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IN THE SUPREME COURT OF THE STATE OF NEVADA

BILL BERRUM, Washoe County Treasurer, Appellant, v. CHARLES OTTO, Trustee of the Otto Family Trust; TODD LOWE, Trustee of the Lowe Family Trust; V PARK, LLC, a Nevada Limited Liability Company, for themselves and on behalf of similarly situated residential property owners and taxpayers at Incline Village/Crystal Bay, Washoe County, Nevada, Respondents.	Case No. 54947
VILLAGE LEAGUE TO SAVE INCLINE ASSETS, INC., MARYANNE INGEMANSON, Trustee of the Larry D. and Maryanne B. Ingemanson Trust; DEAN R. INGEMANSON, individually and as Trustee of the Dean R. Ingemanson Trust; J. ROBERT ANDERSON; and LES BARTA; on behalf of themselves and others similarly situated, Appellants, v. STATE OF NEVADA, *ex rel.* State Board of Equalization; *et al* Respondents.	Case No. 56030

WASHOE COUNTY, a political subdivision of the State of Nevada; Appellant, v. STATE OF NEVADA *ex rel.* State Board of Equalization; CERTAIN TAXPAYERS; CHARLES E. OTTO, V PARK, LLC; MARYANNE INGEMANSON; TODD LOWE; and VILLAGE LEAGUE TO SAVE INCLINE ASSETS, INC.; Respondents. _____ CHARLES E. OTTO, V PARK, LLC; MARYANNE INGEMANSON; TODD LOWE; and VILLAGE LEAGUE TO SAVE INCLINE ASSETS, INC.; Cross-Appellants, v. WASHOE COUNTY, NEVADA, a political Subdivision of the State of Nevada; Cross-Respondent. _____	)	Case No. 56253

POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO CONSOLIDATE CASES PENDING BEFORE THE COURT AND/OR FOR AN APPEAL CONFERENCE

I. Introduction.

The County asks the Court to consolidate these three appeals notwithstanding the lack of a single shared or even similar issue on review. The County's argument for consolidation is that all these cases involve property taxes. The issues on appeal, however, are procedural not substantive. In *Berrum v. Otto,* Case No. 54947, the issue

is the impact of a stay order entered by this Court. In *Village League v. State ex rel State Board of Equalization*, Case No. 56030, the issue is whether petitioners had an adequate remedy at law barring mandamus relief. In *Washoe County v. State ex rel State Board of Equalization*, Case No. 56253, the issue on the County's appeal is whether it failed to name and serve the parties as required by law. The issue on the taxpayers' cross-appeal is the standing of the County to bring the action. The merits of any tax issues are not before this Court on any of these three appeals. No possible "judicial efficiency" could be effected by combining the Court's consideration of these disparate issues. The only result of consolidation would be further delay and injustice.

II. The County's Motion To Consolidate These Three Appeals Must Be Denied.

A. These Appeals Are Not Appropriate For Consolidation Because They Present Different Issues, Involve Different Alignments Of Parties, And Are At Different Stages Of The Appellate Process.

The purpose of consolidation is to facilitate the efficient administration of justice by allowing common issues between the same parties to be litigated together. That purpose is not served by the consolidation order sought by the County. As noted above, the issues raised by these three separate appeals, now also including an additional cross-appeal, are wholly dissimilar. *Berrum v. Otto*, Case No. 54947, involves the implementation of the Washoe County Board of Equalization's 2006 geographic equalization decision once the stays respectively entered by this Court and by the State Board of Equalization were lifted. Until and unless reversed by the State Board of Equalization, the County Board's decision is operative and the District Court so held, requiring the County Treasurer to return to taxpayers excess tax amounts collected by

virtue of the stay orders. The merits of the geographic equalization order are not at issue, merely its natural implementation in the absence of any court or administrative stay order.

Village League v. State ex rel State Board of Equalization, Case No. 56030, is a second appeal, arising after this Court affirmed in part and reversed and remanded in part, the trial court's initial dismissal of the action (Case No. 43441). The issue on this second appeal is the availability of an adequate remedy at law barring the taxpayers' action in mandamus to compel the State Board to equalize. *Washoe County v. State ex rel State Board of Equalization*, Case No. 56253, arises as a petition for judicial review and both the appeal and the cross-appeal involve only the threshold issues of parties, service, and standing.

The lack of identity of parties in the three cases also requires that consolidation be denied. The State Board of Equalization is not a party at all to *Berrum v. Otto,* Case No. 54947. The State Board is a party to the other two appeals but is on the side of the County in the Village League appeal (Case No. 56030) and against the County in the judicial review appeal (Case No. 56253).

Another fact militating against consolidation is that these three appeals are at significantly different stages of appellate process. *Berrum v. Otto,* Case No. 54947, is fully briefed and ready for determination. The opening brief in *Village League v. State ex rel State Board of Equalization*, Case No. 56030, is due in September. In the most recently filed appeal, however, *Washoe County v. State ex rel State Board of Equalization,* Case No. 56253, docketing statements have yet to be filed, the matter has

been referred to the settlement program, and no briefing schedule is in place.

A delay in the determination of the already fully-briefed *Berrum v. Otto* case is particularly inappropriate because this Court has entered a stay of the district court order pending that determination. The district court order had required the Washoe County Treasurer to return excess taxes collected from Incline Village/Crystal Bay homeowners beginning in 2006 under this Court's earlier stay order in the *Bakst* case. For four years and continuing, the County has withheld money that, under the law, would never have been collected from taxpayers in the first place. To put taxpayers on hold even longer, while the Court waits for the briefing on unrelated procedural issues in other appeals to be completed, would work an unconscionable injustice.

B. <u>The Law Does Not Support The County's Motion For Consolidation.</u>

Rule 3(b)(2) of the Nevada Rules of Appellate Procedure provides as follows:

> When the parties have filed separate timely notices of appeal, the appeals may be joined or consolidated by the Supreme Court upon its own motion or upon motion of a party.

Although Rule 3(b)(2) is the Court's authority for consolidation, it is never cited at all by the County in its motion. The County relies solely on NRAP Rules 27 and 33, neither of which has any application to the issue of consolidation. The case authorities cited by the County, none of which are decisions of this Court, likewise solely involve appellate review of consolidation ordered by the trial court. Even absent the express requirement of NRCP 42(a) that consolidated cases involve common issues of law or fact, consolidation of cases in the trial court for purposes of discovery or even for trial

involves consideration of a much broader range of issues raised by the parties. This Court, like other appellate courts, is concerned only with the much narrower scope of the issues identified for appeal. None of the alleged "commonalities" in these three appeals as recited by the County has any bearing on the issue of consolidation because none of those "commonalities" is actually before the Court.

Even in the trial court cases cited by the County, consolidation at a minimum requires similar, if not identical issues, in cases that are at the same stage of development. See, e.g., Chicago v. Atkins, 153 N.E.2d 302, 304 (Ill.App. 1958) ("All the cases filed here could have been made the subject of one proceeding, because the same parties, the same subject matter, and generally the same ordinances are involved."); Prudential Insurance Company of America v. Marine National Exchange Bank, 55 F.R.D. 436, 437 (E.D.Wis. 1972) (denial of consolidation affirmed where two actions were concededly "at substantially different stages of preparation"). Otherwise, consolidation serves no purpose and makes no sense. The County furthermore acknowledges that, even where facts supporting consolidation exist, it should not be ordered where it will result in prejudice to a substantial right of the opposing party. Motion to Consolidate, p. 3, lns. 6-8, citing Zimmerman v. Mansell, 584 N.Y.S.2d 378 (1992). Thus, even if the facts here supported consolidation, which they do not, the County's motion should be denied because of the prejudice to taxpayers in the resulting inevitable delay in the determination of the fully briefed appeal in *Berrum v. Otto*, Case No. 54947.

Under NRAP 3(b)(2), consolidation is appropriate where the issues are identical. See, e.g., Bridgewater v. Warden, Nevada State Prison, 109 Nev. 1159, 865

P.2d 1166 (1993) (appellants "identical" petitions for post-conviction relief were denied by the district court). The case law under NRAP 3(b)(2)'s identical federal counterpart, FRAP 3(b)(2) similarly finds consolidation appropriate only when "the issues presented for appeal are the same." Moore's Federal Practice §303.41[3]; 16A Wright & Miller, Federal Practice and Procedure, §3949.2, pp. 77-81; and see, Fuller Brush Co. v. Northern States Power Co., 261 F.2d 340, 342 (8th Cir. 1958) (appeals arose out of a single trial and were taken from a single judgment); United States v. Tippett, 975 F.2d 713, 716 (10th Cir. 1992) (appeals presented same legal issue); U.S. v. Logan, 333 F.3d 876, 878 (8th Cir. 2003) (issues on appeal are the same); Allison v. Bank One-Denver, 289 F.3d 1223, 1230 n. 1 (10th Cir. 2002) (consolidation of separate appeals that shared identical facts and a common record). That basic prerequisite to consolidation is not and cannot be satisfied here. There is not a single even similar let alone identical legal issue presented by the three appeals which are the subject of the County's motion.

The federal authorities also note that consolidation on appeal, at least presumptively, requires joint briefs. 16A Wright & Miller, supra, at pp. 80-81. That requirement is obviously directly related to the requirement that consolidated appeals present the same, or at least similar, issues. The joint briefing requirement cannot possibly be satisfied here in any event. The *Berrum v. Otto* appeal has already been fully briefed. The issue on that appeal is not raised in the other two appeals and will not be addressed in the briefing on those appeals.

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III. Taxpayers Are Willing To Participate In A Settlement Conference As Long As Briefing Schedules Are Not Suspended And No Delay Results In The Processing Of These Appeals To Resolution.

Washoe County also makes a request for a settlement conference citing Nevada Rule of Appellate Procedure 33. It is actually not altogether clear that Rule 33 includes settlement conferences. Unlike FRAP 33,[1] its federal counterpart, NRAP 33 provides for appeal conferences but makes no mention of settlement, does not include the authority to require the parties to appear, and does not provide for implementing any settlement reached. It may be that this Court sought to avoid the involvement of its members in settlement negotiations in cases that, if those negotiations were unsuccessful, would ultimately have to be decided by the Court. In any event, irrespective of the language or even the intent of NRAP 33, this Court undoubtedly has the inherent power to direct the parties and their counsel to a settlement conference.

It is the taxpayers' experience in these matters that the pursuit of settlement is a fool's errand for several reasons. First of all, as the Washoe County District Attorney's Office has repeatedly advised taxpayers, it has no authority to settle cases and it has no

[1] FRAP 33 provides as follows:

> The court may direct the attorneys—and, when appropriate, the parties—to participate in one or more conferences to address any matter that may aid in disposing of the proceedings, including simplifying the issues and discussing settlement. A judge or other person designated by the court may preside over the conference, which may be conducted in person or by telephone. Before a settlement conference, the attorneys must consult with their clients and obtain as much authority as feasible to settle the case. The court may, as a result of the conference, enter an order controlling the course of the proceedings or implementing any settlement agreement.

client to bring to a settlement conference. Any proposed settlement with the County has to be approved by the Washoe County Commission in an open meeting.

Secondly, all three of these cases are representative actions involving thousands of taxpayers. Two of these cases furthermore involve orders which require the return to taxpayers of substantial amounts of taxes overpaid as a result of this Court's stay order in the Bakst case. Taxpayer respondents cannot compromise any of these cases without the participation and consent of all affected taxpayers.

Finally, none of these appeals presents in a settlement friendly context. The oldest of the three appeals has already been returned from the Court's settlement conference process based on the recommendation of the settlement judge that it was not appropriate for mediation.[2] The two more recent appeals are both from dispositive procedural rulings at the outset of the respective cases. The beneficiaries of those dismissal orders -- the County in one case, taxpayers in the other -- have no incentive to compromise when they may well prevail on appeal, and, if they do not, the worst case is they have to litigate the matter on the merits.

Notwithstanding the foregoing, taxpayers are willing to participate in any settlement conference the Court orders with the caveat that they oppose any suspension of the briefing schedules in the most recently filed appeals and any delay in the processing toward determination of the fully briefed appeal in Case No. 54947 while the

[2] The most recent appeal, Case No. 56253, has also been assigned to the settlement conference program. It is too early for an assessment by the settlement judge of the appropriateness of that appeal for the program. It is not clear why the taxpayers' appeal in Case No. 56030 was viewed as inappropriate for the settlement conference program from the outset and exempted from the program by the Clerk's office.

settlement pipedream is being pursued. The County says that it is seeking a settlement conference in good faith. The County must acknowledge, however, that further delay while it holds on to excess taxes collected only because of this Court's stay order is to the County's advantage and to the detriment of taxpayers.

IV. Conclusion

Taxpayers respectfully submit that the County's motion for consolidation is not supported by either the facts or the law. These three appeals present different issues, involve different parties, and are at different stages of review. The motion should be denied and these appeals should proceed independently and expeditiously to determination.

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

Dated this 6th day of July, 2010.

MORRIS PETERSON

by_____/s/_____
Suellen Fulstone, SBN 1615
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CERTIFICATE OF SERVICE

Pursuant to the Nevada Rules of Appellate Procedure, I certify that this document was filed electronically with the Nevada Supreme Court on July 6, 2010. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Deonne Enns Contine, Counsel for State of Nevada

David Creekman, Counsel for Washoe County

DATED this 6th day of July, 2010.

By_____/s/ Suellen Fulstone_____