ORIGINAL

**IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO**



**TANYA GIDDINGS, BERNALILLO COUNTY ASSESSOR, Petitioner-Appellant,**

**v.**

**No. 35,643**
**No. D-202-CV-2014-07148**

**SRT-MOUNTAIN VISTA LLC, Respondent-Appellee.**

**TANYA GIDDINGS, BERNALILLO COUNTY ASSESSOR, Petitioner-Appellant,**

**v.**

**No. 35,643**
**No. D-202-CV-2014-07149**

**ROBERT AND LINDA FOX, Respondents-Appellees.**

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# PETITIONER-APPELLANT'S BRIEF IN CHIEF

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**ORAL ARGUMENT IS REQUESTED**

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## SUMMARY OF PROCEEDINGS

This matter is before this Court pursuant to the district court's Order Granting Petitioner's Motion for Certification to the Court of Appeals. (SRT-RP 313).[1] This Court accepted the certification and placed the matter on the General Calendar. The Petitioner below is Tanya Giddings, Bernalillo County Assessor ("Assessor"). The Assessor initiated this matter by filing Petitions for Writ of Certiorari in the district court from the decisions of the Bernalillo County Valuation Protests Board ("Board") in two cases: No. D-202-CV-2014-07148, in which the Respondent below is SRT-Mountain Vista, LLC, and No. D-202-CV-2014-07149, in which the Respondents below are Robert and Linda Fox. The district court consolidated the two cases on the assessor's motion. (SRT-RP 128). Respondents are referred to collectively in this appeal as "Respondent Taxpayers."

The two cases involve review of the Board's decisions regarding protests of the 2014 property valuations by the assessor. Both cases concern residential rental property in Albuquerque. As residential properties, the valuations were subject to the limit on increases in value provided in NMSA 1978, § 7-36-21.2(A) unless there had been a change in ownership during the preceding tax year, in which case they would be valued at their current and correct values. The assessor found that there

[1] The Record Proper is contained in three volumes. One volume contains no volume number and is identified only as the record from the SRT Mountain Vista case. The assessor's references to this volume are shown as "SRT-RP" together with the page number. The other two volumes are from the Fox case, and are numbered 1 & 2. The assessor's references to these volumes are shown as "Fox-RP" together with volume number and page number.

had been changes in ownership and therefore valued the properties at their current and correct values without regard to the limitation. Both respondents protested the valuations and the Board conducted hearings on the protests on September 17, 2014 (SRT) and September 18, 2014 (Fox). The Board issued a Decision and Order in each case reversing the assessor's valuation and finding that the limitation on increase in value was applicable in each case. (SRT-RP 316-320; Fox-RP Vol. 2, 559-564). In the SRT case, the subject property had been transferred for purposes of refinancing during the preceding tax year from the Phillip J. Salley Revocable Trust to SRT-Mountain Vista, LLC, which was owned 100% by the trust. (SRT-RP 317, ¶ 9). In the Fox case, the subject properties were owned equally by Robert and Linda Fox through several different trusts and LLC's. They were transferred from the LLC's into the names of Robert and Linda Fox individually for purposes of refinancing and then were transferred back to the LLC's. (Fox-RP Vol. 2, 560, ¶¶ 9-11). The assessor considered these transfers to be changes of ownership, resulting in a lifting of the limitation on valuation. The Board reversed, finding that the transfers did not constitute changes of ownership because in each case the ultimate owners were the same. (SRT-RP 320, ¶ 25; Fox-RP Vol. 2, 563, ¶ 26).

The assessor appealed both decisions by filing a Petition for Writ of Certiorari in each case. (SRT-RP 003; Fox-RP Vol. 1, 003). The provisions of Rule 1-075, NMRA govern the procedures applicable to the constitutional review in the district

court of administrative decisions and orders. The rule provides that the aggrieved party may file a petition for writ of certiorari in the district court and also file copy of the petition with the agency. *Id.* Rule 1-075(B). No further proceedings are contemplated until such time as the district court acts on the petition and issues a writ of certiorari. *Id.* Rule 1-075(G). The writ must direct the agency to file the record of the proceedings in the district court, after which the petitioner is to file a Statement of Review Issues. *Id.* Rule 1-075(H) & (J). In the current case, the agency (i.e., the Board) filed the record in the district court prior to any writ being issued. As a result, the district court ordered the assessor to file her Statement of Review Issues, which she did on March 16, 2015, in both cases. (SRT-RP 111; Fox-RP Vol. 2, 574). She filed the Motion to Consolidate at the same time, and it was granted on April 2, 2015. (SRT-RP 128).

The rule provides that the respondents must file their responses to the statement of review issues within 30 days of filing of the statement. Respondent taxpayers in this case did not file responses. Instead, Respondent SRT filed a Motion to Dismiss Petition for Writ of Certiorari and to Strike Petitioner's Statement of Review Issues. (SRT-RP 130). Respondents Fox filed a Motion to Dismiss. (SRT-RP 160). Respondents simultaneously filed a Joint Expedited Motion to Stay Proceedings. (SRT-RP 157). Following the filing of responses and replies to all of the motions, the court conducted a hearing on the motions on May 28, 2015. The

transcript of that hearing is included in the record as Transcript Volume 1. The primary issue was the contention of the respondent taxpayers that the assessor had not demonstrated a right to review under Rule 1-075 and that the petition should be dismissed. The court granted the assessor leave to file an amended petition, stayed the filing of responses to the statement of review issues, and provided respondent taxpayers with an opportunity to renew the motions to dismiss upon the filing of the amended petition. (Tr. Vol. 1 at 31).

The assessor filed the amended petition on June 29, 2015. (SRT-RP 212). She also filed a Motion for Certification to the Court of Appeals on July 28, 2015. (SRT-RP 237). Respondent taxpayers filed a joint response, opposing the motion for certification. (SRT-RP 242). The court conducted a status hearing on January 26, 2016, and determined that all pending motions should be scheduled for hearing. (Tr. Vol. 2 at 12-13). At that time, seven months had passed since the assessor filed her amended petition, and respondent taxpayers had not filed amended motions to dismiss as the court had allowed at the first hearing. Respondent SRT nevertheless requested leave to file an amended motion to dismiss, which the court approved. SRT filed a Renewed Motion (as amended) to Dismiss on February 9, 2016. (SRT-RP 260). Following the filing of a response and a reply, the court conducted a hearing on all motions on April 13, 2016. (Tr. Vol. 3). The court entered an order certifying the matter to this Court. The order specifically noted that the court had not yet issued

a writ of certiorari, that it had not ruled on the merits of the petition, and that it had not ruled on the amended motion to dismiss. (SRT-RP 313-14). As will be explained in more detail below, all three hearings concerned two principle issues: 1) whether the district court had jurisdiction over the petition for writ of certiorari; and 2) whether the Board had erred in its application of the relevant statute governing the valuations at issue.

Upon accepting the certification, this Court assigned the matter to the General Calendar and directed the parties to brief the jurisdictional issues raised below as well as the merits of the petition and/or amended petition. Accordingly, the assessor will identify and address both the jurisdictional issue and the issues raised on the merits in the amended petition. The facts of the actual property transfers are not in dispute and are contained in the respective decisions of the Board. The assessor will note such facts as necessary in the respective arguments.

As regards jurisdiction, this Court directed the parties in its Calendar Notice to brief "the jurisdictional issues raised below." The district court, in turn, certified the issues raised in Respondents' Motion to Dismiss (as amended). The problem is that the jurisdictional issue has never been clearly articulated by Respondent taxpayers, and the district court never made a jurisdictional ruling. As such, it is not clear what the jurisdictional issue really is.

The assessor initiated this case as a Petition for Writ of Certiorari filed in the district court. But before the court ever issued a writ, both Respondents SRT and Fox filed motions to dismiss. The SRT motion did not challenge jurisdiction, but rather, argued that the assessor had not met the standard for obtaining certiorari review under Rule 1-075. (SRT-RP 131). That argument consisted of arguments: 1) that only the property owner may appeal a determination of the protest board (SRT-RP 131); 2) that Rule 1-075 does not create a right of constitutional certiorari review (SRT-RP 132); and 3) that under the constitutional provision, Article VI, Section 13, the assessor had not made a prima facie showing because she had not demonstrated that the Board acted illegally (SRT-RP 133).

Pursuant to the court's leave, the assessor filed an amended petition that clearly set out the constitutional basis for jurisdiction. (SRT-RP 213-14). Respondent SRT then filed its Renewed Motion (as amended) to Dismiss, simply carrying forward its arguments from the first motion. (SRT-RP 261 (only property owner may appeal); SRT-RP 262 (Rule 1-075 does not create a right of constitutional review); SRT-RP 263 (assessor has not demonstrated that Board acted illegally)). SRT then added a claim, for the first time, that the assessor was not an aggrieved party under Rule 1-075 (SRT-RP 267). While the statutory and aggrieved-party claims may imply a lack of jurisdiction, neither argument addresses the court's constitutional jurisdiction. Instead, SRT's focus, as it has been throughout this

matter, is that the assessor has failed to make a prima facie showing that she is entitled to relief and that the court could therefore exercise its discretion to deny the writ. (SRT-RP 262-65). SRT, in fact, admitted certiorari *jurisdiction*, as opposed to certiorari *discretion*, at the hearings below and in its pleadings below. (Tr., Vol. 1 at 30, lines 12-16; Vol. 3 at 17, line 14 to page 18, line 4; SRT-RP 307 (right to petition is not challenged; only that assessor did not show entitlement to relief under Rule 1-075)). SRT has thus conceded jurisdiction in the district court, and has only added, long after the fact, that jurisdiction may be lacking if the assessor is not an aggrieved party.

Respondents Fox, like SRT, filed a motion to dismiss prior to issuance of a writ, but did not amend that motion upon the assessor's filing of an amended petition. The Foxes motion stated more clearly that the "Court has no jurisdiction over this attempt to create an appeal by writ where the legislature has denied such a right. . ." (SRT-RP 160). The motion then states that this case involves an appeal of a special proceeding created by statute, with its own appeal provisions, and the district court does not have constitutional jurisdiction to hear the appeal outside of the statute. (SRT-RP 161). The argument therefore relies on the appellate provision of the statute applicable to protest hearings, and fails to address the constitutional basis for jurisdiction. Since both SRT and Fox argued initially that Rule 1-075 does not, itself, provide a basis for constitutional jurisdiction, the assessor submitted her amended

petition that very clearly establishes that jurisdiction. (SRT-RP 213-14). Respondents have not addressed that authority, and the district court has not issued a ruling on it.

The jurisdictional question that is now before this Court thus lacks clarity. It is a critical question, though, as a finding by this Court against constitutional certiorari jurisdiction could have the consequence of limiting or eliminating such review by petition for writ of certiorari in many administrative matters, far beyond the area of tax protest board decisions. For this reason, the assessor will address the constitutional issue directly, as presented in her Amended Petition for Writ of Certiorari.

## ARGUMENT AND AUTHORITIES

### I. The district court has jurisdiction over this matter pursuant to the provisions of N.M. CONST. Article VI, § 13 providing the district court with appellate jurisdiction over all cases originating in inferior courts and tribunals.

**Standard of Review.** This Court reviews the district court's application of its appellate jurisdiction de novo. *Board of Psychologist Examiners v. Land*, 2003-NMCA-034, ¶ 6, 133 N.M. 362, 62 P.3d 1244.

The district court's jurisdiction is established in Article VI, Section 13 of the New Mexico Constitution, which reads, in relevant part, as follows:

> The district court shall have original jurisdiction in all matters and causes not excepted in this constitution, and such jurisdiction of special cases and proceedings as may be conferred by law, and appellate

> jurisdiction of all cases originating in inferior courts and tribunals in their respective districts, and supervisory control over the same. The district courts, or any judge thereof, shall have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, prohibition and all other writs, remedial or otherwise in the exercise of their jurisdiction; . . .

N.M. CONST., Art. VI, § 13. The section identifies original jurisdiction, jurisdiction of special cases and proceedings, and appellate jurisdiction. Original jurisdiction is not involved in this case. What is involved are the other provisions of the section: the provision regarding special cases and proceedings as may be conferred by law, and appellate jurisdiction of all cases originating in inferior courts and tribunals. Respondents took the position below that this matter is a special case conferred by law, and never addressed the court's appellate jurisdiction. Their position is that the property tax code provides for an appeal by the property owner of a protest board's decision, but not by the assessor. *See* NMSA 1978, § 7-38-28(A)(property owner may appeal order of protest board pursuant to NMSA 1978, § 39-3-1.1). They argue that since the section does not provide for an appeal by the assessor, there is no such right available. The assessor contends that the statutory provision is separate from that of the constitution, and does not foreclose review by writ of certiorari.

It is necessary to examine the history of the constitutional provision and the relevant statutes in order to delineate the different types of jurisdiction. The New Mexico Supreme Court defined "special cases" in the case of *In re Forest*, 45 N.M. 204, 113 P.2d 582 (1941), using the implementing statutory language and stating:

"The special statutory proceedings contemplated by the statute and rule just quoted are statutory proceedings to enforce rights and remedies created by statute and which were unknown to the common law and equity practice of England prior to 1776. . ." *Id.* 113 P.2d at 583. The statute that was at issue was Chapter 197, Laws 1937, which specified that appeals from special statutory proceedings in district court could be taken to the supreme court. *Id.* 113 P.2d at 583. That section appears today as NMSA 1978, § 39-3-7, similarly providing for appeal from district court to the appellate courts.

By contrast, section 39-3-1.1, providing for appeals from administrative agencies to district court, and then from district court to the appellate courts, was adopted in 1998. That section applies specifically to "judicial review of final agency decisions that are placed under the authority of this section by specific statutory reference." *Id.* § 39-3-1.1(A). "Agency," in turn, is defined as "any state or local public body or officer placed under the authority of this section by specific statutory reference." *Id.* § 39-3-1.1(H)(1). This Court addressed both this section and the constitutional reference to "special cases and proceedings" in *VanderVossen v. City of Espanola*, 2001-NMCA-016, 130 N.M. 287, 24 P.3d 319. The issue in that case was whether the provisions of Article VI, Section 2 of the Constitution, providing for an absolute right of appeal to an aggrieved party, applied to an appeal from a city zoning decision. This Court examined the provisions of that section and of Article

VI, Section 13, and determined that the absolute right of appeal referred to cases within the district court's original jurisdiction, and did not apply to special proceedings. *Id.* ¶ 14. Citing to *In re Forest*, the Court went on to find that zoning determinations are special proceedings that are not subject to the guaranteed appellate provisions of Article VI, Section 2. *Id.* ¶ 15.

The *VanderVossen* opinion did not, however, clearly resolve the matter. In finding that an appeal of a zoning decision should be pursuant to section 39-3-1.1, the Court referred to the district court's appellate jurisdiction, not to its special-statutory-proceedings jurisdiction, stating: "Therefore, in enacting section 39-3-1.1 the legislature properly directed an appeal from city council action to the district court, *sitting in the exercise of its appellate jurisdiction pursuant to Article VI*, Section 13." *Id.* § 16 (emphasis added). This was a different reference from that in the preceding paragraph in which the court noted the distinction in Article VI, Section 13 between "original jurisdiction" and "jurisdiction of special cases and proceedings," and in which it did not mention the district court's appellate jurisdiction. *Id.* § 14. The opinion is thus not clear in its distinction between the district court's jurisdiction in special cases and proceedings and its appellate jurisdiction. That distinction was, however, clarified in *Moriarty Municipal Schools v. Public Schools Insurance Authority*, 2001-NMCA-096, 131 N.M. 180, 34 P.3d 124.

The issue in *Moriarty* was whether the separation of powers doctrine would prevent an original action in district court that might have been subject to the agency's jurisdiction in the first instance and thereafter subject only to the district court's appellate jurisdiction. *Id.* ¶¶ 31-32. To address the issue, the court undertook a review of Article VI, Section 13 in its entirety. After quoting the constitutional provision, the court distinguished original jurisdiction and special jurisdiction:

> "Original jurisdiction" here means general jurisdiction, which means "those matters known 'to the common law and equity practice of England prior to 1776.' As to those matters, as well as matters in which jurisdiction is conferred by statute, district courts may take evidence, adjudicate facts, apply law, and decide the merits of a dispute in favor of one party or another.

*Id.* ¶ 29. The court thus identifies both original jurisdiction and statutory jurisdiction. The opinion then specifically recognizes the third type of jurisdiction, finding that the constitutional provision grants "appellate jurisdiction of all cases originating in inferior courts and tribunals, and also grants jurisdiction to issue various writs, including writs of certiorari." *Id.* ¶30. Noting that section 39-3-1.1 was not applicable under the statute at issue (i.e., the Public School Insurance Authority Act), the court specifically endorsed a right of review by certiorari, stating:

> Independent of statute, the right to seek a constitutional writ of certiorari in the district court 'will lie when it is shown that the inferior court or tribunal has exceeded its jurisdiction or has proceeded illegally,' *Regents of Univ. of N.M. v. Hughes*, 114 N.M. 304, 309, 838 P.2d 458, 463 (1992), and generally not when there exists a right to appeal.

*Id.* ¶ 34 (citing *Roberson v. Board of Education*, 78 N.M. 297, 300, 430 P.2d 868, 871 (1967)).

This Court thus addressed and clarified the jurisdictional distinctions that were not clearly addressed in *VanderVossen*. The *Moriarty* opinion unmistakably recognizes the district court's appellate jurisdiction as distinct from its jurisdiction over statutory special cases and proceedings. It also recognizes that the appellate jurisdiction includes both the statutory appellate provisions of section 39-3-1.1 and the independent right of constitutional review by writ of certiorari, the latter specifically applying when there is no statutory right of review. This is precisely the type of review that is specified in Rule 1-075, which governs "writs of certiorari to administrative officers and agencies pursuant to the New Mexico Constitution when there is no statutory right to an appeal or other statutory right of review." Rule 1-075(A), NMRA. The appellate jurisdiction thus includes both the jurisdiction pursuant to section 39-3-1.1 and the jurisdiction pursuant to review by certiorari. The constitutional provision for jurisdiction of "special cases and proceedings as may be conferred by law" is entirely separate.

In the present case, the review of the Board's action is within the district court's appellate jurisdiction. The code section that provides for the taxpayer's appeal from the Board's decision specifically invokes the provisions of section 39-3-1.1, thereby squarely placing the appeal within the court's appellate jurisdiction.

NMSA 1978, §7-38-28(A)(property owner may appeal pursuant to provisions of section 39-3-1.1). The provision is silent as to the assessor's right of appeal, thereby squarely bringing the matter within *Moriarty's* holding that the constitution provides the right to seek a review by writ of certiorari. This holding is black letter law that has been applied in an unbroken line of cases. *See Zamora v. Village of Ruidoso Downs*, ¶ 18, 120 N.M. 778, 907 P.2d 182 (certiorari is appropriate process to review quasi-judicial proceedings of administrative bodies); *Rainaldi v. Public Employees Retirement Board*, 115 N.M. 650, 654, 857 P.2d 761, 765 (1993)(certiorari lies when it is shown that inferior tribunal has exceeded its jurisdiction or proceeded illegally, and no appeal or other mode of review is allowed or provided); *State ex rel. Board of Commissioners v. Kiker*, 33 N.M. 6, 7, 261 P. 816, 816 (1927)(district court's authority to issue writs of certiorari "in exercise of their jurisdiction of whatever kind or nature"); *Roberson v. Board of Education*, 78 N.M. 297, 299-300, 430 P.2d 868, 870-871 (1967)(review by certiorari when no other right to appeal); *Concerned Residents for Neighborhood Inc. v. Shollenbarger,* 113 N.M. 667, 669, 831 P.2d 603, 605 (Ct. App. 1991)(review by writ of certiorari when no appeal allowed or other mode provided for reviewing proceedings); *Rio Grande Kennel Club v. City of Albuquerque*, 2008-NMCA-093, ¶ 27, 144 N.M. 636, 190 P.3d 1191 (same); *Littlefield v. State ex rel. Taxation and Revenue Dept.*, 1992-NMCA-083, ¶ 11, 114 N.M. 390, 839 P.2d 134 (same); *Masterman v. State Taxation and Revenue Dept.*,

1998-NMCA-126, ¶ 10, 125 N.M. 705, 964 P.2d 869 (same); *State ex rel. Sisney v. Board of Commissioners*, 27 N.M. 228, 199 P. 359, 360-61 (1921)(review by certiorari where statute provides for limited appeal).

The authorities cited by Respondent taxpayers in their motions below are not in conflict. Each case involves the district court's original or special statutory jurisdiction, and none involves or discusses the court's separate jurisdiction for appellate review by writ of certiorari. *See Addis v. Santa Fe County Valuation Protests Board*, 1977-NMCA-122, ¶ 6, 91 N.M. 165, 571 P.2d 822 (statutory appeal by property owner); *State v. Rosenwald*, 23 N.M. 5, 7-8, 170 P. 42, 43-44 (1918)(dealing with statutory and constitutional right of appeal from district court to supreme court; certiorari not discussed); *City of Tucumcari v. Magnolia Petroleum Co.*, 57 N.M. 392, 259 P.2d 351, 353 (1953)(statutory appeal of change of venue; writ of certiorari available in absence of statutory appeal).

Respondents' contention that no review by writ of certiorari is possible because there is no statutory right of appeal is thus exactly contrary to firmly-established law. They also claim that review is precluded because the property tax code directs the assessor to comply with the district court's decision, but the claim is misguided. First, the statue is dealing with the result of the district court's review, not the Board's review. Second, the case law not only does not prohibit review by certiorari when a statue provides for finality of a board decision, it expressly

authorizes it. *See Roberson v. Board of Education*, 78 N.M. 297, 299-300, 430 P.2d 868, 870-71 (1967)(statute provided for finality of decision of Board of Education and no means of appeal; court allowed review by certiorari).

The only qualification on the right of review by writ of certiorari is that the petitioner demonstrate that the agency exceeded its jurisdiction or proceeded illegally. *Moriarty Municipal Schools v. Public Schools Insurance Authority*, 2001-NMCA-096, ¶ 34, 131 N.M. 180, 34 P.3d 124. Respondent taxpayers have spent most of their time below arguing that the assessor has not shown that the board acted illegally. The argument is without merit. The assessor's primary allegation in this case is that the board's decision is in direct contravention of the statute that requires the assessor to value property at its current and correct value. (SRT-RP 217-21). In terms of the administrative standard of review, the allegation is that the decision is not in accordance with law. *See* Rule 1-075(R)(4), NMRA (court determines whether agency's action was not in accordance with law). Respondent taxpayers simply split hairs when they argue that "not in accordance with law" is not a showing of "illegality." The cases clearly hold that an agency's decision that is not in accordance with law is an illegal decision. *See Regents of the University of New Mexico v. Hughes*, 1992-NMSC-049, ¶ 19, 114 N.M. 304, 838 P.2d 458 (administrative standard of review is synonymous with "illegal" for purposes of review by certiorari); *High Ridge Hinkel Joint Venture v. City of Albuquerque*, 1994-

NMCA-139, 119 N.M. 29, 38, 888 P.2d 475 (city's incorrect interpretation of zoning code is illegal act for which writ should issue).

The error in the board's interpretation of the applicable statute is the subject of the argument on the merits, which will be considered below under Point III. For present purposes, it is simply an element of demonstrating an illegal decision for which review by writ of certiorari will lie. Significantly, the discussion will never be engaged if Respondents' claim of a lack of jurisdiction is adopted. This case involves a clear and unambiguous statute that directs the assessor in her valuation of residential property. The board interpreted that statute contrary to the assessor's application of it. By Respondents' reasoning, the board's interpretation is not subject to any judicial review, regardless of whether the interpretation is correct or not. The board thus becomes the final authority on legislative intent, immune from all review. The contention flies in the face of the long-standing principle that statutory interpretation is a legal matter that the courts review de novo. This is a remarkable contention that would have a wide-ranging impact, potentially precluding review of statutory interpretation in agency actions across the spectrum. Such preclusion has never been applied, and the assessor urges the Court not to do so now.

## II. The assessor is an aggrieved party for purposes of Rule 1-075, NMRA.

**Standard of Review.** This Court reviews the district court's application of its appellate jurisdiction de novo. *Board of Psychologist Examiners v. Land*, 2003-NMCA-034, ¶ 6, 133 N.M. 362, 62 P.3d 1244.

Rule 1-075 provides that an aggrieved party may seek review of an agency decision by filing a petition for writ of certiorari in the district court. Rule 1-075(B), NMRA. Respondents amended their motion to dismiss to assert that the assessor is not an aggrieved party. It is not clear from the argument whether this contention is part of their jurisdictional argument or is an allegation regarding standing. Respondents provide no authority for the contention other than a reference to Article VI, Section 2 of the state constitution, and two cases dealing with a party's standing in terms of personal interests. Neither of these sources is applicable in this case, and the law is to the contrary.

The assessor's authority for valuations is established by statute. The property tax code unequivocally states that "the county assessor is responsible and has the authority for the valuation of all property subject to valuation for property taxation purposes in the county . . ." NMSA 1978, § 7-36-2(A). *See Atchison, T. & S.F. Ry. Co. v. Elephant Butte Irrigation Dist.*, 110 F.2d 767, 773 & n. 7 (10th Cir. 1940)(assessment can only be made by official or board designated by law to make it). More particularly, the assessor is required to maintain current and correct values

of property and "shall have at *sole responsibility and authority at the county level for property valuation maintenance*, subject only to the general supervisory powers of the director." NMSA 1978, § 7-36-16(A)(emphasis added); *cf. Chino Mines Co. v. Del Curto*, 114 N.M. 521, 525, 842 P.2d 738 (Ct. App. 1992)(property tax division responsible for mineral valuations; county treasurer's standing to intervene depends on showing that division failed to provide adequate representation).

It is thus clear that the assessor has sole responsibility for valuations. The Board has the authority to hear protests. NMSA 1978, § 7-38-21(A)(1). That authority specifically includes protests of valuations. *Id.* § 7-38-22(A). The limit on increases in value is an element of valuation. *Id.* § 7-36-21.2(A). That valuation duty is specifically assigned to the assessor. *Id.* § 7-36-16(A). Upon appeal, the assessor is the proper party. *Addis v. Santa Fe County Valuation Protests Board*, 1997-NMCA-122, ¶ 5, 91 N.M. 165, 167, 571 P.2d 822 (appeal by property owner; adversaries are property owner and assessor).

Respondent taxpayers' contended in their renewed motion to dismiss that an aggrieved party must have a personal interest that is adversely affected. The cases cited by Respondents, however, concern Article VI, Section 2 of the Constitution, providing that an aggrieved person has an absolute right to one appeal from district court to an appellate court, and the parties in those cases were individuals with personal interests. *See State v. Castillo*, 94 N.M. 352, 354, 610 P.2d 756, 758 (Ct.

App. 1980)(probation revocation); *Pernell v. State*, 92 N.M. 490, 492, 590 P.2d 638, 640 (Ct. App. 1979)(involuntary commitment). Neither case purports to limit the matter to personal interests. Moreover, this Court clearly held in *VanderVossen* that Article VI, Section 2 is concerned with the right to appeal from the district court acting in its original jurisdiction, while Article VI, Section 13 controls the district court's appellate jurisdiction. *Vandervossen v. City of Espanola*, 2001-NMCA-016, ¶11, 130 N.M. 287, 24 P.3d 319.

Contrary to respondent taxpayers' claims, an administrative agency clearly has standing as a "person aggrieved." *Town of Mesilla v. City of Las Cruces*, 120 N.M. 69, 72, 898 P.2d 121, 124 (Ct. App. 1995)(municipality alleging economic injury due to zoning decision of adjoining municipality is "person aggrieved" under zoning code). Moreover, the assessor's interest in valuation is a comprehensive interest. As noted above, the assessor is specifically charged with the *duty* to maintain *current and correct values*. She clearly has an interest in any board decision that impacts that duty. In *Georgia O'Keefe Museum v. County of Santa Fe*, 2003-NMCA-003, ¶133 N.M. 297, 62 P.3d 754, this court noted that all property should bear its share of the cost of government and that tax exemptions have a direct effect on the size of the tax base. *Id.* ¶ 39, *citing NRA Special Contribution Fund v. Board of County Comm'rs.*, 92 N.M. 541, 591 P.2d 672 (Ct. Ap. 1978); *see* N.M. CONST.

Art. VIII, § 1(A)(taxes shall be equal and uniform on subjects of taxation of the same class).

There can be no doubt that the assessor is the proper party for purposes of valuation, that she is required by both constitutional and statutory law to maintain uniform, current and correct values, and that she must do so according to the requirements of and limitations on valuation increases provided in section 7-36-21.2. She is clearly an aggrieved party under Rule 1-075 for purposes of reviewing the Board's decision that reversed her valuations.

## III. The Board's decision is not in accordance with law.

**Standard of Review.** This Court interprets provisions of the Property Tax Code de novo. *Georgia O'Keefe Museum v. County of Santa Fe*, 2003-NMCA-003, ¶ 68, 133 N.M. 297, 62 P.3d 754; *Board of Psychologist Examiners v. Land*, 2003-NMCA-034, ¶ 6, 133 N.M. 362, 62 P.3d 1244 (question of law reviewed de novo).

The district court reviews an agency's action to determine whether the decision is arbitrary, capricious or an abuse of discretion, whether the decision is supported by substantial evidence, whether the action was outside the scope of authority of the agency, or whether the action was otherwise not in accordance with law. Rule 1-075(R), NMRA. The entire issue in this case is whether the Board's determination that there was no transfer of ownership was in accordance with law. Respondent taxpayers characterize that issue as "a mere disagreement," stating that

the Board has the authority to interpret the applicable statue. (SRT-RP 263). But it is not the Board's authority that is in question; it is the Board's application of the law.

Statutory construction is a legal matter for the courts. *Madrid v. University of California*, ¶ 15, 105 N.M. 715, 718, 737 P.2d 74 (1987) (fundamental that interpretation of law is judicial matter). The courts have a duty to construe the state's statutes, even if an administrative tribunal also may make such a determination. *Pan American Petroleum Corp. v. El Paso Natural Gas Co.*, 77 N.M. 481, 487, 424 P.2d 397, 401 (1966). The court conducts a *de novo* review of legal issues. *TPL, Inc. v. New Mexico Dept. of Taxation and Revenue*, 2003-NMSC-007, ¶ 10, 133 N.M. 447, 64 P.3d 474. Respondent taxpayers' contention that an administrative interpretation of a statute is beyond judicial review is unsupportable and contravenes the most basic principles of judicial review.

This case involves the duty of the assessor to value property. The property tax code requires the assessor to update property values so that current and correct values of property are maintained. NMSA 1978, § 7-36-16. The code provides that residential property shall be valued at its current and correct value, subject to any statutory limitations on increase in value. *Id.* § 7-36-21.2(A). The applicable limitation provides that the value of residential property in any tax year shall not exceed 103% of the value from the prior year, i.e., any increase in value is limited

to 3%. *Id.* § 7-36-21.2(A). However, the statute also provides that the limitation does not apply to property in which a change of ownership occurred in the immediately preceding year. *Id.* § 7-36-21.2(B). "Change of ownership" is defined as "a transfer to a transferee by a transferor of all or any part of the transferor's legal or equitable ownership interest in the property." I*d.* § 7-36-21.2(E). This is the section that is at issue in this case.

The transfer in the SRT case was from a revocable trust to an LLC in which the trust was the sole member. The transfers in the Fox case were from various LLC's to the individuals and then back to the LLC's. In both cases, the Board found that the transfers did not constitute a "change in ownership," and that the 3% limitation on increase in value was therefore applicable. (SRT-RP 320; Fox RP Vol. 2, 563-64). The Board based its reasoning in both cases on its determination that, in each case, the property had the same ultimate owners owning the property. (SRT-RP 319-20; Fox RP Vol. 2, 562-63). As will be explained below, this determination was not in accordance with the provisions of section 7-36-21.2(E).

The change-of-ownership provision of the statute explicitly defines the term, and then specifies certain specific exceptions. The provision reads in its entirety as follows:

> As used in this section, "change of ownership" means a transfer to a transferee by a transferor of all or any part of the transferor's legal or equitable ownership interest in residential property except for a transfer:

(1) To a trustee for the beneficial use of the spouse of the transferor or the surviving spouse of a deceased transferor;

(2) To the spouse of the transferor that takes effect upon the death of the transferor;

(3) That creates, transfers or terminates, solely between spouses, any co-owner's interest;

(4) To a child of the transferor, who occupies the property as that person's principal residence at the time of transfer; provided that the first subsequent tax year in which that person does not qualify for the head of household exemption on that property, a change of ownership shall be deemed to have occurred;

(5) That confirms or corrects a previous transfer made by a document that was recorded in the real estate records of the county in which the real property is located;

(6) For the purpose of quieting the title to real property or resolving a disputed location of a real property boundary;

(7) To a revocable trust by the transferor with the transferor, the transferor's spouse or a child of the transferor as beneficiary; or

(8) From a revocable trust described in Paragraph (7) of this subsection back to the settlor or trustor or to the beneficiaries of the trust.

*Id.* § 7-36-21.2(E)(1)-(8).

The section thus unequivocally defines a change of ownership as a transfer of all or any part of the transferor's legal or equitable interest in the property, and then identifies eight specific exceptions. None of the exceptions identifies a transfer to or from an LLC or any other type of corporate entity. An LLC is a separate legal entity

from its owners. *See* NMSA 1978, § 53-19-10(A); *Stinson v. Berry*, 1997-NMCA-076, ¶ 17, 123 N.M. 482, 943 P.2d 129 (corporation is legal entity separate from its shareholders, directors and officers); *Marchman v. NCNB Texas Nat. Bank*, 1995-NMCA-041, ¶ 16, 120 N.M. 74, 898 P.2d 709 (corporation and shareholder, even sole shareholder, are separate entities) The Board specifically and correctly found such distinct and separate entities. (SRT-RP 318, ¶¶ 14-18; Fox-RP Vol. 2, 561-62, ¶¶ 15-19). The Board also specifically found that the warranty deeds clearly and indisputably transferred fee ownership in each case. (SRT-RP 317, ¶ 13; Fox-RP Vol. 2, 561, ¶ 14). The decisions made no reference whatever to the eight listed exceptions.

Based on the Board's explicit findings of clear and indisputable transfers of fee ownership, the Board should then have applied the provision of section 7-36-21.2(B) that requires that the property be valued at its current and correct value without imposition of the 3% limit. Instead, the Board proceeded to inquire into legislative intent, stating: "The question is whether the transfers from one of these separate and distinct legal entities to another separate and distinct legal entity is the kind of change of ownership the Legislative (sic) intended as the exemption in § 7-36-21.2 . . ." (SRT-RP 318, ¶ 19; Fox-RP Vol. 2, 562, ¶ 20). The Board then determined that since the ultimate owners were the same, no change in ownership had occurred. This determination was error.

The district court is not bound by an agency's interpretation of a statute, and should reverse if the agency's interpretation is unreasonable or unlawful. *Morningstar Water Users Association v. New Mexico Public Utility Commission,* ¶ 11, 120 N.M. 579, 583, 904 P.2d 28, 32 (1995). The text of a statute is the primary, essential source of its meaning. NMSA 1978, § 12-2A-19. A clear and unambiguous statute is to be given effect according to its plain meaning without further statutory interpretation. *United Rentals Northwest, Inc. v. Yearout Mechanical, Inc.*, ¶ 9, 148 N.M. 426, 237 P.3d 728 (2010); *Storey v. University of New Mexico Hospital/BCMC*, ¶ 7, 105 N.M. 205, 207, 730 P.2d 1187, 1189 (1986). The plain language of the statute is the primary indicator of legislative intent. *Whitely v. New Mexico State Personnel Board*, ¶ 5, 115 N.M. 308, 311, 850 P.2d 1011, 1014 (1993); *In re Termination of Kibbe*, 2000-NMCA-006, ¶ 14, 128 N.M. 629, 996 P.2d 419.

The plain language of the statute in this case provides for a current and correct valuation of property upon transfer of all or any part of the transferor's legal or equitable interest in the property. NMSA 1978, § 7-36-21.2(B). The statute limits the exceptions to certain specified owners. Id. § 7-36-21.2(E). The statute does not provide for an examination into the ultimate ownership, instead limiting exempt transfers to those specifically identified. The Board cannot read into a statute language that is not there. *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998-NMSC-050, ¶ 5, 126 N.M. 413, 970 P.2d 599. By finding that in each case the

property had the same ultimate owner owning the property, the Board read language into the statute that is not there, in direct contravention of the plain language of the statute. Furthermore, it created a new exception to the limitation on valuation increases which is not authorized by statute.

An administrative agency's decision that is not in accordance with law is illegal and subject to reversal. *Archuleta v. Santa Fe Police Department*, 2005-NMCA-006, ¶ 18, 137 N.M. 161, 108 P.3d 1019; *Concerned Residents for Neighborhood, Inc. v. Shollenbarger*, 1991-NMCA-105, ¶ 15, 113 N.M. 667, 831 P.2d 603, *disapproved on other grounds, Regents of Univ. of N.M. v. Hughes*, 1992-NMSC-049, ¶ 15, 114 N.M. 304, 838 P.2d 458. The decisions of the Board in these cases are contrary to the provisions of the statute and therefore should be reversed. The failure of the Board to apply the plain language of the statute constitutes a prima facie showing that the Board acted illegally and that the assessor is entitled to relief. The writs of certiorari, accordingly, should be issued. NMRA 1-075(G)(2)(court shall issue writ upon prima facie showing that petitioner is entitled to relief).

## IV. The Board's decision is arbitrary and capricious.

**Standard of review.** This Court does not review an agency decision for abuse of discretion, as that is a matter for the district court in its appellate capacity. *Board of Psychologist Examiners v. Land*, 2003-NMCA-034, ¶ 4, 133 N.M. 362, 62 P.3d 1244. However, this Court is not reviewing the district court's determination in this

matter since there has been no determination. To the extent that this Court is answering the certification question on the merits, the review presumably would be that which is required of the district court: a review of the record to determine whether the decision is arbitrary and capricious. *Zamora v. Village of Ruidoso Downs*, ¶ 17, 120 N.M. 778, 907 P.2d 182.

An agency is not free to arbitrarily disregard its own rules and prior decisions. *Bass Enterprises Production Co. v. Mosaic Potash Carlsbad, Inc.*, 2010-NMCA-065, ¶ 20, 148 N.M. 516, 238 P.3d 885; *see In re Termination of Kibbes*, 2000-NMSC-006, ¶ 17-19, 128 N.M. 629, 996 P.2d 419 (disparate treatment by Board of similarly situated persons without explanation is arbitrary and capricious); *Sais v. New Mexico Department of Corrections*, 2012-NMSC-009, ¶¶ 17-18, 275 P.3d 104 (same).

The Board has previously issued decisions in two protests that are identical to the two current protests and that conflict with the decisions in the current protests. In an identical situation to the SRT-Mountain Vista protest, the Board found that a transfer from a revocable trust to an LLC, where the trust is the sole owner of the LLC, does not come within a statutory exception. The Board considered the plain language of the statute and determined that: "A transfer from a revocable trust to its settlor, trustor or beneficiary is not considered a change of ownership under the statute, however the LLC is not such a person or entity." (SRT-RP 233, ¶ 20,

*Decision and Order in the Matter of the Protest of Menaulwood Apartment LLC, dated August 6, 2014*). Moreover, the Board specifically found that none of the enumerated exceptions applied. (*Id.* ¶ 20). In an identical situation to the Fox protest, the Board found that a transfer from an LLC to an individual constitutes a change of ownership under the statute and that it does not come within a statutory exception. (SRT-RP 235, ¶¶ 20-22, *Decision and Order in the Matter of the Protest of Desert Vista Properties LLC, dated August 6, 2014*). Again, the Board found that none of the enumerated exceptions applied. (*Id.* ¶ 22). In each of the current protests, the Board first determined that a transfer had taken place, and then considered whether the legislature intended for those transfers to be included in the exceptions when ultimate ownership remained the same. In SRT-Mountain Vista, the Board found the issue to be "whether the transfers from one of these separate and distinct legal entities to another separate and distinct legal entity is the kind of change of ownership the Legislative [sic] intended as the exemption in § 7-36-21.2 when the LLC is owned 100% by the Phillip J Salley Revocable Trust." (SRT-RP 318, ¶ 19). The Board posed the same issue in the Fox protest, questioning the legislative intent "when all entities are owned in the same proportion by the same two people, Robert and Linda Fox." (Fox-RP, Vol. 2, 562, ¶ 20). Without mentioning the enumerated exceptions, contrary to its findings in *Menaulwood* and *Desert Vista,* the Board only stated that there is no New Mexico case law on the issue. (SRT-RP, 319, ¶ 21; Fox-

RP, Vol. 2, 562, ¶ 22). The Board's posing of the issue is contrary to the plain language of the statute, as discussed above, and is in complete conflict with both the *Menaulwood* and *Desert Vista* orders.

In reversing itself from its prior position, the Board stated: "A literal interpretation would trigger the loss of the valuation cap anytime an owner mortgages a property, grants an easement over a property, has a judgment or lien filed against a property. It is unreasonable to conclude that the Legislature intended those transfers of equitable interest to void the cap." (SRT-RP 318-19, ¶ 20; Fox-RP Vol. 2, 562, ¶ 21). These situations were not before the Board and were purely speculative. There was thus no basis for the Board's determination of unreasonableness and its deviation from the unambiguous language of the statute. *See Marbob Energy Corp. v. New Mexico Oil Conservation Commission*, 2009-NMSC-013, ¶ 9, 146 N.M. 24, 206 P.3d 135 (court gives effect to clear and unambiguous statute and refrains from further interpretation).

The Board nevertheless cited two authorities for its interpretation: California BOE Rule 462.180, and *Askins Properties, LLC v. Oklahoma County Assessor,* 161 P.3d 303 (Okla. 2007). The California rule is distinguishable because it specifically states that "[t]he following transfers do not constitute a change of ownership of the real property: . . . Transfers of real property between separate legal entities or by an individual to a legal entity (or vice versa) which results solely in a change in the

method of holding title and in which the proportional ownership interest in each and every piece of real property transferred remains the same after transfer." (SRT-RP 319, ¶ 23; Fox-RP Vol. 2, 563, ¶ 24). The New Mexico statute has no such language, and the Board unlawfully read this language into the statute. *See High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998-NMSC-050, ¶ 5, 126 N.M. 413, 970 P.2d 599.

Similarly, the Oklahoma case is distinguishable due to differences in the applicable provisions. The constitutional provision at issue in that case provided for full valuation of property that had been "transferred, changed or conveyed to another person." *Askins*, 161 P.3d 303 at ¶ 9. The provision made no distinction between legal and equitable ownership. The related legislation defined "transfers, change or conveyance of title," and explicitly excluded from the definition "deeds pursuant to which property is transferred from a person to a partnership, limited liability company or corporation of which the transferor . . . [is] the only owner of the partnership, limited liability company or corporation." *Id.* The court found that when only legal title is conveyed, with equitable ownership remaining in the same persons before and after the transfer, the constitution allowed for a rate limitation to be specified by the statute. *Id.* ¶ 13.

The New Mexico statute that eliminates the valuation limitation upon transfer, by contrast, specifically identifies transfer of "all or any part of the transferor's legal

or equitable ownership interest." NMSA 1978, § 7-36-21.2(E). This statutory language specifically identifies a limitation that the Oklahoma constitutional provision did not. The Board erred in adopting the Oklahoma interpretation in the face of a specific New Mexico statutory directive to the contrary. *See United Rentals Northwest, Inc. v. Yearout Mechanical, Inc.*, ¶ 9, 148 N.M. 426, 237 P.3d 728 (2010) (statute to be given effect according to its plain meaning); *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998-NMSC-050, ¶ 5, 126 N.M. 413, 970 P.2d 599 (Board may not read language into statute); *Reule Sun Corp. v. Valles*, 2010-NMSC-004, ¶ 15, 147 N.M. 512, 226 P.3d 611(court does not read language into statute, especially when it makes sense as written). The Board thus unlawfully interpreted the statutory provision and thereby arbitrarily and capriciously changed its position from its previous, correct positions in the *Menaulwood* and *Desert Vista* protests. The Board's interpretation in this case is in direct conflict with the plain language of the statute, and directly conflicts with its prior applications of the statute. Accordingly, the decision is arbitrary and capricious, and subject to review by writ of certiorari.

The assessor should also note here that both Respondent taxpayers have argued below that the Board's decision was not in error, but rather that it simply changed its opinion based on legal arguments made by the taxpayers' attorneys in this case, and that the decisions are therefore not arbitrary or capricious. (SRT-RP

195, 267). The argument misses the point. It is not a question of whether the Board can modify its previous position; it is a question of whether the Board is acting in accordance with law. Respondent SRT then contends that the Board's new position "constitutes the last word on the subject until an appellate court considering a proper appeal announces a different interpretation or the Legislature modifies the statute." (SRT-RP 264). SRT maintains, of course, that this is not a proper appeal. The Board's decision, however, has not been the last word on the subject. SRT notes that the Board affirmed its decision in the course of SRT's 2015 protest without the need to revisit the issue. (SRT-RP 264, n. 1). That protest, however, has been appealed by the assessor and is currently pending in a different division of the district court, but has been stayed pending determination in the current case. (*Giddings v. SRT-Mountain Vista, LLC*, D-202-CV-2016-00339, Order entered August 24, 2016). Moreover, the assessor has appealed other 2015 decisions of the Board in which it made the same determinations with respect to transfers to or from an LLC. Three different divisions of the Second Judicial District Court have issued writs of certiorari and have entered orders reversing the Board's determination. None of those decisions have been appealed to this Court, and all have become final. (*Giddings v. Maxon*, D-202-CV-2016-00327, Memorandum Opinion and Order by Judge Malott reversing Board, entered May 24, 2016; *Giddings v. P&B Desert, LLC*, No. D-202-CV-2016-00336, Order and Opinion by Judge Huling reversing Board,

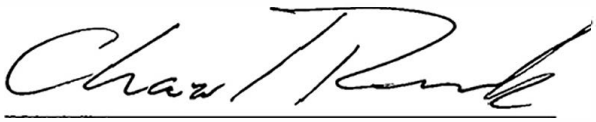
entered August 19, 2016; *Giddings v. P&B Rock*, LLC, No. D-202-CV-2016-00335, Memorandum Opinion and Order by Judge Barela Shepherd reversing Board, entered August 8, 2016). It thus is clear as a practical matter that the Board's unsupported change in position has resulted, and will continue to result, in uneven application of the law.

## CONCLUSION

This matter is before this Court on certification from the district court in a proceeding under Rule 1-075 involving review by certiorari of a decision of the Board. The purpose of the certification is to request a determination from this Court regarding the proper interpretation of section 7-36-21.2 of the state property tax code. That interpretation will determine whether the Board's decision was in accordance with law. The jurisdiction of the district court has been called into question by Respondents motions to dismiss, and the district court has not issued rulings on any of the issues. Accordingly, both jurisdictional issues and the merits of the Board's decision are before this Court. Petitioner Assessor requests that this Court find that the district court has jurisdiction over the matter, and that it find, on the merits, that the Board's decision is not in accordance with law.

WHEREFORE, for all of the above reasons, Petitioner Assessor requests that this Court reverse the decision and order of the Bernalillo County Valuation Protests Board in each of the consolidated cases.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief in Chief was mailed to opposing counsel as follows this 28th day of November, 2016.

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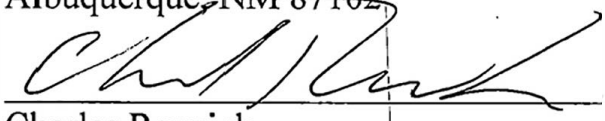

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