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Chief Justice highlights state's failures on property taxes

Cites 'confusion' over how to assess equally

John Dougherty

LAS VEGAS — Nevada Supreme Court Chief Justice James W. Hardesty is voicing serious concern over the failure of the Nevada Legislature and state regulators to develop coherent laws and regulations ensuring that property owners are taxed equally across the state.

Justice Hardesty's comments provide further evidence that Nevada's property-tax system may be violating Article 10 of the Nevada Constitution, which requires uniform and equal assessment and taxation of property.

In statements during a recent court hearing, the chief justice focused on the state's failure to pass adequate statutes and regulations for the state Board of Equalization to use. The board's mission is to ensure that Nevada's 17 elected county assessors are assessing property equally across the state.

"There seems to be quite a bit of confusion ... about what to do about equalization," Justice Hardesty said during a hearing on a case filed by Lake Tahoe property owners. The case seeks personal damages from former members of the state Board of Equalization for failing to equalize property assessments between Washoe and Douglas counties.

Justice Hardesty said the state Board of Equalization, county assessors and taxpayers all are "uncertain" about how statewide equalization is to occur.

"Nevada's statutes seem very unclear about what in the world is supposed to happen, other than, it's pretty clear you are supposed to equalize," he said. "But then,

when you proceed down the road, or the process, it doesn't seem clear to anyone what you are to do."

Statewide equalization is a process used across the country to ensure that property taxes are being assessed equally between different taxing jurisdictions. In Nevada, the county assessors set property valuations, but often use different methodologies to determine values. The state Board of Equalization is supposed to serve as a check on assessors and ensure that similarly situated properties in Clark and Washoe counties will be assessed under the same rules.

The state board, however, does not have regulations specifying how to accomplish statewide equalization. One fundamental reason for the lack of regulations, property-tax experts say, is that Nevada's property-tax system is not based on market value, making it very difficult to measure how accurately and equally county assessors are valuing property.

Nevada is the only state in the nation that uses a "taxable value" system where land is valued at cash value and improvements are valued at replacement cost less depreciation. The legislature abandoned a market-based system in 1981 in response to a statewide initiative seeking to adopt a property-tax system similar to California's Proposition 13, where property taxes are limited to 1 percent of assessed values and assessments cannot increase by more than 2 percent a year until the property undergoes a change in ownership.

Rather than developing statewide equalization regulations suited for a taxable-value system, state tax officials for decades have sidestepped the issue by using

a test called "ratio studies" to determine if statewide equalization is occurring. The ratio studies, however, are designed for market-based property-tax systems, and state officials now concede the reports provide no assurance that statewide equalization is occurring in Nevada.

Evidence uncovered during an eight-year property-owners tax revolt on the North Shore of Lake Tahoe strongly suggests that property valuations are not equalized across the state. After a long and expensive legal battle, North Shore Lake Tahoe property owners forced the state Department of Taxation to undertake a special study on property valuations of high-end homes in the Lake Tahoe basin in Washoe County and Douglas County.

The study concluded that property assessments between the two counties were not equalized. Property assessments for similarly situated properties in Douglas County were much lower than in Washoe County.

In response, the state board of equalization last summer unanimously voted to roll back property-tax assessments for the 2006 tax year to 2003 levels for 9,000 property owners in the affluent North Shore communities of Incline Village and Crystal Bay. The rollback, however, is now raising concerns that property is no longer equally assessed within Washoe County and across the state. Washoe County is appealing the decision, which, if upheld, will require the county to repay more than \$20 million in property taxes.

Justice Hardesty made his comments during a January 5 Supreme Court hearing on whether members of the state Board of Equalization have absolute immunity from a civil rights lawsuit. Lake Tahoe taxpayers are seeking damages individually from four members of the state board for failing to take action to equalize property valuations between Washoe and Douglas counties prior to last summer's decision to roll back 2006 assessments to 2003 levels.

Assistant state Attorney General Keith Marcher, representing the four state board defendants, told the court that the state Department of Taxation is "working on regulations to clarify the process" of how to conduct statewide equalization, but, as of now, "there isn't anything" in place to guide the state board on how to equalize property valuations across the state.

The current equalization statute, Marcher said, only orders the state board to equalize property, but it "doesn't tell them how to do it."

The lack of direction on how to equalize property across the state is not a new or transitory problem.

State records and interviews conducted during NPRI's ongoing property-tax investigation reveal a

systemic failure by state tax regulators — stretching back at least until 1981, when the state shifted to taxable value — to ensure that property assessments across the state are equalized.

Suellen Fulstone, a Reno attorney representing Lake Tahoe plaintiffs, told the justices the state Tax Commission, which must approve regulations for the state Board of Equalization, has long ignored its statutory and constitutional duty to ensure that similarly situated property across the state is equally valued.

The state board's duty to ensure general equalization across the state, Fulstone emphasized, is in addition to its requirement to hear appeals from individual property owners who are unsatisfied with property-tax assessments set by county assessors.

Fulstone noted that in previous rulings, the state Supreme Court has stated that the state board "has a clear and mandatory and affirmative duty of statewide equalization."

"It's that duty that was not done here," she said.

Responsibility for ensuring statewide equalization ultimately rests with the governor's office and the legislature. The governor appoints the key tax regulators, including:

- The eight-person Nevada Tax Commission, which approves all tax regulations developed by the state Department of Taxation.
- The executive director of the Nevada Department of Taxation.
- The five-member state Board of Equalization, which hears property-assessment appeals from individual property owners and is required to equalize property assessments across the state.

Governor Jim Gibbons did not respond to repeated requests for an interview to discuss the lack of statewide equalization regulations.

The absence of statewide equalization regulations is playing a central role in deliberations in the Lake Tahoe taxpayers' case, *Marvin v. State Board of Equalization*, before the Supreme Court.

The appeal concerns whether the members of the state board have absolute immunity from a civil rights lawsuit. In the underlying case, taxpayers appealed a decision of the Washoe County Board of Equalization on their assessed property values to the state Board of Equalization.

The state board took no action on taxpayers' request to equalize the property-tax valuations between Washoe and Douglas counties. The taxpayers subsequently filed a lawsuit against the state board and its members, claiming that their civil rights were violated by the board's refusal

to make any attempt to equalize valuations between the counties.

The state board and its members filed a motion to dismiss, asserting that absolute immunity bars the civil rights claims. The district court granted the motion and dismissed the civil rights claims, and the taxpayers appealed that decision to the Supreme Court.

The question before the Supreme Court is whether the state board and its members are entitled to absolute immunity from the civil rights lawsuit.

Marcher and Fulstone agreed that the state board members have absolute immunity from damage claims arising from their decisions when they act in a quasi-judicial capacity, such as holding a hearing where evidence is presented and decisions are rendered.

However, under a federal civil rights law, board members may have less protection, or only qualified immunity, if it can be shown that decisions were not rendered in a quasi-judicial capacity.

Justice Hardesty and Justice Michael Douglas suggested during the hearing that the state board's duty to perform statewide equalization is not a quasi-judicial action and therefore does not provide absolute immunity to board members.

Justice Douglas noted that if the board were to take action to equalize property across the state, it could do so without providing public notice in advance to taxpayers, which is a necessary requirement when the board is acting in a quasi-judicial capacity such as ruling on property-assessment appeals filed by individual property owners.

Justice Hardesty said the lack of laws and regulations on how to conduct statewide equalization makes it difficult to determine whether action by the state board to equalize property statewide would be considered quasi-judicial, where absolute immunity is provided, or simply administrative, which only affords the more limited protection of qualified immunity.

"In the absence of rules or understanding about the process, it's very difficult to characterize this proceeding (statewide equalization) as either administrative or quasi-judicial," Justice Hardesty stated.

If the court rules that board members are not protected from claims arising from their failure to perform statewide equalization, Assistant Attorney General Marcher warned it would be very difficult to attract citizens to serve on the board in the future.

"I think that to find the board members in this case aren't absolutely immune simply would be to invite every

property owner in Nevada who disagrees with a decision of the board, or who wants to make the argument that they failed to perform a statutory duty, to allow them to sue them individually," Marcher said. "And I think that is obviously a fairly absurd result.

"And I think it would have an obvious chilling effect on who is going to volunteer, and these are volunteer positions."

John Dougherty is the principal of InvestigativeMedia.com and has long been one of America's leading investigative reporters. He has been retained by the Nevada Policy Research Institute to report on critical issues of Nevada governance.

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