

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;

Consolidated with

GREGG VANCE FALLICK and
JANET M. FALLICK,

Appellants,

v.

KAREN L. MONTOYA,
BERNALILLO COUNTY ASSESSOR,

Appellee.

COURT OF APPEALS OF NEW MEXICO

ALBUQUERQUE

FILED

OCT 05 2010



APPELLANTS' REPLY 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 Protests Board

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INTRODUCTION

Appellants challenge whether § 7-36-21.2's classification of homeowners based on when they acquired their homes is permitted under Article VIII, § 1 of the New Mexico Constitution. As Appellants showed in their Brief in Chief (e.g., pages 12-17), subsections (A)(3)(a), -(B), and -(E) of § 7-36-21.2 create a class of residential property taxpayers for any given year whose members (1) are defined on the basis of a "change of ownership" of their residential property in the preceding year and (2) are not protected by the statute's 103% valuation limitation applicable to residential property taxpayers who acquired their homes in earlier years.

Appellee asserts four grounds for the proposition that this discriminatory scheme of classification does not violate Article VIII, § 1. The first three grounds are iterations of the same defense, namely, that § 1(B) permits discrimination of residential property taxpayers based solely on when they acquired their homes. The fourth ground is directed to § 1(A)'s requirement that residential property taxation "shall be equal and uniform".

Based on a tenuous distinction between a "residential property taxpayer" and the residential property that the taxpayer owns, Appellee argues that Article VIII prohibits the legislature from discriminating against taxpayers, but permits the legislature to discriminate against their residential property. Appellee's argument is contradicted by the plain language of § 1(B), which emphatically provides that its mandatory limitation

on annual increases of the valuation of a taxpayer's home "may be applied to classes of residential property taxpayers based on owner-occupancy, age or income" and § 7-38-47 of the Property Tax Code, which makes a property tax the personal obligation of the person owning the property. Subsection 1(B) of Article VIII does not say that the value limitation may be applied to a class of residential property taxpayers defined by when they acquired their homes. As Appellants showed in their Brief in Chief (e.g., pages 21-28), § 1(B) does not permit a discriminatory classification of residential property taxpayers based on "time of acquisition".

Appellee next argues that in enacting § 7-36-21.2, the legislature created classes of "residential *properties*, and was not intending to classify residential property *taxpayers*." [APPELLEE'S ANSWER BRIEF at 14.] The distinction between taxing a person and taxing a person's property is specious; regardless of the verbal formulation, persons who own the residential property—"residential property taxpayers"—bear the economic burden of the tax. Subsection 1(B) of Article VIII protects owners of residential property in New Mexico from discriminatory classifications for purposes of residential property taxation.

Appellee's third point of defense fares no better. While conceding that under § 7-36-21.2 an owner of residential property is taxed more or less than his or her neighbor depending only on when the owner and the neighbors acquired their respective homes, Appellee argues that the discriminatory taxation is permitted if "the discrimination is

founded upon a reasonable distinction”. [See APPELLEE’S ANSWER BRIEF at 18.] As authority for this proposition Appellee relies on holdings decided under the federal equal protection clause or New Mexico’s equal protection clause, Article II, § 18 of the Constitution. But, as Appellants have made clear, they do not challenge § 7-36-21.2 under the federal equal protection clause or Article II, § 18. Instead, the question is whether § 7-36-21.2 passes constitutional muster under Article VIII, § 1. Appellee’s Article II, § 18 cases, therefore, are inapposite. The dispositive issue is not whether § 7-36-21.2 levies residential property taxes equally and uniformly within the *same* class of taxpayers; it is, instead, whether Article VIII, § 1 permits § 7-36-21.2 to levy a higher tax on a *different* class of residential property taxpayers defined by when they acquired their homes.

ARGUMENT

I. The Constitution Protects the Homeowners of New Mexico by Limiting the Legislature’s Power to Create Subclasses of Homeowners for Property Taxation Purposes Based on When They Acquired Their Homes.

New Mexico’s Constitution creates a system of limited government under which the legislature has only the power and authority granted to it by the Constitution. Thus, the legislature’s power of taxation is subject to the limits of or conditions on the taxing power granted to it by the Constitution. Edmunds v. Bureau of Revenue, 64 N.M. 454, 458-59, 330 P.2d 131 (1958), Asplund v. Alarid, 29 N.M. 129, 219 P.2d 786 (1923). It

is axiomatic that “[t]he primary responsibility for enforcing the Constitution's limits on government, at least since the time of *Marbury v. Madison*, has been vested in the judicial branch.” State v. Gutierrez, 116 N.M. 431, 446, 863 P.2d 1052, 1067 (1993). Among other limits or conditions placed on the legislature’s taxing power is the obligation to “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.” N.M. Const., Art. VIII, § 1(B) (2001). The legislature may “apply” the limitation on “annual increases” in valuation “to classes of residential property taxpayers based on owner-occupancy, age or income”. Id. In performing its constitutional duty of judicial review, the Court of Appeals is called upon to “search out and declare the true meaning and intent” of Article VIII, § 1(B). Flaska v. State, 51 N.M. 13, 18, 177 P.2d 174, 177 (1946). In construing subsection 1(B), the terms used “must be taken to mean what they meant to the minds of the voters of the state when the provision was adopted.” Flaska, 51 N.M. at 18.

The intent of the voters who approved Article VIII, § 1 is inferable from the amendment’s plain language, which protects *taxpayers* by (1) requiring the legislature to limit annual valuation increases of their residential property and (2) permitting the legislature to apply the limitation “to classes of residential property taxpayers based on owner-occupancy, age or income”. The voters of New Mexico placed into the hands of the legislature a deft instrument, not a blunt one: thus, the legislature might conceive

that certain groups of taxpayers “based on owner-occupancy, age or income” are more in need of the protection from increasing property taxes than other groups. But nothing in Article VIII, § 1 suggests the voters in New Mexico had in mind the differential taxation of residential property taxpayers based on when they acquired their homes. Thus the legislature is permitted to limit the valuation on residential properties owned by classes of taxpayers defined by the age, income or owner-occupancy status of the taxpayers, but not by the manner in which they acquired it or when they acquired it.

Appellee struggles to get around the plain language of Article VIII, § 1 and, evidently, its best attempt is to fashion an argument predicated on the illusory distinction between taxing property and taxing the person who owns the property. In the end, all property is owned or used by persons, whether corporate or natural, and the taxation of their ownership or use of property is the taxation of a person. The Constitution protects people; and insofar as it limits the legislature’s or executive’s power over a person’s property, it does so as a means to the end of protecting the person. The Property Tax Code expressly recognizes that the legal incidence of a property tax falls on a person—more particularly, on the person who owns the property. N.M. Stat. Ann. § 7-38-47 (“Property taxes imposed are the personal obligation of the person owning the property on the date on which the property was subject to valuation for property taxation purposes and a personal judgment may be rendered against him for the payment of property taxes that are delinquent together with

any penalty and interest on the delinquent taxes.”)

Article VIII, § 1(B) recognizes that the legal incidence of a residential property tax falls on the home’s owner by using the express term “residential property taxpayers”. The *amount* of the homeowner’s personal liability (in contrast to the liability itself) is determined by the property’s *value*. Id. §§ 7-36-7, -15, -16, 7-38-6, -7, -8, -19, -20. A homeowner may administratively dispute his liability for property taxes by protesting the valuation of his or her property. Id. §§ 7-38-21, -22, -24. Article VIII, § 1(B), in short, is a limitation of and condition on the grant of the taxing power. It authorizes classification of residential property *taxpayers* based on their age, income, and owner-occupant status, but it does not authorize the legislature to choose some other criterion such as “time of acquisition”.

For these reasons, the foundation of Appellee’s first two points—that Article VIII, §1(B) and § 7-36-21.2 classify property, not taxpayers—is without merit. The first sentence of subsection 1(B) creates a privileged, general class of property taxpayers based on ownership of *residential* property. The second sentence authorizes (but does not require) the legislature to create a privileged (or disadvantaged) subclass of residential property taxpayers based on their age, their income, or their status as occupants of the homes they own. The second sentence permits the limitation on annual increases in value for property taxation purposes, which would otherwise apply to protect all taxpayers who own residential property, to be applied differently to classes

of taxpayers defined by the specific criteria supplied by subsection 1(B) itself. This provision allows the legislature to create subclasses of homeowners within the general class of homeowners based upon the expressly permitted characteristics of those (e.g., the taxpayers) who own their homes. The taxpayer is not absent from the first sentence of Article VIII, §1(B), as Appellee argues. The taxpayer is instead the *subject of the protection* afforded by the limitation.

In arguing that § 7-36-21.2 does not violate Article VIII, §1(B) because it discriminates only against things (homes) but not people (homeowners), Appellee declares that “Nowhere in this statute is the term ‘taxpayer’ used” and “Nowhere does this statute refer to property owners.” [APPELLEE’S ANSWER BRIEF at 15.] The declaration, while bold, is just plain wrong. The word “taxpayer” does not appear in § 7-36-21.2, but taxpayer is synonymous with “owner.” N.M. Stat. Ann. § 7-38-47 (“Property taxes imposed are the personal obligation of the person owning the property . . .”). The owner of a home bears the legal incidence of the property tax by virtue of his or her ownership of the home, and, therefore, is a “residential property taxpayer” by virtue of his or her ownership.

Section 7-36-21.2 recognizes that a statutory classification based upon “ownership” *is* a classification of a taxpayer. Subsection (E) of § 7-36-21.2 defines “change of ownership” generally as any “transfer to a transferee by a transferor of all or any part” of the transferor’s “ownership interest” in a residence then further defines it

by classifications of taxpayers. Subsection (E) excludes eight classes of taxpayer transferees from the definition of “change of ownership”. If a new transferee of a home does not fit within one of the eight categories, then he or she is deprived of § 7-36-21.2’s 3% limitation on an increase in the value of his or her home in the year of the transfer. If the new transferee falls within one of the eight categories of favored transferees, then he or she is protected by § 7-36-21.2’s 3% limitation. For example, by virtue of the “change of ownership” definition, the 3% valuation-increase limitation protects the class of transferees (e.g., residential property taxpayers) consisting of spouses, children who acquire and occupy the property as a personal residence, and children who receive the property from a revocable trust. N.M. Stat. Ann. §§ 7-36-21.2(E)(1), -(2), -(3), -(4), -(7), -(8). Classes of taxpayers to whom the valuation-increase limitation does *not* apply include changes of ownership involving children who do not occupy the property as a personal residence or who do not receive the property via a revocable trust, and all other transferees who acquired their in a transfer that does not fit within one of the eight favored categories of transfers.

Whether § 7-36-21.2’s limitation on annual valuation increases protects a new homeowner is entirely dependent upon the classification of the homeowner. The facts that a property tax assessor must establish to determine whether the home is or is not entitled to be protected by § 7-36-21.2’s valuation-increase limitation (that is, whether there is a qualifying “change of ownership”), require a classification of the taxpayer.

Finally, Appellants' analysis of Article VIII, §1 has the merit of harmonizing (1) both the first and second sentences of subsection 1(B) with each other and (2) both of these sentences with subsection 1(A). If a property tax is levied equally and uniformly on residences belonging to the "same class" of taxpayers (§1(A)) and if the class of taxpayers is "based on owner-occupancy, age or income" (§1(B)), then the property tax passes muster under Article VIII, § 1. "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). A court's goal is to construe "constitutional provisions as a harmonious whole". Block v. Vigil-Giron, 2004-NMSC-003 {9}, 135 N.M. 24, 28, 84 P.3d 72, 76. Appellants' analysis respects these admonitions. Appellee's tortured parsing of subsections 1(A) and 1(B), in contrast, defy them.

Appellee's argument that Article VIII, §1 limits classification of *taxpayers* but does not limit classification of *property* fails to appreciate that subsection 1(B) authorizes the limitation on annual property value increases to be applied to or withheld from the expressly stated categories of homeowners. Subsection 1(B)'s use of the disjunctive "or" in the clause "based on owner-occupancy, age or income" is decisive in this context. A dictionary may be consulted to determine the ordinary meaning of words used in a constitutional or statutory provision. E.g., State v. Gutierrez, 2007-NMSC-033 {30}, 142 N.M. 1, 11, 162 P.3d 156, 166. "Or" is defined as a word "used to link alternatives: a cup of tea or coffee / are you coming or not?" New Oxford

American Dictionary. The constitutional provision's use of "or" in Article VIII, §1(B) reinforces that classifications can be made based on a homeowner's age or income or his or her status as an owner-occupant. If any implication might arise from subsection 1(B)'s permission to classify homeowners based on their owner-occupant status, age, *or* income, it is the negative implication that all other classifications, including one based on "time of acquisition," are *not* permitted. This, of course, is consistent with the "age-old" legal maxim *inclusio unius est exclusio alterius*, which means "the inclusion of one thing is the exclusion of the other". State of New Mexico v. Nick R., 2009-NMSC-50 {23}, 147 N.M. 182, 187, 218 P.3d 868; Board of Comm'rs of Guadalupe County v. State, 43 N.M. 409, 94 P.2d 515 (1939). Subsection 1(B)'s specification of three—and only three—criteria for varying the application of the limitation on annual property value increases, combined with the absence of any language suggesting the three criteria are merely illustrative, creates an insurmountable presumption against implying additional criteria. See Albuquerque Alumnae Ass'n v. Tierney, 37 N.M. 156, 20 P.2d 267 (1933) (a property tax case involving a claim for a new exemption, in which the Court stated "Section 3 is affirmative and self-executing. It creates exemptions. There is a strong presumption against an intent to permit the Legislature to create others. *Inclusio unius est exclusio alterius*."). Article VIII, § 1 does not include anything from which "time of acquisition" might ordinarily and naturally be derived; therefore, it is excluded.

Second Judicial District Court Judge Theresa Baca's analysis in Dzur treated the classifications based upon owner-occupancy, age or income as "categorical" exceptions to the general rule that residential property shall be valued in a manner that limits annual increases for property taxation purposes:

Article VIII § 1(B) . . . directs the Legislature to draft property tax provisions in a manner that limits annual increases in the valuation of residential property. The second sentence of Subsection (B) provides that "the limitation may be applied to classes of residential property taxpayers based on owner-occupancy, age or income." Reading these two provisions together, the second sentence appears to create 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 ZHAO 75 CO {25}.]

The district court judge in Wang (Judge Nan G. Nash) viewed the matter similarly, stating "The second sentence of Subsection (B) allows three exceptions to the annual increase limitation based on whether the owner occupies the home, the homeowner's age, or the homeowner's income." [RP ZHAO 80 CO {13}.]

Were the Court of Appeals to adopt Appellee's interpretation of § 1(B), the legislature would be free to prefer or disadvantage classes of residential property taxpayers at will by creating favored and disfavored "classes of property". Subsection 1(B) would not constrain the legislature favoring or disfavoring residential property taxpayers who owned xeriscaped houses or perhaps brick houses. Under such an interpretation the clause "based on owner-occupancy, age or income" would be

rendered meaningless. The legislature's plenary power in matters of taxation does not trump the specific provisions of Article VIII, § 1(B).

II. Section 7-36-21.2's "One Time" Increase of a Home's Valuation for Property Taxation Purposes Based on Time of Acquisition Violates Article VIII, § 1's Mandate that Annual Property Tax Increases Be Limited.

Appellee argues that § 7-36-21.2's "one time increase" in the value of a home to its "current and correct value" for property taxation purposes satisfies Article VIII, § 1(B)'s mandate that "annual increases" in the valuation of residential property for such purposes shall be limited, provided the home valuation increases "thereafter" are limited to a 3% increase. [APPELLEE'S ANSWER BRIEF at 17-18.] The argument is fallacious. By allowing the "one time" valuation increase of a new homeowner's residence to exceed the 3% cap available to long-time homeowners, § 7-36-21.2 does not limit the new homeowner's increase in the year of the homeowner's acquisition.

The "one time" increase to the *maximum* value at which a property may legally be placed—to its "current and correct value"—is not a "limitation" on valuation increase in a given year. It is not a "different" limitation. It is, instead, the *absence* of a limitation in the year of the increase. That it is a "one time" absence of limitation does not insulate it from constitutional scrutiny. "Annual" is defined as "reckoned by the year; covering the period of a year based on a year; occurring, appearing, made, done or acted upon every year." Websters Third New International Dictionary Merriam-

Websters Inc. 2002. The word “annual” must not be construed as surplusage. Hannett, 104 N.M. at 395, 722 P.2d at 395. Denying the annual valuation limitation to a class of homeowners for the year in which they acquired their homes plainly contradicts § 1(B)’s mandate that “annual increases” in the valuation of residential property for property tax purposes shall be limited.

Appellee concedes that § 7-36-21.2 “does not treat” long-time homeowners and new homeowners “in the same manner” and that “it discriminates in favor of a certain class”. [APPELLEE’S ANSWER BRIEF at 18.] Appellee attempts to justify this disparity by resort to an equal protection argument. Leaving aside for the moment that Appellants have not challenged § 7-36-21.2 on equal protection grounds, the argument fails to address the point that the “one time” increase violates § 1(B)’s annual-limitation mandate. Withholding the valuation limitation on residential property for the year in which the homeowner acquires his or her home violates § 1(B) mandate.

III. Section 7-36-21.2 Violates the “Uniformity” Clause of Article VIII, § 1(A) by Levying a Higher Tax on a *Different* Class of Residential Property Taxpayers Defined by When They Acquired Their Homes.

Having nowhere else to turn, Appellee attempts to defend its unconstitutional valuation of Appellants’ homes by the strawman argument that § 7-36-21.2 does not violate a homeowner constitutional right of “equal protection”. As noted above, Appellee concedes that § 7-36-21.2 treats long-time homeowners favorably as compared to new homeowners. [APPELLEE’S ANSWER BRIEF at 18.] Appellee attempts

to justify the differential treatment by resort to an equal protection argument, in the course of which it cites Edmunds v. Bureau of Revenue, 64 N.M. 454, 330 P.2d 131 (1958), Gruschus v. Bureau of Revenue, 74 N.M. 775, 399 P.2d 105 (1965), Anaconda Co. v. Property Tax Dept., 94 N.M. 202, 608 P.2d 514 (Ct. App. 1979), and other cases. These cases addressed equal protection challenges under the federal equal protection clause or New Mexico's equal protection clause and, therefore, they are inapposite. Appellants have not mounted an equal protection challenge. They insist only that § 7-36-21.2 must comply with Article VIII, § 1. The question is not whether the equal protection clause of Article II, § 18 of New Mexico's Constitution permits different tax treatment of homeowners based on when they acquired their homes. Instead, the question is whether Article VIII, § 1 permits it. Because § 7-36-21.2 violates subsection 1(B), it is unconstitutional.

Appellee mischaracterizes the “uniformity” issue posed by § 7-36-21.2. The dispositive issue is not whether § 7-36-21.2 levies residential property taxes equally and uniformly within the *same* class of taxpayers; undoubtedly it does. The “uniformity” issue is, instead, whether Article VIII, § 1 permits § 7-36-21.2 to levy a higher tax on a *different* class of residential property taxpayers defined by when they acquired their homes. It does *not*. Subsection 1(B) is dispositive: as a limitation on, and condition of, the legislature's taxing power, subsection 1(B) permits the legislature to apply “the limitation” based only on “owner-occupancy, age or income”. By its plain

terms subsection 1(B) does not permit the legislature to craft any other criterion for applying the limitation. “The old principle that the expression of an intent to include one class excludes another has full application here.” Thompson v. Scheier, 40 N.M. 199, 207, 57 P.2d 293 (1936).

There is no occasion for the suggestion that subsections 1(A) and 1(B) in any way are in conflict. Both subsections are readily harmonized: if a property tax is levied equally and uniformly on residences belonging to the “same class” of taxpayers (§1(A)) and if the class of taxpayers is “based on owner-occupancy, age or income” (§1(B)), then the property tax passes muster under Article VIII, §1. Conversely, if the tax is levied on a class of taxpayers that subsection 1(B) does not permit (e.g., a class defined by “time of acquisition”), then it violates subsection 1(B) and, therefore, is unconstitutional.

CONCLUSION

For the foregoing reasons, § 7-36-21.2’s scheme of higher residential property taxation based on when a homeowner acquires his or her home created violates Article VIII, § 1. Appellants respectfully urge the Court to hold, therefore, that subsections (A)(3)(a), -(B), and -(E) of § 7-36-21.2 are unconstitutional.

Respectfully submitted,



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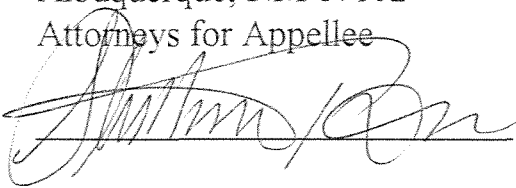
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I hereby certify that the original of the foregoing paper was hand delivered this 5 day of October 2010 to:

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