IN THE SUPREME COURT OF THE STATE OF NEVADA

VILLAGE LEAGUE TO SAVE INCLINE ASSETS, INC., a Nevada non-profit corporation, on behalf of its members, and others similarly situated,

Appellant,

vs.

STATE OF NEVADA on relation of its DEPARTMENT OF TAXATION, the NEVADA TAX COMMISSION, and the STATE BOARD OF EQUALIZATION; WASHOE COUNTY; ROBERT MCGOWAN, ASSESSOR; BILL BERRUM, WASHOE COUNTY TREASURER,

Respondents.

SUPREME COURT CASE NO. 43441

(Second Jud. Dist. Ct. Case No. CV03-06922)

ANSWERING BRIEF OF RESPONDENTS, STATE OF NEVADA, EX REL. DEPARTMENT OF TAXATION, THE NEVADA TAX COMMISSION, AND THE NEVADA STATE BOARD OF EQUALIZATION

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ANSWERING BRIEF

COME NOW the Respondents, the State of Nevada, ex. rel. the State Board of Equalization (the "Board"), the Nevada Tax Commission ("Commission"), and the Department of Taxation ("Department"), through their counsel, George J. Chanos, Attorney General, by Dianna Hegeduis, Chief Deputy Attorney General, and submit the following as their collective Answering Brief.

I.

ISSUES PRESENTED

A. Whether the District Court erred in ruling that the Appellant herein must exhaust its administrative remedies?

B. Whether the District Court erred in ruling that the Appellant's resort to the administrative process would not be futile and/or inadequate?

C. Whether the District Court abused its discretion in requiring the Appellant to exhaust their administrative remedies?

II.

SUMMARY OF CASE

This case is a dispute over the assessment of real property taxes. The Appellant, a group of Lake Tahoe property owners calling themselves the Village League to Save Incline Assets, Inc. (the "Village League"), takes issue with the methodologies by which the Washoe County Assessor (the "Assessor") has determined the taxable values of parcels of real property located at Incline Village and Crystal Bay in Washoe County. (Joint Appendix (hereafter "JA"), p. 1-18, Complaint, ¶¶ 1 & 2.) As argued below, the Board, Department, and Commission have had presumably no involvement in this dispute and, therefore, had no reason to be named in this suit.[1]

[1] A group of property owners with homes at Incline Village and Crystal Bay filed a similar challenge in the First Judicial District Court (Case No. 03-01501A). Since the Village League has not identified its members, one cannot determine whether any of the members of the Village League are also plaintiffs in the case before the First Judicial District Court.

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The Village League purportedly consists of a group of persons with homes at Incline Village and Crystal Bay, Nevada. (JA, p. 1-18, Complaint, ¶ 2.) The Village League has not identified its individual members. The Village League disputes property tax assessments for the tax year 2003-2004, as well as the assessments for "an unknown number of prior years." (JA, p. 1-18, Complaint, ¶ 20.) The Village League failed to allege that its members at any time exercised their rights to challenge the assessments in accordance with the process spelled out in NRS Chapter 361. The Village League failed to allege that its members at any time presented their grievances to the Board, Department, or Commission for review or adjudication. NRS 361.360 and NRS 361.400.

In short, the Village League's reasons for naming the Board, Department, and Commission as parties in this lawsuit remain somewhat a mystery. The Village League's claims against the Board, Department, and the Commission, namely those characterized as the first and second claims for relief, apparently find their genesis in these parties' alleged unlawful state of mind. (JA, p. 1-18, Complaint, ¶¶ 31 & 41.) In other words, the Board, Department, and Commission have apparently been named as parties in this lawsuit because of what they may or may not believe about the propriety of the appraisal methodologies employed by the County Assessor. (JA, p. 1-18, Complaint, ¶¶ 31 & 41.) Simply stated, the Board, Department, and the Commission have never been asked by the Appellant, or the individual property owners, to address or act upon the issues raised in the first and second causes of action.

The first cause of action essentially alleges that the property owners' tax assessments were overvalued because the County Assessor improperly used view classifications (JA, p. 1-18, Complaint, ¶ 20), valued teardown (JA, p. 1-18, Complaint, ¶ 21), used a "time-value" method (JA, p. 1-18, Complaint, ¶ 22), determined "lineal footage" (JA, p. 1-18, Complaint, ¶23), and determined the value of lake-front condominiums (JA, p. 1-18, Complaint, ¶ 24-25). The Appellant's requested relief on its first cause of action is a tax refund from the Assessor.

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The second cause of action essentially alleges an unlawful disparity in property valuation between Douglas and Washoe Counties. (JA, p. 1-18, Complaint, ¶ 36.) The Appellant alleges that the disparity is a result of the Department's failure to "perform its statutory duty to ensure equal and uniform assessments" (JA, p. 1-18, Complaint, ¶ 38), and requests a refund from the County Assessor (JA, p. 1-18, Complaint, ¶ 42). The Commission is not mentioned in this second cause of action.

The complaint is rife with allegations that the County Assessor either violated existing statutes, or acted in excess of its authority. See Third, Fourth, and Fifth Claims for Relief of the Complaint. There are no allegations contained within the Complaint that the regulations or statutes at issue are unconstitutional. In response to the complaint, these Respondents filed two Motions to Dismiss (JA, p. 30-45 and p. 46-56). The basis for both motions was Appellant's failure to exhaust administrative remedies. Remedies do exist pursuant to applicable tax statutes and regulations, which will be discussed immediately below, which Appellant did not pursue. Oppositions were filed by the Appellant (JA, p. 86-94 and p. 95-103); and these Respondents filed reply points and authorities in support of their respective motion for dismissal (JA, p. 104-08 and p. 109-113). The District Court granted the motion on June 4, 2004 (JA, p. 114-19) and this appeal followed (JA, p. 129-31).

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III.

OVERVIEW OF NEVADA'S PROPERTY TAX SYSTEM

County assessors are required to appraise "all real property at least once every five years." NRS 361.260(6). The assessors are required to "establish standards for appraising . . . land [and] consider comparable sales of land before July 1 of the year before the lien date." NRS 361.260(7). "[T]he lien attaches on July 1 of the year for which taxes are levied." NRS 361.450(2). "In making [an] appraisal . . . of land [assessors are to use] market data [unless it] is not available." NAC 361.118. Appraisals of improvements, other than rural buildings, are to be based upon construction costs set forth in the Marshall & Swift cost manuals. NAC 361.128.

"The computed taxable value [of land and improvements] must not exceed its full cash value." NRS 361.227(5). "Full cash value" is defined as "the most probable price which property would bring in a competitive and open market under all conditions requisite to a fair sale." NRS 361.025. In determining whether the taxable value of a property exceeds its full cash value, an assessor may use, as applicable, one or more of the following: (1) an analysis of comparative sales; (2) a summation of land and improvement values; and (3) a capitalization of the income generated by the use of the property. NRS 361.227(5). If the taxable value of a property exceeds its full cash value, the taxable value must be reduced accordingly. Id. If the land is properly valued, then the reduction must be applied to the improvements. NAC 361.131. Pursuant to NRS 361.345(1), the County Board of Equalization "may change and correct any valuation found to be incorrect either by adding thereto or by deducting therefrom such sum as is necessary to make it conform to the taxable value of the property assessed . . . ."

When the assessor has completed his work, the taxpayer may appeal to the County Board of Equalization, which is required to "make an independent determination of the valuation of the property assessed." NAC 361.627. See also NRS 361.355, a property owner "claiming overvaluation or excessive valuation of its real or secured property . . . shall appear before the county board of equalization . . . ." If the taxpayer is aggrieved by the decision rendered by the County Board of Equalization, the taxpayer may appeal to the State Board of Equalization. See NRS 361.356 concerning appeals to the County Board of Equalization. Pursuant to NRS 361.360, should a taxpayer be aggrieved by a decision of the County Board, he can appeal to the State Board of Equalization. NRS 361.400 mandates that the State Board of Equalization "hear and determine all appeals from the action of each county board of equalization . . . ." NRS 361.410(1) states, in part, as follows:

> No taxpayer may be deprived of any remedy or redress in a court of law relating to the payment of taxes, **but all such actions must be for redress from the findings of the State Board of Equalization, and no action may be instituted upon the act of a county assessor or of a county board of equalization or the Nevada Tax Commission until the State Board of**

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Equalization has denied complainant relief. . . . (Emphasis added.)

Pursuant to NRS 361.420, a property owner may seek an appeal to a District Court after "having protested the payment of taxes . . . and having been denied relief by the State Board of Equalization. . . ." The District Court must confine its review to the record before the State Board of Equalization; and the taxpayer has the burden of proof that "any valuation established by the Nevada Tax Commission or the county assessor or equalized by the county board of equalization or the State Board of Equalization is unjust and inequitable." NRS 361.430. Furthermore, judicial reviews of agencies' decisions are conducted pursuant to the Nevada Administrative Procedures Act (NRS Chapter 233B). As can be easily seen, the Legislature has gone through an tremendous amount of effort to establish a system of protesting the valuation of real property located in the State of Nevada. Thus, the Appellant herein had adequate remedies available to it at all times, but simply elected not to pursue those avenues.

IV.

ARGUMENT

A. The Exhaustion Requirement.

The Village League filed a complaint for declaratory relief pursuant to NRS 30.010-160. (JA, p. 1-18, Complaint, ¶ 1.) Since the members of the Village League have failed to exhaust their administrative remedies with respect to the real property assessments at issue in this case, they have deprived the Court of subject matter jurisdiction over the Village League's complaint. County of Washoe v. Golden Road Motor Inn, Inc., 105 Nev. 402, 403, 777 P.2d 358, 359 (1989) (holding that "[t]axpayers must exhaust their administrative remedies before seeking judicial relief."). There are only two exceptions to the exhaustion requirement noted in the Golden Road Motor Inn, Inc. case. This Court explained the exhaustion

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requirement as follows:

> Ordinarily, before availing oneself of district court relief from an agency decision, one must first exhaust available administrative remedies. Two exceptions exist to the exhaustion requirement. First, this court has discretion not to require exhaustion when the issues "relate solely to the interpretation or constitutionality of a statute." Second, exhaustion is not required when a resort to administrative remedies would be futile.

Malecon Tobacco, LLC. v. Department of Taxation, 118 Nev. 837, 839, 59 P.3d 474, 475-76 (2002)(citations omitted).

Clearly, the first exception to the exhaustion requirement does not apply to the Village League's complaint. The Village League alleged that the Board, the Assessor, and others have neglected to adhere to and/or recognize certain unidentified mandates set forth in the "approved and published regulations adopted by the Nevada Tax Commission to govern county assessors in the valuation of property for ad valorem tax purposes." (See, e.g., JA, p. 1-18, Complaint, ¶¶ 20, 21, 22, 23, 24 & 26.) The Village League has not alleged that the regulations are unconstitutional, or that any statute is unconstitutional. Thus, the first exception is inapplicable.

In a nutshell, the Village League would ask the District Court to interpret the Commission's regulations in such a manner as to preclude the Assessor from exercising any discretion whatsoever in determining the value of land at Incline Village and Crystal Bay. In other words, the Village League would insist that the Assessor refrain from applying basic appraisal methodologies in order to make sense of outdated and often limited market data concerning sales of unimproved parcels at Incline Village and Crystal Bay (of which there are very few). The Village League's claims, therefore, require that the District Court not only interpret the Commission's regulations, but determine whether the Assessor's appraisal practices comport with the spirit and intent of the regulations. In other words, the claims present mixed questions of law and fact such that they must first be pursued by way of the administrative process. Malecon, 118 Nev. at 840-41, 59 P.3d at 476.

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Although the Village League alleges that it would be futile to pursue administrative remedies, it offers no concrete explanation as to why it would be futile to pursue administrative remedies. (JA, p. 1-18, Complaint, ¶ 32.) The Village League suggests that its members were somehow misled by the Assessor's alleged failure to "disclose its use of . . . illegal assessment methods." (JA, p. 1-18, Complaint, ¶ 32.) However, this allegation is irrelevant for purposes of determining whether the members of the Village League should have pursued available administrative remedies. Notwithstanding their rhetoric about unlawful assessment methodology, the members of the Village League are essentially challenging the taxable values that have been assigned to their properties. At the core of their complaint is the fundamental premise that their properties have been overvalued for tax purposes and such issues are to be brought before the County Board, then the State Board through elaborately and detailed enacted legislation.

If the properties have indeed been overvalued for tax purposes, then the members of the Village League should have recognized this from the moment they received their assessment notices in the mail. If the members of the Village League were convinced that the Assessor had overvalued their properties, they should have requested an explanation from the Assessor when they received their assessment notices in the mail. The Village League has not alleged that its members ever requested such an explanation. It is absurd for the Village League to suggest that the Assessor was obligated to explain to each and every property owner, in the absence of a request for an explanation, the methodologies by which the Assessor appraised the properties at Incline Village and Crystal Bay.

Of course, the Village League further suggests that some or all of the key players in the administrative process may be inclined to agree with the Assessor's interpretation and application of the existing statutes and regulations concerning land valuation.[2] (JA, p. 1-18,

[2] The Village League did lobby the Nevada Tax Commission to adopt new and/or amended regulations governing appraisal practice and valuation methodology. Indeed, the regulatory and legislative processes provide the only appropriate forum in which to raise the claims at issue in this case.

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Complaint, ¶¶ 31 & 41.) These bare allegations, however, do not set forth an adequate basis upon which to excuse the failure to exhaust administrative remedies. "The purposes underlying the exhaustion doctrine include the opportunity for the ***agency*** to exercise its discretion and expertise and the opportunity to make a record for the district court to review." In re Steele, 799 F.2d 461, 466 (9th Cir. 1986) (emphasis in original). Administrative review is not futile if the plaintiff's allegations of bias are purely speculative. United States v. Litton Industries, Inc., 462 F.2d 14, 18 (9th Cir. 1972).

In summary, the Village League sought to bypass the administrative process by filing the District Court complaint on the theory: (1) that the Assessor did not come forward with an explanation of his appraisal methodologies at the time he issued assessment notices (JA, p. 1-18, Complaint, ¶ 32); and (2) that the adjudicating agencies may tend to agree with the Assessor's interpretation of the law (JA, p. 1-18, Complaint, ¶¶ 31 & 41). If every taxpayer were allowed to bypass the administrative process on this theory, the dispute resolution system would completely unravel. The administrative process is what enables the state and its agencies to manage the sheer volume of disputes that arise in the area of taxation. The Village League failed to allege with adequate specificity the grounds upon which its members should be excused from exhausting their administrative remedies. Accordingly, the District Court lacked subject matter jurisdiction over the Village League's complaint and properly dismissed the same.

B. The Alleged Grounds for Declaratory Relief.

Assuming, for purposes of argument, that the members of the Village League are not required to exhaust their administrative remedies, they have nevertheless failed to state a claim upon which relief can be granted. In the complaint, the Village League makes five claims for relief. The first and second claims for relief are alleged against all defendants. (JA, p. 1-18, Complaint, ¶¶ 12-42.) The third, fourth and fifth claims for relief are alleged against the "Washoe County Defendants" only. (JA, p. 1-18, Complaint, ¶¶ 43-61.) Presumably, the

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Village League does not include these State Respondents among the "Washoe County Defendants."

The first claim for relief alleges, in summary, that the members of the Village League own properties that were improperly valued because the Assessor:

(1) used view classifications to determine the taxable values of properties having views of Lake Tahoe (JA, p. 1-18, Complaint, ¶ 20);

(2) considered market data, including sales of improved properties, to determine the taxable value of land at Incline Village and Crystal Bay (JA, p. 1-18, Complaint, ¶ 21);

(3) used a "time-value" method in order to interpret market data (JA, p. 1-18, Complaint, ¶ 22);

(4) calculated the "lineal footage" of lake front properties as a factor in determining the taxable values of such properties (JA, p. 1-18, Complaint, ¶ 23); and

(5) used market data, including sales of single-family residential properties, to determine the taxable values of condominiums (JA, p. 1-18, Complaint, ¶¶ 24-25).

In its first claim for relief, the Village League failed to allege that the Board, Department, or Commission determined or computed the taxable values assigned to the properties in question.[3] The Village League failed to allege that its members at any point in time sought relief from the Board, Department, or Commission or ever requested the Board, Department, or Commission to review a decision rendered by the County Board of Equalization. Instead, in its first claim for relief, the Village League alleged that these State Respondents, among others, "consider the use by the Washoe County Assessor's office of these illegal

[3] Property tax assessments in Nevada are made pursuant to a bifurcated scheme. Most property tax assessments are made by the county assessor in the county where the property is located (commonly referred to as "locally assessed properties"). NRS 361.260. Such assessments are the basis of this case. In certain other situations, such as assessments of property straddling state or county lines or assessments of certain utilities, the Department makes the property tax assessment (commonly referred to as "centrally assessed properties"). NRS 361.320. Appeals of both locally assessed property taxes and centrally assessed property taxes are made to the State Board of Equalization. NRS 361.400; NRS 361.403. Further, taxes collected from locally assessed properties are collected by the county in which the property was located. NRS 361.475; NRS 361.480; NRS 361.755.

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assessments [sic] methods to be valid and lawful." (JA, p. 1-18, Complaint, ¶ 31.) In short, the Village League's first claim for relief is premised entirely upon its belief that the State Respondents each possess an unlawful state of mind. The Village League failed to explain how this alleged state of mind, without some action or edict on the part of a State Respondent herein, gives rise to a cause of action for declaratory relief. Appellant's allegations are purely speculation.

At any rate, in its second claim for relief, the Village League alleged an unlawful disparity in property valuation between Douglas and Washoe County. (JA, p. 1-18, Complaint, ¶ 36.) The Village League suggests that this disparity is a result of the Board's failure "to equalize the taxable value of similarly situated property at Lake Tahoe in Douglas and Washoe Counties for the tax year 2003/2004 and prior tax years." (JA, p. 1-18, Complaint, ¶40.) The Village League failed, however, to allege that its members ever brought any of the alleged inequalities to the attention of any of the State Respondents, or sought some form of relief, such that the State Respondents could properly be named as parties to the alleged "actual controversy" in this case. (JA, p. 1-18, Complaint, ¶ 41.) The Village League seems to suggest that the "actual controversy" arises from an alleged breach of a general duty to "review the tax rolls of the various counties and equalize the taxable value of the properties reflected on such roll." (JA, p. 1-18, Complaint, ¶ 37.) This is a factual determination best left to the State Respondents.

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C. The Alleged Breach of a Generic Duty To Review Tax Rolls Does Not Give Rise to a Cause of Action for Declaratory Relief.

The State Respondents are quasi-judicial bodies existing as part of the executive branch of the state government. See, e.g., NRS 361.375. Their duties and functions are specifically defined by the Legislature. The State Respondents possess no powers that are not specifically conferred upon them by statute. See Clark County School District v. Clark County Classroom Teachers Association, 115 Nev. 98, 102, 977 P.2d 1008, 1010 (1999). Consequently, these State Respondents perform their duties and functions, and exercise their

powers, only within the context of the adjudication process described in NRS Chapter 361. The State Respondents have no general authority or jurisdiction to directly control, dictate, or orchestrate the conduct of the county assessors. See, e.g., NRS 361.372 through NRS 361.435, inclusive. Rather, their influence over the county assessors is wielded through the adjudication of contested cases involving challenged assessments. NRS 361.360 and NRS 361.400.

Although the Village League has alleged in general terms that these State Respondents have failed to equalize the taxable values of properties located in Douglas and Washoe Counties, the Village League neglected to allege that its members properly challenged the assessments at issue in this case. Consequently, the Village League failed to articulate any case or controversy that would give rise to a cause of action for declaratory relief. If these State Respondents are not even afforded the opportunity to rectify the alleged inequalities, they can hardly be said to have embroiled themselves in an actionable case or controversy. The Village League's cause of action against the Board is apparently premised upon the ridiculous notion that the Board, consisting of five members, has an obligation to *sua sponte* seek out and address any inequities inherent in a system of mass appraisal and tax assessment.

An action for declaratory relief is a remedy designed to address situations where a violation of legal rights appears imminent. As explained by this Court:

> It [declaratory relief] was a defect of the judicial procedure which developed under the common law that the doors of the court were invitingly opened to a plaintiff whose legal rights had already been violated, but were rigidly closed upon a party who did not wish to violate the rights of another nor to have his own rights violated, thus compelling him, where a controversy arose with his fellow, to run the risk of a violation of his fellow's rights or to wait until the anticipated wrong had been done to himself before an adjudication of their differences could be obtained. Thus was a penalty placed upon the party who wished to act lawfully and in good faith which the statute providing for declaratory relief has gone far to remove.

Kress v. Corey, 65 Nev. 1, 35-36, 189 P.2d 352, 368 (1948) (citation omitted). For example, declaratory relief is commonly sought in contract and will disputes, where one party seeks to

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clarify its legal obligations before acting and thus exposing itself to a possible lawsuit for breach of contract. See NRS 30.040-060.

The scope of declaratory relief in Nevada is set forth in NRS 30.030. That statute provides, in relevant part, that courts of record "shall have power to declare rights, status and other legal relations . . . ." NRS 30.030. This Court set forth four requirements that must be present before a party can obtain declaratory relief:

> The requisite precedent facts or conditions which the courts generally hold must exist in order that declaratory relief may be obtained may be summarized as follows: (1) there must exist a justiciable controversy; that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory relief must have a legal interest in the controversy, that is to say, a legally protectible interest; and (4) the issue involved in the controversy must be ripe for judicial determination.

Kress, 65 Nev. at 26, 189 P.2d at 364. As discussed below, the Village League's complaint failed to satisfy any of the four requirements noted above; and the District Court properly dismissed the same.

1. There is no Justiciable Controversy between the Village League and the State.

A justiciable controversy must be based upon a certain set of facts, and not upon hypothetical future events. As explained in Cox v. Glenbrook Co., 78 Nev. 254, 371 P.2d 647 (1962):

> [E]very judgment following a trial upon the merits must be based upon the evidence presented; it cannot be based upon an assumption made before the facts are known or have come into existence . . . . [F]actual circumstances which may arise in the future cannot be fairly determined now. As to this phase of the case we are asked to make a hypothetical adjudication, where there is presently no justiciable controversy, and where the existence of a controversy is dependent upon the happening of future events. A declaratory judgment should deal with a present, ascertained or ascertainable state of facts . . . .

Id., 78 Nev. at 266-68, 371 P.2d at 655-56 (citation omitted).

As noted above, the Village League alleged in general terms that the State Respondents failed to equalize the values of properties in Douglas and Washoe Counties. However, to maintain a cause of action for declaratory relief, the Village League must also

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allege that these State Respondents are somehow poised to violate the rights of the Village League or its members. These State Respondents cannot possibly violate the rights of the Village League, or its members, if they were never afforded an opportunity to review and act upon the assessments at issue in this case.

Naturally, these State Respondents could conceivably violate the rights of the Village League, or its members, at some point in the future if they were ever called upon to adjudicate a contested case involving one or more of the members of the Village League. However, such speculative notions hardly give rise to a claim for declaratory relief. See Knittle v. Progressive Casualty Insurance Co., 112 Nev. 8, 10-11, 908 P.2d 724, 725-26 (1996) (affirming the dismissal of a declaratory relief action where an insurance company denied its policy holder's request for indemnification before the policy holder suffered a judgment in an underlying tort action); Doe v. Bryan, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986) (affirming the dismissal of a declaratory relief action premised on the possibility of a future criminal arrest, and stating that "litigated matters must present an existing controversy, not merely the prospect of a future problem."). Therefore, since there is no justiciable controversy between the Village League and these State Respondents, declaratory relief is unavailable. The Village League's claims against these State Respondents were properly dismissed by the District Court for failure to state a claim upon which relief may be granted.

2. The Village League and the State Do Not Have Adverse Interests.

As previously noted, the Village League has not alleged that the State Respondents ever reviewed or acted upon the assessments at issue in this case. Indeed, the Village League essentially admits that neither the League nor its members followed the administrative process for seeking relief from the assessments. (JA, p. 1-18, Complaint, ¶ 32.) If there exists an administrative process for adjudicating a dispute over taxes, the taxpayer must follow that process. County of Washoe v. Golden Road Motor Inn, Inc., 105 Nev. 402, 403, 777 P.2d 358, 359 (1989) (holding that "[t]axpayers must exhaust their administrative remedies before seeking judicial review."). Here, the Village League did not follow the

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administrative process. Accordingly, the Village League gave the State Respondents no opportunity to take a position that is adverse to the Village League's interest or that of its members. Quite simply, the Village League and these State Respondents do not have adverse interests because these State Respondents have not rendered, nor are they about to render, a decision against the Village League or its members.

3. The Village League Does Not Have a Legally Protectible Interest.

This Court has narrowly defined the circumstances under which a party will be deemed to have a legally protectible interest such that the party can maintain an action for declaratory relief. See Wells v. Bank of Nevada, 90 Nev. 192, 197-198, 522 P.2d 1014, 1017-18 (1974) (precluding persons without rights, duties, or obligations under a contract from seeking declaratory relief with respect to that contract). The Village League does not have a legally protectible interest in the outcome of an alleged dispute involving the assessment of property taxes at issue herein. In fact, the Village League does not own the real property that is the subject of the Assessor's alleged unlawful assessments. (JA, p. 1-18, Complaint, ¶ 2.) Rather, its unidentified members purportedly/allegedly own the real property in question. See NRS 361.362, requiring appellants to provide their identities, or the identity of the person/entity representing them, to the County Board or the State Board of Equalization. Although the Village League's moniker indicates that its purpose is to "Save Incline Assets," its name and/or its mission to prosecute this lawsuit does not alone suffice to create a legally protected interest in an alleged dispute over real property taxes.

4. An Action Against the Board for Declaratory Relief is Not Ripe for Review.

The requirement that a claim for a declaratory judgment be ripe for review is similar to the requirement that the claim amount to a justiciable controversy. See Black's Law Dictionary 923 (6th Ed. 1991) (defining "ripeness doctrine," in part, by stating that "[t]he question in each case is whether there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."); and Cox, 78 Nev. at 268, 371 P.2d at 656 ("A declaratory judgment

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should deal with a present, ascertained or ascertainable set of facts (Citation omitted.).") As discussed in detail in this brief, the Village League's claims against these State Respondents are premised upon the allegation that the Assessor improperly assessed taxes against properties allegedly belonging to the Village League's unidentified members.

However, these State Respondents have yet to address the question of whether the Assessor improperly assessed taxes against the properties that may or may not be at issue in this case. Indeed, these State Respondents will not have occasion to address this question until they are presented with an appeal from a decision of the Washoe County Board of Equalization. See NRS 361.360 and NRS 361.400. The Village League's complaint would suggest that it has no plans to file such an appeal at anytime in the near future; and would further seem to suggest that it expected the District Court to usurp the role of these State Respondents with respect to the equalization of real property in the state. (JA, p. 1-18, Complaint, ¶ 32.) The District Court's proper role, however, is to review decisions that are rendered by state agencies, such as these State Respondents, pursuant to NRS Chapter 233B, not to substitute its judgment for that of the state agency with respect to matters within their competence and expertise. Washoe County v. John A. Dermody, Inc., 99 Nev. 608, 612, 668 P.2d 280, 282 (1983).

D. Cases cited by Appellant can be easily distinguished.

1. Failure to exhaust administrative remedies does bar Appellant's claims.

In support of its position that its claims are not barred although it failed to exhaust its remedies, Appellant cites a number of cases which can be easily distinguished and discounted.

For instance, Appellant cited to Ambassador v. Feldman, 95 Nev. 538, 598 P.2d 630 (1979), which is a defamation case. In Ambassador, this Court held that "the insurance commissioner is without authority to award damages caused by defamation [and that] the commissioner's powers are limited to the regulation of insurance trade practices." Id. at p.

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631. This Court further explained, "[s]ince the commissioner is powerless to grant the relief appellants seek in their suit, the doctrine of exhaustion of administrative remedies is not applicable." Thus, the Ambassador case is distinguishable from the case at hand which would have been properly appealed through the administrative process.

Appellant also cited the case of Board of Equalization v. Sierra Pacific Power Co., 97 Nev. 461,634 P.2d 461 (1981), in which this Court stated that assessment formulae amendments were regulations which required compliance with NRS Chapter 233B. In the case now before this Court, there are statutes and regulations in place for utilization. See NAC 361.118; NAC 361.128; NRS 361.227(5); and NRS 361.025. Appellant's contention that the methodologies "are de facto regulations" is simply inaccurate. (Opening Brief, p. 11, l. 17-19.)

Appellant also cites Engelmann vs. Wetergard, 98 Nev. 348, 647 P.2d 385 (1982), as support for the position that exhaustion of remedies is not necessary when an agency lacks jurisdiction. However, these Respondents do have jurisdiction over the issue of property taxes and protests thereof. This Court recognized these Respondents' respective roles in tax assessments matters in Malecon Tobacco, LLC, v. State Department of Taxation, 118 Nev. 837, 59 P.3d 474 (2002). This Court in Malecon noted that resolution of the Taxpayers' challenges hinges on factual determinations and that such factual "evaluation is best left to the Department of Taxation, which can utilize its' specialized skill and knowledge to inquire into the facts of the case." Malecon, 118 Nev. at 841, 59 P.3d at 477. For example, a property valuation based upon a lake view is a factual, case-by-case determination better left to the appropriate administrative body for initial adjudication.

It was further stated that if the Court, "were to address the taxpayers' claims without the benefit of the Department of Taxation's expertise, we would usurp the Department's role as

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well as contravene the Supreme Court's directive to give deference to an agency's reasonable interpretation of the law and facts at issue." Id. Similarly, in this action, the District Court ruled that the Appellant should have exhausted its remedies through these Respondents, allowing them to hear witnesses judging their credibility, consider evidence pertaining to valuation, and interpret and enforce the laws the agency is charged to enforce using its specialized knowledge and information. Such was a proper ruling by the District Court and it should be affirmed.

Appellant further cites to So. Nev. Oper. Engineers Contract Compliance v. Labor Commissioner, 121 Nev. Adv. Op. No. 54,119 P.3d 720 (2005). However, that case can be easily distinguished from the present matter. In that case, the Labor Commissioner removed a classification of workers from previously established prevailing wage rates during a contested administrative hearing, and then applied the outcome of that administrative hearing in another pending matter before the Labor Commissioner's office. This Honorable Court ruled that such was ad hoc rulemaking because of its general application and because the Labor Commissioner did not hold any type of hearing concerning the classification other that the contested administrative case involving one worker and one employer. In the present matter, Appellant never filed a protest to the property taxes - - there simply was no administrative hearing before any of the bodies named as Respondents herein, nor was any objection to the methodologies used by any of the Respondents filed by Appellant. Appellant simply failed to exhaust its various administrative remedies.

Appellant also relied on Falcke v. County of Douglas, 116 Nev. 583, 3 P.3d 661 (2000), which concerned a petition for writ of mandamus and whether the County Commissioners acted properly when they denied a plan requiring a super-majority vote. This Honorable Court acknowledged that mandamus was proper and granted the petition. Respondent therein

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argued, however, that the matter should have been dismissed for failure to exhaust administrative remedies, citing First Am. Title Co. v. State of Nevada, 91 Nev. 804, 543 P.2d 1344 (1975). This Honorable Court ruled that First Am. Title was inapplicable to the adjudication of Falcke "because no similar Nevada statute requires Falcke to first present his challenge to the Board" concerning the super-majority vote. Falcke, 116 Nev. at 587, 3 P.3d at 663. In the present matter, however, there are statutes and regulations which allows a landowner to appeal his property taxes /valuation if he so desires. Interestingly, in First Am. Title, this Court stated:

> [I]t would contravene the well-established rule that administrative remedies must be exhausted prior to seeking judicial relief . . . . The 'exhaustion doctrine' is sound judicial policy. If administrative remedies are pursued to their fullest, judicial intervention may become unnecessary. Had appellant sought relief before the respective boards of equalization, he may well have been granted the relief he now seeks in the first instance by judicial intervention.

91 Nev. at 806, 543 P.2d at 1345.

Inasmuch as the cases cited by Appellant can be easily distinguished, Appellant's reliance upon these cases is unjustifiable. The cases applicable to this matter are Malecon Tobacco, in which this Honorable Court noted that factual issues pertaining to taxation are better left to the agencies in charge of interpretation and enforcement of Nevada's taxation statutes and regulations, and First Am. Title; and it is respectfully requested that the District Court ruling in this matter be affirmed.

2. Appellant fails to show that the administrative remedies would be futile.

Appellant claims that resorting to its administrative process would be futile. (Opening Brief, p. 13 – 15.) Appellant claims that the County and State Boards of Equalization are comprised of "non-lawyers **who may or may not** have any background and experience with business or real property." (Emphasis added.) (Opening Brief, p. 13, l. 23-25.) Such is speculation on the part of the Appellant; and such speculation does not indicate that an

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appeal to the Board, or to any of these State Respondents, would be futile. NRS 361.375 discusses the composition of the State Board, i.e., the Governor shall appoint to the Board one certified public accountant or registered public accountant; one property appraiser with a professional designation; one member who is versed in the valuation of centrally assessed properties; and two members who are versed in business generally. Thus, such individuals do indeed have a background and experience in business and real property matters, contrary to the assertions of Appellant.

Appellant further states that its case concerns the methods and procedures followed by the parties in assessing valuation; and that the methods used for property tax assessment must be a "fair, just and uniform system." (Opening Brief, p. 14, l. 11-13.) Illogically, Appellant contends that such does not consist of factual determinations. Such cases are very much fact-driven, and are the types of cases typically heard by an administrative body.

Appellant also states that the "State Board's legal counsel is the Attorney General, the same counsel who advises both the Department and the Commission" and that resorting to the "administrative process is undeniably futile." (Opening Brief, p. 14, l 26 – p. 15, l. 2.) Such is not the case. The Commission has its own separate counsel, someone other than the Attorney General; the Board has its own separate counsel, someone other than the Attorney General; and the Department actually has anywhere between five to eight different Deputy Attorney Generals, including approximately two Senior Deputies Attorney General during the time frame in question. Such remarks are simply untrue and are merely being offered by the Appellant as a smoke-and-mirror tactic to avoid the inescapable conclusion that it should have exhausted its administrative remedies. Specific statutes do exist mandating that the Attorney General's office represent various state agencies in various capacities; e.g., prosecutor or as counsel. See also Laman v. Nevada Real Estate Adv. Comm'n, 95 Nev. 50, 56-7, 589 P.2d 166 (1979) (attorneys from the Attorney General's office can represent the Commission and the Department).

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In support of this claim of alleged futility, Appellant cites Engelmann, which was discussed above; Malecon Tobacco, which was discussed above; and State Dept. of Taxation v. Scotsman Mfg., 109 Nev. 252, 849 P.2d 317 (1993). Scotsman Mfg. pertains to sales taxes imposed upon a manufacturer of modular homes sold to the Federal government for use on the test site in Tonopah, Nevada. The District Court ordered a refund of the taxes paid even though the manufacturer did not file a formal request for a refund with the Commission or the Department. In its analysis, this Court noted its prior ruling, in County of Washoe v. Golden Road Motor Inn, 105 Nev. 402, 403-04, 777 P.2d 358, 359 (1989), that a taxpayer must exhaust its administrative remedies before seeking judicial relief; and that failure to do so deprives the District Court of subject matter jurisdiction. This Court ruled further that the "exhaustion doctrine will not deprive the court of jurisdiction 'where the issues relate solely to the interpretation or constitutionality of a statute'" or where such an attempt would be futile. Scotsman Mfg., 109 Nev. at 255, 849 P.2d at 319. As indicated throughout this Brief, Appellant has not shown that resorting to administrative remedies would be futile. Furthermore, Appellant is not actually challenging the constitutionality of a statute, but the valuation of property in Incline Village and Crystal Bay, Washoe County, Nevada. The statutes and regulations at issue are not unconstitutional - - Appellant is merely unhappy with the appraised valuation of property in Northern Nevada and challenges, or appeals, to the valuation of property should be brought to the Board and then beyond. Appellant itself admits that it failed to do so; and the District Court properly dismissed the complaint.

In Hermann v. Delavan, 572 NW.2d 855 (Wis. 1998), certain taxpayers filed suit alleging that the assessor used arbitrary and inconsistent formulas in assessing the values of certain properties. The taxpayers were owners of lakefront property, and they alleged that certain inequities existed between the property values at the lake and inland property. Like

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Nevada, Wisconsin had a very detailed statutory scheme to protest tax assessments. The Court therein held that the complaint inherently questioned the valuation of the properties, and dismissed the litigation because of the taxpayers' failure to exhaust their administrative remedies. Such a case is extremely similar to the one now before this Honorable Court, in which the taxpayers are simply attempting to circumvent the administrative process created by our Legislature. Accordingly, the District Court properly dismissed Appellant's complaint for failure to exhaust its administrative remedies.

3. The District Court properly refused to excuse compliance with the exhaustion doctrine.

Appellant claims that the District Court "misunderstood the gravamen of the League's claims and the law governing the exercise of the court's discretion." (Opening Brief, p. 15, l. 27 – p. 16, l. 1.) It then attempts to clarify its claim by alleging "facial invalidity" of the methods of valuation used by "Washoe County" of the "Commission regulations." (Opening Brief, p. 16, l. 2-11.) Thus, such claims are against the County Assessor - - not against the State Board, State Taxation Department, or the Nevada State Tax Commission. Dismissal of the complaint against those parties by the District Court, therefore, was proper and it should be affirmed by this Honorable Court.

Furthermore, this Honorable Court in Nevada State Gaming Commission v. Glusman, 98 Nev. 412, 651 P.2d 639 (1982), ruled that a facial challenge to a statute would render that statute devoid of any valid application. However, a Legislative act is presumed to be constitutional and should be declared so unless it appears to be clearly in contravention of constitutional principles. Also, in face of an attack, every favorable presumption and intendment will be brought to bear in support of the constitutionality of the statute. Moreover, Appellant has not alleged that the sole issue in this matter is the constitutionality of a statute or regulation. To date, Appellant has not shown that any type of a tax statute or regulation is

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unconstitutional. Thus, the District Court properly dismissed the complaint; and it is respectfully requested that this Honorable Court affirm the District Court ruling.

V.

CONCLUSION

This case presents a garden-variety dispute over the assessment of real property taxes. Consequently, NRS Chapter 361 governs the manner by which the parties must adjudicate the dispute. Chapter 361 of the NRS specifically sets forth the administrative remedies available to the unidentified members of the Village League, provided they are indeed property owners. The members of the Village League have failed to exhaust those administrative remedies. Consequently, they deprived the District Court of subject matter jurisdiction over the Village League's complaint.

Furthermore, even if the members of the Village League were not required to exhaust their administrative remedies, the Village League simply failed to state a proper claim for relief against the Board, the Department, and the Commission upon which relief can be granted. The District Court properly dismissed the complaint; and this appeal should also be dismissed in toto.

DATED THIS 1st day of November, 2005.

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By: _____

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CERTIFICATE OF COMPLIANCE

I, Dianna Hegeduis, hereby certify that I have read the foregoing points and authorities, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record. I understand that I may be subject to sanctions in the event the accompanying brief is not inconformity with the requirements of the Nevada Rules of Appellate Procedure as required by NRS 233B.136.

DATED THIS 1st day of November, 2005.

Dianna Hegeduis

DIANNA HEGEDUIS

CERTIFICATE OF MAILING

I hereby certify that on the 2nd the day of November, 2005, I served a copy of the foregoing upon all parties hereto by depositing a true copy thereof in the U.S. mail, addressed to them at their last known address, postage thereon prepaid, addressed as follows:

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