

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2
3 BILL BERRUM, WASHOE COUNTY
4 TREASURER,

Case No. 54947

Electronically Filed
Jun 24 2010 04:24 p.m.
Tracie K. Lindeman

5 Appellant,

6 v.

7 CHARLES OTTO, et al.,

8 Respondents.
_____ /

9 VILLAGE LEAGUE TO SAVE INCLINE
10 ASSETS, INC., et. al.,

Case No. 56030

11 Appellants,

12 v.

13 STATE OF NEVADA, et. al.,

14 Respondents.
_____ /

15 WASHOE COUNTY,

Case No. 56253

16 Appellant,

17 v.

18 STATE, STATE BOARD OF
19 EQUALIZATION, CERTAIN TAX
20 PAYERS, et. al.,

21 Respondents.
_____ /

22 **MOTION TO CONSOLIDATE CASES PENDING BEFORE THE SUPREME COURT**
23 **AND/OR FOR AN APPEAL CONFERENCE**

24 Come now, all Washoe County parties in the above-referenced three cases now pending
25 before the Supreme Court, with this “Motion to Consolidate Cases Pending Before the Supreme
26 Court and/or for an Appeal Conference.” This Motion is filed on behalf of all Washoe County

1 parties in the above-referenced three cases by Washoe County District Attorney Richard A.
2 Gammick and by Chief Deputy District Attorney David Creekman. This motion is authorized
3 by Nevada Rule of Appellate Procedure (“NRAP”) 27 (“Motions”) and by NRAP 33 (“Appeal
4 Conferences”). This Motion is also supported by the following Statement of Points and
5 Authorities, along with all the documents, papers, pleadings, transcripts and electronic records
6 on file with the Court in the above-referenced three cases.

7 **STATEMENT OF POINTS AND AUTHORITIES**

8 I. The authority for this Motion

9 NRAP 27 establishes, in part, that “[a]n application for an order or other relief is made
10 by motion unless these Rules prescribe another form.... A motion must state with particularity
11 the grounds for the motion, the relief sought, and the legal argument necessary to support it....”
12 Meanwhile, NRAP 33 establishes that “[t]he court may direct the attorneys for the parties to
13 appear before the court or a justice thereof for a conference to address any matter that may aid in
14 disposing of the proceedings, including simplifying the issues. The court or justice may, as a
15 result of the conference, enter an order controlling the course of the proceedings.”

16 This motion is also made in furtherance of NRAP 1(c)’s admonition that “[t]hese Rules
17 shall be liberally construed to secure the proper and efficient administration of the business and
18 affairs of the court and to promote and facilitate the administration of justice by the court.” This
19 motion was not possible before the district courts from which these appeals have been perfected
20 because different departments, in different judicial district courts, were involved in each case
21 now on appeal to this Supreme Court. This motion is timely made as one of the most recent of
22 the appeals now before the Supreme Court was filed less than one month ago, whereas the
23 second of the most recent of the appeals now before the Supreme Court was only filed on June
24 18, 2010.

25 Consolidation of actions generally is effected by order of the court in response to a
26 motion or application of a party. State Farm Mut. Auto Ins. Co. v. Jiles, 115 Ga. App. 193, 154

1 S.E.2d 286 (1967). Parties to the actions in question are entitled to notice on an application for
2 consolidation. NRAP 27; Wagner v. Cleveland, 62 Ohio App.3d 8, 574 N.E.2d 533 (8th Dist.
3 Cuyahoga County 1988); Tripp v. Vaughn, 746 P.2d 794 (Utah Ct. App. 1987). The party
4 seeking consolidation has the burden of persuading the court that consolidation is desirable.
5 Prudential Ins. Co. of America v. Marine Nat. Exchange Bank, 55 F.R.D. 436, 16 Fed. R.
6 Serv.2d 469 (E.D. Wis. 1972). When facts sufficient to support consolidation are shown, a
7 party opposing consolidation has the burden of demonstrating prejudice to a substantial right.
8 Zimmerman v. Mansell, 184 A.D.2d 1084, 584 N.Y.S.2d 378 (1992).

9 In the context of property taxation, no Nevada cases are reported regarding
10 consolidation. However, guidance in this area may be found in other jurisdictions. For
11 instance, in New York separate proceedings to review tax assessments may properly be
12 consolidated whenever it can be done without prejudice to a substantial right. Allen v. Rizzardi,
13 5 N.Y.2d 493, 158 N.E.2d 813 (1959). The consolidation of tax refund actions in which
14 taxpayers sought refund of business and occupation tax imposed on interstate manufacturers and
15 sellers, challenged as violative of the Commerce Clause, was proper in W.R. Grace and Co. v.
16 State, Dept. of Revenue, 137 Wash.2d 580, 973 P.2d 1011 (1999). In Illinois, proceedings by a
17 city charging building owners with violations of the municipal code with respect to the
18 maintenance of buildings are in the nature of tax suits and consolidation was held proper in this
19 area. City of Chicago v. Atkins, 19 Ill.App.2d 177, 153 N.E.2d 302 (1958). And in Tennessee,
20 the test for the propriety of consolidating tax suits is the identity of the property involved. State
21 v. Collier, 7 Smith (Tn.) 403, 23 S.W.2d 897 (1930).

22 II. The three appeals now pending before the Supreme Court

23 The three appeals now pending before the Supreme Court which this motion seeks to
24 consolidate, and/or which this motion seeks to have an appeal conference with respect to, are:

25 A. Berrum v. Otto, Case No. 54947 – This is a case which involves questions
26 surrounding the propriety of a District Court judge requiring an independently-elected official of

1 Washoe County to issue tax refunds of allegedly overpaid ad valorem property taxes where the
2 underlying obligation to do so (if any) is not ripe, does not require such action and the taxpayers
3 in question have not established their right to such refunds. Some briefing has occurred in this
4 case.

5 B. Village League to Save Incline Assets, Inc, et al. v. State, State Board of
6 Equalization, Washoe County and Bill Berrum, Washoe County Treasurer, Supreme Court Case
7 No. 56030 - This is a case which involves questions surrounding the propriety of a District
8 Court judge denying extraordinary writ relief to compel the performance, by the Nevada State
9 Board of Equalization, of its equalization function pursuant to NRS 361.395, based, at least in
10 part, upon the adequacy of legal remedies. No briefing has occurred in this case.

11 C. Washoe County v. State, State Board of Equalization, Certain Taxpayers, et al.,
12 Supreme Court Case No. 56253 - This is a case which involves questions surrounding the
13 propriety of a District Court judge's dismissal of Washoe County's Petition for Judicial Review
14 of a decision of the State Board of Equalization, based upon Washoe County's alleged failure to
15 name, and serve all parties of record to the administrative hearing when all those parties of
16 record were, in fact, not necessarily parties of record because they were not served by the State
17 Board of Equalization. No briefing has occurred in this case.

18 III. The commonalities between the three cases now pending before the Supreme Court

19 This court has recognized, in its holding in State of Nevada ex rel. State Board of
20 Equalization v. Barta, 124 Nev. 58, 188 P.3d 1092 (2008), that the State Board of Equalization
21 performs two separate and distinct functions:

22 NRS 361.400 establishes a requirement, separate from the equalization duty, that the
23 State Board hear appeals from decisions made by the county boards of equalization. The
24 two statutes [NRS 361.395 and NRS 361.400] create separate functions: equalizing
property valuations throughout the state and hearing appeals from the county boards.
Barta, 124 Nev. 58, 188 P.3d at 1102 (2008).

25 Although each case pending before the Supreme Court is now in somewhat different stages, at
26 their individual cores, each of these cases involves the State Board of Equalization's

1 performance of its above-cited statutory responsibilities --- either its equalization function under
2 NRS 361.395, or its appellate function over county boards of equalization under NRS 361.400.
3 Each of these cases involves the assessment, for ad valorem tax purposes, of exactly the same
4 real property in the Incline Village and Crystal Bay areas of Washoe County and, assuming the
5 property did not change ownership during the tax years in question, precisely the same
6 taxpayers. Two of these cases involve the assessment of that property for the 2006 tax year,
7 while Supreme Court Case No. 56030 involves the assessment of the same property for the
8 2003, and all subsequent (including 2006) tax years, along with issues of equalization as
9 between similarly-situated property in Incline Village and Crystal Bay, and as between certain of
10 Nevada's counties (Douglas and Washoe). Each of these cases involves potentially many
11 thousands of parties, although from Washoe County's perspective, the status of the parties
12 involved in these cases remains an issue for further litigation before this Court, along with
13 threshold issues of standing. Each case implicates the law of representative or class actions in
14 the tax context. Two of these cases involve the law of extraordinary writ relief, such writ relief
15 arising in the context of the assessment of the same Incline Village and Crystal Bay property in
16 question, and subsequent action (or in-action) of the State Board of Equalization. One of these
17 cases involves threshold notice requirements arising under the Nevada Administrative
18 Procedure Act, at NRS chapter 233B. This issue arises in the context of a Petition for Judicial
19 Review of an action of the State Board of Equalization relative to the same Incline Village and
20 Crystal Bay properties and taxpayers as are involved in the other two cases, and with respect to
21 the 2006 tax year. Each case involves fundamental aspects of Nevada's real property
22 assessment and taxation scheme, at NRS chapter 361, including evidentiary and due process
23 considerations and, ultimately, the anticipated application of the law of voluntary payments, as
24 codified in the tax code at NRS 361.420. The same bottom-line relief, in the form of tax
25 refunds, is sought by the taxpayers as an ultimate result of each of these cases. To the extent
26 attorneys are involved, the same attorneys are involved in each of these cases.

1 In addition to the factual and legal similarities previously described, each of these cases
2 traces its origin to the Nevada Constitution’s provision, at Article 10, section 1, that “[t]he
3 Legislature shall provide by law for a uniform and equal rate of assessment and taxation...” and
4 to precedent of this Supreme Court which was derived from that important constitutional
5 provision. That precedent includes State of Nevada ex rel. State Board of Equalization v. Bakst,
6 122 Nev. 1403, 148 P.3d 717 (2006), State of Nevada ex rel. State Board of Equalization v.
7 Barta, 124 Nev. ____, 188 P.3d 1092 (2008), Village League to Save Incline Assets, Inc., et al.
8 v. State of Nevada ex. Rel State Board of Equalization, et al., 124 Nev. ____, 194 P.3d 1254
9 (2008) and, most recently, Marvin, et al. v. Fitch, et al., 126 Nev. Adv. Op. 18, entered on May
10 27, 2010. Although presently the cases which this Motion seeks to consolidate are of local
11 significance, each ultimately implicates the same constitutional provision, the same line of case
12 law, and the same statutory scheme, all with regional and statewide ramifications.

13 Finally, each of these cases is also significant for the same shared public policy reasons.
14 From Washoe County’s perspective, revenue certainty and stability is necessary in order to
15 prevent the taxing entity from using funds paid by taxpayers in a given budget year and
16 subsequently being required to refund those amounts. From the perspective of the taxpayers, the
17 public policy consideration they most likely advocate is the Nevada Constitution’s “uniform and
18 equal” provision, as applied to their individual situations. These are significant public policy
19 goals, sometimes in competition with one another, the resolution of which best occurs in a
20 proceeding which consolidates these three cases now before the Supreme Court.

21 IV. Consolidating these cases may lead to their settlement

22 As part of this Motion, Washoe County submits that the consolidation of these cases
23 could lead to an amicable, and voluntary, settlement of this matter. Washoe County is prepared,
24 in good faith, to discuss settlement in these cases. But such settlement discussions are hindered,
25 if not totally impossible, with so many actions pending where settlement of one of those actions
26 offers no finality, no impact, on the other related actions. For this reason, Washoe County

1 suggests that such settlement negotiations would be facilitated by an appeal conference, ordered
2 and conducted pursuant to NRAP 33, in these cases.

3 V. Conclusion

4 Common issues, legal and factual, a common statutory scheme, common property,
5 common property owners and taxpayers, a common tax assessor, a common tax collector and
6 common lawyers combine to argue favorably for the consolidation of these cases before the
7 Supreme Court. Furthermore, a potential settlement argues for the assignment of these cases to
8 an appeal conference.

9 AFFIRMATION PURSUANT TO NRS 239B.030

10 The undersigned does hereby affirm that the preceding document does not contain the
11 social security number of any person.

12 Respectfully submitted this 24th day of June, 2010.

13 RICHARD GAMMICK
14 Washoe County District Attorney

15 By /s/ DAVID C. CREEKMAN
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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on June 24, 2010. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Suellen Fulstone, Esq.
Counsel for Respondents

Dennis Belcourt, Deputy Attorney General
Deonne Contine, Deputy Attorney General
Counsel for State Board of Equalization

Nicholas Frey, Settlement Judge

Dated this 24th day of June, 2010.

/S/ TINA BLEDSOE
TINA BLEDSOE