



MEMORANDUM

Date: May 28, 2020

To: Indhubala Srinivasan
State Board of Equalization

From: Charles J. Moll III
McDermott Will & Emery LLP

Cc: Henry Nanjo; Brenda Fleming

Re: Analysis of Revenue and Taxation Code Section 170

I. SECTION 170 RELIEF

Revenue and Taxation Code Section 170 is intended to allow counties to provide immediate property tax relief for diminution in value caused by misfortune and calamities. It is well established that the language in a statute should be interpreted liberally to fulfill the intended purpose of the statute to grant relief. *Select Base Materials, Inc. v. Board of Equalization*, 51 Cal. 2d 640 (1959); *County of Alameda v. Kuchel*, 32 Cal. 2d 193, 199 (1948).

Section 170 contains three subdivisions providing for relief. Of these, Section 170(a)(2) is the broadest. It simply provides for relief where the damage is caused by “misfortune or calamity.” This subdivision has been construed to require direct physical damage to the property. *Slocum v. State Board of Equalization*, 134 Cal. App. 4th 969 (Cal. Ct. App. 2005).

There are, however, two narrow subdivisions providing relief in limited, specific, circumstances. The more relevant here of those two subdivisions is Section 170(a)(1). This subdivision applies in the limited circumstance of properties damaged by a “major misfortune or calamity, in an area or region subsequently proclaimed by the Governor to be in a state of disaster.” In contrast to the general rule in subdivision (a)(2), for this subdivision “damage includes a diminution in the value of the property as a result of restricted access to the property....” Thus, rather than requiring actual physical damage to the affected property, in the narrow circumstance of a Governor-declared proclamation, the plain language of this subdivision clearly defines “damage” to include “restricted access”. Nowhere in the language of this subdivision is actual physical damage required. Indeed, if it were, then the broad subdivision (a)(2) would already apply, and subdivision (a)(1) would be rendered superfluous. To construe this subdivision to also require physical damage would require adding words that are not in the statute, which is impermissible as a general rule of statutory construction.¹

¹ The third subdivision is limited to certain possessory interests, and also could apply to those properties where the right to enter the property was suspended or restricted due to the COVID-19 pandemic and shelter-in-place rules.

II. SLOCUM

In our prior discussions, some have claimed that the court in the *Slocum* case cited above held that the entirety of Section 170 does not apply unless there is direct physical damage to property. However, as mentioned above, that holding applied specifically to the general subdivision of 170(a)(2). For subdivision 170(a)(1) [and Subdivision 170 (a)(3)], the Court’s statements in that case are explicitly to the contrary:

“Direct physical damage is a requirement of Section 170, subdivision (a)(2) but not of subdivision (a)(1) and (3).” 134 Cal. App. 4th at 978. Rather, “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....” *Id.* The Court observed further “the Legislature provided for reassessment due to restricted access in Section 170, subdivision (a)(1) and (3), but not in subdivision (a)(2).” *Id.* at 978-979. Thus, while the Court held that physical damage is required for the general rule in subdivision (a)(2) – it was not required for the different, narrower, subdivisions that are applicable to the COVID-19 pandemic but which were not applicable in that case.

The Court reached this conclusion, even after delving into the Constitutional and legislative history and prior attorney general opinions that some suggest compel a different outcome.

III. PHYSICAL DAMAGE HAS OCCURRED

Even if physical damage is required, that is satisfied for purposes of §170. There should be no dispute that a property that suffers from contamination is physically damaged.

Whether property is contaminated by asbestos, radioactivity, or a virus (which is a physical thing), physical damage has occurred. Indeed, scientists and health authorities confirm this. *See, e.g.,* County of Santa Barbara Health Order No. 2020-9 (“This order is issued because ... the virus physically is causing property loss or damage due to its proclivity to attach to surfaces for prolonged periods of time.”).

IV. IS SECTION 170(a)(1) CONSTITUTIONAL?

The answer to this question certainly should be yes. The Legislature has the authority to set alternative valuation dates, and valuation methods. It can do so in a separate section, or could do so, as was already done, in §170.

But in any event – this is not the proper venue to challenge the constitutionality of the long-standing statute, for assessors and administrative agencies lack the authority to declare an enacted statute unconstitutional, or to decline to follow the statute, particularly on the grounds that it is unconstitutional. Cal. Const. Art. III Section 3.5. Only a court can declare a statute unconstitutional. Assessors and administrative agencies must comply with the statute as enacted.