the Decision and Order of the administrative agency who heard the taxpayers' protests if it determines that the Board acted "arbitrarily or capriciously" or not "in accordance with law" or if the Decision and Order is not supported by substantial evidence. N.M. Stat. Ann. § 39-3-1.1(D) (1999). Section (F) of this statute further provides that:

> The district court may certify to the court of appeals a final decision appealed to the district court, but undecided by that court, if the appeal involves an issue of substantial public interest that should be decided by the court of appeals. The appeal shall then be decided by the court of appeals.

The Board's decision was not in accordance with law. Appellants' challenge to the constitutionality of § 7-36-21.2 of the Property Tax Code presents questions of law reviewable *de novo*. Georgia O'Keefe Museum v. County, 2003-NMCA-003 {68}, 133 N.M. 297, 311-12, 62 P.3d 754, 758-59; Dell Catalog Sales v. Taxation, 2009-NMCA-001 {17}, 145 N.M. 419, 423, 199 P.3d 863, 867; Sonic Industries v. State, 2006-NMSC-038 {7}, 140 N.M. 212, 141 P.3d 1266.

The issue was preserved by appellants' objections to the Assessor's classification of the taxpayers based upon a change of ownership and resulting

valuations of their homes at the current and correct (market valuation) based upon the unconstitutionally impermissible change of ownership classification, and the Assessor's arguments in the administrative agency and before the district court in the consolidated cases (as shown below) that the change of ownership provision found in § 7-36-21.2 is constitutionally valid under Nordlinger v. Hahn, (505 U.S. 1, 5, 112 S.Ct. 2323, 2329 (1992)) and an equal protection analysis.

2. SUBSECTIONS (A)(3)(A), -(B), AND –(E) OF § 7-36-21.2 (2003) OF THE PROPERTY TAX CODE CREATE AN UNAUTHORIZED CLASS OF RESIDENTIAL PROPERTY TAXPAYERS BASED SOLELY UPON TIME OF ACQUISITION

In the November 1998 general election, the voters of New Mexico amended Article VIII, § 1 of the New Mexico Constitution. In pertinent part, the amended article provides:

> 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 . . . .
>
> B. The legislature *shall* provide by law for the valuation of residential property for property taxation purposes in a manner that limits annual increases in valuation of residential property. The limitation may be applied to classes of residential property taxpayers based on owner-occupancy, age or income . . . .

New Mexico Constitution, Article VIII, § 1 (As Amended 1998) (emphasis added). The word "shall" signifies that Article VIII, § 1 *requires* the levy of property taxes

to be "equal . . . upon subjects of taxation of the same class" and *requires* the legislature to "provide by law" for the property tax valuation of residential property "in a manner that limits annual increases in valuation". Mountain States Tel. v. New Mexico State Corp., 90 N.M. 325, 330, 563 P.2d 588, 593 (1977) (The word "shall" indicates a provision is mandatory rather than discretionary).

The New Mexico legislature enacted § 7-36-21.2 (2003) to implement the residential property tax limitation required by the amendment of Article VIII, § 1. Section 7-36-21.2(A) 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 year shall not exceed the higher of one hundred three percent [103%] of the value in the tax year 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 of 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[.]*

NMSA § 7-36-21.2(A)(3)(a) (bracketed material and emphasis added).[6]

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[6] Subsection (B) fleshes this scheme out by providing that if the residential property at issue changed ownership "in the year immediately prior to the tax year" at issue, then the home shall be valued at its "current and correct value". Generally, "current and correct value" corresponds to market value. Rule 3.6.5.23(C) NMAC. Subsection (E), in turn, defines "change of ownership".

With the enactment of § 7-36-21.2, the legislature established an "acquisition value" system of residential property taxation in New Mexico. The United States Supreme Court defined the "acquisition value" system of property taxation as one in which property, "is assessed at values related to the value of the property at the time it is acquired by the taxpayer, rather than to the value it has in the current real estate market." Nordlinger v. Hahn, 505 U.S. 1, 5, 112 S.Ct. 2323, 2329 (1992). The New Mexico statutes at issue implemented by the legislature created an acquisition value system by limiting valuation increases on residential property unless the property is sold, whereupon it is raised to market value, just like California's:

> In short, Article XIIIA combines a 1% ceiling on the property tax rate with a 2% cap on annual increases in assessed valuations. The assessment limitation, however, is subject to the exception that new construction or a change of ownership triggers a reassessment up to current appraised value. Thus, the assessment provisions of Article XIIIA essentially embody an "acquisition value" system of taxation rather than the more commonplace "current value" taxation. Real property is assessed at values related to the value of the property at the time it is acquired by the taxpayer rather than to the value it has in the current real estate market. Nordlinger v. Hahn, 505 U.S. 1, 5, 112 S.Ct. 2323, 2329 (1992).

On their face, subsections (A)(3)(a), -(B), and –(E) create a class of residential property taxpayers for any give year (1) whose members are defined on the basis of a "change of ownership" of their residential property in the prior year (referred to hereinafter as "newer homeowners"); (2) whose members are not

protected by the 103% valuation limitation applicable to residential property taxpayers who acquired their homes in earlier years (referred to hereinafter as "older homeowners"). In any given taxable year, § 7-36-21.2(A)(3)(a) limits property tax valuation increases for older homeowners to 3%, but withholds the limitation from newer homeowners. Consequently, while, older homeowners in Appellants' neighborhoods were protected by a valuation limitation of no more than a 3% increase in their 2008 property tax valuations, Appellants received increases far in excess of 3%. Mr. Zhao's valuation, for example, went from $243,786 in 2007 to $363,600 in 2008, an increase of 49%. [RP ZHAO 0067, CO ¶ 5]. As the Bernalillo County Valuation Protests Board explained, the Assessor increased the assessed value of appellant Zhao's home "by more than the 3% limitation of Section 7-36-21.2 because the property owners purchased the subject property during the 2007 tax year, and thus its value was raised to the market value as of January 1, 2008." [Decision and Order ¶ 9, at 2, RP ZHAO 0005].

In plain terms, taxpayers homes lying side-by-side and receiving identical governmental services, were assessed using different valuation methods (a market value method for Appellants versus a 3% limitation for older homeowners) and increased at substantially disparate levels (3% v. 49%), *depending only on the classification of the taxpayer based upon time of acquisition.*

The Assessor has not disputed the characterization of New Mexico's residential property valuation as an "acquisition value system." In arguing to the Bernalillo County Valuation Protests Board that our "acquisition value system" of classification and taxation is lawful, the Assessor relied on the United States Supreme Court's decision in Nordlinger v. Hahn, 505 U.S. 1, 112 S.Ct. 2323 (1992) which held that California's "acquisition value system" of residential property taxation does not deprive homeowners of equal protection under the Fourteenth Amendment of the United States Constitution. [TR2 ZHAO 25:48 to 27:00] (Argument by Assessor's attorney, David Chacon).

Unquestionably §§ 7-36-21.2(A)(3)(a), -(B), and -(E)'s "acquisition value" system of residential property taxation creates two classes of taxpayers—long-time homeowners and newer homeowners—defined on the basis of the time of acquisition of their properties in the year preceding the assessment year at issue or in earlier years. As the Supreme Court in Nordlinger v. Hahn observed, "[o]ver time" the creation of two, disparate, classes of homeowners by California's "acquisition value system" led to "dramatic disparities in the taxes paid by persons owning similar pieces of property." Nordlinger, 505 U.S. at 6, 112 S.Ct. at 2331.

There is one final reason why the "change of ownership" classification and its resulting exclusion from the residential property valuation limitation must fail. For simplicity Appellant has been referring to the unconstitutional legislative

classification in terms of "older homeowners"—those whose valuation increases are limited to 3% per year, and "newer homeowners"—those whose valuations in the year after a change of ownership are increased to the current and correct (market) value. NMSA § 7-36-21-2(E)—which appellant has alleged is unconstitutional—provides a complex definition of "change of ownership" that sub-classifies residential property taxpayers in a manner that even further distances and detaches the classification "change of ownership" from any basis in owner-occupancy:

> E. As used in this section, "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 except for a transfer:
>
> (1) to a trustee for the beneficial use of the spouse of the transferor or the surviving spouse of a deceased transferor;
>
> (2) to the spouse of the transferor that takes effect upon the death of the transferor;
>
> (3) that creates, transfers or terminates, solely between spouses, any co-owner's interest;
>
> (4) to a child of the transferor, who occupies the property as his principal residence at the time of transfer; provided that the first subsequent tax year in which that person does not qualify for the head of household exemption on that property, a change of ownership shall be deemed to have occurred;
>
> (5) that confirms or corrects a previous transfer made by a document that was recorded in the real estate records of the county in which the real property is located;

(6) for the purpose of quieting the title to real property or resolving a disputed location of a real property boundary;

(7) to a revocable trust by the transferor with the transferor, the transferor's spouse or a child of the transferor as beneficiary; or

(8) from a revocable trust described in Paragraph (7) of this subsection back to the settlor or trustor or to the beneficiaries of the trust.

These eight categories define "change of ownership" in an arbitrary way such that some "changes of ownership" will remain eligible for the 3% valuation limitation while others do not. Subsections (7) and (8) are remarkable in that a property owner could retain the 3% limitation and avoid a reassessment at market value upon change of ownership by using a revocable trust to transfer his property to his child—with no requirement that the child "occupy" the property. A two-step transfer into and subsequently out of a revocable trust for the transferor's child will avoid an assessment at the current and correct valuation, yet the same transfer directly from the transferor to the child without the use of a revocable trust would permit a reassessment to "current and correct" value. Likewise, if the transferor used an *irrevocable* rather than the statutorily required *revocable trust* to accomplish a change of ownership to his child the transfer would not qualify for the 3% limitation and the current and correct (market) valuation would instead apply.

Under subsection (4) a transfer to a child who occupied the property as his principal place of residence at the time of the transfer would not be a "change of ownership" until such time as the child ceased to qualify under the "head of household" exemption whereupon a change of ownership and a reassessment at current and correct valuation would then occur. In contrast, had the parent instead used a revocable trust to change ownership to his child pursuant to subsections (7) and (8), the child would in no way be obligated to comply with the "principal place of residence," and "head of household," requirements, and even *owner-occupancy* would not be required.

This statutory scheme is invalid on its face. It is so far divorced from the permitted "owner-occupancy" classification of taxpayers for applying the limitation on the annual increases so as to preclude an argument that "change of ownership" is a permissible classification based upon owner-occupancy.

If the New Mexico legislature means to impose this unwelcomed classification scheme on New Mexico homeowners, any attempt to do so must comply with Article VIII, § 1.

3. SECTION 7-36-21.2's CREATION OF A CLASS OF RESIDENTIAL PROPERTY TAXPAYERS BASED ON CHANGE OF OWNERSHIP VIOLATES ARTICLE VIII, § 1 OF NEW MEXICO'S CONSTITUTION

The Assessor's legal justification for the classification based upon a change of ownership has been that the Nordlinger case (505 U.S. 1, 112 S.Ct 2326, 2327

(1992)) authorizes an acquisition value system. Nordlinger's Fourteenth Amendment analysis is not relevant to the issues on appeal. Nordlinger addressed the constitutionality of the 1978 ballot initiative in California known as "Proposition 13." Id., 505 U.S. at 1, 112 S.Ct. at 228. Through the initiative process the voters of California adopted an "acquisition value system" of property taxation by amending the California constitution to add Article XIII A to the California Constitution:

> In response to rapidly rising real property taxes, California voters approved a statewide ballot initiative, Proposition 13, which added Article XIIIA to the State Constitution. Among other things, Article XIIIA embodies an "acquisition value" system of taxation, whereby property is reassessed up to current appraised value upon new construction or a change in ownership. . . . Longer term owners pay lower taxes reflecting historic property values, while newer owners pay higher taxes reflecting more recent values. Nordlinger v. Hahn, 505 U.S. 1, 112 S.Ct 2326, 2327 (1992).

The taxpayers in Nordlinger challenged Proposition 13 on federal Equal Protection grounds. Appellants here, in contrast, do not challenge §§ 7-36-21.2(A)(3)(a), -(B), and -(E)'s "acquisition value system" on *federal* constitutional grounds or on equal protection grounds under Article II, § 18 of New Mexico's Constitution. Instead, their challenge to § 7-36-21.2(A)(3)(a)'s differential classification of homeowners for property tax purposes solely on when they acquired their homes is rooted in Article VIII, § 1 of New Mexico's Constitution.

The Assessor suggested that § 7-36-21.2 operates like the "acquisition value system" that was made a part of California's constitution, which withstood a federal equal protection challenge and was upheld in Nordlinger v. Hahn. [TR4 ZHAO 26:22 – 28:30]. The fact that an acquisition value system may survive a federal equal protection challenge has no bearing on this issue in this appeal: *whether the statutorily created acquisition value system violates Article 8 Section 1 of the New Mexico Constitution.* The fundamental, dispositive, distinction between California's "acquisition value system" and New Mexico's lies in the authority for their existence. California's voters approved their "acquisition value system" by a statewide ballot initiative that amended their constitution, thus the acquisition value system is state constitutional law in California. In contrast, the New Mexico legislature created New Mexico's "acquisition value system" of property taxation by statute. The difference between an act of the voters in a state-wide election to create an "acquisition value system" of residential property taxation by amendment of their constitution and a legislature's enactment of such a system by statute is as obvious as it is decisive. An "acquisition value system" of residential property taxation embodied in a state's constitution is, by definition, constitutional under that state's laws (unless, of course, it violates federal law—the issue in Nordlinger). But an "acquisition value system" of taxation *created by state statute* is not constitutional if it violates the *state's constitution.*

Unquestionably §§ 7-36-21.2(A)(3)(a), -(B), and -(E)'s "acquisition value system" of residential property taxation creates two classes of taxpayers—older and newer homeowners—defined solely on the basis of whether a homeowner changed ownership in the year immediately prior to the assessment year at issue, or in earlier years. In view of §§ 7-36-21.2(A)(3)(a), -(B), and -(E)'s creation of two classes of residential property taxpayers, the dispositive question *sub judice* is whether withholding the 3% limitation on a valuation increase from a class of residential property taxpayers defined solely on the basis of when the taxpayer acquired his or her home passes constitutional muster under Article VIII, § 1(B) of New Mexico's Constitution.

Article VIII § 1(A) starts with a general rule applicable to tangible property:

> **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. [emphasis added].

Article VIII, § 1(A) carves out an exception to its own requirements to the extent such exception is found in Subsection (B):

> The legislature shall provide by law for the valuation of residential property for property taxation purposes in a manner that limits annual increases in valuation of residential property. The limitation may be applied to classes of residential property taxpayers based on owner-occupancy, age or income. . . .

Subsection (B) authorized the legislature to apply the limitation to classes of residential property taxpayers "based on owner-occupancy, age or income." Consequently, the dispositive question becomes whether the legislature was authorized to create a *fourth* class of residential property owners, and more specifically, if Article VIII § 1(B) (explicitly, the only permissible exception to Aricle VIII § 1(A): "Except as provided in subsection (B) of this section . . . .") authorizes a *fourth* class of residential property owners. Neither Article VIII nor any other provision of the New Mexico Constitution permits the classification of residential property taxpayers solely on the basis of when they acquired their home.

Article VIII, § 1(B) articulates a general rule with three exceptions. The general rule states that the legislature, "shall provide by law" for limiting "annual increases" in the valuation of residential property. The word "shall" in the Constitution makes a provision mandatory. Mountain States Tel. v. New Mexico State Corp., 90 N.M. 325, 563 P.2d 588 (1977); Montano v. Williams, 89 N.M. 86, 89, 547 P.2d 549, 552 (1976) ("The ordinary and usual meaning of the word 'shall' in a statute is mandatory, not permissive."). The legislature complied with this mandate by enacting § 7-36-21.2(A)'s 3% valuation increase limitation.

Article VIII, § 1(B)'s exception language is framed in permissive terms, as shown by the article's use of the word "may" in contrast to its contiguous use of

the word "shall". Hence, the Legislature may "apply" the mandatory valuation limitation to classes of taxpayers "based on" three—*and only three*—specified attributes: "owner-occupancy," "age," and "income". By virtue of the article's use of the word "may," however, the legislature it is not required to favor or disfavor these taxpayers. Hence, by enacting §§ 7-36-21.2(A)(3)(a), -(B), and -(E), the legislature attempted to act within its discretionary, *permissive authority* when it sought to "apply" the 3% limitation discriminatorily by *withholding* the limitation from a new class of taxpayers: from a newly created *fourth* class of taxpayers, those residential property owners who acquired their home in the year immediately prior to the taxable year at issue. The legislature exceeded its authority by doing so.

The Assessor seeks to justify the statutory "time of acquisition" exception to Article VIII, § 1 on the ground the legislature is not limited to the three attributes—"owner-occupancy," "age," and "income"—that Article VIII, § 1 expressly specifies. [Bernalillo County Assessor's Response to Appellant's Statement of Appellate Issues at 12, RP ZHAO 0051; Bernalillo County Assessor's Response to Appellant's Statement of Appellate Issues at 13, RP FALLICK 0105.] This reasoning ignores the fact that the Constitution itself dictates how the legislature can classify residential property taxpayers when applying the annual valuation increase limitation. "The limitation may be applied to classes of

residential property taxpayers based on owner-occupancy, age or income." New Mexico Constitution Article VIII, § 1(B). Whether the legislature can create a class of taxpayers characterized only by when they acquired their property based upon the language of Article VIII, § 1(B)'s mandate to limit the annual valuation increases of residential property (but permitting the legislature to apply the limitation to classes of taxpayers based upon owner-occupancy age or income) is a question of interpretation.

A court's goal in interpreting a provision of the Constitution is "to give effect to the intent of the Legislature which proposed it and the voters of New Mexico who approved it." E.g., Block v. Vigil-Giron, 2004-NMSC-003 {4}, 135 N.M. 24, 27, 84 P.3d 72, 75. This intent, of course, is to be determined by the language of the constitutional provision and, unless a different intent is clearly manifested, the words used must be given their ordinary and usual meaning. Montano, 89 N.M. at 89, 547 P.2d at 552.

To the extent the Assessor argues that the classification based upon change of ownership is not a fourth class, but rather, a permissible sub-classification of "owner-occupancy," this Court must interpret the Constitution. The term "owner-occupancy" must be given its plain and ordinary meaning—*a homeowner who occupies the home*—and that the legislature was not permitted to distinguish a favored subclass of owner-occupant residential property owners (*older*

homeowners) from a disfavored subclass of owner-occupant residential property owners (*newer* homeowners). Article VIII, § 1 permits the legislature to favor owners who occupy their homes over owners whose home is unoccupied or is occupied by a tenant. There is, however, nothing about the plain meaning of "owner-occupancy" that permits the legislature to favor any residential property owner who purchased *prior* to 2007, for example, (the older homeowner) and to disfavor the homeowner's next-door neighbor who purchased his or her home *in* 2007 (the newer homeowner).

To the extent the Assessor contends that the "time of acquisition" exception contained in subsections (A)(3)(A), -(B), and –(E) of § 7-36-21.2 is permitted as a subclass of "owner-occupants," the Assessor must bear the burden of persuasion on the point. This follows from the long-established rule that "[t]hose who claim their case falls within the exceptions created by a statutory proviso 'must establish it as being within the words as well as within the reasons thereof.'" Regents of the Univ. of New Mexico v. New Mexico Fed'n of Teachers, 1998-NMSC-020 {27}, 125 N.M. 401, 410, 962 P.2d 1236, 1245 (quoting United States v. Dickson, 40 U.S. (15 Pet.) 141, 165 (1841).

The Assessor attempts to justify the "time of acquisition" exception in subsections (A)(3)(A), -(B), and –(E) of § 7-36-21.2 as a permissible subclass of "owner-occupants" under Article VIII, § 1 (B). The effect of the Assessor's

argument is to "narrow, qualify, or otherwise restrain the scope," Regents of the Univ. of New Mexico, 1998-NMSC-020 {24}, 125 N.M. at 409, 962 P.2d at 1244, of Article VIII, § 1's general mandate that annual increases in residential property valuation shall be limited. The exception of newer homeowners removes from the mandate's reach "a class that would otherwise be encompassed by its language." Id. As the alleged constitutional anchor for the "time of acquisition" exception in §7-36-21.2, the term "owner-occupancy," therefore, must be narrowly construed. Id. 1998-NMSC-020 {27}, 125 N.M. at 410, 962 P.2d at 1245. See Postal Finance Co. v. Sisneros, 84 N.M. 724, 725, 507 P.2d 785 (1973) ("The usual principles governing the construction of statutes also apply to the interpretation of constitutions."); State v. Isaac, 2001-NMCA-088 {5}, 131 N.M. 235, 237, 34 P.3d 624, 626 ("The normal rules of statutory construction apply equally to constitutional and statutory provisions.").

The Court is guided in the task of interpreting Article VIII, § 1 by the presumption that the voters of New Mexico knew the meaning of the words they use in constitutional provision, and "that they use them according to their plain, natural and usual signification and import". Block, 135 N.M. at 27, 84 P.3d at 75 (citing, Flaska v. State, 51 N.M. 13, 22, 177 P.2d 174, 179 (1946)). The hyphenation of "owner-occupancy" compels the conclusion that ownership must be linked to "occupancy". "Constitutions must be construed so that no part is

rendered surplusage or superfluous." Hannett v. Jones, 104 N.M. 392, 395, 722 P.2d 643, 395 (1986). As a signifier of a homeowner's status for residential property taxation, the hyphenated term "owner-occupancy" as used in Article 8 Section 1's limitation on the annual increase in valuation of residential properties, is not ambiguous: it means simply a taxpayer who both owns and occupies residential property. This is in contrast, for example, to a residential property owner who owns a home but leases it to a tenant.

Unlike the express language of California's Proposition 13 constitutional amendment, Article VIII, § 1 does not mention "acquisition" or "time of acquisition," or "change of ownership." These terms are utterly absent from Article VIII, § 1. A court "will not read into a statute or ordinance language which is not there, particularly if it makes sense as written." Burroughs v. Board of County Comm., 88 N.M. 303, 306, 540 P.2d 233, 236 (1975). In view of the plain and ordinary meaning of the terms "owner" and "occupancy," and these long established canons of constitutional construction, there simply is no basis for reading "change of ownership" or "time of acquisition" into Article VIII, § 1.

Section 15 of Article VIII, enacted contemporaneously with Article VIII Section 1 of New Mexico's Constitution, uses the terms "owner" and "occupy" in conjunction in a manner that reinforces the interpretation of owner-occupant as a person with title to residential property who uses the property as his residence.

Section 15 was added to Article VIII in the same November 1998 general election that added the amendment (Article VIII § 1 (B)) to Article VIII § 1. The plain, ordinary meaning of such terms as "owner-occupancy," "owned," and "occupies" in §§ 1 and 15 of Article VIII leave no room for interpretation. This section of Article VIII confers a constitutionally mandated property taxation benefit on homeowners who occupy their home. Article VIII, § 15 provides, in pertinent part, that "The legislature shall exempt from taxation the property" of certain disabled veterans "if the veteran occupies the property as his principal place of residence." The exemption extends to the disabled veteran's surviving spouse "if the widow or widower continues to occupy the property" as a principal residence. Generally, New Mexico courts construe "constitutional provisions as a harmonious whole". Block, 2004-NMSC-003 {9}, 135 N.M. at 28, 84 P.3d at 76.

As the New Mexico Supreme Court said in Thompson v. Scheier, 40 N.M. 199, 207, 57 P.2d 293 (1936), "The old principle that the expression of an intent to include one class excludes another has full application here." By approving the amendment of Article VIII, § 1 in 1998, the voters of New Mexico intended to permit the legislature to create a classification to benefit all homeowners who occupy their homes without distinction by a constitutional mandate that limits annual increases in the valuation of their homes for property taxation purposes. There simply is no basis in the text or in logic to carve out a different, disfavored,

treatment for certain homeowners based solely on when they acquired their homes. Sections 7-36-21.2(A)(3)(a), -(B), and -(E), in short, exceed the scope of Article VIII, § 1. Subsections (A)(3)(a), -(B), and -(E) unconstitutionally distinguish appellants who acquired their home in 2007 from their neighbors who acquired their homes in earlier years, by authorizing an increase in the property tax valuation of their home by 50%, while limiting the increase of the property tax valuation of their neighbors' homes to 3%. For this reason, subsections (A)(3)(a), -(B), and -(E) are unconstitutional.

CONCLUSION

For all of the reasons stated above which are incorporated by reference, Appellants Zhao and Fallick seek an Order (1) holding that NMSA Sections 7-36-21.2(A)(3)(a), -(B), and -(E) violate the New Mexico Constitution and severing those subsections from the remainder of the statute; (2) reversing the Decision and Order of the Bernalillo County Protests Board on the ground that the decision of the Board was not in accordance with law and as such, Appellants' properties were unlawfully classified and assessed; (3) remanding the matter to the District Court with instructions to enter an order in accordance with this Court's directive.

Respectfully submitted,

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I hereby certify that an authentic copy
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