

ND-68433

Case No. 14-CV-00128

Pursuant to NRS 239B.030, the undersigned affirms that the following document does not contain the social security number of any person.

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COUNT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

Andrea Anderson
FILED

JUL 17 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

JOHN L. MARSHALL
SBN 6733
570 Marsh Avenue
Reno, Nevada 89509
Telephone: (775) 303-4882
Attorney for Petitioners Comstock
Residents Association, Gayle Sherman, Joe
McCarthy

IN THE THIRD JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR LYON COUNTY

COMSTOCK RESIDENTS ASSOCIATION,
GAYLE SHERMAN, JOE McCARTHY

Petitioners,

v.

LYON COUNTY BOARD OF
COMMISSIONERS; COMSTOCK
MINING INCORPORATED

Respondents.

**PETITIONERS COMSTOCK RESIDENTS ASSOCIATION
AND JOE McCARTHY'S NOTICE OF APPEAL**

Notice is hereby given that the Comstock Residents Association and Joe McCarthy,
Petitioners above named, hereby appeal to the Supreme Court of Nevada from the following
final judgment and orders entered in this action:

RECEIVED
JUL 17 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT

15-21700

1 1. Order Denying Petition for Judicial Review, entered on June 15, 2015, attached
2 hereto as Exhibit A.

3 2. Order Granting in Part and Denying in Part Plaintiffs' Motion to Augment the
4 Record, entered on June 10, 2015, attached hereto as Exhibit B.

5 3. Order Granting in Part and Denying in Part Motion to Dismiss, entered on
6 December 5, 2014, attached hereto as Exhibit C.

7
8 Dated: July 14, 2015.

9 Respectfully submitted,

10
11
12 By 

John L. Marshall, SBN 6733

570 Marsh Avenue

Reno, NV 89509

775.303.4882

13
14
15 Attorney for Petitioners Comstock Residents
16 Association and Joe McCarthy
17
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Notice of Appeal was served on the parties by mailing a copy thereof on the 14th day of July, 2015, by United States mail, postage prepaid to:

Steven B. Rye
District Attorney
31 S. Main Street
Yerington, NV 89447

James R. Cavilla
Allison, MacKenzie, Pavlakis, Wright & Fagan
402 N. Division Street
Carson City, NV 89703

EXHIBIT A

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EXHIBIT A

Case No. 14-CV-00128

Dept. No. Senior Judge

2015 JUN 15 PM 2:57

The undersigned hereby affirms this
document does not contain a social security
number.

COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

DeAnn Peeples
DEPUTY

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF LYON

COMSTOCK RESIDENTS ASSOCIATION,
GAYLE SHERMAN, JOE McCARTHY,

Plaintiffs/Petitioners,

vs.

LYON COUNTY BOARD OF
COMMISSIONERS; COMSTOCK MINING
INCORPORATED,

Defendants/Respondents,

NOTICE OF ENTRY OF ORDER

Please take notice that the Court entered its Order Denying Petition for Judicial Review
on June 5, 2015. A copy of the Order is attached hereto.

DATED this 15th day of June, 2015.

STEPHEN B. RYE
DISTRICT ATTORNEY

By: 
STEPHEN B. RYE
DISTRICT ATTORNEY
31 South Main Street
Yerington, NV 89447
775-463-6511

Attorney for Respondent/Defendant
Lyon County Board of Commissioners


Certificate of Service

The undersigned, an employee of the Lyon County District Attorney, certifies that on the 15th day of June, 2015, a copy of the foregoing Notice of Entry of Order and Order was mailed, postage prepaid, by placing the same in the mail receptacle at Lyon County Administrative Offices, addressed to:

John L. Marshall, Esq.
570 Marsh Ave.
Reno, NV 89509

James R. Cavilia, Esq.
Allison, MacKenzie, Pavlakis
Wright & Fagan, Ltd.
402 N. Division Street
Carson City, NV 89703

Dated this 15th day of June, 2015.



Employee

1 Case No. 14-CV-00128

2 Dept. No. II

FILED
2015 JUN -5 PM 1:51

TANYA SCEIRINE
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

Tanya Sceirine DEPUTY

3
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5
6 IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF LYON

8
9 COMSTOCK RESIDENTS ASSOCIATION,
GAYLE SHERMAN, JOE McCARTHY,

10 Plaintiffs/Petitioners,

11 vs.

12 LYON COUNTY BOARD OF
13 COMMISSIONERS; COMSTOCK MINING
INCORPORATED,

14 Defendants/Respondents,

15
16 **ORDER DENYING PETITION FOR JUDICIAL REVIEW**

17 Plaintiffs/Petitioners, Comstock Residents Association, Gayle Sherman, and Joe
18 McCarthy, (collectively "CRA") filed a Complaint for Injunctive and Declaratory
19 Relief/Petition for Judicial Review on January 31, 2014. The Complaint alleged four causes
20 of action: (1) Violations of Nevada Open Meeting Law; (2) denial of Due Process; (3) Abuse
21 of Discretion; and (4) Violation of NRS 278.220. Comstock Mining, Inc. ("CMI") filed its
22 Answer on March 28, 2014. Lyon County filed its Answer on March 27, 2014. On June 6,
23 2014, Lyon County submitted to the Court a Motion to Dismiss or in the alternative Motion
24 for Summary Judgment in which CMI joined, requesting that the Court dismiss the first,
25 second and fourth causes of action (the "Motion to Dismiss"). On December 3, 2014, the
26 Court issued an Order Granting in Part and Denying in Part the Motion to Dismiss and
27 dismissed the first and second causes of action. The Court further ordered the parties to
28

1 prepare and the parties did prepare a briefing schedule on the third and fourth causes of
2 action (collectively the "Petition for Judicial Review").

3 After being fully briefed, this matter came before the Court for hearing on April 20,
4 2015. James R. Cavilia, Esq., and Justin Townsend, Esq., of Allison MacKenzie, Ltd.,
5 appeared representing CMI. Stephen B. Rye, Lyon County District Attorney, appeared
6 representing Lyon County. John L. Marshall, Esq. appeared representing CRA. The Court
7 reviewed the pleadings and all documents on file, the applicable law, and considered the
8 arguments of the parties.

9 Good cause appearing, the Court makes the following Findings of Fact, Conclusions
10 of Law, and Orders.

11 **Findings of Fact:**

- 12 1. The entire record on appeal (the "Record") has been presented to the Court and
13 the Court has reviewed it in its entirety.
- 14 2. The Record contains testimony and evidence both in favor of and against CMI's
15 Application for a Master Plan Amendment and Zone Change (the "Application").
- 16 3. The Record reflects that there was presented to the governing body testimony
17 from the public, surveyors, engineers, land use planners, CRA members, CRA's
18 attorney, and environmental experts.
- 19 4. The Record further reflects that Lyon County considered the environmental
20 impacts and the compatibility of the requested changes to the surrounding area
21 and whether the changes were permitted under and consistent with the goals and
22 policies of the Lyon County Comprehensive Master Plan.
- 23 5. On December 10, 2013, the Lyon County Planning Commission considered CMI's
24 Application and voted to recommend that the Lyon County Board of
25 Commissioners deny the Application. Thereafter, Lyon County planning staff
26 prepared and delivered to the Board of Commissioners reports on the Planning
27 Commission's action with respect to the Application.

- 1 6. The Board of Commissioners considered CMI's Application on January 2, 2014
2 and, after a public hearing in which the testimony and evidence outlined above
3 were presented, deliberated and voted to approve a Master Plan Amendment and
4 Zone Change.
- 5 7. On January 30, 2015, the Board of Commissioners sent a letter to the Planning
6 Commission notifying the Planning Commission of its decision approving the
7 Application.
- 8 8. On February 11, 2014, the Planning Commission held a regularly-scheduled
9 meeting and considered the Board of Commissioners' decision on the Master
10 Plan Amendment and determined therein to prepare and send a report back to
11 the Board of Commissioners in which they expressed their concerns regarding the
12 Board's decision.
- 13 9. On March 6, 2014, the next available regularly-scheduled Board of
14 Commissioners meeting, the Board considered the Planning Commission's report
15 and voted unanimously to acknowledge receipt of the same.

16 **Conclusions of Law:**

- 17 1. It is well-settled law in Nevada that the Court is constrained in judicial review of
18 land use and zoning decisions to a review of the Record for abuse of discretion
19 and that the Court may not substitute its judgment for that of the Lyon County
20 Board of Commissioners absent a showing of manifest abuse of discretion.
21 McKenzie v. Shelly, 77 Nev. 237, 362 P.2d 268 (1961); City Council of Reno v.
22 Irvine, 102 Nev. 277, 721 P.2d 371 (1986).
- 23 2. The Lyon County Board of Commissioners' decision to approve the Application to
24 amend the master plan and zoning will not be overturned absent a showing that
25 said decision lacks support in the form of substantial evidence. Stratosphere
26 Gaming Corp. v. City of Las Vegas, 120 Nev. 523, 96 P.3d 756 (2004).
27 Substantial evidence is that which a reasonable mind could accept as sufficient to
28

1 support a conclusion. City of Reno v. Citizens for Cold Springs, 126 Nev. 27, 236
2 P.3d 10 (2010).

- 3 3. The Record contains substantial evidence, as noted in the Findings of Fact
4 above, which a reasonable mind could accept as sufficient to support the Board of
5 Commissioners' decision to amend the master plan and zoning.
- 6 4. The Board of Commissioners, in relying on the substantial evidence before it, did
7 not abuse its discretion in amending the master plan and zoning and, whether or
8 not the Court agrees with the Board's decision, the Court will not disturb the
9 decision of the Board of Commissioners.
- 10 5. NRS 278.220(4), which requires that the Board of Commissioners refer its
11 decision to amend the master plan to the Planning Commission for a report, is
12 ambiguous.
- 13 6. The Planning Commission was provided notice of the Board of Commissioners'
14 decision and reported back to the Board of Commissioners, and the Court
15 concludes that NRS 278.220(4) does not require the Board to vote again after
16 receipt of the Planning Commission's report.
- 17 7. The actions of the Board of Commissioners in reporting its decision to the
18 Planning Commission and subsequently accepting the Planning Commission's
19 report complied with NRS 278.220(4).

20 Based on the foregoing, and good cause appearing,

21 IT IS HEREBY ORDERED that the Petition for Judicial Review is DENIED in its
22 entirety.

23 IT IS FURTHER ORDERED that judgment is entered in favor of
24 Defendants/Respondents on the Third and Fourth Causes of Action.

25 Dated this 5th day of ^{June}~~May~~, 2015.

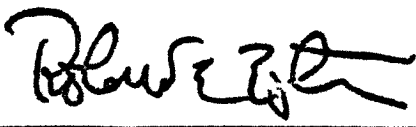
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28 DISTRICT JUDGE

EXHIBIT B

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EXHIBIT B

1 Case No. 14-CV-00128

2 Dept. No. Senior Judge

3 The undersigned hereby affirms this
4 document does not contain a social security
5 number.

FILED
2015 JUN 10 PM 2:01
TANYA SCHMIDT
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT
KATHY THOMAS
DEPUTY

6
7 IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
8 IN AND FOR THE COUNTY OF LYON

9 COMSTOCK RESIDENTS ASSOCIATION,
10 GAYLE SHERMAN, JOE MCCARTHY,

11 Plaintiffs/Petitioners,

12 vs.

13 LYON COUNTY BOARD OF
14 COMMISSIONERS; COMSTOCK MINING
15 INCORPORATED,

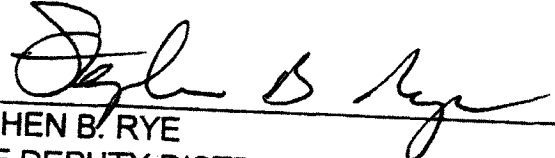
16 Defendants/Respondents,

17 **NOTICE OF ENTRY OF ORDER**

18 Please take notice that the Court entered its Order Granting in Part and Denying in Part
19 Plaintiffs' Motion to Augment Record on June 5, 2015. A copy of the Order is attached hereto.

20 DATED this 10 day of June, 2015.

21 ROBERT L. AUER
22 DISTRICT ATTORNEY

23 By: 
24 STEPHEN B. RYE
25 CHIEF DEPUTY DISTRICT ATTORNEY
26 31 South Main Street
27 Yerington, NV 89447
28 775-463-6511

Attorney for Respondent/Defendant
Lyon County Board of Commissioners

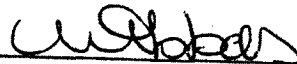
Certificate of Service

The undersigned, an employee of the Lyon County District Attorney, certifies that on the 10th day of June, 2015, a copy of the foregoing Notice of Entry of Order and Order was mailed, postage prepaid, by placing the same in the mail receptacle at Lyon County Administrative Offices, addressed to:

John L. Marshall, Esq.
570 Marsh Ave.
Reno, NV 89509

James R. Cavilia, Esq.
Allison, MacKenzie, Pavlakis
Wright & Fagan, Ltd.
402 N. Division Street
Carson City, NV 89703

Dated this 10th day of June, 2015.



Employee

1 Case No. 14-CV-00128

2 Dept. No. II

3 2015 JUN -5 PM 1:51

4 TANYA SCEIRINE
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT
5 Tanya Sceirine DEPUTY

6 IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF LYON

8
9 COMSTOCK RESIDENTS ASSOCIATION,
GAYLE SHERMAN, JOE McCARTHY,

10 Plaintiffs/Petitioners,

11 vs.

12 LYON COUNTY BOARD OF
13 COMMISSIONERS; COMSTOCK MINING
INCORPORATED,

14 Defendants/Respondents,

15
16 **ORDER GRANTING IN PART AND DENYING IN PART**
17 **PLAINTIFFS' MOTION TO AUGMENT RECORD**

18 Plaintiffs/Petitioners, Comstock Residents Association, Gayle Sherman, and Joe
19 McCarthy, (collectively "CRA"), filed a Motion to Augment the Record on December 16,
20 2014. Defendant/Respondent, Lyon County, and Defendant/Respondent, Comstock
21 Mining, Inc. ("CMI"), jointly filed an Opposition to the Motion on January 2, 2015. CRA filed
22 Reply on January 9, 2015.

23 This matter came before the Court for hearing on April 20, 2015. James R. Cavilia,
24 Esq., and Justin Townsend, Esq., of Allison MacKenzie, Ltd., appeared representing CMI.
25 Stephen B. Rye, Lyon County District Attorney, appeared representing Lyon County. John
26 L. Marshall, Esq. appeared representing CRA. The Court reviewed the pleadings and all
27 documents on file, the applicable law, and considered the arguments of the parties.
28

1 Good cause appearing, the Court makes the following Findings of Fact, Conclusions
2 of Law, and Order.

3 **Findings of Fact:**

- 4 1. CRA seeks to augment the record on appeal (the "Record") by adding thereto the
5 entirety of the 2010 Lyon County Comprehensive Master Plan (the "Master Plan"),
6 certain emails between Plaintiff/Petitioner Gayle Sherman and Lyon County
7 Commissioner Vida Keller, and certain letters from John L. Marshall, Esq. to Lyon
8 County Commissioners Bob Hastings and Vida Keller.
- 9 2. CRA also requests that the Court take judicial notice of the official minutes of the
10 December 23, 2010 meeting of the Lyon County Board of Commissioners,
11 portions of election contribution reports for Lyon County Commissioners Bob
12 Hastings, Vida Keller, and Chuck Roberts, and a May 2, 2014 letter from the Lyon
13 County District Attorney's Office to John L. Marshall, Esq. concerning a public
14 records request.
- 15 3. Lyon County and CMI consented to the Court taking judicial notice of the entirety
16 of the Master Plan, although all relevant portions thereof are already included in
17 the Record. Lyon County and CMI also stipulated to the addition to the Record of
18 the emails between Plaintiff/Petitioner Gayle Sherman and Commissioner Keller
19 and the letters from John L. Marshall, Esq. to Commissioners Hastings and Keller.

20 **Conclusions of Law:**

- 21 1. In judicial review of land use and zoning matters, all that the Court may consider
22 is the evidence that was available and presented to the governing body when the
23 final decision was made. City of Reno v. Citizens for Cold Springs, 126 Nev. 27,
24 236 P.3d 10 (2010); NRS 233B.135(1)(b).
- 25 2. Except for those items to which Lyon County and CMI have consented, the items
26 CRA seeks to have added to the Record were not part of the Record before the
27 governing body and may not be considered by the Court in this action.

28 ///

1 Based on the foregoing, and good cause appearing,

2 IT IS HEREBY ORDERED that the Motion is GRANTED as to those items to which
3 Lyon County and CMI specifically stipulated, which are (a) that the Court take judicial notice
4 of the entirety of the Master Plan, which is included as Exhibit A to CRA's Motion; (b) that
5 the Record is augmented to include the emails between Plaintiff/Petitioner Gayle Sherman
6 and Commissioner Keller, which are included as Exhibit D to CRA's Motion; and (c) the
7 letters from John L. Marshall, Esq. to Commissioners Hastings and Keller, which are
8 included as Exhibit F to CRA's Motion.

9 IT IS FURTHER ORDERED that the remaining portions of the Motion are DENIED.

10 Dated this 5th ^{June} day of ~~May~~, 2015.

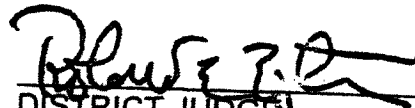
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13 DISTRICT JUDGE

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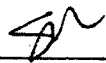
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EXHIBIT C

1 Case No. 14-CV-00128

2 Dept. No. Senior Judge

3 The undersigned hereby affirms this
4 document does not contain a social security
5 number.



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7 IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
8 IN AND FOR THE COUNTY OF LYON

9 COMSTOCK RESIDENTS ASSOCIATION,
10 GAYLE SHERMAN, JOE McCARTHY,

11 Plaintiffs/Petitioners,

12 vs.

13 LYON COUNTY BOARD OF
14 COMMISSIONERS; COMSTOCK MINING
15 INCORPORATED,

16 Defendants/Respondents,

17 **NOTICE OF ENTRY OF ORDER**

18 Please take notice that the Court entered its Order Granting in Part and Denying in Part
19 Motion to Dismiss on December 3, 2014. A copy of the Order is attached hereto.

20 DATED this 5 day of December, 2014.

21 ROBERT L. AUER
22 DISTRICT ATTORNEY

23 By: 

24 STEPHEN B. RYE
25 CHIEF DEPUTY DISTRICT ATTORNEY
26 31 South Main Street
27 Yerington, NV 89447
28 775-463-6511

Attorney for Respondent/Defendant
Lyon County Board of Commissioners

Office of the District Attorney
Lyon County, State of Nevada
801 Overland Loop, Suite 308, Dayton, Nevada 89403 · 31 South Main Street, Yerington, Nevada 89407 · 565 East Main Street, Fernley, Nevada 89404


Certificate of Service

The undersigned, an employee of the Lyon County District Attorney, certifies that on the 5th day of December, 2014, a copy of the foregoing Notice of Entry of Order and Order was mailed, postage prepaid, by placing the same in the mail receptacle at Lyon County Administrative Offices, addressed to:

John L. Marshall, Esq.
570 Marsh Ave.
Reno, NV 89509

James R. Cavilia, Esq.
Allison, MacKenzie, Pavlakis
Wright & Fagan, Ltd.
402 N. Division Street
Carson City, NV 89703

Dated this 5th day of December, 2014.



Employee

1 Case No. 14-CV-00128

2 Dept. No. II

3 2014 DEC -3 PM 12:26

4 COURT CLERK
THIRD JUDICIAL DISTRICT
5 DeAnn Peoples
6 DEPUTY

7 IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
8 IN AND FOR THE COUNTY OF LYON

9 COMSTOCK RESIDENTS ASSOCIATION,
10 GAYLE SHERMAN, JOE McCARTHY,

11 Plaintiffs/Petitioners,

12 vs.

13 LYON COUNTY BOARD OF
14 COMMISSIONERS; COMSTOCK MINING
INCORPORATED,

15 Defendants/Respondents,

16 **ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS**

17 Comstock Residents Association, Plaintiff/Petitioner herein, ("CRA") filed a Complaint
18 for Injunctive and Declaratory Relief/Petition for Judicial Review. The Complaint included
19 four causes of action: (1) Violations of Nevada Open Meeting Law; (2) Denial of Due
20 Process; (3) Abuse of Discretion; (4) Violation of NRS 278.220. Comstock Mining, Inc.
21 ("CMI") filed its Answer on March 28, 2014. Lyon County filed its Answer on March 27,
22 2014. On June 10, 2014, Lyon County filed a Motion to Dismiss or in the alternative Motion
23 for Summary Judgment, requesting that the Court dismiss the first, second and fourth
24 causes of action. CMI filed a joinder in the Motion on June 13, 2014. CRA filed its
25 Opposition to the Motion on July 3, 2014. Lyon County filed its Reply on July 29, 2014.

26 This matter came before this Court for hearing on September 10, 2014. James R.
27 Cavilia, Esq., and Justin Townsend, Esq., Allison, MacKenzie, Pavlakis, Wright and Fagan,
28 Ltd., appeared representing CMI. John L. Marshall, Esq. appeared representing CRA.

1 Stephen B. Rye, Lyon County Chief Deputy District Attorney, appeared representing Lyon
2 County. The Court reviewed the pleading and all documents on file, the applicable law, and
3 considered the arguments of the parties.

4 On October 23, 2014, the Court held a hearing to issue the ruling on the pending
5 motions before the Court.

6 Good cause appearing, the Court makes the following findings and Order.
7 **Findings of Fact:**

- 8 1. Citizens have alternative methods to pursue some of the claims in the Complaint.
- 9 2. CRA filed a complaint under the Open Meeting Law alleging essentially: (1) that
10 the Board of County Commissioners held a meeting or deliberated outside of an
11 agendized meeting in violation of the Open Meeting law; and, (2) the agenda item
12 was not specific enough, and the Board took action that was not specified on the
13 agenda.
- 14 3. CRA alleges in the complaint that two commissioners met on January 1, 2014, in
15 violation of the Nevada Open Meeting law.
- 16 4. The Complaint does not contain allegations that more than two commissioners
17 met outside of an agendized meeting. CRA alleges in its Opposition that a third
18 commissioner met with a representative of the applicant and that representative
19 was present at the January 1, 2014 meeting.
- 20 5. The complaint and opposition do not include an allegation that supports or
21 establishes any serial meeting.
- 22 6. CRA filed a cause of action for violation of due process based on a conflict of
23 interest of two of the County Commissioners. The thrust of the CRA complaint is
24 that a Commissioner must recuse him or herself when a reasonable person would
25 perceive a conflict of interest.
- 26 7. CRA alleges that Commissioner Keller received compensation from CMI.
- 27 8. Commissioner Keller stated in the record that she consulted with the Nevada
28 Commission on Ethics and the Lyon County District Attorney.

- 1 9. Commissioner Keller disclosed on the record prior to her decision what her
- 2 connections were with CMI.
- 3 10. No person or entity objected at the hearing to Commissioner Keller's participation
- 4 in the hearing.
- 5 11. Representatives of CRA were present at the Planning Commission and County
- 6 Commission public hearings on the CMI Applications.
- 7 12. CRA alleges that campaign contributions to certain board members rose to the
- 8 level creating a conflict of interest, and that said members were required to recuse
- 9 themselves from the decision.
- 10 13. CRA filed a cause of action alleging that Lyon County did not follow NRS 278.220
- 11 with respect to the CMI Applications.

12 **Conclusions of Law:**

- 13 1. A motion to dismiss a claim under NRCP 12(b)(5) tests the legal sufficiency of the
- 14 claim set out against the moving party and such a motion should be granted if it
- 15 appears beyond doubt that the plaintiff is entitled to no relief under any set of
- 16 facts that could be proved in support of the claim. Washoe Medical Center, Inc. v.
- 17 Reliance Insurance Co., 112 Nev. 494, 915 P.2d 288 (1996).
- 18 2. The Court must balance the rights granted citizens to challenge acts by the
- 19 government with the rights of the governing body and rights of citizens who may
- 20 or may not oppose the actions of the government.
- 21 3. The Board of County Commissioners' meetings are subject to the Nevada Open
- 22 Meeting law.
- 23 4. The allegations in the Complaint together with the factual showing in CRA's
- 24 opposition brief for a violation of the Nevada Open Meeting law are factually
- 25 deficient to state claim under the Nevada Open Meeting law.
- 26 5. A meeting is defined as a gathering of a quorum of members of the public body to
- 27 deliberate towards a decision. NRS 241.015(2). A quorum is defined as a simple
- 28 majority of the members of the board. NRS 241.015(5).

- 1 6. The Nevada Open Meeting Law is not intended to inhibit all private discussions of
2 public issues. Dewey v. Redevelopment Agency of City of Reno, 119 Nev. 87, 94-
3 95, 64 P.3d 1070, 1075 (2003) (citing McKay v. Board of Cty. Comm'rs, 103 Nev.
4 490, 495-96, 746 P.2d 124, 127 (1987).
- 5 7. The Nevada OML prevents or prohibits collective deliberations or actions where a
6 quorum is present. The complaint alleges that only two County Commissioners
7 were present at the specific meeting held January 1, 2014, alleged to be the
8 violation.
- 9 8. Serial meetings are also prohibited under the Nevada OML if such serial meetings
10 constitute deliberations. In this case, the complaint and opposition brief do not
11 sufficiently allege a serial meeting or any serial deliberation. The facts alleged in
12 the complaint and opposition brief do not constitute a serial meeting as defined in
13 the Nevada Open Meeting Law or pursuant to the Nevada Supreme Court
14 decision of Del Papa v. Bd. of Regents, 114 Nev. 388, 956 P.2d 770 (1998).
- 15 9. The agenda items challenged by CRA for the January 2, 2014, County
16 Commissioner agenda are clear and complete in accordance with NRS 241.020.
- 17 10. The action of the Board of Commissioners did not exceed the scope of the clear
18 and complete agenda items. NRS 241.020(2)(c)(1) requires that discussion at a
19 public meeting cannot exceed the scope of a clearly and completely stated
20 agenda topic. Sandoval v. Bd. of Regents of Univ., 119 Nev. 148, 154, 67 P.3d
21 902, 905 (2003). The Board complied with the applicable provisions of Nevada
22 law with respect to the agenda topics.
- 23 11. CRA has not stated a claim under the Nevada Open Meeting Law.
- 24 12. The Commissioners made adequate disclosures related to CMI prior to
25 consideration of the agenda items and decision on the CMI Applications.
26 Therefore, the Commissioners were allowed to deliberate on the matter. See
27 NRS 281A.420(1).
28

- 1 13. A public official who properly discloses the items mentioned in NRS 281A.420(1)
2 is permitted to deliberate and vote on the matter in question unless the "judgment
3 of a reasonable person in the public officer's position would be materially affected
4 by" the disclosed item(s). NRS 281A.420(3).
- 5 14. A public official is presumed not to be materially affected by the gift, loan,
6 significant pecuniary interest, or commitment to another's interests if the benefit to
7 the public officer is not greater than that accruing to any other person affected by
8 the matter in question. NRS 281.420(4).
- 9 15. The complaint does not contain sufficient allegations to support a claim that there
10 was an actual or perceived conflict of interest requiring that any Board members
11 recuse themselves from the decision under the relevant standards set forth in
12 Nevada and federal law.
- 13 16. Nevada law does not require recusal based upon campaign contributions if they
14 are properly reported. See NRS 281A.420(2)(a); Nevada Attorney General
15 Opinion 1998-29.
- 16 17. CRA has not stated a claim for violation of due process in the Complaint in file
17 herein.
- 18 18. The Lyon County Commissioners have ultimate authority to make changes to the
19 master plan pursuant to NRS Chapter 278 and NRS 278.220. If the County
20 violates NRS 278.220, the statute provides a remedy. NRS 278.220 states quite
21 clearly that no change may be made.
- 22 19. NRS 278.220 carries its own remedy in that before that change can be made,
23 which the court understands that the Board of Commissioners has the ultimate
24 authority, it still requires a report by the Planning Commission. When the county
25 makes a change that change may or may not be beneficial and that's the reason
26 that the Planning Commission or why the statute states that the Planning
27 Commission must make a report. The Comstock Residents argue that the county
28

1 put the cart before the horse. The Court agrees. The violation of NRS 278.220 is
2 not dismissed.

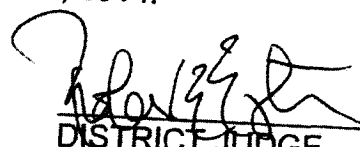
3 Based on the foregoing, and good cause appearing,

4 IT IS HEREBY ORDERED that the Motion to Dismiss with respect to the First Cause
5 of Action, Nevada Open Meeting Law Violation, is GRANTED, and the First Cause of Action
6 is DISMISSED with prejudice and without leave to amend.

7 IT IS FURTHER ORDERED that the Second Cause of Action, Due Process, is
8 GRANTED, and the Second Cause of Action is DISMISSED with prejudice and without
9 leave to amend.

10 IT IS FINALLY ORDERED that the Motion to Dismiss the Fourth Cause of Action,
11 NRS 278.220, is DENIED.

12 Dated this 2nd day of December, 2014.

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14 : 
15 DISTRICT JUDGE
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1 Case No. 14-CV-00128

2 Pursuant to NRS 239B.030, the undersigned
3 affirms that the following document does not
4 contain the social security number of any person.

2015 JUL 14 PM 4:58

COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

4 JOHN L. MARSHALL
5 SBN 6733
6 570 Marsh Avenue
7 Reno, Nevada 89509
8 Telephone: (775) 303-4882
9 Attorney for Petitioners Comstock
10 Residents Association, Gayle Sherman, Joe
11 McCarthy

Andrea Andersen TV

10 IN THE THIRD JUDICIAL DISTRICT COURT
11 OF THE STATE OF NEVADA
12 IN AND FOR LYON COUNTY

13 COMSTOCK RESIDENTS ASSOCIATION,
14 GAYLE SHERMAN, JOE MCCARTHY

15 Petitioners,

16 v.

17 LYON COUNTY BOARD OF
18 COMMISSIONERS; COMSTOCK
19 MINING INCORPORATED

20 Respondents.
21 _____/

22 CASE APPEAL STATEMENT

23
24 1. Name of appellant filing this case appeal statement: Comstock Residents Association and
25 Joe McCarthy.

26 2. Identify the judge issuing the decision, judgment or order appealed from: The
27 Honorable Robert Estes, Senior Judge.
28

1 3. Identify each appellant and counsel:

2 a. Comstock Residents Association

3 Counsel: John L. Marshall
4 570 Marsh Avenue
5 Reno, Nevada 89509
6 775.303.4882
7 johnmarshall@charter.net

8 b. Joe McCarthy

9 Counsel: John L. Marshall
10 570 Marsh Avenue
11 Reno, Nevada 89509
12 775.303.4882
13 johnmarshall@charter.net

14 4. Identify each respondent and counsel:

15 a. Lyon County Board of Commissioners

16 Counsel: Steven B. Rye
17 District Attorney
18 31 S. Main Street
19 Yerington, NV 89447

20 b. Comstock Mining Incorporated

21 Counsel: James R. Cavilla
22 Allison, MacKenzie, Pavlakis, Wright & Fagan
23 402 N. Division Street
24 Carson City, NV 89703

25 5. All counsel listed above are licensed to practice in the State of Nevada.

26 6. Appellants were represented by retained counsel in the district court.

27 7. Appellants are represented by retained counsel on appeal.

28 8. Appellants were not granted leave to appear in *forma pauperis*.

 9. Proceedings commenced in the district court on January 31, 2014.

 10. Comstock Residents Association (CRA), Gayle Sherman and Joe McCarthy sued

Lyon County and Comstock Mining Incorporated (CMI) over Lyon County's approval of

1 CMI's application to change the longstanding Lyon County Comprehensive Master Plan and
2 zoning designations to allow mining within Silver City, Nevada, where CRA members and Joe
3 McCarthy live and/or work. The District Court dismissed a number of claims brought by
4 Plaintiffs/Petitioners related to the approval (i.e., violations of the Nevada Open Meeting Law
5 (First Cause of Action) and due process (Second Cause of Action)). After briefing on the merits
6 of the remaining judicial review claims, the District Court ruled in favor of Lyon County and
7 CMI and denied Appellants' Petition for Judicial Review and all relief sought. Appellants
8 appeal from the District Court's final judgment denying the judicial writ petition, its order
9 dismissing their First and Second Claims for Relief, and its order denying in part Appellants'
10 Motion to Augment the Record.
11

12 11. This case has not been subject of a previous appeal.

13 12. This appeal involves no issues of child custody or visitation.

14 13. This case likely involves no possibility of settlement.

15 Dated: July 17, 2015.

16
17 Respectfully submitted,

18
19
20 By 

21 John L. Marshall, SBN 6738
22 570 Marsh Avenue
23 Reno, NV 89509
24 775.303.4882

25 Attorney for Petitioners Comstock Residents
26 Association and Joe McCarthy
27
28

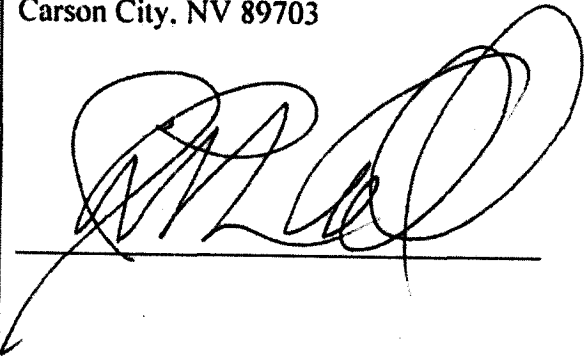
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Case Appeal Statement was served on the parties by mailing a copy thereof on the ___th day of July, 2015, by United States mail, postage prepaid to:

Steven B. Rye
District Attorney
31 S. Main Street
Yerington, NV 89447

James R. Cavilla
Allison, MacKenzie, Pavlakis, Wright & Fagan
402 N. Division Street
Carson City, NV 89703



A handwritten signature in black ink, appearing to read 'JRC', is written over a horizontal line. An arrow points from the signature down towards the left margin.

Case Summary

COMSTOCK RESIDENTS ASSOCIATION, GAYLE SHERMAN, JOE MCCARTHY, LYON COUNTY BOARD OF COMMISSIONERS, COMSTOCK MINING, INC - COMPLAINT

Court: 14-CV-00128

Agency: Third Judicial District Court

CaseID: 14-157

Received Date: 1/31/2014

Status Date: 6/5/2015

Type: Other Real Property Case

Status: Closed

Age: 529 days Active Age: 490 days

Involvements

Primary Involvements

COMSTOCK RESIDENTS ASSOCIATION Plaintiff

SHERMAN, GAYLE Plaintiff

MCCARTHY, JOE Plaintiff

LYON COUNTY BOARD OF COMMISSIONERS Defendant

COMSTOCK MINING, INC Defendant

Other Involvements

Cavilia, James R. Esq. Defendant's Attorney

Marshall, John Esq. Plaintiff's Attorney

Third Judicial District Court (14-CV-00128)

Estes, Honorable Robert Judge

Other Real Property Case

1. NRCP 3 - COMPLAINT Occurred: 1/31/2014

COMSTOCK RESIDENTS ASSOCIATION Plaintiff

Disposition: Summary Judgment Dispo Date: 6/5/2015

COMSTOCK MINING, INC Defendant

Disposition: Summary Judgment Dispo Date: 6/5/2015

Lead/Active: True

Case Status History

1/31/2014 1:47:00 PM | Open

6/5/2015 1:47:00 PM | Closed

Documents

1/31/2014 Complaint for Declaratory and Injunctive Relief-Petition for Writ of Mandate of Judicial Review.pdf - Filed

1/31/2014 Summons.pdf - Issued

Notes: Added from Document Scanning session.

1/31/2014 Civil Cover Sheet.pdf - Filed

Notes: Added from Document Scanning session.

2/25/2014 Affidavit of Service.pdf - Filed

Notes: Added from Document Scanning session.

2/25/2014 Acceptance of Service.pdf - Filed

Notes: Added from Document Scanning session.

3/27/2014 Lyon County Board of Commissioners Answer to Complaint.pdf - Filed

Notes: Added from Document Scanning session.

3/28/2014 Comstock Mining Incorporated's Answer to Complaint.pdf - Filed

JUSTWARE

7/14/2015 5:51:21 PM

Case Summary

Notes: Added from Document Scanning session.
4/1/2014 Order of Recusal and Transferring Case to Dept I.pdf - Filed
Notes: Added from Document Scanning session.
5/2/2014 Order of Recusal.pdf - Filed
Notes: Added from Document Scanning session.
5/5/2014 Request for a Senior Judge.pdf - For Court Use Only
6/10/2014 Motion to Dismiss (Lyon County).pdf - Filed
Notes: Added from Document Scanning session.
6/10/2014 Memorandum of Temporary Assignment-Robert Estes-Supreme Court.pdf - Filed
Notes: Added from Document Scanning session.
6/10/2014 Notice of Assignment by Clerk.pdf - Filed
Notes: Added from Document Scanning session.
6/10/2014 Record on Appeal.pdf - Filed
Notes: Added from Document Scanning session.
6/10/2014 Board of Commissioners 1-2-14 Sign In Sheet (mtg)(p. 508-510).pdf - Filed
Notes: Exhibit to Record on Appeal
6/10/2014 Doc. Bates # 1-3050\Board of Commissioners 1-2-14 Sign In Sheet (mtg)(p. 508-510).pdf - Filed
Notes: Exhibit to Record on Appeal
6/10/2014 Doc. Bates # 1-3050\Bob Hastings Disclosure Statement(p. 511).pdf - Filed
Notes: Exhibit to Record on Appeal
6/10/2014 Doc. Bates # 1-3050\County Commission Agenda Packet 1-2-14 (p. 1-507).pdf - Filed
Notes: Exhibit to Record on Appeal;
6/10/2014 Doc. Bates # 1-3050\County Commission Minutes 12-5-13 (p. 522-523).pdf - Filed
Notes: Exhibit to Record on Appeal
6/10/2014 Doc. Bates # 1-3050\Disclosure Statements and Motions (p. 515-521).pdf - Filed
Notes: Exhibit to Record on Appeal
6/10/2014 Doc. Bates # 1-3050\January 2, 2014 County Commission Meeting Minutes (p. 524-533).pdf - Filed
Notes: Exhibit to Record on Appeal
6/10/2014 Doc. Bates # 1-3050\Maureen Williss Documents and Notices (p. 534-544).pdf - Filed
Notes: Exhibit to Record on Appeal
Exhibit to Record on Appeal
6/10/2014 Doc. Bates # 1-3050\Vida Keller Disclosure Statement (p. 512-514).pdf - Filed
Notes: Exhibit to Record on Appeal
6/10/2014 Add materials from Planning File\Aug 14, 2013 Planning Dept Letter to Andrew Motter Manhard (p.582-588).pdf - Filed
Notes: Exhibit to Record on Appeal
6/10/2014 Add materials from Planning File\Aug 16, 2013 Letter from Manhard (p. 589-630).pdf - Filed
Notes: Exhibit to Record on Appeal
6/10/2014 Add materials from Planning File\Bound Materials Part II (p. 739-833).pdf - Filed
Notes: Exhibit to Record on Appeal
6/10/2014 Add materials from Planning File\CMI Master Plan and Zone Change App Dated Aug 2013 (p.549-581).pdf - Filed
Notes: Exhibit to Record to Appeal
6/10/2014 Add materials from Planning File\December 13, 2010 Letter from CMI (p. 545-548).pdf - Filed
Notes: Exhibit to Record on Appeal
6/10/2014 Add materials from Planning File\January 8, 2014 Letter from Manhard (p.853-866).pdf - Filed
Notes: Exhibit to Record on Appeal
6/10/2014 Add materials from Planning File\Materials Delivered to Plan Comm Members by CRA For 11-12-13 Mtg (p. 631-738).pdf - Filed
Notes: Exhibit to Record on Appeal
6/10/2014 Add materials from Planning File\Misc. Maps, check and other docs (Planning file)(p. 834-840).pdf - Filed
Notes: Exhibit to Record on Appeal
6/10/2014 Add materials from Planning File\Planning Commission Sign In Sheet December 10, 2013 (p. 841-848).pdf - Filed
Notes: Exhibit to Record on Appeal
6/10/2014 Add materials from Planning File\Planning Commission Sign in Sheet November 12, 2013(p.849-852).pdf - Filed
Notes: Exhibit to Record on Appeal
6/10/2014 PLAN COMM 12.10.2013.wav - Filed
Notes: Audio Exhibit to Record on Appeal
6/10/2014 CMI-1-2-14 #2.wav - Filed
Notes: Audio Exhibit to Record on Appeal Commissioner Mtg 1-2-14
6/10/2014 CM 1-2-14I #3.wav - Filed

Case Summary

Notes: Audio Exhibit to Record on Appeal Commissioner Mtg 1-2-14
6/10/2014 CMI 1-2-14 #1.wav - Filed
Notes: Audio Exhibit to Record on Appeal Commissioners Mtg 1-2-14
6/10/2014 PLAN COMM MTG 11.12.13.wav - Filed
Notes: Audio Exhibit to Record on Appeal Planning Commission Mtg 11-12-13
6/13/2014 Joinder to Defendant Lyon County Board of Comm Motion to Dismiss.pdf - Filed
Notes: Added from Document Scanning session.
7/3/2014 Motion to Amend Complaint-Petition.pdf - Filed
Notes: Added from Document Scanning session.
7/3/2014 Opposition to Motion to Dismiss.pdf - Filed
Notes: Added from Document Scanning session.
7/7/2014 Setting Memo.pdf - Filed
Notes: Added from Document Scanning session.
7/25/2014 Opposition to Plaintiffs-Petitioner' Motion to Amend Complaint-Petition.pdf - Filed
Notes: Added from Document Scanning session.
7/29/2014 Lyon County Board of Commissioners' Opposition to Motion to Amend Complaint Petition.pdf - Filed
Notes: Added from Document Scanning session.
7/29/2014 Lyon County Board of Comm Reply to Oppo to Mtn to Dismiss, or in alternative, Mtn for Partial Summ Judgment.pdf - Filed
Notes: Added from Document Scanning session.
8/5/2014 CRA's Reply to Lyon Co. and CMI's Opposition to Motion to Amend Complaint.pdf - Filed
Notes: Added from Document Scanning session.
9/25/2014 Setting Memo (2).pdf - Filed
Notes: Added from Document Scanning session.
10/14/2014 CRA's Notice of Supplementary Authority Re Motion to Amend.pdf - Filed
Notes: Emailed to Judge Estes 10-14-14 @ 3:10 p.m. Added from Document Scanning session.
10/16/2014 Lyon County's Objection to Court's Consideration of CRA's Supplemental Authority.pdf - Filed
Notes: Emailed to Judge Estes 10/16/14 2:54 p.m. Added from Document Scanning session.
10/21/2014 Objection to Court's Consideration of CRA's Supplemental Authority.pdf - Filed
Notes: Emailed to Judge Estes 10/21/14. Added from Document Scanning session.
11/5/2014 Transcript - Decision - 10-23-14 (2).pdf - Filed
Notes: Added from Document Scanning session.
12/3/2014 Order Denying Plaintiffs Motion to Amend.pdf - Filed
Notes: Added from Document Scanning session.
12/3/2014 Order Granting in Part and Denying in Part Motion to Dismiss.pdf - Filed
Notes: Added from Document Scanning session.
12/3/2014 Stipulation and Order Regarding Briefing Schedule.pdf - Filed
Notes: Added from Document Scanning session.
12/8/2014 Notice of Entry of Order (Order Denying Plaintiff's Motion to Amend).pdf - Filed
Notes: Added from Document Scanning session.
12/8/2014 Notice of Entry of Order (Order Granting in Part and Denying in Part Motion to Dismiss).pdf - Filed
Notes: Added from Document Scanning session.
12/15/2014 Memorandum of Points & Authorities in Opposition to Peition for Judicial Review.pdf - Filed
Notes: Added from Document Scanning session.
12/16/2014 MotionTo Augment Record and or Request for Judicial Notice.pdf - Filed
Notes: Added from Document Scanning session.
12/16/2014 Comstock Residents Association's Opening Brief on Petition for Judicial Review.pdf - Filed
Notes: Added from Document Scanning session.
1/2/2015 Supplement to Record on Appeal-See exhibit folder.pdf - Filed
Notes: Exhibits in folder named Supplement to Record on Appeal
1/2/2015 Joint Opposition of Respondents Lyon County Board of Commissioners & Comstock Mining to Mtn to Augment Record.pdf - Filed
Notes: Added from Document Scanning session.
1/2/2015 Supplement to Record on Appeal 11-12-13 Materials from CRA presented to Planning Commission\Silver City Presentation to Lyon County 1 V3 w-SC Response FINAL (1).pdf - Filed
1/2/2015 Supplement to Record on Appeal 11-12-13 Materials from CRA presented to Planning Commission\SC Interviews 10-2013 draft5.mov - Filed
1/9/2015 Reply.pdf - Filed
Notes: Added from Document Scanning session.
1/9/2015 Opposition.pdf - Filed

Case Summary

Notes: Added from Document Scanning session.

1/12/2015 Memorandum Of Points & Authorities in Oppo to Opening Brief.pdf - Filed

Notes: Added from Document Scanning session.

1/16/2015 Mem of Points and Authorities in Reply to Comstock Residents Association's Oppo Brief in Support of Petition for Judicial Review.pdf - Filed

Notes: Added from Document Scanning session.

1/20/2015 Oral Argument Requested.pdf - Filed

Notes: Added from Document Scanning session.

1/27/2015 Request to Submit for Decision.pdf - Filed

Notes: Added from Document Scanning session.

3/3/2015 Setting Memo (4-20-15).pdf - Filed

Notes: Added from Document Scanning session.

4/10/2015 Letter from S. Rye to Judge Estes.pdf - For Court Use Only

Notes: Added from Document Scanning session.

4/27/2015 Transcript of Proceedings Motion April 20, 2015.pdf - Filed

Notes: Emailed to Judge Estes 4/29/15. Added from Document Scanning session.

6/5/2015 Order.pdf - Filed

Notes: Added from Document Scanning session.

6/5/2015 Order (2).pdf - Filed

Notes: Added from Document Scanning session.

6/10/2015 Notice of Entry of Order Deying Petition for Judicial Review.pdf - Filed

Notes: Added from Document Scanning session.

6/15/2015 Notice of Entry of Order.pdf - Filed

Notes: Added from Document Scanning session.

7/14/2015 Petitioners Comstock Residents Association and Joe McCarthy's Notice of Appeal.pdf - Filed

Notes: Added from Document Scanning session.

1 Case No. 14-CV-00128

2 Dept. No. II

FILED

2015 JUN -5 PM 1:51

TANYA SCORING
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

Tanya Scoring

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6 IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF LYON

8
9 COMSTOCK RESIDENTS ASSOCIATION,
GAYLE SHERMAN, JOE McCARTHY,

10 Plaintiffs/Petitioners,

11 vs.

12 LYON COUNTY BOARD OF
13 COMMISSIONERS; COMSTOCK MINING
INCORPORATED,

14 Defendants/Respondents,

15
16 **ORDER DENYING PETITION FOR JUDICIAL REVIEW**

17 Plaintiffs/Petitioners, Comstock Residents Association, Gayle Sherman, and Joe
18 McCarthy, (collectively "CRA") filed a Complaint for Injunctive and Declaratory
19 Relief/Petition for Judicial Review on January 31, 2014. The Complaint alleged four causes
20 of action: (1) Violations of Nevada Open Meeting Law; (2) denial of Due Process; (3) Abuse
21 of Discretion; and (4) Violation of NRS 278.220. Comstock Mining, Inc. ("CMI") filed its
22 Answer on March 28, 2014. Lyon County filed its Answer on March 27, 2014. On June 6,
23 2014, Lyon County submitted to the Court a Motion to Dismiss or in the alternative Motion
24 for Summary Judgment in which CMI joined, requesting that the Court dismiss the first,
25 second and fourth causes of action (the "Motion to Dismiss"). On December 3, 2014, the
26 Court issued an Order Granting in Part and Denying in Part the Motion to Dismiss and
27 dismissed the first and second causes of action. The Court further ordered the parties to
28

1 prepare and the parties did prepare a briefing schedule on the third and fourth causes of
2 action (collectively the "Petition for Judicial Review").

3 After being fully briefed, this matter came before the Court for hearing on April 20,
4 2015. James R. Cavilia, Esq., and Justin Townsend, Esq., of Allison MacKenzie, Ltd.,
5 appeared representing CMI. Stephen B. Rye, Lyon County District Attorney, appeared
6 representing Lyon County. John L. Marshall, Esq. appeared representing CRA. The Court
7 reviewed the pleadings and all documents on file, the applicable law, and considered the
8 arguments of the parties.

9 Good cause appearing, the Court makes the following Findings of Fact, Conclusions
10 of Law, and Orders.

11 **Findings of Fact:**

- 12 1. The entire record on appeal (the "Record") has been presented to the Court and
13 the Court has reviewed it in its entirety.
- 14 2. The Record contains testimony and evidence both in favor of and against CMI's
15 Application for a Master Plan Amendment and Zone Change (the "Application").
- 16 3. The Record reflects that there was presented to the governing body testimony
17 from the public, surveyors, engineers, land use planners, CRA members, CRA's
18 attorney, and environmental experts.
- 19 4. The Record further reflects that Lyon County considered the environmental
20 impacts and the compatibility of the requested changes to the surrounding area
21 and whether the changes were permitted under and consistent with the goals and
22 policies of the Lyon County Comprehensive Master Plan.
- 23 5. On December 10, 2013, the Lyon County Planning Commission considered CMI's
24 Application and voted to recommend that the Lyon County Board of
25 Commissioners deny the Application. Thereafter, Lyon County planning staff
26 prepared and delivered to the Board of Commissioners reports on the Planning
27 Commission's action with respect to the Application.

- 1 6. The Board of Commissioners considered CMI's Application on January 2, 2014
2 and, after a public hearing in which the testimony and evidence outlined above
3 were presented, deliberated and voted to approve a Master Plan Amendment and
4 Zone Change.
- 5 7. On January 30, 2015, the Board of Commissioners sent a letter to the Planning
6 Commission notifying the Planning Commission of its decision approving the
7 Application.
- 8 8. On February 11, 2014, the Planning Commission held a regularly-scheduled
9 meeting and considered the Board of Commissioners' decision on the Master
10 Plan Amendment and determined therein to prepare and send a report back to
11 the Board of Commissioners in which they expressed their concerns regarding the
12 Board's decision.
- 13 9. On March 6, 2014, the next available regularly-scheduled Board of
14 Commissioners meeting, the Board considered the Planning Commission's report
15 and voted unanimously to acknowledge receipt of the same.

16 **Conclusions of Law:**

- 17 1. It is well-settled law in Nevada that the Court is constrained in judicial review of
18 land use and zoning decisions to a review of the Record for abuse of discretion
19 and that the Court may not substitute its judgment for that of the Lyon County
20 Board of Commissioners absent a showing of manifest abuse of discretion.
21 McKenzie v. Shelly, 77 Nev. 237, 362 P.2d 268 (1961); City Council of Reno v.
22 Irvine, 102 Nev. 277, 721 P.2d 371 (1986).
- 23 2. The Lyon County Board of Commissioners' decision to approve the Application to
24 amend the master plan and zoning will not be overturned absent a showing that
25 said decision lacks support in the form of substantial evidence. Stratosphere
26 Gaming Corp. v. City of Las Vegas, 120 Nev. 523, 96 P.3d 756 (2004).
27 Substantial evidence is that which a reasonable mind could accept as sufficient to
28

1 support a conclusion. City of Reno v. Citizens for Cold Springs, 126 Nev. 27, 236
2 P.3d 10 (2010).

- 3 3. The Record contains substantial evidence, as noted in the Findings of Fact
4 above, which a reasonable mind could accept as sufficient to support the Board of
5 Commissioners' decision to amend the master plan and zoning.
- 6 4. The Board of Commissioners, in relying on the substantial evidence before it, did
7 not abuse its discretion in amending the master plan and zoning and, whether or
8 not the Court agrees with the Board's decision, the Court will not disturb the
9 decision of the Board of Commissioners.
- 10 5. NRS 278.220(4), which requires that the Board of Commissioners refer its
11 decision to amend the master plan to the Planning Commission for a report, is
12 ambiguous.
- 13 6. The Planning Commission was provided notice of the Board of Commissioners'
14 decision and reported back to the Board of Commissioners, and the Court
15 concludes that NRS 278.220(4) does not require the Board to vote again after
16 receipt of the Planning Commission's report.
- 17 7. The actions of the Board of Commissioners in reporting its decision to the
18 Planning Commission and subsequently accepting the Planning Commission's
19 report complied with NRS 278.220(4).

20 Based on the foregoing, and good cause appearing,

21 IT IS HEREBY ORDERED that the Petition for Judicial Review is DENIED in its
22 entirety.

23 IT IS FURTHER ORDERED that judgment is entered in favor of
24 Defendants/Respondents on the Third and Fourth Causes of Action.

25 Dated this 5th ^{June} day of ~~May~~, 2015.

26 
27 _____
28 DISTRICT JUDGE

1 Case No. 14-CV-00128

2 Dept. No. II

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2015 JUN -5 PM 1:51

TANYA DEWITT
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

Tanya Dewitt

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6 IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF LYON

8
9 COMSTOCK RESIDENTS ASSOCIATION,
GAYLE SHERMAN, JOE McCARTHY,

10 Plaintiffs/Petitioners,

11 vs.

12 LYON COUNTY BOARD OF
13 COMMISSIONERS; COMSTOCK MINING
INCORPORATED,

14 Defendants/Respondents,

15
16 **ORDER GRANTING IN PART AND DENYING IN PART**
17 **PLAINTIFFS' MOTION TO AUGMENT RECORD**

18 Plaintiffs/Petitioners, Comstock Residents Association, Gayle Sherman, and Joe
19 McCarthy, (collectively "CRA"), filed a Motion to Augment the Record on December 16,
20 2014. Defendant/Respondent, Lyon County, and Defendant/Respondent, Comstock
21 Mining, Inc. ("CMI"), jointly filed an Opposition to the Motion on January 2, 2015. CRA filed
22 Reply on January 9, 2015.

23 This matter came before the Court for hearing on April 20, 2015. James R. Cavilia,
24 Esq., and Justin Townsend, Esq., of Allison MacKenzie, Ltd., appeared representing CMI.
25 Stephen B. Rye, Lyon County District Attorney, appeared representing Lyon County. John
26 L. Marshall, Esq. appeared representing CRA. The Court reviewed the pleadings and all
27 documents on file, the applicable law, and considered the arguments of the parties.
28

1 Good cause appearing, the Court makes the following Findings of Fact, Conclusions
2 of Law, and Order.

3 **Findings of Fact:**

- 4 1. CRA seeks to augment the record on appeal (the "Record") by adding thereto the
5 entirety of the 2010 Lyon County Comprehensive Master Plan (the "Master Plan"),
6 certain emails between Plaintiff/Petitioner Gayle Sherman and Lyon County
7 Commissioner Vida Keller, and certain letters from John L. Marshall, Esq. to Lyon
8 County Commissioners Bob Hastings and Vida Keller.
- 9 2. CRA also requests that the Court take judicial notice of the official minutes of the
10 December 23, 2010 meeting of the Lyon County Board of Commissioners,
11 portions of election contribution reports for Lyon County Commissioners Bob
12 Hastings, Vida Keller, and Chuck Roberts, and a May 2, 2014 letter from the Lyon
13 County District Attorney's Office to John L. Marshall, Esq. concerning a public
14 records request.
- 15 3. Lyon County and CMI consented to the Court taking judicial notice of the entirety
16 of the Master Plan, although all relevant portions thereof are already included in
17 the Record. Lyon County and CMI also stipulated to the addition to the Record of
18 the emails between Plaintiff/Petitioner Gayle Sherman and Commissioner Keller
19 and the letters from John L. Marshall, Esq. to Commissioners Hastings and Keller.

20 **Conclusions of Law:**

- 21 1. In judicial review of land use and zoning matters, all that the Court may consider
22 is the evidence that was available and presented to the governing body when the
23 final decision was made. City of Reno v. Citizens for Cold Springs, 126 Nev. 27,
24 236 P.3d 10 (2010); NRS 233B.135(1)(b).
- 25 2. Except for those items to which Lyon County and CMI have consented, the items
26 CRA seeks to have added to the Record were not part of the Record before the
27 governing body and may not be considered by the Court in this action.

28 ///

1 Based on the foregoing, and good cause appearing,

2 IT IS HEREBY ORDERED that the Motion is GRANTED as to those items to which
3 Lyon County and CMI specifically stipulated, which are (a) that the Court take judicial notice
4 of the entirety of the Master Plan, which is included as Exhibit A to CRA's Motion; (b) that
5 the Record is augmented to include the emails between Plaintiff/Petitioner Gayle Sherman
6 and Commissioner Keller, which are included as Exhibit D to CRA's Motion; and (c) the
7 letters from John L. Marshall, Esq. to Commissioners Hastings and Keller, which are
8 included as Exhibit F to CRA's Motion.

9 IT IS FURTHER ORDERED that the remaining portions of the Motion are DENIED.

10 Dated this 5th day of May, 2015.

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12 _____
13 DISTRICT JUDGE
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1 Case No. 14-CV-00128

2 Dept. No. II

3 2014 DEC -3 PM 12:27

4 TARA L. BROWN
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

5 *Tara Brown*
REPUTY

6 IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF LYON

8
9 COMSTOCK RESIDENTS ASSOCIATION,
GAYLE SHERMAN, JOE McCARTHY,

10 Plaintiffs/Petitioners,

11 vs.

12 LYON COUNTY BOARD OF
13 COMMISSIONERS; COMSTOCK MINING
INCORPORATED,

14 Defendants/Respondents,

15
16 **ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS**

17 Comstock Residents Association, Plaintiff/Petitioner herein, ("CRA") filed a Complaint
18 for Injunctive and Declaratory Relief/Petition for Judicial Review. The Complaint included
19 four causes of action: (1) Violations of Nevada Open Meeting Law; (2) Denial of Due
20 Process; (3) Abuse of Discretion; (4) Violation of NRS 278.220. Comstock Mining, Inc.
21 ("CMI") filed its Answer on March 28, 2014. Lyon County filed its Answer on March 27,
22 2014. On June 10, 2014, Lyon County filed a Motion to Dismiss or in the alternative Motion
23 for Summary Judgment, requesting that the Court dismiss the first, second and fourth
24 causes of action. CMI filed a joinder in the Motion on June 13, 2014. CRA filed its
25 Opposition to the Motion on July 3, 2014. Lyon County filed its Reply on July 29, 2014.

26 This matter came before this Court for hearing on September 10, 2014. James R.
27 Cavilia, Esq., and Justin Townsend, Esq., Allison, MacKenzie, Pavlakis, Wright and Fagan,
28 Ltd., appeared representing CMI. John L. Marshall, Esq. appeared representing CRA.

1 Stephen B. Rye, Lyon County Chief Deputy District Attorney, appeared representing Lyon
2 County. The Court reviewed the pleading and all documents on file, the applicable law, and
3 considered the arguments of the parties.

4 On October 23, 2014, the Court held a hearing to issue the ruling on the pending
5 motions before the Court.

6 Good cause appearing, the Court makes the following findings and Order.

7 **Findings of Fact:**

- 8 1. Citizens have alternative methods to pursue some of the claims in the Complaint.
- 9 2. CRA filed a complaint under the Open Meeting Law alleging essentially: (1) that
10 the Board of County Commissioners held a meeting or deliberated outside of an
11 agendized meeting in violation of the Open Meeting law; and, (2) the agenda item
12 was not specific enough, and the Board took action that was not specified on the
13 agenda.
- 14 3. CRA alleges in the complaint that two commissioners met on January 1, 2014, in
15 violation of the Nevada Open Meeting law.
- 16 4. The Complaint does not contain allegations that more than two commissioners
17 met outside of an agendized meeting. CRA alleges in its Opposition that a third
18 commissioner met with a representative of the applicant and that representative
19 was present at the January 1, 2014 meeting.
- 20 5. The complaint and opposition do not include an allegation that supports or
21 establishes any serial meeting.
- 22 6. CRA filed a cause of action for violation of due process based on a conflict of
23 interest of two of the County Commissioners. The thrust of the CRA complaint is
24 that a Commissioner must recuse him or herself when a reasonable person would
25 perceive a conflict of interest.
- 26 7. CRA alleges that Commissioner Keller received compensation from CMI.
- 27 8. Commissioner Keller stated in the record that she consulted with the Nevada
28 Commission on Ethics and the Lyon County District Attorney.

9. Commissioner Keller disclosed on the record prior to her decision what her connections were with CMI.
10. No person or entity objected at the hearing to Commissioner Keller's participation in the hearing.
11. Representatives of CRA were present at the Planning Commission and County Commission public hearings on the CMI Applications.
12. CRA alleges that campaign contributions to certain board members rose to the level creating a conflict of interest, and that said members were required to recuse themselves from the decision.
13. CRA filed a cause of action alleging that Lyon County did not follow NRS 278.220 with respect to the CMI Applications.

Conclusions of Law:

1. A motion to dismiss a claim under NRCP 12(b)(5) tests the legal sufficiency of the claim set out against the moving party and such a motion should be granted if it appears beyond doubt that the plaintiff is entitled to no relief under any set of facts that could be proved in support of the claim. Washoe Medical Center, Inc. v. Reliance Insurance Co., 112 Nev. 494, 915 P.2d 288 (1996).
2. The Court must balance the rights granted citizens to challenge acts by the government with the rights of the governing body and rights of citizens who may or may not oppose the actions of the government.
3. The Board of County Commissioners' meetings are subject to the Nevada Open Meeting law.
4. The allegations in the Complaint together with the factual showing in CRA's opposition brief for a violation of the Nevada Open Meeting law are factually deficient to state claim under the Nevada Open Meeting law.
5. A meeting is defined as a gathering of a quorum of members of the public body to deliberate towards a decision. NRS 241.015(2). A quorum is defined as a simple majority of the members of the board. NRS 241.015(5).

- 1 6. The Nevada Open Meeting Law is not intended to inhibit all private discussions of
2 public issues. Dewey v. Redevelopment Agency of City of Reno, 119 Nev. 87, 94-
3 95, 64 P.3d 1070, 1075 (2003) (citing McKay v. Board of Cty. Comm'rs, 103 Nev.
4 490, 495-96, 746 P.2d 124, 127 (1987).
- 5 7. The Nevada OML prevents or prohibits collective deliberations or actions where a
6 quorum is present. The complaint alleges that only two County Commissioners
7 were present at the specific meeting held January 1, 2014, alleged to be the
8 violation.
- 9 8. Serial meetings are also prohibited under the Nevada OML if such serial meetings
10 constitute deliberations. In this case, the complaint and opposition brief do not
11 sufficiently allege a serial meeting or any serial deliberation. The facts alleged in
12 the complaint and opposition brief do not constitute a serial meeting as defined in
13 the Nevada Open Meeting Law or pursuant to the Nevada Supreme Court
14 decision of Del Papa v. Bd. of Regents, 114 Nev. 388, 956 P.2d 770 (1998).
- 15 9. The agenda items challenged by CRA for the January 2, 2014, County
16 Commissioner agenda are clear and complete in accordance with NRS 241.020.
- 17 10. The action of the Board of Commissioners did not exceed the scope of the clear
18 and complete agenda items. NRS 241.020(2)(c)(1) requires that discussion at a
19 public meeting cannot exceed the scope of a clearly and completely stated
20 agenda topic. Sandoval v. Bd. of Regents of Univ., 119 Nev. 148, 154, 67 P.3d
21 902, 905 (2003). The Board complied with the applicable provisions of Nevada
22 law with respect to the agenda topics.
- 23 11. CRA has not stated a claim under the Nevada Open Meeting Law.
- 24 12. The Commissioners made adequate disclosures related to CMI prior to
25 consideration of the agenda items and decision on the CMI Applications.
26 Therefore, the Commissioners were allowed to deliberate on the matter. See
27 NRS 281A.420(1).
28

- 1 13. A public official who properly discloses the items mentioned in NRS 281A.420(1)
2 is permitted to deliberate and vote on the matter in question unless the "judgment
3 of a reasonable person in the public officer's position would be materially affected
4 by" the disclosed item(s). NRS 281A.420(3).
- 5 14. A public official is presumed not to be materially affected by the gift, loan,
6 significant pecuniary interest, or commitment to another's interests if the benefit to
7 the public officer is not greater than that accruing to any other person affected by
8 the matter in question. NRS 281.420(4).
- 9 15. The complaint does not contain sufficient allegations to support a claim that there
10 was an actual or perceived conflict of interest requiring that any Board members
11 recuse themselves from the decision under the relevant standards set forth in
12 Nevada and federal law.
- 13 16. Nevada law does not require recusal based upon campaign contributions if they
14 are properly reported. See NRS 281A.420(2)(a); Nevada Attorney General
15 Opinion 1998-29.
- 16 17. CRA has not stated a claim for violation of due process in the Complaint in file
17 herein.
- 18 18. The Lyon County Commissioners have ultimate authority to make changes to the
19 master plan pursuant to NRS Chapter 278 and NRS 278.220. If the County
20 violates NRS 278.220, the statute provides a remedy. NRS 278.220 states quite
21 clearly that no change may be made.
- 22 19. NRS 278.220 carries its own remedy in that before that change can be made,
23 which the court understands that the Board of Commissioners has the ultimate
24 authority, it still requires a report by the Planning Commission. When the county
25 makes a change that change may or may not be beneficial and that's the reason
26 that the Planning Commission or why the statute states that the Planning
27 Commission must make a report. The Comstock Residents argue that the county
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1 put the cart before the horse. The Court agrees. The violation of NRS 278.220 is
2 not dismissed.

3 Based on the foregoing, and good cause appearing,

4 IT IS HEREBY ORDERED that the Motion to Dismiss with respect to the First Cause
5 of Action, Nevada Open Meeting Law Violation, is GRANTED, and the First Cause of Action
6 is DISMISSED with prejudice and without leave to amend.

7 IT IS FURTHER ORDERED that the Second Cause of Action, Due Process, is
8 GRANTED, and the Second Cause of Action is DISMISSED with prejudice and without
9 leave to amend.

10 IT IS FINALLY ORDERED that the Motion to Dismiss the Fourth Cause of Action,
11 NRS 278.220, is DENIED.

12 Dated this 2nd day of December, 2014.

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14 : 
15 DISTRICT JUDGE
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Case No. 14-CV-00128

Dept. No. Senior Judge

The undersigned hereby affirms this document does not contain a social security number.

FILED
2015 JUN 15 PM 2:57

TANYA SCORIE
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT


DEPUTY

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF LYON

COMSTOCK RESIDENTS ASSOCIATION,
GAYLE SHERMAN, JOE McCARTHY,

Plaintiffs/Petitioners,

vs.

LYON COUNTY BOARD OF
COMMISSIONERS; COMSTOCK MINING
INCORPORATED,

Defendants/Respondents,

NOTICE OF ENTRY OF ORDER

Please take notice that the Court entered its Order Denying Petition for Judicial Review on June 5, 2015. A copy of the Order is attached hereto.

DATED this 15th day of June, 2015.

STEPHEN B. RYE
DISTRICT ATTORNEY

By: 
STEPHEN B. RYE
DISTRICT ATTORNEY
31 South Main Street
Yerington, NV 89447
775-463-6511

Attorney for Respondent/Defendant
Lyon County Board of Commissioners


Certificate of Service

The undersigned, an employee of the Lyon County District Attorney, certifies that on the 15th day of June, 2015, a copy of the foregoing Notice of Entry of Order and Order was mailed, postage prepaid, by placing the same in the mail receptacle at Lyon County Administrative Offices, addressed to:

John L. Marshall, Esq.
570 Marsh Ave.
Reno, NV 89509

James R. Cavilia, Esq.
Allison, MacKenzie, Pavlakis
Wright & Fagan, Ltd.
402 N. Division Street
Carson City, NV 89703

Dated this 15th day of June, 2015.



Employee

1 Case No. 14-CV-00128

2 Dept. No. II

FILED
2015 JUN -5 PM 1:51

TANYA SCEIRNE
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

Tanya Sceirne DEPUTY

3
4
5
6 IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF LYON

8
9 COMSTOCK RESIDENTS ASSOCIATION,
GAYLE SHERMAN, JOE McCARTHY,

10 Plaintiffs/Petitioners,

11 vs.

12 LYON COUNTY BOARD OF
13 COMMISSIONERS; COMSTOCK MINING
INCORPORATED,

14 Defendants/Respondents,

15
16 **ORDER DENYING PETITION FOR JUDICIAL REVIEW**

17 Plaintiffs/Petitioners, Comstock Residents Association, Gayle Sherman, and Joe
18 McCarthy, (collectively "CRA") filed a Complaint for Injunctive and Declaratory
19 Relief/Petition for Judicial Review on January 31, 2014. The Complaint alleged four causes
20 of action: (1) Violations of Nevada Open Meeting Law; (2) denial of Due Process; (3) Abuse
21 of Discretion; and (4) Violation of NRS 278.220. Comstock Mining, Inc. ("CMI") filed its
22 Answer on March 28, 2014. Lyon County filed its Answer on March 27, 2014. On June 6,
23 2014, Lyon County submitted to the Court a Motion to Dismiss or in the alternative Motion
24 for Summary Judgment in which CMI joined, requesting that the Court dismiss the first,
25 second and fourth causes of action (the "Motion to Dismiss"). On December 3, 2014, the
26 Court issued an Order Granting in Part and Denying in Part the Motion to Dismiss and
27 dismissed the first and second causes of action. The Court further ordered the parties to
28

1 prepare and the parties did prepare a briefing schedule on the third and fourth causes of
2 action (collectively the "Petition for Judicial Review").

3 After being fully briefed, this matter came before the Court for hearing on April 20,
4 2015. James R. Cavilia, Esq., and Justin Townsend, Esq., of Allison MacKenzie, Ltd.,
5 appeared representing CMI. Stephen B. Rye, Lyon County District Attorney, appeared
6 representing Lyon County. John L. Marshall, Esq. appeared representing CRA. The Court
7 reviewed the pleadings and all documents on file, the applicable law, and considered the
8 arguments of the parties.

9 Good cause appearing, the Court makes the following Findings of Fact, Conclusions
10 of Law, and Orders.

11 **Findings of Fact:**

- 12 1. The entire record on appeal (the "Record") has been presented to the Court and
13 the Court has reviewed it in its entirety.
- 14 2. The Record contains testimony and evidence both in favor of and against CMI's
15 Application for a Master Plan Amendment and Zone Change (the "Application").
- 16 3. The Record reflects that there was presented to the governing body testimony
17 from the public, surveyors, engineers, land use planners, CRA members, CRA's
18 attorney, and environmental experts.
- 19 4. The Record further reflects that Lyon County considered the environmental
20 impacts and the compatibility of the requested changes to the surrounding area
21 and whether the changes were permitted under and consistent with the goals and
22 policies of the Lyon County Comprehensive Master Plan.
- 23 5. On December 10, 2013, the Lyon County Planning Commission considered CMI's
24 Application and voted to recommend that the Lyon County Board of
25 Commissioners deny the Application. Thereafter, Lyon County planning staff
26 prepared and delivered to the Board of Commissioners reports on the Planning
27 Commission's action with respect to the Application.

- 1 6. The Board of Commissioners considered CMI's Application on January 2, 2014
2 and, after a public hearing in which the testimony and evidence outlined above
3 were presented, deliberated and voted to approve a Master Plan Amendment and
4 Zone Change.
- 5 7. On January 30, 2015, the Board of Commissioners sent a letter to the Planning
6 Commission notifying the Planning Commission of its decision approving the
7 Application.
- 8 8. On February 11, 2014, the Planning Commission held a regularly-scheduled
9 meeting and considered the Board of Commissioners' decision on the Master
10 Plan Amendment and determined therein to prepare and send a report back to
11 the Board of Commissioners in which they expressed their concerns regarding the
12 Board's decision.
- 13 9. On March 6, 2014, the next available regularly-scheduled Board of
14 Commissioners meeting, the Board considered the Planning Commission's report
15 and voted unanimously to acknowledge receipt of the same.

16 **Conclusions of Law:**

- 17 1. It is well-settled law in Nevada that the Court is constrained in judicial review of
18 land use and zoning decisions to a review of the Record for abuse of discretion
19 and that the Court may not substitute its judgment for that of the Lyon County
20 Board of Commissioners absent a showing of manifest abuse of discretion.
21 McKenzie v. Shelly, 77 Nev. 237, 362 P.2d 268 (1961); City Council of Reno v.
22 Irvine, 102 Nev. 277, 721 P.2d 371 (1986).
- 23 2. The Lyon County Board of Commissioners' decision to approve the Application to
24 amend the master plan and zoning will not be overturned absent a showing that
25 said decision lacks support in the form of substantial evidence. Stratosphere
26 Gaming Corp. v. City of Las Vegas, 120 Nev. 523, 96 P.3d 756 (2004).
27 Substantial evidence is that which a reasonable mind could accept as sufficient to
28

1 support a conclusion. City of Reno v. Citizens for Cold Springs, 126 Nev. 27, 236
2 P.3d 10 (2010).

- 3 3. The Record contains substantial evidence, as noted in the Findings of Fact
4 above, which a reasonable mind could accept as sufficient to support the Board of
5 Commissioners' decision to amend the master plan and zoning.
- 6 4. The Board of Commissioners, in relying on the substantial evidence before it, did
7 not abuse its discretion in amending the master plan and zoning and, whether or
8 not the Court agrees with the Board's decision, the Court will not disturb the
9 decision of the Board of Commissioners.
- 10 5. NRS 278.220(4), which requires that the Board of Commissioners refer its
11 decision to amend the master plan to the Planning Commission for a report, is
12 ambiguous.
- 13 6. The Planning Commission was provided notice of the Board of Commissioners'
14 decision and reported back to the Board of Commissioners, and the Court
15 concludes that NRS 278.220(4) does not require the Board to vote again after
16 receipt of the Planning Commission's report.
- 17 7. The actions of the Board of Commissioners in reporting its decision to the
18 Planning Commission and subsequently accepting the Planning Commission's
19 report complied with NRS 278.220(4).

20 Based on the foregoing, and good cause appearing,

21 IT IS HEREBY ORDERED that the Petition for Judicial Review is DENIED in its
22 entirety.

23 IT IS FURTHER ORDERED that judgment is entered in favor of
24 Defendants/Respondents on the Third and Fourth Causes of Action.

25 Dated this 5th day of ^{June}~~May~~, 2015.

26 
27 _____
28 DISTRICT JUDGE

1 Case No. 14-CV-00128

2 Dept. No. Senior Judge

3 The undersigned hereby affirms this
4 document does not contain a social security
5 number.

FILED
2015 JUN 10 PM 2:01

TANYA SHERMAN
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT
Kathy Thomas DEPUTY

6
7 IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
8 IN AND FOR THE COUNTY OF LYON

9 COMSTOCK RESIDENTS ASSOCIATION,
10 GAYLE SHERMAN, JOE McCARTHY,

11 Plaintiffs/Petitioners,

12 vs.

13 LYON COUNTY BOARD OF
14 COMMISSIONERS; COMSTOCK MINING
15 INCORPORATED,

16 Defendants/Respondents,

17 **NOTICE OF ENTRY OF ORDER**

18 Please take notice that the Court entered its Order Granting in Part and Denying in Part
19 Plaintiffs' Motion to Augment Record on June 5, 2015. A copy of the Order is attached hereto.
20 DATED this 10 day of June, 2015.

21 ROBERT L. AUER
22 DISTRICT ATTORNEY

23 By: *Stephen B. Rye*
24 STEPHEN B. RYE
25 CHIEF DEPUTY DISTRICT ATTORNEY
26 31 South Main Street
27 Yerington, NV 89447
28 775-463-6511

Attorney for Respondent/Defendant
Lyon County Board of Commissioners

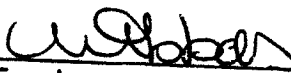
Certificate of Service

The undersigned, an employee of the Lyon County District Attorney, certifies that on the 10th day of June, 2015, a copy of the foregoing Notice of Entry of Order and Order was mailed, postage prepaid, by placing the same in the mail receptacle at Lyon County Administrative Offices, addressed to:

John L. Marshall, Esq.
570 Marsh Ave.
Reno, NV 89509

James R. Cavilia, Esq.
Allison, MacKenzie, Pavlakis
Wright & Fagan, Ltd.
402 N. Division Street
Carson City, NV 89703

Dated this 10th day of June, 2015.


Employee

1 Case No. 14-CV-00128

2 Dept. No. II

3 2015 JUN -5 PM 1:51

4 TANYA SCEIRINE
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT
5 Tanya Sceirine
DEPUTY

6 IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF LYON
8

9 COMSTOCK RESIDENTS ASSOCIATION,
GAYLE SHERMAN, JOE McCARTHY,

10 Plaintiffs/Petitioners,

11 vs.

12 LYON COUNTY BOARD OF
13 COMMISSIONERS; COMSTOCK MINING
INCORPORATED,

14 Defendants/Respondents,

15
16 **ORDER GRANTING IN PART AND DENYING IN PART**
17 **PLAINTIFFS' MOTION TO AUGMENT RECORD**

18 Plaintiffs/Petitioners, Comstock Residents Association, Gayle Sherman, and Joe
19 McCarthy, (collectively "CRA"), filed a Motion to Augment the Record on December 16,
20 2014. Defendant/Respondent, Lyon County, and Defendant/Respondent, Comstock
21 Mining, Inc. ("CMI"), jointly filed an Opposition to the Motion on January 2, 2015. CRA filed
22 Reply on January 9, 2015.

23 This matter came before the Court for hearing on April 20, 2015. James R. Cavilia,
24 Esq., and Justin Townsend, Esq., of Allison MacKenzie, Ltd., appeared representing CMI.
25 Stephen B. Rye, Lyon County District Attorney, appeared representing Lyon County. John
26 L. Marshall, Esq. appeared representing CRA. The Court reviewed the pleadings and all
27 documents on file, the applicable law, and considered the arguments of the parties.
28

1 Good cause appearing, the Court makes the following Findings of Fact, Conclusions
2 of Law, and Order.

3 **Findings of Fact:**

- 4 1. CRA seeks to augment the record on appeal (the "Record") by adding thereto the
5 entirety of the 2010 Lyon County Comprehensive Master Plan (the "Master Plan"),
6 certain emails between Plaintiff/Petitioner Gayle Sherman and Lyon County
7 Commissioner Vida Keller, and certain letters from John L. Marshall, Esq. to Lyon
8 County Commissioners Bob Hastings and Vida Keller.
- 9 2. CRA also requests that the Court take judicial notice of the official minutes of the
10 December 23, 2010 meeting of the Lyon County Board of Commissioners,
11 portions of election contribution reports for Lyon County Commissioners Bob
12 Hastings, Vida Keller, and Chuck Roberts, and a May 2, 2014 letter from the Lyon
13 County District Attorney's Office to John L. Marshall, Esq. concerning a public
14 records request.
- 15 3. Lyon County and CMI consented to the Court taking judicial notice of the entirety
16 of the Master Plan, although all relevant portions thereof are already included in
17 the Record. Lyon County and CMI also stipulated to the addition to the Record of
18 the emails between Plaintiff/Petitioner Gayle Sherman and Commissioner Keller
19 and the letters from John L. Marshall, Esq. to Commissioners Hastings and Keller.

20 **Conclusions of Law:**

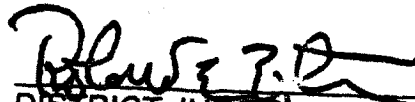
- 21 1. In judicial review of land use and zoning matters, all that the Court may consider
22 is the evidence that was available and presented to the governing body when the
23 final decision was made. City of Reno v. Citizens for Cold Springs, 126 Nev. 27,
24 236 P.3d 10 (2010); NRS 233B.135(1)(b).
- 25 2. Except for those items to which Lyon County and CMI have consented, the items
26 CRA seeks to have added to the Record were not part of the Record before the
27 governing body and may not be considered by the Court in this action.
- 28 ///

1 Based on the foregoing, and good cause appearing,

2 IT IS HEREBY ORDERED that the Motion is GRANTED as to those items to which
3 Lyon County and CMI specifically stipulated, which are (a) that the Court take judicial notice
4 of the entirety of the Master Plan, which is included as Exhibit A to CRA's Motion; (b) that
5 the Record is augmented to include the emails between Plaintiff/Petitioner Gayle Sherman
6 and Commissioner Keller, which are included as Exhibit D to CRA's Motion; and (c) the
7 letters from John L. Marshall, Esq. to Commissioners Hastings and Keller, which are
8 included as Exhibit F to CRA's Motion.

9 IT IS FURTHER ORDERED that the remaining portions of the Motion are DENIED.

10 Dated this 5th ^{June} day of May, 2015.

11
12 
13 DISTRICT JUDGE

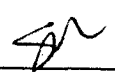
Office of the District Attorney
Lyon County, State of Nevada
801 Overland Loop, Suite 308, Dayton, Nevada 89403 · 31 South Main Street, Yerington, Nevada 89447 · 565 East Main Street, Fernley, Nevada

Case No. 14-CV-00128

Dept. No. Senior Judge

2014 DEC -8 PM 4:23

The undersigned hereby affirms this document does not contain a social security number.



COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT
Andrea Anderson

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF LYON

COMSTOCK RESIDENTS ASSOCIATION,
GAYLE SHERMAN, JOE MCCARTHY,

Plaintiffs/Petitioners,

vs.

LYON COUNTY BOARD OF
COMMISSIONERS; COMSTOCK MINING
INCORPORATED,

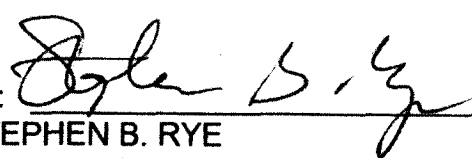
Defendants/Respondents,

NOTICE OF ENTRY OF ORDER

Please take notice that the Court entered its Order Granting in Part and Denying in Part Motion to Dismiss on December 3, 2014. A copy of the Order is attached hereto.

DATED this 5 day of December, 2014.

ROBERT L. AUER
DISTRICT ATTORNEY

By: 
STEPHEN B. RYE
CHIEF DEPUTY DISTRICT ATTORNEY
31 South Main Street
Yerington, NV 89447
775-463-6511

Attorney for Respondent/Defendant
Lyon County Board of Commissioners

Office of the District Attorney
Lyon County, State of Nevada
801 Overland Loop, Suite 308, Dayton, Nevada 89403 · 31 South Main Street, Yerington, Nevada 89447 · 565 East Main Street, Fernley, Nevada

Certificate of Service

The undersigned, an employee of the Lyon County District Attorney, certifies that on the 5th day of December, 2014, a copy of the foregoing Notice of Entry of Order and Order was mailed, postage prepaid, by placing the same in the mail receptacle at Lyon County Administrative Offices, addressed to:

John L. Marshall, Esq.
570 Marsh Ave.
Reno, NV 89509

James R. Cavilia, Esq.
Allison, MacKenzie, Pavlakis
Wright & Fagan, Ltd.
402 N. Division Street
Carson City, NV 89703

Dated this 5th day of December, 2014.



Employee

Case Summary

COMSTOCK RESIDENTS ASSOCIATION, GAYLE SHERMAN, JOE MCCARTHY, LYON COUNTY BOARD OF COMMISSIONERS, COMSTOCK MINING, INC - COMPLAINT

Court: 14-CV-00128

Agency: Third Judicial District Court

Type: Other Real Property Case

CaseID: 14-157

Status: Closed

Received Date: 1/31/2014

Status Date: 6/5/2015

Age: 529 days Active Age: 490 days

Involvements

Primary Involvements

COMSTOCK RESIDENTS ASSOCIATION Plaintiff

SHERMAN, GAYLE Plaintiff

MCCARTHY, JOE Plaintiff

LYON COUNTY BOARD OF COMMISSIONERS Defendant

COMSTOCK MINING, INC Defendant

Other Involvements

Cavilia, James R. Esq. Defendant's Attorney

Marshall, John Esq. Plaintiff's Attorney

Third Judicial District Court (14-CV-00128)

Estes, Honorable Robert Judge

Other Real Property Case

1. NRCP 3 - COMPLAINT Occurred: 1/31/2014

COMSTOCK RESIDENTS ASSOCIATION Plaintiff

Disposition: Summary Judgment Dispo Date: 6/5/2015

COMSTOCK MINING, INC Defendant

Disposition: Summary Judgment Dispo Date: 6/5/2015

Lead/Active: True

Case Status History

1/31/2014 1:47:00 PM | Open

6/5/2015 1:47:00 PM | Closed

Case Summary

Events

8/4/2014 9:00:00 AM | Status Hearing | Judge Estes | Court Room A

Sceirine, Tanya K - TSCEIRINE

Staff - STAFF

Rye, Stephen B. D.A. - X004800

Marshall, John Esq. (Plaintiff's Attorney)

Estes, Honorable Robert (Judge)

Cavilia, James R. Esq. (Defendant's Attorney)

Notes: Court and counsel met in chambers...no clerk involvement.

9/10/2014 9:00:00 AM | Motion Hearing | Judge Estes | Court Room B

Sceirine, Tanya K - TSCEIRINE

Thomas, Kathy Dep. Clerk - KTHOMAS

Staff - STAFF

Court Room B - CourtRmB

Rye, Stephen B. D.A. - X004800

Marshall, John Esq. (Plaintiff's Attorney)

Estes, Honorable Robert (Judge)

Cavilia, James R. Esq. (Defendant's Attorney)

Notes: Court heard argument on motion to dismiss and motion to amend complaint from Mr. Rye, Mr. Marshall and Mr. Cavilia. Court took matter under advisement and will render a written decision. Hearing was JAVS recorded

10/23/2014 10:00:00 AM | Motion Hearing | Judge Estes | Court Room A

Sceirine, Tanya K - TSCEIRINE

Geurts, Patrick

Staff - STAFF

Court Room A - CourtRmA

Marshall, John Esq. (Plaintiff's Attorney)

Estes, Honorable Robert (Judge)

Cavilia, James R. Esq. (Defendant's Attorney)

Notes: Judge Estes Courtroom A

4/20/2015 1:30:00 PM | Motion Hearing | CRTM A DEPT 4 | Court Room A

Sceirine, Tanya K - TSCEIRINE

Staff - STAFF

Court Room A - CourtRmA

Rye, Stephen B. D.A. - X004800

Geurts, Patrick Bailiff - X004896

Marshall, John Esq. (Plaintiff's Attorney)

Estes, Honorable Robert (Judge)

Cavilia, James R. Esq. (Defendant's Attorney)

Notes: Court had considered the motion to enlarge record and based upon the stipulation of the parties allowed the enlargement of that information but denied any other enlargement of the record. Court heard oral argument by Mr. Marshall and Mr. Rye. Court advised parties that the Court is constrained to only the evidence presented to the governing body and when considering abuse discretion it can only consider submitted evidence supporting the governing bodies finding. Court found no compelling reason for the commissioners to take a second vote and that they had heard from over 26 witnesses. Court found substantial evidence to support the conclusion of the change in zoning and the master plan. Mr. Rye will prepare the order.

CASE NO: 14-CV-00128

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF LYON

**COMSTOCK RESIDENTS ASSOCIATION
GAYLE SHERMAN, JOE McCARTHY,
Appellants**

vs

CERTIFICATE

**LYON COUNTY BOARD OF
COMMISSIONERS; COMSTOCK
MINING INCORPORATED,
Respondents**

I, TANYA SCEIRINE, Clerk of the Third Judicial District Court of the State of Nevada, in and for the County of Lyon, State of Nevada, hereby certify that the foregoing **Notice of Appeal, Case Appeal Statement, District Court Docket, Order Denying Petition for Judicial Review, Order Granting in Part and Denying in Part Plaintiffs' Motion to Augment Record, Order Granting in Part and Denying in Part Motion to Dismiss, Notice of Entry of Order (Order Denying Petition for Judicial Review), Notice of Entry of Order (Order Granting in Part and Denying in Part Plaintiffs' Motion to Augment Record), Notice of Entry of Order (Order Granting in Part and Denying in Part Motion to Dismiss) and District Court Minutes** are true and correct copies of the documents on file in my office regarding the case referenced above.

WITNESS my hand and Seal of said Court on this 15th
day of July, 2015.

TANYA SCEIRINE, Court Administrator

By Andrea Andersen Deputy