

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

2
3 VILLAGE LEAGUE TO SAVE INCLINE Case No. 56030
4 ASSETS, INC., a Nevada non-
5 profit corporation, on behalf
6 of its members, and others
7 similarly situated,

Electronically Filed
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Tracie K. Lindeman

8 Appellants,

9 v.

10 STATE OF NEVADA, on relation
11 of its DEPARTMENT OF TAXATION,
12 the NEVADA STATE TAX
13 COMMISSION, and the STATE
14 BOARD OF EQUALIZATION; WASHOE
15 COUNTY; ROBERT MCGOWAN, WASHOE
16 COUNTY ASSESSOR; BILL BERRUM,
17 WASHOE COUNTY TREASURER,

18 Respondents.
19 _____/

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21 **RESPONDENTS' APPENDIX**
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

* * *

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

Case No. CV03-06922

Plaintiffs,

Dept. No. 10

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,

Defendants.

MOTION TO DISMISS

Come now defendants Washoe County, Robert McGowan, and Bill
Berrum, by and through their counsel of record, Richard A.
Gammick, District Attorney of Washoe County, Nevada, and Gregory
R. Shannon, Deputy District Attorney, and move to dismiss this


//

//

1 case. This motion is based upon the attached points and
2 authorities and documents previously filed herein.

3 Dated this 19th day of December, 2003.

4 RICHARD A. GAMMICK
5 District Attorney

6 By 
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I

THE INSTANT LAWSUIT SHOULD BE DISMISSED
FOR FAILURE TO STATE A CLAIM UPON
WHICH RELIEF CAN BE GRANTED

Motions to dismiss for failure to state a claim upon which relief can be granted are governed by NRCP 12(b)(5). In ruling upon a motion to dismiss, the court is to construe the pleadings liberally and draw every reasonable inference in favor of the non-moving party. See Vacation Village v. Hitachi America, 110 Nev. 481, 484, 874 P.2d 744, 746 (1994). All factual allegations of the complaint must be accepted as true. Capital Mortgage Holding v. Hahn, 101 Nev. 314, 315, 705 P.2d 126 (1985). A complaint will not be dismissed for failure to state a claim "unless it appears beyond a doubt that the plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him [or her] to relief." Edgar v. Wagner, 101 Nev. 226, 228, 699 P.2d 110, 112 (1985) (citing Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80. In this case, as will be seen in the following sections of this motion, plaintiff's complaint fails to state a claim for which relief can be granted.

II

PLAINTIFF HAS FAILED TO EXHAUST
ADMINISTRATIVE REMEDIES

Plaintiff Village League to Save Incline Assets, Inc., a fictitious organization that is not an owner of real property in Washoe County, Nevada, purports to bring a lawsuit on behalf of

1 property owners, challenging methods utilized by the Washoe
2 County Assessor to assess real property at Incline Village and
3 Crystal Bay, Washoe County, Nevada. Clearly, as will be
4 discussed in the next section, this fictitious organization
5 lacks standing to bring the instant lawsuit and fails to qualify
6 as a member of its own class of "owners of real property at
7 Incline Village and Crystal Bay . . ." Complaint for Declaratory
8 and Related Relief (hereinafter, "Complaint"), p. 2. The failure
9 to exhaust issue shall be discussed first, however, since this
10 failure is fatal to the instant case even if an appropriate
11 plaintiff were to be substituted for the inappropriate Village
12 League.

13 NRS Chapter 361 lays out a procedure for taxpayers to
14 follow to challenge actions by assessors or county boards of
15 equalization. Any person claiming overvaluation or excessive
16 valuation of its real or secured personal property "shall"
17 appear before the county board of equalization and submit proof
18 of his claim. NRS 361.355(1). Also see NRS 361.356(1):

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

25 Any such party who is dissatisfied with the ruling of the
26 county board of equalization may file an appeal with the state
board of equalization. NRS 361.360(1). The appeal must be
filed by March 10 following the board of equalization's ruling.

1 NRS 361.360(1). No appeal to the state board shall be heard
2 "save upon the evidence and data submitted to the county board
3 of equalization, unless it is proven to the satisfaction of the
4 state board of equalization that it was impossible in the
5 exercise of due diligence to have discovered or secured such
6 evidence and data in time to have submitted the same to the
7 county board of equalization . . ."

8 Only after appealing a valuation issue to the county and
9 state boards of equalization pursuant to the procedures
10 referenced above may a taxpayer seek redress in a court of law.
11 See NRS 361.410(1), which states, in pertinent part:

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

19 (emphasis added)

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

24 Every action commenced under the provisions of this section
25 must be commenced within 3 months after the date of the
26 payment of the last installment of taxes, 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

1 the decision of the state board of equalization denying
2 relief, whichever occurs later, 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 same
10 year. Appeal to the state board and payment of the disputed
11 taxes under protest are conditions precedent to filing suit in
12 state court. Failure to file suit within 3 months of the
13 mandatory payment of taxes under protest forever bars suit in
14 district court. Plaintiff fails to allege completion of any of
15 these steps. Plaintiff, even if it were an owner of real
16 property, is thus "forever barred" from bringing this lawsuit.

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

22 . . . [I]t would contravene the well-established rule that
23 administrative remedies must be exhausted prior to seeking
judicial relief. [citation]. The 'exhaustion doctrine' is
24 sound judicial policy. If administrative remedies are
pursued to their fullest, judicial intervention may become
25 unnecessary. Had appellant sought relief before the
respective boards of equalization, he may well have been
26 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." Plaintiff's failure
5 to allege the required exhaustion of administrative relief
6 results in a failure to state a claim for which relief can be
7 granted. NRCP 12(b)(5). The complaint must therefore be
8 dismissed. Since plaintiff is "forever barred" from seeking
9 relief in this forum, dismissal should be with prejudice.

10 III

11 PLAINTIFF LACKS STANDING
12 TO BRING THIS LAWSUIT

13 NRCP 17(a) states that "[e]very action shall be prosecuted
14 in the name of the real party in interest." The real party in
15 interest to a challenge of an assessor's valuation is clearly
16 identified in Chapter 361 as the real property owner who alleges
17 improper assessment or valuation. See, e.g., NRS 361.356(1):
18 "An owner of property who believes that his property was
19 assessed at a higher value than another property whose use is
20 identical and whose location is comparable may appeal the
21 assessment" Plaintiff, which as noted above is a
22 fictional entity, does not allege that it owns any affected
23 property within Washoe County. In fact, the complaint may be
24 fairly read to indicate that the plaintiff does not own such
25 property. The complaint is carefully drafted to indicate that
26 members of plaintiff association, rather than the plaintiff

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

11 NRCP 17(a) provides: "Every action shall be prosecuted in
12 the name of the real party in interest." In the absence of
13 any express statutory grant to bring suit on behalf of the
14 owners, or a direct ownership interest by the association
15 in a condominium within the development, a condominium
16 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.

17 Similarly, in this case it is the property owners themselves,
18 not the plaintiff association, that has standing to sue since
19 they must eventually bear the costs of the tax assessments.
20 Since the only plaintiff in this case lacks standing to bring
21 this lawsuit, the complaint fails to state a claim for which
22 relief can be granted and must be dismissed. Dismissal should
23 be with prejudice, since this plaintiff cannot correct its lack
24 of standing.

25 //

26 //

IV

PLAINTIFF LACKS THE NECESSARY
"TYPICALITY" ELEMENT REQUIRED
TO REPRESENT THE ALLEGED CLASS

Although this case has been brought as a class action, it cannot be so maintained. Among the requirements of a class action is the requirement that a plaintiff be a member of the class, with claims or defenses "typical of the claims or defenses of the class." NRCP 23(a). The complaint itself states that the "plaintiff class consists of the owners of approximately 6713 parcels of real property at Incline Village and Crystal Bay, in Washoe County, Nevada . . ." Complaint, p. 3. Yet, as has been noted above, the complaint does not allege that plaintiff Village League is itself such a property owner. The complaint makes clear that *members* of the association, rather than the association itself, own the real property at issue in this case. Complaint, p. 2. See A & M Supply Co. v. Microsoft Corp., 654 N.W.2d 572, 598 (2002):

The threshold question in any proposed class action is whether the proposed class representative is a member of the class. "A plaintiff who cannot maintain the cause of action as an individual is not qualified to represent the proposed class." [citation omitted]

It has already been demonstrated that plaintiff Village League cannot maintain a cause of action as an individual since it is not a property owner affected by the allegedly erroneous assessments. Plaintiff thus fails to share claims typical of the class. Amendment to name an appropriate member of the class as a representative plaintiff would be futile in this case

1 since, as we have seen, no plaintiff can overcome the failure to
2 exhaust administrative remedies. Therefore, the appropriate
3 resolution of this case is dismissal.

4 V

5 CONCLUSION

6 The named plaintiff is not a property owner and thus lacks
7 standing to bring this lawsuit. Furthermore, plaintiff is not a
8 member of the class of plaintiffs identified in the complaint
9 and therefore cannot represent plaintiffs. Finally, the
10 exclusive method set forth by statute to challenge erroneous
11 assessments has not been followed. Accordingly, this case must
12 be dismissed for failure to exhaust administrative remedies.
13 Defendants therefore request that the court dismiss this case
14 with prejudice.

15 Dated this 19th day of December, 2003.

16 RICHARD A. GAMMICK
17 District Attorney

18 By 

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

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

Plaintiff,

vs.

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

Defendants.

Case No. CV03-06922

Dept. No. 10

MOTION TO DISMISS AND JOINDER IN
STATE BOARD OF EQUALIZATION'S MOTION TO
DISMISS FIRST AND SECOND CLAIMS FOR RELIEF

COMES NOW Defendants, The State of Nevada, ex. rel. Nevada Tax Commission
("Commission") and Nevada Department of Taxation ("Department"), by and through its
counsel Brian Sandoval, Attorney General, by Joshua J. Hicks, Deputy Attorney General, and
hereby requests this case be dismissed pursuant to NRCP 12(b)(5) for failure to state a claim
upon which relief may be granted, and for the reasons set forth in the State Board of

///


///

1 Equalization's Motion to Dismiss First and Second Claims for Relief. This motion is based
2 upon the following points and authorities and all papers and pleadings on file herein.

3 DATED this 29th day of December 2003.

4 BRIAN SANDOVAL
5 Attorney General

6
7 By:


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POINTS AND AUTHORITIES

I. BACKGROUND

This case involves a property tax dispute between a group of Lake Tahoe property owners and the Washoe County Assessor. As discussed below, the Commission and Department have no part in this dispute, and therefore no reason to be in this case.

Plaintiff apparently consists of a group of real property owners at Incline Village and Crystal Bay, Nevada. (Complaint, ¶ 2). Individual property owners are not identified.¹ Plaintiff apparently takes issue with property tax assessments made by Washoe County for the 2003-2004 tax year, as well as with respect to property tax assessments for "an unknown number of prior years." (Complaint, ¶ 20). The Complaint fails to allege that Plaintiff or its members availed themselves of the administrative remedies in place for challenges to property tax assessments. See NRS 361.355-400.

Similarly, there is no allegation that either the Commission or the Department have ever considered any of the property tax assessments at issue or taken any action with respect to any of the property tax assessments at issue. Finally, the relief ultimately sought by Plaintiff is a tax refund, yet there is no allegation that any property taxes were collected by either the Commission or Department, and there is no request for a refund from either the Commission or the Department. (Complaint, 16-18).

II. DISCUSSION

A. Standard for an NRCP 12(b)(5) Motion to Dismiss

NRCP 12(b)(5) states, in relevant part, that a case may be dismissed for "failure to state a claim upon which relief can be granted." In deciding a Rule 12(b)(5) motion to dismiss, the Court "must construe the pleading liberally and draw every fair intendment in favor of the [non-moving party]." *Bratcher v. City of Las Vegas*, 113 Nev. 502, 507, 937 P.2d 485, 489 (1997) (citations omitted). The factual allegations of the complaint must be accepted as true.

¹ A similar property tax challenge has been filed by Lake Tahoe property owners in the First Judicial District Court, Case No. 03-01501A. A motion to dismiss was filed in that case by the Commission and Department and is pending as of the date this motion was filed. As Plaintiffs in this case are unidentified, it cannot be determined whether any individuals in this case are also plaintiffs in the First Judicial District case.

1 *Id.*, at 507. The complaint should only be dismissed if "it appears beyond a doubt that the
2 plaintiff could prove no set of facts, which, if accepted by the trier of fact, would entitle him [or
3 her] to relief." *Id.*, at 507 (citation omitted).

4 The decision to deny declaratory relief is a matter of the Court's discretion. *El Capitan*
5 *Club v. Fireman's Fund Insurance Co.*, 89 Nev. 65, 506 P.2d 426 (1973); NRS 30.080

6 **B. The Complaint Fails to State a Claim Upon Which Relief can be Granted by**
7 **Either the Commission or the Department.**

8 Plaintiff filed a complaint for declaratory relief pursuant to NRS 30.010-160.²
9 (Complaint, ¶ 1). As discussed below, neither the Commission nor the Department are proper
10 parties to this case. As such, declaratory relief against the Commission and Department is
11 inappropriate in this case.

12 In its complaint, Plaintiff makes five claims for relief. The first and second claims for
13 relief are alleged against all defendants. (Complaint, ¶¶ 12-42). The third, fourth and fifth
14 claims for relief are alleged against the "Washoe County Defendants" only. (Complaint, ¶¶
15 43-61). Presumably the "Washoe County Defendants" does not include either the
16 Commission or the Department.

17 The first claim for relief essentially alleges that Plaintiff's property tax assessments
18 were overvalued because the Washoe County Assessor improperly: used view classifications
19 (Complaint, ¶ 20); valued teardowns (Complaint, ¶ 21); used a "time-value" method
20 (Complaint, ¶ 22); determined "lineal footage" (Complaint, ¶ 23); and determined the value of
21 lake-front condominiums (Complaint, ¶¶ 24-25). There is no allegation that any of the
22 property tax assessments at issue were undertaken by either the Commission or the
23 Department.³ Instead, the first claim for relief alleges that the Commission and Department
24

25 ² Typically, a taxpayer brings a claim for a property tax refund to the district court by filing either a complaint for a
26 refund pursuant to NRS 361.420, or a petition for judicial review pursuant to NRS 233B.130.

27 ³ Property tax assessments in Nevada are made pursuant to a bifurcated scheme. Most property tax
28 assessments are made by the county assessor in the county where the property is located (commonly referred to
as "locally assessed properties"). NRS 361.260. Such assessments are the basis of this case. In certain other
situations, such as assessments of property straddling state or county lines or assessments of certain utilities,
the Department makes the property tax assessment (commonly referred to as "centrally assessed properties").
NRS 361.320. Appeals of both locally assessed property taxes and centrally assessed property taxes are made

1 somehow "allow[ed] the use of an illegal assessment." (Complaint, ¶¶ 27-29). The first claim
2 for relief requests a tax refund from Washoe County, but not from either the Commission or
3 the Department. (Complaint, ¶ 34).

4 The second claim for relief essentially alleges an unlawful disparity in property
5 valuation between Douglas and Washoe County. (Complaint, ¶ 36). Plaintiff alleges that this
6 disparity is a result of the Department's failure to "perform its statutory duty to ensure equal
7 and uniform assessments." (Complaint, ¶ 38). The second claim for relief alleges no
8 improper action by the Commission whatsoever. In fact, the Commission is not even
9 mentioned in the second claim for relief. As with the first claim for relief, the second claim for
10 relief requests a tax refund from Washoe County, but not from either the Commission or the
11 Department. (Complaint, ¶ 42).

12 Similarly, the Complaint is rife with allegations that the Washoe County Assessor either
13 violated existing statutes and regulations, or acted in excess of any authority granted pursuant
14 to existing statutes and regulations. However, there is no allegation that any statute or
15 regulation is invalid on its face.⁴

16 In sum, the only allegation against either the Commission or the Department is a theory
17 that the Commission or the Department somehow allowed the Washoe County Assessor to
18 make unequal and non-uniform property tax assessments of unidentified property owners.
19 Although this case is really about a request for a property tax refund, no refund request is
20 made from the Commission and the Department. As discussed below, a declaratory relief
21 action against the Commission and Department is improper with respect to the allegations of
22 this case.

23 1. Declaratory Relief is Improper in this Case.

24 Declaratory relief is a prophylactic remedy for situations where a violation of legal rights
25 is imminent. As explained by the Nevada Supreme Court:

26
27 to the State Board of Equalization. NRS 361.400; 361.403. Further, taxes collected from locally assessed
28 properties are collected by the county in which the property was located. NRS 361.475; 361.480; 361.755.

⁴ Generally, the Commission has the authority to enact regulations pertaining to Nevada taxes, including property
taxes. In this case, there is no challenge to the validity of any regulation. Instead, Plaintiffs' allege that existing
regulations were applied incorrectly by the Washoe County Assessor.

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

11 *Kress v. Corey*, 65 Nev. 1, 35-36, 189 P.2d 352 (1948) (citation omitted). For example,
12 declaratory relief is commonly sought in contract and will disputes, where one party seeks to
13 clarify its legal obligations before acting and thus exposing itself to a possible breach of
14 contract lawsuit. See NRS 30.040-060.

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

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

27 *Kress*, 65 Nev. at 26. As discussed below, none of these requirements exist in this case.

28 a. A Justiciable Controversy

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

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

1 dependent upon the happening of future events. A declaratory judgment should
2 deal with a present, ascertained or ascertainable state of facts . . .

3 *Id.*, 78 Nev. at 266-68 (citation omitted).

4 As discussed above, the only allegation against the Commission and Department is
5 that both entities somehow allowed unequal and non-uniform property tax assessments by the
6 Washoe County Assessor. This allegation necessarily depends on a determination that the
7 property tax assessments made by the Washoe County Assessor were in fact unequal and
8 non-uniform. That determination has not been made, and likely will not be made for some
9 time. Assuming Plaintiff's prevail against the Washoe County Assessor, then and only then
10 would there be even the possibility of a justiciable controversy between Plaintiff and the
11 Commission and Department on the theory alleged. See *Knittle v. Progressive Casualty*
12 *Insurance Co.*, 112 Nev. 8, 10-11, 908 P.2d 724 (1996) (affirming the dismissal of a
13 declaratory relief action where an insurance company denied its policy holder's request for
14 indemnification before the policy holder suffered a judgment in an underlying tort action); *Doe*
15 *v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443 (1986) (affirming the dismissal of a declaratory
16 relief action premised on the possibility of a future criminal arrest, and stating that "litigated
17 matters must present an existing controversy, not merely the prospect of a future problem.").

18 Because there is no justiciable controversy between Plaintiff and either the
19 Commission or the Department, declaratory relief is inappropriate and Plaintiff's complaint
20 should be dismissed for failure to state a claim upon which relief may be granted.

21 b. Adverse Interests

22 As discussed earlier, neither the Department nor the Commission had any involvement
23 in the assessments at issue. Moreover, even if Plaintiff properly challenged the assessments
24 via its administrative remedies (see footnote 2, *supra*), neither the Commission nor the
25 Department would have been involved. This case is a tax dispute between a group of
26 Washoe County property owners and the Washoe County Assessor. The adverse interests lie
27 between those parties. The claim that the Commission and Department somehow allowed
28 unequal and non-uniform property tax assessments is peripheral to the main issue alleged by
Plaintiff – whether the property tax assessments made by the Washoe County Assessor were

1 lawful. As such, there are no sufficient adverse interests between the Plaintiff and the
2 Commission and Department to justify a declaratory relief action and dismissal is appropriate
3 for this reason as well.

4 c. A Legally Protectible Interest

5 Whether a party has a legally protectible interest for purposes of a declaratory relief
6 action has been narrowly defined by the Nevada Supreme Court. See *Wells v. Bank of*
7 *Nevada*, 90 Nev. 192, 197-98 522 P.2d 1014 (1974) (precluding persons without rights, duties
8 or obligations under a contract from seeking declaratory relief with respect to that contract).

9 Here, Plaintiff does not have a legally protectible interest with respect to the
10 Commission or the Department. As discussed earlier, Plaintiff takes issue with certain
11 property tax assessments made by the Washoe County Assessor. The Commission and the
12 Department took no action with respect to those assessments. Indeed, Plaintiff recognizes
13 such and specifically limits any request for a refund as from Washoe County only. (Complaint,
14 ¶¶ 34, 42). Moreover, had Plaintiff utilized its administrative remedies to challenge the
15 assessments, the Commission and Department would not have been involved in any
16 administrative proceedings. (See footnote 2, *supra*). Because the Commission and the
17 Department are not proper parties in taxpayer challenges to property tax assessments made
18 by county tax assessors such as the Washoe County Assessor, Plaintiff has no legally
19 protectible interest that can be enforced against the Commission or Department in a
20 declaratory relief action. Accordingly, dismissal of this case is appropriate.

21 d. Ripeness

22 Ripeness is similar to the requirement that a justiciable controversy exist. See *Black's*
23 *Law Dictionary*, 923 (6th Ed. Abgd. 1991) (defining "ripeness doctrine" in part, by stating that
24 "[t]he question in each case is whether there is a substantial controversy, between parties
25 having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a
26 declaratory judgment."); Cox, 78 Nev. at 268 ("A declaratory judgment should deal with a
27 present, ascertained or ascertainable set of facts.") (citation omitted).

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1 As discussed in detail in section II(B)(1)(a) of this motion, Plaintiff's allegations against
2 the Commission and the Department are premised on a determination that the Washoe
3 County Assessor acted unlawfully – a determination which has yet to be made. Even if such a
4 determination were made, Plaintiff's allegations against the Commission and Department
5 require at the least some kind of proof that the Commission and Department somehow failed
6 in their statutory obligations. Because Plaintiff's claims against the Commission and
7 Department are dependent on future events, they are not ripe at this time and declaratory
8 relief is therefore inappropriate. (See section II(B)(1)(a), supra).

9 **C. Joinder in the State Board of Equalization's Motion to Dismiss.**

10 The Commission and the Department hereby join in the argument advanced by the
11 State Board of Equalization in section III(B) of its Motion to Dismiss First and Second Claims
12 for Relief.

13 **III. CONCLUSION**

14 This case is simply a tax dispute between Plaintiff and the Washoe County Assessor.
15 The Commission and the Department were not involved in the tax assessments at issue. Any
16 allegation that the Commission or Department somehow allowed unequal and non-uniform
17 property tax assessments by the Washoe County Assessor is pure conjecture and is not
18 actionable by way of Plaintiff's complaint for declaratory relief. Moreover, Plaintiff failed to
19 exhaust their administrative remedies to challenge a property tax assessment. Accordingly,

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1 this case should be dismissed for failure to state a claim pursuant to NRCP 12(b)(5) and also
2 for a lack of subject matter jurisdiction.

3 DATED this 29th day of December 2003.

4 BRIAN SANDOVAL
5 Attorney General

6
7 By: 

8 JOSHUA J. HICKS
9 Deputy Attorney General
10 Nevada State Bar #6679
11 100 North Carson Street
12 Carson City, Nevada 89701-4717
13 (775) 684-1233
14 (775) 684-1156 (f)

15 Attorneys for the State of Nevada, ex. rel.
16 Nevada Tax Commission and
17 Nevada Department of Taxation
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on the 29th day of December 2003, I served a copy of the foregoing **MOTION TO DISMISS** via hand delivery by way of Reno/Carson Messenger Service to the following:

Suellen Fulstone, Esq.
Woodburn and Wedge
6100 Neil Rod, Suite 500
Reno, Nevada 89511
Attorney for Plaintiff

Greg Shannon, Esq.
Deputy District Attorney
Washoe County District Attorney's Office
50 S. Liberty Street
Reno, Nevada 89501
Attorney for Washoe County/Washoe County Assessor

Gregory L. Zunino, Esq.
Senior Deputy Attorney General
100 N. Carson St.
Carson City, Nevada 89701
Attorney for State of Nevada, ex. rel. State Board of Equalization
(via hand delivery)



Zina Lee, Legal Secretary II
Office of the Attorney General

ORIGINAL

2315
BRIAN SANDOVAL
Attorney General
GREGORY L. ZUNINO
Senior Deputy Attorney General
Nevada State Bar #4805
100 North Carson Street
Carson City, Nevada 89701-4717
Attorney for State of Nevada, ex. rel.
the State Board of Equalization

2003-07-10 10:00

[Signature]

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

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

Plaintiff,

vs.

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

Defendants.

Case No. CV03-06922

Dept. No. 10

STATE BOARD OF EQUALIZATION'S MOTION
TO DISMISS FIRST AND SECOND CLAIMS FOR RELIEF

COMES NOW the defendant, the State of Nevada, ex. rel. the State Board of
Equalization (the "Board"), by and through its counsel, Brian Sandoval, Attorney General, by
Gregory L. Zunino, Senior Deputy Attorney, and moves the Court for an order dismissing the
plaintiff's complaint on the ground that the Court lacks subject matter jurisdiction over the
complaint. If the Court determines that it has subject matter jurisdiction over the complaint,
then the Board moves the Court, pursuant to NRCP 12(b)(5), for an order dismissing the
plaintiff's claims against the Board, specifically those claims that the plaintiff has characterized
as its first and second claims for relief. The plaintiff has failed to state, either by way of its first

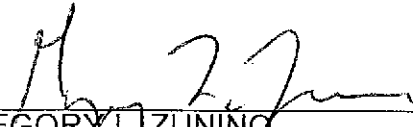
Attorney General's Office
100 N. Carson Street
Carson City, Nevada 89701-4717

1 or its second claim for relief, an actionable claim against the Board. This motion is based
2 upon the following points and authorities and all papers and pleadings on file herein.

3 DATED this 29th day of December 2003.

4 BRIAN SANDOVAL
5 Attorney General

6
7 By:


8 GREGORY L. ZUNINO
9 Senior Deputy Attorney General
10 Nevada State Bar #4805
11 100 North Carson Street
12 Carson City, Nevada 89701-4717
13 (775) 684-1223
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15 Attorney for the State of Nevada, ex. rel.
16 The State Board of Equalization
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POINTS AND AUTHORITIES

I. SUMMARY OF CASE

This case is a dispute over the assessment of real property taxes. The plaintiff, a group of Lake Tahoe property owners calling themselves the Village League to Save Incline Assets, Inc. (the "Village League"), takes issue with the methodologies by which the Washoe County Assessor (the "Assessor") has determined the taxable values of parcels of real property located at Incline Village and Crystal Bay in Washoe County. (Complaint, ¶¶ 1 & 2). As discussed below, the State Board of Equalization (the "Board") has presumably had no involvement in the dispute, and therefore has no reason to be named in this suit.¹

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

In short, the Village League's reasons for naming the Board as a defendant in this lawsuit remain a mystery. Indeed, the Board is specifically mentioned in only five paragraphs of the Village League's complaint. (Complaint, ¶¶ 1, 4, 27, 39 & 40). The Village League's claims against the Board, namely those characterized as the first and second claims for relief, apparently find their genesis in the Board's alleged unlawful state of mind. (Complaint, ¶¶ 31 & 41). In other words, the Board has apparently been named as a defendant in this lawsuit

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

1 because of what the Board may or may not believe about the propriety of the appraisal
2 methodologies employed by the Assessor. (Complaint, ¶¶ 31 & 41).

3 II. OVERVIEW OF NEVADA'S PROPERTY TAX SYSTEM

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

12 "The computed taxable value [of land and improvements] must not exceed its full cash
13 value." NRS 361.227(5). "Full cash value" is defined as "the most probable price which
14 property would bring in a competitive and open market under all conditions requisite to a fair
15 sale." NRS 361.025. In determining whether the taxable value of a property exceeds its full
16 cash value, and assessor may use, as applicable, one or more of the following methods: (1)
17 an analysis of comparative sales; (2) a summation of land and improvement values; and (3) a
18 capitalization of the income generated by the use of the property. NRS 361.227(5). If the
19 taxable value of a property exceeds its full cash value, the taxable value must be reduced
20 accordingly. Id. If the land is properly valued, then the reduction must be applied to the
21 improvements. NAC 361.131.

22 When the assessor has completed his work, the taxpayer may appeal to the County
23 Board of Equalization, which is required to "make an independent determination of the
24 valuation of the property assessed." NAC 361.627. If the taxpayer is aggrieved by the
25 decision rendered by the County Board of Equalization, the taxpayer may appeal to the State
26 Board of Equalization. NRS 361.360. If the taxpayer is thereafter aggrieved by a decision of
27 the State Board of Equalization, the taxpayer may appeal the decision to the District Court.
28 NRS 361.420. Unless the taxpayer alleges that his property is exempt from taxation, that he

1 is not the owner of the property, or that more than one county has assessed the property, the
2 District Court must confine its review to the record before the State Board of Equalization. Id.

3 III. ARGUMENT

4 A. The Standard for an NRCP 12(b)(5) Motion to Dismiss.

5 NRCP 12(b)(5) states, in relevant part, that a case may be dismissed for "failure to
6 state a claim upon which relief can be granted." In deciding a Rule 12(b)(5) motion to dismiss,
7 the Court "must construe the pleading liberally and draw every fair intendment in favor of the
8 [non-moving party]." Bratcher v. City of Las Vegas, 113 Nev. 502, 507, 937 P.2d 485, 489
9 (1997) (citations omitted). The factual allegations of the complaint must be accepted as true.
10 Id., at 507. The complaint should only be dismissed if "it appears beyond a doubt that the
11 plaintiff could prove no set of facts, which, if accepted by the trier of fact, would entitle him [or
12 her] to relief." Id., at 507 (citation omitted).

13 The decision to deny declaratory relief is a matter of the Court's discretion. El Capitan
14 Club v. Fireman's Fund Insurance Co., 89 Nev. 65, 506 P.2d 426 (1973); NRS 30.080.

15 B. The Exhaustion Requirement.

16 The Village League has filed a complaint for declaratory relief pursuant to NRS 30.010-
17 160. (Complaint, ¶ 1). Since the members of the Village League have failed to exhaust their
18 administrative remedies with respect to the real property assessments at issue in this case,
19 they have deprived the Court of subject matter jurisdiction over the Village League's
20 complaint. County of Washoe v. Golden Road Motor Inn, Inc., 105 Nev. 402, 403, 777 P.2d
21 358 (1989)(holding that "[t]axpayers must exhaust their administrative remedies before
22 seeking judicial relief."). There are only two exceptions to the exhaustion requirement noted in
23 the Golden Road case. In Malecon Tobacco, LLC. v. Department of Taxation, the Nevada
24 Supreme Court explained the exhaustion requirement as follows:

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

3 ___ Nev. ___, 59 P.3d 474, 475-76 (2002)(citations omitted).

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

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

22 Although the Village League alleges that it would be futile to pursue administrative
23 remedies, it offers no concrete explanation as to why it would be futile to pursue administrative
24 remedies. (Complaint, ¶ 32). The Village League suggests that its members were somehow
25 misled by the Assessor's alleged failure to "disclose its use of . . . illegal assessment
26 methods." (Complaint, ¶ 32). However, this allegation is irrelevant for purposes of determining
27 whether the members of the Village League should have pursued available administrative
28 remedies. Notwithstanding their rhetoric about unlawful assessment methodology, the

1 members of the Village League are essentially challenging the taxable values that have been
2 assigned to their properties. At the core of their complaint is the fundamental premise that
3 their properties have been overvalued for tax purposes.

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

13 Of course, the Village League further suggests that some or all of the key players in the
14 administrative process may be inclined to agree with the Assessor's interpretation and
15 application of the existing statutes and regulations concerning land valuation.² (Complaint, ¶¶
16 31 & 41). These bare allegations, however, do not set forth an adequate basis upon which to
17 excuse the failure to exhaust administrative remedies. "The purposes underlying the
18 exhaustion doctrine include the opportunity for the **agency** to exercise its discretion and
19 expertise and the opportunity to make a record for the district court to review." In re Steele,
20 799 F.2d 461, 466 (9th Cir. 1986) (emphasis in original). Administrative review is not futile if
21 the plaintiff's allegations of bias are purely speculative. United States v. Litton Industries, Inc.,
22 462 F.2d 14, 18 (9th Cir. 1972).

23 In summary, the Village League seeks to bypass the administrative process on the
24 theory: (1) that the Assessor did not come forward with an explanation of his appraisal
25 methodologies at the time he issued assessment notices (Complaint, ¶ 32); and (2) that the
26 adjudicating agencies may tend to agree with the Assessor's interpretation of the law

27
28 ² The Village League is currently lobbying the Nevada Tax Commission to adopt new and/or amended
regulations governing appraisal practice and valuation methodology. Indeed, the regulatory and legislative
processes provide the only appropriate forum in which to raise the claims at issue in this case.

(Complaint, ¶¶ 31 & 41). If every taxpayer were allowed to bypass the administrative process on this theory, the dispute resolution system would completely unravel. The administrative process is what enables the state and its agencies to manage the sheer volume of disputes that arise in the area of taxation. The Village League has failed to allege with adequate specificity the grounds upon which its members should be excused from exhausting their administrative remedies. Accordingly, the Court lacks subject matter jurisdiction over the Village League's complaint.

C. The Alleged Grounds for Declaratory Relief.

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

The first claim for relief alleges, in summary, that the members of the Village League own properties that were improperly valued because the Assessor: (1) used view classifications to determine the taxable values of properties having views of Lake Tahoe (Complaint, ¶ 20); (2) considered market data, including sales of improved properties, to determine the taxable value of land at Incline Village and Crystal Bay (Complaint, ¶ 21); (3) used a "time-value" method in order to interpret market data (Complaint, ¶ 22); (4) calculated the "lineal footage" of lake front properties as a factor in determining the taxable values of such properties (Complaint, ¶ 23); and (5) used market data, including sales of single-family residential properties, to determine the taxable values of condominiums (Complaint, ¶¶ 24-25).

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1 In its first claim for relief, the Village League fails to allege that the Board determined or
2 computed the taxable values assigned to the properties in question.³ The Village League
3 fails to allege that its members at any point in time sought relief from the Board, or ever
4 requested the Board to review a decision rendered by the County Board of Equalization.
5 Instead, in its first claim for relief, the Village League alleges that the Board, among others,
6 "consider the use by the Washoe County Assessor's office of these illegal assessments [sic]
7 methods to be valid and lawful." (Complaint, ¶ 31). In short, the Village League's first claim for
8 relief is premised entirely upon the notion that the Board possesses an unlawful state of mind.
9 The Village League fails to explain how the Board's state of mind, without some action or edict
10 on its part, gives rise to a cause of action for declaratory relief. Perhaps such an explanation
11 will be forthcoming in the form of an opposition to this motion.

12 At any rate, in its second claim for relief, the Village League alleges an unlawful
13 disparity in property valuation between Douglas and Washoe County. (Complaint, ¶ 36). The
14 Village League suggests that this disparity is a result of the Board's failure "to equalize the
15 taxable value of similarly situated property at Lake Tahoe in Douglas and Washoe Counties
16 for the tax year 2003/2004 and prior tax years." (Complaint, ¶ 40). The Village League fails,
17 however, to allege that its members ever brought any of the alleged inequalities to the Board's
18 attention, or sought some form of relief from the Board, such that the Board could properly be
19 named as a party to the alleged "actual controversy" in this case. (Complaint, ¶ 41). The
20 Village League seems to suggest that the "actual controversy" arises from an alleged breach
21 of a general duty to "review the tax rolls of the various counties and equalize the taxable value
22 of the properties reflected on such roll." (Complaint, ¶ 37).

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

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

The Board is a quasi-judicial body existing as part of the executive branch of the state government. See NRS 361.375. The Board's duties and functions are specifically defined by the Legislature. The Board possesses no powers that are not specifically conferred upon it by statute. See Clark County School District v. Clark County Classroom Teachers Association, 115 Nev. 98, 102, 977 P2d 1008, 1010 (1999). Consequently, the Board performs its duties and functions, and exercises its powers, only within the context of the adjudication process described in chapter 361 of the NRS. The Board has no general authority or jurisdiction to directly control, dictate or orchestrate the conduct of the county assessors. See, e.g., NRS 361.372 through NRS 361.435, inclusive. Rather, the Board's influence over the county assessors is wielded through its adjudication of contested cases involving challenged assessments. See NRS 361.360 and NRS 361.400.

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

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

It [declaratory relief] was a defect of the judicial procedure which developed under the common law that the doors of the court were invitingly opened to a plaintiff whose legal rights had already been violated, but were rigidly closed

1 upon a party who did not wish to violate the rights of another nor to have his own
2 rights violated, thus compelling him, where a controversy arose with his fellow,
3 to run the risk of a violation of his fellow's rights or to wait until the anticipated
4 wrong had been done to himself before an adjudication of their differences could
be obtained. Thus was a penalty placed upon the party who wished to act
lawfully and in good faith which the statute providing for declaratory relief has
gone far to remove.

5 Kress v. Corey, 65 Nev. 1, 35-36, 189 P.2d 352 (1948) (citation omitted). For example,
6 declaratory relief is commonly sought in contract and will disputes, where one party seeks to
7 clarify its legal obligations before acting and thus exposing itself to a possible lawsuit for
8 breach of contract. See NRS 30.040-060.

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

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

18 Kress, 65 Nev. at 26. As discussed below, the Village League's complaint fails to satisfy any
19 of four requirements noted above.

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

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

24 [E]very judgment following a trial upon the merits must be based upon the
25 evidence presented; it cannot be based upon an assumption made before the
26 facts are known or have come into existence [F]actual circumstances
27 which may arise in the future cannot be fairly determined now. As to this phase
28 of the case we are asked to make a hypothetical adjudication, where there is
presently no justiciable controversy, and where the existence of a controversy is

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1 dependent upon the happening of future events. A declaratory judgment should
2 deal with a present, ascertained or ascertainable state of facts

3 Id., 78 Nev. at 266-68 (citation omitted).

4 As noted above, the Village League has alleged in general terms that the Board failed
5 to equalize the values of properties in Douglas and Washoe Counties. However, to maintain a
6 cause of action against the Board for declaratory relief, the Village League must also allege
7 that the Board is somehow poised to violate the rights of the Village League or its members.
8 The Board cannot possibly violate the rights of the Village League, or its members, if it was
9 never even afforded an opportunity to review and act upon the assessments at issue in this
10 case.

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

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

25 As previously noted, the Village League has not alleged that the Board ever reviewed
26 or acted upon the assessments at issue in this case. Indeed, the Village League essentially
27 admits that neither the League nor its members followed the administrative process for
28 seeking relief from the assessments. (Complaint, ¶ 32). If there exists an administrative

1 process for adjudicating a dispute over taxes, the taxpayer must follow that process. County
2 of Washoe v. Golden Road Motor Inn, Inc., 105 Nev. 402, 403, 777 P.2d 358 (1989) (holding
3 that "[t]axpayers must exhaust their administrative remedies before seeking judicial review.")
4 Here, the Village League did not follow the administrative process. Accordingly, the Village
5 League gave the Board no opportunity to take up a position that is adverse to the Village
6 League's interest or that of its members. Quite simply, the Village League and the Board do
7 not have adverse interests because the Board has neither rendered, nor is it about to render,
8 a decision against the Village League or its members.

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

10 The Nevada Supreme Court has narrowly defined the circumstances under which a
11 party will be deemed to have a legally protectible interest such that the party can maintain an
12 action for declaratory relief. See Wells v. Bank of Nevada, 90 Nev. 192, 197-198, 522 P.2d
13 1014 (1974) (precluding persons without rights, duties or obligations under a contract from
14 seeking declaratory relief with respect to that contract). The Village League does not have a
15 legally protectible interest in the outcome of an alleged dispute involving the assessment of
16 property taxes at Incline Village. In fact, the Village League does not own the real property
17 that is the subject of the Assessor's alleged unlawful assessments. (Complaint, ¶ 2). Rather,
18 its members own the real property in question. Although the Village League's moniker
19 indicates that its purpose is to "Save Incline Assets," its name and/or its mission to prosecute
20 this lawsuit does not alone suffice to create a legally protectible interest in an alleged dispute
21 over real property taxes. See id.

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

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

1 present, ascertained or ascertainable set of facts.") (Citation omitted.) As discussed in detail
2 in section III(D)(1) of this motion, the Village League's claims against the Board are premised
3 upon the allegation that the Assessor improperly assessed taxes against properties belonging
4 to the Village League's members.

5 However, the Board has yet to address the question of whether the Assessor
6 improperly assessed taxes against the properties at issue in this case. Indeed, the Board will
7 not have occasion to address this question until it is presented with an appeal from a decision
8 of the Washoe County Board of Equalization. See NRS 361.360 and NRS 361.400. The
9 Village League's complaint would suggest that it has no plans to file such an appeal at
10 anytime in the near future. To the contrary, the Village League's complaint would suggest that
11 it expects this Court to usurp the role of the Board with respect to the equalization of real
12 property in the state. (Complaint, ¶ 32). The Court's proper role, however, is to review
13 decisions that are rendered by the Board, not to substitute its judgment for that of the Board
14 with respect to matters within the Board's competence and expertise. Washoe County v. John
15 A. Dermody, Inc., 99 Nev. 608, 612, 668 P.2d 280, 282 (1983).

16 IV. CONCLUSION

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

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Attorney General's Office
100 N. Carson Street
Carson City, Nevada 89701-4717

1 Furthermore, even if the members of the Village League are not required to exhaust their
2 administrative remedies, the Village League has failed to state a claim against the Board upon
3 which relief can be granted.

4 DATED this 29th day of December 2003.

5 BRIAN SANDOVAL
6 Attorney General

7
8 By: 
9 GREGORY L. ZUNINO
10 Senior Deputy Attorney General
11 Nevada State Bar #4805
12 100 North Carson Street
13 Carson City, Nevada 89701-4717
14 (775) 684-1223
15 (775) 684-1156 (f)

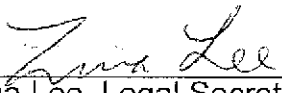
16 Attorney for the State of Nevada, ex. rel.
17 The State Board of Equalization
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on the 29th day of December 2003, I served a copy of the foregoing **MOTION TO DISMISS** via hand delivery by way of Reno/Carson Messenger Service to the following:

Suellen Fulstone, Esq.
Woodburn and Wedge
6100 Neil Road, Suite 500
Reno, Nevada 89511
Attorney for Plaintiff Village League

Greg Shannon
Deputy District Attorney
Washoe County District Attorney's Office
50 S. Liberty Street
Reno, Nevada 89501
Attorney for Washoe County/Washoe County Assessor


Zina Lee, Legal Secretary II
Office of the Attorney General

2540
GREGORY R. SHANNON
Deputy District Attorney
Nevada State Bar Number 612
P. O. Box 30083
Reno, NV 89520-3083
(775) 337-5700
ATTORNEY FOR WASHOE COUNTY

2004 JUN -4 PM 3:48
P. Cronney
CLERK

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

* * *

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

Case No. CV03-06922
Dept. No. 7

Plaintiffs,

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,

Defendants.

NOTICE OF ENTRY OF ORDER

To: VILLAGE LEAGUE TO SAVE INCLINE ASSETS, INC. and its
attorney of record

Please take notice that an Order in the above-entitled

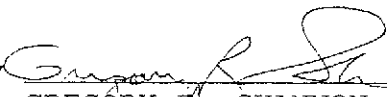
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1 matter was entered on June 2, 2004. A copy of that order is
2 attached.

3 Dated this 4th day of June, 2004.

4
5 RICHARD A. GAMMICK
6 District Attorney

7 By 
8 GREGORY R. SHANNON
9 Deputy District Attorney
P. O. Box 30083
Reno, NV 89520-3083
(775) 337-5700

10 ATTORNEYS FOR WASHOE COUNTY

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FILED

JUN - 2 2004

RONALD A. LONGSTIN, JR., CLERK

By: K. Driggs
DEPUTY

1 CODE NO. 3060

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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF WASHOE

8 * * *

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

Plaintiff,

Case No. CV03-06922

Dept. No. 7

12 vs.

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

17 Defendants,
18

19 ORDER GRANTING MOTIONS TO DISMISS

20 Plaintiff is a nonprofit membership organization that claims its members
21 consist of the owners of approximately 6,700 parcels of real property located in Incline
22 Village and Crystal Bay, Nevada. Plaintiff claims that property taxes assessed on the
23 members' real property in 2003 far exceed the property taxes assessed on other real
24 property within the County. Specifically, Plaintiff claims that while property taxes have risen
25 by approximately 2.5% on average in Washoe County, real property taxes at Incline and
26 Crystal Bay have risen by an average of 31%, and in some individual cases as high as
27 400%. In addition, these amounts are far out of proportion to real property taxes paid by
28

1 Douglas County residents of property that is the same or similar to those situated in Washoe
2 County.

3 Plaintiff brought this class action for relief requesting a declaration from the
4 court that the specific methods used by the Washoe County Assessor's Office to assess
5 real property in Incline Village and Crystal Bay are illegal, discriminatory, and
6 unconstitutional. Thus, as a result of this improper methodology, Plaintiff alleges the
7 property values in these areas were overvalued in comparison to other properties in
8 Washoe County. Further, Plaintiff asks the Court to declare that Defendant State Board of
9 Equalization and the State Department of Taxation failed to equalize the assessments made
10 on property located in Douglas County and Washoe County as constitutionally required and
11 have thus failed in their statutory and constitutionally mandated duties. Additionally, Plaintiff
12 alleges that the notice of the property tax assessments given by Washoe County do not
13 meet the Due Process requirements of both the Nevada and United States Constitutions.
14 Finally, on behalf of its members, Plaintiff seeks tax refunds in the amounts equal to the
15 over assessed amounts paid and damages based on the invalid and unconstitutional taxes
16 assessed.
17

18 Defendants Washoe County, the State Board of Equalization, the Nevada Tax
19 Commission and Nevada State Board of Taxation (collectively "Defendants") have each
20 separately moved for dismissal of the entire action pursuant to NRCP 12(b)(5) arguing that
21 Plaintiff has failed to state a claim upon which relief can be granted. Defendants argue that
22 this case should be dismissed because the Plaintiff's members failed to exhaust all
23 administrative remedies provided in the Nevada Revised Statutes for the challenging of
24 property assessments and taxes and are therefore precluded from bringing this action in
25 District Court. Plaintiff opposes each motion to dismiss. While Plaintiff admits that the
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1 administrative remedies were not exhausted, Plaintiff argues that it is excused from
2 exhausting the administrative remedies based on recognized exceptions to that rule of law.

3 The Court having considered the pleadings and oral argument of counsel,
4 finds as follows. A motion to dismiss for failure to state a claim for relief will only be granted
5 if it appears to a certainty that plaintiff is entitled to no relief under any set of facts which
6 could be proved in support of the claim. NRCP 12(b)(5); Zalk-Josephs Co. v. Wells Cargo,
7 Inc., 81 Nev. 163, 170 (1965). In considering a motion to dismiss the court must accept all
8 allegations of the complaint as true. Haertel v. Sonshine Carpet Co., 102 Nev. 614, 615
9 (1986). In addition, the court must construe the pleading liberally, drawing fair inferences in
10 favor of the non-moving party. Simpson v. Mars, Inc., 113 Nev. 188, 190 (1997).

11 Plaintiff's claims are based on allegations of overvaluation of the property
12 owned by Incline Village and Crystal Bay property owners in relation to other property
13 owners in Washoe and Douglas counties. Based on these claims, the Nevada Revised
14 statutes provide a detailed means for challenging the over assessment of taxes through
15 administrative remedies. See NRS 361.355; NRS 361.356; NRS 361.360; NRS 361.420.

16 Ordinarily, a taxpayer must exhaust administrative remedies before seeking
17 judicial relief. County of Washoe v. Golden Road Motor Inn, Inc., 105 Nev. 402, 403 (1989).
18 Failure to do so deprives the district court of subject matter jurisdiction. Id. at 403-404. In
19 addition, if a statutory scheme exists for the overpayment of taxes erroneously collected,
20 that procedure must ordinarily be followed before commencing suit. State of Nevada v.
21 Scotsman, 109 Nev. 252, 255 (1993).

22 However, there are exceptions to the "exhaustion doctrine". First, the district
23 court is not be deprived of jurisdiction where issues relate solely to the interpretation or
24 constitutionality of a statute. Id. In addition, the "exhaustion doctrine" does not apply where
25

1 the initiation of administrative proceedings would be futile. Id.

2 As to the first exception, a district court would not be deprived of jurisdiction for
3 the failure to exhaust administrative remedies when the issues presented relate solely to the
4 interpretation or constitutionality of a statute. Id. However, simply providing a constitutional
5 challenge to a statute or provision is not sufficient to avoid the requirement of exhaustion.
6 Thus, when a statute is attacked on its face, or in other words the claim is that the statute as
7 enacted is unconstitutional an agency determination on this point would rarely aid the court
8 in resolving the issue and accordingly exhaustion would not be required. Malecon Tobacco,
9 Inc. v. State of Nevada, 59 P. 3d 474, 476 (Nev. 2002). However, when the taxpayer does
10 not challenge that the statute is unconstitutional but rather the statute has been applied
11 unconstitutionally to them, this is a matter which is properly resolved by the agency. Id.
12 These determinations inherently require a factual context and the agency is in the best
13 position, through its experience and expertise, to make such factual findings. Id. Thus, in
14 these cases, there is not an exception to the exhaustion doctrine merely because a
15 constitutional claim is made.
16

17 The Court finds that Plaintiff does not challenge the constitutionality of any
18 statutory provision or administrative rule. The claims do not challenge whether Washoe
19 County has the constitutional authority to make such assessments or to levy taxes on the
20 property. Rather, Plaintiff challenges the manner, methods, and ultimate conclusions made
21 by the Washoe County Assessor in relation to the taxable value made on these properties.
22 For example, Plaintiff claims it was improper to utilize "view classifications" and the "time
23 value" and "allocation" methods to determine the valuation of these properties, thus arguing
24 these actions are inconsistent and arbitrary. Plaintiff claims these actions violate equal
25 protection and due process. However, these are the types of claims that would inherently
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1 require factual determinations and context to determine if in fact the use of these methods
2 and other valuation classifications are improper as guidelines and provisions available to
3 county assessors for the valuation of property, and thus being unconstitutionally applied.
4 Accordingly, this exception to the exhaustion requirement does not apply to the instant
5 case.
6

7 Furthermore, the Court does not agree that the utilization of the administrative
8 remedies would be futile under the circumstances. The local and state entities that would be
9 required to hear any such challenge to these assessments are particularly able to make
10 these determinations due to their expertise and knowledge of the subject matter involved.
11 Furthermore, the mere fact that there may be many claimants with similar claims of
12 overvaluation does not excuse the use of the administrative process, as one successful
13 challenge to these methods would arguably correct the alleged impermissible valuation
14 methods. Accordingly, the exhaustion of administrative remedies would not be futile under
15 this exception.
16

17 Plaintiff has failed to exhaust the administrative remedies as required under
18 NRS 361.355 *et. seq.* Therefore, this failure precludes Plaintiff from bringing any action
19 based on the overvaluation of the properties involved as to all named Defendants. NRS
20 361.410(1). Accordingly, Defendants' Motions to Dismiss should be GRANTED in their
21 entirety as to all Defendants.
22

23 IT IS SO ORDERED.

24 DATED: This 2 day of June, 2004.
25

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DISTRICT JUDGE

CERTIFICATE OF SERVICE BY MAILING

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Second Judicial District Court, in and for the County of Washoe; and that on this 2 day of June, 2004, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true and correct copy of the attached document addressed as follows:

Suellen Fulstone, Esq.
Woodburn and Wedge
6100 Neil Rd., Suite 500
Reno, NV 89511

Gregory L. Zunino
Senior Deputy Attorney General
100 N. Carson St.
Carson City, NV 89701-4717

Joshua J. Hicks
Deputy Attorney General
100 N. Carson St.
Carson City, NV 89701-4717

Gregory R. Shannon
Deputy District Attorney
Civil Division


KIM DRIGGS
Administrative Assistant

CERTIFICATE OF SERVICE BY MAIL

Pursuant to NRCP 5(b), I certify that I am an employee of the Office of the District Attorney of Washoe County, over the age of 21 years and not a party to nor interested in the within action. I certify that on this date, I deposited for mailing in the U. S. Mails, with postage fully prepaid, a true and correct copy of the foregoing Notice of Entry of Order in an envelope addressed to the following:

Suellen Fulstone, Esq.
Dale Ferguson, Esq.
Woodburn and Wedge
6100 Neil Road, Suite 500
Reno, NV 89511

Gregory L. Zunino
Senior Deputy Attorney General
100 N. Carson Street
Carson City, NV 89701-4717

Joshua J. Hicks
Deputy Attorney General
100 N. Carson Street
Carson City, NV 89701-4717

Dated this 7th day of June, 2004.

Debbie Rossi

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on November 2, 2010. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Suellen Fulstone, Esq., Counsel for Appellants

Deonne Contine, Deputy Attorney General, Counsel for Respondents

Dated this 2nd day of November, 2010.

/s/ MICHELLE FOSTER
MICHELLE FOSTER