SUBGROUP 3	**1:30 p.m. to 2:30 p.m.-RTC Section 170, Disaster Relief**
SPEAKER:	COMMENT:
Sue Blake	Introduction
Kris Cazadd	Information for participants to provide to subgroup (homework) by Tuesday, April 28. Due to Board in 10-days. • State the need and provide supporting data for relief. • Provide legal arguments. • Provide solutions (i.e. legislation)→provide a statement • Provide recommendation to Board.
Marcy Berkman	• Issues/Concerns—There restrictions to economic damage definition. • Constitution requires physical damages and Section 170 applied to COVID-19 related damages are unconstitutional even with added language.
Marty Dakessian	• Section 170 A1 is clear on diminution of value. Direct or indirect damages includes restricted access causing damages to property. Based on Slokam case opinion. Therefore, COVID-19 is example of indirect damage to property.
Peter Kotschedoff	• There is room for interpretation. This can impede on taxpayers' rights—delays, limits on relief. • Taxpayers need any short-term solution. • Aside from Section 170, another solution would be to claim relief under Prop. 8 (Decline in Value) which is much easier than filing a claim under Section 170 which can be tied up in court. • Focus more on Prop. 8 which is easier route.
Larry Stone	• BOE adopted Rule 139 due to 911 based on airline damages that were indirectly damaged. • Higher courts deemed unconstitutional. • A lot of time will be spent arguing that Section 170 does not apply to COVID 19 disaster. • Section 170 does not supersede constitution. • Physical damage has been defined through statute and the courts. • County Boards do not have authority to grant Section 170. To do so would require ordnance changes that will take months to put in the books.
Charles Moll	• Consider other valuation methods such as external obsolescence/reduced value other than physical damage. • Legislation has authority to pick valuation date and valuation methodology.
Jerri Bradley	• Above is not practical to the extent that changes can't be done this year. • Constitution says it must have physical damage. • Can't get economic damage added to constitution.
Chuck Leonhardt	• It will be difficult for smaller local governments to change their systems. • Section 170 relief will be stuck in litigation for a long time. • Focus on more immediate relief rather than this (170)

Peter Kotschedoff	• Group should be focused on solutions and not barriers.
David Ginsberg	• Measures already in place to grant relief that will have immediate impact. • Assessor is being proactive to get ahead of an upcoming problem—which is faster than what is provided in the law.
Marcy Berkman	• Jan 1 will be when reductions in value will apply based on market and economic value. It will happen naturally based on the systems that are in place.
Larry Stone	• 538 action lawsuit provides for lawsuit against BOE.
Sue Blake	• Send comments/solutions to Sue.Blake@boe.ca.gov

CALIFORNIA ALLIANCE
OF TAXPAYER ADVOCATES

SBE Property Tax Relief Task Force TEAM 3

Revenue & Tax Code Section 170, Disaster Relief

The California Alliance of Taxpayer Advocates (CATA) appreciates the opportunity to participate with the SBE, the counties, and industry to assist California taxpayers during these difficult times. CATA believes that California property taxpayers are in need of timely relief relative to the COVID-19 crisis. The Section 170 issue has a high likelihood of litigation that will not be resolved in the short-term. As such, CATA is not submitting a Section 170 recommendation, nor taking a position at this time, and believes it is best to focus on the shorter-term solutions as submitted in the Team 1, 2, 4 & 5 Task Force documents.

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From: Marty Dakessian
To: Blake, Sue
Subject: [External]Slocum Section 170 Analysis
Date: Thursday, April 23, 2020 1:27:35 PM
Attachments: 2020.04.23 Slocum 170 Analysis.pdf

Please see attached.

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Slocum v. State Board of Equalization
Diminution in value due to restricted access *is* "Physical damage."

Section 170 allows counties to adopt an ordinance providing for reassessment after the lien if a property was "damaged or destroyed." The statute then describes three situations that qualify a property owner for relief:

> (1) A major misfortune or calamity, in an area or region subsequently proclaimed by the Governor to be in a state of disaster, if that property was damaged or destroyed by the major misfortune or calamity that caused the Governor to proclaim the area or region to be in a state of disaster. As used in this paragraph, "damage" includes a diminution in the value of property as a result of restricted access to the property where that restricted access was caused by the major misfortune or calamity.
>
> (2) A misfortune or calamity.
>
> (3) A misfortune or calamity that, with respect to a possessory interest in land owned by the state or federal government, has caused the permit or other right to enter upon the land to be suspended or restricted. As used in this paragraph, "misfortune or calamity" includes a drought condition such as existed in this state in 1976 and 1977.
>
> Rev. & Tax. Code, § 170.

The counties argue that Section 170 requires "physical damage." But they miss the point with this argument. According to Slocum, the Legislature defined such damage to include "restricted access":

> [T]he Legislature delineated two exceptions to the general meaning of 'damage or destruction' as implying direct physical injury to the property, thereby providing limited relief for *indirect* physical damage. *Thus, in subdivision (a)(1) the term "damage" includes diminution in value due to restricted access to the property, where the restricted access was caused by a major misfortune or calamity which spurred the Governor to proclaim the area to be in a state of disaster.*
>
> Slocum, at 978.

So according to Slocum, there are two types of physical damage under Section 170—"direct" and "indirect." ***Direct*** physical damage "[implies] direct physical injury to the property." Slocum, at 978. ***Indirect*** physical damage includes "restricted access." Slocum, at 981.

The Slocum court plainly states:

> Direct Physical Damage is a Requirement of Section 170, Subdivision (a)(2) But Not of Subdivision (a)(1) and (3).
>
> Slocum, at 978.

The following excerpt from the opinion confirms this dichotomy:

> Rule 139 cannot be justified as consistent with Section 170, subdivision (a)(1) because the rule permits reassessment in the absence of physical damage, *whether direct or, in the case of restricted access, indirect.*
>
> Slocum, at 981 (italics added).

In sum, the Legislature defined the term "physical damage" under Section 170(a)(1) explicitly to include "indirect" physical damage—diminution in value due to restricted access.[1]

---

[1] If the counties are inclined to argue that Section 170(a)(1) violates the plain meaning of the words "physical damage" in Article XIII, § 15, they will have at least two hurdles. First, "If there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action. Such restrictions and limitations are to be construed strictly, and are not to be extended to include matters not covered by the language used.' That rule is a corollary of the strong presumption of the constitutionality of an act of the Legislature." Delaney v. Lowery (1944) 25 Cal.2d 561, 568–569. Second, Revenue and Taxation Code § 538 requires the counties to sue the State Board of Equalization for declaratory relief to challenge the constitutionality of a statute. If the counties fail to do so and simply assess the affected taxpayers based on their legal theory, they are subject to a mandamus action directing them to process Section 170 claims while the litigation is pending Reasonable attorneys' fees may be awarded to a taxpayer that prevails in a refund action under Section 5152.

Slocum v. State Bd. of Equalization

Court of Appeal, First District, Division 4, California. | December 9, 2005 | 134 Cal.App.4th 969 | 36 Cal.Rptr.3d 627

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Outline

134 Cal.App.4th 969
Court of Appeal, First District, Division 4, California.

Warren A. SLOCUM, as County Assessor, etc., et al., Plaintiffs and Respondents,
v.
STATE BOARD OF EQUALIZATION, Defendant;
Gary Orso, as County Assessor, etc., et al., Interveners and Respondents;
American Airlines et al., Interveners and Appellants.

No. A107905.
|
Dec. 9, 2005.

Synopsis

Background: County assessors filed action against State Board of Equalization (SBE) challenging regulation permitting midyear reassessment of property suffering loss in value because of diminished access after 9/11 terrorist attack, and airlines intervened in support of SBE. The Alameda County Superior Court, No. 2002065000, Steven Brick, J., proclaimed regulation invalid, and airlines appealed.

[Holding:] The Court of Appeal, Reardon, Acting P.J., held that airlines were not entitled to reassessment due to restricted access.

Affirmed.

West Headnotes (20)

[1] Administrative Law and Procedure Legislative rules; substantive rules
Administrative Law and Procedure Scope and Extent of Review of Regulations, Rules, and Other Policies
Courts afford quasi-legislative rules the dignity of statutes, and when scrutinizing the validity of such rules, the scope of review is narrowly confined to determining whether the regulation (1) comes within the scope of the controlling statute and (2) is reasonably necessary to carry out the statutory purpose.

[2] Administrative Law and Procedure Review for arbitrariness, capriciousness, unreasonableness, or illegality
Courts have the last word when it comes to deciding whether a regulation lies within the scope of the authority delegated by the Legislature.

[3] Administrative Law and Procedure Consistency with statute, statutory scheme, or legislative intent
Agencies do not have discretion to promulgate regulations that are inconsistent with the governing statute, or that alter or amend the statute or enlarge its scope.
6 Cases that cite this headnote

[4] Administrative Law and Procedure Competence, expertise, and knowledge of agency
Administrative Law and Procedure Construction without force of law; informal construction
Although an agency's expertise with respect to pertinent legal and regulatory issues lends presumptive value to interpretive regulations, agency interpretations, whether expressed in a regulation or less formal statement, are nothing more than legal opinions freighted with a diminished power to bind.

[5] Administrative Law and Procedure Deference to Agency in General
The final construction of a statute rests with the courts, and in exercising that power they accord weight to an administrative interpretation based on the particular context.

[6] **Administrative Law and Procedure** Deference to Agency in General
Administrative Law and Procedure Consistent or longstanding construction
Factors signifying that an agency's interpretation of a given statute is probably correct include evidence that the agency consistently followed the interpretation in question, and the interpretation was contemporaneous with enactment of the statute subject to interpretation; judicial deference is more deserving under circumstances indicating that the interpretation was part of a regulation adopted by the agency in accordance with the Administrative Procedure Act (APA), rather than contained in an advice letter prepared by a staff member.
2 Cases that cite this headnote

[7] **Administrative Law and Procedure** Deference to Agency in General
An agency's formal interpretive rules do not command the same weight as quasi-legislative rules.

[8] **Administrative Law and Procedure** Types of Rules, Regulations, or Other Policies
Administrative rules do not always fall neatly into an interpretive or quasi-legislative category; the terms designate opposite ends of an administrative continuum, depending on the breadth of the authority delegated by the Legislature.

[9] **Administrative Law and Procedure** Property taxes
Taxation Administrative agencies in general
Because the State Board of Equalization's (SBE) implied authority to interpret key terms in the property tax statutory scheme is an interpretive function, ultimately it is court's job to decide whether a given interpretation is consistent and not in conflict with the operative statute.

[10] **Statutes** Language and intent, will, purpose, or policy
Statutes Context
Statutes Statutory scheme in general Courts should ascertain the Legislature's intent so as to effect the purpose of the law in question, and look first to the language of the statute itself, considering that language in the context of the entire statute and statutory scheme.
1 Cases that cite this headnote

[11] **Statutes** Plain Language; Plain, Ordinary, or Common Meaning
Statutes Natural, obvious, or accepted meaning
Statutes Context
Courts give effect to statutes according to the ordinary, usual import of the language used in framing them, and construe words in their context, mindful of the nature and obvious purpose of the statute where they appear.

[12] **Constitutional Law** Constitutionality of Statutory Provisions
Constitutional Law Presumptions and Construction as to Constitutionality
Statutes inconsistent with the Constitution are void, and where possible courts will construe statutes in favor of their validity.

[13] **Statutes** Plain, literal, or clear meaning; ambiguity
Courts do not consult legislative history where the statutory language is clear and unambiguous.

[14] **Taxation** Mode of assessment in general

That property be physically damaged has always been a constitutional requirement for reassessment due to diminishment of value, even when not explicitly stated. West's Ann.Cal. Const. Art. 13, § 15.

[15] **Taxation** Mode of assessment in general

Taxation Reassessment

State Board of Equalization (SBE) regulation permitting midyear reassessment of property suffering loss in value because of diminished access after 9/11 terrorist attack, was inconsistent with statute permitting reassessment simply for damage due to a "misfortune or calamity," which requires physical damage, in conformity with the Constitution which requires that property be "physically damaged or destroyed." West's Ann.Cal. Const. Art. 13, § 15; West's Ann.Cal.Rev. & T.Code § 170(a)(2).

[16] **Statutes** Express mention and implied exclusion; expressio unius est exclusio alterius

Where the Legislature carefully uses a term or phrase in one place but excludes it in another, courts will not imply the term or phrase where excluded.

2 Cases that cite this headnote

[17] **Statutes** Express mention and implied exclusion; expressio unius est exclusio alterius

Where an exception to a general rule is specified by statute, courts will not imply or presume other exceptions.

[18] **Taxation** Reassessment

Airlines were not entitled to reassessment of airport property due to diminished value caused by restricted access following 9/11 terrorist attack, and regulation allowing such reassessment was invalid, where statute only permitted reassessment when restricted access was caused by a major misfortune or calamity which spurred the Governor to proclaim the area to be in a state of disaster or when misfortune or calamity restricted access to federal or state land in which taxpayer had possessory interest. West's Ann.Cal. Const. Art. 13, § 15; West's Ann.Cal.Rev. & T.Code § 170(a)(1–3).

See 9 Witkin, Summary of Cal. Law (9th ed. 1988) Taxation, § 185.

[19] **Statutes** Superfluousness

Courts always seek to avoid a statutory construction that renders some words surplusage.

[20] **Statutes** Particular Kinds of Legislative History

Statutes Motives, Opinions, and Statements of Legislators

Materials did not constitute cognizable legislative history where they reflected the individual views or understandings of an Assemblyman and two county officials, and where there was no indication that the documents were made available or communicated to the Legislature as a whole.

Attorneys and Law Firms

****629** Nielsen, Merksamer, Parrinello, Mueller & Naylor, John E. Mueller, Eric J. Miethke, Sacramento, for appellants.

Richard E. Winnie, County Counsel (Alameda), Claude F. Kolm, Deputy County Counsel, Thomas F. Casey III, County Counsel (San Mateo), Lee A. Thompson, Deputy County Counsel, Ann Miller Ravel, County Counsel (Santa Clara), James J. Rees, Deputy County Counsel, John J. Sansone, County Counsel (San Diego), Walter DeLorrel III, Deputy County Counsel, Robert A. Ryan, County Counsel (Sacramento), Thomas Parker, Deputy County Counsel, Benjamin P. deMayo, County Counsel (Orange), James C. Harman, Deputy County Counsel, William C. Katzenstein, County Counsel (Riverside), Ash Hormozan, Deputy County Counsel, for respondents.

Opinion

REARDON, Acting P.J.

***971** Recognizing that in the aftermath of the events of September 11, 2001, "[a]ccess to airport property throughout California was restricted," in 2002 the California State Board of Equalization (SBE or board) promulgated a regulation to permit midyear reassessment of property suffering loss in value because of such diminished access. (Cal.Code Regs., tit. 18, ***972** § 139 (hereafter, Rule 139).) Entitled "Restricted Access as Damage Eligible for Reassessment Relief Pursuant to Revenue and Taxation Code Section 170," the SBE specifically drafted Rule 139 with air carriers and airport concessionaires in mind. ****630** (*Id.,* "Example.")

Respondent county assessors [1] challenged the regulation on constitutional and statutory grounds. The trial court concluded that Rule 139 was "inconsistent with Tax Code § 170" and therefore proclaimed it invalid. We agree and accordingly affirm the judgment.

I. CONSTITUTIONAL, STATUTORY AND REGULATORY CHAIN OF AUTHORITY

In California, county assessors are charged with assessing "all property subject to general property taxation at its full value." (Rev. & Tax.Code, [2] § 401.) Except for state-assessed property, all taxable property in a county is assessed annually to the person who owns, possesses, claims or controls it on the lien date, which is January 1. (§§ 405, subd. (a), 2192.)

Adopted November 5, 1974, article XIII, section 15 of the California Constitution empowers the Legislature to authorize local taxing entities "to provide for the assessment or reassessment of taxable property physically damaged or destroyed after the lien date to which the assessment or reassessment relates." Pursuant to this authority, the Legislature enacted section 170, a broad property tax disaster relief statute. Subdivision (a) of section 170 authorizes county boards of supervisors to pass ordinances which allow assessees of taxable property "whose property was damaged or destroyed without his or her fault" to apply for reassessment of that property. The statute goes on to state: "To be eligible for reassessment the damage or destruction to the property shall have been caused by any of the following:[¶] (1) A major misfortune or calamity, in an area or region subsequently proclaimed by the Governor to be in a state of disaster, if that property was damaged or destroyed by the major misfortune or calamity that caused the Governor to proclaim the area or region to be in a state of disaster. As used in this paragraph, 'damage' includes a diminution in the value of property as a result of restricted access to the property where that restricted access was caused by the major misfortune or calamity. [¶] (2) A misfortune or calamity. [¶] (3) A misfortune or calamity that, with respect to a possessory interest in ***973** land owned by the state or federal government, has caused the permit or other right to enter upon the land to be suspended or restricted. As used in this paragraph, 'misfortune or calamity' includes a drought condition such as existed in this state in 1976 and 1977." (section 170, subd. (a)(1)–(3).)

In turn, Rule 139 represents an attempt to interpret the term "damage" as used in section 170. Of interest in this action are the following provisions: "(a) For purposes of determining property eligible for reassessment pursuant to ... section 170, the term 'damage or destruction' includes diminution in the value of the property resulting from a period of restricted physical access to the property. [¶] (b) 'Restricted physical access to the property' means that access to the property was wholly or partially denied to the property owner and/or operator, or that the normal business activities of the property owner and/or operator were suspended as a result of compliance with a directive, order, law or other exercise of police or regulatory powers by the federal, state or local government." (Rule 139, subds. (a)–(b).)

****631 II. PROCEDURAL BACKGROUND

The SBE duly promulgated Rule 139 in accordance with the procedures set forth in the Administrative Procedures Act (APA). (Gov.Code, § 11340 et seq.) Following its enactment, the assessors of the Counties of San Mateo, Santa Clara, Alameda and San Diego sought declaratory relief concerning the validity of the rule and the assessors of Riverside, Sacramento and Orange Counties quickly and successfully applied to intervene. The SBE was named as the defendant;

several airlines, appellants herein, [3] also intervened. The SBE has not appealed the judgment.

The parties filed cross-motions for summary judgment. The trial court granted the Assessors' motion and denied the motions of SBE and Airlines. This appeal, by Airlines only, followed.

III. DISCUSSION

A. *Standard and Scope of Review*

1. *Standard of Review*

We undertake de novo review of the trial court's decision to grant summary judgment. (***974** *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476, 110 Cal.Rptr.2d 370, 28 P.3d 116.) As well, issues of statutory and constitutional interpretation raise pure questions of law, subject to independent appellate review. (*Redevelopment Agency v. County of Los Angeles* (1999) 75 Cal.App.4th 68, 74, 89 Cal.Rptr.2d 10.)

2. *Scope of Review*

[1] **[2]** **[3]** The parties squabble over whether Rule 139 is a quasi-legislative rule implicating the SBE's exercise of a delegated lawmaking power, or an interpretive rule in which the agency construed section 170's legal meaning and effect. We afford quasi-legislative rules the dignity of statutes. Therefore, when we scrutinize the validity of such rules, our scope of review is narrowly confined to determining whether the regulation (1) comes within the scope of the controlling statute and (2) is reasonably necessary to carry out the statutory purpose. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 10–11, 78 Cal.Rptr.2d 1, 960 P.2d 1031 (*Yamaha*).) However, courts do have the last word when it comes to "deciding whether a regulation lies within the scope of the authority delegated by the Legislature." (*Id.* at p. 11, fn. 4, 78 Cal.Rptr.2d 1, 960 P.2d 1031.) In short, agencies do not have discretion to promulgate regulations that are inconsistent with the governing statute, or that alter or amend the statute or enlarge its scope. (*Ontario Community Foundations, Inc. v. State Bd. of Equalization* (1984) 35 Cal.3d 811, 816–817, 201 Cal.Rptr. 165, 678 P.2d 378.)

[4] **[5]** An agency's expertise with respect to pertinent legal and regulatory issues lends presumptive value to interpretive regulations. Nonetheless, agency interpretations, whether expressed in a regulation or less formal statement, are nothing more than legal opinions freighted with a diminished power to bind. (*Yamaha, supra,* 19 Cal.4th at p. 11, 78 Cal.Rptr.2d 1, 960 P.2d 1031.) The final construction of a statute rests with the courts, and in exercising that power we accord weight to an administrative interpretation based on the particular context. (*Id.* at p. 12, 78 Cal.Rptr.2d 1, 960 P.2d 1031.)

[6] **[7]** Courts have identified certain factors signifying that the agency's interpretation ****632** of a given statute is probably correct. These include evidence that the agency consistently followed the interpretation in question, and the interpretation was contemporaneous with enactment of the statute subject to interpretation. (*Yamaha, supra,* 19 Cal.4th at pp. 12–13, 78 Cal.Rptr.2d 1, 960 P.2d 1031.) Judicial deference is more deserving under circumstances indicating that the interpretation was part of a regulation adopted by the agency in accordance with the APA, rather than contained in an advice letter prepared by a staff member. "However, even formal interpretive rules do not command the same weight as quasi-legislative rules." (*Id.* at p. 13, 78 Cal.Rptr.2d 1, 960 P.2d 1031.) Again, in the end it is the courts that discern the meaning of statutes.

[8] ***975** Our Supreme Court has acknowledged that "administrative rules do not always fall neatly into one category or the other; the terms designate opposite ends of an administrative continuum, depending on the breadth of the authority delegated by the Legislature." (*Yamaha, supra,* 19 Cal.4th at p. 6, fn. 3, 78 Cal.Rptr.2d 1, 960 P.2d 1031; see *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 799, 85 Cal.Rptr.2d 844, 978 P.2d 2.) As further explained in *Ramirez, supra,* at page 799, 85 Cal.Rptr.2d 844, 978 P.2d 2, regulations falling somewhere along the continuum may share characteristics of quasi-legislative and interpretive rules, "as when an administrative agency exercises a legislatively delegated power to interpret key statutory terms."

Here the SBE indicated it was promulgating Rule 139 pursuant to Government Code section 15606, subdivision (c). Among other duties, this enabling statute mandates that the SBE "[p]rescribe rules and regulations to govern ... assessors when assessing...." (*Ibid.*) On the quasi-legislative side of our analysis, without question the enactment of Rule 139 comes within the scope of duties delegated to the board by Government Code section 15606 because Rule 139 elaborates the meaning of "damage or destruction" for the purpose of applying section 170, therefore prescribing a rule that would govern all assessors when providing calamity reassessment relief under that statute.

[9] However, Government Code section 15606 does not entrust SBE with discretion to promulgate a rule that conflicts with section 170 or any other property tax law that is within its purview to enforce. "Whenever by the express or implied terms of any statute a state agency has authority

to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute." (Gov.Code, § 11342.2.) And because the SBE's implied authority to interpret key terms in the property tax statutory scheme is an *interpretive* function, ultimately it is our job to decide whether a given interpretation is "consistent and not in conflict with" the operative statute.

Weighing against attributing considerable judicial deference to SBE's interpretation are the following: (1) its interpretation was not contemporaneous with the enactment of section 170; and (2) SBE has not historically and consistently maintained

the interpretation codified in Rule 139 [4] and indeed ***976** the board has abandoned ****633** its adherence to that interpretation by not defending it on appeal. Weighing in favor of more deference is the fact that the promulgation of Rule 139 complied with all APA rulemaking procedures, including public notice and comment. Some, but not substantial, deference is due in this case. [5]

B. *Rule 139 is Not Consistent With Section 170, Subdivision (a)(2) or the Constitutional Provision that Section 170, Subdivision (a)(2) Implements.*

1. *Airlines' Plain Language Argument Does Not Hold.*

Airlines first insist that Rule 139 *is consistent with* the plain language of section 170, subdivision (a)(2), quoted above. Since the provision states that it applies to damage due to a "misfortune or calamity," they argue eligibility for reassessment thus is not restricted to *any particular type* of misfortune or calamity. Continuing in this vein, Airlines assert that the events of September 11, 2001, clearly constitute a misfortune or calamity as required by section 170, subdivision (a)(2). Therefore, because the language does not *forbid* reassessment as prescribed by Rule 139, we should construe the statute in a manner that effects the salutary purposes of affording taxpayers the remedy of reassessment due to a calamity or misfortune.

Airlines omit a key fact in this argument: The September 11, 2001 events did not occur in California and, other than the crashed aircraft which apparently were taxed in California but are not at issue here, no California property was physically damaged.

[10] **[11]** More to the point, Airlines' interpretation does not hold. The rules of statutory construction teach us that courts should ascertain the Legislature's intent so as to effect the purpose of the law in question. In fulfilling this rule, we look first to the language of the statute itself, considering that language in the context of the entire statute and statutory scheme. Further, we are called ***977** to give effect to statutes according to the ordinary, usual import of the language used in framing them. We construe words in their context, mindful of the nature and obvious purpose of the statute where they appear. (*Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 743, 110 Cal.Rptr.2d 828, 28 P.3d 876.)

[12] Section 170 spells out procedures for reassessment where there has been "damage or destruction to the property" brought about by a misfortune or calamity as delineated in section 170, subdivision (a)(1) through (3). The term "damage" as it appears in the lead-in to these subsections can be viewed as ambiguous in that it does not specify the type of damage for which relief is available. However, section 170 implements ****634** article XIII, section 15 of the California Constitution. The plain language of this constitutional provision permits reassessment where taxable

property is "physically damaged or destroyed." [6] Statutes inconsistent with our Constitution are void. (*Hotel Employees & Restaurant Employees Internat. Union v. Davis* (1999) 21 Cal.4th 585, 602, 88 Cal.Rptr.2d 56, 981 P.2d 990.) It goes without saying that where possible, as it is here, we will construe statutes in favor of their validity. (*Turner v. Board of Trustees* (1976) 16 Cal.3d 818, 827, 129 Cal.Rptr. 443, 548 P.2d 1115.)

[13] **[14]** We are aware that the Constitutional Revision Task Force on Article XIII [7] as well as the ballot argument in favor of the proposition leading to enactment of the proposed revisions—including article XIII, section 15—indicated that the revisions were not intended to be substantive in nature. From this Airlines argue that section 15 took the meaning of the predecessor section 2.8, which did not explicitly require that the property be physically damaged. First, we do not consult legislative history where, as here, the language is clear and unambiguous. (*Title Ins. & Trust Co. v. County of Riverside* (1989) 48 Cal.3d 84, 96, 255 Cal.Rptr. 670, 767 P.2d 1148.) Second, rather than *ignoring* the insertion of the word "physical" and violating the admonition that we give significance, if possible, to every word, phrase and part of an enactment (*Mercer v. Perez* (1968) 68 Cal.2d 104, 112, 65 Cal.Rptr. 315, 436 P.2d 315), we conclude that inclusion

***978** of the term expressed the literal understanding and

intent of the task force as it interpreted former section 2.8. In other words, physicality has *always* been a constitutional requirement, even when not explicitly stated. As explained by the legislative analyst in the very ballot argument to which Airlines refer us, one of the purposes of the proposition was to clarify wording. Insertion of the word "physical" did just that.

2. *Direct Physical Damage is a Requirement of Section 170, Subdivision (a)(2) But Not of Subdivision (a)(1) and (3).*

[15] Moreover, looking to the whole of the statute and its purpose, it is clear the Legislature intended the qualifying damage to be physical damage. First, the one appellate court decision that has construed section 170 states that its overall objective "is to afford financial relief to the owners of property *physically damaged or destroyed* by an unforeseeable occurrence beyond their control." (*T.L. Enterprises, Inc. v. County of Los Angeles* (1989) 215 Cal.App.3d 876, 880, 263 Cal.Rptr. 772, italics added.) Second, looking to the context of the statute we observe that section 170, subdivision (g) states that "[t]he assessed value of the property *in its damaged condition* ... shall be the taxable value of the property until it is restored, repaired, reconstructed...." (Italics added.) ****635** Property cannot be restored, repaired or reconstructed unless it is physically damaged.

[16] **[17]** **[18]** **[19]** Nonetheless, we recognize in section 170, subdivision (a)(1) and (3) the Legislature delineated two exceptions to the general meaning of "damage or destruction" as implying direct physical injury to the property, thereby providing limited relief for indirect physical damage. Thus, in subdivision (a)(1) the term "damage" includes diminution in value due to restricted access to the property, where the restricted access was caused by a major misfortune or calamity which spurred the Governor to proclaim the area to be in a state of disaster. Additionally, reassessment is available under subdivision (a)(3) for a possessory interest in government land where a misfortune or calamity has restricted access to that land. However, no expanded meaning is set forth in subdivision (a)(2). Where the Legislature carefully uses a term or phrase in one place but excludes it in another, we will not imply the term or phrase where excluded. (*Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564, 576, 273 Cal.Rptr. 584, 797 P.2d 608.) Further, where an exception to a general rule is specified by statute, we will not imply or presume other exceptions. (*Mutual Life Ins. Co. v. City of Los Angeles* (1990) 50 Cal.3d 402, 410, 267 Cal.Rptr. 589, 787 P.2d 996.) Here the Legislature provided for reassessment due to restricted ***979** access in section 170, subdivision (a)(1) and (3), but not in subdivision (a)(2). Moreover, construing subdivision (a)(2) to apply in cases of restricted access would render mere surplusage the terms "restricted access" in subdivision (a)(1) and the "right to enter upon the land to be suspended or restricted" in subdivision (a)(3). We always seek to avoid a construction that renders some words surplusage. (*Estate of MacDonald* (1990) 51 Cal.3d 262, 269–270, 272 Cal.Rptr. 153, 794 P.2d 911.)

3. *Attorney General Opinions Do Not Help Airlines.*

Airlines also claim that the Attorney General has opined that section 170 applies to economic loss or damage caused by restricted physical access to property. Their argument is convoluted and wrong.

In 1972 the Attorney General construed former section 155.1, a predecessor to section 170, subdivision (a)(1) which, like the current statute, defined "damage" as including diminished value due to restricted access. (55 Ops.Cal.Atty.Gen. 412, 413 (1972); see Stats.1970, ch. 963, § 2, pp. 1729–1731.) That opinion addressed the issue whether former section 155.1 allowed for reassessment of property that *was not physically damaged* and did not suffer impaired access but nonetheless experienced economic devaluation by reason of its location in the disaster area. The Attorney General concluded it did not that encompass such devaluation.

(55 Ops.Cal.Atty.Gen., *supra,* at p. 414.)

Three years later the Attorney General turned attention to former section 155.13, a predecessor of section 170, subdivision (a)(2), that also defined "damage" as encompassing diminished value resulting from restricted access. (58 Ops.Cal.Atty.Gen. 327, 328 (1975); see Stats.1973, ch. 901, § 1, pp. 1675–1677.) The opinion noted, not surprisingly, that "the words 'damaged or destroyed' *as used in the comparably worded section 155.1* ... does [*sic*] not encompass economic loss in the absence of physical injury." (58 Ops.Cal.Atty.Gen., *supra,* at p. 330, italics added.) Airlines seize on the italicized language to conclude that the 1975 opinion "effectively affirmed the 1972 opinion that damage under Section 170 includes economic damage caused by restricted physical access....."

Further, they exclaim as important the fact that the 1975 opinion "was written ****636** *after the 1974 amendment* which added the words 'physically damaged' to the Constitution."

We are stymied by this conclusion and statement. First, the 1975 opinion makes no such affirmation. Second, both opinions predate section 170, of ***980** which subdivision (a)(2) thereof notably *does not* define damage to include diminished value resulting from restricted access. Third, the 1972 opinion specifically *declined* to pass on the constitutionality of the portion of former section 155.1 which allowed for reassessment in instances of restricted access. (55 Ops.Cal.Atty.Gen., *supra,* at p. 414, fn. 1.)

Fourth, the 1975 Attorney General opinion *was* published *after* article XIII, section 15 was added to the Constitution, and that provision, adopted November 5, 1974, does specifically refer to "taxable property *physically* damaged or destroyed." (Italics added.) However, the 1975 opinion actually speaks of a 1974 amendment *to article XIII, section 2.8,* which referred simply to taxable property that was "damaged or destroyed," without any qualifier. (58 Ops.Cal.Atty.Gen., *supra,* at p. 328.) Let us clear up the confusion. Former section 2.8 of article XIII was amended June 4, 1974, and repealed November 5, 1974, at the same time article XIII, section 15 was adopted. The drafter of the 1975 opinion had not kept pace with this change. Therefore, by no possible stretch can we rely on the 1975 opinion as affirming that damage under section 170 and its predecessors encompasses economic loss due to impeded access to the property, and that such construction is compatible with the physicality requirement of article XIII, section 15.

4. *Legislative History Does Not Aid Airlines.*

[20] Airlines also delve into the legislative history of former section 155.13, a predecessor of section 170, subdivision (a)(2), in an attempt to persuade us of their interpretation. In particular, 1976 amendments to former section 155.13 eliminated the language that defined damage as including loss of value due to restricted access. (Stats.1976, ch. 1388, §§ 2.5, 3.5, pp. 6294–6296, 6296–6297.) The history Airlines think is pertinent consists of a 1976 memorandum from the Contra Costa County Assessor to the county administrator stating, among other points, that the omitted language was redundant and unnecessary. This memorandum was attached to a letter from the county administrator to Assemblyman John T. Knox, the author of the relevant bill that was enacted but shortly thereafter superseded. These materials do not constitute cognizable legislative history. At most they reflect the individual views or understandings of Assemblyman Knox and two county officials. Nor is there any indication that the documents were made available or communicated to the Legislature as a whole. (*People v. Patterson* (1999) 72 Cal.App.4th 438, 443–444, 84 Cal.Rptr.2d 870; see *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 30, 39, 34 Cal.Rptr.3d 520.)

Airlines also offer as persuasive certain committee and SBE analyses, but only for the assertion that they failed to discuss the omitted language as one of the changes wrought by the amendment. This argument leads nowhere.

***981** C. *Rule 139 is Not Consistent with Section 170, Subdivision (a)(1) and in Any Event that Provision Does Not Apply to the Events of September 11, 2001.*

Airlines also argue that Rule 139 implements and is consistent with ****637** section 170, subdivision (a)(1), which allows for calamity reassessment *within a Governor-declared disaster area or region of this state.* The Governor is empowered to proclaim a state of emergency upon finding that "conditions of disaster *or* of extreme peril to the safety of persons and property within the state caused by [enumerated conditions]" exist. (Gov.Code, §§ 8625, 8558, subd. (b), italics added.) Thus the Governor can declare that a state of emergency exists either because of a disaster, on the one hand, or because of extreme peril, on the other hand.

As a general matter, Rule 139 cannot be justified as consistent with section 170, subdivision (a)(1) because the rule permits reassessment in the absence of physical damage, whether direct or, in the case of restricted access, indirect. (See 55 Ops.Cal.Atty.Gen., *supra,* at p. 414.) Moreover, as a specific matter and irrespective of the fit between Rule 139 and section 170, subdivision (a)(1), section 170, subdivision (a)(1) does not apply to the events of September 11, 2001, because the condition precedent of a Governor-declared state of disaster in a particular region or area of the state is absent.

On September 11, 2001, the Governor proclaimed a "State of Emergency" based on the finding "that conditions of extreme peril to the safety of persons and property exist within the State of California." The state of emergency was decreed for the specific purpose of permitting the Chair of the Judicial Council to invoke the provisions of Government Code section 68115, which permits the courts to exercise extraordinary powers with respect to court sessions and proceedings.

Significantly, the Governor did not declare a state of disaster. Additionally, the proclamation had nothing to do with damaged or destroyed property, let alone property tax relief. Indeed the proclamation was limited to an initial term of 10 days, which would not be the case had the Governor

intended to declare a disaster in a region or area of the state necessitating provisions for property tax relief. In short, section 170, subdivision (a) does not apply.

*982 IV. CONCLUSION; DISPOSITION

The SBE'S effort to expand calamity reassessment relief beyond the requirement of direct physicality embedded in the Constitution and section 170, subdivision (a)(2) is invalid. Moreover, Airlines have asked us to sanction relief based on restricted access in the absence of *any* physical damage in California. Such relief has never been available under section 170 and its predecessors. Therefore, the judgment in favor of the Assessors is affirmed.

SEPULVEDA, J., and MUNTER, J. *, concur.

All Citations

134 Cal.App.4th 969, 36 Cal.Rptr.3d 627, 05 Cal. Daily Op. Serv. 10,425, 2005 Daily Journal D.A.R. 14,209

Footnotes

1 Respondents are the duly elected assessors of the Counties of Alameda, Orange, Riverside, Sacramento, San Diego, San Mateo and Santa Clara (collectively, the Assessors).

2 Unless otherwise specified, all statutory references are to the Revenue and Taxation Code.

3 Appellants are American Airlines, United Airlines, Alaska Airlines, Aloha Airlines, America Trans Air, Continental Airlines, Delta Airlines, Fedex, Northwest Airlines and Southwest Airlines (hereafter, Airlines).

4 Airlines claim to the contrary that the SBE has historically construed section 170 to encompass diminished value due to restricted access and "[m]any" assessors have followed this lead. The question is not the construction of section 170 as a whole, but the particular construction given to section 170, subdivision (a)(2). (See pt. III.B., *post.*) The SBE letters and other documentation to which Airlines refer are directed to the board's discussion of section 170 generally or section 170, subdivision (a)(1), not section 170, subdivision (a)(2). Moreover, Airlines mention but a handful of assessors, out of 58. All but one is a respondent in this very lawsuit and the "evidence" that supposedly shows deference to their interpretation is considerably underwhelming.

5 Airlines also argue that the trial court incorrectly ruled that section 170 announced an exemption from tax, such that any doubt as to its applicability would be resolved against the exemption. With this error they posit that the court's construction was wrong and must be ignored. Moreover, they maintain that section 170 is a remedial statute which we must construe liberally to achieve its purpose and protect the persons within its purview, citing *Booth v. Robinson* (1983) 147 Cal.App.3d 371, 378, 195 Cal.Rptr. 130. We agree that section 170 is remedial. However, regardless of the remedial nature of the statute, we do not ignore the rules of statutory construction.

6 Although the trial court stated that Rule 139 "appears to expand the circumstances under which property taxes can be reassessed beyond that authorized by the Constitution," it declined to decide the constitutionality of the rule because it concluded Rule 139 improperly expanded the definition of "damage or destruction" beyond the bounds established in section 170. While we understand the trial court's reticence to decide the matter on constitutional grounds, ignoring the pyramid of authority which sandwiches section 170 between the constitutional base and the regulatory tip leads to an incomplete and stilted analysis.

We are also aware that the physical damage requirement of article XIII, section 15 may raise questions regarding the constitutionality of section 170, subdivision (a)(1) and (3). The Assessors have not challenged those provisions and thus their validity is not before the court.

7 7 Assembly Journal (1973–1974 Reg. Sess.) May 16, 1974, pages 13237–13238, 13266.

* Judge of the San Francisco Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

End of Document

From:	daviscs@gtlaw.com
To:	Blake, Sue
Cc:	Cazadd, Kristine
Subject:	[External]SBE COVID-19 Property Tax Relief Task Force -- Team 3 (Rev. & Tax. Code Section 170) GT Amendment
Date:	Monday, April 27, 2020 3:15:55 PM
Attachments:	COVID 19 Sec. 170 GT Amendment.docx

Ms. Blake:

I have prepared a draft amendment to Revenue and Taxation Code section 170 to address shortcomings in the existing statute that prevents assessors from granting misfortune and calamity relief for the remaining four months of the 2019-2020 tax year for loss arising from the COVID-19 Pandemic and related governmental actions.

The existing statute is limited by article XIII, sec. 15 and *Slocum v. State Board of Equalization* (2005) 134 Cal.App.4th 969 to providing mid-year property tax relief caused by physical damage. While viral contamination might be considered "physical damage" for purposes of the Section 15, the fact is that such contamination could not be proved in most cases, and the physical contamination is short-lived, perhaps measured in only hours. The Legislature has previously recognized that environmental contamination should be considered as part of section 170 in SB-1340 (Huff) in connection with the Porter Ranch /Aliso Canyon Well Release Event, but the Governor vetoed that bill. The actual cause of the loss in value is, in any event, the various governmental restrictions imposed in response to the COVID-19 Pandemic. Those regulatory restrictions are not "physical damage." While the principle that "market value" should reflect governmental restrictions is well established (Rev. & Tax. Code section 402.1), that statute does not provide for mid-year relief. Finally, while much of the adverse impact of the Pandemic results from "loss of access," and while such interference with access is recognized in section 170, the loss of access at issue is not caused by physical damage. Thus, while all of the key elements required to provide immediate relief for COVID-19-related losses under the misfortune and calamity statute exist in some form, there are various technical barriers to actually implementing these value corrections. This bill provides the required legislative interpretation of Section 15 necessary to remove these limitations.

The attached draft bill provides the details of the required corrections.

I recommend that the SBE sponsor this amendment as part of the pending budget bill so that it can take effect immediately without a 2/3 vote.

Please let me know if you have any questions or require additional information.

C. Stephen Davis
Shareholder

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SUBJECT: COVID-19 Misfortune and Calamity Property Tax Relief Bill

SOURCE: Greenberg Traurig, LLP

DIGEST: The recent COVID-19 Pandemic and governmental efforts to minimize the loss of life as a result of that Pandemic has caused widespread loss of property value. The California Constitution requires that property tax assessments not exceed fair market value in most instances, but certain statutory procedural provisions prevent assessors from aligning property values with declining market values. Mid-year tax relief currently available for calamity and misfortune is often construed to require physical damage as condition for relief, and as so narrowly construed, those affected by the COVID-19 events may be unable to qualify for property tax relief consistent with the constitutional fair market value standard and fundamental fairness. These procedural limitations will cause extended periods of assessment based on arbitrary values considerably higher than constitutional standards. Continued assessment levels exceeding fair market value under prevailing economic conditions is unfair and results in material hardship to California property taxpayers.

This bill expands eligibility for calamity and misfortune reassessment, requires assessors to consider the effects of the COVID-19 Pandemic and associated emergency measures when revaluing taxable property, authorizes immediate relief and applies its provisions retroactively.

Existing Law

1) Permits the Legislature to authorize local agencies to provide for the assessment or reassessment of taxable property physically damaged or destroyed for property tax purposes.

a) Allows a county board of supervisors to enact an ordinance allowing any taxpayer whose property was physically damaged or destroyed without his or her fault to apply for reassessment. The ordinance can apply to large disasters, such as earthquakes or wildfires, or site-specific incidents, like house fires.

b) Directs assessors to revalue property that is physically damaged by the disaster if the county enacts an ordinance providing that relief.

c) Allows assessors to revalue property to reflect restricted access to property resulting from the disaster only when the Governor has issued a disaster proclamation as a result of the disaster.

d) Does not expressly provide for any reduction in value resulting from pandemic conditions.

This bill:

1) Expands eligibility for disaster reassessment to include a major misfortune or calamity in an area subsequently proclaimed by the Governor to be in a state of emergency, not only a disaster, so long as the property was "damaged or destroyed" by the major misfortune or calamity that caused the Governor to issue the proclamation and/or measures adopted by the government to respond to that event.

2) Directs assessors to consider loss of property value resulting directly or indirectly from viral contamination associated with the COVID-19 Pandemic and governmental measures intended to contain such viral contamination when revaluing the property to its disaster-affected value.

3) Declares that COVID-19 virus contaminates physical surfaces and represents physical damage to property for purposes of article XIII, section 15 of the California Constitution.

3) States that its provisions apply retroactively as required to implement the immediate property tax relief intended by this bill.

4) Allows affected taxpayers to apply for reassessment within 12 months of the date the bill is enacted.

5) Establishes an effective date of March 2, 2020 for initial recognition of the COVID-19 Pandemic for purposes of this statute.

TEXT OF AMENDMENT

Section 1. Section 170 of the Revenue and Taxation Code is amended to read as follows:

170. Reassessment of property damaged by misfortune or calamity.

(a) Notwithstanding any other law, the board of supervisors, by ordinance, may provide that every assessee of any taxable property, or any person liable for the taxes on that property, whose property was damaged or destroyed without his or her fault, may apply for reassessment of that property as provided in this section. The ordinance may also specify that an assessor may initiate the reassessment where the assessor determines that within the preceding 12 months taxable property located in the county was damaged or destroyed.

To be eligible for reassessment the damage or destruction to the property shall have been caused by any of the following:

(1) A major misfortune or calamity, in an area or region subsequently proclaimed by the Governor to be in a **state of emergency** or disaster, if that property was damaged or destroyed by the major misfortune or calamity that caused the Governor to proclaim the area or region to be in a **state of emergency** or disaster. As used in this paragraph, "damage" includes a diminution in the value of property as a result of restricted access to the property where that restricted access was caused by the major misfortune or calamity.

[Balance of Existing Statute]

(m) As used in this statute, the term "damage" includes (i) diminution in value of taxable property caused by actual or potential contamination by the COVID-19 virus and/or (ii) a diminution in the value of taxable property resulting from laws, regulations or ordinances adopted, or orders issued,

by local, city, county and state governments or agencies in response to the COVID-19 Pandemic, specifically including moratoriums on evictions enacted pursuant to the Governor's Executive Orders No. N-33-20 and N-37-20, to mitigate the effects of the COVID-19 Pandemic; and, the terms "major misfortune and calamity" and "misfortune and calamity" include the COVID-19 Pandemic and resulting government responses to that Pandemic.

(n) The term "physical damage" as used in Article XIII, section 15 of the California Constitution, includes actual or potential contamination by the COVID-19 virus and any diminution in the value of property as a result of laws adopted by local, city, county and state in response to the COVID-19 Pandemic, specifically including moratoriums on evictions enacted pursuant to the Governor's Executive Orders No. N-33-20 and N-37-20 to mitigate the effects of the COVID-19 Pandemic.

(o) The amendments made to this statute for purposes of providing COVID-19 Pandemic property tax relief shall apply retroactively to the date of the Governor's executive orders. Notwithstanding any other law, in the case of these properties, the application for reassessment may be filed within 12 months of the enactment of this subdivision or within the time specified in the ordinance, whichever is later.

(p) The amendments to this statute made pursuant to the Omnibus COVID-19 Property Tax Relief Bill shall apply to any County which has adopted an ordinance pursuant to section (a) hereof, and to any county that has adopted any ordinance or law the provides for substantially the same relief as this statute.

(q) This statute is remedial in nature and should be broadly construed to provide comprehensive property tax relief to those paying property taxes in California whose property was damaged by the COVID-19 misfortune and calamity. Any ambiguity or inconsistencies with other provisions of law shall be resolved in favor of providing the intended relief.

(r) The date for which relief is deemed to be available for the COVID-19 misfortune and calamity shall be March 2, 2020, the date the California Office of Emergency Services (CAL OES) activated its State Operations Center in response to the COVID-19 Pandemic.

SEC. 2.

The Legislature finds and declares that a special law is necessary and that a general law cannot be made applicable within the meaning of Section 16 of Article IV of the California Constitution because of the unique circumstances related to the COVID-19 viral pandemic and governmental responses to that pandemic.

SEC. 3.

This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

To provide necessary relief as soon as possible to the owners of taxable property which has suffered a material decline in property value as the result the COVID-19 Pandemic it is necessary that this act take effect immediately

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Team 3: Revenue & Tax Code Section 170, Disaster Relief
Leader: Sue Blake
Senior Tax Counsel to BOE Vice Chair Mike Schaefer
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916-838-8864

1. What is your statement of need for relief?

If there is a reduction in property values as a result of the COVID-19 situation, those reductions should be recognized as soon as possible to provide relief to the taxpayers.

2. Please provide any data or estimates to support your statement of need E.g., numbers of taxpayers negatively impacted in your periphery, costs to taxpayers, possible revenue impact to your county, impact on future appeals

For Kern County, the largest percentage of taxes comes from residential homeowners, but the largest taxpayers are agriculture and energy companies, both of which are considered essential services (Executive Order N-33-20).

For homeowners, any reduction in value will be recognized if their home changes hands during the crisis. Without either new construction or a change in ownership (Cal Rev & Tax. Code §75.10), the only way to recognize a reduction in value would be through a Prop. 8 reduction or by the FMV/Prop 13 balancing procedure on the next lien date.

For the agriculture and energy sectors, there is no evidence as yet that the crisis has reduced the value of those properties. People still need to eat, farms and production facilities are still in operation for the most part and costs of transportation have declined. Oil and gas prices have declined, it's true, but they were already falling due to the pricing war between Russia and Saudi Arabia. Prices are already starting to increase, even though the shelter in place order continues. And, since California pricing is based upon the Brent standard, rather than West Texas Light, California's oil industry was sheltered from the crash in the West Texas Light pricing.

Both the agriculture and energy sectors are still subject to the same revaluation issues as residential properties. Value changes are based on either a change in ownership or new construction.

This is not to downplay the effect the crises has had on California taxpayers, but there is just no evidence as yet that the crisis has affected property values.

3. Are there any legal issues you see from your perspective? Case law, statutes, regulations, rules, historical BOE guidance, etc.

It has been suggested that property owners may qualify for disaster relief under California Revenue & Taxation Code section 170. Despite argument to the contrary, it is clear that physical damage is required for that statute to apply. For example, the assessed value of the damaged property is the taxable value until such time as it is ". . . restored, repaired or reconstructed . . ." Rev. & Tax. Code, § 170(g) Without physical damage, none of those things can occur. Presumably the idea in our situation is that once the restricted access is lifted the property is "restored." But that violates the constitutional restriction of article XIII, section 15, which specifically requires physical damage. ["The Legislature may authorize local government to provide for the assessment or reassessment of taxable property physically damaged or destroyed after the lien date to which the assessment or reassessment relates." Cal. Const., art. XIII, § 15]

As noted in *Slocum v. State Bd. of Equalization* (2005) 134 Cal.App.4th 969, 977 [36 Cal.Rptr.3d 627, 633–634],

> Section 170 spells out procedures for reassessment where there has been "damage or destruction to the property" brought about by a misfortune or calamity as delineated in section 170, subdivision (a)(1) through (3). The term "damage" as it appears in the lead-in to these subsections can be viewed as ambiguous in that it does not specify the type of damage for which relief is available. However, section 170 implements article XIII, section 15 of the California Constitution. The plain language of this constitutional provision permits reassessment where taxable property is "physically damaged or destroyed." Statutes inconsistent with our Constitution are void. (*Hotel Employees & Restaurant Employees Internat. Union v. Davis* (1999) 21 Cal.4th 585, 602, 88 Cal.Rptr.2d 56, 981 P.2d 990.) It goes without saying that where possible, as it is here, we will construe statutes in favor of their validity. (*Turner v. Board of Trustees* (1976) 16 Cal.3d 818, 827, 129 Cal.Rptr. 443, 548 P.2d 1115.) *Slocum v. State Bd. of Equalization* (2005) 134 Cal.App.4th 969, 977 [36 Cal.Rptr.3d 627, 633–634]

Slocum goes on to say,

> Therefore, by no possible stretch can we rely on the 1975 opinion as affirming that damage under section 170 and its predecessors encompasses

> economic loss due to impeded access to the property, and that such construction is compatible with the physicality requirement of article XIII, section 15. *Id.* at 980

Further, article XIII only authorizes the legislature to authorize local government to provide for disaster relief. It does not authorize the legislature to provide for that relief directly. California Revenue & Taxation Code section 170 only authorizes local boards of supervisors to create an ordinance to provide for disaster relief. ["Notwithstanding any other law, the board of supervisors, by ordinance, may provide that every assessee of any taxable property, or any person liable for the taxes thereon, whose property was damaged or destroyed without his or her fault, may apply for reassessment . . . "] As the State Board of Equalization has no direct authority over a local board of supervisors, it appears that it cannot order a board of supervisors to alter their ordinance.

It has been argued that the legislature could provide a statute which specifically authorizes disaster relief based upon economic diminution due to restricted access, but that would be outside the legislature's authority.

In California, property taxes are authorized by the constitution. "All property is taxable and shall be assessed at the same percentage of fair market value." Cal. Const., art. XIII, § 1. The constitution then grants the legislature the power to determine taxation requirements for personal property. Cal. Const., art. XIII, § 2 ("The Legislature may provide for property taxation of all forms of tangible personal property, shares of capital stock, evidences of indebtedness, and any legal or equitable interest therein not exempt under any other provision of this article.") No such concession is granted for real property. The Constitution then creates specific real property exemptions.

The Constitution then provides, in article XIIIa, sections 1 and 2, that taxes shall not be more than 1% of full cash value as adjusted for inflation (but no more than 2%) and defines full cash value specifically. The only reason there is consideration for disaster relief is because of article XIII, section 15, which requires physical damage. Therefore, should the legislature provide for disaster relief in such a way as to change the assessed value of property to something other than that authorized by article XIIIa, it would be an unconstitutional act.

4. What practical solutions would you suggest to provide relief? It's fine to provide more than one.

It appears to me that what the BOE seeks is immediate relief to taxpayers. The burden on taxpayers as a result of the crisis is difficulty in meeting deadlines and the ability to pay, given the restrictions they are living under. Section 170 provides neither of those. The BOE would be better served by requesting an executive order extending deadlines set by statute and providing for payment arrangements. However, the payment

arrangements would mean that local governments would have to be backfilled by the state to prevent deficits until full payment is received.

5. What are your recommendations to the Board Members? Issue Letter to Assessors (LTA), post FAQs on Board of Equalization website, Property Tax Rule change, seek statutory/legislative changes

Executive orders (see #4 above)

PLUMAS COUNTY ASSESSOR

1 Crescent Street, • Quincy, CA 95971 • (530) 283-6380 • Fax (530) 283-6195

CHARLES W. LEONHARDT
ASSESSOR

Date: April 24, 2020

To: California State Board of Equalization

From: Charles W. Leonhardt, Assessor

Subject: Section 170-Disaster Relief

On April 23, 2020 I participated in a conference call sponsored by the BOE Task Force on Section 170-Disaster Relief.

Statement of Need

In summary, due to the COVID-19 Pandemic, there are a number of individuals and groups that are attempting to develop creative ideas to assist tax payers during this challenging time. One of those ideas is to use Section 70 to provide tax relief to taxpayers. One of the challenges discussed is the lack of current market data to show direct evidence that there has in fact been a decline. The group discussed varying opinions on the proper interpretation of Section 170. Those with long histories in the property tax world recalled this analysis being done after the 911 attack. At that time the Slocum appellate court decision is deemed by those parties to be defining that Section 170 only applies to physical damage. Others interpret that decision to not imply that Section 170 only applies to physical damage. At the end of the day, the parties agreed to disagree. Unlike physical loss where the calculation is straight forward, if it were to be determined that Section 170 did apply to the pandemic event, calculating the amount of loss would be extremely difficult, if not impossible at this early time and without sufficient direct market evidence. At this juncture Prop 8 reductions would seem to be a better avenue.

Solutions/Recommendations

1. I recommend that the Board Legal Department review the Constitutional provisions, Revenue Taxation Code 170, the Slocum case and whatever other research is necessary to provide the Board, Assessors' and Industry with an unbiased legal opinion as the extent that Section 170 applies to the current Pandemic. Until that analysis is complete, there is no reason to move any further on this topic.

Please feel free to contact me in the event you have any questions.

OFFICE OF
ASSESSOR-COUNTY CLERK-
RECORDER & ELECTIONS
COUNTY OF SAN MATEO

MARK CHURCH
ASSESSOR-COUNTY CLERK-
RECORDER & CHIEF ELECTIONS OFFICER

April 27, 2020

State Board of Equalization
455 Golden Gate Ave Suite 10500
San Francisco, CA 94102

Dear State Board of Equalization:

I write to provide input solicited by the State Board of Equalization in relation to tax policy considerations related to the impact of the novel coronavirus known as COVID-19. In general, market forces, existing law, and the lagging nature of the property tax structure sufficiently address taxpayer concerns regarding the adverse economic impact of the virus and related shutdown. However, state and county officials should consider means for reducing administrative or bureaucratic burdens for taxpayers seeking certain forms of relief.

I now turn to address the specific topics on which I understand the State Board of Equalization is seeking input.

1. Business Personal Property Tax Statement (Form 571-L)

Our office believes that many businesses in San Mateo County are well-positioned to file a Business Personal Property Tax Statement (Form 571-L) timely because their staff is able to work remotely and has access (electronic or otherwise) to the information needed to complete the form and is able to submit it electronically. Other businesses (perhaps smaller businesses, especially) may have difficulty in timely filing a Form 571-L because they are unable to access information needed to complete the form due to the Shelter-in-Place orders. Our office is working to educate the public about the option of e-filing the Form 571-L and to provide instructions for doing so to facilitate timely filings. In addition, our office is planning to enroll small business assessments based on last year's filings, mitigating the imposition of the penalty.

We do not favor an extension of the deadline to file the Form 571-L because such an extension would require an extension of the roll. The resulting delay would have wide-ranging impacts not only on the Assessor operations, but also on the Tax Collector, the Controller, and general County operations. Further, as noted above, it appears that many businesses will be able to file in time due to their ability to access information remotely and file electronically.

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To the extent that individual businesses are unable to file timely due to Shelter-in-Place orders or other COVID 19-related circumstances, perhaps a streamlined process could be implemented to enable them to apply for and obtain penalty abatement from the Assessment Appeals Board. For example, perhaps a form declaration could be developed for businesses in this situation to complete, sign, and submit in order to simplify the process and allow them to obtain penalty abatement without a hearing in cases where there is no objection by the Assessor.

2. Statutes of Limitations

We have no comment on the issue of statute of limitations applicable for assessment appeals.

3. Disaster Relief Under Revenue & Taxation Code Section 170

Revenue and Taxation Code section 170 authorizes a County Board of Supervisors to enact an ordinance that allows assessees whose property "was damaged or destroyed" due to misfortune or calamity to apply for reassessment as provided in that section. As explained in *Slocum v. State Board of Equalization* (2005), 134 Cal.App.4th 969, Section 170 was enacted pursuant to Article XIII, section 15 of the California Constitution, which permits reassessment only where taxable property is "physically damaged or destroyed." *Slocum* makes clear that for reassessment under section 170(a)(2), direct physical damage is required, and for reassessment under section 170(a)(1), indirect physical damage is required in addition to a declaration of a state of disaster by the Governor. Accordingly, Section 170 cannot be used to authorize reassessment of property that was not physically damaged.

4. Proposition 8 Decline in Value

We have serious concerns regarding the proposals aimed at expanding the ability of taxpayers to pursue tax relief under Proposition 8 due to decline in value. The tax structure is lagging by design in order to allow for budget-planning by government and by taxpayers. The fact that the economic effects of the COVID-19 virus and shutdown were not experienced until after the lien date does not justify altering that design.

The lien date of January 1 cannot be changed without legislative action. Further, to the extent that property values continue to decline, it would seem that selection of a new lien date would be an arbitrary exercise, and the date could become a "moving target" for taxpayer advocates seeking reform or relief. Because property tax assessment is a lagging economic indicator, any decline in value in property will be captured as of January 1, 2021. In the same way that an increase in value that occurs after the lien date is not captured until the next lien date, any decline is also correctly accounted for at that time.

Also problematic are proposals to allow Assessment Appeals Boards to consider market data far beyond the January 1 lien date, such as through June 30. For

assessment purposes, value is determined based on an annual snapshot in time, and as such property tax is a lagging economic indicator. To the extent that certain market conditions were not in effect on the lien date, but developed later, they are not available as a basis for tax relief and will be accounted for, to the extent that they remain present, in the following year based on the next lien date. Taxpayer proposals to allow for consideration of market value long after the lien date thus amounts to a redesign of the tax system for the benefit of a limited number of taxpayers (such as those whose property has a high base-year value).

Lastly, we oppose any proposal for the State Board of Equalization to set capitalization rates, as that would fail to account for market conditions and the fact that capitalization rates differ by property type and by geographic area.

In our view, the use of payment plans is a better approach to help taxpayers having difficulty making property tax payments during this time.

5. Form of Signature

County assessors should have the discretion to accept different forms of signature, besides wet signatures, including signatures provided on faxes and pdfs.

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The COVID-19 pandemic will have different tax consequences for different taxpayers. Different industries will be differently impacted, real property will be affected in different ways than personal property, and recently-acquired real property will be differently impacted than real property acquired long ago. Due to the lagging nature of our tax system, economic effects that were not accounted for in assessments on the January 1, 2020 lien date will be accounted for next year on the January 1, 2021 lien date. Changes for the benefit of a subset of taxpayers, therefore, are not warranted, particularly given the risk of unintended consequences. Rather, we should rely on mechanisms available in existing law to ease burdens on taxpayers that are encountering difficulties in fulfilling their obligations — such as making timely filings or payments — due to COVID-19.

Sincerely,

Mark Church

cc: Rebecca Archer, Lead Deputy County Counsel
Terry Flinn, Deputy Assessor Clerk-Recorder
Alex Tharayil, Deputy Assessor Clerk-Recorder

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Date: April 27, 2020

To: California Board of Equalization

Attn: Sue Blake, Senior Tax Counsel to BOE Vice Chair Mike Schaefer

From: Don Gaekle, Assessor

RE: Revenue & Tax Code Section 170, Disaster Relief

Dear Ms. Blake,

At the April 21, 2020 Board of Equalization (BOE) Meeting, and again at the topic specific meeting on April 23rd, a few speakers suggested that Revenue & Taxation Code Section 170's disaster relief provisions may be, or some argued is, applicable to the current COVID-19 emergency. The expressed need was that business commercial property owners have suffered a loss due to separation from their place of business or properties. The scope of financial losses is unknown now and will be unknown for some time.

The issue at hand is whether Section 170 is the proper vehicle to address economic losses where no physical damage has occurred to the properties because of the current emergency.

1. Section 15 of Article XIII of the California Constitution gives authority to the Legislature to provide disaster relief where there has been physical damage to the property.
2. Revenue and Taxation Code 170 when read in its entirety clearly contemplates Assessor actions based on physical damage of some nature that has affected the property.
3. The BOE has previously promulgated Rule 139 under the premise of separation from property when no physical damage had occurred. This Rule was later invalidated by the courts as inconsistent with R & T Code Section 170 in Slocum vs, Board of Equalization.

A review is required from Chief Counsel to the Board Henry Nanjo, as to applicability of the Constitutional provisions and the provisions of section 170, in light of the Slocum case, to provide the Board and all interested parties with an impartial opinion as to the applicability of disaster relief under the statute as it relates to the COVID-19 emergency in California.

This is necessary before any further discussion.

From: Moll, Charles
To: Blake, Sue
Subject: [External]section 170 relief task force
Date: Monday, April 27, 2020 4:48:23 PM

Sue—below is my submission to the task force. Due to time constraints and because I was on a plane —I did not have time to add additional details in response to questions 1-2, nor was I able to respond to question 5.

Best regards, chuck

1-2. Need:

The need for quick relief is great and widespread, and covers all types of property owners – homeowners with mortgages that are in arrears, owners/landlords of real estate that is shut down, hotels, retail operations, manufacturing plants, service businesses, movie theaters and other entertainment venues, and many more. A major concern is to reverse the slide of the economy to Great Depression levels, which would inflict further harm on individuals, businesses, and local governments.

3. Legal issues:

There should be little doubt that Section 170 itself provides for relief in the situation that we are currently experiencing with the Covid–19 pandemic. Section 170 (a)(1) expressly provides that "'damage' includes a diminution in the value of property as a result of restricted access to the property where that restricted access was caused by the major misfortune or calamity." *See also Slocum v. State Board of Equalization*, 134 Cal. App. 4th 969 (2005) ("Direct physical damage is a requirement of Subdivision 170(a)(2) but not of Subdivision (a)(1) and (a)(3).")

Questions have been raised here by some as to the constitutionality of section 170. However, it would not seem to be an appropriate time --now in the midst of a catastrophic pandemic--to debate the constitutionality of the statute which has been on the books for decades without a challenge to its constitutionality, as the *Slocum* case acknowledged. Rather, as an initial matter, there should be no doubt that the Legislature has the authority to prescribe appropriate valuation methodologies, including ways to calculate declines in value even in the absence of actual physical damage. Indeed there are many examples of this authority, including the application under currently accepted valuation methodologies of external obsolescence which occurs without any physical damage to the property itself, special valuation methodology for subsidized low-income housing, and others.

Thus, the primary issue raised by those questioning the constitutionality of section 170, really appears to be whether the Legislature possesses the authority to alter the valuation date from the lien date of January 1 to another date, i.e. to when the calamity occurred. But that also is readily resolved, because the Legislature does possess the authority to determine when dates of valuation should be made and has exercised that authority in the past without challenge. The Legislature has done so when it has changed the lien date from March to January, and the Legislature has done so when it set forth the dates for supplemental

assessment valuations. Indeed, for supplemental assessments, while the Legislature generally chose the valuation date as the date of the event, it could have chosen a different date (which in fact, it did for fixtures). Certainly, the Legislature likewise has the same power to determine the date of valuation when a calamity occurs, and no contrary authority has been cited.

4. Proposal :

a. Relief during the 2019–20 fiscal year – taxpayers who are property owners would file for relief pursuant to section 170 in the counties that have authorized the relief by ordinance. The taxpayer should specify the decline the property suffered, covering the period from when the shelter in place/shut down of business occurred in late March or early April, depending upon the county, to June 30 or the release of the shelter in place/shut down of the business, whichever comes first. A petition specifying a decline in value up to 25% would be prima facie evidence of that decline--in essence a safe harbor. For specified declines of 26% to 50%, the claim should be accompanied by evidence, and would be presumed correct, subject to subsequent audit and claw back of any refunds granted over 25%. Finally for claims over 50%, the property owner would be required to present satisfactory evidence, acceptable to the assessor at that time, for the excess amount over 50% to be granted. For claims up to 50% declines, the taxpayer would receive an immediate refund within a specified period of time, such as 45 days, subject to the subsequent claw back described above.

The practical effect of this proposal for property owners claiming a 25% decline in value, would be a return of a portion of the additional amount that the property owner had paid for this fiscal year (2019–20) compared to the prior fiscal year. For example, assuming a two month shut down period, a property owner filing for a 25% reduction would essentially receive a refund of approximately 4% of the amount that owner paid in property tax for the 2019–20 fiscal year. If that property owner had not finished making the second tax installment in April 2020, then the relief would simply be to reduce the remaining required payment.

b. If the shelter in place/business closures extends past July 1, then under the proposal set forth above, any reductions in value would not result in a refund for 2020–21, but would simply result in a reduction, in the same manner as previously stated above, of the December 2020 (August for unsecured property) tax payment.

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Lawrence E. Stone

April 28, 2020

Sent via email

Honorable Antonio Vazquez and Honorable Mike Schaefer
California State Board of Equalization
Capitol Mall
Sacramento, CA 95814

Re: Responses to the Five Hearings Initiated by BOE Task Force on Covid-19

Dear Chair Vazquez and Vice Chair Schaefer,

We have a health crisis which has triggered an equally serious financial crisis. The vast majority of the proposals advanced by CATA, and under consideration by the BOE, will create a political crisis of equal proportions. Consideration of proposals, such as changing the lien/valuation date, is the height of irresponsibility.

As noted in this response, the dramatic, and at times radical, proposals offered by CATA and others are grossly disproportionate to the lack of demonstrated need. Unlike the evidence-based economic crisis and the commensurate national and state response, there is no information to suggest that the property tax system is the appropriate venue to provide financial relief. Implementing the proposals would be neither quick nor easy, and likely to invite lengthy litigation, further hampering the desired objective.

Simply, the property tax system cannot provide the urgent short-term financial relief proposed by CATA. Instead, the property tax system can and will provide the appropriate property tax relief. Where possible, the BOE should support efforts by assessors to waive penalties, or permit assessors to accept documents without a "wet" signature.

I urge the BOE to focus on the "doable" by partnering with assessors in managing through the greatest crisis facing property tax administration in 40 years.

Nevertheless, as requested last Thursday, I write to submit feedback in my capacity as Santa Clara County Assessor.

I. Business Personal Property Tax Statement, 571L

Statement of Need:
CATA has stated that Covid-19 is preventing taxpayers and their employees from gathering and assembling the necessary information needed to prepare and timely file business property statements by the May 7th deadline. The annual business property statement is the principal tool for assessors to discover equipment and machinery subject to assessment. To date, there is little evidence and minimal anecdotal accounts to support CATA's claim.

As noted by California tax collectors, the collection of property tax payments on April 10 ranged between 93 and 97 percent. Similarly, the Santa Clara County Assessor's Office continues to receive electronic and even paper submissions of the 571L form. Overall, the number of filings year to date remains over 80 percent with the largest numbers expected during the two weeks leading up to the deadline.

Second only to Los Angeles, Santa Clara County is an important indicator statewide of filings. If business owners were having problems filing statements due to this crisis, they would be contacting our office to inquire about the deadline. To date, inquiries have not materialized to any significance. Even though we are the 6th most populous County, we have the second largest unsecured roll in excess of $35 billion.

In a letter to the Governor, the BOE has recommended that the compliance date for filing Form 571s be extended beyond May 7 (CATA requested to June 15 for all original and amended filings). To date, the Governor has not responded . Since the May 7 deadline will have passed by the time the BOE has re-convened, this recommendation is essentially moot.

As I outlined in the attached letter to the Governor, the CAA is strongly opposed to extending the deadline. There is little evidence to suggest that the coronavirus crisis has created a concurrent crisis for the ability of all companies to timely submit their 571L business property statement. In addition, since the filing date of corporate federal and state income taxes has been extended to July 15, many businesses and their tax managers should have sufficient time to prepare their 571L statements.

The Senior Tax Manager for Apple told me personally last week that Apple will have no problem meeting the May 7th deadline, and any decent software system should provide the ability for business owners to meet the deadline. Most very small business owners do not need software, as they utilize an online tool created by assessors. Most small businesses can e-file the form in less than 15 minutes.

In recognition that a limited number of taxpayers will need a temporary penalty waiver, I recommend that the Governor empower assessors with the same authority granted to tax collectors to waive the late filing penalties.

Revenue Impact:
Assessors are not revenue agents, and revenue impacts should be directed to the appropriate agency, including the BOE staff which routinely projects financial impacts.

Extending the filing deadline for the 571 would have immediate and significant financial consequences for schools, cities and counties, already struggling to manage the demand for expanded services, while facing diminishing resources due to the economic impact of the impending recession. Any blanket, statewide delay of the filing of the business personal property statement to July, would have immediate impacts on anticipated cash flow derived from $3 billion in taxes, payable no later than August 31.

Legal Arguments/Considerations:
The only legal recourse must come from the Governor who has not responded to the BOE request.

Solution:
The BOE can support efforts by local assessors to waive the penalty for late filings submitted until May 31.

Recommendation:
It is recommended that the proposal to extend the filing date of the Business Property Statement (571L) be rejected. Further, that the BOE urge the Governor to grant assessors the authority to waive late filing penalties for Covid-19 related circumstances.

II. County Assessment Appeals Board (AAB) Deadlines (statutes of limitations: 2-year deadline for AAB, 60-day deadline for taxpayer to appeal supplemental assessment notice)

Statement of Need:
The BOE task force conducted a hearing on the extent to which property owners right to file an assessment appeal is impacted by Covid-19.

Supplemental Assessment Notice
CATA stated that due to the Covid-19, the 60-day deadline to file an assessment appeal on supplemental assessments should be extended as taxpayers will not be receiving mailed notices due to the shelter in place order.

There is no evidence to indicate that taxpayers are not receiving supplemental notices, or that dramatic change is needed. The vast majority of supplemental and escape assessments notices are issued to homeowners who receive their mail at their residence. Businesses are not legally prohibited from entering their premises to gather mail and other documents, including utility bills, bank and mortgage statements, etc. They always have the option to request mail be automatically forwarded to an alternate address.

In Santa Clara County, the public health department FAQ specifically addresses the issue of the "Shelter-in--Place" order as it relates to non-essential businesses. Specifically, it states:

> "What if my business is not considered an essential business? Does this Order require that I shut down my business facility? Yes, it does, except for the following "Minimum Basic Operations," which are defined in the following excerpt from the Order:
>
> 1. The minimum necessary activities to maintain and protect the value of the business's inventory and facilities; ensure security, safety, and sanitation; process payroll and employee benefits; provide for the delivery of existing inventory directly to residences or businesses; and related functions.
> 2. The minimum necessary activities to facilitate owners, employees, and contractors of the business being able to continue to work remotely from their residences, and to ensure that the business can deliver its service remotely."

The Revenue and Taxation Code (RTC) provides a sufficient mechanism for relief in limited circumstances. For assessments made outside of the regular roll time period, RTC Section 1605(b)(1) provides that if the taxpayer does not receive the notice of the supplemental assessment or notice of escape assessment at least 15 calendar days before the 60-day deadline to file an assessment appeal application, then the applicant may file their assessment appeal application within 60 days of the date of mailing printed on the tax bill or the postmark on the tax bill, whichever is later, along with an affidavit declaring under penalty of perjury that the notice of assessment was not timely received.

Assessment Appeal Issues

Counsel to and the Clerks of the AAB testified that appeals in March, April and May have been cancelled throughout California out of abundancy of caution to protect taxpayers and staff alike and due to the shelter in place order. Assessors and taxpayers have agreed to numerous hearing postponements. As shelter in place orders continue to hamper AAB operations and jeopardize due process for a taxpayers, we support efforts by the CACEO that provide relief in a manner that limits a backlog of appeals. It is anticipated that appeals in 2021 will skyrocket and accumulated backlog heading into that difficult situation will only further jeopardize due process.

Revenue Impact:

A delay of appeals now will create an uneven flow of appeals and potential refunds (plus interest) as a larger number of appeals than normal will be processed at a later time once appeal hearings resume.

Legal Arguments/Considerations:

The BOE has the legal authority to grant, upon request, the AAB with a minimum of forty days extension on appeals with pending deadlines. As the demonstrated need has far exceeded 40 days the BOE should call on the Governor to support tolling of the statue beyond the Covid-19 emergency declaration and other recommendations from the CACEO.

Solution:
Support tolling of the statue beyond the Covid-19 emergency declaration; authorizing AAB to conduct hearings with non-physical appearance of applicants, their agents, and/or assessor office representatives by means of remote-access technology and allow the clerk to schedule an application based on the urgency of the appeal, and not consider whether or not the clerk, county board, or assessment hearing officer had postponed or continued an appeal to a specific calendar date.

Recommendation:
We oppose any extension of time from issuance of supplemental or escape assessments to file assessment appeals and support the CACEO's proposals to toll deadlines to hear appeals during the Covid-19 pandemic.

III. RTC Section 170, Disaster Relief

Statement of Need:
The BOE task force received a proposal by CATA to adopt a rule permitting taxpayers to file Misfortune and Calamity (M&C) claims under Revenue and Taxation Code Section 170 due to the impact on property values from Covid-19 "Shelter-in-Place" orders. The primary purpose of such a radical change is to provide property tax relief faster than allowed by the California Constitution. The proposal will not provide rapid relief, nor is it lawful. Moreover, it is not consistent with sound appraisal theory, and cannot be implemented without creating extreme chaos with California's property tax system.

Revenue Impact:
It is likely that the increased cost to administer this proposal, and the sudden and dramatic loss of revenue at the apex of the Covid-19 crisis may threaten the state and local government ability to deliver vital public health services.

Legal Arguments/Considerations:
There is significant historical precedent with attempting to apply R&T Code Section 170 for property tax relief as a result of economic harm.

In 2002, I served as President of the CAA after 9/11. The airlines claimed property tax relief as a result of economic harm suffered by 9/11 terrorist attacks.

BOE staff prepared a report concluding that Sec. 170 was not applicable to the events of 9/11 because the statute required physical damage. Nevertheless, BOE adopted Rule 139, allowing relief from a diminution of value resulting from a period of restricted access to the property (aircraft).

CAA filed 538 action against the BOE. Marcy Berkman, Deputy County Counsel in Santa Clara County, litigated the CAA lawsuit.

Assessors argued that State Constitution and related statutes, RTC 170 require that property must be physically damaged in order to qualify for relief. Assessors argued that Section 15, Article 13 of California Constitution, which provides for legislative implementation of calamity relief via Section 170, plainly requires physical damage, not economic damage.

Court on appeal ruled that a property owner must show that the property was physically damaged or destroyed. Court ruled physical damage is distinct from economic damage, and that Rule 139 improperly expanded the definition of damage beyond Section 170.

Solution:
Rely on the federal government to provide short term relief to the business community and rely on existing property tax laws for property tax relief by addressing declines in market value (Proposition 8) as of January 1, 2021.

Recommendation:
We recommend the BOE reject this proposal.

IV. Prop 8, Decline in Value (Lien date)

Statement of Need:
CATA representatives recommend that absent supplemental relief provided by R&T Section 170, the provisions of Section 51(a)2 will not provide timely property tax relief because, under current law, the next valuation (lien) date, under which reductions can be granted, will be January 1, 2021, affecting the 21/22 regular assessment roll for which tax bills will be issued in October 2021.

CATA has made two proposals. First, to change the lien date from January 1st to July 1st, or perhaps some other date. Second, to change Section 402.5 to allow consideration of comparable sales occurring more than 90 days after the valuation date. We strongly oppose both proposals.

First, to abruptly change the lien date would require legislative action to amend RTC Section 2192. In addition, it would throw the administration of California's' property tax system into chaos and confusion for taxpayers, as well as assessors, as the lien date is referenced in scores of RTC code sections and official forms. The last time the lien was changed from March 1st to January 1st, the legislature allowed assessors more than a year to implement the change.

Assessors throughout the state have been preparing their local rolls for 10 months based on the statutory lien date of January 1, 2020. Millions of assessments throughout the state have already been calculated and prepared assuming a January 1, 2020 lien date. It would be impossible to amend these assessments in such a short time period, and deliver 2020 assessment rolls by the end of the June deadline. There are simply insufficient personnel resources available, nor are assessment computer systems, many legacy based, flexible enough to quickly adapt to such a radical change.

This idea risks the timely delivery of assessment rolls throughout California, and would further disrupt operations downstream for Tax Collectors, County Controllers, and Clerks of the Board, forcing changes to multiple noticing requirements, and changes to filing periods for assessment appeals.

In addition, changing the lien date would undermine confidence in the property tax system itself, long valued for its stability and predictability. Undermining that confidence, in a time of crisis, and imperiling the ability for local government to perform constitutional responsibilities, would exacerbate the crisis that we are already enduring. This is the worst time possible to entertain such a destabilizing notion when statewide property tax rolls are set to be delivered by the July 1 deadline.

The second proposal, extending the window of time for consideration of comparable sales, is seriously flawed and does not provide significant, timely relief for the vast majority of taxpayers. Consistent with nationally accepted appraisal practice, the best data available is actual transactions occurring before the date of valuation. Data from transactions after the date of valuation have rapidly diminished merit.

Moreover, a time adjustment would apply to any data not occurring on the date of valuation. A time adjustment of value would likely be greatest the further from the date of valuation. The best, and most plentiful and accessible information and data, would be close to the existing lien date, January 1, 2020. Allowing sales data further past that valuation date would likely not provide reliable relief to taxpayers.

The property tax system is not designed to provide rapid and significant relief, particularly when annual assessment rolls are nearly complete. However, should the Shelter in Place orders persist, creating further economic disruption, assessors statewide will proactively reduce assessments for the next lien date, January 1, 2021, as they did in 2009. At the height of the Great Recession, assessors proactively provided relief to over three million property owners, a clear demonstration of assessors' commitment to protect taxpayers and render accurate assessments.

Today, assessors are better prepared technologically to make proactive reductions, and possess more bandwidth in the appeals system. Market data will be more plentiful, allowing for well documented, auditable assessments.

The system should be allowed to work as designed by Howard Jarvis and Paul Gann, the architects of Proposition 13. As assessors prepare for the largest single year increase in Prop 8 requests, combined with the potential for a negative 2020 CCPI, assessors in 2021 are likely to enroll the steepest one year decline in assessed value in the State's history. This will have catastrophic consequences on property tax revenue and the bonding capacity of public agencies.

Assessors are independently elected and understand the economic crisis caused by Covid-19. As an income property owner, I am sympathetic to the plight of business owners. However, the federal government is providing the near-term response with $2.3 trillion in stimulus aid to business and local governments. The Federal Reserve extended $600 billion in loans through its Main Street Lending Program to small and medium-sized businesses impacted by the coronavirus pandemic. The bank's corporate credit facilities and Term Asset-Backed Securities Loan Facility are now collectively offering up to $850 billion to households, employers, and companies.

With such assistance, the federal government is facilitating its traditional role as the sole entity in the nation that can literally print money. The statewide property tax system is designed to provide longer term relief as it has done historically.

Revenue Impact:
The revenue impact would be severe, hobbling the operations of local governments, schools, and county hospitals, essential to safeguarding our communities. Moreover, the property tax system would be thrown into chaos, confusing property owners as to payment deadlines, valuation dates, appeals filing periods and other unforeseen complications.

Worse, the coronavirus impact would remain for several years, creating controversy as to whether changes implemented due to the crisis would be permanent or sunset, and if so, when.

Legal Arguments/Considerations:
Each of these proposals would require legislative change, delaying implementation. Given there is only two months until completion of the 2020 assessment roll, the proposed changes, if adopted might have to be applied retroactively, further complicating implementation and impacting operations.

Solution:
Rely on the federal government to provide short term relief to the business community and rely on existing property tax laws provide property tax relief by addressing declines in market value as of January 1, 2021.

Recommendation:
We recommend that CATA's proposals be rejected.

V. Wet Signature vs. e-Signature

Statement of Need:
According to the BOE Taskforce taxpayers who are unable to hand deliver or mail forms, such as the 571 or assessment applications, requiring "wet" signatures are unable to submit forms due to the shelter in place order. It is feasible that some taxpayers' timely compliance may be hampered by limitations on the method of submission. However, there is no evidence to support the claim.

Assessors strongly support a variety of means to accept documents without a wet signature. Over the past 25 years, we have worked with the BOE to provide guidance, resources and direction, and opposed efforts that require a "one size fits all" solution.

A county that only receives a few hundred forms a year should not be mandated to utilize a technology solution that ignores the cost/benefit.

In 2002, Santa Clara County created an online filing system for businesses. In the absence of leadership and resources from the BOE, we worked with the CAA to create a statewide system for the filing of business property statements. This involved the creation of a JPA to fund the joint effort, including new statues approving the utilization of this technology. CAA's electronic filing was launched in 2005 with 35 counties participating. In 2020, most business property statements in California are now processed electronically through this system.

While more than two-thirds of all property statements are received electronically, Santa Clara County recently joined other assessors requesting the BOE to grant our office the authority to accept the 571 form without a wet signature; BOE professional staff promptly approved our request.

There is no demonstrated need requiring assessors divert precious limited resources, during this crisis, toward additional means for receiving taxpayer information. Going forward, the BOE should provide the financial and technology resources to continue to further expand the range of technologies available to assessors for accepting information contained in forms.

In 2018, CATA opposed AB 2425, a simple bill allowing assessors to require the electronic transmittal of information and data from taxpayers. AB 2425 was subsequently chaptered.

Revenue Impact:
It is unlikely there would be an impact on revenue, nor a demonstrated barrier to compliance.

Legal Arguments/Considerations:
The BOE has authority to grant assessors, upon request, the ability to receive documents without a wet signature. The BOE does not have the legal authority to dictate what medium the assessor utilizes for accepting documents and forms.

Solution:
The BOE should continue to grant assessors, upon request, the ability to receive documents without wet signature.

Recommendation:
The BOE should provide guidance and resources to support assessors' efforts to increase the medium for transmitting information.

Conclusion:
CATA's proposals to extend deadlines would delay workload completion, compounding the problems in future years in which assessors already anticipate unprecedented surges in workload. Virtually everything in an assessor's office is on an annual 12-month cycle, ending with the close of the assessment roll, which is our constitutional responsibility. Within that 12-month cycle, there are many deadlines, some statutory, some internal. Deadlines usually don't stand alone. They are often connected. Changing one date can impact other deadlines in sequence, creating problems for not only assessors, but the tax collector, controller, clerk of the board, and even public jurisdictions, schools, cities, and special districts that depend on property tax revenue.

Any change in major deadlines simply compresses assessors work within that annual cycle. We simply cannot add a 13th month to handle an overload or a crisis. Deadlines are difficult, but they promote work discipline, consistency and efficiency. It is why assessors were united in their opposition to extending the May 7th statutory deadline to file form 571L.

Finally, we urge the BOE to notify and include BOE staff and members of the general public in future hearings. We were disappointed that the many affected parties, like homeowners, counties, schools and cities were not properly noticed.

As an Assessor, property owner and taxpayer, I am deeply troubled that the BOE would seriously entertain such radical changes which endanger the only predictable source of revenue for schools, county, and state government which all residents are relying upon to safeguard the health and welfare of our community.

Sincerely,

Lawrence E. Stone
Assessor

LES:lcc

Attachments:
Santa Clara County letter to Governor dated April 10, 2020
Santa Clara County Counsel memorandum re: RTC Sec. 170
2002 Santa Clara County letter to BOE re: RTC Sec. 170

cc: Honorable Malia Cohen, Board of Equalization
Honorable Ted Gaines, Board of Equalization
Honorable Betty T. Yee, State Controller
Honorable Don Gaekle, CAA President, Assessor, Stanislaus County
Honorable Phil Ting, Assemblymember
Honorable Adrin Nazarian, Assemblymember
Rob Grossglauser, CAA Advocate
California Assessors' Association
Dr. Jeffrey Smith, County Executive, Santa Clara County

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CONFIDENTIAL MEMORANDUM
ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

TO: Lawrence E. Stone, Assessor

FROM: Robert A. Nakamae, Deputy County Counsel

RE: Revenue and Taxation Code section 170

DATE: April 27, 2020

The law regarding COVID-19 disaster relief falls into three categories: (1) California Constitution, (2) Revenue and Taxation Code section 170, and (3) *Slocum v. State Board of Equalization*.

I. CONSTITUTION

The California Constitution unambiguously provides that "[u]nless otherwise provided by [the California] Constitution or laws of the United States . . . [a]ll property is taxable and shall be assessed at the same percentage of market value." Cal. Const., Art. 13, § 1; see also Cal. Rev. & Tax. Code § 201. State law also provides that property is assessed according to its value on the lien date (i.e., January 1). Cal. Rev. & Tax. Code § 401.3.

Article 13, section 15 of the California Constitution plainly and unambiguously grants to the Legislature power to authorize reassessments of property due to disasters only to the extent that property has been physically damaged:

> The Legislature may authorize local government to provide for the assessment or reassessment of taxable property ***physically*** damaged or destroyed after the lien date to which the assessment or reassessment relates. Cal. Const., Art. 13, § 15 (emphasis added).

Any statute enacted by the legislature which exceeded that constitutional grant of authority, and any statutory interpretation which exceeded that constitutional grant of authority,

would be unconstitutional.

Pursuant to the authority granted by Article 13, Section 15 of the Constitution, Section 170 of the Revenue and Taxation Code ("Section 170") provides that, under certain circumstances, property owners may be eligible for reassessment of damaged or destroyed property prior to the next lien date following the damage to or destruction of the property in question:

> [T]he board of supervisors [of each county in the State] may, by ordinance, provide that every assessee of any taxable property, or any person liable for taxes thereon, whose property was damaged or destroyed without his or her fault, may apply for a reassessment of that property . . . . Cal. Rev. & Tax. Code § 170(a).

The Legislature cannot provide COVID-19 disaster relief by amending the Revenue and Taxation Code. The Legislature's power to tax property in California is constitutionally derived. Therefore, the Legislature has no power to grant an exemption unless the Constitution explicitly provides for it. Article 13, Section 15 of the California Constitution does not authorize the Legislature to pass disaster relief from property taxes. Instead, it grants the Legislature the power to authorize the local board of supervisors to pass an ordinance allowing disaster relief and gives the necessary terms to be included in that ordinance.

II. REVENUE AND TAXATION CODE SECTION 170(a)(1)

A. Section 170 must be read consistently with the Constitution.

Any analysis of Section 170 begins with the California Constitution. Article 13, section 15 of the California Constitution both predates Section 170 and provides the authority for the Legislature to adopt that statute. Article 13, section 15 unambiguously provides that the Legislature's power to authorize reassessments of property due to disasters extends only to property which has been physically damaged:

> The Legislature may authorize local government to provide for the assessment or reassessment of taxable property ***physically*** damaged or destroyed after the lien date to which the assessment or reassessment relates. Cal. Const., Art. 13, § 15 (emphasis added).

Thus, properly considered within California's Constitutional framework, it is manifestly clear that physical damage to property is required to qualify for tax relief under Section 170.

B. Under the canons of statutory construction, Section 170 cannot be read to permit recovery unless property is physically damaged.

First, to read Section 170 as not requiring physical damage requires improperly imputing a meaning to that statute which would violate the Constitution. As the California Supreme Court long ago established, "If the terms of a statute are by fair and reasonable interpretation capable of a meaning consistent with the requirements of the Constitution, the statute will be given that meaning, rather than another in conflict with the Constitution." *Metromedia, Inc. v. City of San Diego* (1982) 32 Cal.3d 180, 186 (internal quotation and citation omitted). Any attempt to read Section 170 as providing tax relief for pure economic losses to property in the absence of physical damage would improperly impute an unconstitutional meaning into Section 170 which would cause that statute to be at odds with the Constitution and in excess of the Constitutional grant of authority to the legislature.

Second, based upon its plain meaning of the statutory language, Section 170 cannot properly be read as encompassing economic losses in value caused by factors other than physical damage**.** It is axiomatic that "[w]here . . . legislative intent is expressed in unambiguous terms, [courts] must treat the statutory language as conclusive" and that, in such cases, "no resort to extrinsic aids is necessary or proper." *Jenkins v. County of Los Angeles* (1999) 74 Cal.App.4th 542, 530 (citing *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1119-20).

Third, another well-established canon of statutory construction is that "[t]he provisions of a statute should be construed in context and harmonized whenever possible, and rendering some words surplusage is to be avoided." *Fig Garden Park No. 2 Ass'n v. Local Agency Formation Comm*. (1984) 162 Cal.App.3d 336, 342. The California Alliance of Tax Advocates' ("CATA") proffered reading of Section 170 would render at least part of the California Constitution's text mere surplusage. If "damage" is read to encompass pure economic losses to property, section 15 of article 13 of the Constitution, which expressly requires *physical* damage to property to qualify for a reassessment, would be rendered meaningless by the very statute it authorizes.

Thus, to read Section 170 as encompassing economic losses in value caused by factors other than physical damage would violate each of these longstanding canons of statutory construction.

III. *SLOCUM*

Slocum v. State Board of Equalization (2005) 134 Cal.App.4th 969 arose from the airlines' attempt to "shoehorn" the 9/11 tragedy into Section 170 and then Property Tax Rule 139. The State Board of Equalization ("SBE") enacted Property Tax Rule 139 to permit midyear reassessment of property suffering loss in value because of diminished access after 9/11. County assessors successfully challenged Property Tax Rule 139 and courts held that Property Tax Rule 139 was invalid.

CATA will focus on the language from the opinion to support a position that physical damage is not required for Section 170(a)(1).

> Thus, in subdivision (a)(1) the term "damage" includes diminution in value due to restricted access to the property, where the restricted access was caused by a major misfortune or calamity which spurred the Governor to proclaim the area to be in a state of disaster. *Id*. at 978.

However, the opinion does not support CATA's position for three reasons.

First, reading Section 170(a)(1) as not requiring physical damage is inconsistent with the California Constitution and renders that section void.

> Section 170 spells out procedures for reassessment where there has been "damage or destruction to the property" brought about by a misfortune or calamity as delineated in section 170, subdivision (a)(1) through (3). The term "damage" as it appears in the lead-in to these subsections can be viewed as ambiguous in that it does not specify the type of damage for which relief is available. However, section 170 implements article XIII, section 15 of the California Constitution. ***The plain language of this constitutional provision permits reassessment where taxable property is "physically damaged or destroyed." Statutes inconsistent with our Constitution are void.*** *Id*. at 977 (citing *Hotel Employees & Restaurant Employees Internat. Union v. Davis* (1999) 21 Cal.4th 585, 602, 88 Cal.Rptr.2d 56, 981 P.2d 990, (emphasis added).)

Second, the court rejected the airlines' attempt to provide relief based on restricted access absent physical damage.

> Moreover, Airlines have asked us to sanction relief based on restricted access in the absence of any physical damage in California. Such relief has never been available under section 170 and its predecessors. Therefore, the judgment in favor of the Assessors is affirmed. *Id*. at 982.

Third, irrespective of the interpretation of "restricted access" Section 170(a)(1) did not apply to 9/11 and does not apply to the COVID-19 pandemic because the Governor did not declare a state of disaster. Section 170(a)(1) requires the Governor to declare a state of disaster. On March 4, 2020 Governor Newsom signed a Proclamation of a State of Emergency but did not declare a state of disaster.

> Moreover, as a specific matter and irrespective of the fit between Rule 139 and section 170, subdivision (a)(1), section 170, subdivision (a)(1) does not apply to the events of September 11, 2001, because the condition precedent of a Governor-declared state of disaster in a particular region or area of the state is absent.
>
> On September 11, 2001, the Governor proclaimed a "State of Emergency" based on the finding "that conditions of extreme peril to the safety of persons and property exist within the State of California." *Id*. at 981.

Slocum provides that the California Constitution controls and requires physical damage. *Slocum* also provides the taxpayer did not qualify for relief under Section 170(a)(1) for restricted access because there was no physical damage. Finally, *Slocum* notes that the taxpayer would not qualify under any interpretation because the Governor declared a state of emergency, not a state of disaster as required by Section 170(a)(1).

IV. CONCLUSION

There is no doubt that California taxpayers are suffering economic loss as a result of the COVID-19 pandemic and resulting shelter in place orders. The County assessors understand this and are sympathetic to the tragic events of 2020. However, any interpretation of or amendment to Section 170 that does not require physical damage is contrary to the express requirements of the California Constitution. Federal, state and local governments have an opportunity to provide economic relief to taxpayers (such as the Paycheck Protection Program, eviction moratorium, stimulus checks, etc.) However, interpreting or amending Section 170 in a way that contradicts the California Constitution is not an appropriate solution.

RAN:elv

CALIFORNIA ASSESSORS' ASSOCIATION

April 16, 2002

Ms. Diane Olson
Regulations Coordinator
California State Board of Equalization
MIC:80
P.O. Box 942879
Sacramento, California 94279-0080

RE: Proposed Property Tax Rule 139

Dear Ms. Olson,

This letter is to present the objections, comments, and observations of the California Assessors' Association, to the proposed adoption by the State Board of Equalization (the "SBE" or this "Board") of Property Tax Rule 139, and to request that this Board withdraw the proposed rule.

1. Background

In the wake of the events of September 11, 2001, members of this Board directed the SBE staff to present options to provide commercial airlines with property tax relief as a result of the economic harm caused by the terrorist attacks. In particular, the SBE staff was directed to examine whether section 170 of the Revenue and Taxation Code[1] allows for calamity reassessments as a result of the economic harm suffered by the airlines caused by the events of September 11.

The SBE staff convened two interested party meetings, at which it gathered input from industry and County representatives. At these interested party meetings, County representatives expressed that, while the terrorist attacks of September 11 served as the catalyst for property tax relief proposals, the measures under consideration would have ramifications far transcending that context. After these meetings, the SBE staff prepared a report, dated December 14, 2001, on proposals for property tax relief related to the September 11 terrorist attacks. Among other things, this report concluded section 170 is inapplicable to the events of September 11 because that statute requires ***physical damage*** to be applicable.

---

[1] Unless otherwise stated, all statutory references are to the Revenue and Taxation Code.

The SBE met in Administrative Session on December 20, 2001, at which time it heard from its staff and other speakers regarding the applicability of section 170 to the events of September 11. The Board also discussed Proposed Property Tax Rule 139. At the conclusion of the Administrative Session, the Board stated its intent to hold a public hearing on proposed Rule 139. Pursuant to notice dated February 8, 2002, the Board set a public hearing on proposed Rule 139 for March 27, 2002, and indicated that written comments should be submitted by that date.

2. **Comments of California Assessors Association**

A. Proposed Property Tax Rule 139 Unconstitutionally Allows Calamity Relief in the Absence of Physical Damage to Property

Proposed Property Tax Rule 139 is constitutionally flawed because, by its terms, it allows calamity reassessments under ordinances adopted pursuant to section 170 in the absence of any physical damage to the property for which the reassessment is sought.

Rule 139 defines "damage or destruction," as that term is used in section 170 of the Code, to include a "diminution in value of . . . property resulting from a period of restricted physical access to the property." Proposed Prop. Tax Rule 139(a). In turn, Rule 139 also defines "periods of restricted physical access" to mean that "access to the property was wholly or partially denied . . . as a result of compliance with a directive, order, law or other exercise of police or regulatory power by the federal, state or local government." Proposed Prop. Tax Rule 139(b).

Stated differently, Rule 139 equates mere "restricted physical access" imposed by a governmental entity with property "damage or destruction" for purposes of section 170. However, as discussed below, the State Constitution and statutes, as well as other controlling precedent, require that property be ***physically*** damaged in order to qualify for calamity reassessments. This Board cannot promulgate a rule, such as proposed Rule 139, that ignores the ***physical damage*** requirement.

Section 15 of Article 13 of the California Constitution, which predates section 170 as it currently exists (and which authorized the Legislature to adopt that statute), makes unambiguous that the power of a county to provide for reassessments of property due to misfortune or calamity applies only to property that has been ***physically*** damaged:

> The Legislature may authorize local government to provide for the assessment or reassessment of taxable property ***physically*** damaged or destroyed after the lien date to which the assessment or reassessment relates.

Cal. Const., Art. 13, § 15 (emphasis added).

Section 170, which Rule 139 purports to construe, provides that, under certain circumstances, property owners may be eligible for reassessment of damaged or destroyed property prior to the next lien date following the damage to or destruction of the property in question:

> [T]he board of supervisors [of each county in the State] may, by ordinance, provide that every assessee of any taxable property, or any person liable for taxes thereon, whose property was damaged or destroyed without his or her fault, may apply for a reassessment of that property . . . .

Cal. Rev. & Tax. Code § 170(a).

The Code goes on to state that counties may adopt resolutions providing for reassessment of property damaged under one or more of the following circumstances:

> (1) A major misfortune or calamity, in an area or region subsequently proclaimed by the Governor to be in a state of disaster, if that property was damaged or destroyed by the major misfortune or calamity that caused the Governor to proclaim the area or region to be in a state of disaster. As used in this paragraph "damage" includes a diminution in the value of property as a result of restricted access to the property where the restricted access was caused by the major misfortune or calamity.
>
> (2) A misfortune or calamity.
>
> (3) A misfortune or calamity that, with respect to a possessory interest in land owned by the state or federal government has caused the permit or other right to enter upon the land to be suspended or restricted. As used in this paragraph, "misfortune or calamity" includes a drought condition such as existed in this state in 1976 and 1977.

Clear from the above constitutional and statutory language is that, in order to make a claim under any ordinance adopted pursuant to section 170, a property owner must show that property was "damaged or destroyed."

Significantly, all who have addressed the matter -- including this Board's staff -- have concluded that section 170 and its precursor statutes apply only in the case of *physical* damage to property. See 55 Ops. Cal. Atty. Gen. 412, 413-14 (1972) ("[I]t is abundantly clear that the Legislature did not regard the word 'damage' as encompassing economic loss except in those instances where economic devaluation directly resulted from restricted access to property."); 58 Ops. Cal. Atty. Gen. 327, 330 ("As noted in the prior opinion of this office, the words 'damaged or destroyed' as

used [in the precursor statutes to section 170] d[o] not encompass economic loss in the absence of physical injury."); State Board of Equal. Letter to Assessors (Jan. 24, 1977) (lack of snow at ski resort does not qualify as a casualty because there was no physical damage). Indeed, this Board's legal staff recently opined that relief under an ordinance adopted pursuant to section 170 requires physical damage to property, and that there is no indication that the Legislature intended section 170 to apply to losses other than those caused by physical damage. See Attachment A to this letter.

Rule 139's apparent attempt to equate a restriction on access to property with *physical* damage finds no support in the law or in common understanding. First, nowhere in the text of the California Constitution or section 170 is there any indication that a restriction on access is sufficient, in itself, to constitute "physical damage" so as to support a calamity reassessment to property. [3] Cf. In re Rojas (1979) 23 Cal. 3d 152, 155 ("In engaging in statutory interpretation we are to accord words their usual, ordinary, and common sense meaning based on the language the Legislature used and the evident purpose for which the statute was adopted."); County of Orange v. Flournoy 42 Cal. App. 3d 908, 912 ("[I]n construing a statute a word should not be given a forced and strained meaning contrary to its common understanding.").

A common sense reading "physical damage" makes clear that term is distinct from economic damages occasioned by a mere loss of access. See Webster's Ninth Colleg. Dictionary (1983), at 887 (defining "physical," among other things, as "having material existence, perceptible especially through the senses and subject to the laws of nature," and as "characterized or produced by the forces and operations of physics"); cf. Assess. Handbk. § 501, at 81 (Jan. 2002) (noting that "physical deterioration" may be "the result of wear and tear either from use or the forces of nature").

Further, it is beyond cavil that the California Legislature acted with full knowledge of the prior administrative interpretation of section 170's predecessor statutes as requiring physical damage. It should therefore be presumed that the Legislature intended that section 170 be read in the same manner. See, e.g., California Motor Express, Ltd. v. State Board of Equal. (1955) 133 Cal. App. 2d 237, 239-40 ("Reenactment of a provision which has a meaning well established by administrative construction is persuasive that the intent was to continue the same construction previously recognized and applied.") (citing cases); Godward v. Board of Trustees (1928) 94 Cal. App. 160, 163 (stating that it should be presumed that the Legislature has knowledge of an administrative agency's "long-standing practical construction" of a statute).

Moreover, in other contexts, the case law of this state has recognized a distinction between "physical damage" on the one hand, and the mere impairment of rights, which might result in economic loss, on the other. Cf. Kazi v. State Farm Fire and Cas. Co. (2001) 24 Cal. 4th 871, 887 (discussing an insurer's duty to defend, and stating that "a loss of 'pure rights in

property' is not physical damage or injury to tangible property that triggers a duty to defend under a comprehensive liability insurance policy that provides coverage only for such losses"); Aas v. Superior Court of San Diego County (2000) 24 Cal. 4th 627, 636 ("In actions for negligence, a manufacturer's liability is limited to damages for *physical injuries*; no recovery is allowed for economic loss alone.") (emphasis added; citation omitted).

Assuming, for the sake of argument, that section 170 provided for calamity reassessment in the absence of *physical* damage -- an assumption without support in the record -- the statute would be void as inconsistent with the State Constitution, which explicitly requires ***physical damage***. Hotel Employees and Restaurant Employees Internat. Union v. Davis (1999) 21 Cal. 4th 585, 602. Such a reading of section 170 should be avoided. Metromedia, Inc. v. City of San Diego (1982) 32 Cal. 3d 180 ("If the terms of a statute are by fair and reasonable interpretation capable of a meaning consistent with the requirements of the Constitution, the statute will be given that meaning, rather than another one in conflict with the Constitution.") (internal quotation and citation omitted).

B. Proposed Rule 139 Improperly Expands the Definition of "Damage" Beyond The Parameters Specifically Stated by the Legislature

Section 170(a)(1) states that *for the purposes of that paragraph*, "'damage' includes a diminution in the value of property as a result of restricted access to the property . . . ." That paragraph also provides, however, that, in order to be eligible for calamity reassessment on the basis of a restriction on access, the property must be "in an area or region subsequently proclaimed by the Governor to be in a state of disaster . . . ." Similarly, section 170(a)(3) provides for calamity reassessments where a misfortune or calamity has resulted in the suspension of or restriction on entry "with respect to a possessory interest in land owned by the state or federal government."

Proposed Rule 139, if adopted, would have the effect of defining "damage" to include "restricted physical access" for *all purposes* under section 170, notwithstanding the Legislature's clear mandate that restricted access may constitute "damage" only in limited circumstances (none of which are applicable to the events of September 11, 2001).[2] This Board's purported expansion of the term "damage" to include "restricted physical access" even in the absence of a Governor-declared state of disaster and with respect to property other than possessory interests in

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[2] Section 170(a)(1) of the Code provides that "damage" includes a diminution in value to property due to restricted access where the restriction on access is caused by a major misfortune or calamity in an area declared by the Governor to be in a state of disaster. However, given the requirement for a declared state of disaster, it seems clear that reassessment relief under section 170(a)(1) is predicated on the existence of physical damage causing the restricted access.

land owned by the state or federal government, clearly violates the well recognized rule of statutory construction that where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed. People v. Pieters (1991) 52 Cal. 3d 894, 905; see also 58 Cal. Jur. 3d (1980) Statutes, § 115, at 503 ("Under the maxim *expressio unius est exclusio alterius*, which applies only in the event of statutory ambiguity or uncertainty, the enumeration of acts, things, or persons as coming within the operation or exception of a statute will preclude the inclusion by implication in the class covered or excepted of other acts, things, or persons.").

A common example serves to illustrate the overbroad scope of proposed Rule 139. Under the proposed rule, a property owner whose restaurant has been shut down by a local health department (i.e., in compliance with a local government order) could apply for a calamity reassessment, arguing that his property has been "damaged" within the meaning of section 170 (as modified by Rule 139) by the health department's actions. There exists no indication that the State Constitution (or the Legislature) contemplated calamity reassessments under circumstances involving the exercise of police power, except in a Governor-declared disaster area. Yet, proposed Rule 139, by its literal terms, arguably allows a claim when a local government exercises its police powers in circumstances such as those set forth above.

It is axiomatic that an administrative agency's rule making power is limited by the scope of the statutes that the agency is empowered to construe. Simply put, an administrative agency may not adopt a regulation that alters or amends a statute, or that enlarges or impairs its scope. See Morris v. Williams (1967) 67 Cal. 2d 733, 748; Welsh v. Gnaizda (1976) 58 Cal. App. 3d 119, 124-25. Here, through proposed Rule 139, this Board proposes to expand the scope of section 170 and the county ordinances adopted thereunder by broadening the meaning of the term "damage" to include restricted access beyond those cases explicitly provided for by the Legislature under the authority provided by the State Constitution. Indeed, proposed Rule 139 purports to require local assessors to apply a definition of "damage" clearly proscribed by state law. For this reason, the proposed rule should be withdrawn.

C. Proposed Rule 139 Intrudes Upon the Authority of County Governments and the State Legislature

"A county or city may make and enforce within its limits all local, police, sanitary and other ordinances and regulations not in conflict with general laws." Cal. Const., Art. IX, § 7. Article 15 of the California Constitution, and the State Legislature (through section 170), clearly vests in the counties the power to allow and implement calamity reassessments.

This constitutional and statutory delegation of authority vests counties with broad discretion to determine the substance of their respective calamity claims ordinances, and, in areas where

counties are empowered to exercise police power, such power is as broad as that exercised

by the Legislature itself. See Birkenfeld v. Berkeley (1976) 17 Cal. 3d 129, 140 ("The Constitution itself confers upon all cities and counties the power to "make and enforce within [their] limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (Cal. Const., art. XI, § 7.) A city's police power under this provision can be applied only within its own territory and is subject to displacement by general state law but otherwise is as broad as the police power exercisable by the Legislature itself.") (citations omitted). It follows that only the State Legislature, the entity that has vested the counties with authority to adopt and implement calamity ordinances, has power to limit or modify the county's exercise of their ordinance power in this area.

Consequently, this Board's attempt, through proposed Rule 139, to define the meaning and determine the scope of county calamity claim ordinances is unlawful.

3. **Conclusion**

For the reasons discussed above, as well as for those stated by the SBE staff in its report of December 14, 2001, the California Assessors Association requests that proposed Rule 139 be withdrawn.

Sincerely,

Lawrence E. Stone
President

From: Marty Dakessian
To: Blake, Sue
Subject: [External]Legislative authority
Date: Wednesday, April 29, 2020 4:05:21 PM

Sue -- Here is some case law regarding the broad scope of legislative authority. -- Marty

> 'Unlike the Federal Constitution, which is a grant of power to Congress, the California Constitution is a limitation or restriction on the powers of the Legislature.' [Citations.] Thus, 'the entire law-making authority of the state, except the people's right of initiative and referendum, is vested in the Legislature, and that body may exercise any and all legislative powers which are not expressly or by necessary implication denied to it by the Constitution.' [Citations.] ***'[W]e do not look to the Constitution to determine whether the Legislature is authorized to do an act, but only to see if it is prohibited.'*** [Citations.]
>
> "The above stated principle 'is of particular importance in the field of taxation, in which the Legislature is generally supreme.' [Citations.] 'Generally the Legislature is supreme in the field of taxation, and the provisions on taxation in the state Constitution are a limitation on the power of the Legislature rather than a grant to it.' [Citation.] ***'In other words, the Legislature's authority to impose taxes and regulate the collection thereof exists unless it has been expressly eliminated by the Constitution.' "***
>
> *Howard Jarvis Taxpayers' Assn. v. Fresno Metropolitan Projects Authority* (1995) 40 Cal.App.4th 1359, 1374–1375 (emphasis added).

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Assessor/Recorder Department

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April 28, 2020

Honorable Antonio Vazquez, Chair
Honorable Mike Schaefer, Vice Chair
California State Board of Equalization
Sacramento, California

Sent via email

Subject: Responses to Working Group Meetings on April 23, 2020 (Teleconference)

Dear Chair Vazquez and Vice Chair Schaefer:

As requested, I am responding to select working group meetings held on April 23, 2020, although I listened in on all working groups.

1. Business Personal Property Tax Statements, 571 L

My office encourages all business owners to file business property statements that are complete and timely, by the May 7 deadline. If they are not in a position to file a complete statement, we encourage them to file with whatever information they have available to them, but do so by the May 7 deadline. We explain to them the Assessor has no discretion when it comes to the application of the 10% late file penalty, we are required by statute to apply it, and they would need to go through an assessment appeal process to be considered for relief from the penalty. We also encourage them to amend their statements (if needed) by May 31, the last day to amend. In a typical year, we have 50% of our property statements returned by April 1 and the remainder by May 7. As of the date of this letter, only 25% of business owners have returned their property statements. A reasonable option would be to provide Assessor's authority/discretion to waive penalties for statements filed after the May 7 due date.

2. County Assessment Appeals Boards Deadlines

My office has lived with the current statutory deadline up to this point. We were able to get through the Great Recession when the Prop 8 count - at its peak - included more than half of our 143,000 parcels. Should Covid-19 impact next year's assessed values and/or should the Split Roll Initiative pass in November, the number of assessment appeals will likely increase. I would be open to participating in discussions to include legislative changes.

3. Revenue & Taxation Code Section 170, Disaster Relief

I listened in on this discussion topic and have no comment at this time.

4. Prop 8, Decline in Value (Lien Date)

I listened in on this discussion topic and have no comment at this time.

5. Wet vs. E-Signature

Our office would be supportive of alternatives to wet signatures.

Sincerely,

MARC C TONNESEN
Assessor/Recorder

Cc: Honorable Don Gaekle, President, Calif. Assessors' Association, Stanislaus County Assessor
Dan Wolk, Deputy County Counsel
Glenn Zook, Assistant Assessor/Recorder
Haddon Zia, Chief Appraiser

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douglasmo@
eversheds-sutherland.com

April 30, 2020

Via E-Mail (Sue.Blake@boe.ca.gov)

Sue Blake
Senior Tax Counsel
State Board of Equalization
455 Golden Gate Ave., Suite 10500
San Francisco, CA 94102

Re: SBE Property Tax Relief Tax Force - Subgroup 3 (R&T Code Section 170)

Dear Ms. Blake,

Thank you for your efforts with this subgroup.

We believe that Section 170 of the Revenue and Taxation Code is applicable to COVID-19 related damage if the property owner suffers restricted access to his or her property.

As outlined in Section 170(a)(1), interim valuation relief may be available to taxpayers if, *inter alia*:

1. There is a major misfortune or calamity, in an area or region subsequently proclaimed by the Governor to be in a state of disaster.

2. The subject property is damaged or destroyed by the major misfortune or calamity without the fault of the taxpayer. For purposes of this subsection, "damage" includes "a diminution in the value of property as a result of restricted access to the property where that restricted access was caused by the major misfortune or calamity."

Governor Newsom's Proclamation of a State of Emergency on March 4, 2020, covering the entire State of California, satisfies the first criteria recited above.

As to the second criteria, we are aware that the California Constitution, Article XIII, Section 15, uses the words "physical damage." It is within the purview of the Legislature to give meaning to these words, and such meaning is cloaked with a strong presumption of constitutionality. In the context of Section 170(a)(1), the Legislature has determined that "restricted access" constitutes a form of physical damage.

We note that the constitutionality of Section 170(a)(1) has not been called into question since its enactment in 1979. If any assessor believes that Section 170(a)(1), and in particular its adoption of "restricted access" as a form of physical damage is unconstitutional, his or her sole remedy is to bring a declaratory relief action under Section 1060 of the Code of Civil Procedure. Rev. & Tax. Code § 538. We are not aware that any such action has been brought. Moreover, in *Slocum v. State Board of Equalization*, 134 Cal.App.4th 969 (2005), the Court of Appeal strongly suggested that the Legislature's interpretation was a permissible one—characterizing restricted access as a form of "indirect physical damage." We agree with the Court of Appeal's conclusion that "restricted access" is a form of physical damage.

We understand that some assessors have questioned whether an epidemic is the type of disaster that can give rise to a claim under Section 170(a)(1). But a "disaster," under Section 8680.3 of the California Government Code, is defined as a "fire, flood, storm, tidal wave, earthquake, terrorism, ***epidemic***, or other similar public calamity that the Governor determines presents a threat to public safety." (emphasis added). Government Code Section 8558(b) is to the same effect. It defines a state of emergency to mean the "existence of condition of disaster or of extreme peril to the safety of persons and property within the state caused by conditions such as air pollution, fire, flood, storm, ***epidemic***, riot, drought, cyberterrorism, sudden and severe energy shortage . . . ." (emphasis added). By making Section 170(a)(1) relief contingent on the existence of a "disaster" and by explicitly defining an "epidemic" to be a form of disaster, the Legislature has evinced a clear intent to include damage caused by an epidemic within the scope of Section 170(a)(1). Contrary to the arguments being made by the assessors, the Legislature did not except "epidemics" from the types of "disasters" covered by the statute.

Respectfully submitted,

Douglas Mo