ORIGINAL

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, Appellant, vs. STATE OF NEVADA, on relation of of its DEPARTMENT OF TAXATION, the NEVADA TAX COMMISSION, and the STATE BOARD OF EQUALIZATION; WASHOE COUNTY; ROBERT McGOWAN, WASHOE COUNTY ASSESSOR; BILL BERRUM, WASHOE COUNTY TREASURER, Respondents.	)	No. 43441 APPEAL CV03-06922 SECOND JUDICIAL DISTRICT COURT IN AND FOR THE COUNTY OF WASHOE OF THE STATE OF NEVADA HONORABLE PETER J. BREEN DISTRICT JUDGE

FILED

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JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES AND OTHER AUTHORITIES

I. INTRODUCTION.

In its review of this matter, this Court must accept at true the allegations of the complaint that members of the Village League have been unfairly and unconstitutionally taxed and that the state and county government agencies charged by statute with the duties of real property valuation and equalization have failed in the discharge of those duties.[1] Accepted as true, those allegations raise serious constitutional, statutory and public policy issues. This Court must also be mindful of the Taxpayer Bill of Rights enacted by the Nevada Legislature in 1991 which requires that "statutes imposing taxes and any regulations adopted pursuant thereto" be "construed in favor of the taxpayer. . . ." NRS §360-291(o). Accordingly, this Court must reject the efforts of respondents to hide behind the exhaustion doctrine or use that doctrine as a shield against accountability. Analyzing the complaint and the law giving the benefit of every doubt to the League, this Court must reverse the trial court's dismissal and allow this action to go forward to a resolution on the merits.

II. THE LEAGUE HAS ASSOCIATIONAL STANDING IN THIS CASE.[2]

The complaint in this action seeks declaratory and injunctive relief. Under the law, the Village League has associational standing to pursue those claims on behalf of its members. The Washoe County Respondents argue that "[t]he real party in interest to a challenge of an assessor's valuation is clearly identified in Chapter 361 as the real property owner who alleges

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[1] The standard of review is the same for a dismissal under NRCP 12(b)(1) for lack of subject matter jurisdiction or under NRCP 12(b)(5) for failure to state a claim. See, e.g., Kourafas v. Basic Food Flavors, Inc., 120 Nev. 195, 88 P.3d 822, 823 (2004); Cohen v. Mirage Resorts, 119 Nev. 1, 62 P.3d 720, 734-735 (2003); see also, Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974); McCarthy v. United States, 850 F.2d 558, 560 (9th Cir.1988), cert. denied, 489 U.S. 1052, 109 S.Ct. 1312, 103 L.Ed.2d 581 (1989); Love v. U.S., 871 F.2d 1488, 1491 (9th Cir.1989).

[2] This issue is raised only by the Washoe County Respondents.

improper assessment or valuation." Answering Brief of Respondent Washoe County ("County Respondents' Brief"), p. 15, lns. 17-19. This action, however, is not a challenge to an individual valuation; it challenges the use of discriminatory, illegal and unconstitutional valuation methods on behalf of all affected property owners at Incline Village and Crystal Bay, Lake Tahoe. Nothing in NRS Chapter 361 limits the real property taxpayer to an individual action. Nothing in NRS Chapter 361 prohibits a class action by real property taxpayers to redress discriminatory, illegal and unconstitutional valuation methods used by an assessor's office. Nothing in NRS Chapter 361 prohibits real property taxpayers from forming an association to protect their rights, interests and assets or from bringing a legal action in the name of that association.

The doctrine of associational standing is well-established in the law. See, e.g., United Automobile Workers v. Brock, 477 U.S. 274, 290, 106 S.Ct. 2523, 91 L.Ed.2d 228 (1986) ("the doctrine of associational standing recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others.") In Hunt v. Washington Apple Advertising Commission, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977), the U.S. Supreme Court stated the requirements of such standing as follows:

> [A]n association has standing to bring suit on behalf of its members when:
>
> (a) its members would otherwise have standing to sue in their own right;
>
> (b) the interests it seeks to protect are germane to the organization's purpose; and
>
> (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

432 U.S. at 343, 97 S.Ct. at 2441, 53 L.Ed.2d at 394.

All three requirements are clearly met here. It is not disputed that the real property taxpayers who are the members of the Village League have standing to sue in their own right. The interests that the Village League seeks to protect in this action are directly related to its purpose, as reflected in its name, its website *http://www.nevadapropertytaxrevolt.org*, and its public statements. Finally, this action alleges claims for declaratory and injunctive relief which, by their nature, do not "require the participation of individual members."

The Washoe County respondents focus on the third Hunt requirement, arguing that "individual participation by each property owner who wishes to challenge his assessment is necessary for resolution of the issues in this case." County Respondents' Brief, p. 17, lns. 10-12. The County Respondents, however, fail to support this conclusory argument with any proof and no such proof exists. In truth, the issues presented by the Village League's complaint are legal, not factual. The resolution of those issues requires no "individual participation" whatsoever.

The third Hunt requirement that "individual members" not be required to participate in the lawsuit is essentially a reference to claims for damages, which are, for the most part, individual and require individualized proof. See, e.g., Warth v. Seldin, 422 U.S. 490, 511, 95 S.Ct. 2197, 2212, 45 L.Ed.2d 343, 362 (1975) ("[S]o long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the case, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction."). The League's complaint alleges the ultimate right of League members and others similarly situated to refunds. However, contrary to the representations of respondents, it does not ask the district court to adjudicate those refunds and does not call for any individualized proof with respect to those refunds. In this

regard, the League's complaint specifically requests only that the trial court direct the Assessor's Office to make new valuations under valid and legal assessment methods and then determine the amounts to be refunded. Apx., p. 17. No factual determinations with respect to individual properties are to be made by the district court.

The County Respondents also cite Deal v. 999 Lakeshore Association, 94 Nev. 301, 579 P.2d 775 (1978) for the proposition that the Village League does not have standing as an associational plaintiff. In Deal, a condominium management association joined the individual owners of the condominiums to sue the developer and contractor for damages to certain common areas. This Court held that, although the suit by the individual owners could proceed, the management association had no action for damages because it had no ownership interest. As the Deal Court wrote:

> Only the owners of condominiums have standing to sue for construction or design defects to the common areas, since they must eventually bear the costs of assessments made by the association. 94 Nev. at 304, 579 P.2d at 777.

Deal was an action for damages. The Deal opinion does not address the doctrine of associational standing and the Deal holding has no application to an action, as here, in which an associational plaintiff seeks declaratory or injunctive relief. On this issue of first impression in Nevada, this Court should adopt the U.S. Supreme Court's Hunt test for cases involving associational standing to seek declaratory relief challenging governmental action. See, Hunt, supra; Warth, supra; see also, Glengary-Gamlin Protective Association, Inc. v. Bird, 675 P.2d 344, 347-349 (Idaho App. 1984); Utah Restaurant Association v. Davis County Board of Health, 709 P.2d 1159, 1163 (Utah 1985); Architectural Committee of the Mount Olympus Cove Subdivision No. 3 v. Kabatznick, 949 P.2d 776, 778 (Utah App. 1997); Alaskans for a Common Language, Inc. v. Kritz, 3 P.3d 906, 915 (Alaska 2000); National

Electrical Contractors Association v. Employment Security Department of the State of Washington, 34 P.3d 860, 864-865 (Wash.App. 2001). This Court's concern in Deal was assuring that litigation was pursued by the "real party in interest" as required by NRCP Rule 17(a). Since the members of the Village League are "real parties in interest" here, the policy purposes of Rule 17(a) are served by granting the League "associational standing." See, e.g., Painter v. Anderson, 96 Nev. 941, 620 P.2d 1254 (1980).

III. THIS CASE IS APPROPRIATE FOR DECLARATORY RELIEF.[3]

A. In Arguing That Declaratory Relief Is Unavailable, The State Respondents Misstate The Law And Misconstrue The Allegations Of The Complaint.

As noted above, the Village League's complaint seeks declaratory as well as injunctive relief. The State Respondents argue that declaratory relief is inappropriate in this case because none of the requirements for declaratory relief, as set forth in Kress v. Corey, 65 Nev. 1, 26, 189 P.2d 352, 364 (1948), are met. Answering Brief of Respondents, State of Nevada, ex rel. Department of Taxation, the Nevada Tax Commission, and the Nevada State Board of Equalization ("State Respondents' Brief"), pp. 10 - 15. According to the State Respondents,

(1) There is no justiciable controversy.

(2) The State Respondents are not adverse to the members of the Village League.

(3) The members of the Village League do not have legally protectible interests.

(4) The issues involved are not "ripe" for determination.

To support this argument, the State Respondents both misstate the law and misconstrue the

[3] The availability of declaratory relief is an issue raised only by the State Respondents.

allegations of the complaint.

The State Respondents begin by asserting that they "are quasi-judicial bodies. . . [who] consequently, . . . perform their duties and functions, and exercise their powers, only within the context of the adjudication process described in NRS Chapter 361." State Respondents' Brief, p. 10, ln. 22- p. 11, ln. 1. The State Respondents further assert that they "have no general authority or jurisdiction to directly control, dictate, or orchestrate the conduct of the county assessors." State Respondents' Brief, p. 11, lns. 2-3.

The law is expressly, indisputably, undeniably otherwise.

The respondent State Department of Taxation is created by NRS §360.120. Under NRS §360.200, the Department is empowered to "exercise general supervision and control over the entire revenue system of the state" in addition to exercising the "specific powers enumerated" in the statutes. NRS §360.215 lays out in substantial detail the specific "powers and duties" of the respondent State Department of Taxation "regarding county assessors, assessment procedures and equalization." Those "powers and duties" are described as follows:

> The department:
>
> 1. May assist the county assessors in appraising property within their respective counties which the ratio study shows to be in need of reappraisal.
>
> **2. Shall consult with and assist county assessors to develop and maintain standard assessment procedures to be applied and used in all of the counties of the state, to ensure that assessments of property by county assessors are made equal in each of the several counties of this state.**
>
> * * *
>
> 3. Shall visit a selective cross section of assessable properties within the various counties in cooperation with the county assessor and examine those properties and compare them with the tax roll and assist the various county assessors in correcting any inequalities found to exist with factors of equal value and actual assessed value considered, ...
>
> **4. Shall carry on a continuing study, the object of which is the equalization of property values between counties.**

5. Shall carry on a program of in-service training for county assessors of the several counties of the state, ...

6. Shall continually supervise assessment procedures which are carried on in the several counties of the state and advise county assessors in the application of such procedures. The department shall make a complete written report to each session of the legislature, which must include all reports of its activities and findings and all recommendations which it has made to the several county assessors, and the extent to which the recommendations have been followed.

7. Shall carry on a continuing program to maintain and study the assessment of public utilities and all other property assessed by the department to the end that the assessment is equalized with the property assessable by county assessors.

8. May conduct appraisals at the request of and in conjunction with any county assessor . . . .

9. Shall establish and maintain a manual of assessment policies and procedures. (Emphasis added.)

Given these specific and express statutory powers and duties with respect to "county assessors, assessment procedures, and equalization," counsel for the State Respondents is being less than candid with this Court in arguing that the Department of Taxation can "influence" county assessors and their practices "only within the context of the adjudication process described in NRS Chapter 361." State Respondents' Brief, p. 11, lns. 1-6.

The same is true of the Tax Commission and the State Board of Equalization. NRS §360.250 sets forth the specific powers of the Tax Commission with respect to county assessors and their assessments. That provision states as follows:

The Nevada tax commission may:

(a) Confer with, advise and **direct** county assessors, . . . and all other county officers having to do with the preparation of the assessment roll or collection of taxes or other revenues as to their duties.

(b) Establish and prescribe general and uniform regulations governing the assessment of property by the county assessors of the various counties, not in conflict with law.

(c) Prescribe the form and manner in which assessment rolls or tax lists must be kept by county assessors.

(d) Prescribe the form of the statements of property owners in making returns of their property.

(e) Require county assessors . . . and all other county officers having to do with the preparation of the assessment roll or collection of taxes or other revenues, to furnish such information in relation to assessments, licenses or the equalization of property valuations and in such form as the Nevada tax commission may demand.

(f) Except as otherwise provided in this Title, share information in its records with agencies of local governments which are responsible for the collection of debts or obligations . . . . (Emphasis added.)

NRS §360.250(2) further requires each county assessor to "certify under penalty of perjury" that, in assessing property, he or she "has complied with the regulations of the Nevada tax commission." NRS §360.260 empowers the respondent Tax Commission to "direct what proceedings, actions and prosecutions shall be instituted to support the law." NRS §360.270 further authorizes the Tax Commission and the Department of Taxation to exercise "any necessary and proper power" in the performance of their enumerated duties.

The respondent State Board of Equalization is created by NRS §361.375. Under NRS §361.395, the State Board of Equalization must

(a) Equalize property valuations in the state

(b) Review the tax rolls of the various counties as corrected by the county boards of equalization thereof and raise or lower, equalizing and establishing the taxable value of the property, for the purpose of the valuations therein established by all the county assessors and county boards of equalization and the Nevada tax commission. . . .

It should be noted that NRS §361.395, and the obligations it imposes on the State Board of Equalization, is separate from NRS §361.400, which authorizes the State Board to hear appeals from county boards of equalization.

The State Respondents argue that "[t]he Village League's cause of action against the [State Board of Equalization] is apparently premised upon the ridiculous notion

that the Board. . . has an obligation to *sua sponte* seek out and address any inequities inherent in a system of mass appraisal and tax assessment." State Respondents' Brief, p. 11, lns. 14-17. Actually, the only "ridiculous notion" that the League and its members have is that the State Board as well as the Tax Commission and the State Department of Taxation should perform their statutory duties and obligations and exercise their statutory powers to enforce the Nevada Constitution and statutes. It is admittedly that "ridiculous notion" upon which the League's complaint is premised.

The State Respondents also argue that, in its complaint, the Village League "neglected to allege that its members properly challenged the assessments at issue in this case" and that the State Respondents "were never afforded an opportunity to review and act upon the assessments at issue in this case." State Respondents' Brief, p. 11, lns. 9-10; p. 13, lns. 3-4. Again, the State Respondents are attempting to rewrite both League's complaint and the law.

There are no "assessments" at issue in this case and certainly no requirement under the declaratory judgment act that the League allege any such assessments. The claims in this case as alleged against the State Respondents are based on their failure to perform their statutory duties and obligations. There is no administrative adjudicatory procedure by which the League or its members can challenge the failure of the Department to "develop standard assessment procedures" for all the counties in the state or the failure of the Commission to enforce its regulations governing the assessment of property or the Board to equalize across the state.

The statutory obligations of the Department, the Commission and the Board are not triggered by some action of the taxpayer. Those obligations are ongoing, as is the "opportunity" to perform them. The failure of the State Respondents to perform their

statutory duties and obligations are properly challenged by this action for declaratory relief under NRS Chapter 30.

B. All Of The Requirements For Declaratory Relief Are Satisfied Here.

Both the standards governing motions to dismiss and the declaratory relief statutes require liberal construction and administration. As this Court has written:

> Actions for declaratory relief are governed by the same liberal pleading standards that are applied in other civil actions. [Citation omitted.] The formal sufficiency of a claim is governed by NRCP 8(a), which requires only that the claim, "shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled." Breliant v. Preferred Equities, Inc., 109 Nev. 842, 846, 858 P.2d 1258, 1260-1261 (1993); see also, Tahoe Village Homeowners Association v. Douglas County, 106 Nev. 660, 799 P.2d 556 (1990); NRS §30.140.

Although whether or not to grant declaratory relief may ultimately be discretionary with the trial court, it is not a discretion to be exercised at the pleading stage.

1. There Is A Justiciable Controversy.

The League's complaint names the State Board of Equalization and alleges its statutory responsibility under NRS §361.395 for equalizing property valuations in the State. Apx., pp. 3, 10. The complaint seeks a declaration that the Board has failed to meet those statutory obligations and further seeks injunctive relief compelling and requiring it to do so. Id., pp. 16-17. The complaint similarly names the State Department of Taxation and the Nevada Tax Commission, the head of that Department, and alleges their statutory obligations under NRS. §360.215, §360.250 and §360.280 to maintain standard assessment procedures to be used in all of the counties of the state, to prescribe regulations establishing those standard assessment procedures, and to supervise and advise county assessors for purpose of

maintaining uniformity of taxation throughout the state. Id., pp. 5, 6, 8. The complaint alleges the failure of the Department and Commission to meet their statutory obligations and seeks injunctive relief compelling and requiring them to do so. Id., p.17.

A "justiciable controversy" is "a controversy in which a claim of right is asserted against one who has an interest in contesting it." Kress, supra, 65 Nev. at 26, 189 P.2d at 364. On its face, the League's complaint clearly states a justiciable controversy. The members of the League ask the court to declare the failure of the State Respondents to perform their statutory obligations. The State Respondents indisputably have an interest in contesting such claims, an interest which is demonstrated by their contest in fact.

2. The Village League And The State Respondents Have Adverse Interests.

The State Respondents argue that they are not adverse to the Village League and its members because they have never "rendered" a decision "against the Village League or its Members." State Respondents' Brief, p. 14, lns. 3-5. That argument simply begs the question. "Adverse interests" for purposes of declaratory relief does not require that respondents have "rendered" an adverse decision. The allegations of the League's complaint are that the State Respondents have failed to act as they are required by Nevada law. Unless the State Respondents are prepared to admit to that failure in the performance of their statutory duties and obligations, they and the Village League have "adverse interests" in this action.

3. The Village League Has A Legally Protectible Interest.

The State Respondents argue that the League does not have the "legally protectible interest" required for declaratory relief because it "does not own the real property that is the subject of the Assessor's alleged unlawful assessments." State Respondents' Brief,

p. 14, lns. 13-14. This is, for all practical purposes, the same issue as raised by the County Respondents with respect to "associational standing." The League does not own any real property. Its members, however, do. In the pursuit of injunctive or declaratory relief, an association has standing if its individual members would have standing. See, e.g., Hunt, supra; Oregon Advocacy Center v. Mink, 322 F.3d 1101, 1111 (9th Cir. 2003); Alaska Fish & Wildlife Federation and Outdoor Council, Inc. v. Dunkle, 829 F.2d 933, 938 (9th Cir.1987).

4. The Issues In This Action Are Ripe For Review.

The State Respondents argue that the question of "ripeness" is essentially the same as the existence of a "justiciable controversy." State Respondents' Brief, p. 14, lns. 22-23. In that context, the State Respondents argue again that they "have yet to address the question of whether the Assessor improperly assessed taxes against the properties [owned by League members]" and that they "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." State Respondents' Brief, p. 15, lns. 5-9. State Respondents further argue that the League "expect[s] the District Court to usurp the role of these State Respondents with respect to the equalization of real property in the state" and that "the District Court's proper role . . . is to review decisions that are rendered by state agencies . . . not to substitute its judgment for that of the state agency with respect to matters within their competence and expertise." State Respondents' Brief, p. 15, lns. 11-17.

With these arguments, the State Respondents reach new heights, or, as the case may be, depths, of intellectual casuistry. The State Department of Taxation and the Tax Commission are never "presented" with appeals from County Boards of Equalization. The claims against the State Respondents, as alleged in the League's complaint, are based not

on the actions of the Washoe County Assessor's Office but rather on the failure of the State Respondents to perform their statutory duties and obligations. No amount of "spin" or obfuscation on the part of the State Respondents can change the focus of those allegations. Likewise, nothing in the League's complaint suggests that the trial court should engage in the equalization of property tax assessments or "substitute" its judgment for that of the agency on matters of state agency "competence and expertise." Any such "suggestion" has been wholly invented by the State Respondents. All the League's complaint seeks is a declaration that the State Respondents have failed to exercise that "competence and expertise" as required by the governing statutes and an order requiring them to do so. The issues as framed by the League's complaint are undeniably "ripe" for judicial determination.

C. The Cases Cited By The State Respondents Are Inapposite.

The cases cited by the State Respondents to defeat declaratory relief are inapposite on the facts. In Cox v. Glenbrook Co., 78 Nev. 254, 371 P.2d 647 (1962), one issue was whether a proposed subdivision would constitute an illegal burden on the servient estate of a right-of-way easement. This Court declined to make a "hypothetical adjudication" and ruled that the decision had to wait until the subdivision was constructed and proper evidence could be presented of the burden created. 78 Nev. at 266-267. The failures of the State Respondents to ensure standard assessment procedures or to equalize property valuations as alleged in the League's complaint are not "future events."

In Knittle v. Progressive Casualty Insurance Company, 112 Nev. 8, 908 P.2d 724 (1996), this Court affirmed the trial court's dismissal of the plaintiff's attempt to litigate simultaneously her tort action against the alleged tortfeasor and a declaratory judgment action as to coverage under the tortfeasor's insurance policy. Until there was a judgment against the

tortfeasor, the insurance company had no duty to the plaintiff and the plaintiff had no legally protectible interest to assert against the tortfeasor's insurance policy. 112 Nev. at 10-11. In the present case, however, the duties and obligations of the State Respondents already exist. The Village League brings this action on behalf of its members and those similarly situated to enforce those existing and ongoing duties and obligations.

In Doe v. Bryan, 102 Nev. 523, 728 P.2d 443 (1986), this Court held that homosexuals who had never been arrested or prosecuting for violating the sodomy statute could not challenge the constitutionality of the statute with a declaratory relief action. Again, there is no application to the facts of the present case. Here, the State Respondents have failed their statutory obligations to adopt and enforce standard assessment procedures and to equalize property valuations in compliance with the constitutional requirement of equal and uniform taxation. Unlike Doe, Knittle, or Cox, the present case meets all the requirements for declaratory relief.

IV. THE ARGUMENTS MADE BY RESPONDENTS IN THEIR ANSWERING BRIEFS ARE UNSUPPORTED BY THE FACTS OR THE LAW.

A. The Arguments of the State Respondents.

The State Respondents argue that the League "failed to allege that its members at any time presented their grievances to the Board, Department or Commission for review or adjudication," citing NRS §361.360 and §361.400. State Respondents' Brief, p. 2, lns. 7-9; see also, State Respondents' Brief, p. 10, lns. 12-15. No procedure is created under either statute for presenting "grievances" to the Department or the Commission. NRS §361.360 and §361.400 deal with appeals from county boards of equalization. Those county boards of equalization have no power to equalize property taxation on a statewide basis. No procedure is created under either §361.360 or §361.400 for "reviewing" or "adjudicating" the failure of

the State Board under NRS §361.395 to equalize the tax rolls throughout the State. In the absence of any such administrative procedure, there can be no requirement of "exhaustion."

The State Respondents also argue that the 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." State Respondents' Brief, p. 9, lns. 17-19. The enabling statutes, however, mandate that the Board, Department and Commission act to ensure standard assessment methodologies and uniform and equal taxation as required by the Nevada Constitution. See, e.g., NRS §360.215, §360.250, §360.260, §361.395. Not one of those statutes is prefaced by the language: "if asked to do so by a taxpayer." Not one of the duties and obligations created by those statutes depends on or requires initiation by a taxpayer.

The State Respondents also argue that the League is asking the trial 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." State Respondents' Brief, p. 6, lns. 16-18. They also argue that "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." State Respondents' Brief, p. 6, lns. 19-22. Finally, they argue that the League's claims "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." State Respondents' Brief, p. 6, lns. 22-24. The State Respondents then conclude that all these things that they say the League is asking the court to do "present mixed questions of law and fact such that they must first be

pursued by way of the administrative process." State Respondents' Brief, p. 6, lns. 24-26. Nowhere, however, in this entire string of arguments about what the League's complaint seeks and what the trial court would have to do is there either (1) a single reference to a single allegation of the complaint that supposedly supports the argument or (2) a single description of a single fact that the trial court would have to determine under the allegations of the League's complaint.

The State Respondents also profess to be "mystified" by their inclusion in this lawsuit. State Respondents' Brief, p. 2, lns. 10-11. Any such "mystification" is a sham. There is nothing mysterious about the allegations of the League's complaint. In paragraph 17, that complaint alleges that the defendant Department of Taxation is "required by law to 'consult with and assist county assessors to develop and maintain standard assessment procedures to be applied and used in all of the counties of the state, to ensure that assessments of property by county assessors are made equal in each of the several counties of this state,'" citing NRS §360.215 (2). Apx., p. 5. Paragraph 17 further alleges that, under NRS §360.215(6), the Department is "required by law to 'continually supervise assessment procedures' as carried on in the several counties of the state and to 'advise county assessors in the application of such procedures.'" Id.

In paragraph 18, the League's complaint cites NRS §360.280(1) and alleges that

> the defendant Nevada Tax Commission is required to establish and prescribe regulations for the determination of taxable value to be adopted and put into practice by all county assessors in the State of Nevada for the purpose of maintaining uniformity of taxation throughout the state. Apx., pp. 5-6.

Paragraph 18 further alleges that "the Washoe County Assessor is governed by [the]

regulations issued by the State Tax Commission." Id. Paragraph 26 of the complaint realleges the statutory duties of the Department and the Commission and Paragraphs 27 and 28 allege the failure of the Department and the Commission to meet those statutory duties and obligations. Id., pp. 8-9. Paragraph 29 alleges that, by allowing the use of the illegal assessment methods by the Washoe County Assessor's office to determine the taxable value of real property, the Department and the Commission have effectively made these illegal assessment methods de facto "regulations" of the Commission which are invalid because they were not adopted by the Commission in compliance with the notice and hearing requirements of NRS Chapter 233B. Id., pp. 9.

The State Respondents argue that the League's contention "that the methodologies 'are de facto regulations' is simply inaccurate." State Respondents' Brief, p. 16, lns. 10-12. That is not a determination that can be made by this Court or the trial court on a Rule 12(b)(5) motion to dismiss. For purposes of this motion, this Court must accept as true the allegation that those methodologies constitute "de facto regulations" which have not been enacted in accordance with the law and for which the judicial system provides a remedy. See, e.g., Public Service Commission of Nevada v. Southwest Gas Corp., 99 Nev. 268, 272-274, 662 P.2d 624, 626-628 (1983).

The State Respondents also argue that the League has alleged that the State Respondents have "an unlawful state of mind" and that such allegations are purely speculative and not actionable. State Respondents' Brief, p. 10, lns. 1-6. This argument is disingenuous to the point of being offensive. The State Respondents are named and sued in this action because they have statutory duties and obligations with respect to real property assessment and they have failed to meet those duties and obligations.

The State Respondents characterize this action as a "garden-variety dispute over the assessment of real property taxes." State Respondents' Brief, p. 22, lns. 5-6. State Respondents engage in this kind of put-down in an attempt to minimize the League's claims which are, in fact, not "garden variety" at all as even a cursory review of the actual allegations of the complaint will demonstrate. Individual contests of the assessment of their real property do not ordinarily involve challenges directed at the Commission or the Department nor do they involve statewide equalization.

The State Respondents also argue that the League "failed to allege with adequate specificity the grounds upon which its members should be excused from exhausting their administrative remedies." State Respondents' Brief, p. 8, lns. 16-17. If this is the basis for the dismissal of the League's complaint, that dismissal was plain error. Under Cohen v. Mirage Resorts, 119 Nev. 1, 22, 62 P.3d 720, 734 (2003), the appropriate action for the trial court would have been to grant leave to amend as requested by the Village League. See Transcript, p. 32, lns. 9-17.

The State Respondents argue that the two cases that are applicable to this matter are Malecon Tobacco, LLC v. State, Department of Taxation, 118 Nev. 837, 59 P.3d 474 (2002), and First American Title v. State of Nevada, 91 Nev. 804, 543 P.2d 1344 (1975). State Respondents' Brief, p. 18, lns. 15-21. They argue that Malecon governs because "factual issues pertaining to taxation are better left to the agencies in charge of interpretation and enforcement of Nevada's taxation statutes and regulations." Id., p. 18, lns. 17-19. The State Respondents again fail to identify any factual issue that the trial court is being asked to determine on the allegations of the League's complaint in this action.

However, if factual issues are "better left" to the agencies, clearly legal issues

are better left to the courts, including the legal issues raised here with respect to the statutory duties and obligations of the State Respondents. It is not by accident that both district judges and members of this Court are required to be lawyers (NRS §2.020; §3.060) or that statutory interpretations are determined *de novo* by this Court. See, e.g., Seino v. Employers Ins. Co. of Nevada, 121 Nev. Adv. Op. No. 17, 111 P.3d 1107, 1110 (May 26, 2005). The administrative process that must be exhausted, according to the State Respondents, begins with the County Board of Equalization and ends with the State Board of Equalization, after which judicial review must be sought. With respect to legal issues, neither the County Board nor the State Board of Equalization is composed of lawyers or even has a lawyer representative. The County Board is advised by the same lawyers that advise the County Assessor. The State Board is advised by the same lawyers that advise the State Department of Taxation and the State Tax Commission.

The First American Title case is cited by the State Respondents for the proposition that, if League members had pursued the administrative process, they "'may well have been granted the relief they now seek'" and "'judicial intervention may [have been] unnecessary.'" State Respondents' Brief, p. 18, lns. 11-13. In this case, however, the League seeks a declaration as to the failure of the Department, State Board of Equalization, and the Commission to perform their statutory duties and obligations. That relief is not available through any administrative process.

Finally, the State Respondents cite Hermann v. Delavan, 572 N.W.2d 855 (Wis. 1998), as "extremely similar" to the instant case. The characterization is inaccurate. In Hermann, some Wisconsin taxpayers brought an action challenging the valuation for assessment purposes of their properties on the grounds that the valuation violated the

uniformity clause of the Wisconsin Constitution. The Wisconsin Supreme Court addressed whether the plaintiff taxpayers could have obtained the relief they sought through the administrative procedure. After reviewing the three different ways which the Wisconsin Legislature had established for seeking review of tax assessments, the Wisconsin Court determined that the taxpayers could have obtained the relief they sought in court through one or more of those administrative processes and held the court action precluded by their failure to do so. No similar analysis can be made here. The members of the Village League cannot obtain through the available administrative processes a determination that the Department of Taxation, the Tax Commission or the State Board of Equalization have failed to perform their statutory duties and obligations. The Delavan court acknowledged that "[w]here an appeal to an administrative agency would not provide adequate resolution of the issues raised by a party, that party may properly challenge an administrative decision by commencing a separate action for relief." 572 N.W.2d at 860.

B. The Arguments of the County Respondents.

The County Respondents argue that NRS §361.260(7) gives the County Assessor the "authority to establish standards for the appraisal of land." County Respondents' Brief, p. 3, lns. 16-18. At the time of the filing of the League's complaint, NRS §361.260(7) provided as follows:

> The county assessor shall establish standards for appraising and reappraising land pursuant to this section.

In fact, it is the interpretation of NRS §361.260(7) and its relationship to NRS §360.215 and to NRS §360.250 that are at the heart of the League's complaint and one of the reasons that, if the exhaustion doctrine applies here, it is excused. NRS §361.260(7) requires the county assessor to establish appraisal standards. NRS §360.215, at the same time, requires the

Department of Taxation to "supervise assessment procedures" followed by county assessors and to "consult with and assist county assessors to develop and maintain standard assessment procedures to be applied and used in all of the counties of the state to ensure that assessments of property . . . are made equal in each of the several counties." At the same time as well, NRS §360.250 requires the Tax Commission to "establish and prescribe general and uniform regulations governing the assessment of property by the county assessors . . . ."

Construing these three separate statutes, which all address the same subject matter, in a way that gives them all meaning is a job for the court, not a board of citizen volunteers. See, e.g., Southern Nevada Homebuilders Association v. Clark County, 121 Nev. Adv. Op. No. 46, 117 P.3d 171, 173 (Aug. 11, 2005) ("When interpreting a statute, this court must give its terms their plain meaning, considering its provisions as a whole so as to read them 'in a way that would not render words or phrases superfluous or make a provision nugatory.' Further, it is the duty of this court, when possible, to interpret provisions within a common statutory scheme 'harmoniously with one another in accordance with the general purpose of those statutes' and to avoid unreasonable or absurd results, thereby giving effect to the Legislature's intent.")

The County Respondents also rely heavily on NRS §361.410(1) which states 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 Equalization has denied complainant relief. See County Respondents' Brief, p. 5, lns. 5-15; p. 8, ln. 21 - p. 9, ln. 3.

According to the County Respondents, this statute "operates as a blanket prohibition against

bringing an action for relief from the payment of taxes without first exhausting the established administrative remedies." County Respondents' Brief, p. 9, lns. 4-7. In making this argument, the County Respondents fail to take into account either the history of this statute or its particular language. NRS §361.410(1) was enacted in 1917 as part of the legislation which created the Nevada Tax Commission and the State Board of Equalization. 1917 Nev.Stat. 328-338. Under that legislation, the Governor was the chairman of both the Tax Commission and the State Board of Equalization and the State Board consisted of the members of the Tax Commission and all of the county assessors. Id.

In any event, this action by the Village League is neither at law nor related to the "payment" of taxes. It is an action for declaratory relief with respect to the construction and interpretation of statutes. See NRS §30.040. This Court has already acknowledged that the trial court has the discretion not to require exhaustion of administrative remedies in tax assessment matters that involve the interpretation or constitutionality of statutes. Malecon, supra.

The County Respondents also insist that the League's complaint "seeks to apply law to facts by challenging assessor methodologies as they pertain to particular properties." County Respondents' Brief, p. 9, fn. 2; see also p. 11, ln. 15 - p. 13, ln. 5. The County Respondents, however, have either misread or intentionally misrepresent the League's allegations. The mere allegation of facts in the complaint for illustrative or demonstrative purposes, such as allegations as to the comparative increases in assessed valuation, do not convert legal issues into factual issues. In its complaint, the League challenges the use of certain assessment methodologies by the Washoe County Assessor as unconstitutional, discriminatory and contrary to the Commission's regulations. Apx., p. 7-10, 16. In its

complaint, the League also alleges the failure of the Department to perform its statutory duty to develop and maintain standard assessment procedures. Id., pp. 5, 8, 9. Nowhere in that complaint does the League challenge the application of assessment methods to particular properties. The issues presented by the League's complaint are legal, not factual.

The County Respondents have also misunderstood the futility exception to the exhaustion requirement. The League, for example, has asserted that, inasmuch as the Assessor's Office and the County Board of Equalization have the same lawyers, the taxpayer cannot expect the Board, which relies on its counsel for legal advice, to take the position that the Assessor's methods violate the Nevada statutes or Constitution. In response, the County Respondents argue that, assuming that to be true, the "worst potential outcome" is that the League and its members can appeal to the district court. The whole point of the "futility" exception, however, is that, if the issue is going to end up in court anyway, it might as well start there and avoid the delay of the administrative process. See, e.g., Malecon, supra, 118 Nev. at 841.

V. ANY "REQUIREMENT" TO EXHAUST ADMINISTRATIVE "REMEDIES" IS EITHER INAPPLICABLE TO THE LEAGUE'S CLAIMS OR EXCUSED.

The League's complaint alleges the following claims:

(1) That the methods used by the Washoe County Assessor's Office are "de facto" regulations under NRS §360.280(1) which are invalid because they have not been adopted in compliance with the requirements of the Administrative Procedure Act;

(2) That the State Department of Taxation and the Nevada Tax Commission have failed to meet their statutory duties and obligations to standardize assessment methods throughout the State;

(3) That the State Board of Equalization and the State Department of Taxation

have failed to meet their statutory duties to prevent a disparity in assessed valuation between similarly situated property at Lake Tahoe in Douglas and Washoe Counties that violates the Constitutional guarantee of uniformity;

(4) That the "view classification" system adopted and used by the Washoe County Assessors' Office in the valuation of property at Crystal Bay and Incline Village violates the constitutional guarantees of equal protection and due process;

(5) That the procedure adopted and used by the Washoe County Assessor's Office for notifying property owners of the assessed valuation of their real property and their rights to challenge that valuation violates due process. Apx., pp. 1-18.

No administrative process exists for the claims that the Village League asserts against the Department, the Commission or even the State Board of Equalization. It is the affirmative duties of the State Board of Equalization under NRS §361.395 to review the tax rolls and equalize property valuations that are at issue in this action, not its duties under NRS §361.400 with respect to appeals from county boards of equalization. It is axiomatic that no exhaustion requirement can be imposed where no process exists.

To the extent an administrative process exists under the Nevada statutes for the review of individual assessments, the application of the exhaustion requirement is a matter of judicial discretion and not imposed where the public policy purposes served by that requirement are not advanced. See, e.g., TDM, Inc. v. Tax Commission, 103 P.3d 190, 191 (Utah App. 2004) ("where purely legal questions are raised that cannot be finally determined in an administrative proceeding, the pursuit of the administrative proceeding may serve no purpose"). This Court has recognized two exceptions to the application of the exhaustion requirement, both of which are found in this case. See, e.g., State, Nevada Department of

Taxation v. Scotsman Manufacturing Company, 109 Nev. 252, 254-255, 849 P.2d 317, 319 (1993); see also, Metropolitan Water District of Southern California v. State, Nevada Department of Taxation, 96 Nev. 506, 665 P.2d 262 (1983).

The first such exception is "where the issues relate solely to the interpretation or constitutionality of a statute." State of Nevada v. Glusman, 98 Nev. 412, 419, 651 P.2d 639, 644 (1982), appeal dism'd, 459 U.S. 1192, 103 S.Ct. 1170, 75 L.Ed.2d 423 (1983). With respect to this exception, the State Respondents argue that the League has failed to challenge the "constitutionality" of any of the statutes involved here. State Respondents' Brief, p. 3, lns. 9-10; p. 20, lns. 16-19. The State Respondents omit any reference to the exception as it applies to the interpretation of statutes, the actual basis for its application here. The County Respondents argue that this exception is unavailable because there are unspecified mixed issues of fact and law to be resolved. County Respondents' Brief, pp. 10-11. As noted above, however, no such issues are, in fact, raised by the League's complaint.

The second exception to the exhaustion requirement that has been recognized by this Court is "where initiation of administrative proceedings would be futile." Engelmann v. Westergard, 98 Nev. 348, 353, 647 P.2d 385, 389 (1982). To the extent any of the Village League's claims could be brought before the county or state boards of equalization, there could be no clearer instance of futility. All of those claims raise legal issues involving the alleged violation of statutes and regulations as well as State and Federal Constitutional guarantees of equal protection and due process. The county and state boards of equalization are not created to decide whether the assessment methods being used constitute invalid "de facto" regulations, whether those methods violate the legislative intent of the enabling statute, Commission regulation, or Constitutional provisions, whether State agencies have failed to meet their

statutory obligations or any other legal issue. Furthermore, whatever the ultimate administrative decision on those legal issues, it would inevitably be appealed to this Court. See, e.g., Mineral County v. State Board of Equalization, 121 Nev. Adv. Op. No. 55, 119 P.3d 706, 707-708 (Sept. 15, 2005).

VI. CONCLUSION -- THE RELIEF SOUGHT

Administrative processes are established to facilitate the determination of factual disputes by quasi-judicial entities created for that purpose. Those processes are not intended to shield government agencies from accountability for their failures to perform their statutory and constitutional duties and obligations. The County Respondents have knowingly applied assessment methods for real property at Crystal Bay and Incline Village that are different from the methods used elsewhere in the county and in the state. In so doing, the County Respondents have unlawfully discriminated against the owners of real property at Crystal Bay and Incline Village and denied them the equal protection of the law. The State Respondents have failed their statutory mandate to ensure that assessment methods are standardized and that assessments are equalized throughout the state. Both the County Respondents and the State Respondents seek to shield their wrongful acts and failures to act from judicial scrutiny by hiding behind an administrative procedure that does not encompass such wrongdoing and that was not and is not intended to remedy such wrongdoing.

Requiring taxpayers to "exhaust" non-existent or ineffective administrative "remedies" only denies them any relief at all other than through the political process. The Taxpayer Bill of Rights evidences the State Legislature's intent that the Tax Commission, the Department of Taxation and other state and county agencies involved in taxation be held accountable. An administrative "process" that does not even reach the Commission or the Department cannot

provide that accountability. The Village League respectfully submits that, under the law, this Court must reverse the trial court's dismissal of this action and remand this matter for a determination on the merits.

Dated this 5th day of January, 2006.

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CERTIFICATE OF COMPLIANCE TO APPELLANT'S REPLY BRIEF

I hereby certify that I have read the appellant's reply brief, 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 a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 5th day of January, 2006.

By: _____

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CERTIFICATE OF SERVICE

Pursuant to NRAP 5(b), I certify that I am an employee of the law offices of Woodburn and Wedge, 6100 Neil Road, Suite 500, Reno, NV 89511, and that on the 5th day of January, 2006, I served the foregoing document(s) described as follows:

APPELLANT'S REPLY BRIEF

On the parties set forth below by:

__X__ Placing an original or true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail, at Reno, Nevada, postage prepaid, following ordinary business practices.

____ Personal delivery.

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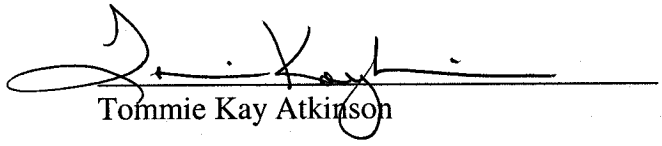

Tommie Kay Atkinson