

Memorandum

To: Honorable Antonio Vazquez, Chairman
Honorable Mike Shaefer, Vice Chairman
Honorable Ted Gaines, First District
Honorable Malia Cohen, Second District
Deputy Controller, Yvette Stowers

Date: May 22, 2020

From: Henry D. Nanjo /s/Henry D. Nanjo
Chief Counsel

Note: Attorney-Client Privilege waived by the
Board on 06/09/2020. /s/HDN

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Subject: *Disaster Relief for COVID-19 Under Revenue & Taxation Code section 170*

At the May 13, 2020 Board Meeting, the Board requested a Legal Opinion addressing Revenue and Taxation Code¹ section 170 and its definition of “damage”.²

As discussed herein, section 170 does not allow for its disaster relief provisions to apply to solely economic damage. The relevant legal framework is clear; the constitution and section 170 require physical damage. Further, the Board has attempted to expand the plain language of the constitution and section 170 in the past to extend its relief provisions to restricted access caused by misfortune or calamity without physical damage by promulgating Property Tax Rule 139. Property Tax Rule 139 was challenged and struck down by the Appellate Court.

If the Board were again to apply such an expansive view of section 170 to the economic damage caused by the novel coronavirus (COVID-19) pandemic, it is highly unlikely to withstand legal challenge. Even if the Board were to hypothetically take such an over-expansive interpretation of section 170, that position would not override the assessors’ individual obligation to administer the law in a legally supportable manner. Ultimately, such a hypothetical action would only result in the Board taking an unsupported, challengeable, high-risk legal interpretation, with no certainty that such a position would be implemented across the state.

¹ All further statutory references are to the Revenue and Taxation Code unless otherwise indicated.

² Where relevant, this memo will also address or contextualize some of the comments made by interested parties at the May 13, 2020, Board Meeting in support of the Board interpreting section 170 to authorize immediate mid-year relief for purely economic damages in response to the novel coronavirus pandemic.

Issue

Section 170 provides property tax relief for property that has been physically damaged as a result of a misfortune or calamity. Because of the Coronavirus pandemic, the Governor issued a “stay-at-home” order and declared a state of emergency requiring the closure of non-essential businesses that is expected to cause diminutions of value to real property as a result of economic losses but not as a result of physical damage to real property. Does section 170 allow assessors to provide property tax relief due to a diminution of value in real property that occurs as a result of the response to COVID-19, but not as a result of physical damage to the property?

Law and Analysis

Background

Article XIII, section 1 of the California Constitution provides that all property is taxable unless otherwise provided by the Constitution or federal law. (See Rev. & Tax. Code, § 401.) Article XIII A, section 2 of the California Constitution provides that property will be reassessed only upon a change in ownership or new construction. Section 401.13 provides “that the assessor shall assess all property subject to general taxation on the lien date as provided in Articles XIII and XIII A of the Constitution and any legislative authorization thereunder.” The lien date is 12:01 am, the first day of January preceding the fiscal year for which the taxes are levied. (Rev. & Tax. Code, § 2192.) Therefore, property may not be assessed on a date other than January 1 unless specifically authorized.

Article XIII, section 15 was passed in 1974 and provides that “[t]he 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.” (Emphasis added.)

The Legislature enacted section 170 which allows County Boards of Supervisors to provide, by ordinance,³ that property owners may apply for reassessment of property damaged or destroyed without his or her fault, and 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 land owned by the state or federal government, has caused the permit or other right to

³ Each of California’s 58 counties has enacted an ordinance to implement section 170.

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, subd. (a)(1)-(3).)

An application for reassessment may be filed within 12 months of the misfortune or calamity, or within the time specified in the County ordinance.⁴ (Rev. & Tax. Code, § 170, subd. (a).) The assessor shall then reappraise the property by calculating the value of the land, improvement, and personalty immediately before and after the damage or destruction. (Rev. & Tax. Code § 170, subd. (b).) If the difference is \$10,000 or more, the assessor must compute the percentage reduction in the land, improvements, and personalty values and reduce the pre-damage assessed value by that percentage. (*Ibid.*) The amount of tax, based on the reassessed value, for which the taxpayer is responsible is calculated pursuant to section 170, subdivision (e) and any refunds are granted pursuant to section 170, subdivision (f).

Section 170, subdivisions (g) and (h) describe what happens to the value of the damaged property as it is reconstructed, restored, or repaired. When property has been partially reconstructed, restored, or repaired, on any subsequent lien date, the taxable value is increased to reflect that reconstruction, restoration or repair.⁵ (Rev. & Tax. Code, § 170, subd. (g).) When the damaged property is fully repaired, restored, or reconstructed, its taxable value is increased to its new taxable value on the date of completion of that repair, restoration, or reconstruction. (Rev. & Tax. Code, § 170, subd. (h).) Section 70, subdivision (c) ensures that reconstruction, restoration, or repair of property damaged or destroyed by misfortune or calamity is not reassessed as new construction.

Therefore, section 70, subdivision (c), in conjunction with section 170, ensures that any repair or reconstruction will not cause the county assessor to enroll a new base year value for the new construction to the extent that such repair or reconstruction is due to the damage or destruction caused by the misfortune or calamity. (Rev. & Tax. Code, §§ 70, subd. (c).) However, any reconstruction of real property that is not substantially equivalent to the damaged or destroyed property, shall be deemed to be new construction and that portion of the property shall have a new base year value determined. (Rev. & Tax. Code, §§ 70, subd. (c). & 71.)

Definition of “Damage”

“Damage” is defined for purposes of section 170, subdivision (a)(1) to include a diminution in the value of property that results from restricted access if that restricted access was caused by major misfortune or calamity. Section 170 does not explicitly require that misfortune or calamity cause physical damage to property. However, the *Slocum v. State Board of Equalization* (2005)

⁴ A county ordinance may also provide that an assessor initiate a reassessment.

⁵ This partial increase is determined by multiplying the difference between its factored base year value immediately before the calamity and its assessed value in its damaged condition by the percentage of the repair, reconstruction, or restoration completed on that lien date. (Rev. & Tax. Code, § 170, subd. (g).)

134 Cal.App.4th 969 (*Slocum*) case, made clear that physical damage is required for section 170 relief.

In *Slocum*, the Court considered a property tax regulation (Property Tax Rule⁶ 139) promulgated by the Board of Equalization allowing relief for misfortune or calamity as a result of the events of September 11, 2001. Similar to the present coronavirus pandemic, the terrorist attacks on September 11, 2001 shut down businesses, particularly airlines and airport concessionaires resulting in massive economic losses. Rule 139 permitted reassessment of property pursuant to section 170 by interpreting the word “damage” to include a diminution of value to property resulting from a period of restricted physical access to the property without the need for any physical damage to the property. The Court held that Rule 139 was inconsistent with section 170(a)(1), (a)(2), and (a)(3) because section 170 and the Constitution require physical damage, while Rule 139 did not. It concluded, “... 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.” (*Slocum, supra*, 134 Cal.App.4th at p. 981, original italics.) As a result of the *Slocum* case, the Board was required to repeal Rule 139.⁷

In holding that Rule 139 was invalid, the Court clearly articulated the requirement that both section 170 and the Constitution require physical damage.⁸ Therefore, allowing restricted access without physical damage to be eligible for relief under section 170 would be a direct contradiction to the court’s ruling, as that is precisely what the court held was fatal to Rule 139. Furthermore, since the Court invalidated a regulation as contradictory to statute, any attempt by the Board to achieve a similar result by mere administrative guidance would carry little or no weight.

In reaching its conclusion, the Court reviewed section 170, including the Constitutional provision, article XIII, section 15, that authorized its passage. It stated:

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.”*^[Fn omitted]

(*Slocum, supra*, 134 Cal.App.4th at p. 977, italics added.)

⁶ All references to “Property Tax Rules” or “Rules” are to regulations promulgated under title 18 of the California Code of Regulations.

⁷ See Letter to Assessors No. 2006/031.

⁸ The Court did not rule that section 170, subdivisions (a)(1) and (a)(3) were unconstitutional because that question was not before it. However, in footnote 6, the Court recognized that to the extent those subdivisions did not require physical damage, a Constitutional issue may arise.

As part of a Constitutional revision in 1974, article XIII section 15 replaced, without substantive effect, article XIII, section 2.8, and section 2.8 was repealed. Article XIII, section 15 of the Constitution explicitly requires physical damage. As mentioned above, it states:

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, italics added.)

Appellants in the case argued that because section 2.8 of article XIII had not included the word “physically” and the Constitutional revisions were not substantive in nature, article XIII, section 15 did not require physical damage in spite of its plain language. The Court rejected this argument and held that physical damage was *always* a requirement of disaster relief, but since article XIII, section 2.8 did not explicitly state so, the revisers of the Constitution added the word “physically” to the new article XIII, section 15 as a *clarification* and not as an additional requirement.

We are aware that the Constitutional Revision Task Force on Article XIII^[Fn omitted] 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. [citation.] 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 [citation], *we conclude that inclusion 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.*⁹ 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.

(*Slocum, supra*, 134 Cal.App.4th at pp. 977-978, italics added.)

Since section 170 implements article XIII, section 15 of the Constitution, section 170 cannot be interpreted to exclude physical damage. Neither did the Legislature, in drafting section 170, intend to exclude physical damage as a requirement. The Court went on to explain that looking at the whole of the statute and its purpose, the Legislature intended qualifying damage to be physical damage.

⁹ Some commenters proffered arguments indicating that the *Slocum* Court equivocated on the constitutional requirement of physical damage, which is clearly disproven by the plain language chosen by the Court.

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.) Property cannot be restored, repaired or reconstructed unless it is physically damaged.¹⁰

(*Slocum, supra*, 134 Cal.App.4th at p. 981, original italics, underline added.)

The Court looked at each of the three qualifying causes for application of section 170 and determined that section 170, subdivision (a)(2) required direct physical damage. With regard to subdivisions (a)(1) and (a)(3), it stated:

Nonetheless, we recognize that 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.*

(*Slocum, supra*, 134 Cal.App.4th at p. 981, emphases added.)

Therefore, each of section 170’s three qualifying causes requires some type of physical damage, either *direct physical* damage (subdivision (a)(2)) or *indirect physical* damage (subdivisions (a)(1) and (a)(3)). Neither the Court nor the Legislature defined “restricted access” as a *type of* physical damage that qualifies for section 170 relief. Rather, the Legislature intended and the Court interpreted section 170 as providing relief only when the restricted access was *caused by* physical damage, which can include indirect physical damage. For this reason, the Court concluded that a Governor-declared state of disaster is a necessary but not sufficient condition that must be satisfied for the application of section 170, subdivision (a)(1):

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,

¹⁰ Commenters stated that there should be no debate that the Legislature has the authority to enact legislation and define Constitutional terms, and therefore section 170 should be administered to not require physical damage because that is how the Legislature drafted section 170, particularly subdivision (a)(1). However, the *Slocum* court clearly stated that the Legislature’s intent was to *require* physical damage.

2001, because the condition precedent of a Governor-declared state of disaster in a particular region or area of the state is absent.¹¹

(*Slocum*, *supra*, 134 Cal.App.4th at p. 981, italics added.)

That physical damage is a prerequisite for relief under section 170 is consistent with the opinion of the Attorney General published in 1972. The 1972 Attorney General's opinion analyzed section 155.1, a predecessor statute to section 170 which included the definition of "damage" found in section 170, subdivision (a)(1). The Attorney General was presented with the following question:

Does Revenue and Taxation Code section 155.1 allow for reassessment of property in a disaster area which is not physically damaged and does not suffer impaired access but experiences economic devaluation by reason of its location therein?

(55 Ops.Cal.Atty.Gen. 412 (1972).)

He concluded:

Revenue and Taxation Code section 155.1 does not apply to such economic losses suffered by property in a disaster area; therefore, no reassessment of such property is permitted thereunder.

(*Ibid.*)

In 1975, the Attorney General opined on section 155.13, a predecessor statute to section 170, subdivision (a)(2), that also defined "damage" as including diminution of value of property caused by restricted access. He wrote that:

It should be noted that section 155.13 requires that the "misfortune or calamity" result in "damaged or destroyed" property which came about "without ... [the owners's] fault". *As noted in a prior opinion of this office, the words, "damaged or destroyed" as used in the comparably worded section 155.1 of the Revenue and Taxation Code does not encompass economic [sic] loss in the absence of physical injury.* [Citation.]

(55 Ops.Cal.Atty.Gen. 327, italics added.)

In spite of this clear language, Appellants in the *Slocum* case argued that the Attorney General opinions supported the fact that section 170 applies to economic loss caused by restricted

¹¹ Therefore, some commenters' argument that the Court expressly stated that when a governor has declared a state of disaster, physical damage is not necessary is incorrect.

physical access to property. The *Slocum* Court dismissed those arguments as “convoluted” and “wrong”. (*Slocum*, *supra*, 134 Cal.App.4th at p. 979.)

Prior to the promulgation of Rule 139, the Board’s longstanding position had also been that physical damage was a prerequisite to receiving disaster relief under section 170.¹² Property Tax Annotation¹³ 360.0045 annotates legal counsel opinions from 1976 and 1984 and states:

Stolen Property. Revenue and Taxation Code section 170 is not applicable to property which has been stolen but not recovered. For reassessment of property to occur, *section 170 requires that the property be physically damaged or destroyed by a calamity.*

(Italics added.)

As well, in 1992, legal counsel opined that section 170 may not be used to provide assessment relief to fishing vessels during a salmon drought. The opinion was annotated as Annotation 360.0016, which states in relevant part:

Documented Vessels. The provisions of Revenue and Taxation Code section 170 do not provide authority for considering a salmon drought a disaster entitling owners of commercial fishing vessels to assessment relief thereunder. *Section 170 contemplates assessment relief because of damage to property caused by a major misfortune or calamity, not economic loss unrelated to physical damage or destruction.*

(Italics added.)

It has been suggested that the COVID-19 pandemic has caused physical damage.¹⁴ If that is the case, and all the other conditions for section 170 relief are met, the value of the property in its damaged state would be the taxable value until the property is physically restored, repaired or reconstructed (Rev. & Tax. Code, § 170, subds. (g). & (h)). In other words, disaster relief would be available for the period of time that the property remains physically damaged, not the period of time economic losses are sustained.

¹² We also note that in 2001, at the request of Board Members, Chief Counsel opined that disaster relief is available under section 170 only if property has suffered actual physical damage and thus no relief was available for declines in property value that occurred as a result of the terrorist attacks on 9/11.

¹³ Property Tax Annotations are summaries of the conclusions reached in selected legal rulings of Board Legal counsel published in the Board’s Property Tax Law Guide and on the Board’s website. See Cal. Code Regs., tit. 18, § 5700 for more information regarding annotations.

¹⁴ Some commenters have suggested the pandemic has caused physical damage to real property by way of contamination. We, of course, cannot express an opinion as to whether or not the coronavirus has caused physical damage to any particular property. We do note, however, the fact that a business has suffered economic damage or loss, does not necessarily mean the property has also been physically damaged.

Administration of Section 170 by the Assessors and the Board

Section 538 requires assessors to bring an action for declaratory relief against the Board prior to making an assessment if the assessor believes a statute is unconstitutional. If an Assessor does not do so, he is potentially subject to the awarding of attorney's fees against him pursuant to section 5152. A prerequisite, however, to the awarding of attorney's fees is that the assessor have a subjective belief that a specific provision of the state constitution, the property tax statutes, or a Board of Equalization rule or regulation was unconstitutional or invalid. (See *SSL Landlord, LLC v. County of San Mateo* (2019) 35 Cal.App.5th 262 [attorney's fees award inappropriate where no evidence that Assessor's position based on a belief that a law or regulation was unconstitutional or invalid], *Land Partners, LLC v. County of Orange* (2018) 19 Cal.App.5th 741 [care must be taken to distinguish between a situation in which an assessor believes a provision to be unconstitutional or invalid, and one where an assessor misinterprets or misapplies a provision].) Here, all authority is clear that section 170 requires physical damage. Therefore, an assessor administering section 170 in that manner is properly administering the law, not refusing to administer the law because he believes it is unconstitutional.¹⁵

In determining whether or not the Board should publish guidance authorizing mid-year relief under section 170, some have suggested that it is not for the Board to decide whether the statute is constitutional or not. Instead, they argue the Board must administer section 170 as written, implying that the statute authorizes section 170 relief when there is no physical damage to property. This argument, however, ignores the fact that, as explained above, section 170, as written, requires physical damage. If the Board were to issue interpretation guidance, a rule or regulation that advised against the physical damage requirement of section 170, the Assessors would not be obligated to follow such guidance and may be required by section 538 to challenge it. Therefore, the Board must administer section 170 to require physical damage.

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¹⁵ For that reason, an assessor need not first bring a section 538 action against the Board prior to administering section 170 to require physical damage.