IN THE SUPREME COURT OF THE STATE OF NEVADA

COMSTOCK RESIDENTS ASSOCIATION; and JOE McCARTHY,

Appellants,

v.

LYON COUNTY BOARD OF COMMISSIONERS; and COMSTOCK MINING INCORPORATED

Respondents.
_____/

Case No. 68433
Appeal from Third Judicial Dist.
Court Case No. 14-CV-00128

RESPONDENTS' JOINT PETITION FOR REHEARING

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LEGAL STANDARD

Respondents, Lyon County Board of Commissioners (the "Board") and Comstock Mining Incorporated ("CMI"), respectfully request rehearing pursuant NRAP 40. A petition for rehearing is proper "when the court has overlooked or misapprehended some material matter, or when otherwise necessary to promote substantial justice." *Matter of Estate of Hermann*, 100 Nev. 149, 151, 679 P.2d 246, 247 (1984). On a petition for rehearing, a party may not simply reargue matters already decided in the initial disposition or raise legal arguments for the first time. *Gordon v. Eighth Judicial Dist. Court of State of Nev. In & For County of Clark*, 114 Nev. 744, 745, 961 P.2d 142, 143 (1998). Rehearing is appropriate, however, when "the court has overlooked or misapprehended a material fact in the record." NRAP 40(c)(2)(A).

MISAPPREHENDED FACTS

In its December 2, 2016 Order Affirming in Part, Reversing in Part, and Remanding (the "Order"), a panel of this Court recited in the *FACTS AND PROCEDURAL HISTORY* section thereof as follows:

> CMI applied for amendments so that it would have the right to then apply for a special use permit to mine the property in the event that the land contained minerals worth mining.
>
> In 2010, the [Board] denied CMI's applications. CMI then significantly funded the campaign of one new county commissioner and employed the husband of a

> second new county commissioner. CMI reapplied to amend the Master Plan and zoning in 2013.
>
> Prior to voting on CMI's new applications, the commissioners disclosed any personal interests related to CMI, reviewed the Lyon County Planning Commission's report recommending against approving CMI's applications, and heard substantial testimony both in favor of and against the applications. This time, the [Board] approved a reduced version of CMI's applications.

The bulk of the above-recited facts are inaccurate and are not supported by any document in the record before this Court. CMI and the Board respectfully request that, at a minimum, the Order be amended to reflect that CMI did not file an application for a Master Plan Amendment and Zone Change that was denied in 2010, to remove inaccurate language describing CMI's lawful campaign contributions, and to accurately reflect the working relationship between CMI and Scott Keller, husband of former Commissioner Vida Keller.

Further, to the extent this Court relied on the foregoing misstated and erroneous facts in reversing the district court's dismissal of Appellants' due process claim, the Board and CMI respectfully request rehearing of that issue and affirmation of the district court's dismissal thereof.

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ARGUMENT

A. CMI filed one application with the Board to amend the Master Plan and zoning on its property.

In August 2013, CMI filed a Master Plan Amendment and Zone Change Application with the Lyon County Planning Department. JA Vol. 5 at 0654-0686. This is the only application CMI has ever filed with Lyon County to amend the Master Plan and zoning on its property. There was no application filed in 2010 and no assertion to the contrary was even raised by the Appellants in the Opening or Reply Briefs. Appellants' characterization in its district court briefs of communications from CMI to the Board in 2010 is simply in error as shown below.

The 2010 Lyon County Master Plan was adopted by the Board in December 2010 following years of public hearings and workshops. 6 JA 0757; 28 JA 3818-19. In their Opening Brief, Appellants asserted only that "CMI proposed amendments to the draft 2010 [Master Plan] prior to its adoption." Opening Brief p. 18, ll. 4-5. Appellants cited to a December 13, 2010 letter sent by CMI to the Board in which CMI requested a slight change in wording of the designation of a single parcel of land. 5 JA 0650-53. Appellants' use of the term "amendments" in its Opening Brief to describe CMI's December 2010 letter was improper as the Master Plan was not yet adopted and CMI was simply participating in the public drafting process.

Appellants also erroneously claimed that the Board "unanimously rejected CMI's request to redesignate the lands and allow mining" in adopting the Master Plan. Opening Brief at p. 18, ll. 6-10. The document cited in support of this assertion is the minutes from the Board's December 23, 2010 public meeting at which the Master Plan was adopted. 28 JA 3818-19. The minutes make no reference whatsoever to CMI or its December 13, 2010 letter. From the minutes, it is not clear that CMI's requested drafting change was even discussed, much less "unanimously rejected" as claimed by the Appellants and adopted by the Court in the Order.

Appellants' Reply Brief makes no assertions concerning applications in 2010 to amend the Master Plan and zoning. Appellants had the opportunity to and did file three briefs in support of its petition for judicial review with the district court. Appellants' opening brief before the district court contains virtually identical remarks concerning the development of the 2010 Master Plan as those contained in its Opening Brief before this Court. 28 JA 3843-44. However, Appellants' characterization of CMI's involvement in the drafting process was grossly misstated. Appellants asserted that "[p]rior to adoption of the 2010 CMP, CMI sought a Master Plan and zone change to its property to allow mining." 28 JA 3848. In support of this contention, Appellants cited the same December 13, 2010 letter cited in its Opening Brief in these proceedings. As noted above, a

review of the aforementioned letter reveals only that CMI was participating in the drafting process prior to the Board's adoption of the Master Plan—no formal application was filed by CMI to amend the not yet adopted Master Plan or the zoning. Furthermore, there is nothing in the record to suggest that the Board considered, much less specifically rejected, CMI's request for a change in the draft Master Plan that would only affect a portion of a single parcel.

Appellants' opposition and reply briefs in support of their petition for judicial review contain no arguments upon which this Court might have based its finding of fact that CMI had applied for a Master Plan amendment and zone change in 2010. See 28 JA 3894-3904, 3926-36. Lastly, Appellants' Complaint contains a vague allegation that CMI "objected to the proposed land use designations for their property within Silver City – which they desired to mine. Lyon County rejected CMI's request." 1 JA 0015. Again, the only supporting reference for this allegation is CMI's December 13, 2010 letter in which CMI, during the drafting of the Master Plan, requested a slight change to the land use designation of a single parcel.[1]

[1] While Appellants' due process claim was dismissed, the Motion to Dismiss filed by the Board was styled as a Motion to Dismiss or, in the alternative, Motion for Partial Summary Judgment. 1 JA 0082-0101. Where a motion to dismiss is supported by evidence outside of the pleadings and where the Court considers such evidence, the motion should be treated as one for summary judgment. *Meyer v. Sunrise Hospital*, 117 Nev. 313, 22 P.3d 1142 (2001). The district court's Order Granting in Part and Denying in Part Motion to Dismiss contains references to

The record before this Court shows only that CMI briefly participated in the development of the Master Plan in 2010, but did not actually apply for any amendments thereto until August 2013. The Joint Answering Brief filed by CMI and the Board made clear that CMI had only filed one application. Answering Brief at pp. 2-4. Therefore, CMI and the Board respectfully request that this Court correct factual findings to the contrary in its Order.

B. The Order contains inaccurate and unnecessarily incendiary language concerning CMI's campaign contributions.

The Order erroneously recites that after the Board "denied CMI's [2010] applications" CMI "then significantly funded the campaign of one new county commissioner." First, as noted herein, there was absolutely no 2010 application or any denial thereof. Further, the characterization of CMI's campaign contributions as "significant" is without basis and unnecessarily incendiary. This characterization appears to be based on Appellants' arguments in its Opening

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evidence from the administrative record that is outside of the pleadings to that point and must therefore be treated like an order on summary judgment. 28 JA 3779-84. On summary judgment, the nonmoving party is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture; instead a party opposing such a motion must set forth specific facts showing that there is a genuine issue for trial and the opponent must show it can produce evidence at trial to support its claim. *Id*.; *Van Cleave v. Kietz-Mill Minit Mart*, 97 Nev. 414, 633 P.2d 1220 (1981); *Hickman v. Meadow Wood Reno*, 96 Nev. 782, 617 P.2d 871 (1980). This was argued before the district court. 1 JA 0087. Therefore, it is not enough merely that Appellants made factual allegations in the Complaint to support the factual findings contained in the Order. Those facts must be supported by actual evidence.

Brief, where Appellants asserted that "CMI threw unprecedented cash support behind Bob Hastings…CMI and its related companies contributed $17,500 in cash to Bob Hastings to insure his election. CMI's cash contributions were approximately 60 percent of Mr. Hastings' cash contributions that year." Opening Brief at p. 19, ll. 4-8. These assertions were supported only by a reference to Appellants' own Complaint filed in the district court, which in turn contains no evidentiary support for the allegations made therein.

Appellants went on to argue that "CMI's cash contribution to Bob Hastings dwarfed all prior contributions to any candidate from a single interest by 350 percent." Opening Brief at p. 19, ll. 10-13. Except for a vague reference to unspecified Nevada Secretary of State records, Appellants offered no reference to any supporting documentation for this assertion. Should the Court wish to take judicial notice of the facts concerning the 2012 election of Bob Hastings, a review of the Secretary of State records reveals that Mr. Hastings' opponent, Chuck Roberts, received $25,716.50 in campaign contributions[2] compared to Mr.

[2] Nevada Secretary of State Website, Campaign Contributions and Expenses Report of Chuck Roberts, available at: http://nvsos.gov/SOSCandidateServices/AnonymousAccess/ViewCCEReport.aspx?syn=7mUejp3ELhHip5gEPPPdMg%253d%253d

Hastings' $29,559.37.[3] Indeed, a review of Mr. Roberts' campaign finance disclosures reveals that he also received substantial contributions from corporate interests. The total campaign contributions to the respective candidates were substantially similar. Without CMI's contributions to Mr. Hastings, Mr. Roberts' campaign would have been funded far in excess of Mr. Hastings'.

Allegations of impropriety in providing campaign contributions to Mr. Hastings in Appellants' Opening Brief and Complaint are wholly unsubstantiated. Further, a review of the actual facts concerning Mr. Hastings' election in 2012 belies Appellants' allegations. For these reasons, to the extent the Court relied on these unsubstantiated and inaccurate allegations in writing the facts section of its Order, CMI and the Board respectfully request a correction thereto. At a minimum, CMI and the Board request that this language in the Order be tempered to indicate that these "facts" are merely unsupported assertions raised in Appellants' Complaint to the district court.

C. The Order improperly characterizes the working relationship between CMI and the spouse of former Commissioner Keller.

The Order states that CMI "employed the husband of a second new county commissioner." This is not true. Former Commissioner Vida Keller's husband,

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[3] Nevada Secretary of State Website, Campaign Contributions and Expenses Report of Bob Hastings, available at: http://nvsos.gov/SOSCandidateServices/AnonymousAccess/ViewCCEReport.aspx?syn=EjDsJCF8jhNTuJnXhkcsbg%253d%253d

Scott Keller, either through his own company or other companies he has worked for, has been an independent contractor working on a few non-mining projects involving CMI, including restoration and repair of historical structures. 4 JA 0621-22. In their Opening Brief, Appellants make a series of allegations concerning the work performed by Scott Keller for CMI. Opening Brief at p. 20. None of these allegations are supported by reference to any evidence except Appellants' own Complaint in this matter. Moreover, the precise nature of Mr. Keller's dealings with CMI is outlined in the written disclosure prepared by Commissioner Keller, which she read into the record during the Board's January 2, 2014 meeting. 4 JA 0621-23.

As argued in the Joint Answering Brief, there is no evidence in the record to support this Court's conclusion that CMI "employed" Mr. Keller, only that he had pecuniary interests in projects funded by CMI, all of which was properly disclosed under applicable statutes. Answering Brief at p. 37, ll. 1-9. Therefore, CMI and the Board respectfully request a correction to the Court's statement concerning Mr. Keller's dealings with CMI as supported by evidence in the record.

D. To the extent this Court's reversal of the district court's dismissal of Appellants' due process claim is based on the erroneous facts discussed herein, rehearing of that reversal is warranted.

Each of the misapprehended facts discussed herein are pertinent to Appellants' due process claim, which sought redress based on allegations of

improper influence by CMI with Commissioners Keller and Hastings. 1 JA 0031. This claim was dismissed by the district court, which noted that Appellants' due process claim failed as a matter of law because none of the perceived conflicts, even assuming all supporting facts alleged in the Complaint were true, actually rose to the level necessary to require recusal under NRS Chapter 281A and finding that the affected commissioners had properly disclosed everything required of them under applicable law. 28 JA 3769-70.

This Court has misapprehended the facts as presented in the briefing and in the Complaint as shown herein, namely the allegations by CRA that "CMI significantly funded one commissioner's campaign and employed another commissioner's husband on a year-to year contract." This misapprehension of the facts, particularly when taken together, gives the due process claim additional, unwarranted weight. When you eliminate the error concerning the 2010 application and properly state the facts that follow, the due process claim falls apart in light of applicable statutory authority as argued both here and in the district court.

Moreover, the Court may wish to take judicial notice that Appellants simultaneously advanced claims of ethics violations against Commissioners Keller and Hastings with the Nevada Ethics Commission during the proceedings in this matter. A Panel of the Ethics Commission dismissed the claims against

Commissioner Keller and found Keller did not violate any applicable ethical provisions by participating in the process of considering CMI's Application. The Ethics Commission deferred action on the request for opinion regarding Commissioner Hastings.

CONCLUSION

For the reasons set forth herein, CMI and the Board respectfully request that this Court amend its Order to correct misstatements of material fact and to reconsider its reversal of the district court's dismissal of Appellants' due process claim.

DATED this 20th day of December, 2016.

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CERTIFICATE OF COMPLIANCE (BASED UPON NRAP FORM 16)

1. I hereby certify that this petition for rehearing 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 Office Word 2007 in 14 point Times New Roman type style.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 40 because it is proportionately spaced, has a typeface of 14 points or more, and contains 2,424 words.

DATED this 20th day of December, 2016.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that I am an employee of ALLISON MacKENZIE, LTD., Attorneys at Law, and that on this date, I caused the foregoing document to be served on all parties to this action by:

✓ Placing a true copy thereof in a sealed postage prepaid envelope in the United States Mail in Carson City, Nevada

as follows:

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

DATED this 20th day of December, 2016.

/s/ Nancy Fontenot
NANCY FONTENOT

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