No. 336221 and 336239

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

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CITY OF SPOKANE, a municipal corporation,

*Respondents*,

v.

VICKI HORTON, Spokane County Assessor, ROB CHASE, Spokane County Treasurer,

*Appellants*,

and

THE STATE OF WASHINGTON, by and through the Department of Revenue,

*Interested Party.*

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# SUPPLEMENTAL BRIEF OF APPELLANTS

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# I. ARGUMENT

## A. Introduction

The Court has requested further briefing on two questions. The first is whether *Town of Tekoa v. Reilly*, 47 Wn. 202, 91 P. 769 (1907) requires this Court to affirm the City of Spokane's Ordinance No. C-35231 (hereinafter "the Ordinance") which is the subject of this appeal. The second is whether that case has been overruled *sub-silentio* by subsequent authority. In answer to the first question, Appellants Horton and Chase (hereinafter collectively "the County"), contend *Town of Tekoa* and its application of a rational basis test to determine uniformity is not only inapplicable to the property tax exemption at issue, but that *Town of Tekoa* is further distinguishable in that it interpreted a legislative act, and not a municipal act made without any express legislative authority. In response to the second question, to the extent that this Court concludes *Town of Tekoa* requires the application of this rational basis test when determining uniformity to the property tax at issue here, *Town of Tekoa* clearly has been overruled *sub silentio*.

Under case law subsequent to *Town of Tekoa*, the current standard for constitutional uniformity for property taxes requires both an equal levy rate and equality of value. If either element is lacking, uniformity does not exist.

The City's Ordinance created separate mill rates and calculated taxes in a manner inconsistent with the statutory requirements of Chapters 84.36 and 84.52 RCW and does not meet this requirement.

B. *Town of Tekoa v. Reilly* is not controlling

In 1907, the time the Washington Supreme Court decided *Town of Tekoa v. Reilly*, 47 Wn. 202, 91 P. 769 (1907), the Washington Constitution had two provisions concerning uniformity. The first, Wash. Const. art. VII, § 2 stated in relevant part:

> The legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state, according to its value in money, and shall prescribe such regulations by general law as shall secure a just valuation for taxation of all property, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property...; provided, further, that the property of the United States, and of the state, counties, school districts, and other municipal corporations, and such other property as the legislature may by general laws provide, shall be exempt from taxation.

The second, Wash. Const. art. VII, § 9 stated in relevant part:

> For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, and such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same.

Wash. Const. art. VII, § 2 governs taxes imposed upon property in the state. Wash. Const. art. VII, § 2. Poll taxes, the tax at issue in *Town of Tekoa*, have been found to not be governed by this provision. *See State v.*

*Ide*, 35 Wn. 576, 583, 77 P. 961 (1904), overruled on other grounds by *Town of Tekoa v. Reilly*, 47 Wn. 202, 91 P. 769 (1907).

Wash. Const. art. VII, § 9, has been found to be satisfied by the application of a rational basis test or equal protection principles, but only when considering a tax other than a tax on property. As discussed in detail below, when a property tax is at issue, neither uniformity provision is satisfied by such a test.

In *Town of Tekoa*, the Washington Supreme Court considered the constitutionality under of the following law passed by the legislature in 1905:

> The city council of cities of the third and fourth class in this state shall have power to impose on and collect from every male inhabitant of such city over the age of twenty-one years an annual street poll tax not exceeding two dollars, and no other road poll tax shall be collected within the limits of such city.

*Town of Tekoa*, 47 Wn. at 203. This legislation exempted females, and males under the age of 21 from payment of the poll tax. *Id.* at 204.

The Court, applying this provision to the poll tax[1] in question, interpreted the words found in Wash. Const. art. VII, §9, ("and such taxes shall be uniform in respect to persons and property within the jurisdiction

[1] A poll or head tax is not a tax upon property, but is a tax against the person. E. McQuillin, *The Law of Municipal Organizations*, § 44:241 at 1044-45 (3d ed. 2013). It is "a capitation tax; a tax of specific sum levied upon each person within the jurisdiction of the taxing power and within a certain class (as all males of a certain age, etc.) without reference to his property or lack of it." H. Black, *Black's Law Dictionary* (5th ed. 1979).

of the body levying the same"), and concluded that a less rigorous "equal protection" or rational basis standard was applicable. *Id.* The Court reasoned as follows:

> The people of this state in adopting a constitution did not hope to attain the unattainable ... they fully understood that, if a street or road poll tax should be imposed, certain classes of persons would of necessity be exempt from the imposition.

*Id.* at 205. In making its decision, the Court further relied upon the fact that prior to the adoption of the Washington State Constitution similar poll taxes were imposed exempting certain individuals, and that "nearly [all], if not, all the municipal charters granted by the territorial Legislature authorized the imposition of a street poll tax with like exemptions." *Id.* at 206. The Court further relied upon the fact that after the adoption of the Washington State Constitution containing this uniformity requirement, the legislature immediately imposed an annual poll tax and authorized municipalities to do the same, with no suggestion that such an act was contrary to the recently adopted constitutional provisions, cited above. *Id.* at 207.

In *State v. Ide*, 35 Wn. 576, 77 P. 961 (1904), the court ruled similar legislation exempting certain individuals from payment of a poll tax violated the tax uniformity requirements of Wash. Const. art. VII, § 9. In expressly overruling *Ide*, the Court in *Tekoa* suggested the *Ide* Court's

reliance upon *Hunsaker v. Wright*, 30 Ill. 146 (1863), was in error because *Hunsaker* "involved a property tax, and the question of classification or exemption under a poll tax was not considered or decided." *Town of Tekoa*, 47 Wn. at 207. The *Town of Tekoa* Court further cited to *Town of Pleasant v. Kost*, 29 Ill. 490 (1863), where an Illinois Court found a similar poll tax fell within constitutional limitations. *Id.* Other cases not involving property taxes were also cited as authority for the application of the "rational basis" standard. *See generally Town of Tekoa*, 47 Wn. 202.

Later decisions citing *Town of Tekoa* further support its limited application to non-property taxes. *Town of Tekoa* was cited by *Shane et al. v. City of Hutchinson et al.*, 88 Kan. 188, 127 P. 606 (1912), where the court examined the State's constitutional uniformity requirements as applied to a poll tax for street purposes. The Kansas Court held the inapplicability of a law allowing a poll tax to cities of the first class, did not violate the Kansas constitutional requirement that the rate of assessment and taxation be uniform because "[t]hat provision is not applicable to this form of taxation." *Shane*, 127 P. at 607. The court continued:

> It is said that poll taxes, not being laid upon property, are not within constitutional requirements as to equality and uniformity, unless by reason of an arbitrary exemption of a certain class of persons. Any exemption founded upon a reasonable classification is unobjectionable.

*Id.* In *Salt Lake City v. Wilson*, 46 Utah 60, 148 P. 1104, 1106 (1915), the court again cited *Town of Tekoa* in discussing a road poll tax, finding:

> It accordingly is held by practically all authorities that such a road poll tax does not come within the uniformity clause of the constitution relating to general taxation ...

The distinction between a poll tax and property tax when determining uniformity was reaffirmed by *Pohl v. Chicago, M. & St. P. Ry. Co.*, 52 Mont. 572, 160 P. 515 (1916).

In *Nipges v. Thorton*, 119 Wn. 464, 470 (1922), the court considered a challenge to a "Poll Tax Law." In affirming the lower court's decision upholding the Law, the Court found:

> The tax in question is not a tax on property, but it is nevertheless a tax, under any proper definition of that term. It is a poll, or capitation, tax, and is so denominated both in the statute and the ordinances. It is levied for a public purpose, and is clearly a revenue measure. But its assessment is not governed by the general Revenue Law, or, strictly speaking, by §2 of Art. 7 of the state Constitution, which declares that the Legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state according to its value to money.

*Nipges*, 119 Wn. at 470. The *Nipges* Court further cited to *Town of Tekoa* for the following proposition:

> Our Constitution does not expressly mention such taxation, and, as that instrument is not a grant of power, but a limitation of power inherent in the state, independent of that instrument, it follows that this tax must be declared valid, unless the Legislature was indirectly and by necessary implication

> prohibited from authorized it to be levied by some provision of the Constitution.

*Id.*

In *MacLaren v. Ferry Cty.*, 135 Wn. 517, 238 P.579 (1925), the Court addressed the constitutionality of legislation concerning the taxation of property for mining purposes, under Wash. Const. art. VII, §§ 1 and 2. While the court initially concluded that "our Constitution is peculiar in its wording and positive in its mandate, [which] is made very clear and forcible by its language, as this court has often recognized ... though it permits classification when that will not defeat the apparent purpose of uniformity and equality." *Id.* at 520 (*Town of Tekoa v. Reilly*, 47 Wn. 202, 91 P. 769 (1907)), the court continued, stating:

> What is meant by the words of the Constitution, 'a uniform and equal rate of assessment and taxation on all property in the state, according to its value in money ...' cannot be other than what the words imply. Equality in taxation is accomplished when the burden of the tax falls equally and impartially upon all the persons and property subject to it, so that no higher rate or greater levy in proportion to value is imposed upon one person or species of property than upon others similarly situation or of like character. Uniformity requires that all taxable property shall be alike subjected to the tax, and this requirement is violated if particular kinds, species, or items of property are selected to bear the whole burden of the tax, while others, which should be equally subject to it, are left untaxed. Further, it is implied that each tax shall be uniform throughout the taxing district involved. A state tax must be apportioned uniformly throughout the state, a county tax throughout the county, and a city tax throughout the city.

*Id.* at 520. In *Thurston Cty. v. Terino Stone Quarries, Inc.*, 44 Wn. 351, 356, 87 P. 634 (1906) (citied by *Town of Tekoa*), the court concluded:

> It is suggested by appellants, and conceded by responded that section 9 of article 7 does not apply to the case at bar, and further there is no provision in the state Constitution requiring a poll tax to be uniform as to persons ...
>
> The character and value of the property of each has no bearing upon the question. The underlying nature and purpose of a poll tax are disassociated entirely from any consideration of property.

An examination of *Town of Tekoa* and the cases relying upon it, without exception, demonstrates the limited application of the rationale basis standard set forth in *Town of Tekoa*, to taxes other than property taxes, such as the poll tax at issue therein.[2]

In the case at hand the existing applicable constitutional provisions, case law, and legislative directives require a different conclusion from that reached in *Town of Tekoa.*

It also should be noted that *Town of Tekoa* ruled on the constitutionality of a grant of taxing authority to cities by the legislature. *See generally Town of Tekoa*, 47 Wn. 202. The question in *Town of Tekoa* was whether or not the *Legislature* could exclude certain individuals from

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[2] At the time *Town of Tekoa* was decided, the legislature's authority to grant property tax exemptions under Wash. Const. art VII, § 2 was limited to property owned by public agencies or quasi-public agencies. The legislature lacked authority to exempt privately-owned property from property taxes. *State ex rel Chamberlain v. Daniel*, 17 Wn. 111, 49 P.243 (1897); *see also Buchanan v. Bauer*, 17 Wn. 688, 49 P. 1119 (1897). For this reason also, *Town of Tekoa*'s rational basis test was not intended to apply to property tax exemptions.

the operation of the poll tax without violating the requirement of tax uniformity. *Id.*

Conversely, in the case at hand, by passing the Ordinance in question, the City of Spokane created a senior citizen property tax exemption at odds with the senior citizen tax exemption enacted by the Legislature. *See* RCW 84.36.381 *et seq.* The City exemption was adopted without an express grant of authority from the Legislature.

It is well-established that municipalities have no inherent authority to tax, and any such authority must be expressly granted by the legislature. *Pac. First Fed. Sav. & Loan Ass'n. v. Pierce Cty.*, 27 Wn.2d 347, 178 P.2d 351 (1947); *see also* A. Harsch, *The Washington Tax System – How It Grew,* 39 Wash.L.Rev. 944, 950 (1964). In *Carkonen v. Williams*, 76 Wn.2d 617, 627, 458 P.2d 280 (1969), the court stated:

> [Const. art. VII, § 9, and art. XI, § 12], permit the state legislature to vest county and other municipal authorities with the power to levy and collect taxes for local purposes, subject to such conditions and limitations as the constitution or the legislature may prescribe. These constitutional provisions are not self-executing, in the sense that county, city, and other municipal bodies are automatically invested with tax levying power. Rather, such political subdivisions must have an express grant of such power either by legislative act or other constitutional provisions.

In *King Cty. v. City of Algona*, 101 Wn.2d 789, 681 P.2d 1281 (1984), the court found that express authority to impose a tax against King County on revenues received from users of a solid waste plant, owned and operated

by the County but located within the city, was lacking. *King Cty. v. City of Algona*, 101 Wn.2d 789, 681 P.2d 1281 (1984) (referencing *Citizens for Financially Responsible Gov't v. City of Spokane*, 99 Wn.2d 339, 662 P.2d 845 (1983); and *Carkonen v. Williams*, 76 Wn.2d 617, 627 (1969)).

The Washington Constitution limits the authority to grant tax exemptions to the legislature. Wash. Const. art. VII, §§ 1, 10. The Constitution grants no such authority to cities. *See* Department of Revenue's Reply Brief, filed March 18, 2016, at pages 12-16. The Washington Constitution does not expressly authorize the legislature to delegate its exemption authority to cities. *Id.* The legislature may only grant cities authority to assess and collect taxes. Wash. Const. art. VII, § 9.

Moreover, even if the legislature could delegate its exemption authority to cities, property tax exemptions may be authorized by the legislature only through clear and explicit language. *Belas v. Kiga*, 135 Wn.2d 913, 935, 959 P.2d 1037 (1998). Most importantly, the legislature has not granted cities the authority to enact their own senior citizen property tax exmptions.

C. Existing Constitutional provisions, case law, and statutes do not support the constitutionality of the Ordinance.

The history of amendments to the constitutional provisions discussed herein is set forth and discussed in detail in the Department of Revenue's Reply Brief, filed March 18, 2016, at pages 12-16.

The existing Washington State Constitutional provisions discussing uniformity and pertinent to the case at hand, include art. VII §1, art. VII, § 9, and art. VII, § 10. Art. VII, § 1 provides in pertinent part:

> All taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax and shall be levied and collected for public purposes only.

Art. VII, § 9, which remains unchanged from that set forth *supra*. Art. VII, § 10 addresses exemptions in the following manner:

> The legislature shall have the power, by appropriate legislation, to grant to retired property owners relief from the property tax on the real property occupied as a residence by those owners. The legislature may place such restrictions and conditions upon the granting of such relief as it shall deem proper. Such restrictions and conditions may include, but are not limited to, the limiting of the relief to those property owners below a specific level of income and those fulfilling certain minimum residential requirements.

Judicial decisions subsequent to *Town of Tekoa* clearly demonstrate that, with respect to property taxes, the *Town of Tekoa* rational basis standard does not apply to a determination of property tax uniformity.

Uniformity of property taxes requires an equal tax rate and equality in valuing property. *Belas v. Kiga*, 135 Wn.2d 913, 923, 959 P.2d 1037

(1969). If either element is lacking, uniformity does not exist. *Id.* Uniformity of taxation must exist within the appropriate taxing district. *Granite Falls Library Capital Facility Area v. Taxpayers of Granite Falls Library Capital Facility Area*, 134 Wn.2d 825, 833-34, 953 P. 2d 1150 (1998). Uniformity of taxation is the "highest and most important of all requirements applicable to taxation under our system." *Inter Island Tel. Co. v. San Juan Cty.*, 125 Wn.2d 332, 334, 833 P.2d 1380 (1994).[3]

In *Belas v. Kiga*, 135 Wn.2d 913, 941-42, 959 P.2d 1037 (1998) the Washington Supreme Court expressly rejected application of a rational basis test to decide if a law violates the Washington Constitution's uniformity requirements with regard to a value averaging system to calculate *property* taxes. The court found persuasive the following language contained in 1995 AGO No. 16:

> Although the acquisition method does not violate the Equal protection Clause of the U.S. Constitution, we are convinced that it would violate the uniformity requirement of Amendment 14 of the State Constitution. Under equal protection analysis, there is no violation if there is a rational basis for the difference in treatment. However, there is no rational basis exception to the

[3] Conversely, non-property taxes and assessments are not subject to the uniformity requirements found in Wash. Const. art. VII, §§ 1, 9. *See Burgland v. City of Tacoma*, 70 Wn.2d 475, 423 P.2d 922 (1967) (special assessments for local improvements not a property tax subject to the uniformity requirements); *Heavens v. King Cty. Rural Library Dist.*, 66 Wn.2d 558, 563, 404 P.2d 453 (1965)(same); *Wellington River Hollow, LLC v. King County*, 121 Wn. App. 224, 239, 54 P.3d 213 (2002) (uniformity required under Wash. Const. art. VII, § 9 was not required for park impact fees under RCW 82.02 because they were not property taxes); *State ex rel. Nettleton v. Case*, 39 Wn. 177, 180-81, 81 P. 554 (1905) (finding a tax of estate property which imposed a sliding fee based upon the value of estates in probate inconsistent with this provision).

> uniformity requirement of Amendment 14. The only discrepancies in uniformity that will be tolerated are those required by the practical necessities of revaluing property when the program is carried out "in an orderly manner and pursuant to a regular plan, and if it is not done in an arbitrary, capricious or intentionally discriminatory manner.

*Belas*, 135 Wn.2d at 941. The Court concluded:

> Arguing that all that is required to satisfy this state's Constitution is a rational basis for classification ignores a century of this Court's cases requiring uniformity of taxation under article VII of the state Constitution and ignores our state Constitution's requirement that all real estate be one class of property. We have treated uniformity challenges very differently than equal protection challenges in taxation cases. *Compare Inter Island,* 125 Wash.2d 332, 883 P.2d 1380, *with Forbes v. City of Seattle,* 113 Wash.2d 929, 785 P.2d 431 (1990). We decline the invitation to ignore our own constitutional uniformity requirement and apply only the protections provided by federal equal protection law. Referendum 47 was not an amendment to the state Constitution and cannot, therefore, abolish or alter the uniformity requirement of article VII, § 1.

*Id.* at 941–42.

D. *Town of Tekoa* has been overruled *sub-silentio*

As shown above, *Town of Tekoa* is clearly distinguishable from this case, and does not necessarily require the City's Ordinance to be sustained. Therefore, *Town of Tekoa* need not be overruled. If, however, this Court concludes *Town of Tekoa* requires it to affirm the Ordinance, which imposes a non-uniform tax upon property by applying the *Town of Tekoa*'s rational basis test, the holding in *Town of Tekoa*, should be found

to be overruled *sub-silentio* as to determining the uniformity of real property taxes under the Washington Constitution.

An earlier decision can be overruled "*sub silentio*" where there is a clear showing that an established rule is incorrect or harmful. See *Lunsford v. Saberhagen Holdings, Inc.* 166 Wn.2d 264, 280, 208 P.3d 1092 (2009), such is the case at hand.

## II. CONCLUSION

Based upon the foregoing, Appellants respectfully request the Court not apply *Town of Tekoa* and respectfully requests the Court reverse the trial court's findings and issuance of a Writ of Mandamus.

RESPECTFULLY SUBMITTED this 8th day of August 2016.

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## DECLARATION OF SERVICE

I, Kristie M. Miller, declare and say as follows:

1. I am a citizen of the United States and resident of the State of Washington, over the age of 18 years, not a party to the above-entitled action, and am competent to be a witness herein. My business address is 618 W. Riverside Ave., Ste. 210, Spokane, Washington 99201-5048, and telephone number is 509-747-9100.

2. On August 8, 2016, I caused to be served the forgoing on the individuals named below in the manner indicated.

| | |
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I declare under the penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 8th day of August, 2016, at Spokane, Washington.

Kristie M. Miller, Legal Assistant