IN THE SUPREME COURT OF THE STATE OF NEVADA

MONTAGE MARKETING, LLC, formerly known as MONTAGE MARKETING CORPORATION, a Delaware limited liability company,
Appellant,

vs.

WASHOE COUNTY *ex rel.* WASHOE COUNTY BOARD OF EQUALIZATION; and WASHOE COUNTY ASSESSOR JOSH WILSON,
Respondents.
_____/

NO. 59063

Appeal from Order Denying Petition for Judicial Review
First Judicial District Court of the State of Nevada

APPELLANT'S OPENING BRIEF

Maupin, Cox & LeGoy
Rick R. Hsu, Esq., NV Bar #5374
Debra O. Waggoner, NV Bar #5808
4785 Caughlin Parkway
P. O. Box 30000
Reno, NV 89520
(775) 827-2000
Attorneys for Appellant Montage Marketing, LLC

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Reno, NV 89520
(775) 827-2000
Attorneys for Appellant Montage Marketing, LLC

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I. JURISDICTIONAL STATEMENT

Appellant Montage Marketing, LLC, formerly known as Montage Marketing Corporation, a Delaware limited liability company ("Appellant"), appeals an Order Denying Petition for Judicial Review ("Order") by the First Judicial District Court of Nevada ("District Court") on July 28, 2011. See Volume 3 Joint Appendix ("3 JA"), Tab 15. Appellant's Petition for Judicial Review challenged decisions of an administrative agency, in particular, the State Board of Equalization ("SBE"). The basis for the Supreme Court's appellate jurisdiction is NRAP 4(a)(1), appeal of a civil case, and NRS 233B.150, review of a final order of a district court on judicial review by the Supreme Court.

Notice of entry of the Order was served on Appellants by mail on August 5, 2011. 3 JA, Tab 16. Appellant filed the Notice of Appeal on August 23, 2011, within the 30-day time period required under NRAP 4(a)(1). 3 JA, Tab 17. Therefore, the appeal is timely.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

The ultimate issue on appeal is whether the District Court erred by affirming the decisions of the SBE. In this regard, the issues on appeal are:

1. Whether the District Court erred by refusing to review the SBE's

interpretation of NRS 361.227(2)(b) *de novo*.

2. Whether the decisions of the SBE affirmed by the District Court were unjust and inequitable by refusing to appraise Appellant's unsold condominiums collectively as a single unit under NRS 361.227(2)(b) despite their undisputed qualification as a subdivision.

3. Whether the decisions of the SBE affirmed by the District Court applied a fundamentally wrong principle of appraising Appellant's unsold condominiums based on retail prices so as to exceed full cash value.

III. STATEMENT OF THE CASE

Appellant is the petitioner below in a Petition for Judicial Review filed in the District Court on January 18, 2011 challenging two separate but related decisions rendered by the SBE pertaining to real property tax valuations of Appellant's unsold condominium units for the 2009-10 and 2010-11 tax years, respectively. See generally Volume 1, Joint Appendix ("1 JA"), Tab 1 and DCT-0007 to DCT-0010 (SBE decision for 2009-10); DCT-0012 to DCT-0015 (SBE decision for 2010-11). Both SBE decisions affirmed decisions rendered by Respondent Washoe County Board of Equalization ("County Board"), and in particular, the method of valuation by Respondent Washoe County Assessor Josh Wilson

("County Assessor"). See 1 JA, Tab 4, DCT-0030 to DCT-0037 (County Board decision for 2009-10); 2 JA, Tab 7, DCT-0280 to DCT-0287 (County Board decision for 2010-11).

After reviewing briefs filed by the parties on judicial review, 3 JA Tabs 12, 13 and 14, the District Court entered its Order Denying Petition for Judicial Review ("Order") on July 28, 2011. 3 JA, Tab 15. Appellant now appeals.

IV. STATEMENT OF FACTS

A. Introduction.

This appeal focuses on the County Assessor's valuation of hundreds of unsold residential condominiums units owned by Appellant and marketed for sale to individual purchasers. In simple terms, the County Assessor determined their total taxable value based on the *retail* list prices of *individual* condominiums. By contrast, Appellant contends the unsold condominiums should be valued *collectively* as one unit to derive a *wholesale* value, as expressly contemplated under NRS 361.227(2)(b). The following chart shows the differences in valuation between the County Assessor and Appellant for the 2009-10 and 2010-11 tax years:

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Total Value of Unsold Condominiums	**2009-10**	**2010-11**
County Assessor's aggregate value based on individual retail prices	$86,804,500	$71,120,370
Appellant's aggregate value when appraised collectively as one (bulk discount value)	$40,350,000	$24,000,000

See 1 JA, Tab 6, DCT-0179 (County 2009-10 valuation); 2 JA, Tab 8, DCT-0294 (County 2010-11 valuation); 1 JA, Tab 5, DCT-0165 (Appellant's valuation).

B. Background.

The Montage is the downtown Reno condominium development project which converted the hotel property formerly known as the Golden Phoenix and Flamingo Hilton. 1 JA, Tab 6, DCT-0177. The project was subdivided into 376 separately parceled residential units. Id., DCT-0177 to DCT- 0178. Appellant acquired the condominiums on December 30, 2008 pursuant to a Deed in Lieu of Foreclosure and has since been actively marketing and selling the unsold condominiums to individual purchasers. See 2 JA, Tab 10 (Request for Judicial Notice).

C. County Assessor's Determination of Retail Value of Individual Units.

The simplest way to describe the County Assessor's method of valuation is to do so within the statutory framework of determining taxable value under NRS 361.227. Under NRS 361.227(1), the County Assessor must appraise the full cash

value of (a) the land; and (b) the improvements made on the land. However, under NRS 361.227(5), "[t]he computed taxable value of any property must not exceed its full cash value."

The County Assessor's appraisal methodology was essentially the same for both tax years. See 1 JA, Tab 6, DCT-0177 to DCT-0182 (2009-10); 2 JA, Tab 8, DCT-0290 to DCT-297 (2010-11). In determining the total land value, the County Assessor designated the land value to be 25% of the *individual* list prices of the condominiums. See 1 JA, Tab 6, DCT-0178 ("The land values for residential parcels are developed through an allocation of 25% of the median sales price of each individual floor plan"); 2 JA, Tab 8, DCT-0292 ("Land values were allocated at 25% of median sales price"). Significantly for purposes of this appeal, the County Assessor determined under NRS 361.227(2)(b), NAC 361.129 and NAC 361.1295 that the condominiums *qualified as a subdivision,* and therefore applied a 50% discount to the land value. See 1 JA, Tab 6, DCT-0178 ("A 50% Subdivision discount was applied to all land values of all unsold units"); 2 JA, Tab 8, DCT-0292 ("Add 50% Subdivision discount").

In determining the value of the improvements, the County Assessor started with the replacement cost new of the entire building, $105 million, and calculated improvement values of individual parcels "based on the size of the parcel as a

percentage of the entire building." 1 JA, Tab 6, DCT-0178; 2 JA, Tab 8, DCT-0293. Once again, the improvement values were derived on an *individual* basis. JA, Tab 6, DCT-0181 ("Calculate *individual* condominium improvement values"); 2 JA, Tab 8, DCT-0293 (same).

Because it became clear that the calculated total of land and improvements exceeded full cash value (even with the 50% subdivision discount on land), the County Assessor applied obsolescence pursuant to the mandate under NRS 361.227(5) to ensure that the computed taxable value did not exceed full cash value. For 2009-10, after applying obsolescence, the County Assessor determined that the total taxable value equaled the individual list price of the condominium minus 10%. 1 JA, Tab 6, DCT-0181; DCT-0222 ("By applying obsolescence we have reduced the appraised taxable value to 90% of the adjusted list prices. . . . In other words, our target taxable value is list - 10%"). For 2010-11, it appears that obsolescence was applied so that total taxable value equaled the "estimated sale price," which was based on individual list prices and actual sales. 2 JA, Tab 8, DCT-0293. The County Assessor's aggregate sum of the unsold condominiums was $86,804,500 for 2009-10 and $71,120,370 for 2010-11. 1 JA, Tab 6, DCT-0179; 2 JA, Tab 8, DCT-0294.

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D. Appellant's Determination of Wholesale Value of Condominiums.

Appellant's appraiser applied a "bulk discount" of the residential units collectively as if being sold to one investor. See generally 1 JA, Tab 5, DCT-0039 to DCT-0174. The appraiser described this approach as a "Condominium Sellout Analysis," which assumes "a sell off of the remaining developer units" and "estimates the gross sales price of each unit then projects its sale over a period of time." 1 JA, Tab 5, DCT-0165. After making appropriate deductions for costs associated with selling the units, "[t]he projected proceeds are then discounted to a present value to determine the net sellout value estimate." Id. The discounting to present value is known as the "discounted cash flow" analysis. See also 1 JA, Tab 5, DCT-0149 ("In order to quantify the income potential of this property, a discounted cash flow analysis is employed").

Using the discounted cash flow model, Appellant's appraiser determined the wholesale value of the unsold condominium inventory to be $40,350,000 for 2009-10, and $24,000,000 for 2010-11. See 1 JA, Tab 5, DCT-0165,

V. SUMMARY OF ARGUMENT

NRS 361.227(2)(b) plainly states that "[t]he unit of appraisal *must be a single* parcel *unless* . . . [t]he parcel is one of a group of contiguous parcels *which qualifies for valuation as a subdivision* pursuant to the regulations of the Nevada

Tax Commission; . . ." (Emphasis added). The converse rule is that a group of contiguous parcels which qualifies for valuation as a subdivision must be appraised collectively as a single unit. In this case, it is undisputed that the Montage condominiums qualified for valuation as a subdivision. Yet, inexplicably, the County Board, SBE and District Court all approved the County Assessor's individual valuation of each unsold condominiums based on retail list price. Procedurally, the District Court erred by not reviewing the SBE's interpretation of NRS 361.227(2)(b) *de novo*.

Substantively, neither the SBE nor the District Court provided a plausible justification for the County Assessor's individual condominium appraisals in light of the plain language of NRS 361.227(2)(b). The legislative history of NRS 361.227(2)(b) reflects that it was intended for situations involving a subdivision developer who holds many unsold parcels due to economic downturn, just like in this case. NRS 361.227(2)(b) requires the subdivision owner's inventory to be appraised collectively as one unit and discounted to reflect the wholesale value of the parcels. The District Court's refusal to recognize the legal effect of NRS 361.227(2)(b) was unjust and inequitable.

The rationale for enacting NRS 361.227(2)(b) was to ensure that taxable value did not exceed full cash value in violation of NRS 361.227(5). By

appraising each condominium individually, the SBE taxed Appellant based on retail value. This is fundamentally wrong because it results in taxable value exceeding full cash value. Instead, the SBE should have taxed the unsold condominiums based on wholesale value after applying a discounted cash flow analysis in a manner consistent with NRS 361.227(2)(b) and NRS 361.227(5)(c). The District Court erred by affirming the SBE decisions which taxed Appellant based on retail, instead of wholesale value, in contravention of the legislative mandate that taxable value not exceed full cash value under NRS 361.227(5).

VI. ARGUMENT

A. Standard of Review.

This Court in Canyon Villas Apartments Corp. v. State of Nevada Tax Comm'n, 124 Nev. 833, 192 P.3d 746, 750 (2008) succinctly set forth the standard of review in challenging SBE's decisions:

> [T]his court presumes that the State Board's decision is valid. To overcome that presumption of validity, the taxpayer must demonstrate by clear and satisfactory evidence that the State Board's valuation is ***unjust and inequitable***. To satisfy this requirement, a taxpayer must demonstrate "'that the [S]tate [B]oard ***applied a fundamentally wrong principle***, ... refused to exercise its best judgment,'" or levied an excessively high assessment that necessarily implicated fraud and bad faith. As regards the State Board's ***determinations that are based on statutory construction***, this court reviews those conclusions ***de novo***. (Footnotes and citations omitted) (Emphasis added).

The District Court erred at multiple levels. Procedurally, the District Court

erred by failing to review the SBE's legal conclusions *de novo*, in particular, the statute directly on point, NRS 361.227(2)(b). Substantively, the District Court erred by refusing to recognize the unjust and inequitable impact of the SBE's decisions which appraised the unsold condominiums based on retail prices in violation of NRS 361.227(2)(b) and the mandate under NRS 361.227(5) that computed taxable value does not exceed full cash value.

B. The District Court Erred by Refusing to Review the SBE's Interpretation of NRS 361.227(2)(b) *de novo*.

The District Court found that the decisions of the SBE "should be upheld as primarily a factual decision," and that "factual findings of an agency which are supported by evidence are conclusive." 3 JA, Tab 15, DCT-584, lines 7-8, 22-23. In doing so, the District Court treated this case as one where the SBE simply accepted the county's weighted indicators of value while rejecting the taxpayer's competing calculations. See Nevada Tax Comm'n v. Southwest Gas Corp., 88 Nev. 309, 310, 497 P.2d 308 (1972) (taxpayer's burden of proof generally is not met by merely showing a difference of opinion between witnesses and the assessing authority). Contrary to such a prototypical battle between appraisers, this appeal involves the taxpayer's legal challenge to the SBE's interpretation of NRS 361.227(2)(b) in appraising the unsold condominiums based on their individual *retail* values. Appellant contends that the cited statute mandates that the unsold

condominiums be appraised collectively as one unit to determine a *wholesale* value. From this standpoint alone, the SBE's decisions were based on statutory construction which should have been reviewed by the District Court *de novo*. Cf. Canyon Villas, 192 P.3d at 750. Therefore, the District Court erred in this regard.

C. The Decisions of the SBE Affirmed by the District Court Were Unjust and Inequitable by Refusing to Appraise Appellant's Unsold Condominiums Collectively as a Single Unit under NRS 361.227(2)(b) Despite Their Undisputed Qualification as a Subdivision.

The purely legal issue on this appeal involves the SBE's interpretation and application of NRS 361.227(2)(b), which states:

> 2. The unit of appraisal ***must be a single*** parcel ***unless***:
> . . .
> (b) The parcel is one of a group of contiguous parcels ***which qualifies for valuation as a subdivision*** pursuant to the regulations of the Nevada Tax Commission; . . . (Emphasis added).

Words in a statute should be given their plain meaning unless this violates the spirit of the act. McKay v. Bd. of Supervisors, 102 Nev. 644, 648, 730 P.2d 438 (1986). The plain language of NRS 361.227(2)(b) dictates that the "unit of appraisal" must be a single parcel unless the parcel is in a group "which qualifies for valuation as a subdivision" pursuant to regulation. The converse rule is that a group of contiguous parcels "which qualifies for valuation as a subdivision" must be appraised *collectively* as a single unit of appraisal.

In this case, it is undisputed that Appellant's unsold condominiums qualify for valuation as a subdivision. See 1 JA, Tab 6, DCT-0178 (applying 50% subdivision discount to land); 2 JA, Tab 8, DCT-0292 (same). In fact, both the SBE and the District Court expressly approved the County Assessor's application of a subdivision discount. See 2009-10 SBE decision, 2 JA, Tab 6, DCT-0273 ("the Assessor had appropriately applied a subdivision discount of 50% to the land pursuant to NRS 361.227, NAC 361.129 and 361.1295"); Order, 3 JA, Tab 15, DCT-0586, lines 19-20 ("The Assessor determined that the Petitioner's property qualified as such a 'subdivision.'"). Nevertheless, the SBE and the District Court refused to follow the plain language of NRS 361.227(2)(b) and appraise the condominiums collectively as a single unit. Such legal error resulted in the unjust and inequitable result of severe overvaluation of Appellant's unsold subdivision parcels.

To the extent Respondent may assert an alternative interpretation of NRS 361.227(2)(b), such a position clearly is not supported by the legislative history. See Baliotis v. Clark County, 102 Nev. 568, 570, 729 P.2d 1338) (1986) (allowing limited resort to legislative committee hearings to clarify or interpret the purpose of the criminal records sealing statutes). In fact, the legislative history of NRS 361.227(2)(b) reveals that the language was intended to address the very type of

situation presented by this case, where a subdivision owner has a large inventory of unsold lots due to a slow economy. NRS 361.227(2)(b) has its origins from Assembly Bill 291 ("AB 291") adopted in 1987. See 1987 Nev. Stat. 2074-2076. Former SBE Chairman, Stephen Johnson, testified in favor AB 291 to codify the appraisal of unsold subdivision lots collectively and described difficult economic times similar to today:

> During his four years on the State Board of Equalization, people were constantly coming before the board appealing their taxes because they believed the counties did not recognize the value of their ownership. ***There was no problem with the holding cost of a subdivision when the economy was high because the parcels could be sold in a relatively short period of time. With the present economy, absorption rates in subdivisions are very slow.*** Lenders financed 80% of the retail sales value of a subdivision in the past. Under present condition lots that have been foreclosed by lenders can be sold for only 50% or 60% of the retail sales potential and lenders nationwide have experienced substantial financial losses. See Minutes of Assembly Comm. on Taxation (April 7, 1987) at 17 (emphasis added).[1]

Mr. Johnson noted the significance of carrying costs on unsold subdivision lots and "emphasized that a dollar today is more valuable than a dollar seven years from now." Id. at 17-18. In his own appraisal practice when appraising a subdivision, Mr. Johnson took into account carrying and other costs, and described

[1]The entire legislative history of AB 291 is available online in .pdf format at: http://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1987/AB291,1987.pdf. The Minutes are found on pages 7 through 17 of 74 of the .pdf document.

how he calculated value: "a present worth calculation is applied over the absorption rate to arrive at present value." Id. at 18. In response to further questioning on AB 291:

> Mr. Johnson emphasized the unsold lots of a subdivision were not of equal value to those lots that had been sold because of reasons previously stated regarding ongoing costs and uncertain time of sale of the lots. Id. at 19.

In essence, legislative history reflects, through Former Chairman Johnson's testimony, that the very purpose of adopting NRS 361.227(2)(b) was to mandate the collective appraisal of unsold subdivision lots and apply a discounted cash flow method to determine a wholesale value. As correctly emphasized by Mr. Johnson, "[t]he law is 'the computed taxable value of any property must not exceed its full cash value.'" Id. at 17; cf. NRS 361.227(5). In other words, the collective appraisal of the unsold inventory was necessary to prevent the unjust and inequitable result of computed taxable value exceeding full cash value.

Inexplicably, neither the SBE nor the District Court provided an understandable legal justification for the County Assessor's retail appraisal of individual unsold condominiums in light of the plain language of NRS 361.227(2)(b). The SBE's legal explanation is incomprehensible at best. In Conclusion of Law No. 4 of both decisions, the SBE paid lip service to the statute, stating:

4) The unit appraisal [sic] must be a single parcel unless the parcel is one of a group of contiguous parcels which qualifies for valuation as a subdivision pursuant to the regulations of the Nevada Tax Commission. NRS 361.227(2)(b). See 2 JA, Tab 6, DCT-0274; Tab 8, DCT-0368.

The SBE apparently attempted to overcome this rule through its confusing and obscure language in Conclusion of Law No. 5:

5) A parcel is a contiguous area of land held under common ownership, subject to separate conveyance, and identified by an assessor's parcel number. *LCB File No. R039-10, Section 22.* A parcel must be valued using a subdivision discount methodology when it qualifies pursuant to the requirements of NAC 361.129 and NAC 361.1295. The maximum available subdivision discount available is 50%. *NAC 361.1295(1)(c).* Id. (italics in original).

Such language falls woefully short of explaining why the County Assessor was allowed to appraise the condominiums individually. While on paper the County Assessor noted a 50% subdivision discount to land, the end result was a maximization of the tax by assessing the condominiums individually at full retail value. The County Assessor cannot have it both ways. Because the condominiums qualify for valuation as a subdivision under NRS 361.227(2)(b), the County Assessor was required to appraised the condominiums collectively as one unit to allow for a wholesale valuation of the subdivision parcels.

Incredibly, Conclusion of Law No. 5 cites to Section 22 of LCB File No. R039-10 despite the SBE's legal counsel acknowledging that the regulation "does

not have the force of law at this point in time." 2 JA, Tab 8, DCT-0431, lines 4-5. The plain language of Section 62 of this regulation states:

> Sections 12 to 61, inclusive, of this regulation ***do not apply to or affect the appraisal, valuation or assessment of any property*** for the purpose of imposing any taxes ad valorem ***for any fiscal year beginning before July 1, 2012.***" See 3 JA, Tab 12, DCT-0533 (emphasis added).

The SBE hearing was held on October 26, 2010. 2 JA, Tab 8, DCT-0372. By citing to a regulation which on its face cannot apply or affect any property valuation before July 1, 2012, the SBE essentially engaged in impermissible *ad hoc* rulemaking. See e.g. Las Vegas Transit v. Las Vegas Strip Trolley, 105 Nev. 575, 576, 780 P.2d 1145 (1989). Even more troubling is the fact that in State Bd. of Equalization v. Barta, 124 Nev. 58, 188 P.3d 1092, 1098 (2008), the SBE took a similar position that regulations adopted in August, 2004 validated methods used to develop values rendered earlier for the 2004-05 tax year. This Court rejected such a position based on the sound principle that "[r]egulations, like statutes, operate prospectively, unless an intent to apply them retroactively is clearly manifested." Id. at 1099. In an act of *deja vu*, the SBE once again disregarded the effective date of its own regulations in a convoluted attempt to overcome the mandate in NRS 361.227(2)(b) that unsold subdivision parcels be appraised collectively.

The arbitrariness of the SBE's legal conclusions on this statute is further highlighted by the following comment from the SBE Chairman made at the hearing:

> We've had – we've had this same argument with other different subdivisions, and properties, and apartment buildings, and condominium buildings throughout the state. ***If you want it valued as a single unit, go down to the courthouse and rerecord it as a single fee simple apartment building.*** Okay? 2 JA, Tab 8, DCT-0425 (emphasis added).

Of course, there is no legal authority requiring unsold subdivision parcels to be re-recorded as a single fee simple property as a condition to being appraised as a single unit. To the contrary, by adopting language "the parcel is one of a group of contiguous parcels" in NRS 361.227(2)(b), the Legislature clearly contemplated multiple contiguous subdivision parcels, each held in fee simple, being appraised as a single unit. Thus, neither the SBE's citation to prospective regulations nor the Chairman's *ad hoc* "re-recording" rule provides a legally justifiable reason for the SBE to ignore NRS 361.227(2)(b).

The District Court's legal interpretation of NRS 361.227(2)(b) is similarly amorphous. Initially, the crucial statute is identified in only one paragraph of the Order. See 3 JA, Tab 15, DCT-0586. After recognizing that the condominiums qualified as a subdivision, the District Court stated:

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> The Assessor determined that the ***subdivision exception to the single parcel rule applied to only the land portion*** of the Petitioner's property, thus permitting the Assessor to apply a discount of 50%, based on the land's status as part of a subdivision, and its expected absorption in the market of 10 or more years. Id. at DCT-0586 to DCT-0587 (emphasis added).

The emphasized language in this confusing sentence suggests that the "subdivision exception" to the "single parcel rule" only applies to parcels of raw land. By implication, the District Court suggested that subdivided parcels containing improvements are not required to be appraised collectively under the "subdivision exception." Once again, there is no legal authority to support such a proposition. The definition of "subdivision" in NRS 278.320 is "any land, *vacant or improved*, which is divided or proposed to be divided into five or more lots, parcels, sites, units or plots ..." (Emphasis added). The Montage was improved land, *i.e.*, a former hotel, that was subdivided into 376 separately parceled residential units. 1 JA, Tab 6, DCT-0177 to DCT-0178. To hold that the unsold Montage condominiums which qualified as a subdivision pursuant to regulation are nevertheless ineligible for the "subdivision exception" under NRS 361.227(2)(b) defies common sense and creates an artificial dichotomy between raw land and improved land subdivisions. Any such dichotomy suggested in the District Court's order would result in a grossly unjust and inequitable rule favoring raw land subdivisions over improved land subdivisions. Based on the undisputed fact that

the unsold Montage parcels qualified for valuation as a subdivision, Appellant has met its burden of proving with clear and satisfactory evidence that the SBE's retail valuation of the individual parcels was unjust and inequitable in violation of the plain language of NRS 361.227(2)(b).

D. The Decisions of the SBE Affirmed by the District Court Applied a Fundamentally Wrong Principle By Appraising Appellant's Unsold Condominiums Based on Retail Prices so as to Exceed Full Cash Value.

The District Court's Order makes no reference whatsoever to NRS 361.227(5), including the crucial first sentence which states, "[t]he computed taxable value of any property must not exceed its full cash value." This statutory check against unjust and inequitable tax assessments is the underlying reason why former SBE Chairman Johnson advocated the passage of AB 291 now codified as NRS 361.227(2)(b). See Minutes of Assembly Comm. on Taxation (April 7, 1987) at 17. The rule that computed taxable value not exceed full cash value was also the premise in Attorney General Opinion 87-8 (AGO 87-8) issued shortly before the enactment of AB 291. See generally AGO 87-8 (April 15, 1987). In AGO 87-8, the Attorney General found that the tax laws were flexible enough to allow the SBE to utilize the "subdivision analysis theory." For illustrative purposes, the Attorney General described a hypothetical scenario of a fairly large subdivision containing unsold lots each with an asking price of $25,000:

> The question then becomes whether the $25,000 selling price for the single lot already sold should be multiplied by the number of remaining lots in the subdivision to come up with ***the aggregate figure*** for the market value of the remainder of the subdivision. ***The answer to this question is "No."*** A single-lot owner, by paying $25,000 for his lot, has established his own market value; he should be prepared to pay taxes on that figure, and he derives benefit from the services he is provided by paying those taxes. However, the present value of a lot which is not to be sold for another four or five years is today worth nowhere near the future sales price of $25,000. Factors such as the absorption rate of the lots, the carrying costs and the annual cash flow of the development must be taken into consideration. ***The appraiser***, whether for fee or tax purposes, ***must distinguish between gross sell-out***, which is the ***aggregate of individual retail lot prices***, and the ***discounted or wholesale value, which is market value***. . . . Thus, ***taxing the subdivision owner today on the gross sell-out figure would be taxing him in contravention to the statute which prohibits taxable value from exceeding full cash value.*** Id. at 29 (emphasis added).

Two months after AGO 87-8 was issued on April 7, 1987, the Legislature passed and the Governor signed AB 291 expressly approving the subdivision analysis method by requiring unsold subdivision parcels to be appraised collectively as one unit. See id. at 32 (Addendum to Opinion 87-8); 1987 Nev. Stat. 2074 (approval date of June 26, 1987). Twelve years later, the 1999 Legislature codified "discounted cash flow" in NRS 361.227(5)(c) as a factor that may be used to ensure that taxable value does not exceed full cash value. 1999 Nev. Stat. 1029-1031; Minutes of the Assembly Comm. on Taxation (April 8, 1999) (explaining that discounted cash flow had been used for years, and the

legislation "was more or less a clarification as it related to discounted cash flow").[2]

In this case, the SBE taxed Appellant on the gross sell-out figures based on individual retail list prices in contravention to the rule in NRS 361.227(5) that taxable value not exceed full cash value. To tax Appellant based on retail instead of wholesale pricing was fundamentally wrong and the exact reason that the Attorney General in AGO 87-8 approved the practice of wholesale valuation of unsold subdivision lots, as now codified in NRS 361.227(2)(b). Despite Appellant informing the District Court of the compelling legislative history of the codification of the subdivision analysis method using discounted cash flow, 3 JA, Tab 14, the District Court simply ignored the mandate in NRS 361.227(5) that taxable value not exceed full cash value.

Finally, the SBE Chairman even recognized that computed taxable value of the unsold Montage condominiums greatly exceeded the full cash value. Despite the County Assessor's aggregate retail values of the individual condominiums of $86,804,500 and $71,120,370 for 2009-10 and 2010-11, respectively, the SBE Chairman conceded:

> It may or may not be sold to an individual, a single individual as an investor, given this economy. I'm sure that whoever has it right now,

[2]The Minutes can be found online at: http://www.leg.state.nv.us/Session/70th1999/Minutes/AM-TAX-990408-Upon%20Adjournment.html.

> if they could get ***44 million dollars*** for it, they might take the check and run. . . But I don't think anybody is going to write that check. 2 JA, Tab 8, DCT-0414 to 0415 (emphasis added).

Nevertheless, the SBE proceeded to affirm the County Assessor's valuations based on the aggregate of the retail prices despite the legislative fiat in NRS 361.227(5) that computed taxable value not exceed full cash value. The District Court erred by failing to recognize this fundamentally wrong principle.

IV. CONCLUSION

For the reasons set forth above, the District Court's Order should be reversed. Appellant respectfully requests this Court to remand the case to the District Court with instructions to set aside the SBE's decisions in their entirety and to further remand the matter to the SBE with additional instructions to order the County to issue tax refunds to Appellant based on the wholesale values presented by Appellant for the 2009-10 and 2010-11 tax years.

Dated this 4th of January, 2012.

MAUPIN, COX & LeGOY

By: _____

Rick R. Hsu, Esq.
Debra O. Waggoner, Esq.
Attorneys for Appellant
Montage Marketing, LLC

CERTIFICATE OF COMPLIANCE

1. I hereby certify that I have read this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is

(X) Proportionally spaced, has a typeface of 14 points or more and contains 4,963 words;

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3. Finally, I certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a

reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 4th of January, 2012.

MAUPIN, COX & LeGOY

By: _____

Rick R. Hsu, Esq.
Debra O. Waggoner, Esq.
4785 Caughlin Parkway
Reno, Nevada 89519
Telephone: (775) 827-2000
Facsimile: (775) 827-2185
Attorneys for Appellant
Montage Marketing, LLC

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that I am an employee of MAUPIN, COX & LeGOY, Attorneys at Law, and in such capacity and on the date indicated below, I deposited for mailing from a point within the State of Nevada a sealed envelope which had enclosed within a true and correct copy of the within document, which envelope had postage fully prepaid thereon, and was addressed as follows:

David C. Creekman, Esq.
Washoe County District Attorney
P.O. Box 30083
Reno, NV 89520-3083

Dated this 4th day of January, 2012.

EMPLOYEE