

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT MCGOWAN, WASHOE  
COUNTY ASSESSOR,  
Petitioner,

vs.

THE SECOND JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF  
WASHOE, THE HONORABLE JEROME  
M. POLAHA, DISTRICT JUDGE,

Respondents,

and

MARYANNE B. INGEMANSON;  
LESLIE P. BARTA; THEODORE G.  
HARRIS; TODD A. LOWE; ALVIN A.  
BAKST; AND VILLAGE LEAGUE TO  
SAVE INCLINE ASSETS, INC., A  
NEVADA NON-PROFIT  
CORPORATION,  
Real Parties in Interest.

No. 46113

**FILED**

FEB 03 2006

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

ORDER GRANTING IN PART AND DENYING IN PART  
PETITION FOR WRIT OF PROHIBITION

This is an original petition for a writ of prohibition seeking to arrest the proceedings in district court Case No. CV05-02241, in which real parties in interest have filed a complaint to remove petitioner from his office as Washoe County Assessor.

Petitioner asserts that none of the five counts set forth in real parties in interest's complaint have alleged that petitioner neglected to perform his official duties in the manner and form prescribed by law, or

that he engaged in acts of malfeasance or nonfeasance necessary to justify his removal from office under NRS 283.440. Petitioner contends that a writ of prohibition is the appropriate means by which to challenge the sufficiency of the complaint, because, if the case is adjudicated on its merits in the district court, it may result in his removal from office, causing him irreparable damage. He argues that, even though an appeal of any removal order that might issue would result in reversal, he has no plain, speedy, and adequate remedy in the ordinary course of law given that NRS 283.440 does not provide for a stay of the removal pending appeal.

In their complaint, real parties in interest seek petitioner's removal from office, based on the following allegations:

1. For the tax years 2000-01 through 2005-06, petitioner failed to certify under penalty of perjury, pursuant to NRS 360.250(2), that he had complied with the regulations of the Nevada Tax Commission in assessing property or furnishing other information to the Commission, and he failed to append such certification to each assessment roll and any other information furnished to the Commission;
2. For the tax year 2005-06, petitioner failed to follow rules and regulations, including those that became effective August 4, 2004, under NRS 360.280;
3. Petitioner failed to review rules of practice at least once every three years under NRS 233B.050(1)(d);
4. Petitioner failed to review regulations at least once every ten years to determine whether the Tax Commission should amend or repeal any regulations under NRS 233B.050(1)(e); and

5. By failing to use approved property statement forms, petitioner failed to fully assess personal property, resulting in a significant loss of revenue to Washoe County.

After reviewing the petition, we directed real parties in interest to file an answer against issuance of the requested writ.<sup>1</sup> We may issue a writ of prohibition to arrest the proceedings of a district court exercising its judicial functions, when such proceedings are in excess of the district court's jurisdiction.<sup>2</sup> A petition for a writ of prohibition is addressed to the sound discretion of this court.<sup>3</sup> Further, such a writ may issue only when there is no plain, speedy, and adequate remedy at law.<sup>4</sup> We have explained that prohibition may be an appropriate remedy in removal proceedings because, if the district court were to order an official removed, and the official was then forced to await appeal before testing the correctness of that ruling, the official could suffer irreparable damage "in humiliation suffered, the loss of the respect and confidence of

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<sup>1</sup>Petitioner has moved to file a reply to real parties in interest's answer but, because a reply is unnecessary to our disposition in this matter, we deny petitioner's motion.

<sup>2</sup>NRS 34.320.

<sup>3</sup>Smith v. District Court, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991).

<sup>4</sup>NRS 34.330.

constituents, . . . [and] the loss of salary and surrender of the office to another.”<sup>5</sup>

In pertinent part, NRS 283.440(1) provides that “[a]ny person now holding . . . any office in this state . . . who refuses or neglects to perform any official act in the manner and form prescribed by law, or who is guilty of any malpractice or malfeasance in office, may be removed therefrom[.]” Removal is “an extreme and extraordinary measure,”<sup>6</sup> and such proceedings are properly initiated only when a verified complaint is presented to the district court alleging that any officer

(a) [h]as been guilty of charging and collecting any illegal fees for services rendered or to be rendered in his office;

(b) [h]as refused or neglected to perform the official duties pertaining to his office as prescribed by law; or

(c) [h]as been guilty of any malpractice or malfeasance in office.<sup>7</sup>

For purposes of NRS 283.440, we have defined nonfeasance as “the substantial failure to perform a required legal duty.”<sup>8</sup> When the

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<sup>5</sup>Buckingham v. District Court, 60 Nev. 129, 134, 102 P.2d 632, 634 (1940).

<sup>6</sup>Jones v. District Court, 67 Nev. 404, 418, 219 P.2d 1055, 1062 (1950).

<sup>7</sup>NRS 283.440(2)(a)-(c).

<sup>8</sup>Schumacher v. Furlong, 78 Nev. 167, 171, 370 P.2d 209, 211 (1962).

allegedly omitted acts are not legally required of the official as part of his duties, failure to perform these acts does not amount to nonfeasance, necessary to trigger removal under NRS 283.440(2)(b).<sup>9</sup> Malfeasance, on the other hand, has been described as being synonymous with malpractice in office, and constituting an act of commission as distinguished from an act of omission.<sup>10</sup>

Here, the complaint's first allegation is that, in contradiction to NRS 360.250(2),<sup>11</sup> petitioner failed to certify under penalty of perjury that he had complied with the regulations of the Nevada tax commission in assessing property and furnishing other information. In his writ petition, petitioner argues that the certification requirement applies only to information requested by the tax commission and, since he never was asked to produce any information for the commission under NRS 360.250,

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<sup>9</sup>Buckingham, 60 Nev. at 136-38, 102 P.2d at 635-36.

<sup>10</sup>Id.; Jones, 67 Nev. at 408, 219 P.2d at 1057.

<sup>11</sup>NRS 360.250 gives the Nevada tax commission the authority to supervise and regulate property assessment and tax collection. Under this authority, the tax commission may, among other things, require county assessors to furnish information compiled in relation to assessments, licenses, or the equalization of property valuations. NRS 360.250(1)(e). In providing such information to the commission, the assessor "shall certify under penalty of perjury that in assessing property or furnishing other information required pursuant to [NRS 360.250] he has complied with the regulations of the Nevada tax commission. This certificate must be appended to each assessment roll and any other information furnished." NRS 360.250(2).

he was not required to provide such certification. Petitioner maintains that the tax assessment roll that he produces each year is not information that he is required to provide to commission under NRS 360.250. He contends that NRS 360.250 defines a relationship between the tax commission and county assessors, and any information the tax commission requests under NRS 360.250 is independent of a county tax assessor's duty to produce a tax assessment roll under NRS 361.310. Thus, petitioner asserts that the complaint is insufficient for failing to identify any specific failure to certify information that he was required to provide to the commission under NRS 360.250.

Still, because the complaint alleges that petitioner failed to perform an official act in the manner and form prescribed by law, namely NRS 360.250(2), it sufficiently states facts constituting a cause for removal under NRS 283.440(2)(b).<sup>12</sup> If, as petitioner asserts, the tax commission has never requested that petitioner furnish information as prescribed under NRS 360.250, then petitioner has a defense to the allegation of nonfeasance, but such a defense requires factual determinations suitable for the district court.<sup>13</sup> Accordingly, we decline to issue a writ of prohibition on this count of the complaint.

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<sup>12</sup>See Schumacher, 78 Nev. at 171-72, 370 P.2d at 211 (determining that the failure to perform a statutory duty constitutes nonfeasance as contemplated by NRS 283.440).

<sup>13</sup>See Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981) (stating that "an appellate court is not an appropriate  
*continued on next page . . .*

Next, the complaint alleged that, for the tax year 2005-06, petitioner failed to follow rules and regulations mandated by statute, including those requiring that all county assessors (a) adopt, and put into practice, the manuals and regulations governing property assessment, (b) properly keep assessment rolls or tax lists, (c) use and require property owners to use approved property statement forms, and (d) maintain maps accurately describing and illustrating all parcels of land as provided by statute.<sup>14</sup> In their complaint, real parties in interest assert that petitioner or his designee refused to comply with a regulation regarding property valuation methods. Petitioner asserts that this allegation “is so vague that it should not be allowed as a basis for this action considering the seriousness of the remedy requested.” He contends that, in ordinary proceedings, he would be allowed to obtain a more definite statement under NRCP 12(e), but because this is a summary removal proceeding, he will not be afforded the opportunity to answer the complaint or conduct discovery to determine precisely with what rules he allegedly failed to comply.

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*... continued*

forum in which to resolve disputed questions of fact”); see also Jones, 67 Nev. at 417-18, 219 P.2d at 1062 (noting that the trial court has the responsibility for deciding matters of proof and defense, and questions as to whether an elected official should be removed).

<sup>14</sup>See NRS 360.280.

Petitioner's assertion is unavailing, given that NRS 283.440 provides him with the opportunity to present evidence to contradict the complaint's allegations during the summary proceedings and, therefore, in essence provides him with an opportunity to answer the complaint in his defense.<sup>15</sup> Moreover, the allegation appears sufficient under Nevada's notice-pleading rule, which requires only a "short and plain statement of the claim," sufficient to give fair notice to the adverse party.<sup>16</sup> Petitioner devotes several pages of his petition defending this claim, but, as stated above, the merits of his defense are better suited for determination in the district court.<sup>17</sup> Thus, we deny the petition as to this count as well.

The third and fourth allegations both assert violations of the Nevada Administrative Procedure Act (NAPA), codified at NRS chapter 233B. Petitioner asserts that because he is not employed by an agency of the "Executive Department of the State Government," the NAPA does not apply to him. After we directed real parties in interest to address petitioner's contention that the NAPA does not apply to him, real parties in interest responded, relying on Mineral County v. State Board of

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<sup>15</sup>See NRS 283.440(2) (providing that, upon receiving a verified complaint for removal, the district court "shall proceed to hear the complaint and evidence offered by the party complained of").

<sup>16</sup>See NRCP 8(a); Nevada State Bank v. Jamison Partnership, 106 Nev. 792, 801, 801 P.2d 1377, 1383 (1990).

<sup>17</sup>See Round Hill, 97 Nev. at 604, 637 P.2d at 536.



Equalization<sup>18</sup> to argue that the NAPA has been extended to apply to Nevada taxing authorities, including county tax assessors. We disagree.

By its express terms, the NAPA applies to “all agencies of the Executive Department of the State Government[.]”<sup>19</sup> The NAPA defines “agency” as follows: “an agency, bureau, board, commission, department, division, officer or employee of the Executive Department of the State Government authorized by law to make regulations or to determine contested cases.”<sup>20</sup> Under NRS chapter 360, the Nevada tax commission has a duty to ensure that counties maintain standard tax assessment procedures.<sup>21</sup> As a commission of the executive branch of the state government, the Nevada tax commission is also subject to the provisions of the NAPA. Under the NAPA, the tax commission is required to periodically review its practice rules and its procedures.<sup>22</sup> The provisions of the NAPA are intended to supplement the provisions of NRS 360 and, thus, the tax commission’s duties under both NRS chapter 360 and NRS chapter 233B can be construed harmoniously.<sup>23</sup>

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<sup>18</sup>121 Nev. \_\_\_, 119 P.3d 706 (2005).

<sup>19</sup>NRS 233B.020.

<sup>20</sup>NRS 233B.031.

<sup>21</sup>NRS 360.215(2).

<sup>22</sup>NRS 233B.050(1)(d) and (e).

<sup>23</sup>See NRS 233B.020; Mineral County, 121 Nev. \_\_\_, 119 P.3d 706.

Real parties in interest's contention that NRS 233B.050(1)(d) and (e) imposes a duty upon petitioner, a county assessor, is erroneous because, as explained above, it is the tax commission's duty to comply with NRS 233B.050's review requirements and to ensure that counties maintain standard tax assessment procedures as set forth under NRS 360.215(2). Contrary to real parties in interest's assertion, nothing in our Mineral County opinion extends the NAPA to apply to county tax assessors.<sup>24</sup> Since the NAPA, by its express terms, does not apply to petitioner, who is employed by a county agency, the writ of prohibition will issue as to the complaint's third and fourth counts.<sup>25</sup>

The complaint's fifth count urges petitioner's removal based on his alleged failure to use the approved property statement form as required under NRS 360.280(1)(c) and NRS 361.275. As a preliminary matter, petitioner correctly points out that NRS 361.275 does not relate to an official duty pertaining to petitioner's office but, instead, merely imposes liability on him for the taxes on all taxable property that is not

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<sup>24</sup>121 Nev. \_\_\_, 119 P.3d 706.

<sup>25</sup>Real parties in interest's argument that prohibition is available to test a complaint's sufficiency only when none of the counts allege acts of nonfeasance or malfeasance necessary to support removal is contrary to the very case that they cite for this proposition. See Jones, 67 Nev. at 418, 219 P.2d at 1062 (in which this court issued a writ of prohibition as to three counts, and denied the writ as to one count, in a four-count complaint seeking removal of a district attorney). Thus, this argument is unavailing.

assessed through his willful or inexcusable neglect. This statute, therefore, is irrelevant to the removal proceedings, as it has nothing to do with whether petitioner has refused or neglected to perform his official duties and, thus, we grant the petition as to this portion of count five.

With regard to the complaint's allegation that petitioner failed to comply with NRS 360.280(1)(c)'s requirement that all county assessors "[u]se and require property owners to use property statement forms approved by the Department for reporting personal property," petitioner asserts that this allegation "is not true." He goes on to assert that he and the assessor's office use, and have used since at least 1991, "a form that is acceptable to the Department." Here again, petitioner puts forth a defense to an allegation that should be heard and decided in the district court.<sup>26</sup> Accordingly, because the complaint, as it relates to NRS 360.280(1)(c), alleges that petitioner failed to perform an official act in the manner and form prescribed by law, it sufficiently states a claim for removal under NRS 283.440(2)(b), and we therefore decline to issue a writ of prohibition with respect to this claim.

Finally, real parties in interest have filed a motion to disqualify the district attorney. Because the removal proceeding is pending in the district court and the issue of attorney disqualification requires a factual inquiry, the disqualification motion should be addressed in the first instance by the district court, with its greater fact-finding

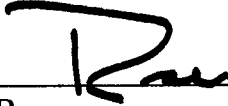
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<sup>26</sup>See Round Hill, 97 Nev. at 604, 637 P.2d at 536.

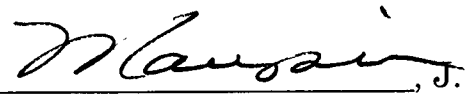
capabilities.<sup>27</sup> Accordingly, we deny without considering the motion to disqualify the district attorney.

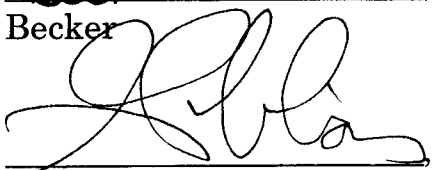
In sum, as to the first, second, and a portion of the fifth counts of the complaint, we deny the petition for writ of prohibition. As to the third, fourth, and the portion of the fifth count related to NRS 361.275, we grant the petition and direct the court clerk to issue a writ of prohibition precluding the district court from taking any further action on these parts of the removal complaint.

It is so ORDERED.

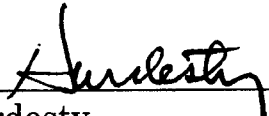
  
\_\_\_\_\_, C.J.  
Rose

  
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Becker

  
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Maupin

  
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Gibbons

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguirre

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<sup>27</sup>See *id.*; see also, e.g., *Brown v. Dist. Ct.*, 116 Nev. 1200, 1205, 14 P.3d 1266, 1269-70 (2000) (noting that district courts deciding attorney disqualification motions are faced with the delicate task of balancing competing interests and have broad discretion in determining whether disqualification is required in a particular case).

cc: Hon. Jerome Polaha, District Judge  
Washoe County District Attorney Richard A. Gammick/Civil  
Division  
Attorney General George Chanos/Carson City  
Thomas J. Hall  
Washoe District Court Clerk