

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, and others similarly
situated,

Case No. 43441

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, WASHOE COUNTY
ASSESSOR; BILL BERRUM, WASHOE
COUNTY TREASURER,

Respondents.

FILED

OCT 31 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY S. Yarn
DEPUTY CLERK

ON APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE

ANSWERING BRIEF OF RESPONDENT WASHOE COUNTY

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OCT 31 2005

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I

Statement of the Issues Presented for Review

1. Whether the district court properly dismissed appellant's lawsuit for failure to exhaust administrative remedies.

II

Statement of the Case

A. The Proceedings Below.

Plaintiff Village League, appellant herein, filed its complaint in the Second Judicial District on November 13, 2005. See complaint, Joint Appendix (JA), pp. 1-18. Appellees Washoe County, Assessor Robert McGowan, and Treasurer Bill Berrum (hereinafter referred to collectively as the county defendants) moved to dismiss on December 19, 2003. These parties asserted the grounds of failure to exhaust administrative remedies and Village League's lack of standing to bring the lawsuit. See Motion to Dismiss, JA 19-29. The State Board of Equalization and Department of Taxation also filed motions to dismiss. JA 30-45; 46-56. Following the completion of briefing and oral argument, the district court on June 2, 2004, granted all motions to dismiss. JA 114-119. The county defendants filed a notice of entry of order on June 4, 2004. JA 120. Plaintiff Village League filed its notice of appeal on June 10, 2004. JA 129. The instant appeal is from the district court's order granting all defendants' motions to dismiss.

//

1 B. Facts.

2 Because this appeal is from an order granting motions to
3 dismiss, the facts are taken from Village League's complaint.
4 Village League claims to be a non-profit membership corporation
5 whose members own real property at Crystal Bay or Incline
6 Village, Washoe County, Nevada. Complaint, JA 2. Village
7 League itself, the only plaintiff in the lawsuit, does not
8 claim to own any real property, whether in Washoe County or
9 elsewhere. The lawsuit was brought to challenge certain
10 methods used by the Washoe County Assessor's office to assess
11 real property in Incline Village and Crystal Bay. Complaint,
12 JA 2. Briefly, those methods include utilizing a "view"
13 classification for determining the taxable value for the land
14 portion of real property at Lake Tahoe (complaint, JA 6); using
15 a "time-value" method to calculate the value of comparable
16 properties if there had been an insufficient number of recent
17 comparable sales on which to value the property (complaint, JA
18 7); using a formula to value lakefront footage (complaint, JA
19 7); and other similar techniques, designed "to determine the
20 taxable value of real property . . ." Complaint, JA 9. The
21 lawsuit challenges these techniques as violative of the Equal
22 Protection clause of the United States Constitution (complaint,
23 JA 17) and of the Nevada Constitution's requirement for "a
24 uniform and equal rate of assessment and taxation" of real and
25 personal property. Complaint, JA 4. Further reference to the
26 allegations of the complaint will be made below.

1 III

2 Argument

3 A. The District Court Properly Dismissed Village
4 League's Lawsuit for Failure to Exhaust Administrative
5 Remedies.

6 NRS Chapter 361 provides a comprehensive scheme for the
7 assessment of real property within the State of Nevada. The
8 county assessor determines the taxable value of real property
9 in accordance with the requirements of NRS § 361.227. The
10 assessor calculates the values of land and improvements
11 separately. NRS 361.227(1). As appellant Village League
12 acknowledges, the taxable value of the land "is its market
13 value as unimproved, vacant land with its highest and best use
14 deemed to be the actual use to which the improvements are being
15 put." Opening brief (O.B.), p. 4. NRS § 361.260 established
16 the method of assessing property for taxation. NRS 361.260(7)
17 gives¹ the assessor authority to establish standards for the
18 appraisal of land:

19 The county assessor shall establish standards for
20 appraising and reappraising land pursuant to this
21 section. In establishing the standards, the county
22 assessor shall consider comparable sales of land
23 before July of the year before the lien date.

24 In assessing real property, the assessor is to take into
25 consideration all of the attributes of the property. See NRS §
26 361.228(3) (emphasis added):

25 ¹ This section was amended during the last legislative session. See AB 392,
26 Sec. 3, 73rd Session of the Nevada Legislature, 2005. The language quoted
supra, however, was operative at the time of the filing of the complaint and
the district court's order dismissing the lawsuit.

1 The attributes of real property, *such as* zoning,
2 location, view and geographic features, are not
3 intangible personal property and must be considered
in valuing the real property, if appropriate.

4 It is clear from the emphasized portion of the quote above that
5 the listed attributes are illustrative rather than
6 comprehensive. The legislature chose, however, to explicitly
7 mention view, location, and geographic features as particular
8 attributes to be considered by the assessor in valuing real
9 property.

10 In addition to describing the duties and powers of
11 assessors, Chapter 361 establishes a procedure for property
12 owners to challenge assessments. Any person claiming
13 overvaluation or excessive valuation of its real or secured
14 personal property "shall" appear before the county board of
15 equalization and submit proof of his claim. NRS 361.355(1).
16 Also see NRS 361.356(1):

17 An owner of property who believes that his property
18 was assessed at a higher value than another property
19 whose use is identical and whose location is
20 comparable may appeal the assessment, on or before
January 15 of the fiscal year in which the assessment
was made, to the county board of equalization.

21 Any such party who is dissatisfied with the ruling of the
22 county board of equalization may file an appeal with the state
23 board of equalization. NRS 361.360(1). The appeal must be
24 filed by March 10 following the board of equalization's ruling.
25 NRS 361.360(1). No appeal to the state board shall be heard
26 "save upon the evidence and data submitted to the county board

1 of equalization, unless it is proven to the satisfaction of the
2 state board of equalization that it was impossible in the
3 exercise of due diligence to have discovered or secured such
4 evidence and data in time to have submitted the same to the
5 county board of equalization" Only after appealing a
6 valuation issue to the county and state boards of equalization
7 pursuant to the procedures referenced above may a taxpayer seek
8 redress in a court of law. See NRS 361.410(1), which states,
9 in pertinent part:

10 No taxpayer may be deprived of any remedy or redress
11 in a court of law relating to the payment of taxes,
12 but all such actions must be for redress from the
13 findings of the state board of equalization, and no
14 action may be instituted upon the act of a county
15 assessor or of a county board of equalization or the
16 Nevada tax commission until the state board of
17 equalization has denied complainant relief.

18 (emphasis added)

19 A taxpayer is further required to pay his taxes under
20 protest in order to commence suit. NRS 361.420. This statute
21 establishes a limitations period for bringing such a suit. See
22 NRS 361.420(3):

23 Every action commenced under the provisions of this
24 section must be commenced within 3 months after the
25 date of the payment of the last installment of taxes,
26 and if not so commenced is *forever barred*. If the
tax complained of is paid in full and under the
written protest provided for in this section, at the
time of the payment of the first installment of
taxes, suit for the recovery of the difference
between the amount paid and the amount claimed to be
justly due must be commenced within 3 months after
the date of the full payment of the tax or the
issuance of the decision of the state board of

1 equalization denying relief, whichever occurs later,
2 and if not so commenced is *forever barred*.

3 (emphasis added)

4 To summarize, in order for a taxpayer to challenge an
5 assessor's valuation of real property, the taxpayer must file
6 his appeal to the county board of equalization on or before
7 January 15 of the fiscal year in which the assessment was made
8 and must then appeal the county board's decision to the state
9 board of equalization, filing the appeal by March 10 of the
10 same year. Appeal to the state board and payment of the
11 disputed taxes under protest are conditions precedent to filing
12 suit in state court. Failure to file suit within 3 months of
13 the mandatory payment of taxes under protest forever bars suit
14 in district court. Village League failed to allege completion
15 of any of these steps.

16 This court has confirmed on more than one occasion the
17 rule that the failure to exhaust the administrative remedies of
18 review by the county and state boards of equalization is fatal
19 to a civil lawsuit. See, e.g., First American Title Co. v.
20 State, 91 Nev. 804, 543 P.2d 1344 (1975):

21 . . . [I]t would contravene the well-established rule
22 that administrative remedies must be exhausted prior
23 to seeking judicial relief. [citation]. The
24 'exhaustion doctrine' is sound judicial policy. If
25 administrative remedies are pursued to their fullest,
26 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.

1 Also see County of Washoe v. Golden Road Motor Inn, Inc., 105
2 Nev. 402, 403, 777 P.2d 358 (1989), which put the matter
3 succinctly: "Taxpayers must exhaust their administrative
4 remedies before seeking judicial relief."

5 In light of the provisions of Chapter 361 discussed *supra*,
6 the various arguments offered by appellant Village League
7 against application of the exhaustion requirement are clearly
8 without merit. Appellant makes the following arguments, each
9 of which will be addressed in turn. First, appellant argues
10 that exhaustion is not required where no administrative
11 remedies exist, citing Ambassador Insurance Corp., v. Feldman,
12 95 Nev. 538, 539, 598 P.2d 630 (1979). O.B. pp. 8, 10-12.
13 While this statement is true as a general proposition, it has
14 no application to the instant case. Ambassador did not concern
15 the question of appeals to boards of equalization, but rather
16 was a defamation lawsuit brought by one insurance company
17 against another. The defendants argued that the lawsuit could
18 not be brought for failure of the plaintiff to bring an
19 administrative action before the insurance commissioner. This
20 court rejected the argument:

21 The insurance commissioner is without authority to
22 award damages caused by defamation; the
23 commissioner's powers are limited to the regulation
24 of insurance trade practices.

Ambassador Insurance, *supra*, 95 Nev. at p. 539.

25 By contrast, appellant seeks to challenge the Washoe County
26 Assessor's property valuations at Lake Tahoe—a matter well

1 within the scope of authority of the county board of
2 equalization. NRS 361.356(3). Appellant argues that the board
3 may "only" determine the valuation of property assessed by the
4 county assessor. O.B. at 11. But this is precisely what
5 appellant seeks. See the prayer of appellant's complaint, JA
6 17, wherein appellant seeks the following relief:

7 That the Court set aside the invalid and
8 unconstitutional valuations by Washoe County of real
9 property of members of the plaintiff class, direct
10 the defendant Washoe County Assessor to make new
11 valuations in accordance with the existing and
properly adopted regulations of the Nevada Tax
Commission, and determine the amounts to be refunded
to members of the plaintiff class.

12 Appellant's various legal theories, such as the argument that
13 the assessor's methods constitute de facto rule making, are
14 simply arguments in the furtherance of the goal of setting
15 aside the valuations, which is within the clear authority of
16 the board of equalization.

17 Appellant asserts, without citation to authority, that
18 there is no requirement to first bring its legal arguments,
19 such as the "de facto rulemaking" argument, before the county
20 board of equalization before bringing the issue to district
21 court. O.B. p. 11. Appellant, however, is in error. NRS
22 361.410(1) states, in pertinent part, that:

23 No taxpayer may be deprived of any remedy or redress
24 in a court of law relating to the payment of taxes,
25 but all such actions must be for redress from the
26 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

1 Nevada Tax Commission until the State Board of
2 Equalization has denied complainant relief.

3 (emphasis added)

4 The law could not be more plainly stated. This statute
5 operates as a blanket prohibition against bringing an action
6 for relief from the payment of taxes without first exhausting
7 the established administrative remedies. The statute does not
8 limit the scope of review of the board of equalization to
9 "relatively narrow parameters" (O.B. p. 8) beyond which
10 taxpayers are free to first file lawsuits in district court.
11 There is no exception for lawsuits posing "mere" questions of
12 law.² The exhaustion requirement applies to "all such actions"
13 and "no action may be instituted" without first exhausting
14 administrative remedies.

15 Appellant makes the disingenuous argument that no county
16 board of equalization has statewide or bi-county power to
17 equalize assessments and therefore no administrative process
18 exists in which appellant can argue that its members'
19 assessments have resulted in unequal assessments in comparison
20 to other jurisdictions within the state. O.B. 12. The
21 argument is specious. The comprehensive administrative
22 procedures set forth in Chapter 361 include a number of
23 separate steps, including review by both the local board of
24 equalization and the state board. See, e.g., NRS 361.420.

25 _____
26 ² In any event, since appellant's lawsuit seeks to set aside the valuations
of real property of its members, the lawsuit clearly does not present mere
abstract legal issues but seeks to apply law to facts by challenging assessor
methodologies as they pertain to particular properties.

1 Among the state board's duties is the duty to "[e]qualize
2 property valuations in the State." NRS 361.395(1)(a). Issues
3 regarding statewide equalization are clearly addressed by the
4 administrative process and afford no opportunity for avoidance
5 of the exhaustion requirement.

6 Appellant next argues that exhaustion of administrative
7 remedies would be futile. O.B. at 13. In support of the
8 futility argument, appellant makes two assertions. First,
9 appellant repeats the argument that the only issues in the
10 lawsuit are legal in nature. Bringing such legal issues before
11 the board of equalization is futile because board members are
12 "non-lawyers." O.B. at 13. Without citation to any authority,
13 appellant asserts that boards of equalization "are set up to
14 decide factual issues such as whether the assessor used the
15 right square footage for the basement . . ." O.B. at 14.
16 Appellant's patronizing characterization of the limitations of
17 boards of equalization finds no support in the law. The scope
18 of authority of county boards of equalization extends to
19 determining the valuation of any property assessed by the count
20 assessor and changing and correcting any valuation found to be
21 incorrect. NRS 361.345(1). Such determinations necessarily
22 involve more than consideration of factual issues. Local
23 boards of equalization must evaluate the facts in light of the
24 methodologies employed by the assessor and the statutorily
25 imposed obligation to assure that assessments are uniform and
26 equal. This court has held that exhaustion is required when

1 legal challenges, including constitutional challenges, depend
2 on underlying factual determinations. See Malecon Tobacco, LLC
3 v. State Dept. of Taxation, 118 Nev. 837, 840-41, 59 P.3d 474
4 (2002) (footnotes omitted):

5 However, " '[w]hen determination of the
6 constitutional issue depends on factual
7 determinations, they should be made first by the
8 administrative officials who are especially equipped
9 to inquire, in the first instance, into the facts.' "
10 The Alaska Supreme Court, in accord with Hawaii, has
11 stated that " 'exhaustion may be required when non-
constitutional issues are present or when a factual
context is needed for deciding the constitutional
issue.' " By so distinguishing, these courts have
left the fact-finding to the administrative agencies,
which are in the best position to make such
determinations.

12 It is clear from the quote above that this court does not
13 share appellant's condescending view of board of equalization
14 members, but rather finds their function to be essential to the
15 administrative process. Appellant's attempt to cut the board
16 of equalization out of the administrative process by claiming
17 that there are no factual determinations to be made in this
18 case must fail in light of the factual issues raised in the
19 complaint and opening brief. See, e.g., complaint, JA 2,
20 wherein appellant objects to assessment methods "such as, for
21 example, the assignment of value based on a view of the Lake
22 from a bathtub" This quote alone belies appellant's
23 claim that "[t]he Village League does not challenge the
24 application of these methods to particular properties." O.B.
25 at 16. But see also O.B. at p. 6 for another example of
26 property-specific allegations:

1 In yet another example, to determine the value of the
2 land portion of lakefront condominiums, Washoe County
3 adopted and used an "allocation" method such that
condominiums of the same size in the very same
building were assigned different land values.

4 A finder of fact with expertise in issues regarding various
5 assessment methods and their application to the valuation of
6 land is "in the best position," Malecon, Id., to evaluate these
7 factual claims. See also O.B. at 7 (repeating allegations made
8 in the complaint at JA 2):

9 In fiscal year 2003-2004, while property taxes in the
10 rest of Washoe County rose less than 2.5% and some
casinos had their taxes reduced by as much as 31%,
11 the average increase in property taxes for Incline
Village and Crystal Bay property owners was 31%, with
12 increases of as much as 400% in some individual
cases.

13 Again, these are factual assertions. A finder of fact with
14 particularized knowledge regarding assessment methodologies
15 would be in the best position to determine whether these
16 alleged assessment disparities are the result of
17 discriminatory, unequal rates of assessment or arise from the
18 attributes of individual parcels of real property, including
19 "zoning, location, view, and geographic features." NRS
20 361.228(3). Most significantly, the prayer of appellant's
21 complaint requests that the court set aside the valuations by
22 Washoe County of real property of Village League members and
23 "determine the amounts to be refunded . . ." JA 17. Appellant
24 clearly wants the court to make property-specific
25 determinations of assessed property values. This process is
26 best left to the boards specifically created by the legislature

1 to perform this function. As the district court stated: "The
2 local and state entities that would be required to hear any
3 such challenge to these assessments are particularly able to
4 make these determinations due to their expertise and knowledge
5 of the subject matter involved." Order, JA 118. The
6 administrative remedy of proceeding before the county and state
7 boards of equalization is not futile, but rather an essential
8 element in the determination of correct assessed property
9 values.

10 The second issue raised in support of the futility
11 argument is that a conflict of interest exists because the
12 Washoe County District Attorney's Office, as general counsel
13 for the county, represents the assessor, but is also
14 statutorily required to be present at all meetings of the
15 county board of equalization "to explain the law and the
16 board's authority." NRS 361.340(10). See O.B. at 14-15. This
17 argument borders on frivolous. If a conflict of interest
18 indeed exists, then it exists not only in this case but in each
19 and every taxpayer appeal to boards of equalization, not only
20 in Washoe County but throughout the state. It follows that all
21 appeals to boards of equalization are futile, allowing all
22 taxpayers to evade the administrative process.

23 Statutes are to be read in harmony and in such a way as to
24 avoid absurd results. Nevada Power Co. v. Haggerty, 115 Nev.
25 353, 365, 989 P.2d 870 (1999). It is clearly the intent of the
26 legislature that the district attorney sit with the board of

1 equalization and that taxpayers exhaust their administrative
2 remedies by first appealing to the board of equalization for
3 relief. Even if it were true that the deputy district attorney
4 who advises the board of equalization "could not give an
5 opinion that the methods used by the Assessor's Office were
6 invalid," O.B. at 15, the worst potential outcome would be that
7 the taxpayer would receive an adverse ruling at the county
8 board of equalization level that he could appeal to the state
9 board and ultimately to district court, following the
10 administrative process. This procedure is no different than
11 that for any other taxpayer who receives an adverse ruling
12 before the county board, and hardly constitutes futility
13 exempting appellant from following the administrative process.

14 Appellant finally argues that this court should simply
15 "excuse" appellant's failure to exhaust administrative
16 remedies. O.B. at 15. The argument consists merely of
17 repetition of previously discussed arguments to the effect that
18 cases involving only legal questions should be allowed to
19 sidestep the administrative process. It is clear, however,
20 that the issues in this case are not merely legal in nature but
21 require an evaluation of particular properties and
22 methodologies in light of state law. The public policy behind
23 the exhaustion requirement, as set forth in NRS Chapter 361 and
24 emphasized in a number of decisions of this court, clearly
25 supports the application of the ordinary administrative
26 processes in this case, including the full factual development

1 of individual claims before the county board of equalization,
2 which is the body specifically established by the legislature
3 for this purpose. The district court did not err in dismissing
4 appellant's lawsuit for failure to exhaust administrative
5 remedies. The county defendants therefore respectfully request
6 that this court affirm the district court's order of dismissal.

7 B. Appellant Lacks Standing to Bring This Lawsuit.

8 County defendants argued below that Village League lacked
9 standing to bring this lawsuit. See Motion to Dismiss, JA 25.
10 In its order dismissing this case, the district court did not
11 analyze the standing issue, dismissing solely for failure to
12 exhaust administrative remedies. Order, JA 114. However, an
13 appellate court may affirm a dismissal on any ground supported
14 by the record. Mothershed v. Justices of Supreme Court, 410
15 F.3d 602, 608 (9th Cir. 2005). This court may therefore affirm
16 on the basis of Village League's lack of standing.

17 The real party in interest to a challenge of an assessor's
18 valuation is clearly identified in Chapter 361 as the real
19 property owner who alleges improper assessment or valuation.
20 See, e.g., NRS 361.356(1): "An owner of property who believes
21 that his property was assessed at a higher value than another
22 property whose use is identical and whose location is
23 comparable may appeal the assessment . . ." Appellant Village
24 League does not allege that it owns any affected property
25 within Washoe County. Rather, the complaint is carefully
26 drafted to indicate that members of the association, rather

1 than the association itself, are property owners. See
2 complaint, JA 2: "Plaintiff, Village League to Save Incline
3 Assets, Inc. ('Village League'), is a nonprofit membership
4 corporation organized and existing under the laws of the State
5 of Nevada, whose members own real property at Crystal Bay or
6 Incline Village, in Washoe County, Nevada, and pay taxes on
7 that property as assessed . . . " (emphasis added) Village
8 League is not a real party in interest lawsuit and thus lacks
9 standing to bring this lawsuit. See Deal v. 999 Lakeshore
10 Ass'n, 94 Nev. 301, 579 P.2d 775 (1978):

11 NRCP 17(a) provides: "Every action shall be
12 prosecuted in the name of the real party in
13 interest." In the absence of any express statutory
14 grant to bring suit on behalf of the owners, or a
15 direct ownership interest by the association in a
16 condominium within the development, a condominium
17 management association does not have standing to sue
as a real party in interest. [citations] 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.

18 Similarly, in this case it is the property owners themselves,
19 not the plaintiff association, who have standing to sue since
20 they must eventually bear the costs of the tax assessments.

21 The case Hunt v. Washington State Apple Advertising
22 Commission, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977),
23 sets forth the requirements of associational standing, which
24 include (a) that an association's members would otherwise have
25 standing to sue in their own right; (2) the interests the
26 association seeks to protect are germane to the organization's

1 purpose; and (c) neither the claims nor the requested relief
2 require the participation of individual members in the lawsuit.
3 Hunt, 432 U.S., at p. 343, 97 S.Ct. at p. 2441. At a minimum,
4 Village League fails to satisfy the third element of the Hunt
5 requirements for associational standing—that neither the claims
6 nor the relief sought require the participation of individual
7 members of the association. As has been shown in the preceding
8 section, the inquiry into the challenged assessment methodology
9 is fact specific and necessarily relates to individual parcels
10 of property. Individual participation by each property owner
11 who wishes to challenge his assessment is necessary for
12 resolution of the issues in this case.

13 IV

14 Conclusion

15 Village League, an entity that owns no real property,
16 brought a lawsuit challenging methodologies employed in the
17 assessment of real property in Incline Village and Crystal Bay,
18 Lake Tahoe. The appellant failed to first exhaust the
19 administrative remedies required by state law, in violation of
20 sound public policy favoring initial review by local and state
21 boards of equalization before district court review. The
22 district court therefore appropriately granted all defendants'
23 motions to dismiss. Village League has failed to demonstrate a
24 legitimate basis to justify exemption from the exhaustion
25 requirement. County defendants accordingly respectfully
26 //

1 request that this court affirm the district court's order of
2 dismissal.

3 V


4 Certificate of Compliance

5 I hereby certify that I have read this appellate brief,
6 and to the best of my knowledge, information, and belief, it is
7 not frivolous or interposed for any improper purpose. I
8 further certify that this brief complies with all applicable
9 Nevada Rules of Appellate Procedure, in particular NRAP 28(e),
10 which requires every assertion in the brief regarding matters
11 in the record to be supported by a reference to the page of the
12 transcript or appendix where the matter relied on is to be
13 found. I understand that I may be subject to sanctions in the
14 event that the accompanying brief is not in conformity with the
15 requirements of the Nevada Rules of Appellate Procedure.

16 Dated this 27th day of October, 2005.

17 RICHARD GAMMICK
18 Washoe County District Attorney

19 BY


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