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11
12 IN THE SUPREME COURT OF THE STATE OF NEVADA

13 COMSTOCK RESIDENTS ASSOCIATION,
14 JOE McCARTHY

15 Appellants,

No. 68433
District Court Case No. 14-CV-
00128

16 v.

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

20 Respondents,
21 _____/

22
23
24 APPELLANTS COMSTOCK RESIDENTS ASSOCIATION

25 AND JOE McCARTHY'S OPENING BRIEF
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1 **RULE 26.1 DISCLOSURE**

2 The undersigned counsel of record certifies that the following persons and
3 entities as described in NRAP 26.1(a), and must be disclosed. These
4 representations are made in order that the justices may evaluate possible
5 disqualification of recusal.
6

7
8 No such entities exist. Appellants Comstock Residents Association and Joe
9 McCarthy are represented by John L. Marshall.

10 Dated: December 8, 2015.
11

12 By _____
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I. JURISDICTIONAL STATEMENT

Nevada Rule of Appellate Procedure 3A(b)(1) grants the Supreme Court jurisdiction over this appeal. On June 5, 2015, the District Court issued its Order Denying Judicial Review (“Merits Order”). Joint Appendix (“JA”) 28:3937. The Merits Order was entered on June 15, 2015. JA 28:3949. On December 5, 2014, the District Court dismissed two of Appellants’ Comstock Residents Association and Joe McCarthy’s (collectively “CRA”) claims for violation of the Open Meeting Law and Due Process. JA 28:3766. The District Court’s Order Granting in Part and Denying In Part Motion to Dismiss was entered on the same day. JA 28:3777. The District Court’s June 5, 2015 Order Granting in Part and Denying in Part Plaintiffs’ Motion to Augment Record was entered on June 10, 2015. JA 28:3944. The District Court’s Merits Order constitutes a final order as it disposed entirely of the remaining issues raised in this case. Appellants timely filed this appeal on July 24, 2015. JA 28:3955.

II. STATEMENT OF ISSUES

A. A complete record of proceedings is required to facilitate judicial review of government action. Did Respondent Lyon County Board of Commissioners (“Lyon County”) fail to provide a complete record when it allowed individual Lyon County Commissioners to unilaterally exclude otherwise relevant public documents from the official record? Did the District Court err in not

1 admitting as evidence official government documents demonstrating the
2 incompleteness of the official record?

3
4 B. For decades, Lyon County consistently applied and strengthened
5 policies in its Master Plan separating incompatible mining uses from residential
6 uses in Silver City, Nevada. Were Lyon County’s boilerplate findings –
7 overturning its own Planning Commission and professional planning staff
8 recommendations – allowing mining uses within Silver City supported by law and
9 substantial evidence where the Commissioners:
10

- 11 1. demonstrated no changed circumstances justifying the radical
12 reversal of longstanding land use policy;
13
- 14 2. provided no explanation for the patent inconsistency with
15 multiple existing Master Plan policies; and,
16
- 17 3. expressly refused to consider the adverse effects of “special uses”
18 (such as mining) and only considered “allowed uses” when changing the applicable
19 land use designations and zoning where the sole purpose of the change was to
20 allow mining?
21

22 C. Nevada Revised Statutes Section 278.220(4) mandates “**No** change in
23 or addition to the master plan or any part thereof, as adopted by the planning
24 commission, may be made by the governing body in adopting the same **until** the
25 proposed change or addition has been referred to the planning commission for a
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1 report thereon and an attested copy of the report has been filed with the governing
2 body.” (Emphasis added.) Did Lyon County violate NRS 278.220(4) when it
3 “referred” its Master Plan change to its Planning Commission days **after** it took
4 unconditional final action approving the modification?
5

6 D. Did the District Court improperly dismiss without leave to amend
7 Appellants’ claim under the Open Meeting Law where evidence indicated that a
8 majority of the Lyon County Commission communicated serially with each other
9 in the days just before the noticed meeting to reach a mutually acceptable new
10 proposal not described in the meeting agenda?
11
12

13 E. Did the District Court improperly dismiss without leave to amend
14 Appellants’ claim that their Due Process rights were violated by individual
15 Commissioners’ participation in this land use decision where applicant-Respondent
16 CMI funded their election campaigns and employed Commissioner spouses and
17 close friends?
18
19

20 **III. STATEMENT OF THE CASE**

21 This is an appeal from an order denying judicial review of Lyon County’s
22 decision to reverse longstanding master plan and zoning designations to allow
23 mining and other industrial uses within the Silver City town boundaries and related
24 orders. CRA also appeals the District Court’s earlier order dismissing CRA’s
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1 claims for violations of the Open Meeting Law and due process. Third Judicial
2 District Court, Lyon County, Hon. Robert Estes, Senior District Judge.

3 4 **IV. ROUTING STATEMENT**

5 Appellant CRA respectfully submits that this appeal is appropriate for
6 resolution in the Supreme Court. As an appeal arising from litigation over land use
7 decision by a local government with claims under NRS Chapters 278 and 241 and
8 the U.S. and Nevada Due Process Clauses, this action does not fall within any of
9 the presumptive
10 categories of NRAP 17(a)(1)-(12) or 17(b)(1)-(10). Because Lyon County is not
11 an administrative agency (see e.g., NRS 233B.031 defining “agency” for purposes
12 of the Nevada Administrative Procedure Act, as a constituent part of the
13 “Executive Department of the State Government”), the “administrative agency
14 appeals” provisions of NRS 17(a)(9) and 17(b)(4) do not on their face apply to this
15 appeal.
16

17 This appeal does raise a constitutional question of first impression under
18 *Caperton v. Massey Coal Company*, 556 U.S. 868, 872 (2009) and *Ivey v. Eighth*
19 *Judicial District*, __ Nev. __, 299 P.3d 354 (2013), whether a claim may be stated
20 for violation of state and federal due process guarantees to affected property
21 owners where sitting County Commissioners fail to recuse themselves after
22 receiving overwhelming campaign contributions and spousal employment by the
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1 mining company land use applicant. NRAP 17(a)(13). In addition, this appeal
2 raises statewide issues of public importance under NRAP 17(a)(14) because it
3 addresses (1) the conditions under which a local government may reverse
4 repeatedly re-enforced longstanding land use policy, (2) whether the procedural
5 requirements of NRS 278.220(4) may be avoided, and (3) whether the Nevada
6 Open Meeting Law was violated through improper serial meetings and
7 introduction of a last-minute, unagendized substitute proposal. The Supreme
8 Court’s decision in this case will provide guidance to local governments on issues
9 directly affecting many Nevada citizens. As a result, Appellant CRA submits that
10 this appeal should be presumptively assigned to the Supreme Court under NRAP
11 17(a)(13) and (14).
12
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14
15

16 **V. BACKGROUND**

17 The Comstock Historic Mining District (“CHD”) represents a truly unique
18 piece of Nevada and national cultural history. Recognizing its critical cultural
19 value to the citizens of Nevada and the Nation, the United States first designated
20 the Virginia City Historic District as a National Historic Landmark on July 4,
21 1961. JA 4:0787. In 1971, the Nevada Legislature enacted Chapter 384 of the
22 Nevada Revised Statutes to create the Virginia City Historic District (subsequently
23 renamed the CHD). JA:0862, 0864. The Comstock Historic District Act, NRS
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1 384.010 to 384.210, is the only Comstock-specific legislation designed to protect
2 this amazing site of Nevada and national heritage.

3
4 In the Comstock Historic District Act, the Nevada Legislature decreed that it
5 is “the public policy of the State of Nevada to promote the educational, cultural,
6 economic and general welfare and safety of the public through the preservation and
7 protection of the structures, sites and areas of historic interest and scenic beauty”
8 of the CHD. NRS 384.020.

9
10 Unfortunately, new mining activities have degraded the CHD and threaten its
11 destruction. “The Virginia City Historic Landmark District is endangered because
12 of previous open pit mining which has limited the visual integrity of the District
13 and which destroyed and continues to threaten contributing cultural resources
14 within the District.” JA 6:0787.

15
16
17 Silver City, nestled in the Comstock, has slowly developed over the last 40
18 years into a tightknit community proud of its mining heritage and bent on
19 preserving the state and national historic monument status. Over that same time
20 period, Lyon County separated the town from incompatible industrial uses through
21 adoption of increasingly protective Master Plan policies and zoning and rejection
22 of specific efforts to alter them.

23
24
25 After unprecedented efforts by a new land owner, Comstock Mining, Inc., to
26 alter the make-up and influence the Lyon County Commission, the Commission
27

1 overturned its own Planning Commission and professional planning staff, and
2 granted Comstock Mining’s request to change the master plan designation and
3 zoning on January 2, 2014 to allow mining uses on CMI property within the Silver
4 City townsite.
5

6 **A. History of Increasing Protection for Silver City from Incompatible**
7 **Uses in County Master Plans and Actions**

8 In 1971, Lyon County enacted its first master plan and related zoning. It
9 planned and zoned Silver City like all the other towns in the county: urban
10 appropriate uses and densities within the town and rural uses and densities outside
11 of town. The 1971 Plan identified Silver City as an “urbanizing area” surrounded
12 by residential lands and open space. The zoning ordinances that followed placed
13 virtually all of the townsite in First Non-rural Residential (NR-1), with a narrow
14 strip of commercial and light industrial along Main Street. The NR-1 zoning
15 allowed for homes, associated buildings, parks, recreation areas and cottage
16 businesses. One of the principal objectives of this residential zoning was to protect
17 the quality of life and property values within in the Silver City townsite.
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22 The goals and policies section of the 1971 General Plan emphasized the
23 importance of Lyon County’s residential communities and especially the historic
24 resources located within. The Plan’s language clearly valued open space land as
25 “one of the most important uses” critical to preserving recreation resources,
26 residential stability, sustainable growth, and the area’s precious historic and
27

1 cultural significance. The 1971 Plan also emphasized that industrial development
2 should be prohibited if it would change the natural features or reduced the primary
3 importance of Lyon County communities. In support of that directive, the 1971
4 Plan identified Silver City as a significant, recreational, historical and cultural
5 attraction with an emerging, prosperous residential community. JA 6:0752-753.
6

7
8 In 1986, Nevex Mining Company (“Nevex”) applied to Lyon County to
9 change the land use and zoning designations for property within Silver City from
10 more urban residential densities to more rural densities so as to allow mining
11 within the town. The Lyon County Commission denied Nevex’s proposed land use
12 and zone changes specifically finding that Nevex’s application for more rural uses
13 and densities violated its Master Plan and was otherwise inappropriate. The land
14 use changes Nevex sought in 1986 are identical to the changes sought by CMI in
15 2014. See generally JA 6:0877-938.
16

17
18 In its 1986 findings, the County adopted a comprehensive list of “findings of
19 fact” supporting the denial, including that, “[t]he proposed rezoning violates the
20 following expressed goals of the county’s master plan: To manage natural
21 resources in a beneficial way; To improve neighborhood stability and increase
22 property values by preventing incompatible and disruptive land use.” JA 6:0937-
23 938. Other specific findings the County made in 1986 include:
24
25

26 In reference to requirements for zoning established by NRS
27 Section 278 and 250, we find (A) that the Nevex rezoning
28

request does not comply with the Lyon County Master Plan. (B) The proposed rezoning does not promote the conservation of open space or protect the natural and scenic resources from unreasonable impairment. (C) The proposed rezoning would have both a long-term adverse financial impact to Silver City and the Comstock National Historic Landmark. (D) The proposed rezoning does not promote the health and general welfare of the Silver City area. (E) The proposed rezoning is not compatible with the Silver City area and does not encourage the most appropriate use of land in the Silver City Townsite.

There is no land in the Silver City Town site zoned RR-5, and the present zoning is predominantly residential in nature.

The proposed rezoning would significantly harm the integrity of the Comstock Historic District and the National Landmark District.

The proposed rezoning violates the following expressed goals: (A) To manage national resources in a beneficial way. (B) to improve neighborhood stability and increase property values by preventing incompatible and disruptive land uses.

Id.

In 1990, Lyon County affirmed its 1986 decision when it adopted a new Master Plan and maintained the same urban/rural land use designations for Silver City. Specifically, Lyon County approved two goals for Silver City in the 1990 Master Plan:

Goal #1 – To maintain, promote, and secure the historic character of the community and to prevent the destruction or degradation of the historic character. Objective: Lyon County should support the Comstock Historic District Commission in its legislative mission.

1 Goal #2 – Lyon County should review all new development
2 proposals with the intent to protect the riparian ecology
3 associated with Gold Canyon and American Ravine [both within
4 Silver City], with the intent of protecting water quality,
5 minimizing flooding, erosion and sedimentation, and preserving
6 natural drainage, habitat, and aesthetic functions.

7 JA 6:0754-755.

8 About a decade later Lyon County again examined the appropriate land use
9 designations for Silver City and its environs and reaffirmed the existing
10 designations. In the 2002 West Central Lyon County Land Use Plan, the County
11 designated Silver City as appropriate for urban uses and densities, not mining. The
12 2002 West Central Plan concluded that Silver City has the potential for continued
13 limited growth with only half of the potential home sites developed. The 2002
14 Plan set gradual residential and commercial growth for Silver City while
15 maintaining the community’s historical integrity.

16 In the 2002 Plan, the County adopted multiple additional specific goals for
17 Silver City. These goals articulated the future direction and reaffirmed earlier
18 policies:

19 **To limit earth disturbance or above-ground mining activities**
20 **that create visual scarring or that disrupt the fabric of the**
21 **community.** “Lyon County shall establish a land use policy that
22 minimizes the impact of mining and other significant earth-
23 disturbing activities that degrade quality of life.

24 **To recognize, enhance, and protect the unique character of**
25 **Silver City.** Among the actions set forth to implement this Goal
26 was “to maintain that scale and primary residential character by
27

1 retaining the existing Master Plan designation and zoning
2 categories.”

3 **To preserve the scale of the community by architectural**
4 **review that is sensitive to how new structures fit into the**
5 **existing fabric.** Among the actions set forth to implement this
6 Goal was “to preserve the existing pedestrian character by
7 maintaining alleys, soft paving approaches, and relatively
8 narrow streets.”

9 **To promote the revitalization of the commercial corridor by**
10 **promoting reinvestment.**

11 **To preserve and strengthen the existing infrastructure, i.e.,**
12 **water, roadways, drainage, and public facilities.** Among the
13 actions set forth to implement this Goal was “Lyon County shall
14 provide an infrastructure inventory and deficiency evaluation
15 and report. Lyon County shall provide a long term if modest
16 capital improvement commitment (i.e., 20 years) that
17 methodically addresses these deficiencies.” Also included was
18 an action “to implement and actively oversee the ‘dark sky’
19 ordinance.”

20 **To focus on encouraging tourist-oriented historic activities**
21 **that do not degrade the quality of life central to Silver City’s**
22 **uniqueness.** Among the actions set forth to implement this Goal
23 was “to actively support the efforts of residents to preserve and
24 improve their property.”

25 JA 6:0756-757.

26 Some eight years after the County adopted the 2002 Plan, the County again
27 specifically considered the appropriate land uses for Silver City and reaffirmed its
28 prior decisions for the fifth time. In December 2010, Lyon County adopted a fully
vetted County-wide Comprehensive Master Plan (2010 CMP). See generally JA
6:0757-763.

1 During the development of the 2010 Comprehensive Master Plan, numerous
2 public hearings and community workshops were held throughout Lyon County.
3
4 The community workshops concentrated on developing the county-wide land use
5 map as well as the language to be included in the text. Development of the 2010
6 Comprehensive Master Plan was a standing item on Lyon County Planning
7 Commission meetings from September of 2005 to its adoption in late 2010. *Id.*

8
9 The 2010 Comprehensive Master Plan was a,
10
11 culmination of four years of dialogue and analysis that has
12 included a wide array of participants including the Board of
13 Commissioners, the Planning Commission, community advisory
14 councils, County staff and the community at large. A series of
15 community meetings, open house events and workshops were
16 held throughout the county to obtain citizen input and
17 recommendations, including eight meetings on issues
18 identification in March 2007, eight community meetings and
19 two joint Planning Commission/Board of Commissioners
20 sessions on community vision in April and September 2007, six
21 meetings in November 2008 in goals and policies, fourteen
22 meetings in January, April and May 2009 on land use maps, six
23 meetings in July 2009 on land use goals and policies, and finally
24 eleven sessions in October 2009 and March 2010 on the overall
25 County-wide Comprehensive Plan.

26
27 JA 6:0757 (2010 CMP at 1.10-1.11).

28 The 2010 CMP “represents a future vision of Lyon County along with
recommendations for achieving that vision. The ideas of the Plan are a distillation
of the community's many desires, tempered by what seems necessary, feasible, and
reasonable.” The 2010 Comprehensive Master Plan is organized in two tiers: a

1 County-wide Component and more specific Community Plans. The County-wide
2 Component of the 2010 CMP provides for the overall foundation and framework
3 for directing the County's future growth and development. The County-wide
4 Component is the umbrella document that applies to all of the unincorporated area
5 of Lyon County. It represents the overall vision, goals and policy direction,
6 generalized land use patterns for the entire County, and the land use designations
7 for lands outside of defined communities. The County-wide Component provides
8 guidance for the preparation of the more specific Community Plans. JA 6:0757-
9 763.

13 The Community Plan tier of the 2010 Comprehensive Master Plan presents
14 the specific vision, goals and policy direction, and land use pattern for each
15 identified community as determined through the community planning process.
16 Community Plans are to be designated for existing established communities.
17 These maps provide detailed views of the community's desired growth and
18 development for the future taking into consideration each community's unique
19 character, opportunities and constraints. The County will work with each
20 community to complete Community Plans, including Community Land Use Plans.
21 *Id.*

1 The 2010 CMP contains policies and goals that are County-wide in nature as
2 well as specific to its eight diverse communities, including Silver City. The
3 following excerpts from the Master Plan are relevant to CMI's 2013 Application.
4

5 Policy LU 1.1: "Follow development patterns as established on
6 Countywide Land Use Plan or a more specific Community Plan.
7 The Community Plan envisioned for Silver City has not yet been
8 initiated by Lyon County."

9 Policy LU 1.4: "Locate industrial development as designated on
10 County-wide Land Use Plan or determined by criteria.
11 Industrial uses, including extractive industries, will occur in
12 areas that are designated on the County-wide Land Use Plan.
13 **New industrial uses should only be located in areas that do
14 not adversely impact existing residential settlements."**

15 Policy CC 1.3: "Design Tailored to Communities. New
16 development in Lyon County should address and respect the
17 unique character of communities within the county. Strategies:
18 develop Community Plans to identify typical or desirable design
19 elements that maintain or promote the community's desired
20 image. Adopt County-wide standards that allow the flexibility to
21 address specific design needs for individual communities in
22 Lyon County."

23 JA 6:0758-759.

24 In Silver City, this means maintaining the historic character of development
25 in the Town Site, continuing the architectural standards within the Comstock
26 Historic District, retaining or restoring existing historic structures, and limiting
27 new development to those proposals that fit with the historic image of Silver City.
28

Goal CC-3: Heritage (under Community Character and Design,
Chapter 5). "Historic places, structures, and landmarks in the

1 county will be preserved and will provide an opportunity for
2 residents and visitors to learn about and celebrate our heritage.”

3 Policy CC-3.1: “Maintain and restore historic resources. Lyon
4 County will encourage and support efforts to preserve and
5 restore registered historic structures, and landmarks, and
6 districts. Strategies: Revise zoning to encourage historic use and
7 development patterns including mixed-use structures and
8 districts. Within historic districts, promote historic design
9 elements, features, and context, and prohibit building design that
10 compromises the integrity of the historic community character.
11 **Within historic districts, limit new land uses that would pose
12 a risk to historic structures or the historic character of the
13 district. Promote the preservation of historic landscape
14 features to maintain historic settings and the integrity of
15 historic resources within historic districts.”**

16 Goal NR 9: Mining and Resource Extraction (under Natural
17 Resources and Environment, Chapter 6). Lyon County will
18 promote the continued development of mineral and aggregate
19 resources while **working to prevent and reduce conflict
20 between mining and other resource extraction activities and
21 residential, commercial and industrial development.**

22 Goal CP-1: Support Diversity. “Lyon County will celebrate and
23 support the diversity of character among communities in the
24 county.”

25 Policy CP-1.1: “Recognize Diversity of Communities. Lyon
26 County planning efforts and regulations will consider the unique
27 aspects of communities in the county, and will allow for
28 variation and exceptions to address key aspects of their
diversity.”

Goal CP-3: Community Plans. “**Lyon County will support
community-based planning efforts that elaborate
community-specific goals that are developed with strong
public consensus.**”

JA 6:0758-760 (emphasis added).

1 The communities within the Comstock Historic District, including Silver City,
2 are the oldest in Lyon County, representing a unique aspect of historic
3 development within the County. The 2010 Comprehensive Master Plan establishes
4 the entire area within the Silver City Community Boundary as an Historic
5 Character District, defined as follows: “Historic Districts include those areas in and
6 around lands included in the Comstock Historic District and Silver City or other
7 future historic designations to preserve existing historic character or to promote
8 ‘historic’ architectural design elements. Tools might include mixed-use, design
9 guidelines and conservation easements.” The lands within the Community
10 Boundary for Silver City will also be the subject of a Community Plan for Silver
11 City. The lands owned by CMI that are proposed for the Master Plan Amendment
12 and Zoning Map Change are all included within the Community Boundary.
13 Therefore, all of the Comstock Mining lands included in its application are within
14 the Historic Character District. JA 6:0760-761.
15
16

17 In addition to the Character Districts, the Land Use Plan Map for Silver City
18 establishes Land Use Categories. In keeping with the historical pattern of planning
19 and zoning for Silver City, the lands proposed for Master Plan Amendment and
20 Zoning Map Change are generally divided between a Suburban Residential
21 designation within the Town Site boundary, and a Resource designation outside
22 that boundary. JA 6:0761. The 2010 Comprehensive Master Plan states “Silver
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1 City has a strong sense of identity and prides itself on its cohesive small town
2 atmosphere. The community treasures its historic buildings and landscape
3 features, as evidenced by the preservation and rehabilitation of many original
4 structures. New construction is regulated for exterior architectural features by the
5 Comstock Historic District Commission.” *Id.* It is anticipated that the Community
6 Plan process will begin soon for Silver City, which is identified as one of eight
7 existing, established communities in Lyon County for which a Community Plan is
8 required under the Comprehensive Master Plan. JA 6:0760.

11
12 Over the years, Nevada citizens, including CRA members, purchased/and or
13 invested in property and businesses within and around Silver City as a result of,
14 and in reliance on, these repeated public, deliberate and consistent land use
15 decisions. JA 6:0798-801, 3:0403-404 (Rob Reno); 3:405-406 (Chris and Bonnie
16 Brown); 4:0600-601 (Quest Lakes); 4:0604-0605 (Robert Elston); 4:0606-609
17 (Theo McCormick).

18
19
20 **B. CMI’s Mining Activities in the Comstock**

21 As suggested by its eponymous name, CMI is a mining company. It exists to
22 mine for gold and silver in the Comstock. For example, CMI actively mines the
23 open Lucerne Pit adjacent to Silver City in Storey County. The Lucerne Pit, a
24 huge open hole adjacent to State Route 342, in lower Gold Hill near Devil’s Gate,
25
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27

1 causes multiple adverse impacts to the residents of Silver City. See generally JA
2 3:0461-463, 0468-469.

3
4 To facilitate mining of its holdings in Lyon County, CMI proposed
5 amendments to the draft 2010 CMP prior to its adoption. JA 5:0650-653. The
6 Lyon County Commissioners, including two holdover members, unanimously
7 rejected CMI's request to redesignate the lands and allow mining and again
8 affirmed the longstanding use designations for Silver City and adopted the 2010
9 CMP as developed through the intensive community process. JA 28:3818-3819.
10

11
12 **C. Advent of CMI's Unprecedented Money Influence in the Comstock**

13 After the Lyon County Commission had rejected its request to allow mining
14 uses in Silver City in 2010, CMI sought to remake the Commission through
15 elections and influence. When the Lyon County Commission adopted the 2010
16 Master Plan and rejected CMI's reclassification request, the Commission consisted
17 of Chairman Joe Mortenson, Vice-chair Chuck Roberts, and Commissioners
18 Phyliss Hunewill, Ray Fierro and Larry McPherson. Vice-chair Chuck Roberts
19 represented District I, which includes Silver City. See JA 1:0018. Commissioner
20 Roberts made clear that he favored maintaining the longstanding land use
21 designations in Silver City. In 2011, Vida Keller replaced Commissioner Larry
22 McPherson. *Id.*
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1 In order to gain the vote of the District I Commissioner, CMI needed to
2 replace Commissioner Roberts, who came up for reelection in 2012. In that
3 election, CMI threw unprecedented cash support behind Bob Hastings, the
4 challenger to Commissioner Roberts. CMI and its related companies contributed
5 \$17,500 in cash to Bob Hastings to insure his election. CMI's cash contributions
6 were approximately 60 percent of Mr. Hastings' cash contributions that year. JA
7 1:0018-19.

10 According to Nevada Secretary of State records, CMI's cash contribution to
11 Bob Hastings dwarfed all prior contributions to any candidate from a single
12 interest by 350 percent. The CMI cash contribution to Bob Hastings was more
13 than any other Lyon County BOC candidate has ever raised in **total** contributions
14 (cash and in-kind) in any other BOC election. The average Lyon County BOC
15 candidate since 2008 has raised \$7,379 in these other races according to reports
16 posted by the Nevada Secretary of State. CMI's \$17,500 contribution more than
17 doubled this average campaign fund raising. *Id.* In the November 2012 election,
18 Mr. Hastings defeated Mr. Roberts in the election for District I Commissioner.
19 After CMI's overwhelming support for Commissioner Hastings and in opposition
20 to a perceived antagonist, CMI provided a blunt message to the other County
21 Commissioners: if CMI perceives a commissioner as unfriendly to its position,
22 CMI will fund an opponent who supports it. *Id.*

1 CMI also sought to influence the Commission by hiring relatives of individual
2 Commissioners. For example, CMI hired Keller Rebuilders (owned by
3 Commissioner Keller and her husband Scott Keller) or Mr. Keller directly to work
4 on CMI buildings and structures in the Comstock. CMI thereafter created a
5 foundation, only supported by CMI contributions, and hired either Keller
6 Rebuilders or Commissioner Keller's husband to continue to work on CMI projects
7 in the Comstock. JA 1:0019-20.

10 By the time of the Commission vote in 2014, Scott Keller worked for CMI's
11 foundation on a one-year contract. This contract was due to expire in the Spring
12 2014, just after the Commission's vote. JA 4:0621. According to her Nevada
13 Financial Disclosure Forms, in 2013 and 2014 Ms. Keller received income from
14 only four sources: Lyon County (\$26,136 annually), Priceless Realty Inc., Keller
15 Rebuilders/Consulting, and Lakeview Plaza LLC. JA 1:0020.

18 CMI also employed Commissioner Hastings' wife in relation to certain events
19 it put on. CMI also hired Commissioner Hastings' daughter's boyfriend as an
20 equipment operator. In addition to directly hiring family members, CMI
21 contributed to causes favored by Commissioners. JA 4:0620.

24 **D. With Influence In Place, CMI Applied to Change Silver City Land**
25 **Uses Designations to Allow Mining**

26 In order to mine its Lyon County property, CMI need to change the
27 longstanding Master Plan land use designation and zoning districts. In the 2010

1 CMP, the Lyon County Board of Commissioners determined the appropriate land
2 designation within the Silver City townsite should be a mix of suburban residential
3 and resource with NR-1 zoning. This combination of districts give the property
4 maximum residential flexibility from 1 dwelling unit per parcel to 1-18 dwelling
5 units per acre with a mix of uses consistent with the suburban setting. JA 1:0113.
6
7 The associated zoning, however, does not permit mining. In Lyon County, mining
8 is associated with rural and resource land uses and at very low residential densities
9 (e.g., 1 unit to 5 to 20 acres or more). *Id.* Therefore, in August 2013, CMI applied
10 to Lyon County to downzone its property within Silver City from “Suburban” to
11
12 “Rural Residential” and from NR-1 to Third and Fifth Rural Residential (“RR-3”
13 and “RR-5”) zoning, districts which list mining as a permissible use.
14
15

16 CMI did not cloak the purpose of its application: it was for “the purpose of
17 pursuing continued mineral exploration, development and the economic mining
18 potential of the subject property.” JA 5:0658. CMI’s 2013 Application was, for all
19 intents and purposes, the same application for land use designation changes filed
20 by Nevex Gold and rejected by Lyon County in 1986. See generally JA 6:0877-
21 938.
22
23

24 In its application, CMI asserted that all prior Lyon County land use decisions
25 on the subject property had been in error. JA 5:0657. CMI contended that its
26 preferred rural residential classifications were better suited to the site in isolation
27
28

1 and were consistent with a few cherry-picked Master Plan policies. CMI did not
2 address the incompatibility of placing mining uses within the town boundaries, any
3 changed circumstances that would justify such a radical reversal in land use policy
4 so near to adoption of a comprehensive planning effort, or how the request was
5 consistent with the myriad 2010 CMP policies directly opposed to the location of
6 those uses within the town. See generally JA 2:0255-287. Not surprisingly, the
7 citizens of Silver City overwhelmingly opposed CMI's application. JA 2:0255-
8 287.

11
12 **E. Lyon County Unelected Officials and Staff Reject CMI Application**
13 **as Inconsistent with the 2010 Master Plan**

14 Lyon County has a multilayered process for the analysis and consideration of
15 a proposal to change its Master Plan and rezone property. First, Lyon County
16 created town advisory councils to provide input of the directly affected
17 communities on issues of concern. In September 2013, the Silver City Advisory
18 Council considered CMI's 2013 Application and unanimously voted to recommend
19 that it be denied. JA 1:0060.

22 Upon receipt of CMI's 2013 Application, Lyon County's professional
23 Planning Department staff began to analyze it and compare the proposal to the
24 policies and guidance contained in the 2010 Master Plan. To aid in this analysis,
25 CRA completed a thorough legal, planning, environmental, economic and
26 historical evaluation of CMI's Application. JA 2:0373-6:0843.

1 Rather than submit contrary evidence, CMI instead applied pressure on Lyon
2 County staff through its friendly Commissioner Bob Hastings. Mr. Hastings
3 contacted Rob Loveberg, head of the Lyon County Planning Department. Mr.
4 Hastings reported to Mr. Loveberg that CMI was “intense” and that CMI was
5 concerned that the staff report might be negative. JA 21:3030. Commissioner
6 Hastings then noted that in his experience Mr. Loveberg drafted staff reports based
7 on facts. *Id.* A report based on facts, however, would “not calm [CMI] nerves”
8 and Commissioner Hastings asked whether the report would be negative or
9 recommend a denial. *Id.* Mr. Loveberg responded that he had not finished the
10 report but intended to submit a balanced one. *Id.*

14 Commissioner Hastings then went to work to produce a more CMI-friendly
15 report. He forwarded Mr. Loveberg’s response to Commissioner Keller and asked
16 for her thoughts. JA 21:3030. Commissioner Hastings subsequently called
17 Commissioner Keller to discuss Mr. Loveberg’s apparently problematic (i.e.
18 factual) approach. JA 21:3032. Commissioner Hastings then coordinated with
19 CMI’s President and CEO Corrado De Gasperis. Commissioner Hastings informed
20 Mr. De Gasperis of his communications with Mr. Loveberg. *Id.* Commissioner
21 Hastings then reported to Mr. De Gasperis that he “will be discussing this matter
22 further with [Lyon County Manager and Mr. Loveberg’s supervisor] Jeff Page.”
23 *Id.* Commissioner Hastings assured Mr. De Gasperis that he would take care of
24
25
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27

1 CMI's interests in this matter: "I want to make sure that Rob [Loveberg]
2 understands that concerns we have and Jeff amy [sic] be the conduit we need." *Id.*

3
4 It is troubling enough that Commissioner Hastings so heavily identified with
5 the interest of his electoral patron use that he uses the collective "we" in these
6 emails. Commissioner Hastings, however, in response to a request for a meeting
7 with CRA representatives, cautioned, "I should let you know that I can listen but
8 because it is an agendized item that is before the Planning Commission and will
9 likely come to the BOCC in some form **it would be inappropriate for me to**
10 **make any comments at this time.**" JA 21:3040 (emphasis added). At the same
11 time Commissioner Hastings informed townspeople he could make no comments
12 he was communicating with CMI on who might make a positive witness for the
13 company at the upcoming hearings. JA 21:3036; see also JA 21:3044 (Email from
14 CMI to Commissioner Hastings: "Let's talk tomorrow about the upcoming LC
15 Planning meeting. I will fill you in.")

16
17 Commissioner Hastings and CMI were well concerned that a staff report
18 might be based on facts. After Lyon County professional planning staff
19 exhaustively reviewed CMI's application, it issued in-depth reports. JA 1:0169-
20 213. Notwithstanding the pressure placed on them, the professional staff
21 recommended that CMI's application be denied based on the following
22 considerations: (1) the industrial land uses requested by the application were in

1 conflict with multiple 2010 Master Plan policies, (2) no change in conditions has
2 occurred to justify so altering the longstanding land use designations within Silver
3 City from the recently adopted Master Plan, (3) the proposed reduction in
4 residential density would make needed town infrastructure improvements less
5 likely, and (4) as envisioned by the 2010 Master Plan, a land use change of such a
6 magnitude should be considered, if at all, during the development of the Silver City
7 Community Plan. *Id.*¹

10 On November 12, 2013, the Lyon County Planning Commission held a public
11 hearing on CMI's 2013 Application.² After hearing hours of public testimony, the
12 Planning Commission adopted the recommendation of its professional staff and
13 recommended – by a 5 to 1 vote – the County Commissioners deny CMI's
14 application. The Planning Commission found, *inter alia*, that (1) the proposed
15 Master Plan amendment was not in substantial compliance with, nor promoted, the
16 Master Plan, (2) would result in land uses incompatible with actual and planned
17 adjacent land uses and did not reflect a logical change in land use, failed to identify
18 or respond to changed conditions or further studies had identified a need for a

24 ¹ After CMI received the Staff Report recommending denial of its application it contacted
25 upper level Lyon County management and held a meeting attended by members of the
26 Planning Commission and the County Commission and the Lyon County Manager. JA
27 13:2387 (County Manager email reporting on telephone conversation with CMI who
28 demanded face to face meeting).

² Both Commissioner Hastings and Keller attended the November 2013 Planning
Commission during the hearing on CMI's 2013 Application. JA 1:0166-167.

1 change, (3) the requested amendment did not represent a more desirable utilization
2 of land, and would adversely affect the implementation of the Master Plan goals,
3 objectives and actions, (4) would adversely impact the public health, safety or
4 welfare, (5) the existing Comprehensive Master Plan and/or any related element
5 thereof is not in need of the proposed amendment, and (6) the proposed
6 amendment is not compatible with the surrounding area, and the goals and policies
7 of the Comprehensive Master Plan, particularly those related to Silver City. JA
8 8:1319-1320; JA 1:0158-0164. The Planning Commission's findings mirrored the
9 County Commission's 1986 findings on the similar Nevex Gold Master Plan
10 amendment application. See JA 6:0937-938.

14 **F. County Commission Reversed its Own Prior Findings, its**
15 **Professional Staff and Planning Commission Recommendations**

16 The County Commissioners heard CMI's 2013 Application at its January 2,
17 2014 meeting. At the beginning of the meeting, the County Manager announced
18 Commissioner Keller had met with members of staff, the Commissioner and CMI
19 had a new proposal for consideration. JA: 5:0633-0634. Commissioners Keller
20 and Hastings made disclosures regarding their conflicts of interest and, over the
21 prior objection of CRA (JA 28:3833-3836), decided to participate. JA 5:0633-
22 0634; 5:0616-619.

23 On January 1, 2014, Commissioner Keller and her husband, the CMI
24 employee, met privately with Chair Joe Mortensen and the Lyon County Manager.
25

1 Commissioner Keller, her husband, Commissioner Mortensen and the County
2 Manager then met with CMI's CEO and its consultant. Sometime prior to this
3 meeting, CMI's consultant had met with Commissioner Fiero.³ Commissioner
4 Keller's new proposal redrew the designations requested in order to respond to
5 Commissioner Fiero's objection to the possible destruction of historic mining
6 resources. JA 1:0026.
7

8
9 CMI's proposed change in land use and zoning designation would permit it, or
10 any subsequent land owner, to pursue further permits for a range of new uses
11 including industrial type uses such a mining, feed lots, etc. Some of these uses
12 were classified as "allowed," which means that CMI could pursue them with an
13 ordinary permit application. Other of the new uses, such as industrial mining,
14 could only be pursued after obtaining a "special" use permit.
15

16
17 When Lyon County's professional planning staff assessed the appropriateness
18 of CMI's application, it analyzed the full range of potential uses (including special
19 uses such as mining) that could occur under the proposed land use changes. In
20 direct contravention to their professional planning staff analysis and the
21 Commissioners' consideration of the same basic planning decision such as the
22 1986 Nevex Gold application, Commissioners in favor of the application
23
24

25
26 ³ Even though they had advance knowledge of the new proposal, no Commissioner or
27 Lyon County staff contacted Silver City residents or their known representatives to
28 either discuss the proposal or provide any notice of the intent to introduce it during the
January 2, 2014 hearing.

1 determined that they could only consider the allowed uses during their discussion
2 of CMI's 2013 Application, not special uses such as mining. These members
3 determined that they could not consider the potential impacts of special uses, such
4 as mining and other industrial uses, at this stage in the land use planning
5 determination. *Infra*, at 46-47.

6
7
8 After public comment, the Commissioners held an abbreviated discussion
9 consistent with their constrained view of the allowable impacts to consider and
10 voted, 4 to 1 to overturn the Silver City Advisory Council, its professional
11 planning staff recommendation, and the recommendation of its Planning
12 Commission, and grant Commissioner Keller's new proposal. JA 5:0636.
13 Commissioners' final decision was not conditioned on any subsequent action and
14 its findings consisted of rote recitation of the statutory criteria. *Id.*

17 G. District Court Proceedings

18 CRA filed this action on January 31, 2014. JA 1:0001. CRA's Complaint for
19 Declaratory and Injunctive Relief and Petition for Judicial Review stated four
20 causes of action. CRA alleged in its first claim that CMI's overwhelming financial
21 support for Commissioners and their subsequent participation in the consideration
22 and voting on CMI's application violated CRA members' due process rights. JA
23 1:0030-31. CRA's second claim alleged that the County Commission violated the
24 Nevada Open Meeting law by failing to properly notice the last minute proposal by
25
26
27

1 Commissioner Keller and by the Commissioners prior consideration of Ms.
2 Keller's proposal outside of an agenda meeting. JA 1:0031. In its third claim,
3 CRA alleged that the Commissioners' decision to grant CMI's application was
4 an abuse of discretion. JA 1:0032-33. CRA alleged in its fourth claim that the
5 Commissioner violated NRS 278.220(4) by unconditionally granting the revised
6 application prior to remanding the matter to its Planning Commission for a report
7 and recommendation. JA 1:0033. Lyon County answered the Complaint/Petition
8 on March 27, 2014 (JA 1:38-52); CMI answered the next day (JA 1:0053-0070).
9

10
11 Throughout the consideration of CMI's 2013 Application, individual County
12 Commissioners used personal email addresses and personal cellular numbers to
13 communicate with each other and with CMI representatives and members of the
14 public. JA 27:3688. On February 11, 2014, CRA submitted a request for public
15 records under the Nevada Public Records Act ("NPRA"), NRS Chapter 239, to
16 Lyon County for copies of all records relating to consideration of CMI's 2013
17 Application, including all records of communication between the Commissioners
18 and with CMI or its consultants regardless of whether the public records were
19 created or received on personal devices. JA 27:3688 (Proposed Amended
20 Complaint). In response, Lyon County produced documents that ultimately
21 became the "Record on Appeal," filed on June 10, 2014. JA 1:0102-17:3647. As
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1 described below, Lyon County's Record on Appeal failed to include relevant
2 records of communications of Commissioners.

3
4 The high profile nature of this case resulted in the recusal of both sitting
5 Judges of the Third Judicial District as they had represented Defendant Lyon
6 County during development of past Master Plans. JA 1:0071; JA 1:0076. On June
7 10, 2014, the case was ultimately assigned to Senior Judge Robert E. Estes. JA
8 1:0079.

9
10 On June 10, 2014, Lyon County moved to dismiss CRA's due process, OML
11 and NRS 278.220 claims. JA 1:0082. On July 3, 2014, CRA moved to amend its
12 Complaint/Petition to include a claim under NRS Chapter 239 to force Lyon
13 County to produce all public records of Commissioners' communication regarding
14 CMI's 2013 Application. 27:3651. After briefing and hearing on both motions,
15 the District Court issued two separate orders on December 3, 2014.

16
17 In its Order Granting in Part and Denying in Part Motion to Dismiss (JA
18 28:3766-3771), the District Court dismissed CRA's OML claim without leave to
19 amend finding that CRA had failed to argue facts indicating that a majority of
20 Commissioners had deliberated outside of a publicly agendized meeting. *Id.* The
21 Court held the Complaint /Petition failed to allege a serial meeting. JA 28:3767
22 (Fact 5). The Court also held that Commissioner Keller last minute proposal did
23 not violate the OML agenda requirement. JA 28:3769. The Court dismissed
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1 CRA's equal protection claim finding that sufficient facts had not been pled to
2 establish "an actual or perceived conflict of interest requiring that any
3 [Commission] members recuse themselves" JA 28:3770. Finally, the Court
4 denied the County's motion to dismiss CRA's claim under NRS 278.220, holding
5 that the statute required a remand to Planning Commission prior to final action by
6 the County Commissioner and in this case the County had "put the cart before the
7 horse". JA 28:3770-3771.
8

9
10 In its Order Denying Plaintiffs' Motion to Amend to add the NPRA claim, the
11 District Court found that while Lyon County had produced some records from
12 Commissioners' personal electronic devices, CRA sought full production of all
13 records relevant to consideration of CMI's 2013 Application. JA 28:3763.
14 However, the Court found that the NPRA claim could and should be brought
15 separately to avoid delay. *Id.*⁴
16

17
18 The parties thereafter briefed the merits of CRA's Petition for Judicial Review
19 (including the abuse of discretion and NRS 278.220 claims). In conjunction with
20 its Opening Brief, CRA sought to augment the administrative record with, and/or
21 take judicial notice of, numerous documents left out by Lyon County. JA 28:3812.
22 The documents included the complete 2010 Lyon County Comprehensive Master
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27 ⁴ CRA's NPRA separately filed lawsuit against Lyon County is currently pending in the
28 Third Judicial District (Case No. 14 CV 01304).

1 Plan and documents submitted by CRA to Commissioners regarding CMI's 2013
2 Application. *Id.*

3
4 On June 5, 2015, the District Court denied CRA's Petition for Judicial
5 Review. JA 28:39493940. The Court found that the County Commissioners relied
6 upon substantial record evidence and had not otherwise violate the law, including
7 NRS 278.220. The Court granted in part and denied in part CRA's Motion to
8 Augment. The Court refused to augment the record with the full 2010 Master Plan
9 as that document had not been physically presented to the Commissioners, but the
10 Court did take judicial notice of it. The Court augmented the record with
11 documents directly submitted by CRA to individual Commissioners, but did not
12 take notice of a letter from Lyon County regarding the absence of relevant
13 documents from the Record on Appeal that had been created or received on
14 personal electronic devices. JA 28:3941-3943.
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18 VI. SUMMARY OF ARGUMENT

19
20 A. In a judicial review action, the defending government entity must
21 present the reviewing court with a complete record of the proceeding below. Here,
22 Respondent Lyon County failed to ensure that all relevant documents were
23 included into the administrative record and therefore cannot argue that the record is
24 complete. The District Court also erred when it refused to consider Lyon County
25 documents demonstrating the incompleteness of the record.
26
27

1 B. In order to reverse longstanding, consistently and repeatedly re-enacted
2 and progressively strengthened land use policy, a local government must describe
3 what conditions changed to justify the reversal and also establish by substantial
4 evidence that the new policy is consistent with its Master Plan. Here, the Lyon
5 County Board of Commissioners adopted a set of boilerplate findings that fail to
6 identify, nor does the record contain substantial evidence of, changed conditions to
7 depart from its prior policy of separating incompatible uses within Silver City,
8 particularly where allowing mining uses would violate multiple other existing
9 Master Plan policies and bypass its emphasis on community planning.
10

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12
13 C. Nevada's Open Meeting Law, NRS Chapter 241, requires that all
14 deliberations of a public body on an agendized action be conducted in a public
15 meeting. Here, evidence indicates that a majority of Lyon County Commissioners
16 used a series of last-minute private meetings to generate a mutually agreeable
17 alternative proposal and avoid deliberating in open session on CMI's application to
18 allow mining uses. Furthermore, the alternative proposal was not agendized nor
19 did the public receive any advanced notice of it. Under these circumstances, the
20 District Court erred when it dismissed without leave to amend CRA's Open
21 Meeting Law claim.
22
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24

25 D. Due process guarantees under the United State and Nevada
26 Constitutions demand that public decision-makers be free from the appearance of
27

undue bias. In this case, CMI funded the majority of a friendly Commissioner's election campaign and employed the spouses of two Commissioners. Not only did these Commissioners fail to recuse themselves from deciding upon CMI's land use application they also intimately involved themselves in its consideration and actively agitated and voted for its approval. The District Court dismissed CRA's Due Process cause of action for failure to state a claim because it believed that under these facts there was no possibility of a perceived conflict of interest because neither NRS Chapter 281 nor Chapter 281A mandated recusal. The District erred when it required a statutory violation as a precondition for a claim under the federal and state Due Process Clauses.

VII. STANDARD OF REVIEW

This Court reviews Lyon County's decision to reverse its Master Plan and zoning designations under an abuse of discretion standard. *City of Reno v. Harris*, 111 Nev. 672 (1995). An abuse of discretion can be shown if the County failed to proceed in accordance with law or that its decision is not supported by substantial evidence in the record before the County at the time of its decision. *Id.*; *Kay v. Nunez*, 122 Nev. 1100 (2006); *Nova Horizon, Inc. v. City Council of the City of Reno*, 105 Nev. 92 (1989); *Serpa v. County of Washoe*, 111 Nev. 1081 (1995). An appellate court scrutinizes the challenged governmental action *de novo*. *City of Reno v. Harris*, *supra*. Questions of statutory interpretation are also

1 reviewed *de novo*. *Kay v. Nunez*, *supra*. The Court reviews an order dismissing
2 claims *de novo*, assuming allegation of fact to be true in order to test the claims’
3 legal sufficiency. *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 228,
4 181 P.2d 670 (2008).

6 **VIII. ARGUMENT**

7 **A. Lyon County Failed to Provide the Entire Administrative Record**

8
9 The foundational requirement of judicial review of governmental action is a
10 complete record. See e.g. NRS 233B.131(1) (“... the agency that rendered the
11 decision which is the subject of the petition shall transmit to the reviewing court
12 the original or a certified copy of the **entire** record of the proceeding under review
13 ...”) Once the entire record is before the reviewing court, its review is generally
14 limited to that record. See e.g. NRS 233B.135(1)(b).
15
16

17 However, “when it comes to the administrative record [], any reduction in its
18 contents is presumptively prejudicial ...” *County of Orange v. Superior Court*,
19 113 Cal.App.4th 1, 13 (2003); *Protect Our Water v. County of Merced*, 110
20 Cal.App.4th 362, 373 (2003) (Failure to certify a complete administrative record
21 constitutes a prejudicial abuse of discretion.) Moreover, compiling the record “is
22 essentially a ministerial task” that does not involve agency discretion. *Id.* at 11. In
23 this case, Lyon County never certified that it provided a complete record.
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1 Lyon County Commissioners used their own personal electronic devices to
2 communicate extensively with each other and CMI regarding CMI's land use
3 application. See e.g. 15:3032. Lyon County refused to provide copies of all of
4 these public records. Instead, Lyon County argued that communications regarding
5 the public's business on personal devices were not public records and would not be
6 provided unless individual Commissioners had voluntarily agreed to forward these
7 records to county administrators. JA 28:3831.⁵

8
9 Thus, Lyon County left it in the hands of individual Commissioners whether
10 to submit public records to county administrators for inclusion in the official
11 record for this case. From the uncontested evidence, Commissioners failed to
12 provide all relevant documents for inclusion in the record. For example,
13 Commissioner Keller left out direct communications with CRA members using her
14 personal email address that Appellants had to seek added to the record. See e.g. JA
15 28:3835-3836. Moreover, it is clear that substantial communication between
16 Commissioners and CMI occurred in the days just before the January 2, 2014
17 hearing but little email and no texts were provided from the Commissioners,
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24 ⁵ The District Court abused its discretion in not taking judicial notice of the letter from
25 Lyon County District Attorneys' Office, a government record, an admission against
26 interest and bears directly on the completeness of the administrative record. See e.g.,
27 *Western States Petroleum Assoc. v. Superior Court*, 9 Cal.4th 559, 575-576 fn. 5, 88 P.2d
28 1268, (1995) (court may consider extra-record evidence that bears on the accuracy of the
record).

1 particularly from Commissioner Keller, the apparent instigator of the
2 communications.⁶

3
4 Since Lyon County failed to ensure that the record contained all relevant
5 documents, the Court should reverse the District Court’s decision and remand to
6 require Lyon County to do so.

7
8 **B. Lyon County’s Boilerplate Findings Amending The 2010 Master**
9 **Plan Are Not Supported By Law Or Substantial Evidence**

10 Master plans guide the orderly physical development of the community.
11 Under NRS 278.160, master plans are composed of multiple different plans
12 covering a variety of topics including, land use, conservation, community design,
13 historic property preservation, housing, and recreation. *Id.* Because master plans
14 are the “constitution” for development, each element must be both internally
15 consistent and consistent with one another. See Lyon County Code (“LCC”)
16 10.12.09(G)(2) (“Prior to adoption of any master plan amendment, the board shall .
17 . . determine if the proposed amendment or element is consistent with the existing
18 master plan goals, objectives and actions or the proposed amendment or element
19 represents a necessary and appropriate modification”)

20
21 Once a master plan is adopted, “no plan or map, hereafter, may . . . [be] part
22 of the master plan until is has been adopted as part of the master plan . . . whenever

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26 ⁶ Appellant CRA is at a distinct disadvantage regarding the content of the record since it
27 has no control or independent knowledge of the documents received or produced by
28 individual Commissioners using their personal devices or accounts.

1 changed conditions or further studies . . . require such amendments, extension or
2 addition.” NRS 278.210(4); see also LCC 10.12.09(F)(C) (finding for approval:
3 “[t]he proposed amendment has demonstrated and responds to changed conditions
4 or further studies that have occurred since the Master Plan was adopted by the
5 Board . . .”).

6
7
8 Moreover, when making such findings, a public agency may not simply parrot
9 the required finding with simple boilerplate language. *City of Reno v. Citizens for*
10 *Cold Springs*, 236 P.3d 10, 18-19 (2010). In order to facilitate public
11 understanding and judicial review, findings must set forth how the agency traveled
12 from facts found to conclusions reached. *County of Eureka v. State Engineer*, 131
13 Nev.Adv.Ops. 84, at p. 15-16 (2015). In this case, the County Commission
14 overturned its Planning Commission and professional staff recommendations using
15 formulaic findings without support of substantial record evidence.

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18 1. No Evidence of Changed Conditions

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20 Over the last 45 years, Lyon County has maintained, readopted and
21 strengthened its Master Plan policies separating incompatible uses in Silver City
22 and preserving the Comstock Historic District. In 1971, Lyon County determined
23 the correct land use and zoning designations for the Silver City townsite was for
24 urban/suburban type residential densities that precluded major industrial uses like
25 mining. In 1986, Lyon County affirmed its 1971 decision by denying a different
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1 mining company's application to redesignate CMI's property as rural and allow
2 mining as a special use. In 1990, Lyon County again considered the proper land
3 use/zoning for CMI's property in Silver City and determined that the existing
4 designation should remain. In 2002, Lyon County specifically considered the
5 future for Silver City in its West Central Lyon County Land Use Plan and
6 expanded the considerations and protections for Silver City and again reaffirmed
7 its long-standing urban/suburban land use designation and uses. In 2010, Lyon
8 County yet again specifically examined land use within Silver City and its other
9 existing communities and yet again expanded considerations for such historic
10 districts, added specific protections for existing communities from new mining
11 uses, and for the fifth time designated Silver City as urban/suburban and excluded
12 mining uses – all over the objections of CMI. *Supra* at pp. 6-15. And Silver City
13 residents invested and relied upon this continued history to build homes, business
14 and lives. *Supra* at 12-13.

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20 As noted by the County staff and found by the Planning Commission, CMI
21 presented no evidence of changed circumstances since the adoption of the 2010
22 CMP. CMI argues instead that Lyon County erred in 1971, 1986, 1990, 2002 and
23 in 2010 when the County determined that lands within the boundaries of the Silver
24 City community should be urban/suburban with associated compatible uses (not
25 including mining). See e.g., JA 2:0259 (CMI's application contending land use
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1 designations applied as “an erroneous or impractical consideration of dense
2 dwelling development or as an exclusionary attempt to prevent any future mining
3 developments.”); JA 4:0575 (CMI’s hearing presentation stating proposed
4 amendment “corrects a fundamental, persistent error”). Nor did the County
5 Commissioners note any changed conditions, especially since 2010, that would
6 comply with NRS 278.210(4) and LCC 10.12.09(F)(C). See e.g. Audio of 1/2/14
7 County Commission Meeting (CMI#3.wav) at 28:20-31:40 (Commissioner Keller:
8 “Nothing’s guaranteed in life”); 31:40 et seq. (Commissioner Hastings: same). In
9 particular, Commissioners Mortenson and Fierro provided no explanation for their
10 individual votes reversing their position taken in 2010.
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14 Thus, the Commissioners’ bare finding that changed conditions exist is
15 without substantial evidentiary support in the record.
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17 2. New Land Use Designations Inconsistent with 2010 Master Plan

18 As noted above, the Planning Commission and professional staff determined
19 that CMI’s proposed Master Plan amendment and zone change were patently
20 inconsistent with multiple provisions of the 2010 CMP. The inconsistencies
21 breakdown into three general categories: the 2010 CMP planning frame, separation
22 of incompatible uses, the recognition and protection of the unique nature of Silver
23 City and the Comstock Historic District.
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1 a. Improper Pre-emption of Community Planning

2 As described above, the 2010 CMP created a two step planning process for the
3 unincorporated communities of Lyon County: the County-wide Master Plan and
4 specific, individual Community Plans for the eight identified communities –
5 including Silver City. “Through its Community Planning process, Lyon County
6 will address individual community needs and desires while implementing county-
7 wide policies and actions.” 2010 CMP, Guiding Principles, Communities and
8 Planning, at 26. The land use designations and zoning of the 2010 CMP – County-
9 wide component were created with extensive input and direct participation by
10 Lyon County communities. *Id.* at 1.10-1.11.
11

12 The next step expressly contemplated by the 2010 CMP is development of the
13 local community plans. “Lyon County will support community-based planning
14 efforts that elaborate community specific goals and are developed with strong
15 public consensus.” JA 8:1305 (Goal CP 3). Moreover, Policy CC 1.3 states:
16

17 Design Tailored to Communities. New development in Lyon
18 County should address and respect the unique character of
19 communities within the county.
20

21 Strategies: develop Community Plans to identify typical or
22 desirable design elements that maintain or promote the
23 community’s desired image. Adopt County-wide standards that
24 allow the flexibility to address specific design needs for
25 individual communities in Lyon County.
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1 JA 8:1286. The implementation chapter of the 2010 CMP (Chapter 11) prioritizes
2 completion of the Silver City Community Plan as one of the first implementation
3 tasks. *Id.* at 11.7.
4

5 CMI's proposal – to radically change the uses available and potentially the
6 nature and character of Silver City – is exactly the type of fundamental community
7 decision the 2010 CMP contemplated would occur at the Community Plan stage.
8

9 As the Lyon County Staff eloquently stated: “Land use regulations and zoning are
10 community master plan implementation measures intended to help promote and
11 produce the community envisioned by its citizens.” JA 8:1316 (Staff Report).
12

13 Indeed, the Chairman of the Planning Commission sought to direct the
14 conversation on the use of CMI lands into the Community Planning process. JA
15 13:2387 (Planning Commission Chair Davies “suggested that a potential win/win
16 option to the current CMI master plan amendment and zone change may be the
17 preparation of the Silver City community plan This would allow CMI and the
18 community to work together on the mining issue in a facilitated setting.”)
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21 However, the Commission's approval of CMI's application completely bypassed
22 the two-step planning process created by the 2010 CMP and is therefore
23 inconsistent with it.
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1 b. Fails to Separate Incompatible Uses

2 One of the key land use components of the 2010 CMP, indeed one of the
3 central purposes for land use planning is to separate incompatible uses. “The
4 principal purpose of land-use regulation and zoning is to limit conflicts between
5 incompatible land-uses. As a general rule, lower density and rural residential uses
6 can be compatible with higher density residential uses if properly arranged,
7 particularly if they back up to them or if they are separated by a street. However,
8 higher intensity industrial uses are generally incompatible with residential uses.”
9 JA 8:1316 (Staff Report)(emphasis added).
10

11 The 2010 CMP, in fact, provides direct guidance on the siting of industrial
12 uses such as mining. “Industrial uses, including **extractive industries**, will occur
13 in areas that are designated on the County-wide Land Use Plan. **New industrial**
14 **uses should only be located in areas that do not adversely impact existing**
15 **residential settlements.”** JA 8:1285 (Policy LU 1.4) (emphasis added). Lyon
16 County reemphasized the importance of avoiding conflicts with mining and other
17 uses in Goal NR 9: “Lyon County will promote the continued development of
18 mineral and aggregate resources **while working to prevent and reduce conflict**
19 **between mining . . . and residential, commercial and industrial development.**
20 JA 8:1287 (emphasis added). In other words, the 2010 CMP’s mandated direction
21 is not to locate incompatible uses next to each other.
22

1 There is no dispute: mining on CMI's property within the boundaries of Silver
2 City will adversely impact the existing residential community of Silver City. First,
3 the undisputed evidence before the Commission established that CMI's mining in
4 the Lucerne Pit, farther away than the proposed site, already adversely impacts
5 Silver City residents. JA 3:0461-463, 0468-469. Second, anticipated impacts
6 from mining on CMI properties within the townsite include significantly lower
7 property values (JA 6:0787-0805) and adverse affects on air quality (e.g., dust),
8 scenic values, traffic, and noise (JA 6:0764-767).

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11 Given these adverse impacts to an existing residential community, it is not
12 surprising that the Planning Commission and Lyon County planning staff found the
13 range of uses sought by CMI to be incompatible with the residential nature of
14 Silver City and inconsistent with multiple provisions of the 2010 CMP. JA
15 8:1319-1320.

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18 c. Commissioners Action Is Inconsistent with the Unique
19 Character and Preservation of Historic Silver City

20 CMI's proposal conflicts with multiple provisions of the 2010 CMP that
21 protect the nature and character of Lyon County's designated historic existing
22 communities, such as Silver City. As described in detail in the Staff Report and
23 above, a major focus of the 2010 CMP is the preservation of local historic
24 communities. For example, Goal CC-3: Heritage: "Historic places, structures, and
25 landmarks in the county will be preserved and will provide an opportunity for
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1 residents and visitors to learn about and celebrate our heritage.” JA 8:1286.

2 Implementing Policy CC-3.1 directs Lyon County to:

3
4 Maintain and restore historic resources. Lyon County will
5 encourage and support efforts to preserve and restore registered
6 historic structures, and landmarks, and districts.

7 Strategies: Revise zoning to encourage historic use and
8 development patterns including mixed-use structures and
9 districts. Within historic districts, promote historic design
10 elements, features, and context, and prohibit building design that
11 compromises the integrity of the historic community character.

12 **Within historic districts, limit new land uses that would pose
13 a risk to historic structures or the historic character of the
14 district. Promote the preservation of historic landscape
15 features to maintain historic settings and the integrity of
16 historic resources within historic districts.**

17 JA 8:1286-1287 (emphasis added).

18 Silver City is one of the few designated historic districts in Lyon County. JA
19 8:1279. As found by the County professional planning staff,

20 [CMI’s] requested master plan amendment and zoning change
21 request and [CMI’s] stated purpose for both could result in
22 development directly contrary to this goal, policy and strategies.
23 Silver City is a unique, historic community within Lyon County
24 that lies within a historic district which contributes to its
25 character and quality of life.

26 JA 8:1287.

27 In other words, mining activities within the townsite do not “promote the
28 preservation of the historic landscape” or the “integrity of the historic resources
within” the Silver City Historic District. JA 6:0787-790. CMI’s proposed uses are

1 therefore inconsistent with the 2010 CMP goals and policies on historic
2 preservation.

3
4 CMI's request is also inconsistent with other CMP provisions designed to
5 protect its existing unique communities. For example, Policy LU 3.2 directs that
6 business and industry should be located consistent with the County's future land
7 use plan. JA 8:1286. Specifically, the CMP directs the County to "[u]se the
8 Countywide Land Use plan and Community Plans as a guide to determine
9 appropriate location for business and industry." *Id.* However, as found by Lyon
10 County staff, "the County-wide Land Use Plan designations for the Silver City
11 community do not identify lands for industry or mining within the community
12 boundaries." *Id.* In a similar economic vein, the CMP directly supports a diverse
13 local economy. See e.g., JA 8:1286 (Goal LU 3, Policy LU 3.1). Mining within
14 the Silver City boundaries will adversely impact local businesses, tourism and
15 home values; all in conflict with the CMP. JA 6:0747-843. In addition, "[n]ew
16 development in the communities of Lyon County should create inviting places for
17 locals and visitors to live, shop, eat, visit and do business." JA 8:1286 (Policy
18 CC1.1). CMI's development plans for its lands within the Silver City community
19 boundaries are entirely inconsistent with the type of development Lyon County's
20 articulated vision for its eight designated communities. See also JA 8:1286 (Policy
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1 CC1.3); *id.* (CMI’s proposed uses do not “address and respect the unique character
2 of communities within the county.”).

3
4 Finally, CMI’s proposed downzoning to rural is not consistent with existing
5 town residential densities and contrary to densities necessary to improve Silver
6 City infrastructure. The existing town consists of urban and suburban densities,
7 without any rural zoning. JA 8:1285 (Staff Report) (“The current [urban] Land
8 Use Plan is consistent with the identified long term development goals for Silver
9 City and consistent with approximately 40 years of County master planning efforts
10 and community input.”). Moreover, the planned urban densities are necessary to
11 support future needed infrastructure improvements, such as water and sewer. See
12 e.g., JA 8:1285 (“The existing land use designation includes densities starting from
13 one acre per dwelling unit and provide for densities that could improve the
14 potential for the expansion of infrastructure within Silver City.”); JA 8:1233
15 (“Consideration should be given to whether or not the change in development
16 potential and pattern would have a positive or negative impact on the future
17 expansion of the Silver City water system.”). Lyon County planning staff also
18 noted CMP goals and policies for the provision of municipal water and sewer and
19 concluded:
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25 Silver City has extensive limitations for individual and on-site
26 sewer disposal systems. Additional large lot residential parcels
27 requiring septic systems may be contrary to long term water
28 quality and may reduce the opportunity for a future connection

1 to a municipal sewer system. [¶] Water system improvements
2 are needed for the community and a sewer system may be
3 necessary in the future. Cost effective improvement and
4 expansion will be influenced by Silver City's [] long term
development potential.

5 JA 8:1289.

6 In sum, CMI's proposal is not consistent with multiple provisions of the 2010
7 CMP protecting the Silver City designated historic nature and community
8 uniqueness and should therefore be vacated. See e.g. *Families Unafraid to Uphold*
9 *Rural El Dorado County v. El Dorado County Board of Supervisors*, 62
10 Cal.App.4th 1332, 1341, 74 Cal.Rptr.2nd 1 (1998).
11

12
13 d. County Commission Erred by Ignoring Range of Potential
14 Uses

15 Given the patent conflict with the central principals and goals of the 2010
16 CMP and CMI's proposed uses, one wonders how the County Commissioners
17 could have found CMI application consistent with the CMP. The answer was
18 simple: wholly ignore these problematic uses. For example, although CMI sought
19 the land uses changes in order to mine their property, its application materials
20 focus on the residential development potential of the property rather than the
21 complete range of uses (including mining) contemplated by the requested land use
22 and zoning designations. See e.g., JA 8:1390-1392. When the Commissioners
23 considered the impacts of their decision, they refused to consider the possible
24 impacts from mining during their considerations. The Commissioners contended
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1 that they could only consider impacts from “allowed” (e.g. residential) but not
2 “special” uses (e.g. mining) under the new land use designations.⁷ See e.g., Audio
3 of January 2, 2014 County Commission Meeting (CMI#3.wav) at 46:17, 53:23
4 (Comments of Commissioner Fierro); *id.* at 49:58 (Comments of Commissioner
5 Keller).

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8 However, the County must consider the full range of uses authorized
9 otherwise it never will have the opportunity to do so. See e.g., *City of Redlands v.*
10 *County of San Bernardino*, 96 Cal.App.4th 398, 406-408; 117 Cal.Rptr.2d 582,
11 587-588 (County must assess the impacts of all potential consequences arising
12 from amendments to its General Plan). The Commission members’ blinkered view
13 is directly contrary to the position of its own professional planning staff. JA
14 8:1288 (“The future potential for mineral exploration and extraction operations
15 should be considered for the requested master plan amendment and concurrent
16 zone change.”) Moreover, as Lyon County staff also explained, once the basic
17 land use designations and zoning are set, the Commission’s discretion becomes
18 ever more limited. Because the Commission improperly constrained its own
19 consideration of relevant factors, its resulting decision is an abuse of discretion.

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24 *Valley Advocates v. City of Fresno*, 160 Cal. App.4th 1039, 1062-1063, 72

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27 ⁷ In general allowed uses are those that could be permitted by the County without public
28 hearing; special uses require a public hearing before permitting. See LCC 10.12.01(A)-
(D).

1 Cal.Rptr.3d 690 (2008) (“a prejudicial abuse of discretion occurs when a public
2 agency is misinformed regarding its discretionary authority and, as a result, does
3 not choose whether to exercise that discretionary authority.”)
4

5 CMI spent considerable time in its presentations listing various CMP
6 provisions for which it contends are consistent with its proposed land use
7 designations and zoning. See e.g. JA 8:1392-1394 (CMI application). However,
8 consistency with selected CMP provisions does not cure direct inconsistency with
9 those provisions outlined above. See e.g., *Concerned Citizens of Calaveras*
10 *County v. Calaveras County Board of Supervisors*, 166 Cal.App.3d 90, 212
11 Cal.Rptr. 273 (1985) (General plan traffic element inconsistent with land use
12 element even though both internally consistent); *San Bernardino Valley Audubon*
13 *Society, Inc. v. County of San Bernardino*, 155 Cal.App.3d 738, 752, 202 Cal.Rptr.
14 423 (1984) (County Board’s consistency determination arbitrary where no
15 evidence contradicted staff report concluding proposed uses conflicted with
16 specific general plan policy). Nowhere does the County Commission reconcile the
17 findings of its own Planning Commission and staff that CMI proposed designations
18 are inconsistent with the 2010 CMP.
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24 The Nevada Supreme Court has shown little patience when local governments
25 disregard master plans for politically expedient reasons. In *Nova Horizons, supra*,
26 the Supreme Court overturned a decision by the City of Reno that was clearly
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1 driven not by planning principles but political pressures. *Id.*, 105 Nev. at 96-98.
2 Likewise, in *American West Development, Inc. v. City of Henderson*, 111 Nev.
3 804, 898 P.2d 110 (1995), the Supreme Court dismissed an attempt by a
4 municipality to ignore the express provision of the existing master plan in order to
5 respond to a powerful constituency. In this instance, CMI with its resources and
6 influence, asked Lyon County commissioners to ignore the directly applicable
7 2010 CMP provisions that stood in the way of its corporate objectives. The
8 unelected Planning Commissioners resisted; the elected County Commissioners
9 did not and as a result its conclusion was not supported by substantial evidence or
10 consistent with applicable law.
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14 **C. The County Violated NRS 278.220 By Taking Final Action Prior To**
15 **Referral To Planning Commission For Report on the New Proposal**

16 Lyon County violated NRS 278.220(4) by taking final action before referring
17 CMI's application back to the Planning Commission for a report on the proposed
18 change to the CMI application. NRS 278.220(4) mandates that Lyon County
19 follow a certain order of procedures when amending its master plan. "No change
20 in or addition to the master plan or any part thereof, as adopted by the planning
21 commission, may be made by the governing body in adopting the same **until** the
22 proposed change or addition has been referred to the planning commission for a
23 report thereon and an attested copy of the report has been filed with the governing
24 body." *Id.* (emphasis added). Lyon County incorporated the same principle in its
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1 own development code. LCC 10.12.09(G)(4) states “[i]f the board [of county
2 commissioners] proposes to modify the amendment, as recommended by the
3 commission, it shall refer the proposed modifications to the [planning] commission
4 for its consideration.”

6 The plain language of NRS 278.220(4) states that the Lyon County
7 Commission can make “no” change in the Master Plan “until” the proposed change
8 has been referred to the Planning Commission. Similarly, LCC 10.12.09(G)(4)
9 uses the nondiscretionary “shall” to mandate reference back to the Planning
10 Commission. The timing requirements of NRS 278.220(4) and LCC
11 10.12.09(G)(4) implement the overall intent of master planning set forth in NRS
12 Chapter 278. The Planning Commission initially prepares the master plan under
13 NRS 278.150(1): “The planning commission shall prepare and adopt a
14 comprehensive [master] plan” The master plan may only then be adopted by
15 the governing body of the local government (i.e., the County Commission). NRS
16 278.220(1) (“Upon receipt of the certified copy of the master plan, or of any part
17 thereof, as adopted by the planning commission, the governing body may adopt
18 [it].”). NRS 278.220(4) then limits the authority of the governing body by
19 prohibiting the governing body from adopting any change not referred by the
20 planning commission until the planning commission first hears and reports on the
21 governing body’s proposal. In this way, the Legislature ensured that master plan
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1 proposals will be first considered by the planning commission – even if generated
2 by the County Commission itself – and only then referred to the governing body
3 for consideration for adoption regardless of whether they arise first with planning
4 commission or the governing body.
5

6 This Court addressed a similar planning requirement in *City of Reno v.*
7
8 *Citizens for Cold Springs*, supra. There, the Court held that NRS 278.0282, which
9 required a jurisdiction to submit a “draft” master plan amendment to the regional
10 planning agency, could be satisfied where the jurisdiction adopted the amendment
11 conditioned on subsequent review and approval. *Id.* 236 P.3d at 16.
12

13 Here, Lyon County failed to follow any such procedure. Lyon County admits
14 that the action of the County Commission triggered NRS 278.220(4) – “the
15 commissioners’ decision on the Master Plan Amendment is a final action but it
16 needs to be sent back to the planning commission for a report.” JA 5:0636; see
17 also JA 5:641-644 (Letters of Final Action dated January 7, 2014). However,
18 County Commission did not condition its final action on subsequent actions of the
19 Planning and County Commission. Because it took final unconditional action prior
20 to its reference back to the Planning Commission, the County violated NRS
21 278.220 and LCC 10.12.09(G)(4), and its approval should be vacated.
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1 **D. The District Court Improperly Dismissed Open Meeting Law**
2 **Claim**

3 The Nevada Open Meeting Law (“OML”) protects and enhances public
4 participation in government decisionmaking. It does so by, *inter alia*, requiring a
5 public agency to clearly and specifically agendaize all items it intends to take action
6 upon and to conduct all meetings openly and in public. NRS 241.020. Moreover,
7 public agencies must recognize that a “higher degree of specificity [for agenda
8 items] is needed when the subject to be debated is of special or significant interest
9 to the public.” *Sandoval, v. Board of Regents*, 119 Nev. 148, 154-155 (2003).
10 Strict adherence to these principles allows the public advance notice of proposals
11 to be considered and to witness and participate in decisions affecting their vital
12 interests. *Id.* at 154.
13

14 In its Complaint/Petition, CRA alleged two violations of the OML: (1) that
15 members of the Lyon County Commission deliberated outside of a public meeting
16 to create a new “compromise” proposal, and (2) failed to provide the public with
17 timely notice of the new proposal. JA 1:0025-0031 (Complaint/Petition at ¶¶ 95-
18 99, 108a, 108b, 111-115). The District Court dismissed CRA’s OML claim with
19 prejudice, finding simply that “[t]he facts alleged in the complaint and opposition
20 brief do not constitute a serial meeting as defined in the [OML] . . . [;]” and “[t]he
21 action of the [County] Commissioners did not exceed the scope of the complete
22 and clear agenda items.” JA28:3769.
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1 The District Court erred as a matter of law. A public body cannot avoid the
2 OML's prohibition on discussing and deliberating towards a decision outside a
3 public meeting by doing so serially. NRS 241.015(2)(a)(2); *Del Pappa v. Board of*
4 *Regents*, 114 Nev. 388 (1998); *Dewey v. Redevelopment Agency of the City of*
5 *Reno*, 119 Nev. 87, 99 (2003). Here, it appears that a quorum of the Lyon County
6 Commissioners conducted private serial meetings to prepare an agreed-upon
7 proposal for the upcoming public meeting. On December 30, 2013 (several day
8 before the January 2, 2014 public meeting) CMI's representative met with
9 Commissioner Fiero to discuss CMI's application. (Audio CD of 1/2/14 County
10 Commission Meeting) (CMI#1.wav) at 15:18-16:00. Then, on December 31,
11 2013, CMI's representative sent to Commissioner Fiero via email a map of the
12 parcels in question with the new proposal highlighted in red, presumably in
13 response to the prior meeting. JA 19:2932. The next day, January 1, 2012,
14 Commissioner Keller held several meetings with CMI's representatives,
15 Commissioner Mortensen, and County Manager Jeff Page (and strangely,
16 Commissioner Keller's husband, the CMI employee) to discuss the same proposal.
17 1/2/14 Audio CD. Later that same day, CMI's representative emailed the County
18 Manager the map of the "compromise" proposal worked out in these serial
19 meetings. JA 20:2994.

1 Thus, it appeared that a quorum of at least three of the five Lyon County
2 Commissioners discussed and deliberated on an alternative proposal that was then
3 presented to the public for the first time the next day. See 1/2/14 Audio CD
4 (CMI#1.wav) at 50:10 (Comments of Mark Rotter stating that the “compromise”
5 proposal was worked out in response to a discussion about removing the northern
6 end and the Dayton Consolidated sites). Such a process violates the OML. *Del*
7 *Pappa v. Board of Regents*, supra. At a minimum, the District Court should have
8 granted CRA leave to amend to state this claim if the allegations of the
9 Complaint/Petition were insufficient.
10

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13 Second, Lyon County also failed to provide clear and advanced notice that the
14 Commissioners would offer a substantially different proposal than what the public
15 would be expecting – without any advance notice, indeed purposefully keeping the
16 public (but not CMI) ignorant of what was to come. CRA alleged that Lyon
17 County did not provide adequate notice of actual action taken by Lyon County; a
18 proposal made by Commissioner Keller and disclosed publically for the first time
19 at the January 2, 2014 meeting. JA 1:0026.
20
21

22 The proposal between CMI and the County was made to allegedly to “address
23 the viewshed” issue. 1/2/14 Audio CD (Comments of County Manager Jeff
24 Page)(CMI#1.wav) at 5:40-6:10. CMI characterized the proposal to provide
25 adequate buffers. *Id.* at 51:00 (comments of Mark Rotter). Commissioner Keller
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1 stated that she “reached out” to CMI after “listening to concerns of the Silver City
2 residents” about the viewshed. At the hearing, the mechanics of the Keller
3 proposal required extensive explanation. *Id.* at 51:00 (Comments of Mark Rotter
4 and colloquy with Commissioner Arellano, apparently the one Commissioner out
5 of the loop). When Commissioner Keller came to make the motion to approve her
6 “compromise” proposal she had to list a string of assessor parcel numbers excluded
7 from CMI’s agendized application, parcel numbers apparently pulled out for an
8 alleged specific purpose – viewshed protection – without any prior public
9 disclosure of the rationale or location.
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13 The public, and CRA, was therefore left without notice on whether or not the
14 proposed parcels were indeed those mapped and more importantly whether those
15 parcels when removed from possible open pit mining provide any viewshed
16 protection. Under these circumstances, where the County itself had prior notice,
17 the changes represented a substantial modification in application and rationale for
18 the proposal, CRA’s allegations – that the agenda item listing only CMI’s original
19 proposal was inadequate for OML purposes – adequately states a cause of action.
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23 **E. The District Court Improperly Dismissed Due Process Claim**

24 Due Process protects citizens “when ‘the probability of actual bias on the part
25 of the judge or decisionmaker is too high to be constitutionally tolerable.’ ”

26 *Caperton v. Massey Coal Company*, 556 U.S. 868, 872 (2009) quoting *Withrow v.*
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1 *Larkin*, 421 U. S. 35, 47 (1975); see also *Gilman v. Nevada State Board of*
2 *Veterinary Med. Examiners*, 120 Nev. 263, 269 (2004)(clarified on other grounds
3 in *Nassiri v. Chiropractic Physicians’ Bd.*, 130 Nev. Adv. Op. 27 (April 3, 2014));
4 *Ivey v. Eighth Judicial District*, __ Nev. __, 299 P.3d 354 (2013). CRA’s
5 Complaint/Petition alleged that “the probability of actual bias” is constitutionally
6 intolerable in this case because of the influence of CMI upon the Lyon County
7 Commission. These allegations, accepted as true for the purposes of this appeal
8 and as set out above, include the overwhelming and unprecedented financial
9 support CMI provided Commissioner Hastings to unseat the unfriendly incumbent
10 (e.g., dwarfing other individual interest support by 350 percent) and sending a
11 blunt message to other Commissioners (JA 1:0018-0019), providing needed
12 income to Commissioner Keller by employing her husband with his contract due
13 to expire shortly after the vote on CMI’s application (JA 1:0019) at a time when
14 Commissioner Keller could not even afford to pay her Lyon County property tax
15 bill (JA 1:0020). CMI also hired friends and relatives of Commissioner Hastings
16 and worked closely with him to support his favored charities. *Id.*

17
18 Notwithstanding the strong and direct financial ties, these Lyon County
19 Commissioners failed to recuse themselves from consideration of CMI’s land use
20 application. To the contrary, the Commissioners intimately involved themselves
21 with the application by working hand-in-glove with CMI to attempt to shape the
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1 staff report and broker a last minute, behind the scenes alternative proposal to
2 ensure approval.

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4 The District Court, however, dismissed CRA's Due Process claim because, in
5 its estimation, no specific Nevada statutory law regarding conflict of interest was
6 broken. The Court determined that because the Commissioners disclosed their
7 relationships with CMI pursuant to NRS 281 and 281A, they could participate. JA
8 28:3769-3770.

9
10 While the District Court's assertion may or may not be true, it is irrelevant for
11 due process purposes. As established by the United States Supreme Court in
12 *Caperton v. Massey Coal Company, supra*, the Due Process Clause applies to a
13 mining company's overwhelming funding of a judicial candidate notwithstanding
14 the fact that the contributions did not violate state election law or ethics laws.
15
16 Similarly, in *Ivey v. Eighth Judicial District*, this Court examined whether
17 campaign contributions in accordance with state limits, nevertheless amounted to a
18 due process violation.
19
20

21 CRA therefore does not need to allege that CMI's influence or the
22 Commissioners' conduct violated the Nevada Ethics in Government Act; only that
23 such conduct created "the probability of actual bias on the part of the . . .
24 decisionmaker [that] is too high to be constitutionally tolerable." *Caperton, supra*,
25 556 U.S. at 872. For Commissioners Hastings and Keller, CRA's allegations of
26
27

1 CMI funding of his campaign and other actions supporting their financial interests
2 and families create a triable issue of whether a due process violation occurred
3 through their participation in CMI's application. CRA has therefore pled a
4 cognizable claim for relief in its Second Cause of Action.
5

6 **IX. CONCLUSION**
7

8 CRA respectfully request that the Supreme Court reverse the District Court
9 and direct that judgment should be entered in its favor on its Judicial Review
10 claims and remand the action for trial on its OML and Due Process claims.
11

12 Dated: December 8, 2015.
13

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CERTIFICATE OF COMPLIANCE

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

7
8 2. I further certify that this brief complies with the page- or type-volume
9 limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted
10 by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or
11 more, and contains 13,646 words.
12

13 3. Finally, I hereby certify that I have read this appellate brief, and to the
14 best of my knowledge, information, and belief, it is not frivolous or interposed for
15 any improper purpose. I further certify that this brief complies with all applicable
16 Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which
17 requires every assertion in the brief regarding matters in the record to be
18 supported by a reference to the page and volume number, if any, of the transcript
19 or appendix where the matter relied on is to be found. I understand that I may be
20 subject to sanctions in the event that the accompanying brief is not in conformity
21 with the requirements of the Nevada Rules of Appellate Procedure.
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23

24 Dated: December 8, 2015.
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26 By _____
27 John L. Marshall
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