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Electronically Filed
Jan 10 2017 10:28 a.m.
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Clerk of Supreme Court

10 IN THE SUPREME COURT OF THE STATE OF NEVADA

11 COMSTOCK RESIDENTS ASSOCIATION,
12 JOE McCARTHY

13 Appellants,
14 00128

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

15
16 v.

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

20 Respondents,
21 _____/

22 APPELLANTS' OPPOSITION TO RESPONDENTS'

23
24 JOINT PETITION FOR REHEARING
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I. INTRODUCTION

Appellants Comstock Residents Association and Joe McCarthy (CRA) hereby oppose Respondents Lyon County Board of Commissioners (BOC) and Comstock Mining Incorporated's (CMI) Joint Petition for Rehearing. On December 2, 2016, this Court affirmed in the main, the District Court's determination in Respondents' favor on CRA's claims for relief. Order Affirming in Part, Reversing in Part, and Remanding, December 20, 2016 (Order). This Court, however, reversed the District Court's dismissal of CRA's First Claim for Relief because CRA sufficiently alleged facts, which if proven true, stated a legal claim for relief for a violation of due process. Order at 2-4.

In their Joint Petition, Respondents misuse the "misapprehension of a material fact" standard of NRAP 40(c)(2)(A) to reargue whether as a matter of fact CRA proved a violation of due process. As set forth below, the Court should deny Respondents' Joint Petition as it meets no grounds for altering the Court's prior disposition of this matter.

II. ARGUMENT

A. The Court Misapprehended No Material Fact

Respondents focus the Court on three paragraphs of the Introduction to the Order in their attempt to win a rehearing on the reinstatement of CRA's due process claim. Joint Petition at 2-3. These introductory paragraphs are simply a summary of the Court's recitation of CRA's allegations supporting its due process

1 claim. Compare Order at 1-2 with 2-3. Appellants will address the first two
2 paragraphs as the Respondents do argue the misapprehension arising from it.
3

4 1. Full Paragraph 1.

5 Comstock Residents Association (CRA) petitioned the district
6 court for judicial review after the Lyon County Board of
7 Commissioners (BOC) approved Comstock Mining Inc.'s
8 applications to amend the Master Plan and zoning of some of
9 CMI's property near Silver City. CMI applied for amendments
10 so that it would have the right to then apply for a special use
11 permit to mine the property in the event that the land contained
12 minerals worth mining. (Order at 1.)

13 The Court misapprehended no fact in this paragraph. CMI applied to the
14 BOC to change the master plan and zoning designation to allow it to apply to
15 mine its property near Silver City. JA 5:654-686. The BOC approved the
16 application (albeit in a reduced form as noted by the Court in the third paragraph
17 discussed below). JA 5:0636. CRA then petitioned for judicial review. JA 1:001.

18 2. Paragraph 2.

19 In 2010, the BOC denied CMI's applications. CMI then
20 significantly funded the campaign of one new county
21 commissioner and employed the husband of a second
22 commissioner. CMI reapplied to amend the Master Plan and
23 zoning in 2013. (Order at 1.)

24 In Paragraph 2, the Court characterizes CMI's request to amend the
25 applicable master plan and zoning in 2010 as an "application" and its action in
26 2013 as "reapplied." Both of these characterizations are not factually correct but
27 the mistake is not material. In 2010, CMI requested that the BOC amend the
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1 master plan and zoning via letter during the process to adopt the updated
2 Comprehensive Master Plan. See Appellants' Opening Brief at 18. CMI 2013
3 application, therefore, was not a "reapplication" but instead that organization's
4 first official "application." Should the Court desire to amend it's Order it may
5 substitute "similar request" for "applications" in the first sentence and "applied"
6 for "reapplied" in the third sentence.¹
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9 These changes require no rehearing because they are not material to the
10 outcome of the Court's Order. CMI's 2010 action, whether characterized as an
11 application, request, proposal, etc., is not central to, indeed not even mentioned in,
12 the Court's determination that CRA's factual allegations adequately stated a
13 potential due process violation. The Court set forth the allegations relevant to its
14 due process considerations at pages 2 to 4 of its Order. These allegations center
15 on BOC and CMI conduct during consideration of CMI's 2013 application, not
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19 ¹ In its briefing below and in this Court, Appellants never characterized CMI's
20 request/proposal to amend the proposed 2010 Master Plan as an "application," as
21 Respondents concede. Joint Petition at 4. Respondents take issue with Appellants'
22 characterization of CMI's 2010 letter to the BOC as "proposing amendments" to
23 the draft 2010 Master Plan as that document had not been adopted. *Id.* In the 2010
24 Letter, CMI specifically requested the BOC to change the applicable land use
25 zoning to one parcel and extend the "Resource" designation to the "entirety" of 12
26 others. JA 5:650-651. CMI's proposals can certainly be characterized as
27 proposing amendments to draft 2010 Master Plan. In addition, the BOC rejected
28 CMI's request when it unanimously adopted the 2010 Master Plan without the
amendments proposed by CMI. The Respondents quibble because the record of
the BOC's proceeding does not contain a specific reference to CMI's proposal.
Joint Petition at 5. However, the net result of the BOC's action in 2010 remains:
CMI's request was effectively denied. The Court made no misapprehension of fact
here.

1 how CMI's 2010 proposals should be characterized. Thus, even if the Court
2 determined that it "misapprehended a fact" in how CMI's 2010 action should be
3 characterized, it is not relevant or material.
4

5 Next, Respondents inappropriately attempt to attack, as a matter of fact, the
6 truth of CRA's allegations relied upon by the Court to reverse the dismissal of
7 CRA's due process cause of action, namely that CMI thereafter significantly
8 funded one commissioner's election and employed the husband of another. Joint
9 Petition at 7-10 (citing the second sentence of Paragraph 2 above). As made clear
10 in the Order, the Court did not find as a matter of fact that these CMI actions took
11 place, but rather simply that CRA alleged that they did. Order at 2 - 4. To the
12 extent that the Court desires to clarify that its recitation of the second sentence of
13 the third paragraph of page 1 of its Order is based on CRA's allegations (as made
14 clear just a page later), CRA has no objection.
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18 However, CRA vigorously objects to Respondents' attempt to try these
19 factual allegations in this post-decision rehearing proceeding. Respondents' basic
20 argument on this one sentence is that CRA cited little or "no evidentiary support
21 for the allegations made [in its Compliant]." Joint Petition at 8.
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24 However, the District Court dismissed CRA's First Claim for Relief based
25 entirely on the asserted insufficiency of the allegations of fact in the First Cause of
26 Action. JA 27:3873 ("The complaint does not contain sufficient allegations to
27 support a claim that there was an actual or perceived conflict of interest requiring
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1 that any Board members recuse themselves from the decision under relevant
2 standards set forth in Nevada and federal law.”). Respondents do not dispute that
3 the District Court dismissed CRA due process claim. Joint Petition at 11.²
4 Therefore, CRA was precluded from undertaking discovery or conducting a trial
5 on the due process allegations. Indeed, the remainder of the proceeding
6 constituted a petition for judicial review based on the record as produced by the
7 BOC itself.
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10 On appeal, the question presented to this Court was whether the District
11 Court erred as a matter of law when it granted Respondents’ Motion to Dismiss
12 based on the allegations contained in CRA’s Complaint. See Order at 3 (“A
13 decision to dismiss a complaint is rigorously reviewed on appeal with all alleged
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17 ² For the first time on appeal, Respondents contend that the District Court’s
18 dismissal of CRA’s due process claim should be interpreted as a grant of summary
19 judgment. Joint Petition at 6-7, n.1. Not only is this argument completely
20 untimely and wholly inappropriate for a Petition for Rehearing, it is also wrong.
21 First, Respondents waived the argument as they could have raised it in its
22 Answering Brief in this Court but did not (indeed, as noted above, Respondents
23 affirmatively characterized the District Court’s action as a dismissal and agreed
24 with CRA on the appropriate standard of review for dismissals not summary
25 judgment). *Bates v. Chronister*, 100 Nev. 675, 681-82, 691 P.2d 865, 870 (1984).
26 Second, NRAP Rule 40(c)(1) expressly precludes it: “no point may be raised for
27 the first time on rehearing.” See also *In re Hermann*, 100 Nev. 149, 151 (1984).
28 Finally, Respondents vaguely cite to the entire District Court order to claim
“references” were made to facts outside of the pleadings. Joint Petition at 7, n.1.
The District Court quite clearly accepted all of facts in the Complaint regarding the
due process claim as true and held, as a matter of law, not resolving fact, that since
no violation of state election/ethics law occurred in its mind, no violation of due
process could occur either. JA 4:3782-3783.

1 facts presumed true and all inferences drawn in favor of the complaint.”); see also
2 **Respondents’** Answering Brief, at 18 (“This Court reviews orders of dismissal *de*
3 *novo*. [...] A claim must be dismissed if it appears beyond doubt that plaintiff is
4 entitled to no relief under any set of facts that could be proved in support of the
5 claim.” (Citations omitted.)) Respondents’ arguments – that CRA has not proven
6 its due process allegations – are thus irrelevant at this pleading stage in the
7 proceedings.³

10 Lastly, Respondents reargue their basic legal theory, accepted by the District
11 Court, but rejected by this Court: that NRS Chapter 281A controls state and
12 federal due process claims. Joint Petition at 10-11 (compare Joint Answering
13

15 ³ Even if the Court were to entertain Respondents’ arguments as the facts, they fail.
16 For example, Respondents take issue with the Court’s use of the word
17 “significantly” when discussing CMI funding of Commissioner’s Hastings
18 election. However, the Respondents do not contest that CMI provided 60 percent
19 of Mr. Hastings funding. Rather Respondents argue that other facts (not in the
20 record) indicate that his opponent received close but somewhat less in total cash
21 contributions and conclude, “Without CMI’s contributions to Mr. Hastings, [the
22 opponent’s] campaign would have been funded far in excess of Mr. Hastings’.”
23 This conclusion underlines, rather than undermines, the significance of CMI’s
24 funding and Mr. Hasting debt to the company. Similarly, Respondents dance
25 around the details of Commissioner Keller’s husband’s pecuniary relationship with
26 CMI, arguing that “it is not true” that CMI “employed” Mr. Keller. Joint Petition
27 at 9, citing Ms. Keller’s disclosure statement at JA 4:621-623. Not only is this
28 argument irrelevant as the truth of CRA’s allegations must be assumed, but in any
event, Commissioner Keller states that “Scott Keller was under contract with
Comstock Mining Incorporated for one year from November 2011 to November
2012,” then worked for his brother on a projected funded by CMI, then worked
directly for a nonprofit also funded by CMI. *Id.* It should be left to further
discovery and the trier of fact to determine the exact nature of Ms. Keller’s
financial entangles with CMI under the applicable legal standard.

1 Brief at 32-40). The Court did not misapprehend facts. It simply applied the
2 correct standard of review, accepted the allegations of CRA's complaint as true,
3 and applied straightforward due process law to reverse the District Court
4 dismissal.⁴

6 III. CONCLUSION

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8 The Court properly reversed the District Court's dismissal of CRA's
9 allegations of a due process claim. Under the guise of "misapprehension of
10 material fact," Respondents BOC and CMI seek rehearing. However, as shown
11 above, the Court misapprehended no fact material to its ruling and the Joint
12 Petition should be denied.

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14 Date: January 9 2017.

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25 ⁴ Again for the first time, Respondents assert, incorrectly and without citation or
26 proper request for judicial notice, that CRA "simultaneously advanced" claims of
27 ethics violations with the Nevada Ethics Commission (NEC). CRA did not seek
28 NEC review. Moreover, even assuming the Respondents' characterization of the
NEC's action to be accurate, NRS Chapter 281A state law does not control claims
under state and federal due process clauses, as fully briefed by the parties during
the appeal. See e.g., CRA's Opening Brief at 57-60; CRA's Reply Brief at 23-25.

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 1,945 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

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1 subject to sanctions in the event that the accompanying brief is not in conformity
2 with the requirements of the Nevada Rules of Appellate Procedure.

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4 Dated: January 9, 2017.

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