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

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

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IN THE SUPREME COURT OF THE STATE OF NEVADA

COMSTOCK RESIDENTS ASSOCIATION, JOE McCARTHY

Appellants,

v.

LYON COUNTY BOARD OF COMMISSIONERS; COMSTOCK MINING INCORPORATED

Respondents,

_____/

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

APPELLANTS COMSTOCK RESIDENTS ASSOCIATION AND JOE McCARTHY'S REPLY BRIEF

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I. INTRODUCTION

Comstock Mining Incorporated ("CMI") owns or controls large areas of land within the Comstock Historic District. It actively mines a huge open pit just up Highway 342 from Silver City, Nevada. Not satisfied with these other, nearby opportunities, CMI sought to add mining uses to its land in and adjacent to Silver City.

Prior to the actions challenged in this appeal, the applicable land use designations and zoning classifications allowed a wide range of residential densities and separated industrial uses, like mining, from occurring in and adjacent to Silver City but allowing such uses a little farther away. This balance between types of land uses in Silver City has been incorporated by Lyon County into its Master Plan for decades, had been consistently applied by it, repeatedly adopted by it, strengthened by it, and relied upon for substantial investments by residents of the town.

Prohibited from pursuing its industrial uses in and adjacent to the town, CMI needed a pretext to change the applicable residential land use designations and zoning districts to rules that no longer separated the existing residential uses from future industrial ones and a more receptive audience to approve these changes. Lyon County's professional planners and unelected Planning Commission, however, rejected the pretext and found that CMI's proposed land use change was

neither consistent with past actions nor present Master Plan policies separating such incompatible uses.

The Lyon County Commission came to CMI's rescue and, as forthrightly described in its Answering Brief ("AB"), stripped away all inconvenient fact, context and law and approved CMI's proposal to add industrial uses, including mining, as a special use next to the residents of Silver City. To the Lyon County Commissioners, their past actions were irrelevant (not even mentioned), including their prior conclusion that the exact proposal to change the land use to allow industrial uses on these parcels was inconsistent with a weaker prior Master Plan. Indeed, Respondents' Answering Brief starts the narrative in 2013 with the filing of CMI's application and never mentions or addresses prior contrary actions. Respondents exhibit similar tunnel vision when they characterize the Commissioners' pretextual justification as merely selecting the appropriate density for residential development rather than examining the actual foreseeable outcomes of their land use designation and zoning changes.

As Respondents Lyon County Commissioners and CMI travel so far from basic principles in their Answering Brief, Petitioners Comstock Residents Association and Joe McCarthy (collectively "CRA") reinforce this Court's foundational land use precedent.

II. ARGUMENT

A. The Court Should Grant CRA's Petition For Judicial Review

1. Lyon County Cannot Leave Compilation Of Complete Record To Discretion Of Individual Commissioners

Instead of directly addressing the very real problem created by Commissioner use of personal devices and accounts for official business when producing a complete administrative record, Lyon County proclaims without citation that it produced the "entire record" and that CRA produced no evidence to the contrary. AB at 19.

Lyon County admits that it is required to present the complete record to facilitate judicial review. AB at 18-19. It also does not dispute that County Commissioners and staff used personal devices and email accounts to conduct official business regarding CMI's land use application. *Id*. In addition, Lyon County does not dispute that it allowed individual Commissioners to determine which, if any, records or communications on personal devices and accounts to provide to the county for compilation in the official administrative record. Compare CRA's Opening Brief ("OB") at 35-37 with AB at 18-19.[1] Finally,

[1] In response to CRA's Opening Brief's Jurisdiction Statement, Respondents intimate that the Court should dismiss the appeal because CRA brief was eventually filed on December 9, 2015, two days past the stipulated deadline. AB at ix. CRA lodged its Opening Brief timely but counsel used an out-of-date NRAP 32(a)(4) Certificate of Compliance. After notified by the Supreme Court Clerk, counsel relodged the brief and it was accepted and filed on December 9, 2015. Respondents claim no prejudice from the slight delay; they even filed their

Lyon County does not rebut and therefore must admit that (1) it agreed to augment the official record with emails CRA members sent to Commissioner Keller on her preferred personal email account that she failed to provide for inclusion in the record, and (2) the record contains individual communications provided voluntarily by other Commissioners. See OB at 36.

Thus, Lyon County cannot assert that it produced the entire record considered by the Commissioners because it had to rely upon individual Commissioners' discretion to produce all relevant communications– which CRA proved did not occur. The burden and impact of the Commissioners' voluntary choice to use their personal devices and accounts should not fall on members of the public, particularly when Lyon County contends that the public has no right under the Nevada Public Records Act to view the full range of documents considered by the Commissioners.[2] Since Lyon County cannot certify the official record is complete, as necessary prerequisite to judicial review, the Court should grant CRA's Petition.

Answering Brief early. As no party gained advantage or suffered harm, the Court may proceed to hear the case on the merits.

[2] Respondents do not defend the District Court's abuse of discretion in not taking notice of Lyon County District Attorney's letter refusing to produce these directly relevant communications among Commissioners and with CMI over personal devices and/or using personal accounts. See OB at 36.

2. Lyon County's Decision Was Entirely Pretextual And Lacks Substantial Record Evidence

a. Controversy Does Not Create Substantial Evidence

In their Answering Brief, Lyon County and CMI support the reversal of land use designation by citing to the fact the Commission received testimony both for and against CMI's application. See e.g. AB at 6, 15, 19-22.

This Court has long held statements in support or in opposition, do not, in and of themselves, constitute substantial evidence. *City Council, Reno v. Travelers Hotel*, 100 Nev. 436, 683 P.2d 960 (1984); see also, *City Council v. Irvine*, 102 Nev. 276, 281, 721 P.2d 371 (1986) ("This court upheld the trial court in *Travelers*, noting that the mere statements of interested parties and their counsel and the opinions of counsel members did not provide a proper reason for the decision."); *State ex rel. Johns v. Gragson*, 89 Nev. 478, 482, 515 P.2d 65 (1973) ("The only 'evidence' supporting revocation of the permit consisted of opinions voiced by the Commissioners. Even if such statements were construed as official positions of the Commission, they do not constitute valid grounds for denial under the ordinance, absent supporting proof."). Thus, Respondents' repeated reliance on the fact of multiple presentations, the presence of "expert opinion," or opinions by the Commissioners does not qualify as substantial evidence.

b. Without Explanation, Lyon County's Reversal of Its Long-Standing and Repeatedly-Applied Land Use Determinations is Contrary to Law and Irrational

In its Opening Brief, CRA set forth Lyon County's 40 years history of prior land use treatment of CMI's holdings in and adjacent to Silver City. OB at 7-17; see also JA 2:373-6:843 (CRA comprehensive submission to Lyon County demonstrating the lack of any changed conditions). Lyon County separated incompatible industrial uses such as mining on CMI's property within and adjacent to Silver City in consistent, repeated and, over the years, progressively stronger and stronger and more and more detailed terms. *Id*. The 2010 Comprehensive Master Plan culminates this history and expressly prohibits locating new mining uses in or adjacent to adversely affected residential communities, specifically protects the historic nature and appearance of the Comstock-era Silver City; and promotes broad-based community planning on issues directly affecting the community. *Id*. In their Answering Brief, Lyon County and CMI wholly ignore this highly relevant history and argue that it need not explain what circumstances have changed in order to justify such a radical and inconsistent shift in policy and in any event the finding of changed circumstances was made and was supported by – unspecified – "substantial evidence." AB at 22-23.

Land use planning provides stability to investors and the public. *Coronet Homes, Inc. v. McKenzie*, 84 Nev. 250, 257, 439 P.2d 219 (1968) ("Too often a

property owner will, after careful consideration, select a site and build in conformity with, and reliance upon, the zoning ordinance then in effect, only to face time and again attempts by others to change the zoning plan and character of the neighborhood . . . ."). While not necessarily a "straightjacket," a master plan provides members of the public with reasonable expectations upon which to make informed decisions. *Nova Horizon v. City Council, Reno*, 105 Nev. 92, 96, 769 P.2d 721, 723 (1989). Dramatic changes in land use policy without justification betrays the goal of stability.

For example, as discussed in CRA's Opening Brief, NRS 278.210(4) precludes consideration of amendments to the Master Plan unless supported by "changed conditions or further studies," i.e., a justification for a change in policy. OB at 37-38. Respondents argue that this statutory limitation (and its county code counterpart – LCC 10.12.09(F)(C)) applies only to the Planning Commission and/or does not act in any fashion to limit the discretion of the County Board of Commissioners. AB at 22. However, since the Planning Commission must consider all master plan amendments, NRS 278.210(4) serves a gatekeeper function to limit amendments considered by the County Commission to those that are, in fact, needed. To interpret NRS 278.210(4) as Respondents do would render it null, a construction to be avoided. *Bd. of County Comm'rs v. CMC of Nevada,* 99 Nev. 739, 744, 670 P.2d 102, 105 (1983).

Moreover, application of NRS 278.210(4) avoids the substantial evidence problems Lyon County faces here. Numerous courts have held that when a public agency reverses course from a long-standing position, it must explain itself. See e.g., *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808, 93 S.Ct. 2367, 37 L.Ed.2d 350 (1973) (plurality opinion) (describing an "agency's duty to explain its departure from prior norms" and holding that when an agency departs from prior norms, its reasons "must be clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate"); *Northwest Environmental Defense Center v. Bonneville Power Administration*, 477 F.3d 668, 690 (9th Cir. 2007); *Ramasrakash v. Federal Aviation Authority*, 346 F.3d 1121, 1130 (D.C. Cir., 2003).

As Lyon County has repeatedly, consistently and with increasing vigor rejected exactly the type of uses CMI sought in their application based on, *inter alia,* the incompatibility of those uses with the existing residential uses, it cannot now reverse those prior decisions without explaining what changed circumstances occurred to render the basis for those repeated prior decisions inapplicable. Policy reversals without an articulated explanation for the shift in position are arbitrary and capricious. See e.g., *City Council v. Irvine*, 102 Nev. at 280, 721 P.2d at 372-73 ("[T]he essence of the abuse of discretion, of the arbitrariness or capriciousness of government action...is most often found in an apparent absence

of any grounds or reasons for the decision."); *Tighe v. Von Goerken*, 108 Nev. 440, 833 P.2d 1135 (1992); *City of Reno v. Estate of Wells*, 110 Nev. 1218, 1222, 885 P.2d 545 (1994)(arbitrary and capricious defined so to include a "sudden turn of mind" without explanation).

CRA does not dispute that Lyon County possesses the discretion to amend its Master Plan. In order to exercise that discretion rationally, however, Lyon County must explain how it could completely reverse its prior repeated, consistent and strengthened position. Since Lyon County did not, and could not, provide such an explanation, its decision to approve CMI's application reversing long-standing policy contravened NRS 278.210(4) and was arbitrary, capricious and an abuse of discretion.[3]

c. Lyon County Cannot Ignored Multiple Inconsistent Master Plan Policies Simply Because Added Uses Required A Subsequent Permitting Process

Lyon County and CMI describe the Commissioners' decision as simply a question of residential density rather than addition of a range of uses incompatible with existing adjacent residential uses. See AB at 2-3. However, this Court repeatedly recognizes the much broader purpose of land uses decisionmaking:

> Regulation of land use through zoning has become desirable in urban communities in order that a reasonable and orderly segregation of residential, commercial and industrial areas be

[3] While Respondents state in their brief that substantial evidence exists for all their findings, including changed conditions (AB at 23:20-21), they provide no citations to evidence supporting this bare conclusion.

> had. Such regulation is primarily concerned with uniformity of land use and stability of community growth. It is general and comprehensive in scope and the considerations which govern it are, accordingly, general and comprehensive.

Primm v. City of Reno, 70 Nev. 7, 15, 252P.2d 835 (1953); see also *State v. Coleman*, 67 Nev. 636, 641, 224 P.2d 309 (1950), quoting *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 120 (1926) ("The court recognizes the fact that the matter of zoning has received the attention of commissions and experts whose reports bear every evidence of painstaking consideration, and that they concur in the view that the segregation of residential, business and industrial buildings 'will increase the safety and security of home life, greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections, decrease noise and other conditions which produce or intensify nervous disorders, preserve a more favorable environment in which to rear children, etc.'"); *Coronet Homes, Inc.*, 84 Nev. at 257 ("Zoning laws are passed in the interest of the public welfare and the benefit accrues not only to the municipality but also to the neighboring land owners.")

As set forth in its Opening Brief, Lyon County's action amending the applicable Master Plan designations and zoning violated a host of directly applicable master plan provisions: i.e., pre-empting community planning goals, failing to separate incompatible uses, and contrary to policies protecting Silver City's unique character and historic designations. See OB at 40-48.

In their Answering Brief, under a heading entitled "the Board's Decision is Consistent with Existing Master Plan Goals," Respondents fail to cite to any Master Plan policy, much less address the inconsistent policies identified by CRA. See AB at 23-26. Instead, Lyon County and CMI argue, without citation, "[t]he Board was not required to consider uses that were not at issue in CMI's Application and expressly did not authorize any mining activity on the subject property." *Id*. at 25-26. Not only does this single argument ignore, and thereby concede, the inconsistencies with pre-empted community planning goals, it also is nonsensical given CMI's express reasons for seeking the amendments.

CMI filed its application for "the purpose of pursuing continued mineral exploration, development and the economic mining potential of the subject property." JA 5:658. Thus under Lyon County's own standard, CMI put mining use "at issue," and the County Commission should have considered the adverse affects from mining (and the other potential newly permissible uses).

Moreover, Lyon County's past action and current review of CMI's application is entirely inconsistent with its present litigating position that the effects of mining should not be considered at this time. For example, in 1986 the County Commissioners considered both the pros and cons of mining when denying Nevex Mining Company's application to change the master plan/zoning (OB at 8-9), yet the Lyon County Commission now takes the position that it cannot do so when it granted CMI's same application.

In addition, Respondents contend that the County Commissioners may consider the positive effects of mining when making consistency findings on CMI's application but considering adverse impacts is "misplaced and premature." See AB at 24. The individual County Commissioners exhibited the same inconsistency of position at the January 2, 2014 hearing. Commissioner Fierro stated he was pro-mining on the one hand (i.e., desirous of certain alleged benefits) but that he was precluded by law from considering mining's adverse impacts in response to comments from CRA. Compare JA 3:636 (Commissioner Fierro comments supporting mining) with JA 29 (Audio of January 2, 2014 County Commission Meeting at 46:17, 53:23 (Comments of Commissioner Fierro in response to CRA's comments)). Finally, at the same time Lyon County and CMI argue the Commissioners were precluded from considering adverse impacts from mining on Silver City as their excuse to ignore inconvenient inconsistencies with the 2010 Master Plan, they tout Commissioner Keller's last minute proposal that allegedly provided a buffer and viewshed protection from mining activities. AB at 10.[4]

Lyon County constructed a one-sided legal theory to enable it to consider only the positive impacts from future mining when considering CMI's application

[4] There is no evidence in the record that Commissioner Keller's proposal would provide any buffer or viewshed protection since the mining activity would likely take place outside of the removed area. See e.g. JA 9:1860 (visual modeling of hillside open pit mine in Silver City).

and expressly precluded itself from considering the negative under the guise that no actual mining had been approved. Such a construct not only violates common sense, it is inconsistent with (1) statutory law (see NRS 278.250(2)(k) ("The zoning regulations must . . . be designed: [¶¶] [t]o ensure the protection of existing neighborhoods and communities . . . ."), and (2) and case law (see *Enterprise Citizen Action Committee v. Clark County*, 112 Nev. 649, 659-660 (1996) (disallowing a sharp land use theory constructed to avoid the County Commission from considering the full impact of a new industrial use added to a property adjacent to existing neighborhoods).

Under Nevada law, Master Plan and zoning designations carry with them a weight of appropriateness for the assigned uses. See e.g., *Nova Horizons*, 105 Nev. at 95. It is imperative therefore that prior to radically changing the 2010 Master Plan and applicable zoning, the County Commissioners must consider the impacts from those uses and their consistency with the master plan. Since Lyon County did not do so, its action was an abuse of discretion; that it did not approve a specific mining project is irrelevant to the review of the appropriateness of the Master Plan amendment and zoning change.

Finally, even Respondents' rationale for rural designations and zoning is not supported by substantial evidence. For example, Respondents repeatedly argue since CMI's property is not currently served by municipal water or sewer, low density residential is more appropriate. See e.g., AB at 25. However,

Respondents admit this location is "not well suited to individual or on-site sewer systems." *Id*. Lyon County Planning Staff therefore point out:

> Immediate development would require the installation of individual sewer disposal systems (ISDS) for residential development, or on-site sewer disposal systems (OSDS) or package sewer treatment plant for non-residential development. The Silver City area is not generally well suited for ISDS or OSDS, and a long-term solution for waste water treatment would be the extension of a municipal sewer system. Densities as contemplated in the [then existing] County's Comprehensive Master Plan would contribute to the cost effectiveness of a sewer system.

JA 1:207. In other words, and contrary to Respondents' assertion, the site's characteristics argue for higher density to spread the costs of needed infrastructure and disfavor the lower density sought by CMI (who isn't interested in residential development in any event).

Similarly, Lyon County Planning Staff addressed Respondents' argument regarding topography:

> The applicant proposes to rezone the steepest areas of the parcels to RR-3, one dwelling per five acres, and the majority of the lowest sloped areas to RR-5, one dwelling per 20 acres. If topography was a determining factor in the justification of the zone change request, it would seem to be more logical that the steepest and most difficult land to develop would be zoned RR-5.

JA 1:210.

As a last gasp, Respondents claim (again without citation to the record) that CMI needed the Master Plan amendments and zone change because, even though

". . . CMI could have explored for minerals . . . under the prior land use and zoning designations, [] to do so under the prior designations was sure to be a waste of time and money as mining was neither a permitted nor a special use under the prior designations." AB at 4. The record demonstrates the contrary. CMI and its predecessors have conducted extensive explorations on the property, with hundreds test bores drilled. JA 2:288-373, 336. Thus the prior land use designations posed no disincentive to mining explorations.[5]

Furthermore, Respondents' unsupported argument – that CMI needed the assurance of the new designations contemplating mining to continue mining exploration that was already allowed – demonstrates the hypocrisy of their position that "[t]he Board was not required to consider uses [i.e. mining] that were not at issue in CMI's Application . . . ." AB at 25-26. Since Respondents admit mining use was the driver for CMI's application, Lyon County needed to measure that use (and the others allowed) against the directly relevant, applicable and patently inconsistent Master Plan policies. Instead, it ducked them.

[5] Respondents' claim (AB at 24), that most of CMI's property at issue lies outside of Silver City, is neither support by the record (JA ROA 1:238 (parcels 2, 4, 5, 6 in within dashed town limits); JA 4:960 (post-action map showing parcels 2, 4, 5 within town boundaries)), nor relevant as the area is in or directly adjacent to Silver City. *Id*.

d. Lyon County Violated NRS 278.220(4)

In order to cover Lyon County's clear and blatant violation of the planning process set forth in NRS 278.220(4),[6] Respondents mischaracterize CRA's argument and proffer an entirely unsupportable gloss on the statute. AB at 26-28. First, Respondents state "CRA interprets the statute to mean that any governing body decision that differs from Planning Commission must be referred back to the Planning Commission before the governing body can take final action." Id at 27. CRA makes no such argument: only when the governing body makes a "change in or addition to the master plan" that was not considered by the Planning Commission, does NRS 278.220(4) require that change or addition be first sent to the Planning Commission for consideration and a report. OB at 51-53. After that reference and report, the governing body is free to exercise its discretion on the "change or addition" to the master plan. Thus, the straightforward application of the plain language of NRS 278.220(4) does not implicate the governing body's ultimate authority to adopt the change or addition it seeks – it merely must follow the statutory process to do so.[7]

In this case, Lyon County agrees that it adopted changes to the master plan that triggered NRS 278.220(4) without first obtaining the required report from its

[6] See CRA's Opening Brief at 51-53.

[7] Because the governing body's ultimate discretion is maintained, Petitioners erroneously rely upon NRS 278.020(1), *Falcke v. Douglas County*, 116 Nev. 583, 3 P.3d 661 (2000) and 79-14 Op. Att'y Gen. 73 (1979).

Planning Commission. AB at 27. Only after the Commission took final action did the Commission refer the matter back to the Planning Commission. *Id*., see also JA 5:641-644 (Lyon County's NRS 278.0235 Notice of Final Action dated prior to reference and report from Planning Commission). By taking final action before undertaking the required statutory process, Lyon County violated NRS 278.220(4). *City of Reno v. Citizens for Cold Springs*, 126 Nev. 263, 236 P.3d 10 (2010); see also *Forman v. Eagle Thrifty Drugs & Markets*, 89 Nev. 533, 516 P.2d 1234 (1973) (land use changes must follow procedural requirements to be valid).

Respondents next argue that NRS 278.220(4) operates as a matter of law to "delay" when prior governing body action becomes final. AB at 27-28. Respondents contend that it satisfied NRS 278.220(4) when the County Commission formally adopted the change or addition to the master plan not heard by the Planning Commission, then referred the matter back to the Planning Commission for a report, and then "declined to alter the decision it had made on January 2, 2014." *Id*.

Such a construction not only undermines the express purpose of NRS 278.220(4) to obtain Planning Commission input prior to the Lyon County Commission's consideration ("No change in or amendment to the master plan . . . may be made by the governing body **until** the proposed change has been referred to the planning commission for a report . . . .") (*id*. (emphasis added)), but it is also inconsistent with Lyon County's own actions. As noted above, Lyon County

issued its Notice of Final Action on January 7, 2014 (JA 5:641-644), which under NRS 278.0235 triggered the 25-day statute of limitations period. In this notice, Lyon County provided nothing to indicate its action was any other than final or that the Commission's action would only become final after it subsequently considered the report from its Planning Commission, some time later. *Id*.

Respondents cannot have it both ways: either the action is ripe for review because Lyon County noticed its final action under NRS 278.0235 on January 7, 2015, or it is not ripe because Lyon County has not subsequently filed a notice with the county clerk to trigger NRS 278.0235. Lyon County violated the procedural requirements of NRS 278.220(4) by taking final action prior to referring the matter back to its Planning Commission. Therefore, the Court should grant CRA's Petition.

B. The Court Should Reverse District Court's Dismissal Of CRA's Open Meeting Law and Due Process Claims

As set forth in CRA's Opening Brief, the District Court improperly dismissed its First (Open Meeting Law) and Second (Due Process) Causes of Action. OB at 54-59. In their Answering Brief, Respondents argue CRA failed to prove violations of either the Open Meeting Law ("OML") or state laws governing ethical disclosures or campaign contributions. AB at 28-40. Respondents, however, use inappropriate standards of proof and due process in a failed attempt to uphold the District Court's ruling on their Motion to Dismiss.

1. CRA Adequately Pled OML Violations Or Should Be Given Leave To Do So

a. Commission Deliberation Outside of Agendized Meeting

CRA's OML Cause of Action alleges "Lyon County BOC violated [] Nevada Open Meeting requirements by . . . deliberating on the action outside of a public hearing." JA 1:30 (at ¶114). CRA also alleged that Commissioner Keller "contacted BOC members and CMI to discuss her proposal [to approve CMI's application]" (JA 1:25 (¶95) and specifically that Commissioner Keller discussed the proposal with Commissioner Mortensen (JA 1:26 (¶96)).

Respondents moved to dismiss arguing CRA did not affirmatively plead that a majority of three of the Commissioners deliberated outside of a meeting. JA 1:92-93. CRA opposed the motion by, in part, providing evidence that (1) the day before the Commissioner Keller and Mortensen meetings with CMI representatives, a third member, Commissioner meet with CMI representatives and that a map of what became Commissioner Keller's proposal was discussed, and (2) that Commissioner Keller and a fourth member, Commissioner Hasting, had discussed and closely coordinated their actions. Notwithstanding the general nature of CRA's pleadings and the proffered evidence, the District Court dismissed without leave to amend. JA 28:3767-3769.

CRA established in its Opening Brief the District Court erred because the OML's prohibition on serial deliberations or walking quorums were clearly

implicated by the Lyon County Commissioners' conduct and the motion should have been denied or CRA should have been given leave to plead expressly a quorum of the Commission deliberated outside of a meeting. OB at 54-56.

In their Answering Brief, Respondents first mistake the applicable law by arguing without citation to authority that a violation of the OML occurs only when "the series of gatherings was held with specific intent to avoid the provisions of NRS Chapter 241" (AB at 29) and CRA presented no evidence of such specific intent (AB at 31). No authority CRA could find requires specific intent for a claim under NRS Chapter 241 nor has this Court ever imposed such a requirement.[8]

Next, Respondents argue that CRA failed on the merits to present sufficient evidence establishing an OML violation. AB at 30-31. At this pleading stage, however, CRA does not need to prove its claim in order to defeat a motion to dismiss. *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 228, 181 P.2d 670 (2008). CRA presented the District Court (and this Court) with record evidence that supports an **allegation** that a majority of the Commissioners deliberated on Commissioner Keller's proposal outside of a public meeting. Moreover, contrary to Respondents' claim, that "there is no evidence that any

[8] Intent become relevant to determine if criminal penalties should apply. See e.g. NRS 241.040(1) ("Each member of a public body who attends a meeting of that public body where action is taken in violation of any provision of this chapter, with knowledge of the fact that the meeting is in violation thereof, is guilty of a misdemeanor.")

Commissioner, either individually, or in concert with other Commissioners, deliberated towards any decision on CMI's Application prior to the January 2, 2014 meeting", is false – as discussed above and in CRA's Opening Brief (at 54-56).

CRA should therefore be allowed to either proceed with its existing claim or amend it for specificity and develop evidence through discovery to then prove its assertions. Dismissal without leave to amend improperly cut short CRA's right to litigate a valid and critical OML claim.

b. Commission's Action Departed from Agenda

CRA also alleged that Lyon County's agenda for the January 2, 2014 meeting did not provide the public with a "clear and complete statement of topics" when the Commission approved Commissioner Keller's last minute proposal. OB at 56-57. In their Answering Brief, Respondents argue no OML violation occurred since the proposal reduced the acreage of the Master Plan amendment, therefore "the property affected by the Board's decision was the same property that was described in the agenda." AB at 33.

In this case, however, the Commission's last minute action denied the public fair notice of the new proposal and its justification in order to rebut the proponents' assertions that the project (rejiggered in private meetings with CMI) actually protected the Silver City viewshed or historic Dayton Consolidated mine buildings as claimed.

Respondents attempt to address this failure asserting the issue was in fact discussed at the January 2 meeting and CRA has not introduced post-decisional evidence in this proceeding contesting the rationale put forward by Commissioner Keller and others. AB at 34. Neither argument holds water. Initially, whether CRA responded to the proposal sprung upon it at that meeting or not, does not operate to negate an OML violation. Given proper notice, CRA could have sought expert reports on the efficacy of the proposal to accomplish its stated goals. Since neither the noticed agenda or the associated staff report failed to disclose the secret proposal, CRA and other members of the public were left in the dark until the actual meeting, a consequence directly in conflict with the objectives of the OML.

Moreover, CRA was not required at the pleading stage to allege an OML notice claim that the rationale advanced by the public agency was false, only that the agenda did not provide clear and complete statement of the topics to be discussed. NRS 241.020(2)(d)(1). Finally, notwithstanding Respondent's lecturing, CRA is expressly barred from introducing post decisional evidence of the validity of the Commission's action. *City of Las Vegas v. Laughlin*, 111 Nev. 557, 558, 893 P.2d 383 (1995) ("Like the district court, this court is limited to the record made before the City in reviewing the City's decision."). In short, the Court should reverse the District Court's dismissal with prejudice of CRA's OML claim for relief.

2. CRA States A Due Process Claim

In its Complaint, CRA alleged that CMI had so predisposed Commission members that their participation violated CRA and its members' Due Process protections under both the United States and Nevada Constitutions. JA 1:17-20, 31.[9] CRA demonstrated in its Opening Brief how the District Court abused its discretion by failing to apply the correct legal standard as articulated by *Caperton v. Massey Coal Company*, 556 U.S. 868, 872 (2009)("*Caperton*") and *Ivey v. Eighth Judicial District*, 129 Nev. __, 299 P.3d 354 (2013)("*Ivey*"). OB at 57-60. Respondent's Answering Brief attempts to resurrect the District Court's dismissal by asserting "CRA's entire claim is based upon erroneous and inapplicable standards." AB at 35. Respondents argue that by relying on *Caperton*, CRA seeks to import a "foreign" West Virginia conflict standard and that no Due Process violation can possibly occur if no violation of Nevada conflict of interest or campaign contribution disclosure laws occur. AB at 17, 35-40. Respondents err on both theories.

First, Respondents seriously misread *Caperton* as applying a "foreign" standard. The United States Supreme Court in no uncertain terms announced that under the Fifth Amendment to the United States Constitution (not the laws of West Virginia), a due process violation occurs "when 'the probability of actual

[9] Nevada's due process protections are coextensive with those under the United States Constitution. *State v. Eighth Judicial District Court (Logan* D.*)*, 129 Nev. __, 306 P.3d 369, 377 (2013).

bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" *Caperton*, 556 U.S. at 872, quoting *Withrow v. Larkin*, 421 U. S. 35, 47 (1975). This Court has similarly announced that the ". . . Due Process Clause does not require proof of actual bias; instead a court must objectively determine whether the probability of actual bias is too high to ensure the protection of a party's due process rights." *Ivey*, 299 P.3d at 357. CRA thus seeks to apply the appropriate United States and Nevada constitutional due process standards.

Second, Respondents err by equating Due Process protections with the minimum recusal and disclosure requirements of NRS Chapters 281 and 281A. AB at 38-40. As made clear in both *Caperton* and *Ivey*, campaign contributions consistent with state law could form the basis of an independent due process claim under the standard set forth above. Indeed, in both cases, the Supreme Courts analyzed the impact of campaign contributions under the Due Process Clause standard notwithstanding all contributions at issue complied with state campaign contribution laws. *Caperton*, 556 U.S. at 874; *Ivey*, 299 P.3d at 357-58. Thus, whether or not Commissioner Keller's fiscal interest in the outcome of CMI's application or CMI's funding of Commissioner Hastings' election violated

Nevada statutory law,[10] these facts, when egregious as here, can state an independent cause of action under the United States and Nevada Constitutions.[11]

Under constitutional due process protections, CRA has stated a claim for relief: the combination of CMI's employment of Commissioner Keller's husband (i.e., supplying her with an apparently much needed source of income that was due to be renewed immediately after the vote on CMI's application to permit mining uses[12]) and the unprecedented funding of Commissioner Hastings' election to defeat an unfriendly Commissioner, might create the probability of "significant and disproportionate influence" or "actual bias on the part of decisionmakers as too high to be constitutionally tolerable." Therefore, the District Court's dismissal of CRA's Second Cause of Action should be reversed and the case remanded for further proceedings.

[10] Commissioner Keller's fiscal interest in her husband's contract with CMI was certainly no less direct than the facts found to violate NRS Chapter 281A in *Carrigan v. v. Comm'n on Ethics*, 129 Nev. ___, 313 P.3d 880, 883 (2013).

[11] Respondents' argument that NRS Chapters 281 and 281A define the extent of the United States and Nevada Due Process protections violates the Supremacy Clause of the U.S. Constitution and basic separation of powers as the Nevada Legislature cannot statutorily circumscribe constitutional rights. *Nevadans for Nevada v. Beers*, 122 Nev. 930, 942 n.20, 142 P.3d (2006).

[12] Respondents surprisingly recite in their Answering Brief that CMI has spent "more than $1 million in historic restoration and preservation efforts" in the Comstock – exposing the substantial monies CMI used to employ Commissioner Keller's husband, and how much was at risk if Commissioner Keller displeased CMI.

III. CONCLUSION

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

Dated: March 2, 2016.

By_____

John L. Marshall
SBN 6733
570 Marsh Avenue
Reno, NV 89509
775.303.4882

Attorney for Appellants Comstock Residents Association and Joe McCarthy

CERTIFICATE OF COMPLIANCE

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

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 6,026 words.

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

Dated: March 1, 2016.

By_____
John L. Marshall
570 Marsh Avenue
Reno, Nevada 89509
775.303.4882

Attorney for Appellants Comstock Residents Association and Joe McCarthy