

Case No. 14-CV-01304

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

2014 OCT 24 PM 3:29

COUNT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

Andrea Andersen DEPUTY

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

COMSTOCK RESIDENTS ASSOCIATION,
GAYLE SHERMAN, JOE McCARTHY

Petitioners,

v.

LYON COUNTY BOARD OF
COMMISSIONERS

Respondents,

PETITION FOR WRIT OF MANDATE

I. INTRODUCTION

1. Petitioners Comstock Residents Association ("CRA") members, Gayle Sherman and Joe McCarthy are residents of the Comstock including Silver City, Lyon County, Nevada. CRA brings this lawsuit to compel the Lyon County Board of County Commissioners to comply with their nondiscretionary duty under Nevada's Public Records Act in response to a request for all records related to Comstock Mining Inc. (CMI). The County Commissioners refused to

1 produce responsive public records created or received in the course of their public duties on
2 individual Commissioners' private electronic devices.

3 **II. PARTIES**

4 2. Petitioner CRA is a not-for-profit organization incorporated in Nevada and through
5 its members appeared at appropriate public hearings and objected to the CMI's application to
6 allow mining uses within Silver City. Members of CRA live, work, recreate and/or commute in
7 the Comstock Historic District (CHD) in general and more specifically in Silver City.
8

9 3. Petitioner Gayle Sherman lives in Silver City at 100 Grant Street. Ms. Sherman
10 first purchased her home in 1976 and lived there for many years until she had to sell her home
11 to pay for her son's college education. Ms. Sherman repurchased her old home in 2001.
12

13 4. Petitioner Joe McCarthy and his wife Ann purchased land from 2003 to 2006 and
14 built their Silver City home in 2006 and have been living there since 2007. Prior to purchasing
15 their land and building their house, Mr. and Ms. McCarthy diligently researched the applicable
16 land uses allowed within Silver City and specifically determined that mining was not a
17 permitted use on lands within Silver City now owned by CMI.

18 5. Defendant Lyon County Board of Commissioners is the governing body of a
19 subdivision of the State of Nevada and pursuant to NRS Chapter 278 possesses the authority
20 and responsibility to regulate land use for the benefit of the public within Lyon County, Nevada.
21 Defendant Lyon County Board of Commissioners is composed of individual members Bob
22 Hastings (District 1), Vida Keller (District 2), Ray Fierro (District 3), Joe Mortenson (District
23 4), Virgil Arellano (District 5). These members are sued in their official capacity.
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25

26 **III. BACKGROUND**

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1 6. CMI owns or controls mining claims on lands within the Silver City townsite or
2 adjacent thereto that prior to January 2, 2013 could not be mined under the applicable Lyon
3 County Master Plan and zoning provisions. In August 2013, CMI applied to Lyon County to
4 change the land use designations and zoning within Silver City from more urban to more rural
5 which would allow industrial uses, such as mining, which heretofore had been prohibited.

6
7 7. CMI, a mining company, filed its 2013 Application in order to mine the property,
8 stating the application was for “the purpose of pursuing continued mineral exploration,
9 development and the economic mining potential of the subject property.”

10 8. The citizens of Silver City overwhelmingly opposed CMI’s 2013 Application.
11 Approximately 75 percent of the 146 registered voters in Silver City oppose CMI’s 2013
12 Application and signed a petition to that effect.

13
14 9. Lyon County has created a system of town advisory councils to provide input of
15 the directly affected communities on issues of concern.

16 10. In September 2013, the Silver City Advisory Council considered CMI’s 2013
17 Application and unanimously voted to recommend that it be denied.

18 11. Upon receipt of CMI’s 2013 Application, Lyon County Planning Department staff
19 began to analyze it and compare it to the policies and guidance contained in the 2010 Master
20 Plan.

21
22 12. In addition, Petitioners completed a thorough legal, planning, environmental,
23 economic and historical evaluation of CMI’s 2013 Application. Petitioners submitted their final
24 collated expert report to Lyon County. The final report established not only consistency of
25 Lyon County’s many prior decisions on the same question, but also inconsistency, and adverse
26 economic, environmental, and social impacts of CMI’s proposed industrial uses within Silver
27 City.
28

1 13. Upon an exhaustive review of the CMI's 2013 Application and Petitioners' final
2 report, Lyon County's professional planning staff recommended that CMI's application be
3 denied, based on the following considerations:

4 a. Industrial land uses requested by the application were in conflict with
5 multiple 2010 Master Plan policies.

6 b. No change in conditions has occurred to justify so altering the longstanding
7 land use designations within Silver City.

8 c. The proposed reduction in density would make needed town infrastructure
9 improvements less likely.

10 d. As envisioned by the 2010 Master Plan, a land use change of such a
11 magnitude should be considered, if at all, during the development of the Silver City Community
12 Plan.
13

14 14. Lyon County originally agendized CMI's 2013 Application for October 8, 2013.

15 15. After CMI received Lyon County planning staff's Staff Report recommending
16 denial of CMI's 2013 Application, Petitioners are informed and believe that CMI contacted
17 upper level Lyon County management and held a meeting attended by both members of the
18 Planning Commissioners and BOC and the Lyon County Manager. Lyon County has never
19 disclosed what was discussed at this meeting.
20

21 16. A large number of Silver City residents attended the October 8, 2013 Planning
22 Commission meeting.
23

24 17. After the Planning Commission had already approved its agenda for the day, while
25 keeping the public at the meeting for more than an hour, CMI and Lyon County staff announced
26 that they had agreed to seek a continuance to the next Planning Commission meeting in
27 November. Although CMI and Lyon County both had advance knowledge of their proposed
28

1 request, neither party alerted Silver City residents or their representatives of the likely
2 continuance of the hearing for which residents travelled to Yerington to participate in.

3 18. November 12, 2013, the Lyon County Planning Commission held a public hearing
4 on CMI's 2013 Application.

5 19. Both Commissioner Hastings and Keller attended the November 2013 Planning
6 Commission during the hearing on CMI's 2013 Application.

7 20. After hearing hours of public testimony, the Planning Commission adopted the
8 recommendation of its professional staff and recommended – by a 5 to 1 vote – that the BOC
9 deny CMI's application.

10 21. Lyon County agendized CMI's 2013 Application to be heard by the BOC at its
11 January 2, 2014 meeting.

12 22. At the beginning of the January 2, 2014 meeting, Commissioner Keller announced
13 she had a new action for consideration by the BOC. Commissioner Keller indicated she had
14 contacted BOC members and CMI to discuss her proposal. Although Commissioner Keller
15 characterized the new proposal as a “compromise” offered on behalf of the Silver City
16 residents, she never contacted any representative of the Silver City Town Board or concerned
17 residents to discuss the new alternative.

18 23. On January 1, 2014, Commissioner Keller and her husband, a CMI employee, met
19 privately with BOC Chair Joe Mortensen and the Lyon County Manager. Petitioners are
20 informed and believe that Commissioner Keller, her husband, Commissioner Mortensen and the
21 County Manager then met with CMI's CEO and its consultant. Despite meeting the day before
22 with CMI's CEO and its consultant, Commissioner Keller informed the public during the
23 January 2 meeting that she had only been working with CMI's consultant.

1 24. Commissioner Keller has had extensive contacts with CMI. Commissioner Keller
2 refused to meet with representatives of Silver City despite repeated invitations.

3 25. After public comment, the BOC held an abbreviated discussion consistent with
4 their constrained view of the allowable impacts to consider and voted, 4 to 1 to overturn the
5 Silver City Advisory Council, its professional planning staff recommendation, and the
6 recommendation of its Planning Commission, and grant Commissioner Keller's new amended
7 CMI 2013 Application.
8

9 26. CRA members, who include many Silver City residents, and Gayle Sherman and
10 Joe McCarthy will be adversely affected by the BOC's approval of the CMI's revised 2013 in
11 the following ways:

12 a. Petitioners did not receive prior notice and an opportunity to prepare for
13 the actual application acted on by the BOC on January 2, 2014.
14

15 b. Petitioners were excluded from communications between BOC members
16 that would otherwise have been public.

17 c. CMI's existing mineral exploration in Silver City and surface mining in
18 the adjacent Lucerne Pit. CMI's past and present exploration and mining activities cause
19 degraded visual conditions, loud industrial noises within a quiet residential area, dust and dirt
20 on roads and in the air, and increased traffic on nearby roads including trucks and other
21 industrial equipment. The change in land use designations and zoning from prohibiting
22 industrial uses such as mining in Silver City will likely cause these present adverse effects to
23 increase.
24

25 d. The change in land use designations and zoning from prohibiting
26 industrial uses such as mining to allowing it under a special use permit will reduce the value of
27 Petitioners' property.
28

1 e. Surface mining, made possible by the change in land use will exacerbate
2 and accelerate the destruction of the CHD. Road building, cuts and fills, trenching, drill pads,
3 and subsequent associated surface mining activities, as noted by the National Park Service
4 individually and cumulatively degrade the unique character of the CHD. In addition, the noise
5 associated with the proposed activities will substantially alter the character of the CHD. As
6 CRA members have testified, the construction, drilling and other activities associated with
7 CMI's past and current mineral exploration and mining have significantly altered the aural
8 landscape in the CHD and efforts to attenuate have proven unsuccessful.

10 f. Mining operations can generate dust from mining and mineral processing
11 operations and associated truck traffic, releasing particulates, nitrous oxide, sulfur dioxide, and
12 carbon monoxide from the equipment used to mine and process ore minerals. These emissions
13 can generate smog and other forms of air pollution that may impact local air quality. Mine
14 sites can also have increased concentrations of specific metals and salts in water used in – or
15 runoff from – mine sites. Acid mine drainage is a phenomenon that can occur when rock
16 containing sulfides is exposed to air and water. The water can become acidic and often carries
17 elevated levels of toxic metals. Acid mine drainage occurs most frequently in association with
18 metals mines [such as gold and silver mines] and can affect water quality. Pit lakes, another
19 water quality concern during and after mine closure, are created when mining is completed in a
20 pit and dewatering pumps are turned off, allowing groundwater to flow back into the pit.
21 Similar concerns about the acidity and concentration of heavy metals in these water bodies
22 arise in association with metals mines. Changes in water quality and quantity can affect not
23 only human health but also wildlife habitat and ecosystem health. Environmental impact
24 assessment processes often intensively focus on bio-diversity issues in Nevada, and as a
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1 consequence, operating plans require significant dedication to design of mitigation and
2 management efforts.

3 g. The change in land use to rural versus urban densities will it more difficult
4 for infrastructure improvement for Silver City that would improve the citizens' quality of life.

5 27. The Nevada Public Records Act ("NPRA") (NRS Chapter 239) provides the
6 public the right to inspect and copy public records created and held by government entities. In
7 relevant part, the NPRA defines a "government entity" as "(a) An elected or appointed officer
8 of this State or of a political subdivision of this State; (b) An institution, board, commission,
9 bureau, council, department, division, authority or other unit of government of this State,
10 including, without limitation, an agency of the Executive Department, or of a political
11 subdivision of this State" NRS 239.005(a), (b).

12 28. On February 11, 2014, Petitioners submitted to the Lyon County Board of County
13 Commissioners and Lyon County staff a request for all public records pursuant to the NPRA
14 and related to CMI's Application for Master Plan Amendment and Zoning Change (PLZ-13-
15 0050, 0051), including but not limited to all records of communication regarding CMI to or
16 from the Commissioners regardless of whether they occurred on devices owned by the County
17 or the Commissioners.

18 29. Lyon County Commissioners utilized private email and cellular phones to
19 communicate with each other, staff and members of the public including CMI and its
20 representatives, regarding CMI's activities in Lyon County, including CMI's application
21 considered by Lyon County on January 2, 2014.

22 30. Lyon County responded to Petitioners' NPRA request and provided, *inter alia*,
23 copies of phone records, emails and other records in electronic form as long as those records
24 were created and or stored on county-owned and controlled equipment.

31. Lyon County refused to provide any record created or stored by an individual County Commissioner, stating: “Lyon County does not provide cellular phones for the County Commissioners, and as such, Lyon County does not maintain any of those records and they are not public records pursuant to NRS Chapter 239.”

FIRST CAUSE OF ACTION

(Violation of NPRA)

32. Petitioners re-allege and incorporate by reference Paragraphs 1 through 31 inclusive, of this Petition, as if fully set forth below.

33. On February 11, 2014, Petitioners served upon Lyon County BOC members a NPRA request for public records regarding CMI.

34. On April 25, 2014, Lyon County denied Petitioners' NPRA request as to those records held by individual Lyon BOC members, asserting these records were not public records within the meaning of the NPRA.

35. Because the NPRA obligates “governmental entities” – defined to include individual county commissioners – to preserve and produce records made in the course of their official duties, Lyon County BOC violated the NPRA by not producing all public records responsive to Petitioners’ NPRA request.

36. The NPRA also requires Lyon County to provide Petitioners with the basis for withholding any public record as privileged.

37. Based on information and belief, Lyon County has withheld public records public but in violation of the NPRA failed to provide Petitioners with any basis for withholding public records.

38. The NPRA authorizes members of the public to bring an action to compel the production of public records where a governmental entity has refused to comply with NPRA requirements.

39. Petitioners therefore request this Court order the Lyon County BOC to respond to Petitioners' NPRA request.

1 **REQUEST FOR RELIEF**

2 WHEREFORE, as a result of the approval of the revised CMI 2013 Application,
3 Petitioners request judgment in their favor as follows:

- 4 1. That the Court declare that Lyon County BOC violated the NPRA by failing to
5 produce all public records responsive to CRA's NPRA request;
- 6 2. That the Court issue a Writ of Mandate directing the Lyon County BOC to produce
7 all public records pursuant to CRA's NPRA request regardless of whether of the revised 2013
8 Application is null and void;
- 9 3. ForPetitioners costs associated with this action;
- 10 4. To the extent permitted by law, for an award of reasonable attorneys' fees; and,
- 11 5. For such other and further relief as the Court may deem just and proper.

12 Dated: October 24, 2014.

13 Respectfully submitted,

14
15 By _____
16 John L. Marshall, SBN 6733
17 570 Marsh Avenue
18 Reno, NV 89509
19 775.303.4882

20 Attorney for Petitioners CRA, Gayle Sherman, Joe
21 McCarthy
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Dated: October 24, 2014.

Joe McCarthy

1 Case No. 14-CV-01304

2 JOHN L. MARSHALL

3 SBN 6733

4 570 Marsh Avenue

5 Reno, Nevada 89509

6 Telephone: (775) 303-4882

7 Attorney Petitioners Comstock

8 Residents Association, Gayle Sherman, Joe

9 McCarthy

2014 OCT 24 PM 3:33

COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

Andrea Andersen DEPUTY

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

14 COMSTOCK RESIDENTS ASSOCIATION,
15 GAYLE SHERMAN, JOE McCARTHY

16 Petitioners,

17 v.

18 LYON COUNTY BOARD OF
19 COMMISSIONERS

20 Respondents,
21 _____/

22 NOTICE OF RELATED CASE

23 Petitioners Comstock Residents Association ("CRA") members, Gayle Sherman and Joe
24 McCarthy file this Notice of Related Case to alert the Court that this case is related to a pending
25 case in Third Judicial District: Comstock Residents Association et al., v. Lyon County Board of
26 Commissioners, et al., Case No. 14-CV-00128 and assigned to Senior Judge Estes. Both cases
27 concern claims whose background concern the approval by Lyon County of a master plan and
28 zoning change application on regarding mining uses in or adjacent to the townsite of Silver
City. Senior Judge Estes also recently denied a Motion to Amend in Case No. 14-CV-00128 to
add the Nevada Public Records Act (NPRa) claim set forth in this case, which motion included

1 considerable briefing on underlying merits of the NPRA claim but did not form the basis for the
2 ruling.

3 Dated: October 24, 2014.

4
5 Respectfully submitted,

6
7 By 

8 John L. Marshall, SBN 6733
9 570 Marsh Avenue
10 Reno, NV 89509
11 775.303.4882

12 Attorney for Petitioners CRA, Gayle Sherman, Joe
13 McCarthy
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CERTIFICATE OF SERVICE

Pursuant to NRS 239B.030, the undersigned affirms that the preceding document does not contain the social security number of any person. I hereby certify that the foregoing Notice of Related Case was served on the parties a copy thereof on the 24th day of October, 2014, by ~~U.S.~~ mail: *hand delivery*.

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


Ann Price McCarthy

Case No. 14-CV-01304
Dept. No. Senior Judge Kosach

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

JA

FILED
2014 DEC .5 PM 1:10

TANYA SCEIRINE
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

KATHY THOMAS DEPUTY

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

COMSTOCK RESIDENTS ASSOCIATION,
GAYLE SHERMAN, JOE McCARTHY,

Petitioners,

vs.

LYON COUNTY BOARD OF
COMMISSIONERS,

Respondents,

ANSWER TO PETITION FOR WRIT OF MANDATE

Defendant LYON COUNTY BOARD OF COMMISSIONERS (referred to as COUNTY),
by and through ROBERT L. AUER, Lyon County District Attorney, and STEPHEN B. RYE,
Chief Deputy District Attorney, and hereby answers Petitioners' Petition for Writ of Mandate
as follows:

1. County is without sufficient information or knowledge to form a belief as to
whether the Plaintiffs are residents of the Comstock or Silver City, Lyon County, Nevada, and
therefore deny the same. As to the remaining averments contained in Paragraph 1 of the
Complaint, they are conclusions and are therefore not required to be answered. To the extent
an answer is required, COUNTY denies the same.

2. As to Paragraph 2, COUNTY is without sufficient information of knowledge to
form a belief as to the veracity of said averments, and therefore denies the same.

1 3. As to Paragraph 3, COUNTY is without sufficient information of knowledge to
2 form a belief as to the veracity of said averments and therefore denies the same.

3 4. As to Paragraph 4, COUNTY is without sufficient information of knowledge to
4 form a belief as to the veracity of said averments and therefore denies the same.

5 5. COUNTY admits Paragraph 5.

6 6. With respect to Paragraph 6, COUNTY admits that CMI owns and/or controls
7 land in the Comstock and that CMI applied to Lyon County to amend the Master Plan and
8 zoning on a portion of property in Lyon County. To the extent any answer is required as to
9 the remaining averments in Paragraph 6, COUNTY denies the same.

10 7. With respect to Paragraph 7 of the Petition, COUNTY admits that quoted
11 language on the application. COUNTY is without sufficient information of knowledge to form
12 a belief as to the veracity of the remaining averments and therefore denies the same.

13 8. COUNTY is without sufficient information to either admit or deny the averments
14 in Paragraph 8, and therefore COUNTY denies the same to the extent any admission or
15 denial is required.

16 9. COUNTY admits Paragraph 9.

17 10. COUNTY admits Paragraph 10.

18 11. COUNTY admits Paragraph 11.

19 12. As to the averments of Paragraph 12, COUNTY is without sufficient information
20 or knowledge to either admit or deny the averments, and therefore denies the same.

21 13. As to Paragraph 13, COUNTY admits that their professional planning staff
22 recommended denial based on the considerations set forth in the Petition. To the extent any
23 answer is required as to the remaining averments in Paragraph 13, COUNTY denies the
24 same.

25 14. As to Paragraph 14, COUNTY admits that the CMI applications were scheduled
26 for hearing before the Planning Commission for October 8, 2013.

1 15. As to the averments of Paragraph 15, COUNTY is without sufficient information
2 or knowledge to either admit or deny the averments, and therefore denies the same.

3 16. As to the averments of Paragraph 16, COUNTY admits that Silver City residents
4 attended the Planning Commission meetings regarding the CMI applications. COUNTY is
5 without sufficient information to determine whether the number is "large," and therefore
6 denies the same.

7 17. As to Paragraph 17, COUNTY admits that the October 8, 2013 hearing on the
8 CMI applications was continued until the November Planning Commission meeting. COUNTY
9 is without sufficient information of knowledge to form a belief as to the veracity of the
10 remaining averments and therefore denies the same.

11 18. COUNTY admits Paragraph 18.

12 19. COUNTY admits Paragraph 19.

13 20. COUNTY admits Paragraph 20.

14 21. COUNTY admits Paragraph 21.

15 22. As to the averments of Paragraph 22, COUNTY is without sufficient information
16 or knowledge to either admit or deny the averments, and therefore denies the same.

17 23. As to Paragraph 23, COUNTY admits Commissioner Keller met with
18 Commissioner Mortensen and the County Manager. As to the remaining allegations,
19 COUNTY is without sufficient information or knowledge to either admit or deny the averments,
20 and therefore denies the same.

21 24. Paragraph 24 is opinion and conclusions and no answer is required. To the
22 extent any answer is required, COUNTY denies the same.

23 25. As to Paragraph 25, COUNTY admits that the BOCC voted 4 to 1 to approve
24 the CMI application for the Master Plan Amendment. As to the remaining allegations, to the
25 extent any answer is required, COUNTY denies the same.

26 26. COUNTY denies Paragraph 26.

1 27. Paragraph 27 of the Complaints sets forth conclusions, opinions, and
2 statements of law and no answer is required. To the extent any answer is required, COUNTY
3 denies the same.

4 28. With respect to Paragraph 28, COUNTY admits that Petitioners submitted a
5 public records request dated February 11, 2014 to the Lyon County Board of County
6 Commissioners and Lyon County Staff. With respect to the remaining allegations, COUNTY
7 denies the same.

8 29. COUNTY is without sufficient knowledge to either admit or deny the allegations
9 of Paragraph 29, and therefore denies the same.

10 30. COUNTY admits that it responded to the Public Records Request. COUNTY
11 further admits that private email and telephone records were not provided pursuant to the
12 public records request.

13 31. COUNTY denies Paragraph 31.

14 32. COUNTY restates its answers to Paragraphs 1-31 as though fully set forth.

15 33. COUNTY admits Paragraph 33, specifically, that Petitioners submitted a Public
16 Records Request dated February 11, 2014 requesting various records from Lyon County.

17 34. With respect to Paragraph 34, COUNTY admits that it did not provide certain
18 records that were not kept, maintained or paid for by the COUNTY. COUNTY admits that
19 such records may not be public records. As to the remaining allegations, they call for legal
20 conclusions, and therefore no answer is necessary. To the extent an answer is necessary,
21 COUNTY denies the same.

22 35. COUNTY denies Paragraph 35.

23 36. COUNTY admits Paragraph 36.

24 37. COUNTY denies Paragraph 37.

25 38. COUNTY admits Paragraph 38.

1 39. With respect to Paragraph 39, COUNTY complied with Petitioners' request, and
2 therefore COUNTY requests that the relief requested be denied.

3 **AFFIRMATIVE DEFENSES**

4 First Affirmative Defense

5 Petitioners have failed to state a claim upon which relief can be granted.

6 Second Affirmative Defense

7 Petitioners have failed to exhaust administrative remedies.

8 Third Affirmative Defense

9 Petitioners' claim or claims are barred by the doctrine of unclean hands.

10 Fourth Affirmative Defense

11 The records requested by Petitioners are not public records and/or do not exist.

12 Fifth Affirmative Defense

13 Petitioners' Public Records Request is overbroad, not specific and/or fails to request
14 records that allow COUNTY to respond to the request.

15 Sixth Affirmative Defense

16 The records requested by Petitioners are protected by privilege, including but not
17 limited to, deliberative process privilege, attorney/client privilege and other privileges available
18 under Nevada law.

19 Seventh Affirmative Defense

20 Petitioners' Public Records Request violates the constitutional and statutory rights of third
21 parties and/or employees and County Commissioners and therefore the County is precluded from
22 disclosing the records.

23 Eighth Affirmative Defense

24 The records requested by Petitioners are not public records as defined by Nevada law.

25 Ninth Affirmative Defense

26 Petitioners' claim or claims are barred by the doctrine of laches.

27 //

Tenth Affirmative Defense

Petitioners' claim or claims are precluded by the related doctrines of collateral estoppel and res judicata.

Eleventh Affirmative Defense

Petitioners' claim or claims are barred by the doctrine of estoppel.

Twelfth Affirmative Defense

Petitioners' claim or claims are barred by the doctrine of waiver.

Thirteenth Affirmative Defense

Petitioners' claim or claims are moot.

Fourteenth Affirmative Defense

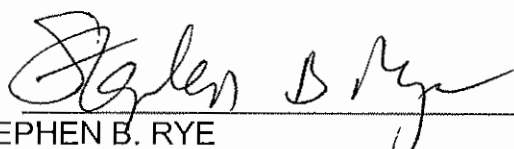
The County has no duty to perform the actions which Petitioners seek to mandate. The County proceed in the manner required by law and has not taken any action which arbitrary or capricious, unsupported by substantial evidence or otherwise unlawful.

WHEREFORE, COUNTY respectfully requests and order form this Court as follows:

- a. Petitioners take nothing by way of the Complaint, and that the Complaint/Petition be dismissed with prejudice.
- b. That the Court award costs of suit to COUNTY along with reasonable attorney's fees, as permitted by law.
- c. For such other relief as the Court deems proper in the premises.

DATED this 5th day of December, 2014.

ROBERT L. AUER
DISTRICT ATTORNEY

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


Attorney for Respondents
Lyon County Board of Commissioners

Certificate of Service

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

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

Dated this 5th day of December, 2014.



Employee

2015 NOV 30 PM 4: 00

TANYA SUCHKINE
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT
DeAnn Peeples
DEPUTY

Case No. 14-CV-01304

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

COMSTOCK RESIDENTS ASSOCIATION
AND JOE McCARTHY

Petitioners,

v.

LYON COUNTY BOARD OF
COMMISSIONERS, et al.

Respondents,

CRA's OPENING BRIEF IN SUPPORT OF
PEITITON FOR WRIT OF MANDATE

I. INTRODUCTION

In the course of their official and public duties, individual Lyon County Commissioners used their personal devices (e.g., computers and cellular telephones) to communicate among themselves and with Comstock Mining Inc. ("CMI") regarding CMI's then pending land use applications before the Lyon County Commission. Petitioners Comstock Residents Association and Joe McCarthy (collectively "CRA") requested under the Nevada Public Records Act ("NPRA") a copy of all records of communication regarding CMI. See Exhibit A to CRA's Request for Judicial Notice ("RJN") filed contemporaneously herewith. Lyon County produced some records but determined the NPRA did not apply to records – otherwise public – that were created or received on Commissioners' personal communication devices and that had not been shared with the central Lyon County administration. See RJN Exhibit B. In other words, Lyon

1 County asserted that the NPRA did not reach what would clearly otherwise be public records, as
2 long as the Commissioners used personal communication devices to create, send or receive
3 those records.

4 CRA's October 24, 2014 Petition for Writ of Mandate names Lyon County
5 Commissioners Bob Hastings, Vida Keller, Ray Fiero, Joe Mortenson, and Virgil Arellano, and
6 states that these members are sued in their official capacity.
7

8 CRA places before the Court a straightforward question: does the NPRA apply to records
9 created, sent or received by elected officials of Respondent Lyon County Board of County
10 Commissioners in the course of their official, public business on their personal communication
11 devices. The plain language of the NPRA applies directly to elected officials not just the
12 County administration. The Court should grant CRA's petition and order the respondent Lyon
13 County Commissioners to produce all public records responsive to CRA's request. To find to
14 the contrary would allow officials to hide public records from public review by using their
15 personal communication devices to conduct the public's business.
16

17 **II. BACKGROUND**

18 A. Historic Land Use in Silver City and CMI's Land Use Applications to Reverse 19 Past Plans

20 Silver City, Nevada, is one of the few residential communities identified in Lyon County.
21 It is one of two communities Lyon County dedicated as a living, historic community. As
22 modern planning and zoning emerged for the area, Silver City has retained this historical
23 backdrop as its foundation, and overlaid a modern transect of desired development. Using
24 zoning law, Lyon County has consistently envisioned the "Silver City Town Site" as a
25 commercial core with a small industrial zone, which includes some historic mills and mines, all
26 surrounded by residential development. Zoning provisions assigned residential densities within
27 the Town Site reflected existing conditions and promoted densities capable of facilitating
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1 infrastructure improvement. Beyond the boundaries of the Town Site, land use has consistently
2 been designated for less dense development and open space. Using different designations with
3 different names, this basic concept has carried through generations of Lyon County land use
4 plans for Silver City since 1971.

5 In August 2013, CMI applied to Lyon County to change the land use designations and
6 zoning within Silver City from more urban to more rural, which would allow industrial uses
7 such as mining that had been prohibited. CMI filed its 2013 Application in order to mine the
8 property stating the application was for, “the purpose of pursuing continued mineral
9 exploration, development and the economic mining potential of the subject property.” CMI’s
10 2013 Application was essentially the same application for land use designation changes filed by
11 Nevex Gold and rejected by Lyon County in 1986. See generally RJN Exhibit C at 002-035.¹
12

13 After Lyon County professional planning staff exhaustively reviewed CMI’s application,
14 it issued in-depth reports on the requested changes. *Id.* Lyon County’s professional planning
15 staff recommended that CMI’s application be denied based on multiple factors, including but
16 not limited to the following: industrial land uses requested by CMI’s application were in
17 conflict with multiple 2010 Master Plan policies; no change in conditions has occurred to justify
18 so altering the longstanding land use designations within Silver City; and as envisioned by the
19 2010 Master Plan, a land use change of such a magnitude should be considered, if at all, during
20 the development of the Silver City Community Plan. *Id.* After hearing hours of public
21 testimony, the Lyon County Planning Commission adopted the recommendation of its
22 professional staff and recommended – by a 4 to 1 vote – that the Lyon County Commission
23 deny CMI’s requested changes. RJN Exhibit C at 1214-1215.
24
25
26
27

28 ¹ RJN Exhibit C consists of excerpts of documents produced by Lyon County in response to
CRA’s NPRA request and also served as the “Record of Action” in CRA’s challenge to Lyon

1 Lyon County scheduled CMI's Application to be heard by the County Commissioners at
2 its January 2, 2014 meeting. At the beginning of the January 2, 2014 meeting, Commissioner
3 Keller announced she had a new action for consideration. Commissioner Keller indicated she
4 had contacted other Commissioners and CMI to discuss her proposal outside of a public
5 meeting. RJN Exhibit C at 528-532. After public comment during the January 2 hearing, the
6 Commissioners held an abbreviated discussion consistent with their constrained view of the
7 allowable impacts to consider and voted, 4 to 1 to overturn the Silver City Advisory Council, its
8 professional planning staff recommendation, and the recommendation of the Lyon County
9 Planning Commission, and grant Commissioner Keller's new amended CMI 2013 Application.
10
11 *Id.*

12 B. Commissioners' Use of Personal Devices to Conduct and Influence Official
13 Business

14 Individual Lyon County Commissioners used their personal devices or email accounts to
15 conduct official business regarding CMI's land use application. For example, CMI applied
16 pressure on Lyon County professional planning staff through Lyon County Commissioner Bob
17 Hastings. On CMI's behalf and using his personal email address, Commissioner Hastings
18 contacted Rob Loveberg, head of the Lyon County Planning Department. Commissioner
19 Hastings reported to Mr. Loveberg that CMI was "intense" and that CMI was concerned that the
20 report might be negative. RJN Exhibit C at 2925. Commissioner Hastings then reported that in
21 his experience Mr. Loveberg drafted staff reports based on facts. *Id.* A report based on facts,
22 however, would "not calm [CMI] nerves." *Id.*

23
24 Commissioner Hastings then went to work to produce a more CMI-friendly report. Using
25 personal electronic devices and email addresses, he forwarded Mr. Loveberg's response to
26

27
28 County's action changing the land use designations to allow mining. The pagination is internal
to the document production.

1 Commissioner Keller and asked for her thoughts. RJN Exhibit C at 2925. Commissioner
2 Hasting subsequently called Commissioner Vida Keller to discuss Mr. Loveberg's apparently
3 problematic (i.e. factual) approach. RJN Exhibit C at 2927 ("I also discussed this with Vida").
4 Commissioner Hastings then coordinated with CMI's President and CEO Corrado De Gasperis.
5 Commissioner Hasting informed Mr. De Gasperis of his communications with Mr. Loveberg.
6 *Id.* Commissioner Hastings then reported to Mr. De Gasperis that he "will be discussing this
7 matter further with [Lyon County Manager and Mr. Loveberg's supervisor] Jeff Page." *Id.*
8 Commissioner Hastings then assured Mr. De Gasperis that he would take care of CMI's
9 interests in this matter: "I want to make sure that Rob [Loveberg] understands that [sic]
10 concerns we have and Jeff amy [sic] be the conduit we need." Mr. Hastings conducted all of
11 these communications using his personal email and cellular accounts, presumably with his
12 personal communication device. *Id.*

13
14
15 Similarly, the Petitioners believe Commissioner Keller may have used personal
16 communication devices to contact CMI to discuss the last minute proposal, as no record
17 produced by Lyon County evidences such contact even though Commissioner Keller herself
18 described having such communications. The Lyon Commissioners offered their personal
19 telephone numbers as their official point of contact on the County's website. RJN Exhibit D.

20
21 C. CRA's Public Records Request and County's Response

22 On February 11, 2014, the Petitioners submitted to the Lyon County Board of County
23 Commissioners and Lyon County staff a request for all public records pursuant to the NPRA
24 and related to CMI's Application for Master Plan Amendment and Zoning Change, including
25 but not limited to all records of communication regarding CMI to or from the Lyon County
26 Commissioners regardless of whether they occurred on devices owned by Lyon County or
27 personally by the Lyon County Commissioners. RJN Exhibit A.
28

1 Lyon County responded to Petitioners' NPRA request and provided, *inter alia*, copies of
2 phone records, emails and other records in electronic form as long as those records were created
3 and or stored on county-owned and controlled equipment. See e.g. RJN Exhibit C at 2925.
4 Lyon County refused to provide any record created or stored by an individual County
5 Commissioner, stating: "Lyon County does not provide cellular phones for the County
6 Commissioners, and as such, Lyon County does not maintain any of those records and they are
7 not public records pursuant to NRS Chapter 239." RJN Exhibit B. Petitioners then commenced
8 this suit to enforce the NPRA's obligation on Lyon County to produce all applicable public
9 records.
10 records.

11 **IV. ARGUMENT**

12 A. NPRA Applies to Public Records Regardless of Means of Creation

13 The Nevada Supreme Court has repeatedly addressed the broad scope of the NPRA and the
14 statutory requirement to liberally construe its terms to maximize public disclosure.
15

16 The NPRA provides that all public books and public records of governmental
17 entities must remain open to the public, unless "otherwise declared by law to be
18 confidential." NRS 239.010(1). The Legislature has declared that the purpose of
19 the NPRA is to further the democratic ideal of an accountable government by
20 ensuring that public records are broadly accessible. NRS 239.001(1). Thus, the
21 provisions of the NPRA are designed to promote government transparency and
22 accountability.

23 In 2007, in order to better effectuate these purposes, the Legislature amended the
24 NPRA to provide that its provisions must be liberally construed to maximize the
25 public's right of access. NRS 239.001(1)-(2); 2007 Nev. Stat., ch. 435, § 2, at
26 2061. Conversely, any limitations or restrictions on the public's right of access
27 must be narrowly construed. NRS 239.001(3); 2007 Nev. Stat., ch. 435, § 2, at
28 2061. In addition, the Legislature amended the NPRA to provide that if a state
entity withholds records, it bears the burden of proving, by a preponderance of
the evidence, that the records are confidential. NRS 239.0113; 2007 Nev. Stat.,
ch. 435, § 5, at 2062.

Reno Newspapers v. Gibbons, 266 P.3d 623, 626 (2011).

1. NPRA's Plain Language Applies to Public Records of Individual Elected Officials

1 The NPRA requires that “all public books and public records of a governmental entity
2 must be open at all times during office hours to inspection by any person, and may be fully
3 copied or an abstract or memorandum may be prepared from those public books and public
4 records.” NRS 239.010. The NPRA defines a “governmental entity” as:

- 6 (a) An elected or appointed officer of this State or of a political subdivision of this State;
7 (b) An institution, board, commission, bureau, council, department, division, authority or
8 other unit of government of this State, including, without limitation, an agency of the
9 Executive Department, or of a political subdivision of this State;
10 (c) A university foundation, as defined in NRS 396.405; or
11 (d) An educational foundation, as defined in NRS 388.750, to the extent that the foundation
12 is dedicated to the assistance of public schools.

13 NRS 239.005(5).

14 Thus, the plain language of the NPRA defines “government entity” to include elected
15 officers of political subdivisions of the State in NRS 239.005(a) from a commission of a
16 political subdivision under NRS239.005(b). In other words, the Legislature expressly applied
17 the NRPA to elected individuals under NRS 239.005 subsection (a) **AND** separately to units of
18 government under NRS 239.005 subsection (b). The individual Lyon County Commissioners
19 are, without a doubt, “elected officers” of a political subdivision of the State of Nevada and are
20 therefore subject to the disclosure requirements of NRS 239.010.

22 This straightforward application of NRS Chapter 239 comports with the Legislative
23 findings and declaration that public access to records of the public’s business “foster[s]
24 democratic principles,” that the NPRA “must be construed liberally to carry out this important
25 purpose” and that any exception to the release of such records be “construed narrowly.” NRS
26 239.001; see also *PERS v. Reno Newspapers, Inc.*, 313 P.3d 221, 224 (2013) (“The Act’s
27
28

1 purpose is to promote government transparency and accountability by facilitating public access
2 to information regarding government activities.”)

3 Lyon County desires to construe the obligation of government entities very narrowly by
4 applying the NPRA to just the countywide administration. Such a construction would enable
5 public officials to conduct public business on their own private devices in order to avoid public
6 disclosure and would be directly contrary to the Legislature’s statutory direction. “[T]he
7 provisions of the NPRA place an unmistakable emphasis on disclosure. The NPRA expressly
8 provides that its provisions ‘must be construed liberally’ to ensure the presumption of openness
9 and explicitly declares that any restriction on disclosure ‘must be construed narrowly.’ ” *Reno*
10 *Newspapers v. Gibbons*, 266 P.3d at 629, quoting NRS 239.001(2)-(3). Because the plain
11 language of the NPRA applies to official records of “elected officers” of Lyon County, it must
12 control. When the language of a statute is plain and unambiguous, a court should give that
13 language its ordinary meaning and not go beyond it. *Reno v. Reno Newspapers*, 105 Nev. 886,
14 891 (1989); *Nev. State Democratic Party v. Nev. Republican Party*, 256 P.3d 1, 4-5 (Nev. 2011)

17 B. The Court Should Order Commissioners to Produce All Relevant Public Records

18 Lyon County argued that NPRA does not apply because the county administration does
19 not have possession of records created or received by the individual Commissioners on their
20 private devices during the course of their official business (unless the Commissioners happened
21 to forward those records to the county offices). As noted above, the NPRA makes no such
22 distinction. To the contrary, the NPRA makes individuals subject to disclosure separate section
23 from the government entity itself by its plain and unambiguous terms.

24 Other jurisdictions also hold that records created by individuals when conducting public
25 business on private devices are public records and must be disclosed regardless of where they
26 are stored. See e.g., *City of Champaign v. Lisa Madigan*, 2013 IL App (4th) 120662 (city
27
28

1 alderman communication about public business on private devices constituted public records);
2 Mississippi Ethics Commission, Public Records Opinion No. R-13-023 (April 11, 2014)(finding
3 text messages sent in official role to be public records notwithstanding their creation or
4 reception on a mayor's private cell phone); *cf. City of San Jose v. Superior Court*, 225
5 Cal.App.4th 75, withdrawn and review granted by 326 P.3d 976, 173 Cal.Repor.3d 46 (2014)
6 (Court of Appeals opinion, reversing trial court's holding that emails, texts and voicemails
7 regarding public business on private devices were public records, now before the California
8 Supreme Court).

10 **III. CONCLUSION**

11 Lyon County Commissioners elected to use their personal electronic devices to conduct
12 public business regarding CMI and its application to allow mining uses on its property in Silver
13 City. Lyon County refuses to produce all of these records, claiming that since the County
14 administrative government did not have possession of these records, they were not public,
15 regardless if they were sent or received when conducting the public's business. However, the
16 NPRA plainly applies to individual elected County Commissioners. Since these Commissioners
17 chose to use their personal devices to conduct their public responsibilities, they cannot now
18 shield these otherwise public records from disclosure. The Court should therefore grant this
19 CRA's Petition for Writ of Mandate and issue a writ ordering Lyon County and the named
20 Commissioners to produce all relevant public records regardless of where they are stored.
21
22

23 ///

24 ///

25 ///

26 ///

27 ///

28

1 Dated: Monday, November 30, 2015

2 Respectfully submitted,

3
4 By 

5 LUKE BUSBY, ESQ.

6 LUKE ANDREW BUSBY, LTD.

7 216 East Liberty St.

8 Reno, NV 89501

9 775-453-0112

10 f- 775-403-2192

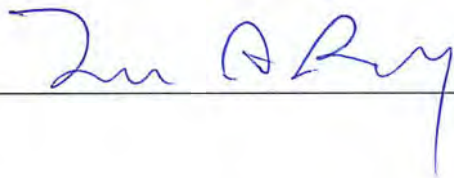
11 luke@lukeandrewbusbyltd.com

12 Attorney for Petitioners CRA and Joe McCarthy

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRS 239B.030, the undersigned affirms that the preceding document does not
3 contain the social security number of any person. I hereby certify that the foregoing Opening
4 Brief In Support of Petition for Writ of Mandate was served on the parties on Monday,
5 November 30, 2015

6 Steven B. Rye
7 Chief Deputy District Attorney
8 31 S. Main Street
9 Yerington, NV 89447
10

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12 _____
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1 Case No. 14-CV-01304

2 2015 NOV 30 PM 4: 00

3 IN THE THIRD JUDICIAL DISTRICT COURT
4 OF THE STATE OF NEVADA
5 IN AND FOR LYON COUNTY
TANIA S. SCOTT
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT
DeAnn Peebles
DEPUTY

6 COMSTOCK RESIDENTS ASSOCIATION
7 AND JOE McCARTHY

8 Petitioners,

9 v.

10 LYON COUNTY BOARD OF
11 COMMISSIONERS, et al.

12 Respondents,
13 _____/

14
15 **REQUEST FOR JUDICIAL NOTICE**

16 Petitioner Comstock Residents Association and Joe McCarthy (collectively "CRA")
17 hereby request that the Court take judicial notice of Exhibits A through D as they are official
18 government records. NRS 47.130; *Jory v. Bennight*, 91 Nev. 763, 767, 542 P.2d 1400, 1403
19 (1975). This Request for Judicial Notice is supported by the Declaration of John L. Marshall,
20 filed contemporaneously herewith.

21
22 Exhibit A: CRA's February 11, 2014 Public Records Request to Lyon County Board
23 of County Commissioners.

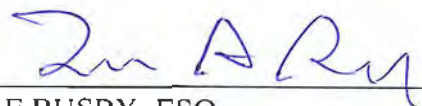
24 Exhibit B: May 2, 2014 Letter from Lyon County District Attorney to John L.
25 Marshall regarding Lyon County's response to CRA's Public Records Request.

26 Exhibit C: Excerpts of Lyon County Board of Commissioners' March 11, 2015
27 document production in response to CRA's Public Records Act request.
28

1 Exhibit D: Page from Lyon County's official website, www.lyon-county.org, accessed
2 September 9, 2014.

3
4 Dated: Monday, November 30, 2015

5 Respectfully submitted,

6
7 By 

8 LUKE BUSBY, ESQ.

9 LUKE ANDREW BUSBY, LTD.

10 216 East Liberty St.

11 Reno, NV 89501

12 775-453-0112

13 f- 775-403-2192

14 luke@lukeandrewbusbyltd.com

15 Attorney for Petitioners CRA and Joe McCarthy

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRS 239B.030, the undersigned affirms that the preceding document does not
3 contain the social security number of any person. I hereby certify that the foregoing Request for
4 Judicial Notice was served on the parties on Monday, November 30, 2015.

5 Steven B. Rye
6 Chief Deputy District Attorney
7 31 S. Main Street
8 Yerington, NV 89447

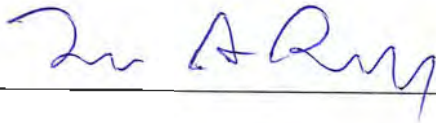
9
10 
11 _____

Exhibit A

Exhibit A

John L. Marshall

ATTORNEY AT LAW

570 Marsh Avenue
RENO, NV 89509

Telephone:
(775) 303-4882

johnmarshall@charter.net

February 11, 2014

Via Electronic Mail

Lyon County Board of County Commissioners
and Lyon County Staff
Jeff Page, Lyon County Manager
27 South Main Street
Yerington, Nevada 89447

Re: Public Records Request, Comstock Mining Inc. Application for Master Plan
Amendment and Zoning Change (PLZ-13-0050, 0051)

To Whom It May Concern:

I do hereby make a public records request pursuant to Nevada Revised Statutes
Chapter 239 on Lyon County Board of County Commissioners and Lyon County Staff.

Specifically, I request access to any and all records related to Comstock Mining Inc.
Application for Master Plan Amendment and Zoning Change (PLZ-13-0050, 0051). This
request includes, but is not limited to, any and all records of communications between
Comstock Mining Inc., ("CMI") and members of the Lyon County Board of County
Commission and Lyon County Staff, including but not limited to phone recordings, emails,
internal documents and communications, notes, and any and all other related documents
in the possession of you subject to disclosure under Nevada's public records law. These
records also include records of all records of communications between CMI and you
regardless of whether the communication occurred on private or public devices.

If you need further clarification on the request, please let me know. Please let me
know if there are any required fees for the reproduction of the documents requested and I
will provide payment in advance as required. Also, please let me know in advance of any
search or copying if the fees will exceed \$100.

JA 037

If you would prefer to respond electronically, please feel free to email the response to the email address contained above.

Thank you for your assistance in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'JLM', written over a horizontal line.

John L. Marshall

Attorney for Comstock Residents Association

cc: Steve Rye, Lyon County District Attorney Office

Exhibit B

Exhibit B

ROBERT L. AUER
District Attorney



<http://www.lyon-county.org>

STEPHEN B. RYE
Assistant District Attorney

**OFFICE OF THE DISTRICT ATTORNEY
LYON COUNTY**

801 OVERLAND LOOP, SUITE 308
DAYTON, NEVADA 89403
Phone: (775) 246-6130
Fax: (775) 246-6132

31 SOUTH MAIN STREET
YERINGTON, NEVADA 89447
Phone: (775) 463-6511
Fax: (775) 463-6516

565 EAST MAIN STREET
FERNLEY, NEVADA 89408
Phone: (775) 575-3353
Fax: (775) 575-3358

May 2, 2014

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

Via electronic mail only:
johnladuemarshall@gmail.com

RE: CRA Records Request – Emails dated April 25, 2014 and May 1, 2014

Dear John:

I am in receipt of your email dated April 25, 2014. Lyon County does not maintain any records related to private telephones or private computers for county staff or elected officials, including County Commissioners. As such, those are not public records maintained and open to inspection pursuant to the Nevada Public Records Law. The cellular phone bills for the County Manager (and other employees) have been provided in the format in which they are maintained by the County.

Lyon County has provided copies of emails provided by County Commissioners pursuant to your records request, whether on private email accounts or on county email accounts. However, that production of emails was not meant to imply or suggest that all of those documents are public records, or that a request entitles a person to all the records on a person's private computer. You have indicated you do not believe you have received all of the emails. If you provide me more information on what specifically you are referring to, I can contact each of the Commissioners with that information. I will provide the requested privilege log under separate cover.

I also have an email response from Josh Foli, Lyon County Comptroller, to your email dated May 1, 2014, regarding phone allowance for county officials/employees. Also enclosed is an email dated the same date from your client, Gayle Sherman, addressed to Josh Foli asking the same question, along with his response to Ms. Sherman. County staff would appreciate if you can coordinate your efforts so that staff is not required to answer the same questions if in fact you are seeking the same information. If your client wants to work directly with Mr. Foli or the County Manager with regards to the public records request, please let me know.

Sincerely,

A handwritten signature in black ink, appearing to read "Steve", written over a horizontal line.

Stephen B. Rye, Esq.
Chief Deputy District Attorney

ROBERT L. AUER
District Attorney



<http://www.lyon-county.org>

**OFFICE OF THE DISTRICT ATTORNEY
LYON COUNTY**

801 OVERLAND LOOP, SUITE 308
DAYTON, NEVADA 89403
Phone: (775) 246-6130
Fax: (775) 246-6132

31 SOUTH MAIN STREET
YERKINGTON, NEVADA 89447
Phone: (775) 463-6511
Fax: (775) 463-6516

STEPHEN B. RYE
Assistant District Attorney

565 EAST MAIN STREET
FERNLEY, NEVADA 89408
Phone: (775) 575-3353
Fax: (775) 575-3358

March 11, 2014

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

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

RE: CRA Records Request and Petition/Complaint

Dear Mr. Marshall and Mr. Cavilia:

The following items are enclosed:

1. Planning Commission Hearing Audio – November 10, 2013
2. Planning Commission Hearing Audio – December 10, 2013
3. County Commission Hearing Audio – January 2, 2014
4. CD with Documents
5. Document Index

We will supplement the request as necessary.

I would like to discuss agreement on the record for purposes of the petition/complaint.
Please contact me after you have reviewed the information provided.

Thank you for your cooperation in this matter.

Sincerely,

Stephen B. Rye, Esq.
Chief Deputy District Attorney



LYON COUNTY PLANNING DEPARTMENT

2750 E. HARRIS STREET, STEVENAGE, NEVADA 89447
(702) 443-4342 (702) 443-1343 FAX

ITEM # _____

Rob Loveberg
Planning Director

REPORT OF PLANNING COMMISSION ACTION

PLZ-13-0050 Master Plan Amendment from Resource to Rural Residential and Suburban Residential to Rural Residential
Meeting Date January 2, 2014
Owners Cornstock Mining, Inc.
Applicant Same
Area Location Silver City
Parcel Number(s) (APNs) 06-091-02 & 06-091-05
Current Master Plan Designation Resource and Suburban Residential
Proposed Master Plan Designation Rural Residential
Existing Zoning NR-1 Single-Family Nonrural Residential (6,000 square foot minimum)
Proposed Zoning RR-3 Third Rural Residential (5 acre minimum) and RR-5 Fifth Rural Residential (20 acre minimum)
Case Planner Rob Loveberg
Planning Director Approval RGL

Request

The applicant is requesting a master plan amendment from Resource to Rural Residential on approximately 12.29 acres outside of the Silver City town site and an amendment from Suburban Residential to Rural Residential on approximately 42.57 acres within the Silver City town site. See the enclosed applicant's revised submittal for more detailed information and the applicant's justification.

A zone change from NR-1 Single-Family Nonrural Residential (6,000 square foot minimum) to RR-3 Third Rural Residential District (5 acre minimum), and to RR-5 Fifth Rural Residential (20 acres minimum), was submitted concurrently with this request. A request for a reversion to acreage involving property included in the requested master plan amendment and zone change was also submitted concurrently and has been heard and approved by the Planning Commission.

Current and Proposed Master Plan Designations:

Master Plan Designation	Current		Proposed	
	Acreage	Percentage	Acreage	Percentage
Resource	12.29±	22.4%	0	0%
Rural Residential	0	0%	54.86±	100%
Suburban Residential	42.57±	77.6%	0	0%
TOTAL	54.86±	100%	54.86±	100%

PLANNING COMMISSION ACTION

The Planning Commission passed a motion to deny the requests for master plan amendments on a vote of five (5) aye, one (1) nay and one (1) absent. The motion was based on the findings listed below.

- A. The proposed amendment is not in substantial compliance with, nor promotes the Master Plan goals, objectives and actions in that it is not in keeping with the majority of applicable guiding principles, goals, policies, strategies and community description contained in the 2010 Lyon County Comprehensive Master Plan, County-wide Component.
- B. The proposed amendment would result in land uses which are incompatible with the actual and planned adjacent land uses, and does not reflect a logical change in land use in that the amendment would change the planned character and intensity of residential development and enables the potential development of a land use incompatible with the actual and planned adjacent and predominant residential land uses.
- C. The proposed amendment fails to identify or respond to changed conditions or further studies that have occurred since the Master Plan was adopted by the Board, and the requested amendment does not represent a more desirable utilization of land.
- D. The proposed amendment will adversely affect the implementation of the Master Plan goals, objectives and actions, and will adversely impact the public health, safety or welfare.
- E. The proposed amendment does not promote the desired pattern for the orderly physical growth of the County as set forth for the Silver City community in the 2010 Lyon County Comprehensive Master Plan, County-wide Component.
- F. The existing Comprehensive Master Plan and/or any related element thereof is not in need of the proposed amendment.
- G. The proposed amendment is not compatible with the surrounding area, and the goals and policies of the Comprehensive Master Plan, particularly those related to Silver City.
- H. The proposed amendment will have effects on service provision, including adequacy or availability of facilities and services, and is not compatible with existing and planned service provision.
- I. Deviation from the strict adherence to the Comprehensive Master Plan would result in a situation neither intended nor in keeping with other key elements and policies of the Plan.
- J. The proposed Plan amendment will not promote the public welfare and will be inconsistent with the goals and policies of the Comprehensive Master Plan and the elements thereof.
- K. The burden of proof has not been met by the applicant in their application to warrant a change in the Master Plan at this time.

Planning Commission Hearings

The Planning Commission conducted an initial hearing of the matter on November 12, 2013. Due to the fact that the Planning Department staff report on the matter was not distributed until the Friday before the Planning Commission hearing, the applicant requested a continuance of the matter to permit adequate time for review. Discussion and public comment was generally limited to the matter of the continuance request. The Planning Commission granted a continuance until the December 10, 2013 Planning Commission meeting. The staff report and backup materials, written public comments received and minutes of the November 12, 2013 Planning Commission meeting are included by reference and enclosed with this report.

The Planning Commission conducted an extensive hearing regarding the requested master plan amendments and zone changes at their meeting of December 10, 2013. The Commission decided to hear the matters together and act on them separately.

The applicant made a presentation (enclosed) which contained additional information not included in the application. Speakers representing the Comstock Residents Association highlighted comments made in their written comments (enclosed) and they played a DVD which contained comments by Silver City residents (enclosed). Public comment representing both pro and con viewpoints was provided. The applicant's representative also made closing remarks prior to the Planning Commission's deliberations.

The Planning Commission members were engaged throughout the hearing; asking questions, and seeking clarifications and greater details on certain points. As required by Chapter 10.12.09 (E)(3) of the Lyon County Code, the Commission reviewed the information, evidence and comments to determine if the proposed amendments were consistent with existing master plan goals, objectives and actions, or that the proposed amendments represented necessary and appropriate modifications of the goals, objectives and actions of the master plan. The Commission, after considering the application, passed a motion recommending denial of the requested master plan amendments. The motion included 11 findings which state why the Commission could not make the required findings for adoption of the amendments as required by 10.12.09 (E)(6) of the Lyon County Code.

The December 10, 2013 staff report and backup materials, application, presentations, written public comments, resident interviews DVD, and draft minutes of the December 10, 2013 Planning Commission meeting are included by reference and enclosed with this report.

ALTERNATIVE FINDINGS AND MOTIONS:

The alternative motions suggested below are offered for the Board of Commissioners' consideration.

Alternative for Denial:

If after the review of all of the information and comments presented the Board agrees with the action of the Planning Commission and determines that the request for a Master Plan Amendments should be denied, the Board must make findings supporting a denial. The Board of Commissioners may wish to consider a motion similar to the following:

The Lyon County Board of Commissioners finds that:

- A. The proposed amendment is not in substantial compliance with, nor promotes the Master Plan goals, objectives and actions in that it is not in keeping with the majority of applicable guiding principles, goals, policies, strategies and community description contained in the 2010 Lyon County Comprehensive Master Plan, County-wide Component.
- B. The proposed amendment would result in land uses which are incompatible with the actual and planned adjacent land uses, and does not reflect a logical change in land use

in that the amendment would change the planned character and intensity of residential development and enables the potential development of a land use incompatible with the actual and planned adjacent and predominant residential land uses.

- C. The proposed amendment fails to identify or respond to changed conditions or further studies that have occurred since the Master Plan was adopted by the Board, and the requested amendment does not represent a more desirable utilization of land.
- D. The proposed amendment will adversely affect the implementation of the Master Plan goals, objectives and actions, and will adversely impact the public health, safety or welfare.
- E. The proposed amendment does not promote the desired pattern for the orderly physical growth of the County as set forth for the Silver City community in the 2010 Lyon County Comprehensive Master Plan, County-wide Component.
- F. The existing Comprehensive Master Plan and/or any related element thereof is not in need of the proposed amendment.
- G. The proposed amendment is not compatible with the surrounding area, and the goals and policies of the Comprehensive Master Plan, particularly those related to Silver City.
- H. The proposed amendment will have effects on service provision, including adequacy or availability of facilities and services, and is not compatible with existing and planned service provision.
- I. Deviation from the strict adherence to the Comprehensive Master Plan would result in a situation neither intended nor in keeping with other key elements and policies of the Plan.
- J. The proposed Plan amendment will not promote the public welfare and will be inconsistent with the goals and policies of the Comprehensive Master Plan and the elements thereof.

Based on the above findings, the Lyon County Board of Commissioners denies the Master Plan Amendments from Resource to Rural Residential on 12.29 acres and from Suburban Residential to Rural Residential on 42.57 acres for Comstock Mining, Inc. as set forth in the written and graphic information contained in the revised master plan amendment application and supporting documents, received by the Lyon County Planning Department on October 18, 2013 (APNs 08-091-02 and 08-091-05) (PLZ-13-0050).

Alternative for Approval:

If after the review of all of the information and comments presented the Board disagrees with the action of the Planning Commission and desires to approve the requested Master Plan amendments from Resource and Suburban Residential to Rural Residential, the Board must make findings supporting the proposed Rural Residential land use designation on the subject parcels. The Board of Commissioners may wish to consider a motion similar to the following:

The Lyon County Board of Commissioners finds that:

- A. The applicant has demonstrated that the amendment is in substantial compliance with and promotes the Master Plan goals, objectives and actions in that it is in keeping with applicable guiding principles, goals, policies, strategies.
- B. The proposed amendment is compatible with the actual and planned adjacent land uses, and reflects a logical change in land uses in that the amendment would decrease the intensity of residential development.

- C. The proposed amendment has demonstrated and responds to changed conditions or further studies that have occurred since the Master Plan was adopted by the Board, and the requested amendment represents a more desirable utilization of land.
- D. The proposed amendment will not adversely affect the implementation of the Master Plan goals, objectives and actions, and will not adversely impact the public health, safety or welfare.
- E. The proposed amendment will promote the desired pattern for the orderly physical growth of the County, maintains relatively compact development patterns, and guides development of the County based on the least amount of natural resource impairment and the efficient expenditure of funds for public services.
- F. The proposed amendment is compatible with the surrounding area, and the goals and policies of the Comprehensive Master Plan.
- G. The proposed amendment will have no major negative impacts on transportation, services, and facilities.
- H. The proposed amendment will have minimal effect on service provision, including adequacy or availability of facilities and services, and is compatible with existing and planned service provision.
- I. Strict adherence to the Comprehensive Master Plan would result in a situation neither intended nor in keeping with other key elements and policies of the Plan.

Based on the aforementioned findings, the Lyon County Board of Commissioners approves the Master Plan Amendments from Resource to Rural Residential on 12.29 acres and from Suburban Residential to Rural Residential on 42.57 acres for Comstock Mining, Inc. as set forth in the written and graphic information contained in the revised master plan amendment application and supporting documents, received by the Lyon County Planning Department on October 18, 2013 (APNs 08-091-02 and 08-091-05) (PLZ-13-0050).

Alternative for Continuance:

If the Board determines that additional information, discussion and public review are necessary for a more thorough review of the proposed Master Plan Amendment, the Board should make appropriate findings and move to **continue** the Public Hearing with a specific time period for the applicant to provide additional specific information necessary for the analysis of the request. The Board of Commissioners may wish to consider a motion similar to the following:

The Lyon County Board of Commissioners finds that:

- A. Additional information, discussion and public review are necessary for a more thorough review of the proposed Master Plan Amendment.

Based on the above findings and with the applicant's concurrence, the Lyon County Board of Commissioners continues the hearing for the Master Plan Amendments from Resource to Rural Residential on 12.29 acres and from Suburban Residential to Rural Residential on 42.57 acres for Comstock Mining, Inc. as set forth in the written and graphic information contained in the revised master plan amendment application and supporting documents, received by the Lyon County Planning Department on October 18, 2013 (APNs 08-091-02 and 08-091-05) (PLZ-13-0050), for __ days.

INFORMATION AND COMMENTS

Background:

The applicant submitted requests for a master plan amendment, a zone change and a reversion to acreage in August 2013 in accordance with the requirements of Title 10.12.09 of the Lyon County Code. Subsequent to the submittal, Lyon County Planning staff discovered that certain zoning information provided to the applicant was incorrect. The applicant revised the requests for the master plan amendment, zone change and reversion to acreage to reflect the corrected information. This report is based on the revised application information.

The Lyon County Comprehensive Master Plan, County-wide Component, was adopted by the Board of Commissioners on December 23, 2010. The residential densities for the following Comprehensive Master Plan land use designations are:

- Resource – 1 dwelling per 40 acres,
- Rural Residential – 1 dwelling per 20 acres to 1 dwelling per 5 acres, and
- Suburban Residential – 1 dwelling per acre to 18 dwellings per acre

The characteristics used to describe the three pertinent land use designations are as follows:

- Resource – Private property, generally inholdings or located in very remote or rural parts of the County (outside of community boundaries). Within communities may be private property used for resource uses. Examples of uses: Open range and dispersed grazing, mining and large scale energy, general rural residential development at very low densities. Within communities uses such as mining, borrow pit or gravel pit operations, energy projects; may include limited employment/industrial uses complementary to and compatible with surrounding uses.
- Rural Residential – Typically in rural districts and on the edge of suburbanizing areas. Lot sizes vary. Typically not served by municipal utilities. Examples of uses: Single-family residences, ranches, and "farmettes".
- Suburban – Typically in suburbanizing areas. Neighborhoods should contain a mix of housing types and lot sizes in a neighborhood setting with a recognizable center (with a park, school, or other public use) and connected, useable open space within the neighborhood. Will be served by municipal utilities. High density residential must be located near major roads and near commercial uses. Examples of uses: Single-family residences, duplexes and attached housing.

The Lyon County Master Plan, County-wide Component, land use designation "Rural Residential" is consistent with the following Lyon County residential zoning districts: RR-3, Third Rural Residential District (5 acre minimum), RR-4, Fourth Rural Residential District (10 acre minimum) and RR-5, Fifth Rural Residential (20 acre minimum) land uses. The "Resource" land use designation is consistent with the following Lyon County zoning district: RR-5, Fifth Rural Residential (20 acre minimum) land uses. The "Suburban Residential" land use designation is consistent with the following Lyon County zoning districts: E-1, First Estates Residential (12,000 square foot minimum), E-2, Second Estates Residential (one-half acre minimum), NR-1, Single-Family Nonrural Residential (6,000 square foot minimum), NR-2, Multiple Residence Nonrural Residential (8,000 square foot minimum) and NR-3, Single-Family Nonrural Residential (9,000 square foot minimum).

Property Information:**Location:**

The parcels are located westerly of State Route 341 and 342, in the area of the southwesterly corner of the Silver City town site.

Size:

The subject properties total approximately 87.2 acres according to the Lyon County Assessor's files. The requested master plan amendment involves 56.86 acres of the total.

Land Use

The subject properties are generally undeveloped, with a historic mill site and buildings on a portion of the property near and visible from State Route 341 and 342 as well as a large portion of Silver City.

Subject Property and Surrounding Area Land Use

	<i>Current Master Plan</i>	<i>Zoning</i>	<i>Current Land Use</i>
<i>Subject Property</i>	Resource Suburban Residential	NR-1	Undeveloped and Historic Mill
<i>North</i>	Commercial Mixed Use Suburban Residential	M-1 NR-1	Historic Residential and Undeveloped
<i>South</i>	Public Lands Resource	RR-5	Undeveloped
<i>East</i>	Resource Suburban Residential	NR-1 RR-5	Historic Residential and Undeveloped
<i>West</i>	Public Lands Suburban Residential Resource	NR-1 RR-5	Historic Residential and Undeveloped

It should be noted that not all zoning districts are consistent with their respective master plan land use designations. A master plan designation is an expression of the county's long-term expectations for development within a particular area.

Physical and Topographic Attributes:

According to information submitted by the applicant, the subject parcels vary from 0% - 10% slopes to slopes greater than 30%. A portion of APN 08-091-05 along State Route 342 has an area of AE flood zone.

Access:

Current access to the subject properties is via State Route 341 and State Route 342.

Historic District:

The parcels are within the Comstock Historic District.

Public Facilities and Services:

The portion of subject properties within the Silver City town site are within the service area of the Storey County Public Works Department, Virginia City Water System. The parcels are not currently served by the municipal water system and significant improvements will be necessary to bring water services to the subject properties.

No municipal sewer system currently serves the Silver City area. 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 County's Comprehensive Master Plan would contribute to the cost effectiveness of a sewer system.

The Central Lyon County Fire Protection District provides fire and emergency medical service from the volunteer fire station located at 745 High Street, Silver City, approximately 455 feet to the northeast of the site and career station at 231 Coral Drive, Dayton, approximately 3.5 miles easterly of the site. The Lyon County Sheriff's Department maintains a substation at 801 Overland Loop, Dayton, approximately 6 miles northeast of the site.

Water Rights:

Water rights information has not been provided. It is anticipated that potential development will bring necessary water rights for the portions of the parcels outside of the water system service area when required for development.

Summary of Applicant's Justification:

The applicant includes the following arguments in support of the requested master plan amendments:

- A reduction in the potential residential development density provides a "more practical and productive current and long range land use and zoning strategy based on topography, actual development potential and proximity to infrastructure and also clean up and align certain parcels that currently have "split" master plan designations."
- "For more than a century the subject property has been used for mining, mine exploration and/or mine development."
- "The current Suburban Residential master plan and NR1 zoning designations that were adopted in the mid 1970's are inconsistent with the long existing patented and unpatented mining claims associated with the property and simply not appropriate based upon traditional land planning principles."
- "In the event that mining activities are ultimately not pursued on the subject property, the proposed master plan designation of Rural Residential and zoning of RR3 and RR5 are more appropriate and more compatible with existing land uses than the current master plan designation and zoning."
- The "zoning designations proposed in this application as well as the long-term planned use of the property owner are compatible with each of the applicable Character Districts."

The applicant believes that "the community Character District of Suburbanizing, the Community Plan Land Use Designation of High Density, Density of 5 to 18 dwelling units per acre, the

Examples of Uses and the Description/ Characteristics and the current Suburban Residential master plan designation" are inconsistent with the following Comprehensive Master Plan goals, and as detailed in the applicant's justification, some related policies and strategies:

- Goal LU1: Orderly Growth Patterns – Direct and manage development in the county that it is orderly and fiscally responsible.
- Goal LU2: Services Coordinated with Growth – Future residential development will be coordinated with development of schools, parks, libraries, and other public services.

The applicant believes that the requested master plan amendments are consistent with and supported by the following Comprehensive Master Plan goals, and as detailed in the applicant's justification, some related policies and strategies:

- Goal LU3: Diverse Economy – The economy will continue to be strong and diverse; attracting businesses that employ residents in primary jobs, as well as service jobs that meet the needs of local residents.
- Goal NR9: Mining and Resource Extraction – Lyon County will promote the continued development of mineral and aggregate resources while working to prevent and reduce conflict between mining and other resource extraction activities and residential, commercial and industrial development.

The revised application submittal, dated October 11, 2013, contains the applicant's detailed request and justification. One must examine the revised information for the complete justification and a full understanding of the applicant's views.

Staff Review and Comments:

Applicant's Request

As specified in the applicant's justification statement "[t]he application is requesting a "down zone" at both the master plan and zoning levels." If approved, the applicant's master plan amendment requests would result in a decrease in planned residential density. The current master plan designation and zoning allow development at densities that are less than the maximum density permitted by the master plan land use designation and the zoning district.

The applicant's justification states that "[t]he applicant seeks the amendments for the purpose of pursuing continued mineral exploration, development and the economic mining potential of the subject property." If approved, the amendments set the stage for zone change requests that may permit uses, such as mining, not currently permitted on the subject parcels.

Access:

Access to the subject properties would be from State Route 341 and 342. Specific access would need to be created based on the type and density/intensity of development. No plan for development of access, intersections and/or ingress and egress points from the subject parcels has been provided.

Comstock Historic District:

Silver City and the subject parcels are within the boundaries of the Comstock Historic District. The District comprises an effort to maintain the historic character and integrity of the Comstock.

The State Historic Preservation Office describes the Comstock Historic Commission as follows:

The Comstock Historic District Commission was created by Nevada Revised Statute 384 and dates to 1969. The state agency encourages the preservation and promotion of historic resources with the Virginia City National Landmark District, which the state refers to as the Comstock Historic District. The Commission provides permits for projects dealing with the exteriors of all buildings within the district, the construction of new structures, and work affecting pavement or fencing. The Commission also takes a proactive role in encouraging archaeological investigations and cemetery restoration within the district.

The District has authority over the exteriors of existing and new structures located on the subject parcels. The visual aspects of the built environment is one very important aspect of efforts to maintain the integrity and historic context of the Comstock. Another important aspect is the visual landscape of the Historic District.

The historic nature of the Comstock and Silver City was identified by the community as being very important during the preparation of the Comprehensive Master Plan. The importance of the community's historic component has remained consistently important during community meetings and discussions regarding land use issues.

Land Use:

The subject parcels are generally undeveloped with an area containing a historic mill site and multiple historic structures. The property appears to have had periodic mineral exploration within the past approximately 40 or more years, and intermittent mining activities in the more distant past.

The current Resource land use designation, which applies to 12.29 acres of the subject parcels, has the following attributes as described in Chapter 3 of the Comprehensive Master Plan, County-wide Component:

- Community Plan Land Use Categories – Resource (private)
- Density range – *1 du per 40 acres or one-sixteenth of a section as described by a government land office survey, or per existing parcel if less than 40 acres or one-sixteenth of a section*
- Characteristics – *Private property, generally inholdings or located in very remote or rural parts of the County (outside of community boundaries). Within communities may be private property used for resource uses. Examples of uses: Open range and dispersed grazing, mining and large scale energy, general rural residential development at very low densities. Within communities, uses such as mining, borrow pit or gravel pit operations, energy projects; may include limited employment/industrial uses complementary to and compatible with surrounding uses.*

The current Suburban Residential land use designation, which applies to 42.57 acres of the subject parcels, has the following attributes as described in Chapter 3 of the Comprehensive Master Plan, County-wide Component:

- Community Plan Land Use Categories – *Medium Density Residential, High Density Residential and Residential Mixed-Use.*
- Density range – *1 du per acre to 18 du per acre.*
- Characteristics –
 - *Medium Density Residential, High Density Residential - Typically in suburbanizing areas. Neighborhoods should contain a mix of housing types and*

lot sizes in a neighborhood setting with a recognizable center (with a park, school, or other public use) and connected, useable open space within the neighborhood. Will be served by municipal utilities. High density residential must be located near major roads and near commercial uses. Examples of uses: Single-family residences, duplexes and attached housing.

- o *Residential Mixed-Use – This category is designed to create opportunities for higher-density neighborhoods in a suburban-setting to promote neighborhoods with a mix of types and intensities in close proximity to commercial and commercial mixed-use districts. Examples of uses: A range of medium to high-density residential housing types with open space, parks, schools, and other public uses.*

The proposed Rural Residential land use designation, which is proposed to apply to 54.86 acres of the subject parcels, has the following attributes as described in Chapter 3 of the Comprehensive Master Plan, County-wide Component:

- Community Plan Land Use Categories – *General Rural and Rural Residential*
- Density range – *1 du per 20 acres to 1 du per 5 acres*
- Characteristics – *Characteristics: Typically in rural districts and on the edge of suburbanizing areas. Lot sizes vary. Typically not served by municipal utilities. Examples of uses: Single-family residences, ranches, and "farmettes".*

The principal purpose of land-use regulation and zoning is to limit conflicts between incompatible land-uses. As a general rule, commercial and industrial uses are more compatible with higher density residential uses, particularly if they back up to them or if they are separated by a street. All master plan land use designations, zone changes, and special uses should be reviewed to ensure that existing and proposed land uses are compatible.

Past Lyon County Master Plans

Information regarding past master plan land use designations, goals and actions provide some context and insight for the current Comprehensive Master Plan provisions that pertain the subject parcels. From Planning staff's review of past documents, including the 1970s Lyon County Master Plan, zoning map circa the 1970s, the 1990 Lyon County Master Plan and the 2002 West Central Lyon County Final Land Use Plan, it appears that the County has been consistent in its planning approach, intended land use and zoning application.

Below are information, goals and actions from past master plans that illustrate the County's and Community's planning desires for Silver City.

1971 Lyon County General Plan

On the 1971 General Plan Map, Silver City is shown as an Urbanizing Area and the Mining Industry land use is not depicted in the Silver City area.

1990 Lyon County Master Plan – Silver City

Goal #1 To maintain, promote, and secure the historic character of the community and to prevent the destruction or degradation of the historic character.

2002 West Central Lyon County Final Land Use Plan – Silver City Master Plan Goals

Goal 1: To recognize, enhance, and protect the unique character of Silver City.

Actions:

- To maintain that scale and primary residential character by retaining the existing Master Plan designation and zoning categories.

Goal 8: To limit any earth disturbance or above ground mining activities that create visual scarring or that disrupt the fabric of the community.

Actions:

- Lyon County shall establish a land use policy that minimizes the impact of mining and other significant earth disturbing activities that degrade quality of life.

Goal 10: To maintain the primary focus of the community as residential.

Actions:

- To urge the Board of Commissioners to carefully consider all zone changes or Master Plan amendments that would substantially alter the character and identity of Silver City.

2010 Comprehensive Master Plan, County-wide Component

A consideration of the various and often competing provisions of the County's Comprehensive Master Plan is an essential aspect of the consideration of any master plan amendment request.

The applicant has provided information in the submitted, revised application materials regarding their opinions on the compatibility and importance of their master plan amendment request with the current County Comprehensive Master Plan, County-wide Component. The information includes discussions of the relevance of various goals, policies, strategies and land use designations. Please refer to the enclosed applicant's revised submittal for the complete text of the applicant's information.

Lyon County Planning staff compiled a listing of County Comprehensive Master Plan County-wide Component information that it considered relevant for background and for the analysis of the applicant's request. This list is enclosed with this report as Attachment 1.

Below are the Comprehensive Master Plan goals, policies and strategies identified by the County Planning staff with brief discussions.

Goal LU 1: Orderly Growth Patterns: Direct and manage development in the county so that it is orderly and fiscally responsible.

Policy LU 1.1: Follow Development Patterns as Established on Countywide Land Use Plan or a More Specific Community Plan

Future development of Lyon County will be consistent with the Countywide Land Use Plan or a more specific Community Plan, if one has been adopted. The Countywide Land Use Plan will guide future growth and development by defining appropriate land use types, densities, and character in different locations including cities and towns, suburbanizing areas, rural areas, farm and ranch land, hillsides, and public lands. The county's future urban and suburban growth will develop largely around existing communities.

Strategies:

- ♦ *Use the Countywide Land Use Plan and adopted Community Plans as a guide for decision-making on development approvals.*

- ♦ *Establish a demand based zoning strategy based on population projections and potential-to-actual development ratio, infrastructure capacity and distance to services.*

The current County-wide Land Use Plan should be used to guide the decision regarding the applicant's requested master plan amendment. The current Land Use Plan is consistent with the identified long term development goals for Silver City and consistent with approximately 40 years of County master planning efforts and community input.

The applicant believes that the requested reduction in residential development potential provides for more orderly and fiscally responsible growth, and is more aligned with potential-to-actual development ratio and infrastructure availability.

The existing land use designation includes densities starting from one acre per dwelling unit and provides for density that could improve the potential for the expansion of infrastructure within Silver City.

Policy LU 1.4: Locate industrial development as designated on County-wide Land Use Plan or determined by criteria.

Industrial uses, including extractive industries, will occur in areas that are designated on the County-wide Land Use Plan. New industrial uses should only be located in areas that do not adversely impact existing residential settlements.

Strategies:

- ♦ *Consider developing a set of siting criteria to be used in determining the suitability of sites for industrial and extraction uses.*
- ♦ *Establish performance standards in areas of noise, odor, dust, traffic generation, etc.*

The potential for the location of a mining use within Silver City, where it was not identified in the Comprehensive Master Plan Land Use Plan, should be carefully considered. The County has not yet developed a set of siting criteria. The Comprehensive Master Plan policy discussion states that new industrial uses, which would include extractive industries, should only be located in areas that do not adversely impact existing residential settlements.

Goal LU 3: Diverse Economy: The economy will continue to be strong and diverse; attracting businesses that employ residents in primary jobs, as well as service jobs that meet the needs of local residents.

Policy LU 3.1: Diverse Economic Base

The county will continue to support a diverse base of jobs to provide for a broader range of employment opportunities that are geographically distributed to be near to population centers.

The county will support economic diversification throughout the county to more fully utilize the broad range of skills, knowledge and abilities inherent in our workforce.

The requested master plan amendment would provide the basis for a zone change that could allow for the expansion of mining. Such a use has the potential for expanding employment opportunities. A mining use that adversely impacts existing Silver City businesses or tourism could also have an adverse impact on the economy and employment within the community.

The applicant states that: "The master plan change would allow for continued mineral exploration on the subject property helping to identify economic assets while employing local residents in primary jobs."

Policy LU 3.2: Business and Industry Locations that are Consistent with Future Land Use Plan

Encourage commercial and industrial development to locate in designated locations shown on the Future Land Use Plan, where public facilities exist or are planned to accommodate such development cost-effectively. The County-wide Land Use Plan will reserve adequate lands for jobs and industry.

Strategies:

- ◆ *Use the Countywide Land Use plan and Community Plans as a guide to determine appropriate locations for business and industry.*

The County-wide Land Use Plan should be used as a guide to determine appropriate locations for business and industry, including mining. The current County-wide Land Use Plan designations for the Silver City community do not identify lands for industry or mining within the community boundaries.

Goal CC 1: Quality Design: New development in Lyon County will improve the appearance and function of our communities.

Policy CC 1.1: Quality New Development

New development in the communities of Lyon County should create inviting places for locals and visitors to live, shop, eat, visit, and do business.

Policy CC 1.3: Design Tailored to Communities

New development in Lyon County should address and respect the unique character of communities within the county.

Consideration should be made to whether or not the proposed master plan amendment would improve the appearance and function of the Silver City community, and address and respect the community's unique character. The existing community development pattern is not inconsistent with the current master plan designation. The proposed decreased residential density does not follow the original town lot development pattern, but would not be inconsistent with the development pattern of parcels outside of the original town map area.

The establishment of uses that would be permitted through the concurrent zone change request may not be consistent with this goal and its policies.

Goal CC 3: Heritage: Historic places, structures, and landmarks in the county will be preserved and will provide an opportunity for resident and visitors to learn about and celebrate our heritage.

Policy CC 3.1: Maintain and Restore Historic Resources

Lyon County will encourage and support efforts to preserve and restore registered historic structures, and landmarks, and districts.

Strategies:

- ◆ *Revise zoning to encourage historic use and development patterns including mixed-use structures and districts.*
- ◆ *Support organizations in the county that apply for historic designation or grant funding for inventory or rehabilitation of historic structures, efforts to identify receiving sites for historic structures that cannot be maintained in their original locations, and similar historic preservation purposes and efforts.*

- ♦ *Work with knowledgeable organizations and individuals to ensure that building and development standards allow for adaptive reuse of valued historic structures, including those without official historic designation.*
- ♦ *Within historic districts, promote historic design elements, features and context, and prohibit building design that compromises the integrity of the historic community character.*
- ♦ *Within historic districts, limit new land uses that would pose a risk to historic structures or the historic character of the district.*
- ♦ *Promote the preservation of historic landscape features to maintain historic settings and the integrity of historic resources within historic districts.*

Staff is concerned that the requested master plan amendment, concurrent zone change request and the applicant's stated purpose for both could result in development directly contrary to this goal, policy and strategies. Silver City is a unique, historic community within Lyon County that lies within a historic district which contributes to its character and quality of life.

The following strategies are particularly relevant to the requested master plan amendment:

- ♦ *Within historic districts, promote historic design elements, features and context, and prohibit building design that compromises the integrity of the historic community character.*
- ♦ *Within historic districts, limit new land uses that would pose a risk to historic structures or the historic character of the district.*
- ♦ *Promote the preservation of historic landscape features to maintain historic settings and the integrity of historic resources within historic districts.*

Goal NR 3: Adequate, Clean Water: Adequate water supply will be available for current and future needs in Lyon County, including safe, healthy drinking water for all Lyon County residents.

Policy NR 3.1: Water Supply and Quality

Recognizing that clean water is a precious resource necessary to maintain our health, economy, and quality of life, Lyon County will protect the water supply and encourage efficient use of water resources.

Strategies:

- ♦ *Maintain and expand the piped municipal water and sewer systems within community core and urbanizing areas of the County as designated on the Future Land Use map.*

Consideration should be given to whether or not the change in development potential and pattern would have a positive or negative impact on the future expansion of the Silver City water system.

Goal NR 9: Mining and Resource Extraction: Lyon County will promote the continued development of mineral and aggregate resources while working to prevent and reduce conflict between mining and other resource extraction activities and residential, commercial and industrial development.

Policy NR 9.1: Guide Development

Lyon County will endeavor to guide development away from areas where minerals and aggregate extraction is currently occurring and where significant resources are known to exist.

Strategies:

- ◆ *Consider the location of known resources when reviewing new development.*

Policy NR 9.3: Mitigate Operations

To the extent possible, Lyon County will require resource extraction projects to mitigate adverse operational impacts on such items as public infrastructure, traffic, agricultural operations, residential and commercial land uses, the visual character of the area, etc.

Strategies:

- ◆ *Promote "limited impact"/environmentally safe resource extraction practices to protect the natural environment, enhance the quality of life of residents; and limit impacts on present and future public facilities and services.*

Policy NR 9.4: Mitigate long-term impacts

To the extent possible, Lyon County will promote long-term reclamation and rehabilitation of extractive sites.

Strategies:

- ◆ *Require resource extraction projects to submit detailed long-term reclamation and reuse plans and to provide adequate funding mechanisms to implement plans*

The future potential for mineral exploration and extraction operations should be considered for the requested master plan amendment and concurrent zone change requests.

Staff does not believe that the existing master plan land use designation or planned residential development within the Silver City community boundaries should be considered as development that should be guided away from mineralized areas. The Comprehensive Master Plan was created based on the concept of recognizing and developing the existing community core areas. Silver City is one of those areas.

The applicant believes that the existing Suburban Residential land use designation is inconsistent with the mining claims associated with the subject parcels and not appropriate with traditional land planning principles.

Goal FS 1: Provision of Services: Municipal water and sewer systems will be expanded only in areas where they are cost effective.

Policy FS 1.1: Location of New Development

New urban development will occur in areas that are served by, or are adjacent to, areas with existing utility systems to avoid distant and costly extensions.

Strategies:

- ◆ *Develop a Capital Improvements Plan and budget for Lyon County utility system expansion that is consistent with the Land Use Map in this Plan.*
- ◆ *Revise the County's development regulations in order to create incentives to build according to the Land Use map in this Plan.*
- ◆ *Require the developer to pay the full cost of utility system extension, in order to discourage inefficient utility system development, and provide for reimbursement mechanisms where appropriate.*

Silver City has an existing municipal water system. In keeping with this goal and strategies, the future improvement and expansion of the water system has been envisioned by Lyon County Public Works Department for some time.

Silver City has extensive limitations for individual and on-site sewer disposal systems. Additional large lot residential parcels requiring septic systems may be contrary to long term water quality and may reduce the opportunity for a future connection to a municipal sewer system.

Water system improvements are needed for the community and a sewer system may be necessary in the future. Cost effective improvement and expansion will be influenced by Silver City's the long term development potential.

Goal CP 1: Support Diversity: Lyon County will celebrate and support the diversity of character among communities in the county.

Policy CP 1.1: Recognize Diversity of Communities

Lyon County planning efforts and regulations will consider the unique aspects of communities in the county, and will allow for variation and exceptions to address key aspects of their diversity.

In considering the requested master plan amendment, Silver City's unique character, development pattern, historic location and dependence on the historic landscape should be recognized and supported.

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

Policy CP 3.1: Support Community Planning Efforts

Lyon County will encourage and offer guidance for community-based planning efforts, with the goal of ensuring that such an effort will result in a document that identifies the unique needs and values of the community in a manner that can be integrated with county-wide planning, regulations, and policies.

Over the past approximately 40 years, the Silver City community has actively participated in several master plan efforts, the results of which appear to be very consistent. During the development of the Comprehensive Master Plan, County-wide Component, the community was very active. Goals, policies, strategies and land use designations affecting Silver City were developed with strong public consensus.

Goal CP 4: Advisory Councils: County staff will confer with the applicable Community Advisory Council when developing programs or policies to address community-specific issues.

Policy CP 4.1: Confer with Community Advisory Councils

When developing a program or policy intended to address a community-specific issue, such as those listed in this Comprehensive Master Plan and in adopted community plans, county staff will confer with the applicable Community Advisory Council before finalizing a decision.

The Silver City Advisory Board has been very active in discussing, reviewing and commenting on the requested master plan amendment and zone change applications. The Advisory Board's comments should be considered in the review and deliberation regarding the requested master plan amendment.

Zoning:

The subject parcels are currently zoned NR-1, Single-Family Nonrural Residential District. A review of the County's zoning maps and zoning information for the subject parcels shows that the current zoning is consistent with zoning dating back to the 1970s.

The NR-1 zoning permits:

- Parcel size of 6,000 square feet or larger;
- Permitted uses consisting of single-family dwellings, detached guest building and accessory uses, garden houses, playhouses, tennis courts and "home occupations;"
- Special uses consisting of child care facilities, churches, group care facilities, parks, public utility serving centers, recreational areas, residential industry, schools, sanitariums and other like uses; and
- Special uses on parcels having a minimum area of 21,000 square feet consisting of private golf, swimming, tennis and similar clubs.

If the Planning Commission adopts the applicant's request for master plan amendments to the Rural Residential land use designation, the applicant's requested zone changes, contained in the concurrent zone change application, would become consistent with the County's Comprehensive Master Plan. If the Planning Commission does not adopt the requested master plan amendments, the applicant's requested zone changes will not be consistent with the County's Comprehensive Master Plan.

Guidance for Reviewing and Granting a Master Plan Amendment

The Lyon County Comprehensive Master Plan, County-wide Component, Chapter 11, Implementation, provides the following guidance for reviewing and granting a master plan amendment:

The public and the County may initiate Plan Amendments in accordance with the provisions of Lyon County Code. All Plan Amendments shall be considered by the Planning Commission and Board of County Commissioners pursuant to their respective powers. Based on its consideration of the recommendations from staff, advisory councils, boards and commissions, and evidence from public hearings, the Planning Commission could then adopt the Plan Amendment (with or without further revisions) or deny the Amendment. Any action on a Plan Amendment by the Planning Commission would be followed by County Commissioners action including, if applicable, its approval of the Plan Amendment. When considering a plan amendment, the County should consider whether:

1. *The existing Comprehensive Master Plan and/or any related element thereof is in need of the proposed amendment;*
2. *The proposed amendment is compatible with the surrounding area, and the goals and policies of the Comprehensive Master Plan;*
3. *The proposed amendment will have no major negative impacts on transportation, services, and facilities;*
4. *The proposed amendment will have minimal effect on service provision, including adequacy or availability of facilities and services, and is compatible with existing and planned service provision;*
5. *Strict adherence to the Comprehensive Master Plan would result in a situation neither intended nor in keeping with other key elements and policies of the Plan; and*
6. *The proposed Plan amendment will promote the public welfare and will be consistent with the goals and policies of the Comprehensive Master Plan and the elements thereof.*

Requirements for Granting a Master Plan Amendment:

Chapter 10.12.09(F) of the Lyon County Code requires that:

When making an approval, modification or denial of an amendment to the Master Plan land use map or text, the Commission and the Board shall, at a minimum, make one of the following findings of fact:

A. Consistency with the Master Plan.

- 1. Approval: The applicant has demonstrated that the amendment is in substantial compliance with and promotes the Master Plan goals, objectives and actions.*
- 2. Denial: The proposed amendment is not in substantial compliance with, nor does it promote the Master Plan goals, objectives and actions.*

B. Compatible Land Uses.

- 1. Approval: The proposed amendment is compatible with the actual and planned adjacent land uses, and reflects a logical change in land uses.*
- 2. Denial: The proposed amendment would result in land uses which are incompatible with the actual and planned adjacent land uses, and does not reflect a logical change in land uses.*

C. Response to Change Conditions.

- 1. Approval: The proposed amendment has demonstrated and responds to changed conditions or further studies that have occurred since the Master Plan was adopted by the Board, and the requested amendment represents a more desirable utilization of land.*
- 2. Denial: The proposed amendment does not identify and respond to changed conditions or further studies that have occurred since the Master Plan was adopted by the Board, and the requested amendment does not represent a more desirable utilization of land.*

D. No Adverse Affects.

- 1. Approval: The proposed amendment will not adversely affect the implementation of the Master Plan goals, objectives and actions, and will not adversely impact the public health, safety or welfare.*
- 2. Denial: The proposed amendment will adversely affect the implementation of the Master Plan goals, objectives and actions, and would adversely impact the public health, safety or welfare.*

E. Desired Pattern of Growth.

- 1. Approval: The proposed amendment will promote the desired pattern for the orderly physical growth of the County, allows infrastructure to be extended in efficient increments and patterns, maintains relatively compact development patterns, and guides development of the County based on the least amount of natural resource impairment and the efficient expenditure of funds for public services.*
- 2. Denial: The proposed amendment does not promote the desired pattern for the orderly physical growth of the County. The proposed amendment does not allow infrastructure to be extended in efficient increments and patterns, does not maintain relatively compact development patterns, and does not guide development of the County based on the least amount of natural resource impairment and the efficient expenditure of funds for public services.*

Summary:

A master plan amendment is the most discretionary decision that the Planning Commission and Board of Commissioners can make regarding land use. After master plan decisions, the Planning Commission's and Board of Commissioners' breadth of discretion becomes more and more constrained until there is relatively little discretion in the matter of conditional and permitted uses.

The County's Comprehensive Master Plan is a long term plan for the development of the County and its individual communities. Decisions on master plan land use designations should be made with deliberate consideration of long term needs, opportunities, community aspirations, community stability, compatibility, and community character. To be most effective, master plans should be amended infrequently when there are compelling justifications which reflect long term community goals and interests.

In short, the prime considerations the Planning Commission needs to determine are whether the proposed master plan amendments:

- ✓ Are needed,
- ✓ Are compatible with the area and Comprehensive Master Plan,
- ✓ Will have no major negative impacts,
- ✓ Will have minimal effect on and will be compatible with services,
- ✓ Will promote the public welfare, and
- ✓ Are consistent with the Comprehensive Master Plan goals and policies.

Staff Recommendation:

Staff would generally recommend that the most appropriate process for making a land use designation decision would be as part of the preparation of a Community Plan for Silver City as envisioned in the Comprehensive Master Plan. However, the Comprehensive Master Plan and County Code provide a process for the master plan amendment now before the County.

Staff recommends denial of the requested master plan amendments based on the guidance provided by the Comprehensive Master Plan, County-wide Component, including the adopted Land Use Plan, the majority of applicable goals, policies and strategies, Silver City's unique and historic character, and the County's lengthy, consistent master plan record of land use planning for Silver City.

Attachment 1

Lyon County Comprehensive Master Plan, County-wide Component Excerpts and Relevant Information

Chapter 1: Introduction

Plan Use

The Comprehensive Master Plan will be used as a decision-making tool by residents, landowners, developers, the County Planning Department, Planning Commission, and Board of Commissioners. The Plan does not change existing zoning or solve all of the county's problems; instead, it serves as a handbook for implementing the county vision. It specifies policy guidelines that respect the individual, reinforce community values, support healthy functioning communities, and advocate quality of life.

The Plan is a catalyst and guide to the establishment, or revision, of mechanisms to implement the selected goals and policies. These mechanisms include development codes and other planning tools such as zoning and subdivision codes, zoning maps, capital improvements programs, Community Plans for the eight identified communities within the County, and other specific "action items."

About Master Plans Generally

The Comprehensive Master Plan is an official public document adopted by the Lyon County Planning Commission and Board of Commissioners. The Plan is a general, long-range, policy and implementation guide for elected and appointed officials in making choices concerning the overall needs, growth and development of the county and its communities. It outlines Lyon County's vision and goals for the future.

The Plan is comprehensive because the elements cover a broad range of development and growth issues which can be influenced significantly by the County Planning Commission, Board of Commissioners and other governing authorities and agencies. The Plan is general because the recommendations are broad. The plan is long-range because consideration is given to the problems and opportunities which may arise over the next twenty or so years. The Plan is dynamic because there will be amendments to adapt to new situations and meet new challenges over time.

The written guiding principles, goals, policies and strategies, in combination with the Land Use Map, provide guidance for decisions affecting growth, the use and development of land, preservation of open space and the expansion of public facilities and services. The Comprehensive Master Plan written policy recommendations and maps should be used together when making decisions. It is also recognized that this document should be reviewed annually at a public hearing and revised as needed to reflect the availability of new implementation tools, changes in State and Federal law, changes in funding sources, the results of monitoring the effectiveness of existing policies and the impacts of past decisions, as well to reflect changes in the community's vision for the future.

How Does Zoning Relate to The Master Plan?

County zoning regulations consist of both a zoning map and a written ordinance that divides the county into zoning districts, including various residential, commercial, and industrial districts. The zoning regulations describe what type of land use and specific activities are permitted in each district, and also regulate how buildings, signs, parking, and other construction may be placed on a lot. The zoning regulations also provide procedures for re-zoning and other planning applications.

The zoning map and zoning regulations provide specific requirements for development of property, while the Master Plan provides a guide for the future development of the property. When changing the zoning of a particular property, it must be consistent with the Master Plan Land Use Map. That is to say, the Land Use Map contained in this Master Plan should guide future re-zoning decisions.

Consistency Between the Master Plan And Zoning

Master plan land use category designations shown on a Land Use Map are not the same as zoning. The adoption of a master plan and Land Use Map does not change a property's zoning.

Master plans are advisory in nature, serving to guide the community at a policy level and to guide future development decisions. Zoning is regulatory in nature, generally serving to implement the master plan and specify permitted uses, allowed densities and development standards.

In many instances, land use category designations on a Land Use Map may not directly correspond to a property's underlying zoning. Unless the County chooses to pro-actively re-zone properties that are not consistent with the Land Use Map, properties retain their underlying zoning. If a property owner desires to change zoning to be consistent with the Land Use Map, the property owner will be required to request re-zoning of the property as part of the development process to bring it into compliance with the Master Plan. There is no requirement in Nevada State law requiring that the zoning of properties be brought into compliance with the Master Plan and its Land Use Map.

Underlying zoning was reviewed and considered throughout the development of this Master Plan to ensure that consistency between planned land uses and zoning could be maintained to the maximum extent feasible. In some instances, land use designations do differ, however, as was necessary to meet the broader objectives of the Master Plan. Re-zoning may be required should the properties develop or redevelop in the future. It should be noted that in many of the cases where inconsistencies do exist, planned land use categories (e.g., mixed-use land use designations) and zoning that would subsequently be required, would allow a much broader range of uses than are allowed today.

Process for Plan Development and Adoption

This County-wide Component of the Comprehensive Master Plan is the culmination of four years of dialogue and analysis that has included a wide array of participants including the Board of Commissioners, the Planning Commission, community advisory councils, County staff and the community at large. A series of community meetings, open house events and workshops were held throughout the county to obtain citizen input and recommendations, including eight meetings on issues identification in March 2007, eight community meetings and 2 joint Planning Commission/Board of Commissioners sessions on

Chapter 2: Vision and Guiding Principals

The Vision, Guiding Principles, and Goals, Policies and Strategies of the Lyon County Comprehensive Master Plan will guide the County in its decisions, and as new development or changes occur, help to maintain and enhance the qualities that make Lyon County a great place in which to live, work, and play.

- ♦ *The Lyon County Vision Statement sets out a desired picture of the future of Lyon County. It represents a future toward which the County will strive.*

- ◆ *Guiding Principles represent the broad values and ideals for the County.*
- ◆ *Goals are statements about what the County aims to achieve over the life of the Comprehensive Plan. Goals are intended to give decision-makers and citizens a clear idea about the County's intended direction.*
- ◆ *Policies provide ongoing guidance for elected and appointed officials, staff, and administrators as these community leaders make decisions about specific development, programs, and capital investments in the County.*
- ◆ *Strategies list detailed actions and methods for implementing the plan. We have listed a range of possible strategies to be considered. Some strategies will be possible to accomplish in the near term, while others will be on-going, or will take place later in the life of the Comprehensive Master Plan.*

How Did We Get Here?

The Vision, Guiding Principles, Goals, Policies, and Strategies in this document are based on public comments gathered in a series of open houses and workshops held in communities throughout Lyon County, in meetings with community advisory councils, and on comments and direction provided by the Planning Commission and Board of County Commissioners. Feedback from these meetings was first distilled into a draft Vision, Guiding Principles, and Goals document that was reviewed by the Planning Board and Board of County Commissioners in September, 2007. Subsequently, comments and concerns and detailed policy direction, in the form of policies and strategies, have been addressed in numerous drafts and updates during 2008, 2009, and 2010.

Overall Vision for Lyon County

A Vision statement is an overall image of what the community wants to be and how it wants to look in the future. It describes the kind of community that residents, business owners, and leaders want their county to become. The Vision for Lyon County describes the community's collective values and aspirations and creates an image of the County based upon what it is today and what residents would like it to be in the future. The Vision is founded on the premise that the health of the County and the quality of life of its residents depend on the balancing of multiple factors, including environmental, economic and community/social considerations. These components are interrelated and essential to the continued health and sustainability of the community. Addressing these factors in a comprehensive manner provides a balanced and flexible basis for formulating the County's Comprehensive Master Plan.

Lyon County Vision

Lyon County will guide growth and change to meet the needs of current and future residents, building on its heritage, and exploring new and innovative techniques to address challenges. The diverse communities within Lyon County will work together to meet shared goals while respecting and promoting the individual character of each community. Residents will enjoy an excellent quality of life characterized by: diverse lifestyle opportunities, quality housing choices, plenty of clean air and water, access to open lands, recreation and wildlife, outstanding public schools, an efficient transportation network, a safe community, and a range of employment and occupational choices. Our rural character, and agricultural and mining heritage, will continue to be a strong part of Lyon County's identity.

Guiding Principals

Eight broad "Guiding Principles" have been identified as the basic beliefs behind the overall County Vision and this Comprehensive Master Plan. The Principles reflect the community's vision at a broad policy level and describe the community's aspirations; highlighting areas where the County has opportunities to build on its strengths—as well as those areas where a change in policy direction is needed to improve a condition that is not consistent with the Vision.

Chapter 3: Land Use, Economy and Growth

Land use patterns in Lyon County have not only been shaped by County regulations and development decisions, but also by physical factors such as topography and water availability. Throughout most of its history, Lyon County has been characterized by a number of compact communities and rural settlements spread over a landscape of valleys and mountains, farm/ranch lands, rivers, and extensive undisturbed areas. For years, the County has been noted for its rural character and image, its historical heritage, and its slow-paced rural way of life.

The rapid growth in the region has brought changes to the County: changes welcomed by many, lamented by others, but of concern to all. Inevitably, in such a process, Lyon County and its communities have been affected by development, increased traffic volumes, encroachment into floodplains, services stretched to meet needs, and a declining agricultural land base.

Future development will be influenced by factors such as population trends, employment growth, and water availability. Lyon County desires to be able to provide employment opportunities for its residents as well as a diverse choice of housing types, commercial services, recreational opportunities and community character.

The County's purpose is not to restrict future growth but to direct it in a way that minimizes negative impacts while offering residents a range of choices and promoting job creation. The County seeks to successfully accommodate growth and consciously decide how development should occur to achieve a more efficient pattern for future development. Lyon County intends to ensure the county's long-term viability by using methods to guide new development to locations where adequate public infrastructure such as roads, water, sewer, schools, and related facilities, is available or can be provided most efficiently and cost effectively, promoting infill development, and providing incentives for quality development.

Lyon County sees more growth and development occurring in and around the existing community cores (its towns and established settlement areas) with more focus on balancing residential, employment, and retail land uses. Less growth is desired in the remote unincorporated areas (outside of community cores). The County also desires to continue agricultural production and the retention of agricultural lands, but allow residential development especially in alternative rural patterns such as clustering, through incentives and density transfer mechanisms. Incentives and density transfer mechanisms are also desired to promote alternative development patterns and the conservation of areas of environmental significance or hazardous features.

Guiding Principal: Lyon County will grow in an orderly fashion concentrating development within designated community cores, maintaining the diversity characterized by its settlement patterns and landscapes, providing jobs as well as housing, and sustaining quality public services and facilities.

Goal LU 1: Orderly Growth Patterns: Direct and manage development in the county so that it is orderly and fiscally responsible.

Policy LU 1.1: Follow Development Patterns as Established on Countywide Land Use Plan or a More Specific Community Plan

Future development of Lyon County will be consistent with the Countywide Land Use Plan or a more specific Community Plan, if one has been adopted. The Countywide Land Use Plan will guide future growth and development by defining appropriate land use types, densities, and character in different locations including cities and towns, suburbanizing areas, rural areas, farm and ranch land, hillsides, and public lands. The county's future urban and suburban growth will develop largely around existing communities.

Strategies:

- ◆ *Use the Countywide Land Use Plan and adopted Community Plans as a guide for decision-making on development approvals.*
- ◆ *Establish a demand based zoning strategy based on population projections and potential-to-actual development ratio, infrastructure capacity and distance to services.*

Policy LU 1.4: Locate industrial development as designated on County-wide Land Use Plan or determined by criteria.

Industrial uses, including extractive industries, will occur in areas that are designated on the County-wide Land Use Plan. New industrial uses should only be located in areas that do not adversely impact existing residential settlements.

Strategies:

- ◆ *Consider developing a set of siting criteria to be used in determining the suitability of sites for industrial and extraction uses.*
- ◆ *Establish performance standards in areas of noise, odor, dust, traffic generation, etc.*

Goal LU 3: Diverse Economy: The economy will continue to be strong and diverse; attracting businesses that employ residents in primary jobs, as well as service jobs that meet the needs of local residents.

Policy LU 3.1: Diverse Economic Base

The county will continue to support a diverse base of jobs to provide for a broader range of employment opportunities that are geographically distributed to be near to population centers.

The county will support economic diversification throughout the county to more fully utilize the broad range of skills, knowledge and abilities inherent in our workforce.

Policy LU 3.2: Business and Industry Locations that are Consistent with Future Land Use Plan

Encourage commercial and industrial development to locate in designated locations shown on the Future Land Use Plan, where public facilities exist or are planned to accommodate such development cost-effectively. The County-wide Land Use Plan will reserve adequate lands for jobs and industry.

Strategies:

- ◆ *Use the Countywide Land Use plan and Community Plans as a guide to determine appropriate locations for business and industry.*

Goal LU 5: Encourage Resource Sensitive Growth: Development will be designed to reduce energy use and minimize environmental impacts.

Overall Land Use Plan Approach – Community Core Concept

Early in the process of developing this Master Plan and based on input from the community and county leadership, an overall approach for future growth and development in the county was identified and is referred to as the Community Core Concept. Under this approach, Lyon County would see more growth and development occurring in and around the existing community cores (its towns and established settlement areas) with more focus on balancing residential, employment, and retail land uses. The concept encourages less growth in the remote unincorporated areas (outside of community cores). The agricultural areas around Smith and Mason Valleys would primarily continue for agricultural production, but would allow residential development especially in alternative rural patterns such as clustering, through such mechanisms as transfer of development rights and non-contiguous density transfers. In addition, the concept promotes alternative development and conservation approaches for areas of environmental significance or hazardous features, such as steep slopes, wetlands, or floodplains.

Community Description

Chapter 3, Land Use, states that "community descriptions should serve as a general guide when considering the implications of the Master Plan County-wide Component on individual communities." The description of Silver City is as follows:

Silver City

Silver City, situated in lower Gold Canyon, represents the first settlement in Nevada based on mining activity. The town is located about 4 miles northwest of Dayton, the site of Nevada's first gold discovery, and 3 miles south of Virginia City along Highways 341 and 342. Approximately 200 home-sites and 100 houses, along with some historic commercial and industrial buildings, comprise the historic town site which is an integral part of the Comstock Historic District – a National Landmark Historic District.

Over the past 30 years residential infill and limited commercial endeavors have occurred on existing historic properties in Silver City. The pace of development has been slow for a variety of reasons, including challenging topography, limited water and sewer infrastructure, and an array of patented and unpatented mining claims. The existing water service infrastructure dates to the late nineteenth century, when a water system to supply the mining operations and settlement demands of the Comstock communities was constructed. This aging water system and a lack of a sewer system limit growth in Silver City. Additionally, title issues due to the historic nature of the town site and complications based in local zoning and building codes, have limited development.

Silver City has a strong sense of identity and prides itself on its cohesive small town atmosphere. The community treasures its historic buildings and landscape features, as evidenced by the preservation and rehabilitation of many original structures. New construction is regulated for exterior architectural features by the Comstock Historic District Commission.

Character Districts

Character District Map Description

"Character" can generally be thought of as the look or feel of a place, including: the built environment, land use patterns, street patterns, open lands, and general density or

intensity and type of uses. The purpose of the Character Districts Map is to help define, maintain, or enhance desired character of development or intensity in particular areas of the county.

Five Character Districts

Character Districts provide guidance to the type, intensity, density, and general development standards for uses intended to occur within their boundaries. They control and modify the land use designations to achieve the type and character of development desired in communities. These Districts are defined areas within communities. A community may have one or more Character Districts within its boundary. The following character districts are described in the sections that follow:

- Rural districts,
- Suburbanizing districts,
- Historic districts,
- Future Plan Areas, and
- General County.

Rural Districts

Rural Districts include those areas that are predominately low density residential development with limited neighborhood commercial uses. They may or may not have agricultural land uses or grazing lands. Improvement standards will reflect the "rural" character of the area. Rural districts are not likely to have municipal water and sewer. Roads are likely to have dirt shoulders, some equestrian paths as well as bike facilities within road rights-of-way.

Suburbanizing Districts

Suburbanizing Districts include those areas that are predominately medium to high density residential development with regional/community commercial, neighborhood, industrial and employment uses. Improvement standards will reflect the "suburban" character of these areas and will include requirements for municipal water and sewer, roadway design appropriate to the planned land uses, landscaping of public areas, and pedestrian facilities (sidewalks and paths). Roads are likely to have some bike and pedestrian facilities within road rights-of-way or separate paths.

Historic Districts

Historic Districts include those areas in and around lands included in the Comstock Historic District and Silver City or other future historic designations to preserve existing historic character or to promote "historic" architectural design elements. Future historic districts could also be designated where the intent is to promote new compatible development that is in keeping with the "historic" development patterns and architectural design elements to create more vitality. Tools might include mixed-use, design guidelines and conservation easements.

General County

Lands outside the boundaries of defined community boundaries are classified as General County. These lands are rural or resource lands or public lands, and are intended to remain largely undeveloped or with very low intensity development within the Master Plan's planning horizon. The development standards applicable to General County lands are the same as those for Rural Character Districts.

County-wide Land Use Plan Map(s)

The intent of the County-Wide Land Use Plan Map(s) is to show the generalized land use patterns for the entire County and the land use designations for lands outside of defined communities. This Plan map(s) provides an overall view of the County's desired development pattern. The county-wide categories, which are very general and the broadest categories to be mapped, encompass the more specific community plan land use designations, as shown in the land use categories table in this section. The County-wide Land Use Plan map(s) provides broad direction for the land uses intended within communities and the County. (Note: The Land Use Plan designations are shown in the blue column in the master table beginning on page 3 28.) Until a Community Plan is adopted, the County-wide Land Use Plan will be the guide.

Land Use Categories shown are generally consistent with Lyon County zoning and do not remove or vastly change owner entitlements to properties. However, some categories suggest a slight refocus of future development patterns to better achieve Comprehensive Plan Goals. For example, the intent for lands designated as "Highway Corridor Mixed-Use" is to gradually transition away from the strip commercial pattern along the county's highways to become a more cohesive mix of uses with offices, residential, and commercial that is focused in centers. Likewise, some of the lands in Smith Valley that are zoned for Rural Residential are shown as Agriculture, because the intent is that they are part of a larger agricultural area where options for landowners to conserve lands, do clustered development, or transfer density to more concentrated rural development areas is desirable. The Agriculture designation does not imply a change in potential development units from current zoning.

Proposals for development must be consistent with the categories and centers shown on the County-wide Land Use Plan or applicable Community Land Use Plan, or be consistent with locational criteria for centers described later in this chapter. The plan amendment procedures section of this plan describes what developers must do when a proposal is not consistent with the land uses defined herein.

County-wide Land Use Categories Table [Excerpts]

Countywide Land Use Category	Community Plan Land Use Categories	Density Range	Description/ Characteristics and Examples of Uses
AGRICULTURE AND RESOURCE LANDS			
Resource	✓ Resource (private)	1 du per 40 acres or one-sixteenth of a section as described by a government land office survey, or per existing parcel if less than 40 acres or one-sixteenth of a section	Characteristics: Private property, generally inholdings or located in very remote or rural parts of the County (outside of community boundaries). Within communities may be private property used for resource uses. Examples of uses: Open range and dispersed grazing, mining and large scale energy, general rural residential development at very low densities. Within communities uses such as, mining, borrow pit or gravel pit operations, energy projects; may include limited employment/industrial uses complementary to and compatible with surrounding uses.
RESIDENTIAL			
Rural Residential	✓ General Rural ✓ Rural Residential	1 du per 20 acres to 1 du per 5 acres	Characteristics: Typically in rural districts and on the edge of suburbanizing areas. Lot sizes vary. Typically not served by

Countywide Land Use Category	Community Plan Land Use Categories	Density Range	Description/ Characteristics and Examples of Uses
Suburban Residential			municipal utilities. Examples of uses: Single-family residences, ranches, and "farmettes".
	<ul style="list-style-type: none"> ✓ Medium Density Residential ✓ High Density Residential 	1 du per acre to 18 du per acre.	Characteristics: Typically in suburbanizing areas. Neighborhoods should contain a mix of housing types and lot sizes in a neighborhood setting with a recognizable center (with a park, school, or other public use) and connected, useable open space within the neighborhood. Will be served by municipal utilities. High density residential must be located near major roads and near commercial uses. Examples of uses: Single-family residences, duplexes and attached housing.
	<ul style="list-style-type: none"> ✓ Residential Mixed-Use 	3 du per acre to 18 du per acre.	Characteristics: This category is designed to create opportunities for higher-density neighborhoods in a suburban setting to promote neighborhoods with a mix of types and intensities in close proximity to commercial and commercial mixed-use districts. Examples of uses: A range of medium to high-density residential housing types with open space, parks, schools, and other public uses.

Chapter 5: Community Character and Design

Lyon County features a rich mosaic of communities, residents, and physical attributes. Residents and property owners have expressed considerable interest in maintaining their many diverse communities and improving community aesthetics. A community's character is defined by its design, its viewsheds, its gathering places, and its historic and cultural resources, as well as by environmental characteristics such as natural quiet and dark night skies. Maintaining this character is important—not only for promoting economic development and diversification, but also for protecting our living spaces, quality of life and open lands. In addition, preserving rural character is a core value of a majority of Lyon County residents.

This Chapter describes the factors that combine to create community character in our county. It also discusses the Guiding Principle, goals, policies and other mechanisms that help us to protect the community characteristics we value. This Community Character and Design Chapter seeks to define, preserve, and enhance the quality of the places where we live, work, and enjoy our leisure time. Its goals include protecting the unique characteristics of our communities.

Each community has distinct features that contribute to its physical character. Many of these features reflect common values for preserving a community's rural character, appearance, natural resources, open spaces, recreation areas, scenic views, vegetation, historic architecture, development patterns, and activity centers. These features promote quality of life and economic well-being. Preserving them should not prohibit

development; however, the County needs to consider them to ensure that new development fits into the existing community fabric.

Guiding Principal: Lyon County will respect and promote the distinct character and heritage of its communities, strive to retain its rural and agricultural culture and promote cohesive and high quality development to improve the overall image and function of its communities.

Goal CC 1: Quality Design: New development in Lyon County will improve the appearance and function of our communities.

Policy CC 1.1: Quality New Development

New development in the communities of Lyon County should create inviting places for locals and visitors to live, shop, eat, visit, and do business.

Policy CC 1.3: Design Tailored to Communities

New development in Lyon County should address and respect the unique character of communities within the county.

Goal CC 3: Heritage: Historic places, structures, and landmarks in the county will be preserved and will provide an opportunity for resident and visitors to learn about and celebrate our heritage.

Policy CC 3.1: Maintain and Restore Historic Resources

Lyon County will encourage and support efforts to preserve and restore registered historic structures, and landmarks, and districts.

Strategies:

- ◆ *Revise zoning to encourage historic use and development patterns including mixed-use structures and districts.*
- ◆ *Support organizations in the county that apply for historic designation or grant funding for inventory or rehabilitation of historic structures, efforts to identify receiving sites for historic structures that cannot be maintained in their original locations, and similar historic preservation purposes and efforts.*
- ◆ *Work with knowledgeable organizations and individuals to ensure that building and development standards allow for adaptive reuse of valued historic structures, including those without official historic designation.*
- ◆ *Within historic districts, promote historic design elements, features and context, and prohibit building design that compromises the integrity of the historic community character.*
- ◆ *Within historic districts, limit new land uses that would pose a risk to historic structures or the historic character of the district.*
- ◆ *Promote the preservation of historic landscape features to maintain historic settings and the integrity of historic resources within historic districts.*

Chapter 6: Natural Resources and Environment

Guiding Principal: The proximity of the natural environment will continue to be an important part of life in Lyon County, where residents will enjoy sustainable supplies of clean water for drinking and agriculture; clean air; wildlife; access to rivers, lakes

and public lands; scenic views, and dark night skies. Lyon County will work to reduce or mitigate natural hazards such as wildfire, flooding, earthquakes and dust.

Goal NR 3: Adequate, Clean Water: Adequate water supply will be available for current and future needs in Lyon County, including safe, healthy drinking water for all Lyon County residents.

Policy NR 3.1: Water Supply and Quality

Recognizing that clean water is a precious resource necessary to maintain our health, economy, and quality of life, Lyon County will protect the water supply and encourage efficient use of water resources.

Strategies:

- ◆ *Maintain and expand the piped municipal water and sewer systems within community core and urbanizing areas of the County as designated on the Future Land Use map.*

Goal NR 9: Mining and Resource Extraction: Lyon County will promote the continued development of mineral and aggregate resources while working to prevent and reduce conflict between mining and other resource extraction activities and residential, commercial and industrial development.

Policy NR 9.1: Guide Development

Lyon County will endeavor to guide development away from areas where minerals and aggregate extraction is currently occurring and where significant resources are known to exist.

Strategies:

- ◆ *Consider the location of known resources when reviewing new development.*

Policy NR 9.3: Mitigate Operations

To the extent possible, Lyon County will require resource extraction projects to mitigate adverse operational impacts on such items as public infrastructure, traffic, agricultural operations, residential and commercial land uses, the visual character of the area, etc.

Strategies:

- ◆ *Promote "limited impact"/environmentally safe resource extraction practices to protect the natural environment, enhance the quality of life of residents, and limit impacts on present and future public facilities and services.*

Policy NR 9.4: Mitigate long-term impacts

To the extent possible, Lyon County will promote long-term reclamation and rehabilitation of extractive sites.

Strategies:

- ◆ *Require resource extraction projects to submit detailed long-term reclamation and reuse plans and to provide adequate funding mechanisms to implement plans*

Chapter 8: Public Facilities and Services

Lyon County desires to have adequate public facilities and services to support desirable land use and development patterns, to contribute to the quality of life and to encourage economic development. Ensuring that the provision of community facilities and services is phased with the demand or need is a major component of managing the future development and growth of communities.

Public facilities and services are those minimum facilities and services the County and other entities provide for the common good. Many entities provide community facilities and services — the County, state and federal agencies, special districts, and the private sector. Maintaining a high degree of coordination between these providers helps ensure that adequate facilities are available and improvements keep pace with development.

Generally, public facilities include land, buildings, equipment and whole systems of activity provided by the County on the behalf of the public. This Chapter addresses public facilities and services related to water and sewer systems, public safety, schools and libraries. The goals and policies are designed to ensure that we plan for adequate services and facilities, either during the land development process or through appropriate government programs.

Guiding Principal: Lyon County residents will have access to excellent schools and libraries, and effective response from well-equipped emergency services. The timing and location of future development will be coordinated with improvements to services and infrastructure to provide cost-effective services to existing and future residents.

Goal FS 1: Provision of Services: Municipal water and sewer systems will be expanded only in areas where they are cost effective.

Policy FS 1.1: Location of New Development

New urban development will occur in areas that are served by, or are adjacent to, areas with existing utility systems to avoid distant and costly extensions.

Strategies:

- ◆ *Develop a Capital Improvements Plan and budget for Lyon County utility system expansion that is consistent with the Land Use Map in this Plan.*
- ◆ *Revise the County's development regulations in order to create incentives to build according to the Land Use map in this Plan.*
- ◆ *Require the developer to pay the full cost of utility system extension, in order to discourage inefficient utility system development, and provide for reimbursement mechanisms where appropriate.*

Chapter 10: Communities and Planning

Lyon County consists of several distinct and diverse communities. The diversity of these communities is reflected in their different growth patterns, character and personality. It is essential that the distinctive character of each identified community is established, maintained, and enhanced.

The Comprehensive Master Plan must address issues that are unique to each community, establish policies that apply strictly to the affected community and deal with issues that are special concerns to that community. The successful implementation of this Comprehensive Master Plan will require that community differences be respected and integrated into the Plan.

Guiding Principal: Through its Community Planning process, Lyon County will address individual community needs and desires while implementing county-wide policies and actions.

Goal CP 1: Support Diversity: Lyon County will celebrate and support the diversity of character among communities in the county.

Policy CP 1.1: Recognize Diversity of Communities

Lyon County planning efforts and regulations will consider the unique aspects of communities in the county, and will allow for 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 and that are developed with strong public consensus.

Policy CP 3.1: Support Community Planning Efforts

Lyon County will encourage and offer guidance for community-based planning efforts, with the goal of ensuring that such an effort will result in a document that identifies the unique needs and values of the community in a manner that can be integrated with county-wide planning, regulations, and policies.

Goal CP 4: Advisory Councils: County staff will confer with the applicable Community Advisory Council when developing programs or policies to address community-specific issues.

Policy CP 4.1: Confer with Community Advisory Councils

When developing a program or policy intended to address a community-specific issue, such as those listed in this Comprehensive Master Plan and in adopted community plans, county staff will confer with the applicable Community Advisory Council before finalizing a decision.

Community Plans

Community Plans comprise the second major component of the Lyon County Comprehensive Master Plan. These plans are essential in carrying out one of the Comprehensive Master Plan's fundamental goals – to recognize and promote the diversity and individual characters of the County's various communities.

Based on the framework established in the County-wide Component, the Community Plans address issues that are unique to each community. The Community Plans provide the specific vision, goals, policies, strategies and land use pattern for each identified community as determined through a community planning process. The Plans and maps contain the detailed information about each community and the views of the community's desired development for the future. They are intended to ensure that the distinctive character of each community is established, maintained, and enhanced.

Policies are established in the Community Plan that apply strictly to the defined community and deal with issues that are of special concern to that community. These may include policies that contain more detailed requirements for land use, development,

or public improvements than are identified in the chapters of the County-wide Component. The Community Plans may also contain detailed implementation measures. These action measures can address issues such as design standards and special use provisions. The goals and policies contained in the Master Plan's County-wide Component also apply to the areas covered by a Community Plan.

Community Plans are designated for the existing, established communities identified during development of the Comprehensive Master Plan. The County will work with the communities to complete Community Plans, including Community Land Use Plans, in each community.

Chapter 11: Implementation

Plan Amendment Process

For the Comprehensive Plan to function over time, Lyon County must be able to periodically review and update it to respond to significant trends or changes in the economic, physical, social, or political conditions.

Plan Amendment Process and Procedures

The public and the County may initiate Plan Amendments in accordance with the provisions of Lyon County Code. All Plan Amendments shall be considered by the Planning Commission and Board of County Commissioners pursuant to their respective powers. Based on its consideration of the recommendations from staff, advisory councils, boards and commissions, and evidence from public hearings, the Planning Commission could then adopt the Plan Amendment (with or without further revisions) or deny the Amendment. Any action on a Plan Amendment by the Planning Commission would be followed by County Commissioners action including, if applicable, its approval of the Plan Amendment. When considering a plan amendment, the County should consider whether:

- 1. The existing Comprehensive Master Plan and/or any related element thereof is in need of the proposed amendment;*
- 2. The proposed amendment is compatible with the surrounding area, and the goals and policies of the Comprehensive Master Plan;*
- 3. The proposed amendment will have no major negative impacts on transportation, services, and facilities;*
- 4. The proposed amendment will have minimal effect on service provision, including adequacy or availability of facilities and services, and is compatible with existing and planned service provision;*
- 5. Strict adherence to the Comprehensive Master Plan would result in a situation neither intended nor in keeping with other key elements and policies of the Plan; and*
- 6. The proposed Plan amendment will promote the public welfare and will be consistent with the goals and policies of the Comprehensive Master Plan and the elements thereof.*

Summary of Priority Actions

To focus the County's efforts on actions that should be taken as soon as possible to ensure that future development decisions are consistent with the goals and policies

contained in this Plan and with the designations on the Land Use Map. Several priority actions are highlighted below. These are already underway or are anticipated to be underway shortly following the adoption of the Plan. The Priority Actions should be reviewed and updated periodically to reflect the County's accomplishments, available resources, and potential shifts in policy direction.

The priority actions listed below are recommended.

Prepare Community Plans

The implementation of the Comprehensive Master Plan framework requires the creation of Community Plans for each of the identified communities. These Plans are to be prepared through a community planning process directed by the County Planning Department. The Community Plans are intended to show the specific land use pattern for each identified community. The Plans will provide detailed views of the community's desired development pattern for the future.

Attachment 2

Past Lyon County Master Plans Excerpts and Relevant Information

1971 Lyon County General Plan

On the 1971 General Plan Map, Silver City is shown as an Urbanizing Area and the Mining Industry land use is not depicted in the Silver City area.

1990 Lyon County Master Plan – Silver City

Goal #1: To maintain, promote, and secure the historic character of the community and to prevent the destruction or degradation of the historic character.

2002 West Central Lyon County Final Land Use Plan – Silver City Master Plan Goals

Goal 1: To recognize, enhance, and protect the unique character of Silver City.

Actions:

- To maintain that scale and primary residential character by retaining the existing Master Plan designation and zoning categories.

Goal 8: To limit any earth disturbance or above ground mining activities that create visual scarring or that disrupt the fabric of the community.

Actions:

- Lyon County shall establish a land use policy that minimizes the impact of mining and other significant earth disturbing activities that degrade quality of life.

Goal 10: To maintain the primary focus of the community as residential.

Actions:

- To urge the Board of Commissioners to carefully consider all zone changes or Master Plan amendments that would substantially alter the character and identity of Silver City.

The Honorable Board of Lyon County Commissioners met this day in regular session with the following present: Chairman Joe Mortensen, Vice-chair Ray Fierro, Commissioners Virgil Arellano, Vida Keller and Bob Hastings. Also present: County Manager Jeff Page, Deputy District Attorney Moreen Scully and Deputy Clerk Donna MacGill.

1. Public participation

Greg Kantz said he is a resident of Lyon County, a business owner in Lyon County, an employer in Lyon County and a candidate for Lyon County Sheriff in 2014. He read an email he sent to Maureen Williss and thanked Maureen Williss for her prompt response. He discussed the use of the sheriff's department uniform for campaigning. He said another candidate has been using his uniform and he also intends to use his. Mr. Kantz would like the county manager's office to speak to the ethics commission for a formal ruling.

2. For Possible Action: Review and adoption of agenda

Comm. Arellano moved to adopt the agenda as presented. Comm. Fierro seconded and the motion passed 5 - 0

3. For Possible Action: Elect Board of County Commissioners Chair and fix the term of office for the Chair as required by NRS 244.070

Comm. Hastings moved to elect Comm. Mortensen to remain as Board Chair for the 2014 calendar year. Comm. Fierro seconded and the motion passed 5 - 0.

4. For Possible Action: Elect the Board of County Commissioners Vice Chair and fix the term of office for the Vice Chair as required by NRS 244.070

Comm. Arellano moved to elect Comm. Fierro to remain as Board Vice-Chair for the 2014 calendar year. Comm. Mortensen seconded and the motion passed 5 - 0.

5. Presentation of awards and/or recognition of accomplishments

There were no awards or recognition of accomplishments.

6. Commissioners/County Manager comment

Comm. Fierro wished everyone a Happy New Year and asked everyone to be respectful to each other during the contentious issue to be heard later in the agenda.

Comm. Arellano said he will be attending a meeting in Washington D.C. regarding Senate Bill 279/House Resolution 596 for distribution of revenues for renewable energy projects on public lands and also wildlife management conservation. He will also be addressing the Pumpkin Hollow/Lyon County Conservation Act. He was also approached by Assemblyman Grady and State Senator Settemeyer regarding a meeting in Winnemucca concerning the listing for the DEIS and the sage grouse issue. He will be attending a state land use planning committee in Las Vegas on February 7th.

Comm. Mortensen, Comm. Hastings, Comm. Keller and County Manager, Jeff Page, had no comments.

7. Elected Official's report

There were no elected official's reports.

8. Appointed Officials comments

Edrie LaVoie said to save the date on January 31st. NACO and the Governor's Commission on Aging will be sponsoring a webinar to educate all of commissioners throughout Nevada on the growing aging population and the lack of resources to meet those needs.

Time Specific – 9:15 A.M. - For Possible Action: Approve the Fiscal Year 2013 Consolidated Annual Financial Report

Jim Sciarani presented FY2013 financial statements. He explained the sole purpose of hiring an audit firm is to issue an opinion on the financial statements. The opinion was a clean and unmodified opinion stating these financial statements present fairly the results of operation and the financial position of the county at June 30, 2013. Mr. Sciarani explained various areas of the financial statements and gave an overview of the General Fund and Enterprise Funds.

Comm. Arellano moved to approve the Fiscal Year 2013 Consolidated Annual Financial Report. Comm. Hastings seconded and the motion passed 5 – 0.

9. Advisory Board reports

There were no advisory board reports.

****CONSENT AGENDA****

10. For Possible Action: Approval of changes on Assessor's tax roll due to corrections in assessments and review of tax roll changes

There were no tax roll changes.

11. For Possible Action: Review and possible approval of business license applications:

- a. Norris, Byron; Norris, Alicia; *B & D Handyman*; 5535 Shoshone Dr., Stage Coach, NV; Re-Open Account Handyman Services
- b. Hoekstra, Michael A.; US2C Holdings LLC; *Bay Swiss Manufacturing*; 5 Airpark Vista Blvd., Dayton, NV; Machining and Manufacturing of Aerospace Assembly Components. Change of Ownership
- c. Bell, Laura; Bell, Rick; *Source One Property Services*; 4345 Dayton Ave., Silver Springs, NV; Handyman Services
- d. Groff, David J.; Garber, Charles W.; Clark, Fred E.; *The Webstaurant Store, Inc.*; 111 Airpark Vista Dr., Dayton, NV; Distribution Center for Food Service Equipment and Supplies

12. For Possible Action: Approve the use of up to \$8,025 of Central Lyon County Park Tax reserves to upgrade the new 3 color LED message boards that are located at Our Park in Dayton

13. For Possible Action: Appoint six (6) members to the Smith Valley Park and Recreation Board, with terms expiring December 31, 2015

14. For Possible Action – Approve loan resolution in the amount of \$6,920,000 with USDA in regards to the Dayton Septic Project

15. For Possible Action – Approve grant agreement not to exceed \$4,985,500 with USDA in regards to the Dayton Septic Project

16. For Possible Action - Appoint Sciarani & Co. as the auditor for Lyon County for fiscal years 2014 – 2016

17. For Possible Action: Approval of Agreement with Satellite Tracking of People, LLC for electronic monitoring services for Juvenile Probation Office (JPO)

18. For Possible Action: Review and accept travel claims

Travel claims totaled \$2,522.28 and registrations totaled \$1695.00.

19. For Possible Action: Review and accept County claims and financial report

County claims totaled \$599,052.32 and payroll totaled \$1,004,575.01.

Comm. Fierro moved to approve the consent agenda as presented. Comm. Keller seconded and the motion passed 5 – 0.

****END OF CONSENT AGENDA****

PUBLIC HEARING ON PLANNING ITEMS

20. **For Possible Action: McFARLAND CASCADE HOLDINGS, INC / NEVADA WOOD PRESERVING – SPECIAL USE PERMIT MODIFICATION DUE TO NEW OWNERSHIP** – Request for a Special Use Permit for the continued operation of an existing wood treatment plant and continue the use of a mobile home for watchman's quarters under new ownership on 16 lots totaling approximately 106.34 acres; located at 1680 Spruce Avenue, Silver Springs (APN's 18-430-01 through 18-430-10; 18-430-16 through 20; and 18-430-23) (PLZ-13-0057)

Planning Commission Recommendation: Based on the recommended findings, the Planning Commission recommended approval of the request for a Special Use Permit modification subject to 18 approval conditions, by a unanimous vote of those members present: 6 ayes; 0 nays; 1 absent (Paul Lanning).

Rob Loveberg presented and recommended approval.

Comm. Fierro moved to approve the special use permit with the following findings: A. is a continuation of a previously approved and operating use through Lyon County's special use permit process. B. at the specified location is consistent with the general purpose and intent of the applicable M-1 General Industrial district regulations; C. will not be detrimental to the use, peaceful enjoyment, economic value, or development of surrounding properties or the general neighborhood; and is compatible with and preserves the character and integrity of adjacent development and neighborhoods or includes improvements or modifications either on-site or within the public right-of-way to mitigate development related to adverse impact such as noise, vibrations, fumes, odors, dust, glare or physical activity; D. will not be detrimental to the public health, safety, convenience and welfare; and E. will not result in material damage or prejudice to other property in the vicinity; and subject to conditions of approval 1 through 18 as follows:

1. The special use permit is subject to annual review by Lyon County.
2. The applicant shall meet all Environmental Protection Agency and State Fire Marshal requirements.
3. The applicant shall provide the county with a disposal plan for the waste generated by the operation and update the plan annually.
4. The applicant shall keep two self-contained breathing apparatus' on the premises in case of emergency in conformance with the requirements of the Central Lyon County Fire Protection District.
5. The applicant shall erect and maintain a security fence totaling 6' in height topped with 1' of barbed wire.
6. The applicant shall provide security lighting and any new or replacement outdoor lighting shall be in compliance with Chapter 10.20 of the Lyon County Code.
7. The applicant shall provide and maintain an in-house fire control system pursuant to the requirements of the Central Lyon County Fire Protection District.
8. The applicant shall obtain a will serve letter from the local water company and install piping to the Central Lyon County Fire Protection District's satisfaction.
9. The applicant shall provide classes on handling of the chemicals used in the operation under emergency circumstances, for the Central Lyon County Fire Protection District.
10. The operation can be inspected by the Public Works Department or the Central Lyon County Fire Protection District at any time during operating hours.
11. The disposal of waste from the operation is to be handled by a licensed hazardous material carrier.

12. The applicant shall maintain a Lyon County business license for the use while occupying the premises.
13. The facility shall meet all Lyon County building codes.
14. The applicant shall remove all unused and inoperable machinery and equipment and all unused or unusable tanks from the property, or locate all unused and inoperable machinery and equipment and all unused or unusable tanks at a central location that is screened from public view by a combination of vegetative screening, fencing and/or terrain modification approved by the Planning Director.
15. The applicant shall comply with Lyon County's 1996 drainage guidelines. The property owner shall be responsible for maintenance of all roads, walks and drainage facilities within the development, as well as the storm water detention facilities, if applicable, whether it is onsite or offsite. Lyon County shall have no financial responsibility for maintenance of these facilities.
16. The applicant shall comply with all State, County, federal and special district rules and regulations as they apply to this special use permit
17. No change in the terms and conditions of the special use permit, as approved shall be undertaken without first submitting the changes to Lyon County and having them modified through a public hearing process.
18. The substantial failure to comply with any conditions imposed on the issuance of a special use permit or the operation of a special use in a manner that endangers the health, safety or welfare of Lyon County or its residents or the violation of ordinances, regulations or laws in the special use or the non-use of the permit for a year, may result in the institution of revocation proceedings.

Comm. Keller seconded and the motion passed unanimously 5 – 0.

21. **For Possible Action: DEMOLSKI, THOMAS / STOVER, LARRY, TRS., ETAL – SPECIAL USE PERMIT – Request for a Special Use Permit to utilize an existing mobile home for watchman's quarters in conjunction with a contractor's equipment yard, on approximately 1.53 acres; located at 41 Highway 341, Mound House (APN 16-194-07) PLZ-13-0056**

Planning Commission Recommendation: Based on the recommended findings, the Planning Commission recommended approval of the request for a Special Use Permit subject to 12 approval conditions, by a unanimous vote of those members present: 6 ayes; 0 nays; 1 absent (Paul Lanning).

Rob Loveberg presented and recommended approval with the conditions.

Comm. Fierro moved to approve the special use permit with findings A through D as follows: A. is consistent with the general purpose and intent of the applicable zoning district regulations; B. will not be detrimental to the use, peaceful enjoyment, economic value, or development of surrounding properties or the general neighborhood; and is compatible with and preserves the character and integrity of adjacent development and neighborhoods or includes improvements or modifications either on-site or within the public right-of-way to mitigate development related to adverse impact such as noise, vibrations, fumes, odors, dust, glare or physical activity; C. will not be detrimental to the public health, safety, convenience and welfare; and D. will not result in material damage or prejudice to other property in the vicinity; and also subject to 12 conditions as follows:

1. The applicant shall comply with all State, County, federal and special district rules and regulations as they apply to this special use permit.
2. The applicant shall comply with all applicable fire, building, zoning and improvement code requirements.
3. The applicant shall acquire all State, County and special purpose district permits and obtain all necessary public inspections.
4. If outdoor lighting is provided, it shall comply with the outdoor lighting requirements of Chapter 10.20 of the Lyon County Code.

5. The applicant shall remove all unused and inoperable machinery and equipment from the property or locate all unused and inoperable machinery and equipment at a central location that is screened from public view by a combination of vegetative screening, fencing and terrain approved by the Planning Director.
6. The applicant shall comply with Lyon County's 1996 drainage guidelines. The property owner shall be responsible for maintenance of all roads, walks and drainage facilities within the parcel, as well as the storm water detention facilities, if applicable, whether it is onsite or offsite. Lyon County shall have no financial responsibility for maintenance of these facilities.
7. The applicant shall maintain a Lyon County business license for the use while occupying the premises.
8. All of the requirements placed on the special use permit by the County Building Official, Central Lyon County Fire Protection District, Planning Director, and other agencies with jurisdiction shall be met prior to the applicant commencing use of the site.
9. The use is subject to the continuous maintenance of an M-1 use that demonstrates the need for the watchman's quarters. The watchman's quarters use shall be discontinued and the manufactured home removed within thirty (30) calendar days if an M-1 use requiring the watchman's quarters is discontinued.
10. No change in the terms and conditions of the special use permit, as approved shall be undertaken without first submitting the changes to Lyon County and having them modified through a public hearing process.
11. The substantial failure to comply with any conditions imposed on the issuance of a special use permit or the operation of a special use in a manner that endangers the health, safety or welfare of Lyon County or its residents or the violation of ordinances, regulations or laws in the special use or the non-use of the permit for a year may result in the institution of revocation proceedings.
12. The special use permit is subject to annual review by Lyon County.

Comm. Keller seconded and the motion passed unanimously 5 – 0.

Public Hearing - 9:30 A.M. – For Possible Action: COMSTOCK MINING, INC. – MASTER PLAN AMENDMENT – Request to change the Master Plan from Resource land use designation and Suburban Residential land use designation to Resource land use designation on approximately 32.34 acres and Rural Residential land use designation on approximately 54.86 acres of a 94.27 total acre parcel; located off of Highway 341, Silver City (a portion of APN 08-091-05 & 08-091-02) PLZ-13-0050

Planning Commission Recommendation: Based on the recommended findings, the Planning Commission passed a motion to deny the Master Plan Amendment request for Comstock Mining, Inc. on APN's 08-091-05 & 08-091-02, by a majority vote of 5 ayes; 1 nay (George Mortensen); 1 absent (Paul Lanning).

Comm. Arellano requested that both of these items regarding the Master Plan and Zoning change be heard concurrently with separate actions.

Jeff Page, County Manager, disclosed that Comm. Keller called to request meeting with him and Comm. Mortensen to discuss possible compromise to Comstock Mining's application. Following that meeting, Mr. Page met with Comstock Mining and Comm. Mortensen to discuss a possible compromise to reduce the view shed.

Comm. Keller read a full disclosure into the record and presented copy to the clerk for a permanent part of the record.

Comm. Hastings also read his disclosure statement into the record and presented copy to the clerk of the board.

Comm. Fierro, Comm. Arellano and Comm. Mortensen also presented their disclosures for the record.

Jeff Page reported that correspondences received as of December 31st at 3:00 p.m. are on the website.

Rob Loveberg, Planning Director, said the planning commission recommended denial of the zone change and denied the master plan amendment.

There were many citizens who were opposed to the changes and many who were in favor of the changes.

Mark Rotter of Manhard Construction was representing Comstock Mining and explained they have been operating in the area for 10 years and currently employ over 110 employees. They have invested over \$80 million over the last three years and \$3 million with Lyon County contractors. They have spent \$2 million on environmental and cultural studies and \$2.5 million on soil testing. He also showed a power point presentation. What they are proposing is to be able to look at the possibility to mining the area. They would need to have a land use that would allow mining.

Those speaking on behalf of the citizens of Silver City and in opposition to the changes were as follows:

Erich Obermayr, Chairman of the Silver City Citizens Advisory Board, presented. The citizen advisory board recommended denial, as it is the wishes of the majority of the residents. The citizens feel it would affect the quality of their day to day life in Silver City.

John Marshall representing the Comstock Residents Association showed a video and spoke on behalf of the Silver City residents.

John Singlaub, Senior Analyst for Ascent Environmental Company, also showed a power point presentation and spoke on behalf of the residents opposed to the changes.

The board of commissioners had questions.

Comm. Keller explained that she spoke with Mr. Rotter to review some maps and go over some concerns regarding the view shed. She also said she spoke to many Silver City residents. She reminded everyone we are here for a master plan amendment and zone change and there is no special use permit being acted on today.

Comm. Keller made a motion to approve the Master Plan Amendments from Resource to Rural Residential on approximately 12.29 acres and from Suburban Residential to Rural Residential on approximately 42.57 acres for Comstock Mining, Incorporated as set forth in the written and graphic information contained in the revised Master Plan Amendment application and supporting documents received by Lyon County planning department on October 18, 2013 (APNs 08-091-02 and 08-091-05)(PLZ-13-0050). Excluding, without prejudice, eight of the nine previously approved on October 18, 2013 reversion to acreage application for Silver City town sites APN 08-091-05 and 08-091-02. Town sites to be excluded are 101, 102, 103, 104, 133, 277, 278 and 279, a total of approximately 13.72 acres and an additional 1.77 acres from the north end of parcel 08-091-05 known as the "Marble Lode". As depicted on the revised map presented this day January 2, 2014. To hereby be made part of the record and to include findings A through I as follows: A. The applicant has demonstrated that the amendment is in substantial compliance with and promotes the Master Plan goals, objectives and actions in that it is in keeping with applicable guiding principle, goals, policies and strategies. B. The proposed amendment is compatible with the actual and planned adjacent land uses, and reflects a logical change in land uses in that the amendment would decrease the intensity of residential development. C. The proposed amendment has demonstrated in response to changed conditions or further studies that have occurred since the Master Plan was adopted by the Board, and the requested amendment represents a more desirable utilization of land. D. The proposed amendment will not adversely affect the implementation of the Master Plan goals, objectives and actions and will not adversely impact the public health, safety or welfare. E. The proposed amendment will promote the desired pattern for the orderly physical growth of the County, maintains relatively compact development patterns, and guides

development of the County based on the least amount of natural resource impairment and the efficient expenditure of funds for public services. F. The proposed amendment is compatible with the surrounding area, and the goals and policies of the Comprehensive Master Plan. G. The proposed amendment will have no major negative impacts on transportation services, and facilities. H. The proposed amendment will have minimal effect on service provision, including adequacy or availability of facilities and services, and is compatible with existing and planned service provision. I. Strict adherence to the Comprehensive Master Plan would result in a situation neither intended nor in keeping with key elements and policies of the plan. Comm. Mortensen seconded the motion for discussion.

Those opposed:

Janet Rose
Carol Godwin
Ann Price McCarthy – Retired lawyer – She said there is a letter in the record from Richard Keith Corbin where he has violated a number of Supreme Court rules.
Gayle Sherman – presented signed petition
John Hadder – Great Basin Resource Watch
Joe McCarthy
Dan Shoup
Robert Elston on behalf of Dr. Barker
Bonnie Brown
Kathy McIntosh – in favor of jobs but not surface mining
Thomas Cutts
Shawn Griffin – opposed to open pit mining
Patty Marshall
Jack Richmond
Barbara Peck
Chris Brown
Ron James
John Cobbey
Ron Reno
Mark Joseph Phillips
Austin Crouch
Chad Olson
Allison Woodman
Madison Woodman
Margaret Burns
Paulla Comley – against open pit mining

Those in favor:

Tom Cartwright – Mason Valley resident
Mark Turner
Marty Hanna
Lynette Patmor
John Bennetts
John Parrish
John Currie
Serge Marchale
Carl Miller
Rita Wheeler
Pierre Dermey
Joey Moore
Tony Verde
Larry Moore
Charles Kirkness
Paul Eades
Steven Saylor
Frank Pedlar
Randy Harris
Joe McGinley

Scott Jolcover
Josh Hutchison
Mendy Elliott on behalf of Ty Cobb

END PUBLIC COMMENT

Comm. Mortensen read letters from Allison Woodman and David Chapman into the record stating they were opposed to changes.

Comm. Arellano said there have been a considerable number of comments from the Lyon County citizens regarding the Master Plan Amendment. He explained that a Master Plan Amendment is a land use issue. This Master Plan Amendment would affect the entire community. He does hope that Comstock Mining is successful but he could not support the motion.

Comm. Fierro said this has been a difficult decision for him being both pro mining and pro historic preservation. He said the commissioners cannot condition a Master Plan Amendment or a Zone Change. Any continuance needs to come from the applicant. He also commented on the industrial zoning that currently exists in Silver City.

Comm. Keller explained that zoning changes and Master Plan changes happen about every 10 to 20 years in a county. The motion she presented included a compromise.

Comm. Hastings also commented on Master Plan changes in order for a community to have the opportunity to grow.

Comm. Mortensen felt that reducing the density would be beneficial. The commissioners can place conditions at the time of a Special Use Application.

Mr. John Marshall presented some closing arguments against approval of the Master Plan Amendment. He feels a better course of action would be to attempt to work out a solution that is agreeable to both sides.

There were comments from the commissioners.

Mark Rotter from Manhard Consulting explained that Comstock Mining does not have a plan. This step would allow them the opportunity to explore a plan for future needs. The conditions would happen during the Special Use Permit application as previously mentioned by Comm. Fierro.

Comm. Keller said the motion stated earlier in the meeting applies to the 9:30 a.m. public hearing for possible action for the Comstock Mining Incorporated Master Plan Amendment. They have been listening to the Master Plan Amendment and comments about the Zone Change concurrently. The motion is for the Master Plan Amendment Only.

Comm. Mortensen called for the vote. The motion passed 4 – 1. Comm. Arellano voted nay.

Rob Loveberg, Planning Director, explained the commissioners' decision on the Master Plan Amendment is a final action but it needs to be sent back to the planning commission for a report. The commissioners' action on the Zone Change is a final action and does not need to be sent back to planning.

For Possible Action: COMSTOCK MINING, INC – ZONE CHANGE - Request to change the zoning from NR-1 (Non-Rural Residential - 6,000 sq. ft. lot size) and RR-5 (Fifth Rural Residential - 20 acre minimum) to RR-3 (Third Rural Residential-5 acre minimum) on approximately 54.86 acres and RR-5 (Fifth Rural Residential - 20 acre minimum) on approximately 32.34 acres, of a 94.27 total acre parcel; located off of Highway 341, Silver City (a portion of APN 08-091-05 & 08-091-02) PLZ-13-0051

Planning Commission Recommendation: Based on the recommended findings, the Planning Commission passed a motion to recommend denial of the Zone Change request for Comstock Mining, Inc. on APN's 08-091-05 & 08-091-02, by a unanimous vote of those members present: 6 ayes; 0 nay; 1 absent (Paul Lanning).

Comm. Keller moved to approve the Zone Change request from NR-1, Single-Family Non-Rural Residential (6,000 Square foot minimum) to RR-3, Third Rural Residential District (five-acre minimum) on approximately 54.86 acres and to RR-5, Fifth Rural Residential District (20 acre minimum) on approximately 32.34 acres for Comstock Mining, Incorporated as set forth in the revised zoning map amendment application and supporting documents, received by the Planning Department October 11, 2013 (APNs 08-091-02 and 08-091-05) (PLC-13-0051). Excluding, without prejudice, eight of the nine previously approved on October 8, 2013 reversion to acreage application for Silver City town sites APNs 08-091-05 and 08-091-02. Town sites to be excluded are 101, 102, 103, 104, 133, 277, 278 and 279, a total of approximately 13.72 acres at 1.77 acres from the north end of parcel 08-091-05 known as the "Marble Lode". As depicted on the revised map presented this day, January 2, 2014, to be hereby made part of the record. The Lyon County board of Commissioners finds that: A. The applicant has demonstrated that the zone change is in substantial compliance with and promote the Lyon County Comprehensive Master Plan, Countywide Component goals, policies and strategies. B. The applicant has demonstrated that the proposed zoning will promote development that is commensurate with the charter and physical limitations of the land. Comm. Hastings seconded and the motion passed 5 - 0.

****END OF PLANNING APPLICATIONS ****

REGULAR AGENDA

22. For Possible Action: Appoint County Commissioners and staff to the following Boards, Commissions, or Committees for calendar year 2014:

After discussion among to commissioners appointments were made to the following Boards, Commissions or Committees for calendar year 2014 as follows:

A.	Planning Commission (Ex-Officio)	Comm. Keller/Alt-Comm. Hastings
B.	Comstock Historic District	Comm. Fierro
C.	Debt Management Commission	Comm. Mortensen
D.	Mason Valley Conservation District	Comm. Arellano
E.	Smith Valley Conservation District	Comm. Arellano
F.	Dayton Valley Conservation District	Comm. Fierro
G.	Nevada Public Agency Insurance Pool	Comm. Arellano
H.	Nevada Association of Counties	
	1. Board of Directors-	Comm. Hastings
	2. Legislative Committee -	Comm. Keller & Comm. Arellano
	3. Public Lands and Natural Resources Committee	Comm. Keller & Comm. Arellano
I.	Local Emergency Planning Committee	Comm. Hastings
J.	Northern Nevada Development Authority	Comm. Keller
K.	Western Nevada Development District	Comm. Mortensen
L.	Nevada WORKS	Comm Hastings/Alt-Comm Keller
M.	State Land Use Planning Advisory Committee (SLUPAC)	Comm. Arellano
N.	Walker River Irrigation District	Comm. Arellano
O.	Carson Water Subconservancy District	Comm. Fierro
P.	Lyon County Room Tax Board	Comm. Mortensen
Q.	Nevada Commission for the Reconstruction of the V & T Railway	Comm. Hastings
R.	Quarterly Jail Inspection	Comm. Fierro/Alt. Comm. Keller
S.	Truckee Canal Safety Commission	Comm. Mortensen
T.	Lyon County Regional Transportation Commission	Comm. Fierro
U.	LCEA Labor Negotiations Team	Comm. Hastings
V.	LCSEA Labor Negotiations Team	Comm. Mortensen
W.	Quad County Legislative Coalition	Comm. Mortensen & Comm. Fierro
X.	Carson Area Metropolitan Planning Organization	Comm. Fierro/Alt-Mike Workman

23. Commissioner Comments

Comm. Arellano asked about the open meeting violation regarding employee bonuses.

Comm. Fierro read a letter into the record from Bennett Medical Supply stating they will no longer be a part of the St. Mary's Health Plan after January 1, 2014.

Comm. Mortensen thanked everyone for their cooperation and consideration during today's meeting.

24. For Possible Action: Approve Minutes of December 5 & 19, 2013

Comm. Fierro moved to approve the minutes of December 5, 2013 and December 19, 2013 as presented. Comm. Keller seconded and the motion passed unanimously 5 – 0.

25. Public participation

Keith Trout feels the meeting should have been moved to another venue such as the school gym or the school multipurpose room.

26. Adjourn

The meeting was adjourned.

LYON COUNTY BOARD OF COMMISSIONERS

JOE MORTENSEN, Chairman

ATTEST

NIKKI BRYAN, Lyon County Clerk/Treasurer



LYON COUNTY PLANNING DEPARTMENT

27 SOUTH MAIN STREET
YERINGTON, NEVADA 89447
(775) 463-6592 (775) 463-5305 FAX

ROBERT G. LOVEBERG
PLANNING DIRECTOR

December 10, 2013

Corrado DeGasperis
Comstock Mining, Inc.
P.O. Box 1118
Virginia City, NV 89440

Re: **COMSTOCK MINING, INC – MASTER PLAN AMENDMENT** – Request to change the Master Plan from Resource land use designation and Suburban Residential land use designation to Resource land use designation on approximately 32.34 acres and Rural Residential land use designation on approximately 54.86 acres of a 94.27 total acre parcel; located off of Highway 341, Silver City (a portion of APN 08-091-05 & 08-091-02) PLZ-13-0050

Dear Mr. DeGasperis:

The Lyon County Planning Commission, at a duly noticed public hearing held on Tuesday, December 10, 2013, considered the above-referenced application. The Planning Commission passed a motion to deny the Master Plan Amendment request for Comstock Mining, Inc. on APN's 08-091-05 & 08-091-02, based on the following findings:

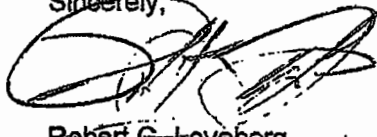
- A. The proposed amendment is not in substantial compliance with, nor promotes the Master Plan goals, objectives and actions in that it is not in keeping with the majority of applicable guiding principles, goals, policies, strategies and community description contained in the 2010 Lyon County Comprehensive Master Plan, County-wide Component.
- B. The proposed amendment would result in land uses which are incompatible with the actual and planned adjacent land uses, and does not reflect a logical change in land use in that the amendment would change the planned character and intensity of residential development and enables the potential development of a land use incompatible with the actual and planned adjacent and predominant residential land uses.
- C. The proposed amendment fails to identify or respond to changed conditions or further studies that have occurred since the Master Plan was adopted by the Board, and the requested amendment does not represent a more desirable utilization of land.
- D. The proposed amendment will adversely affect the implementation of the Master Plan goals, objectives and actions, and will adversely impact the public health, safety or welfare.
- E. The proposed amendment does not promote the desired pattern for the orderly physical growth of the County as set forth for the Silver City community in the 2010 Lyon County Comprehensive Master Plan, County-wide Component.
- F. The existing Comprehensive Master Plan and/or any related element thereof is not in need of the proposed amendment.
- G. The proposed amendment is not compatible with the surrounding area, and the goals and policies of the Comprehensive Master Plan, particularly those related to Silver City.
- H. The proposed amendment will have effects on service provision, including adequacy or availability of facilities and services, and is not compatible with existing and planned service provision.

- I. Deviation from the strict adherence to the Comprehensive Master Plan would result in a situation neither intended nor in keeping with other key elements and policies of the Plan.
- J. The proposed Plan amendment will not promote the public welfare and will be inconsistent with the goals and policies of the Comprehensive Master Plan and the elements thereof, and
- K. The burden of proof has not been met by the applicant in their application to warrant a change in the Master Plan at this time.

This is not the final hearing or action on this application. The Board of County Commissioners will hear these applications on January 2nd, 2014. Their office will notify you of this hearing.

If you have any questions or concerns please feel free to contact this office.

Sincerely,



Robert G. Loveberg,
Planning Director

cc: File

Manhard Consulting, Inc., Attn: Mark Rotter, 9850 Double R Blvd., Suite 101, Reno, NV 89521
Silver City Advisory Council, Attn: Erich Obermayr, P.O. Box 249, Silver City, NV 89428



Bob Hastings <ninergold3@gmail.com>

Fwd: Zoning Issue Quastion

1 message

Bob Hastings <ninergold3@gmail.com>
To: vida keller <vidakeller@gmail.com>

Fri, Oct 25, 2013 at 3:05 PM

Vida -

I finally got a response from Rob regarding Comstock. It is below. Tell me what you think.

Bob

----- Forwarded message -----

From: Rob Loveberg <rloveberg@lyon-county.org>
Date: Fri, Oct 25, 2013 at 12:37 PM
Subject: Re: Zoning Issue Quastion
To: Bob Hastings <ninergold3@gmail.com>
Cc: Jeff Page <jpage@lyon-county.org>, Kerry Page <kpage@lyon-county.org>

Bob,

I have not completed the report so I can't tell you yet what the staff recommendation will be. However I will tell you the same thing I told their consultant when asked a similar question, I intend to write a balanced report with the facts and information available which permits the Planning Commission and Board of Commissioners to make their own determination.

I have a bias regarding Master Plans. I do not believe that a Master Plan should be changed frequently, nor should it be changed without compelling long term justification which reflects the long term community goals and interests.

I would be happy to talk with you regarding the CMI application. Please do not hesitate to call me at 775-302-6051.

On Thu, Oct 24, 2013 at 10:37 AM, Bob Hastings <ninergold3@gmail.com> wrote:
Good Morning Rob -

I tried calling a few times but manage to keep missing you. I'll try an email now. LOL

First, please understand I am only coming to you with this because I was asked to. Also, please don't think I am in any way trying to influence anything. I am simply trying to get info.

I know you are working on the staff report for the Comstock Mining. Comstock contacted me and they are quite "intense". Of course their concern is that the staff report will either recommend denial or be cast in a negative light. I have tried to convince them that you are a guy who writes the reports based on fact - but that does not calm nerves. If you can tell me - do you expect the final report to be negative towards Comstock and/or recommend a denial? I'm not asking for promises and I realize anything can change, based on facts, in the next few weeks.

Thanks for your help.

--

Bob Hastings
Lyon County Commissioner - District 1
www.bobhastingsnv.com

14 CV 00128 - 002925

JA 090

LYON COUNTY

email: ninergold3@gmail.com
775-771-9848

PO Box 686
Dayton, NV 89403

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--

Rob Loveberg
Planning Director/Emergency Management Coordinator
Lyon County
27 South Main Street
Yerington, Nevada 89447
775.463.6592 office
775.302.6051 cell
775.463.5305 fax
rloveberg@lyon-county.org

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--

Bob Hastings
Lyon County Commissioner - District 1
www.bobhastingsnv.com
email: ninergold3@gmail.com
775-771-9848

PO Box 686
Dayton, NV 89403

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14 CV 00128 - 002926

JA 091

LYON COUNTY

Exhibit C

Exhibit C



Bob Hastings <ninergold3@gmail.com>

CMI Zone Change

1 message

Bob Hastings <ninergold3@gmail.com>

Mon, Oct 28, 2013 at 3:53 PM

To: Corrado DeGasperis <DeGasperis@comstockmining.com>

Corrado -

I received a response Rob. First he states that he has not finalized the report but the final version will be balanced and based on facts. He also noted something about generally not liking to make Master Plan changes. But I do not believe that will be anywhere in the report. I also discussed this with Vida. That said I will be discussing this further with Jeff Page. I want to make that Rob understands the concerns we have and Jeff may be the conduit we need.

--

Bob Hastings
Lyon County Commissioner - District 1
www.bobhastingsnv.com
email: ninergold3@gmail.com
775-771-9848

PO Box 686
Dayton, NV 89403

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14 CV 00128 - 002927

JA 093

LYON COUNTY

Exhibit D

Exhibit D



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Board

Lyon County is governed by a five-member board elected from geographic districts on a partisan basis for staggered four-year terms. Each commissioner serves "at-large," which means that they are elected by and represent all citizens in the County. The County Commissioners annually elect a chairperson, who serves as the Commission's presiding officer.

Ex-Officio Board

The Lyon County Board of Commissioners also serves as the "ex-officio" board for:

- Central Lyon Vector Control District
- Mason Valley Mosquito Abatement District
- Silver Springs General Improvement District
- Walker River Weed Control District
- Willowcreek General Improvement District.

Lyon County Commissioners

P.O. Box 686
Dayton, Nevada 89403
Phone: (775) 246-4350

P.O. Box 201
Silver Springs, Nevada 89429
Phone: (775) 691-0173

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Dayton, NV 89403
Phone: (775) 246-0930
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Fernley, NV 89408
Phone: (775) 575-4778
[Email](#)

38 Nadel Lane
Yerington, Nevada 89444
Phone: (775) 463-6531
[Email](#)

Open Meeting Law Manual may be found [here](#)

COMMISSION APPOINTMENTS

Planning Commission - EXOfficio
Comstock Historic District -
Debt Management Commission -
Mason Valley Conservation District -

Commissioner Hastings
Commissioner Fierro
Commissioner Mortensen
Commissioner Arellano

1 Case No. 14-CV-01304

2015 NOV 30 PM 4:01

TAMARA SCHEINWE
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT
DeAnn Peebles
DEPUTY

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

6 COMSTOCK RESIDENTS ASSOCIATION
7 AND JOE McCARTHY

8 Petitioners,

9 v.

10 LYON COUNTY BOARD OF
11 COMMISSIONERS, et al.

12 Respondents,
13 _____

14
15 **DECLARATION OF JOHN L. MARSHALL IN SUPPORT OF**
16 **CRA's REQUEST FOR JUDICIAL NOTICE**

17 I, John L. Marshall, declare:

18 1. I am an attorney licensed to practice in the State of Nevada and until mid-2015 I
19 was counsel of record for Petitioner Comstock Residents Association and Joe McCarthy
20 (hereinafter "CRA") and have personal knowledge of all fact stated herein. I am also counsel of
21 record in the separate action *CRA v. Lyon County Board of Commissioners, Comstock Mining*
22 *Inc.*, Nevada Supreme Court Case No. 68433 (Third District Court Case No. 14-CV-00128).

23 2. On February 11, 2014, I delivered to Lyon County a request under the Nevada
24 Public Records Act ("NPRA") on behalf of CRA. A true and correct copy of that NPRA
25 request is attached as Exhibit A to CRA's Request for Judicial Notice ("RJN").

26 3. On or about May 2, 2014, I received a copy of a May 2, 2014 letter from Lyon
27 County District Attorney's office that described Lyon County's position that the NPRA did not
28


1 apply to records regarding official business conducted by individual County Commissioners on
2 their personal electronic devices that had not also been copied to Lyon County administrative
3 offices. A true and correct copy of that May 2, 2014, Lyon County District Attorney letter is
4 attached as Exhibit B to CRA's RJN.

5 4. On or about March 11, 2014, I received a document production from Lyon County
6 both in response to CRA's February 1, 2014 NPRA request and also to serve as the "Official
7 Record" for the judicial review claims in the litigation denominated *CRA v. Lyon*
8 *County/Comstock Mining Inc*, Nevada Supreme Court Case No. 68433 (Third District Court
9 Case No. 14-CV-00128). Exhibit C to CRA's RJN constitutes true and correct copies of
10 excerpted pages from the March 11, 2014 document production.

12 5. On or about September 9, 2014 I accessed Lyon County's official website
13 (www.lyon-county.org). Exhibit D to CRA's RJN is a true and correct copy of the page for
14 official contact information for individual County Commissioners from Lyon County's official
15 website as of approximately September 9, 2014.

16 I declare under penalty of perjury that the foregoing is true and correct.

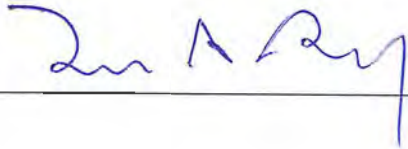
17 DATED: November 30, 2015, at Reno, Nevada.

18
19
20
21
22
23
24
25
26
27
28

John L. Marshall

CERTIFICATE OF SERVICE

Pursuant to NRS 239B.030, the undersigned affirms that the preceding document does not contain the social security number of any person. I hereby certify that the foregoing Declaration of John L. Marshall in Support of CRA's Request for Judicial Notice was served on the parties on the Monday, November 30, 2015.

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

A handwritten signature in blue ink, appearing to read "S. B. Rye", is written over a horizontal line.

Case No. 14-CV-01304

Dept. No. Senior Judge Kosach

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

Sly

FILED
2016 JAN -4 PM 4:05

TANYA SCURINE
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT
Tanya Scurine
DEPUTY

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

COMSTOCK RESIDENTS ASSOCIATION,
JOE McCARTHY,

Petitioners,

vs.

LYON COUNTY BOARD OF
COMMISSIONERS,

Respondents,

**LYON COUNTY BOARD OF COMMISSIONERS RESPONSE TO
OPENING BRIEF**

The Lyon County Board of Commissioners, Respondents herein, file their Response Brief. This matter is before the Court on the Petition for Writ of Mandate filed by the Comstock Residents Association and Joe McCarthy. The action arises out of a public records request made by Petitioners in 2014.

I. Issue Presented

This case presents a very important and undecided question in Nevada: are emails and cellular telephone communications on privately held and privately paid for devices public records? Lyon County submits that the answer to this question is no.

II. Procedural History

On February 11, 2014, John L. Marshall, Attorney at Law, made a public records request to Lyon County. At the time of this request, Mr. Marshall represented the Comstock Residents Association, Gayle Sherman and Joe McCarthy in a Petition for Judicial Review

1 and related actions arising out of the Lyon County Board of Commissioners approval of an
2 application of master plan and zone change amendment filed by Comstock Mining, Inc. in
3 2013. Over the course of several months, the County responded to the public records
4 request.

5 On October 24, 2014, the Petitioners and Gayle Sherman filed a Petition for Writ of
6 Mandate in relation to a public records request made by John L. Marshall, Esq. The
7 Respondents filed an Answer to the Petition on December 5, 2014. On April 25, 2015, Lyon
8 County provided counsel for Petitioners with its NRCP 16.1 Early Case Discovery Exchange,
9 which included documents and a list of persons with knowledge of the case. The parties
10 agreed to a briefing schedule, and Lyon County now files its Response Brief.

11 **III. Statement of Facts**

12 The relevant facts for this case are set forth herein. The County would request an
13 evidentiary hearing in this matter to present some additional information relevant to the case.

14 In 2013, Comstock Mining, Inc. filed an application with the Lyon County Community
15 Development Department to change the master plan and zoning designations for certain
16 property in the Silver City area of Lyon County ("CMI Application"). The application proceeded
17 through the process and was considered by the Lyon County Planning Commission on
18 November 12, 2013 and December 10, 2013, and the CMI Application was ultimately
19 approved by the Lyon County Board of Commissioners at a hearing held January 2, 2014.
20 The Board of County Commissioners approved the Application by a vote of 4-1.
21 Respondents Record (RR), Exhibit 1.

22 After approval of the application, the Comstock Residents Association ("CRA") filed an
23 action on January 31, 2014, in District Court challenging the decision of Lyon County on the
24 Planning Application. That case proceeded to court with the District Court upholding the
25 decision of Lyon County. RR, Exhibit 2. The District Court also denied a request for the
26 Petitioners to Amend the Petition to include a Public Records cause of action. RR, Exhibit 3.
27 The Land Use case is currently on appeal to the Nevada Supreme Court.
28

1 On February 11, 2014, John L. Marshall, Attorney at Law, made a public records
2 request to the Lyon County, Lyon County Commissioners and Lyon County Staff. ("Public
3 Records Request") RR, Exhibit 4. Over the course of the next several months, numerous
4 records and documents were provided by Lyon County. It is critical to understand the
5 parameters and scope of the request in this case. The initial request is as follows:

6 Specifically, I request access to any and all records related to Comstock Mining, Inc.
7 Application for Master Plan Amendment and Zoning Change (PLZ-13-0050, 0051)
8 This request includes, but is not limited to, any and all records of communication
9 between Comstock Mining, Inc., ("CMI") and members of the Lyon County Board of
10 Commissioners and Lyon County Staff, including but not limited to phone recordings,
11 emails, internal documents and communications, notes, and any and all other related
12 documents in the possession of you subject to disclosure under Nevada's public
13 records law. These records also include records of all communications between CMI
14 and you regardless of whether the communications occurred on private or public
15 devices.

16 The initial request covers a period of three (3) years and includes the entire county staff, all
17 departments and all elected or appointed officials. See RR, Exhibit 4. The request also relates
18 specifically to the Application.

19 The County sought further clarification as to the parameters of the request, and on
20 March 21, 2014, Mr. Marshall expanded the request significantly as follows:

21 I do agree that CRA February 11 Request is limited to records concerning CMI's
22 application for the master plan and zone change. Please treat my email of yesterday
23 as expanding that request to all records of communication with Comstock Mining
24 Incorporated from January 1, 2010 to the present.

25 RR, Exhibit 5. The Public Records Request further included phone logs/records, texts, emails
26 or any other form of communication. Contrary to the implication on Petitioner's brief, this
27 request is not only about County Commissioners.

28 The County responded to the request by providing thousands of pages of documents,
cellular phone bills kept or maintained at the County, long distance phone records kept or
maintained by the County, an email from the County explaining the new phone system and
ability to retrieve records. RR, Exhibit 6. Numerous emails received by the County
Commissioners on private email accounts were included in the public records response
provided by the County.

1 Lyon County does not provide or reimburse the County Commissioners for cellular
2 telephones and the County does maintain any of those records. RR, Exhibit 7, Declaration of
3 Jeff Page, Lyon County Manager. Lyon County does not pay for or reimburse County
4 Commissioners for cellular telephones, computers or email accounts. Id. At the time of this
5 request, Lyon County Commissioners paid for their own cellular telephones and home
6 computers and private email accounts. Lyon County does not maintain email records or
7 telephone records for County Commissioners' private telephones and email accounts. The
8 County Commissioners use their cellular telephones and email accounts for private matters in
9 addition to County Business. Id.

10 Commissioner Hastings uses a cellular telephone provided and paid for by his
11 employer. Commissioner Hastings does not receive the bills, is unaware of records retention
12 of those bills and is not familiar with whether multiple phones are billed on the same invoice.
13 RR, Exhibit 8, Declaration of County Commissioner Bob Hastings.

14 The County provides certain staff with cellular telephones and bills for those devices
15 are sent directly to the County, paid by the County and the telephone bills are maintained by
16 the County. Copies of these bills and records were provided to Petitioners pursuant to the
17 Public Records Request. RR, Exhibit 7.

18 The County did not have a policy for gathering or retaining text messages sent or
19 received from either County owned or privately paid for cellular telephones. The County does
20 not maintain in its offices or on its computer servers any emails sent or received from
21 commissioners, employees or officials private cellular or private email accounts. Id.

22 The County had approximately 341 employees at the time the Petition was filed, which
23 includes employees, appointed and elected officials who are paid employees. In addition, the
24 County had approximately 125 appointed officials (including the County Health Officer and
25 Public Administrator) who are unpaid that serve on advisory boards and in similar capacities
26 for Lyon County. Id. At the time of this request, Lyon County did not have a written policy
27 regarding the use of private cellular telephones, computers and email account. Id.
28

1 Although Petitioners focus on the County Commissioners, this Public Records Request
2 is not limited to the County Commissioners and must be reviewed with respect to the specific
3 request directed to all elected officials, employees and staff.

4 **IV. Legal Argument**

5 Lyon County contends in this matter that the records sought from the private emails,
6 telephones, and other private records of County Staff and elected and appointed officials are
7 not public records subject to inspection for the following reasons: (1) they are not "public
8 records" under the NRPA; (2) privacy interests weigh against disclosure; (3) practical
9 limitations preclude this Court from declaring all records public records; (4) the records are
10 confidential under the deliberative process privilege.

11 The Nevada Legislature has declared that the purpose of the Nevada Public Records
12 Act (NPRA) is to further the democratic ideal of an accountably government by ensuring that
13 public records are broadly accessible. NRS 239.001(1). "All public books and public records
14 of a governmental entity, the contents of which are not otherwise declared by law to be
15 confidential, must be open at all times during office hours to inspection by any person, and
16 may be fully copied or an abstract or memorandum may be prepared from those public books
17 and public records." NRS 239.010. The provisions of the NPRA are designed to promote
18 government transparency and accountability. Reno Newspapers, Inc. v. Gibbons, 127 Nev.
19 Adv. Op. 79, 266 P.3d 623 (2011). Open records are the rule and any nondisclosure is the
20 exception. *Id.* at 627 (citing Reno Newspapers, Inc. v. Sheriff, 126 Nev. 211, 234 P.3d 922
21 (2010)).

22 "Governmental entity" for purposes of the NPRA includes county departments and
23 elected and appointed officers of the County. NRS 239.005(5). The parties agree that Lyon
24 County, elected officials, appointed officials and County Commissioners are subject to the
25 provisions of the NPRA. However, that does not answer the question in this case. The issue
26 is whether the information requested are public records and whether the County and the
27 County Commissioners are required to disclose the same.
28

1 **A. Private Cellular Phone Records and Private Email Records are not Public**
2 **Records under the Nevada Public Records Act (NPRA)**

3 **1. Public Records Must be Paid for with Public Money**

4 The NPRA itself does not define “public record” or specify what documents or records
5 are included within its provisions. However, a review of the Nevada Administrative Code,
6 various provisions of the NPRA, Nevada jurisprudence and cases from other jurisdictions
7 helps to answer this question.

8 At the time of this request the Nevada Administrative Code defined “public record” for
9 purposes of records of local governments as follows:

10 “NAC 239.091. “Public record” defined. (NRS 239.125, 378.255) “Public record”
11 means a record of a local government entity that is created, received or kept in the
12 performance of a duty **and paid for with public money.** (emphasis added).

13 RR, Exhibit 9. (This provision existed until it was repealed in October 2014 by Regulation
14 LCB File No. R118-12, effective October 24, 2014). Therefore, at the time of this request the
15 law applicable to the request clearly established that, in order for something to be a public
16 record, it had to be paid for with public money. It is uncontroverted that the cellular phones
17 and private email accounts for the County Commissioners and other county elected officials
18 and employees were not paid for by public money. That is the end of the analysis, and the
19 records sought are not public records subject to the NPRA.

20 The County Commissioners and Lyon County are entitled to rely on the law as it
21 existed. It is reasonable for the County and its elected and appointed officials to believe that
22 communications on private devices would not be deemed public records based on the
23 Nevada Administrative Code. This is particularly true in the case of private information where
24 the elected and appointed officials were under no legal duty to preserve the items as public
25 records. In addition to not paying for the records, the government has not provided, identified
26 or paid for any way to maintain or handle these records. This Court cannot impose a burden
27 on appointed and elected officials when the law does not require it.
28

1 **2. The Records Sought are Not Open To Public Inspection**

2 Other statutes and cases provide further support that the private cellular telephone
3 records and private email accounts of employees and elected officials are not public records.
4 “All public books and records of a governmental entity must be open at all times during office
5 hours to inspection by any person.” NRS 239.010(1). This section explicitly provides that
6 public books and records are those that are open to inspection during office hours. The
7 private records of an individual commissioner or a county employee are never open to
8 inspection by any person. There are not regular office hours or a system to maintain such
9 records such that they can be “open to inspection.” To allow such would open up a
10 Commissioner’s or employee’s home or business to inspection at all times. That is not the
11 purpose or intent of the NPRA. The NPRA clearly contemplates records that are maintained
12 at the government location or on equipment provided or maintained by the government. The
13 Court must interpret the statute in a way that gives meaning to the words of the statute.
14 Southern Nevada Homebuilders Ass’n v. Clark Cty., 121 Nev. 446, 449, 117 P.3d 171, 173
15 (2005)(When interpreting a statute, this court must give its terms their plain meaning,
16 considering its provisions as a whole so as to read them “in a way that would not render
17 words or phrases superfluous or make a provision nugatory”). The Court must also construe
18 the statute in a manner that avoids absurd results. In order for the Court to declare the
19 records on these private devices “public records” it would have to completely disregard the
20 “open to inspection” language in the statute. Or it would lead to the absurd result of having
21 private records and residences and businesses open to inspection by the public. That is not
22 the intent or plain meaning of the statute.

23 **3. The Records are not in the Legal Custody or Control of the Commissioner or**
24 **County**

25 This is further supported by NRS 239.010(4) which states, in part, that “an officer,
26 employee or agent of a governmental entity **who has legal custody or control** of a public
27 record: (a) shall not refuse to provide a copy . . .” In many cases, the county commissioner or
28 employee does not have legal custody or control of the record requested if it is on a private

1 email account or device. A governmental entity's duty to disclose a public record applies only
2 to records within the entity's custody or control. LVMPD v. Blackjack Bonding, 343 P.3d 608,
3 612 (2015). LVMPD v. Blackjack Bonding involved a request by Blackjack for certain inmate
4 telephone records. Las Vegas Metro had a contract with Century Link to provide the inmate
5 telephone services. The contract specifically provided that the requested information could
6 be generated by the inmate telephone system that Century Link provides and could be
7 obtained by LVMPD. Id. at 613.

8 With respect to this request, the facts are quite different than those in Blackjack. None
9 of the County Commissioners, and it is unlikely any of the employees, elected officials or
10 appointed officials maintain private email servers to keep their emails. Each of the accounts
11 at issue in this case is on an internet email service provider. The exact terms of the
12 agreement for each is unknown, however, it is not clear that any of the requested records are
13 in the legal custody of the county commissioners or individual employees. The same is true
14 for cellular phone records. The records are maintained and under the control of the cellular
15 telephone providers for the commissioners and employees. The countless contractual
16 arrangements and people involved, even for a relatively small county such as Lyon, make
17 managing each of these items as public records virtually impossible.

18 The NAC defines "legal custody" as follows:

19 NAC 239.051. "Legal custody" defined. (NRS 239.125, 378.255) "Legal custody"
20 means all rights and responsibilities of access to and maintenance of a record which
21 are vested in an office or department of a local government entity and with the official
or head of the department charged with the care, custody and control of that record.

22 Further, the records of the board of county commissioners are kept by the Clerk, and the
23 Clerk is charged with the rights and responsibilities of access to and maintenance of the
24 records of the County Commission. NRS 244.075. Because the County and County
25 Commissioners do not have legal custody or control of the information, it is not a "public
26 record" for purposes of the NPRA.

1 **4. The Communications are Not Official Actions and Are not Required by Law or**
2 **Ordinance or Made in Connection with the Official business or any agency or**
3 **department**

4 Even if the Court will not consider the NAC definition of “public record” in existence at
5 the time of the public records request, the current version of the NAC also would exclude
6 these requested records from the definition of “public record.” “Record of a local
7 governmental entity” or “record” means information that is created or received pursuant to a
8 law or ordinance, or in connection with the transaction of the official business of any office or
9 department of a local governmental entity. NAC 239.101. “Office or department of a local
10 governmental entity” is defined as an office, department, board, commission, committee,
11 agency or any other subdivision of a local governmental entity where records and made,
12 received or kept.” NAC 239.061. “Nonrecord materials” means any other documentation that
13 does not serve as the record of an official action of a local governmental entity. NAC
14 239.051.

15 Emails to individual commissioners or from individual commissioners or telephone
16 records, or notes, or other writings do not serve as the record of an official action of the
17 Commissioners. As such, the requested records are not public records. The rationale for this
18 seems obvious. Under Petitioners argument, any records created by County Commissioners
19 (or County staff for that matter) that in any way relate to Lyon County would be public records.
20 County Commissioners (and other elected officials) could make no notes, could not
21 communicate with constituents or citizens without those communications being subject to a
22 public records request.

23 **5. Nevada Law does Not Support That The Requested Documents are Public**
24 **Records**

25 Contrary to Petitioners assertion, Lyon County has never asserted that the County,
26 County Commissioners, or county staff are not subject to the NPRA. Nor has the County
27 claimed that the NPRA should be construed narrowly. However, no law supports Petitioners
28

1 broad based assertion that all county commissioner or elected official communications related
2 to the county are public records.

3 In Reno Newspapers, Inc. v. Gibbons, 127 Nev.Adv.Op. 79, 266 P.3d 623 (2011), the
4 Nevada Supreme Court addressed a Petition where Newspaper requested access to 104 of
5 former Governor Gibbons e-mail communications while he was in office which were issued
6 from the state-issued email account (not his private email). The State denied the request for
7 the emails, stating in part that the emails were not public records. The district court
8 determined that of the 104 emails, 24 were personal, 32 were transitory, 42 were transitory or
9 covered by the deliberative process privileged and 6 were not confidential. Id. The Supreme
10 Court never changed this determination. This case is important for a number of reasons –
11 foremost it deals with state issued email accounts, not private accounts. It is also important
12 because it emphasizes that not all emails or communications are public records.

13 In fact, no case in Nevada supports Petitioners' claim that the records sought in this
14 matter – communications from employees and elected officials on private email accounts or
15 devices - are public records. The line of Nevada cases interpreting the NPRA deal with a
16 variety of issues, but they all involve records that are kept as official records of the County or
17 elected or appointed officials at a location and in a manner under the custody and control of
18 the County or elected official. See Donrey of Nevada v. Bradshaw, 106 Nev. 630, 798 P.2d
19 144 (1990)(request for a police investigative report); DR Partners v. Board of County
20 Commissioners, 116 Nev. 616, 6 P.3d 465 (2000)(Las Vegas Review Journal request to
21 compel disclosure of billing statements documenting county officials' use of publicly owned
22 cellular telephones); Reno Newspapers v. Sheriff, 126 Nev. ____, 234 P.3d 922, 923 (2010)(
23 Newspaper sought records related to concealed weapons permits maintained by the Sheriff of
24 Washoe County); LVMPD v. Blackjack Bonding, 343 P.3d 608 (2015)(Blackjack sought
25 records from jail inmate telephone service).

26 The Petitioners ask this Court to go where no Nevada court has gone, declaring all
27 communications by a County Commissioner or County employee related to County business
28 to be public records. The decision of this magnitude should be left to the legislature. This

1 Court should review the cases and language of the NAC and NPRA, and determine that the
2 reasonable interpretation of the NPRA does not include communications on private devices
3 that are not open to inspection or within the custody or control of the County Commissioners.

4 That a County Commissioner or other county official or employee may conceal their
5 communications on public issues by sending them on private devices is a serious concern,
6 however, that is a matter for the legislature to address. This Court should not abridge its
7 judicial role. See City of San Jose v. Superior Court, 225 Cal.App.4th 75 (2014) (withdrawn
8 and review granted by 326 P.3d 976, 173 Cal.Rptr.3d 46 (2014)). This Nevada Supreme
9 Court has not expanded the definition of public records in a manner inconsistent with the plain
10 language of the statute, administrative code and case law. This Court should not either.

11 **B. Privacy Interests Weigh Against Disclosure**

12 Privacy interests also weigh against declaring all communications with a county
13 commissioner about county business public records. The Nevada Open Meeting Law permits
14 private conversations about the county's business by less than a majority of its members.
15 NRS 241.015. Declaring all communications with a County Commissioner regarding county
16 business as public records could have a chilling effect on citizens who wish to exercise their
17 Constitutional rights to instruct their representatives. Furthermore, conversations and
18 communications allowed under the Nevada Open Meeting law but not "public" would now be
19 made public under the NPRA. The NPRA and the Nevada Open Meeting law should be
20 interpreted in a manner consistent with one another. The Court should avoid an interpretation
21 that would render discussions between commissioners which are not public under the OML
22 subject to public disclosure. It is important that County Commissioners be allowed to discuss
23 matters of public interest without threat of disclosure. The official business of the County
24 Commission is recorded and the Clerk keeps records of the acts of the Board.

25 **C. Practical Limitations Preclude this Court from Declaring All Records Public**
26 **Records**

27 This Court should consider the practical limitations for a County such as Lyon County
28 before deciding this case. Lyon County has an IT staff of two. Be it fair to say that the IT

1 Department can nary manage the computer systems used by the County. If Lyon County
2 were required to search the personal electronic accounts of their elected officials and
3 employees (if the County is even able to do so) the burden and cost would be overwhelming.
4 Not to mention the challenges if an employee, elected or appointed official refuses to
5 cooperate with the search of the records. This request is a good example of the scope of a
6 possible request: three (3) full years of records for all elected, appointed officials and
7 employees.

8 **D. The Records Would Be Confidential Pursuant to the Deliberative Process**
9 **Privilege.**

10 The deliberative process privilege protects the deliberative and decisional processes.
11 DR Partners v. Clark County Commissioners, 116 Nev. 616 (2000). To qualify for non-
12 disclosure, the requested documents must be both predecisional and deliberative. Id.
13 (citations omitted). The initial request in this case requests information relating to the
14 Planning Application pending before the County and decided on January 2, 2014. As such,
15 all of the records sought are predecisional. It can be claimed that the records requested in
16 this case, unlike in DR Partners, go far beyond the names of the persons consulted. For that
17 reason, the Court should further deny the request for any of the County Commissioners
18 records under the deliberative process privilege.

19 **V. Conclusion**

20 This case presents a complicated and yet unanswered question under Nevada law: are
21 emails, text messages, and phone records sent on private devices public records in Nevada.
22 The answer to this question has very far reaching implications for Lyon County and other local
23 governments in the State of Nevada. At the time of this request, the Nevada Administrative
24 Code clearly limited "public records" to those records paid for with public money. That is the
25 end of the analysis. However, in further support of the County's position, the NPRA, Nevada
26 cases and the NAC lead to the only reasonable conclusion: that these are not public records
27 as contemplated under the NPRA. In the event the Court deems otherwise, the Court should
28 find that the privacy interests and interests in open government allow the County to withhold

1 disclosure of these communications, to the extent any exist. Lastly, the Court should find that
2 these communications are protected by the deliberative process privilege.

3 Lyon County respectfully requests that this Court to deny the Petition.

4 DATED this 14th day of January, 2016.

5
6 STEPHEN B. RYE
DISTRICT ATTORNEY

7
8
9 By: 

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

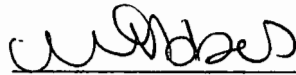
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12 Attorney for Respondents
13 Lyon County Board of Commissioners
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Certificate of Service

The undersigned, an employee of the Lyon County District Attorney, certifies that on the 4th day of January, 2016, a copy of the foregoing was mailed, postage prepaid, by placing the same in the mail receptacle at Lyon County Administrative Offices, addressed to:

Luke Busby, Esq.
Luke Andrew Busby, Ltd.
216 East Liberty Street
Reno, NV 89501

Dated this 4th day of January, 2016.


Employee

1 Case No. 14-CV-01304

2 Dept. No. Senior Judge Kosach

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

[Signature]

2016 JAN -4 PM 4:06

TANIA S. BROWN
COUNTY ADMINISTRATOR
THIRD JUDICIAL DISTRICT

[Signature]

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

9
10 COMSTOCK RESIDENTS ASSOCIATION,
JOE McCARTHY,

11 Petitioners,

12 vs.

13 LYON COUNTY BOARD OF
14 COMMISSIONERS,

15 Respondents,

16 RESPONDENT LYON COUNTY COMMISSIONERS

17 EXHIBITS 1-9

Table of Contents

1. Exhibit 1 – Board of County Commissioner Decision Regarding Master Plan Amendment and Zone Change Amendment
2. Exhibit 2 – District Court Order Denying Petition for Judicial Review
3. Exhibit 3 – Order Denying Plaintiff's Motion to Amend
4. Exhibit 4 – Public Records Request dated February 11, 2014
5. Exhibit 5 – Emails Expanding Public Records Request
6. Exhibit 6 – Letters and Emails Related to the Public Records Request and Redaction Log
7. Exhibit 7 – Declaration of Jeff Page
8. Exhibit 8 – Declaration of Bob Hastings
9. Exhibit 9 – NAC 239.091

Certificate of Service

The undersigned, an employee of the Lyon County District Attorney, certifies that on the 4th day of January, 2016, a copy of the foregoing was mailed, postage prepaid, by placing the same in the mail receptacle at Lyon County Administrative Offices, addressed to:

Luke Busby, Esq.
Luke Andrew Busby, Ltd.
216 East Liberty Street
Reno, NV 89501

Dated this 4th day of January, 2016.



Employee

RESPONDENT LYON COUNTY
COMMISSIONERS
EXHIBIT 1



BOARD OF COUNTY COMMISSIONERS

LYON COUNTY NEVADA

27 South Main Street
Yerington, Nevada 89447
Phone: (775)463-6531 Fax: (775)463-5305

Virgil Arellano
Ray Fierro
Bob Hastings
Vida Keller
Joe Mortensen

Jeff Page, County Manager

January 7, 2014

Corrado DeGasperis
Comstock Mining, Inc.
P.O. Box 1118
Virginia City, NV 89440

Re: Notice of Final Action

Dear Applicants:

At their regularly scheduled meeting of January 2, 2014, the Lyon County Board of Commissioners considered the following planning application:

COMSTOCK MINING, INC – MASTER PLAN AMENDMENT – Request to change the Master Plan from Resource land use designation and Suburban Residential land use designation to Resource land use designation on approximately 32.34 acres and Rural Residential land use designation on approximately 54.86 acres of a 94.27 total acre parcel; located off of Highway 341, Silver City (a portion of APN 08-091-05 & 08-091-02) PLZ-13-0050

The Board of Commissioners by majority approved your Master Plan Amendment with the following motion and vote:

Comm. Keller made a motion to approve the Master Plan Amendments from Resource to Rural Residential on approximately 12.29 acres and from Suburban Residential to Rural Residential on approximately 42.57 acres for Comstock Mining, Incorporated as set forth in the written and graphic information contained in the revised Master Plan Amendment application and supporting documents received by Lyon County Planning Department on October 18, 2013 (APNs 08-091-02 and 08-091-05)(PLZ-13-0050). Excluding, without prejudice, eight of the nine previously approved on October 8, 2013 reversion to acreage application for Silver City town sites APN 08-091-05 and 08-091-02. Town sites to be excluded are 101, 102, 103, 104, 133, 277, 278 and 279, a total of approximately 13.72 acres and 1.77 acres from the north end of parcel 08-091-05 known as the "Marble Lode". As depicted on the revised map presented this day January 2, 2014. To hereby be made part of the record and to include findings A through I as follows:

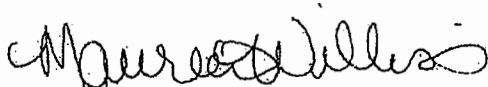
A. The applicant has demonstrated that the amendment is an substantial

compliance with and promotes the Master Plan goals, objectives and actions in that it is in keeping with applicable guiding principle, goals, policies, strategies.

- B. The proposed amendment is compatible with the actual and planned adjacent land uses, and reflects a logical change in land uses in that the amendment would decrease the intensity of residential development.
- C. The proposed amendment has demonstrated and responds to changed conditions of further studies that have occurred since the Master Plan was adopted by the Board, and the requested amendment represents a more desirable utilization of land.
- D. The proposed amendment will not adversely affect the implementation of the Master Plan goals, objectives and actions and will not adversely impact the public health, safety or welfare.
- E. The proposed amendment will promote the desired pattern for the orderly physical growth of the County, maintains relatively compact development patterns, and guides development of the County based on the least amount of natural resources impairment and the efficient expenditure of funds for public services.
- F. The proposed amendment is compatible with the surrounding area, and the goals and policies of the Comprehensive Master Plan.
- G. The proposed amendment will have no major negative impacts on transportation services, and facilities.
- H. The proposed amendment will have minimal effect on service provision, including adequacy or availability of facilities and services, and is compatible with existing and planned service provision.
- I. Strict adherence to the Comprehensive Master Plan would result in a situation neither intended nor in keeping with other key elements and policies of the Planning Commission. Joe Mortensen seconded and the motion passed 4 – 1. Comm. Arellano voted nay.

If you have any questions or concerns, please call me at 463-6531.

Sincerely,



Maureen Williss
Office Manager
Lyon County Commissioners/
County Manager's Office

C: Manhard Consulting, Inc., Attn: Mark Rotter, 9850 Double R Blvd., Suite 101, Reno, NV 89521
Silver City Advisory Council, Attn: Erich Obermayr, P.O. Box 249, Silver City, NV 89428



BOARD OF COUNTY COMMISSIONERS
LYON COUNTY NEVADA

27 South Main Street
Yerington, Nevada 89447
Phone: (775)463-6531 Fax: (775)463-5305

Virgil Arellano
Ray Fierro
Bob Hastings
Vida Keller
Joe Mortensen

Jeff Page, County Manager

January 7, 2014

Corrado DeGasperis
Comstock Mining, Inc.
P.O. Box 1118
Virginia City, NV 89440

Re: Notice of Final Action

Dear Applicant:

At their regularly scheduled meeting of January 2, 2014, the Lyon County Board of Commissioners considered the following planning application:

COMSTOCK MINING, INC – ZONE CHANGE (for possible action) - Request to change the zoning from NR-1 (Non-Rural Residential - 6,000 sq. ft. lot size) and RR-5 (Fifth Rural Residential - 20 acre minimum) to RR-3 (Third Rural Residential-5 acre minimum) on approximately 54.86 acres and RR-5 (Fifth Rural Residential - 20 acre minimum) on approximately 32.34 acres, of a 94.27 total acre parcel; located off of Highway 341, Silver City (a portion of APN 08-091-05 & 08-091-02) PLZ-13-0051

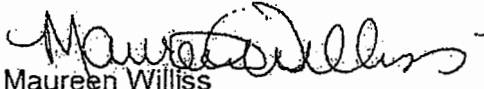
The Board of Commissioners unanimously approved your zone change application with the following motion and vote:

Comm. Keller moved to approve the Zone Change request from NR-1, Single-Family Non-Rural Residential (6,000 Square foot minimum) to RR-3, Third Rural Residential District (five-acre minimum) on approximately 54.86 acres and the RR-5, Fifth Rural Residential District (20 acre minimum) on approximately 32.34 acres for Comstock Mining, Incorporated as set forth in the revised zoning map amendment application and supporting documents, received by the Planning Department October 11, 2013 (APNs 08-091-02 and 08-091-05) (PLC-13-0051). Excluding eight of the nine previously approved on October 8, 2013 reversion to acreage application for Silver City town sites APNs 08-091-05 and 08-091-02. Town sites to be excluded, without prejudice, are 101, 102, 103, 104, 133, 277, 278 and 279, a total of approximately 13.72 acres at 1.77 acres from the north end of

parcel 08-091-05 known as the "Marble Lode". As depicted on the revised map presented this day, January 2, 2014, to be hereby made part of the record. Comm. Hastings seconded and the motion passed 5 - 0.

If you have any questions or concerns, please call me at 463-6531.

Sincerely,



Maureen Willis
Office Manager
Lyon County Commissioners/
County Manager's Office

C: Manhard Consulting, Inc., Attn: Mark Rotter, 9850 Double R Blvd., Suite 101, Reno, NV 89521
Silver City Advisory Council, Attn: Erich Obermayr, P.O. Box 249, Silver City, NV 89428

RESPONDENT LYON COUNTY
COMMISSIONERS
EXHIBIT 2

1 Case No. 14-CV-00128

2 Dept. No. II

FILED

2015 JUN -5 PM 1:51

TANYA SCEIRINE
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

Tanya Sceirine DEPUTY

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

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

10 Plaintiffs/Petitioners,

11 vs.

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

14 Defendants/Respondents,

15
16 ORDER DENYING PETITION FOR JUDICIAL REVIEW

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

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

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

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

11 **Findings of Fact:**

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

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

16 **Conclusions of Law:**

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

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

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

20 Based on the foregoing, and good cause appearing,

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

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

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

26 
27 _____
28 DISTRICT JUDGE

RESPONDENT LYON COUNTY
COMMISSIONERS
EXHIBIT 3

Case No. 14-CV-00128

Dept. No. II

2014 DEC -3 PM 12: 25

TANIA SORRENTI
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT
DeAnn Peoples
DEPUTY

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

COMSTOCK RESIDENTS ASSOCIATION,
GAYLE SHERMAN, JOE McCARTHY,

Plaintiffs/Petitioners,

vs.

LYON COUNTY BOARD OF
COMMISSIONERS; COMSTOCK MINING
INCORPORATED,

Defendants/Respondents,

ORDER DENYING PLAINTIFFS MOTION TO AMEND

Comstock Residents Association ("CRA"), Plaintiff/Petitioner herein, filed a Motion to Amend the Complaint on July 3, 2014. CRA sought permission to file an amended complaint to include Public Records Request Action against Lyon County, Defendant/Respondent. Lyon County filed an Opposition to the Motion on July 28, 2014. Defendant Respondent, Comstock Mining, Inc. ("CMI") filed an opposition on July 25, 2014. CRA filed its reply on August 5, 2014.

This matter came before this Court for hearing on September 10, 2014. James R. Cavillia, Esq., and Justin Townsend, Esq., Allison, MacKenzie, Pavlakis, Wright and Fagan, Ltd., appeared representing CMI. John Marshall, Esq. appeared representing CRA. Stephen B. Rye, Lyon County Chief Deputy District Attorney, appeared representing Lyon County. The Court reviewed the pleadings and all documents on file, the applicable law,

1 and considered the arguments of the parties. Good cause appearing, the Court makes the
2 following findings and Order.

3 **Findings of Fact:**

- 4 1. CRA seeks to amend the Complaint/Petition to include a cause of action against
5 Lyon County under Chapter 239 of the Nevada Revised Statutes, the Nevada
6 Public Records Act.
- 7 2. Essentially CRA alleges that Lyon County failed to comply with a public records
8 request for written electronic transmission and telephone records.
- 9 3. The parties agree that Lyon County did provide some records from private
10 computers and cellular phones pursuant to the CRA public records request.
- 11 4. Lyon County did not provide all private cellular phone and private computer
12 records that CRA seeks.
- 13 5. Some of the evidence that may be garnered by a release of government records
14 may be relevant to the some of the issues in the original complaint.
- 15 6. CMI is not a party to the public records request cause of action and would be
16 burdened by the delay and litigation related to this cause of action.

17 **Conclusions of Law:**

- 18 1. A motion to amend is addressed to the sound discretion of the trial court. NRCP
19 15; Stephens v. S. Nevada Music Co., Inc., 89 Nev. 104, 105, 507 P.2d 1338, 139
20 (1973)(Citations omitted).
- 21 2. The public records request and any subsequent litigation is a cause of action
22 which can proceed on its own merits.
- 23 3. The Amendment, if allowed, would essentially add another step to the quick and
24 speedy determination of the land use issues in this case.
- 25 4. The land use issues can be decided separately from the public records action.
- 26 5. Allowing this amendment will cause undue delay to CMI and will be burdensome
27 and prejudicial to CMI.

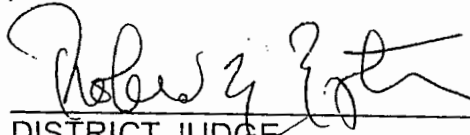
1 6. The land use claims need to move forward to a final resolution for the county,
2 petitioner, CMI, and the citizens of Lyon County, and this amendment would
3 further delay that resolution. See Kantor v. Kantor, 116 Nev. 886, 891, 8 P.3d
4 825, 828 (2000).

5 Based on the foregoing, and good cause appearing,

6 IT IS HEREBY ORDERED that the Motion to Amend is Denied.

7 IT IS FURTHER ORDERED that CRA is not precluded from filing a separate action
8 or pursuing the public records request separately.

9 Dated this 2nd day of ^{December}~~November~~, 2014.

10 : 
11 DISTRICT JUDGE

RESPONDENT LYON COUNTY
COMMISSIONERS
EXHIBIT 4

John L. Marshall

ATTORNEY AT LAW

570 Marsh Avenue
RENO, NV 89509

Telephone:
(775) 303-4882

johnmarshall@charter.net

February 11, 2014

Via Electronic Mail

Lyon County Board of County Commissioners
and Lyon County Staff
Jeff Page, Lyon County Manager
27 South Main Street
Yerington, Nevada 89447

Re: Public Records Request, Comstock Mining Inc. Application for Master Plan
Amendment and Zoning Change (PLZ-13-0050, 0051)

To Whom It May Concern:

I do hereby make a public records request pursuant to Nevada Revised Statutes
Chapter 239 on Lyon County Board of County Commissioners and Lyon County Staff.

Specifically, I request access to any and all records related to Comstock Mining Inc.
Application for Master Plan Amendment and Zoning Change (PLZ-13-0050, 0051). This
request includes, but is not limited to, any and all records of communications between
Comstock Mining Inc., ("CMI") and members of the Lyon County Board of County
Commission and Lyon County Staff, including but not limited to phone recordings, emails,
internal documents and communications, notes, and any and all other related documents
in the possession of you subject to disclosure under Nevada's public records law. These
records also include records of all records of communications between CMI and you
regardless of whether the communication occurred on private or public devices.


If you need further clarification on the request, please let me know. Please let me
know if there are any required fees for the reproduction of the documents requested and I
will provide payment in advance as required. Also, please let me know in advance of any
search or copying if the fees will exceed \$100.

Lyon County Commissions and Staff
February 11, 2014
Page 2

If you would prefer to respond electronically, please feel free to email the response to the email address contained above.

Thank you for your assistance in this matter.

Sincerely,



John L. Marshall
Attorney for Comstock Residents Association

cc: Steve Rye, Lyon County District Attorney Office

RESPONDENT LYON COUNTY
COMMISSIONERS
EXHIBIT 5



Steve Rye <srye@lyon-county.org>

CRA's Public Records Request

3 messages

John Marshall <johnmarshall@charter.net>

Thu, Mar 20, 2014 at 5:06 PM

To: srye@lyon-county.org

Steve,

As we discussed on the telephone yesterday, I am in receipt of Lyon response to the Comstock Residents Association's February 11, 2014 Public Records request. In that request, CRA sought records of all communications, regardless of form, concerning Comstock Mining Incorporated. Lyon County's March 11, 2014 response includes emails but other forms of communications, including texts and any telephone messages or records of telephone calls made between Story County Commissioners and CMI representatives or among themselves or with staff. Please provide these communications as soon as possible. In addition, during our call you informed me that Lyon County had simply requested Commissioners provide it with emails. Apparently no independent search of devices or servers was undertaken. CRA is concerned particularly with the Ms. Vida Keller's response. Ms. Keller failed to produce emails CRA representatives sent to her or any email that she sent. Since we know Ms. Keller's response was inadequate, we urge Lyon County to carefully search its files, physical and electronic as well as those of its Commissioners and provide a full response as soon as possible. Please contact me if you have any questions.

John

John L. Marshall
570 Marsh Ave
Reno, NV 89509
775.303.4882

Steve Rye <srye@lyon-county.org>

Fri, Mar 21, 2014 at 8:16 AM

To: John Marshall <johnmarshall@charter.net>

John,

You did not request telephone records, and as such, those were not included. Now that you have expanded to include the telephone records, I will contact the various departments and get back to you with the cost for that request and Lyon County's response. Also, your records request is limited to all records related to Comstock Mining Inc. Application for Master Plan Amendment and Zoning Change. Your email states something quite different. The County is responding to your records request dated February 11, 2014.

Steve

Steve Rye
Lyon County District Attorney's Office
775-463-6511

This email is intended only for the use of the individual or entity to which it is addressed, and may contain information that is privileged, confidential and exempt from disclosure under applicable law. If you are not the intended recipient, any dissemination, distribution or copying of this communication is strictly prohibited.

If you have received this communication in error, please notify us immediately by telephone and email and delete all copies of this message. Thank you.

[Quoted text hidden]

John Marshall <johnmarshall@charter.net>

Fri, Mar 21, 2014 at 9:26 AM

To: Steve Rye <srye@lyon-county.org>

JA 134

Steve,

I disagree that CRA limited its request to certain types of communication records. CRA requested "any and all records of communications between Comstock Mining Inc., ("CMI") and members of the Lyon County Board of County Commission and Lyon County Staff, including but not limited to phone recordings, emails, internal documents and communications, notes, and any and all other related documents." (February 11, 2014, Request at 1). "Records of communications" clearly includes phone logs/records, texts, emails or any other form of communication.

I do agree that CRA February 11 Request is limited to records concerning CMI's application for the master plan and zone change. Please treat my email of yesterday as expanding that request to all records of communication with Comstock Mining Incorporated from January 1, 2010 to the present.

Thank you.

John

From: Steve Rye <srye@lyon-county.org>
Date: Friday, March 21, 2014 8:16 AM
To: John Marshall <johnmarshall@charter.net>
Subject: Re: CRA's Public Records Request

[Quoted text hidden]

RESPONDENT LYON COUNTY
COMMISSIONERS
EXHIBIT 6

ROBERT L. AUER
District Attorney



<http://www.lyon-county.org>

STEPHEN B. RYE
Assistant District Attorney

OFFICE OF THE DISTRICT ATTORNEY
LYON COUNTY

801 OVERLAND LOOP, SUITE 308
DAYTON, NEVADA 89403
Phone: (775) 246-6130
Fax: (775) 246-6132

31 SOUTH MAIN STREET
YERINGTON, NEVADA 89447
Phone: (775) 463-6511
Fax: (775) 463-6516

565 EAST MAIN STREET
FERNLEY, NEVADA 89408
Phone: (775) 575-3353
Fax: (775) 575-3358

March 11, 2014

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

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

RE: CRA Records Request and Petition/Complaint

Dear Mr. Marshall and Mr. Cavilia:

The following items are enclosed:

1. Planning Commission Hearing Audio – November 10, 2013
2. Planning Commission Hearing Audio – December 10, 2013
3. County Commission Hearing Audio – January 2, 2014
4. CD with Documents
5. Document Index

We will supplement the request as necessary.

I would like to discuss agreement on the record for purposes of the petition/complaint.
Please contact me after you have reviewed the information provided.

Thank you for your cooperation in this matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Steve", is written over a horizontal line.

Stephen B. Rye, Esq.
Chief Deputy District Attorney



Steve Rye <srye@lyon-county.org>

Telephone Records

Josh Foli <jfoli@lyon-county.org>
To: **Steve Rye** <srye@lyon-county.org>

Mon, Mar 31, 2014 at 9:56 AM

Steve,

I went in to run the reports. When Pacific States Communications set up our server, they set it up so that it retains history for the most recent 36 days only. So, I could go to the phone company and see if they can retrieve the information...but there may be a cost for that.

The County does not pay for any Commissioner cell phones, bills, or any costs related thereto. So we also don't get copies of those phone records.

The County does pay for Jeff's cell phone and we do get bills with detail of the calls.

Let me know how you want me to proceed. If you want me to go to the phone company, then please have them give us a specific date range for the calls.

Thanks!

Josh Foli, CPA
Lyon County Comptroller
(775) 463-6510
[Quoted text hidden]



Steve Rye <srye@lyon-county.org>

Records4 messages

Steve Rye <srye@lyon-county.org>
To: Josh Foli <jfoli@lyon-county.org>

Wed, Apr 9, 2014 at 1:19 PM

Josh,

Any timeline on the phone info and copies of cell phone bills for Jeff? Thanks.

Steve Rye
Lyon County District Attorney's Office
775-463-6511

This email is intended only for the use of the individual or entity to which it is addressed, and may contain information that is privileged, confidential and exempt from disclosure under applicable law. If you are not the intended recipient, any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone and email and delete all copies of this message. Thank you.

Josh Foli <jfoli@lyon-county.org>
To: Steve Rye <srye@lyon-county.org>

Wed, Apr 9, 2014 at 1:22 PM

Steve,

I think I sent you the phone records I have for the last month internally.

I was waiting on the cell phone copies as I thought you were going to provide them with an estimated cost and see if they wanted to: come in and look, narrow their timeframe, or pay the entire cost.

Let me know.

Thanks.

Josh Foli, CPA
Lyon County Comptroller
(775) 463-6510
[Quoted text hidden]

Steve Rye <srye@lyon-county.org>
To: Josh Foli <jfoli@lyon-county.org>

Wed, Apr 9, 2014 at 2:19 PM

I maybe misunderstood. I thought we estimated about \$100 for copies. In that case, I thought we should go ahead and make the copies.

Steve

Steve Rye
Lyon County District Attorney's Office
775-463-6511

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JA 139

4/25/2014

Lyon-county.org Mail - Records

from disclosure under applicable law. If you are not the intended recipient, any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone and email and delete all copies of this message. Thank you.

[Quoted text hidden]

Josh Foli <jfoli@lyon-county.org>
To: Steve Rye <srye@lyon-county.org>

Wed, Apr 9, 2014 at 2:25 PM

Ok, we will put together the records we have and get them to you. Thanks.

[Quoted text hidden]



Steve Rye <srye@lyon-county.org>

Fwd: Phone Record Request

1 message

Josh Foli <jfoli@lyon-county.org>

Thu, Apr 24, 2014 at 8:54 AM

To: Steve Rye <srye@lyon-county.org>

Long distance records show no calls to Comstock Mining for the Commissioner's Office from January 1, 2010 through the date that we went to the new phone system (about a year ago).

Thanks.

Josh Foli, CPA
Lyon County Comptroller
(775) 463-6510

----- Forwarded message -----

From: **Mark Petersen** <mpetersen@lyon-county.org>

Date: Thu, Apr 24, 2014 at 8:50 AM

Subject: Re: Phone Record Request

To: Josh Foli <jfoli@lyon-county.org>

Josh,

Mark,

Yes, they pulled the archived records and searched all the way back. There were minimal calls to review. Cherri

On Wed, Apr 23, 2014 at 5:25 PM, Josh Foli <jfoli@lyon-county.org> wrote:

Mark,

I wonder if they really looked at the year...It is from 2010 forward. There should be calls as we didn't put in our new phone system until about a year ago.

Thanks!

Josh Foli, CPA
Lyon County Comptroller
(775) 463-6510

On Wed, Apr 23, 2014 at 5:02 PM, Mark Petersen <mpetersen@lyon-county.org> wrote:

Josh,

This is the information that I received back from AT&T. Is this what you expected or did you expect to see a list of calls?

Thanks,

JA 141

Mark

----- Forwarded message -----

From: HEINZE, CHERRI L <ch1861@att.com>

Date: Wed, Apr 23, 2014 at 12:57 PM

Subject: RE: Phone Record Request

To: Mark Petersen <mpetersen@lyon-county.org>

Cc: "ABOU-BECHARA, MICHELLE A" <mh1957@att.com>

Mark,

Good afternoon and happy Wednesday.

There were no calls found on the following request:

Would you please check with AT&T OneNet to see how much it would cost to retrieve the phone history from January 1, 2010 through the date of their last record from 463-6531 and 463-6532 to (775) 847-5272?

Please let me know if you need anything further.

Cherri

From: Mark Petersen [mailto:mpetersen@lyon-county.org]

Sent: Wednesday, April 02, 2014 8:46 AM

To: ABOU-BECHARA, MICHELLE A; HEINZE, CHERRI L

Subject: Fwd: Phone Record Request

Michelle or Cherri,

Could you please let me know if the below is possible and if yes, how much would it be to obtain this information?

Thanks,

Mark

JA 142

----- Forwarded message -----

From: **Josh Foli** <jfoli@lyon-county.org>
Date: Tue, Apr 1, 2014 at 3:18 PM
Subject: Phone Record Request
To: Mark Petersen <mpetersen@lyon-county.org>

Mark,

Would you please check with AT&T OneNet to see how much it would cost to retrieve the phone history from January 1, 2010 through the date of their last record from 463-6531 and 463-6532 to (775) 847-5272?

We have a public record request for this information, so we want to know if it is possible and how much. Please don't proceed with incurring any costs for this.

Thanks!

Josh Foli, CPA
Lyon County Comptroller
(775) 463-6510

--

Mark B. Petersen
Lyon County - IT/Telecoms Technician
North County Area Support
Tel: (775) 246-6145 or
Cell: (775) 720-5094
Email: mpetersen@lyon-county.org

--

Mark B. Petersen
Lyon County - IT/Telecoms Technician
North County Area Support
Tel: (775) 246-6145 or
Cell: (775) 720-5094
Email: mpetersen@lyon-county.org

4/24/2014

Lyon-county.org Mail - Fwd: Phone Record Request

Mark B. Petersen
Lyon County - IT/Telecoms Technician
North County Area Support
Tel: (775) 246-6145 or
Cell: (775) 720-5094
Email: mpetersen@lyon-county.org

ROBERT L. AUER
District Attorney



<http://www.lyon-county.org>

STEPHEN B. RYE
Assistant District Attorney

OFFICE OF THE DISTRICT ATTORNEY
LYON COUNTY

801 OVERLAND LOOP, SUITE 308
DAYTON, NEVADA 89403
Phone: (775) 246-6130
Fax: (775) 246-6132

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YERINGTON, NEVADA 89447
Phone: (775) 463-6511
Fax: (775) 463-6516

565 EAST MAIN STREET
FERNLEY, NEVADA 89408
Phone: (775) 575-3353
Fax: (775) 575-3358

April 25, 2014

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

RE: CRA Records Request

Dear John:

The following items are enclosed:

1. County cellular phone bills for 2010 to present (per modified request)
2. Phone system Records as available for the County Manager and Commissioner's Office
3. Email from County Comptroller dated April 24, 2014, stating that long distance records for Commissioner's office show no long distance calls from January 1, 2010 through the date of the new phone system
4. Email explaining the new phone system and ability to retrieve records

This information is provided in the format in which it is kept. Lyon County does not provide cellular phones for the County Commissioners, and as such, Lyon County does not maintain any of those records and they are not public records pursuant to NRS Chapter 239.

With respect to emails, I have provided what the County Commissioners have indicated they received. If you have specific requests, or believe that information has not been provided with respect to emails, please let me know, and I will follow-up. If you want additional research on telephone records, let me know and I will get back to you.

The invoice for this information will be sent separately.

Sincerely,

A handwritten signature in black ink, appearing to read "Steve", is written over a horizontal line.

Stephen B. Rye, Esq.
Chief Deputy District Attorney

Encl

✓Cc: Josh Foli, Comptroller



Steve Rye <srye@lyon-county.org>

CRA's Public Record Requests

1 message

John Marshall <johnladuemarshall@gmail.com>

Tue, Apr 29, 2014 at 3:52 PM

To: Steve Rye <srye@lyon-county.org>

Steve,

I am in receipt of your April 25, 2014 letter regarding Lyon County's response to CRA Public Records Request. I would to confirm that all applicable records have been produced and that no records have been withheld as confidential. If responsive public records have been withheld, please provide me with a privilege log identity of each document, its nature and the basis for any claim of confidentiality. See *Reno Newspapers, Inc. v. Gibbons*, 266 P.3d 623 (2011).

I would also like to confirm your response provided to me over the telephone regarding public records associated with private computers and cellular telephones employed by Lyon County officials in the course of their public duties. You indicated to me that Lyon County does not provide County Commissioners with computers or cellular telephones for their use. Lyon County therefore contends that any relevant record contained on the Commissioners' private computers or telephones, which would be a "public record" if the devices were supplied by the County, is not in the possession of the County and is not subject to Nevada's Public Records Act. Please note that CRA's Public Records Request was address to the Lyon County Commissioners — not just the County itself.

Thank you for your prompt response.

John



Steve Rye <srye@lyon-county.org>

Question regarding CRA's PRA request5 messages

John Marshall <jmarshall@trpa.org>
To: Steve Rye <srye@lyon-county.org>

Thu, May 1, 2014 at 9:01 AM

Steve,
Does the County provide Commissioners with a phone allowance or otherwise subsidize the use of privately owned communication devices?
John

Steve Rye <srye@lyon-county.org>
To: Josh Foli <jfoli@lyon-county.org>

Thu, May 1, 2014 at 9:04 AM

Josh,

Do you know the answer to this question?

Steve Rye
Lyon County District Attorney's Office
775-463-6511

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[Quoted text hidden]

Josh Foli <jfoli@lyon-county.org>
To: Steve Rye <srye@lyon-county.org>

Thu, May 1, 2014 at 9:06 AM

Steve,

We do not provide a phone allowance or any type of a subsidy for privately owned communication devices.

Josh Foli, CPA
Lyon County Comptroller
(775) 463-6510
[Quoted text hidden]

Steve Rye <srye@lyon-county.org>
To: Josh Foli <jfoli@lyon-county.org>

Thu, May 1, 2014 at 9:10 AM

Can you also verify whether the County provides cellular phones or pays phone bills for the Commissioners.
Thanks.

Steve Rye
Lyon County District Attorney's Office
775-463-6511

JA 147

5/1/2014

Lyon-county.org Mail - Question regarding CRA's PRA request

This email is intended only for the use of the individual or entity to which it is addressed, and may contain information that is privileged, confidential and exempt from disclosure under applicable law. If you are not the intended recipient, any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone and email and delete all copies of this message. Thank you.

[Quoted text hidden]

Josh Foli <jfoli@lyon-county.org>
To: Steve Rye <srye@lyon-county.org>

Thu, May 1, 2014 at 9:11 AM

We do not.

Josh Foli, CPA

[Quoted text hidden]

JA 148



Steve Rye <srye@lyon-county.org>

Re: Question Regarding Cell Phone use

1 message

Josh Foli <jfoli@lyon-county.org>
To: Gayle Sherman <gales@gbis.com>
Cc: Steve Rye <srye@lyon-county.org>

Thu, May 1, 2014 at 12:02 PM

Gayle,

Lyon County employees and/or elected officials receive NO compensation for use of of private cell phones or computers.

Take care,

Josh Foli, CPA
Lyon County Comptroller
(775) 463-6510

On Thu, May 1, 2014 at 10:53 AM, Gayle Sherman <gales@gbis.com> wrote:

Hello Mr. Foli,

Could you please tell me if county employees and/or elected officials receive any compensation (stipend, allowance, etc.) for use of their private cell phones or computers? If so what is the compensation or stipend arrangement?

Thanks

Gayle Sherman
Silver City, Nevada.

ROBERT L. AUER
District Attorney



<http://www.lyon-county.org>

STEPHEN B. RYE
Assistant District Attorney

**OFFICE OF THE DISTRICT ATTORNEY
LYON COUNTY**

801 OVERLAND LOOP, SUITE 308
DAYTON, NEVADA 89403
Phone: (775) 246-6130
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Fax: (775) 463-6516

565 EAST MAIN STREET
FERNLEY, NEVADA 89408
Phone: (775) 575-3353
Fax: (775) 575-3358

May 2, 2014

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

Via electronic mail only:
johnladuemarshall@gmail.com

RE: CRA Records Request – Emails dated April 25, 2014 and May 1, 2014

Dear John:

I am in receipt of your email dated April 25, 2014. Lyon County does not maintain any records related to private telephones or private computers for county staff or elected officials, including County Commissioners. As such, those are not public records maintained and open to inspection pursuant to the Nevada Public Records Law. The cellular phone bills for the County Manager (and other employees) have been provided in the format in which they are maintained by the County.

Lyon County has provided copies of emails provided by County Commissioners pursuant to your records request, whether on private email accounts or on county email accounts. However, that production of emails was not meant to imply or suggest that all of those documents are public records, or that a request entitles a person to all the records on a person's private computer. You have indicated you do not believe you have received all of the emails. If you provide me more information on what specifically you are referring to, I can contact each of the Commissioners with that information. I will provide the requested privilege log under separate cover.

I also have an email response from Josh Foli, Lyon County Comptroller, to your email dated May 1, 2014, regarding phone allowance for county officials/employees. Also enclosed is an email dated the same date from your client, Gayle Sherman, addressed to Josh Foli asking the same question, along with his response to Ms. Sherman. County staff would appreciate if you can coordinate your efforts so that staff is not required to answer the same questions if in fact you are seeking the same information. If your client wants to work directly with Mr. Foli or the County Manager with regards to the public records request, please let me know.

Sincerely,

A handwritten signature in black ink, appearing to read "S. Rye".

Stephen B. Rye, Esq.
Chief Deputy District Attorney

Encl

cc: Josh Foli, Comptroller

REDACTION LOG

June 3, 2014 Response to John Marshall's and/or Comstock Residents Association's
February 11, 2014 Public Records Request

ITEM* REDACTED	ITEM DATE	General Description	Nondisclosure Explanation
4 Items	12-4-2013 to 12-9-2013	Legal advice of DA's Office	Attorney-client privileged
2 Items	12-10-2013 to 12-11-2013	Legal advice of DA's Office	Attorney-client privileged
3 Items	12-20-2013 (and unknown subsequent date)	Legal advice of DA's Office	Attorney-client privileged
2 Items	12-23-2013	Legal Advice of DA's Office	Attorney-client privileged
1 Item	12-23-2013	Legal Advice of DA's Office	Attorney-client privileged
1 Item	12-30-2013	Legal Advice of DA's Office	Attorney-client Privileged
1 Item	1-1-2014	Legal Advice of DA's Office	Attorney-client privileged
1 Item	1-2-2014	Legal Advice of DA's Office	Attorney-client privileged
3 Items	2-6-2014	Legal Advice of DA's Office	Attorney-client privileged

***ITEM NOTE:** The email database search program captures for each individual email in the centralized email server (depending on the facts of each case) one item for email sent, one item for email received, one item for email opened, and one item for email read. Therefore, for example, the redaction on one email sent (with no reply email) could be up to four (4) items redacted. Larger item counts are multiple emails in a string having the same date with a different time stamp.

RESPONDENT LYON COUNTY
COMMISSIONERS
EXHIBIT 7

1 Case No. 14-CV-01304

2 Dept. No. Senior Judge Kosach

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

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

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

11 Petitioners,

12 vs.

13 LYON COUNTY BOARD OF
14 COMMISSIONERS,

15 Respondents,

16 **DECLARATION OF JEFF PAGE**

17 Jeff Page, declares under penalty of perjury, as follows:

18 1. I am employed by Lyon County as the County Manager and have been so
19 employed since 2010. I have worked for Lyon County for over twenty-nine years.

20 2. Lyon County responded to Petitioners' NPRA request and provided, inter alia,
21 copies of phone records, emails and other records in electronic form. as long as those
22 records were created and or stored on county-owned and controlled equipment.

23 3. Lyon County does not pay for or reimburse County Commissioners for cellular
24 telephones, computers, or email accounts.

25 4. Lyon County Commissioners pay for their own cellular telephones and home
26 computers and private email accounts.

27 5. Lyon County does not maintain email records or telephone records for County
28 Commissioners' private telephones and email accounts.

1 6. In 2013 and 2014, it is my understanding that the Lyon County Commissioners
2 used their cellular telephones and private email accounts for matters other than County
3 business.

4 7. In 2013 and 2014, it is my understanding that Commissioner Hastings used a
5 cellular telephone provided and paid for by his employer. Commissioner Hastings did not
6 receive bills, was unaware of record retention by his employer, and was not familiar with
7 whether multiple phones are billed on the same invoice or account. According to
8 Commissioner Hastings, he did not believe that he had open access to that information or
9 that the public had open access to that information.

10 8. County staff, including employees and officials, in addition to County
11 Commissioners, often uses private cellular phones for county business. The County does
12 not always pay or reimburse employees for the use of private cellular telephones.

13 9. For County provided cellular telephones, the bills are sent directly to the County,
14 paid by the County and the telephone bills are retained by the County. Copies of these bills
15 and records were provided to Petitioners pursuant to their public records request.

16 10. Lyon County does not have a policy for gathering or retaining text messages
17 sent or received from County owned or paid for cellular telephones.

18 11. Lyon County has an IT staff of two. Lyon County does not have the staff
19 or resources to review the private communication devices for all employees, appointed and
20 elected officials.

21 12. Lyon County does not maintain in its offices or on its computer servers any
22 emails sent or received from commissioners, employees or officials private cellular or private
23 email accounts.

24 13. At the end of 2014, Lyon County had approximately 341 employees, which
25 includes employees, appointed and elected officials who are paid employees. In addition,
26 Lyon County has approximately 125 appointed officials (including the County Health Officer
27 and Public Administrator) who are unpaid that serve on advisory boards and in similar
28 capacities for the County.

RESPONDENT LYON COUNTY
COMMISSIONERS
EXHIBIT 8

1 Case No. 14-CV-01304

2 Dept. No. Senior Judge Kosach

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

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

9
10 COMSTOCK RESIDENTS ASSOCIATION,
JOE McCARTHY,

11 Petitioners,

12 vs.

13 LYON COUNTY BOARD OF
14 COMMISSIONERS,

15 Respondents,

DECLARATION OF BOB HASTINGS

16 Bob Hastings, declares under penalty of perjury, as follows:

17 1. I am an elected Lyon County Commissioner and I have served in that position since
18 2013.

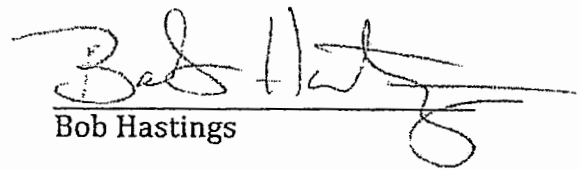
19 2. In 2013 and 2014, I used a cellular telephone provided by my employer.

20 3. I did not have custody or control of the telephone bills or other information related
21 to the cellular telephone account of my employer.

22 4. The County did not pay for the cellular telephone I used in 2013 and 2014.

23 5. I am unaware whether the cellular telephone contract for my employer and the
24 telephone I used included more than one telephone or other employees' telephones on the
25 same account. I do not believe that my employer kept or received text messages or other
26 information from my cellular telephone.

27 DATED: This 4th day of January, 2016.


Bob Hastings

Office of the District Attorney
Lyon County, State of Nevada
801 Overland Loop, Suite 201, Dayton, Nevada 89403 · 31 South Main Street, Yerington, Nevada 89447 · 565 East Main Street, Fernley, Nevada 89408

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RESPONDENT LYON COUNTY
COMMISSIONERS
EXHIBIT 9

RECORDS OF LOCAL GOVERNMENTAL ENTITIES

NAC 239.011 Definitions. (NRS 239.125, 378.255) As used in NAC 239.011 to 239.165, inclusive, unless the context otherwise requires, the words and terms defined in NAC 239.022 to 239.121, inclusive, have the meanings ascribed to them in those sections.

(Added to NAC by St. Librarian, eff. 10-26-83; A 1-24-92; 3-30-94; 7-9-96; A by Library & Archives Admin'r by R090-06, 6-1-2006)

NAC 239.022 "Division" defined. (NRS 239.125, 378.255) "Division" means the Division of State Library and Archives of the Department of Administration.

(Added to NAC by Library & Archives Admin'r by R090-06, eff. 6-1-2006)

NAC 239.031 "Duplicate" defined. (NRS 239.125, 378.255) "Duplicate" means any accurate and unabridged copy of a record or series of records which is not an original.

(Added to NAC by St. Librarian, eff. 10-26-83)

NAC 239.035 "Electronic record" defined. (NRS 239.125, 378.255) "Electronic record" means a representation of a record of a local governmental entity in electronic format containing information, knowledge, facts, concepts or instructions which is being prepared or has been formally prepared and is intended to be processed, is being processed or has been processed in a system or network.

(Added to NAC by Library & Archives Admin'r by R090-06, eff. 6-1-2006)

NAC 239.041 "Legal custody" defined. (NRS 239.125, 378.255) "Legal custody" means all rights and responsibilities relating to the maintenance of and access to a record or series of records are vested in an office or department of a local governmental entity and the official or head of the department is charged with the care, custody and control of that record or series of records. The term does not include the ownership of the record.

(Added to NAC by St. Librarian, eff. 10-26-83; A 7-9-96)

NAC 239.051 "Nonrecord" defined. (NRS 239.125, 378.255) "Nonrecord" means published books and pamphlets, books and pamphlets printed by a governmental printer, worksheets used to collect or compile data after it has been included in a record, answer pads for a telephone or other informal notes, unused forms except ballots, brochures, newsletters, magazines, newspapers except those newspapers received pursuant to the provisions of NRS 247.070 or parts of newspapers retained as evidence of publication, scrapbooks, and property left or deposited with an office or department which would otherwise be defined as a record except that the ownership of that property does not reside with a local governmental entity.

(Added to NAC by St. Librarian, eff. 10-26-83; A by Library & Archives Admin'r by R090-06, 6-1-2006)

NAC 239.061 "Office or department" defined. (NRS 239.125, 378.255) "Office or department" means an office, department, board, commission, committee, agency or any other subdivision of a local governmental entity where records are made, received or kept.

(Added to NAC by St. Librarian, eff. 10-26-83)

NAC 239.091 "Public record" defined. (NRS 239.125, 378.255) "Public record" means a record of a local governmental entity that is created, received or kept in the performance of a duty and paid for with public money.

(Added to NAC by St. Librarian, eff. 10-26-83; A by Library & Archives Admin'r by R090-06, 6-1-2006)

NAC 239.101 "Record of a local government" defined. (NRS 239.125, 378.255) "Record of a local government" means information that is created or received pursuant to a law or ordinance, or in connection with the transaction of the official business of any office or department of a local

1 Case No. 14-CV-01304

2 Dept. No. Senior Judge Kosach

3
4 The undersigned hereby certifies that
this document does not contain a sealed
security matter.

Victoria Tovar

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

9 COMSTOCK RESIDENTS ASSOCIATION
10 AND JOE McCARTHY

11 Petitioners,

12 v

13 LYON COUNTY BOARD OF
14 COMMISSIONERS, et al.

15 Respondents,
16 _____/

17 CRA's REPLY BRIEF

18 I. INTRODUCTION

19
20 As Respondent Lyon County takes such liberties with it, Petitioners Comstock Residents
21 Association and Joe McCarthy (collectively "CRA") begin by addressing the central legal
22 question presented to this Court which is: May public officials hide records that would
23 otherwise public records solely because they were produced or received on personal electronic
24 devices? Contrary to Lyon County's position, CRA does not seek disclosure of any of the
25 Commissioners' private communications. Instead, CRA seeks those records that would be
26 public but for the Commissioners' deliberate decision use personal devices to receive or send
27 them. In other words, CRA contends that it is the character of the record that determines
28

1 whether it is public rather than its storage location. All records regarding public affairs made by
2 public officials remain public and those officials cannot avoid disclosure by choosing to make
3 or receive the otherwise public records on a personal device or address. The examples provided
4 below illustrate this distinction.

5 **Example 1:** A land use applicant sends a letter to a public official present him or her with
6 facts and argument to approve an application pending before the public official, which is clearly
7 a matter of public interest. Under Lyon County's theory, the letter is a public record if it is
8 addressed to the public official at either a physical location of the government or on a
9 government provided electronic device; however, such a communication becomes a private
10 communication not subject to public disclosure if the applicant sends the letter to a personal
11 address (either physical or electronic). Under the plain language of the Nevada Public Records
12 Act ("NPRA"), however, it is the nature of the communication rather than delivered address that
13 drives the determination of whether the record is a public record. This is particularly important
14 where, as is the case here, public officials advertise to the public that the proper address to
15 receive such communications is their personal addresses (both physical and electronic).

16 **Example 2:** A county commissioner sends an email or text to his or her fellow
17 commissioners extolling the virtues of a land use application currently before the commission
18 and urging them to vote for a version of it. Lyon County would assert that whether this email
19 would be a public record or a private communication would depend on whether the
20 commissioners used other commissioners' public or personal addresses. CRA contends this
21 distinction is solely controlled by the choice of the commissioner of which address to use and
22 therefore cannot be dispositive of whether the NPRA applies. To rule as much would provide
23 public officials in Nevada with the means to conduct the public's business entirely outside of
24 public review and to skirt the NPRA entirely.

1 Lyon County categorically denied CRA's public records request¹ as to these types of
2 records solely because they were stored outside of Lyon County's administrative control. In its
3 Answering Brief, Lyon County asserts a number of arguments as to why its Commissioners can
4 avoid the application of the NPRA when they choose a particular sender or recipient's address.
5 CRA will argue in this Reply that none of the arguments made by Lyon County to avoid
6 disclosure of otherwise public records relieve the County and the named public officials from
7 the duty imposed by the NPRA to disclose such public records.
8

9 II. ARGUMENT

10 A. **Lyon County Ignores the Plain and Controlling Language Of NRS 239.010**

11 The Legislative directive contained in NRS 239.010 is clear and unambiguous: "all public
12 books and public records of a governmental entity must be open at all times during office hours
13 to inspection by any person, and may be fully copied or an abstract or memorandum may be
14 prepared from those public books and public records." Lyon County admits its elected County
15 Commissioners fall within the NRPA's definition of a "government entity." (Answering Brief
16 at 5:22-25) The plain language of NRS 239.010 makes all "public records" subject to
17 disclosure, notwithstanding Lyon County's complaints of that it would have to request to obtain
18 the records from Commissioners. The Commissioners made the deliberate choice to create and
19 receive records regarding public matters on their personal devices or addresses. The resultant
20
21

22 ¹ In several places in its Answering Brief, Lyon County refers to CRA's public records request as
23 "made by John L. Marshall." Answering Brief at 1, 2. As made clear by Mr. Marshall's
24 signature block, the request was made on behalf of Petitioner CRA. See Respondent Lyon
25 County Commissioners Exhibit 4 at 2 (February 11, 2014 letter). Mr. Marshall also clearly
26 stated in subsequent emails that the public records request was made on behalf of the CRA. See
27 e.g. Respondent Lyon County Commissioners Exhibit 5 at 1 (referencing "the Comstock
28 Residents Association's February 11, 2014 Public Records request"), Exhibit 6 at unpaginated
page 10 ("CRA's Public Records Request"). Indeed, Respondents themselves refer to the
request as CRA's not Mr. Marshall's. See *Id.*, at unpaginated page 13 (Lyon County District
Attorney Letter dated May 2, 2014, "RE: CRA Records Request . . ."); Answering Brief at
1:19-20 ("The action arises out of a public records request made by Petitioners.").

1 inconvenience to them provides no grounds to avoid application of the plain language of the
2 NPRA. Such a result would be contrary to express legislative and Nevada Supreme Court
3 direction that, “the Legislature amended the NPRA to provide that its provisions must be
4 liberally construed to maximize the public’s right of access. NRS 239.010(1)–(2) [citation
5 omitted]. Conversely, any limitations or restrictions on the public’s right of access must be
6 narrowly construed. NRS 239.010(3) [citation omitted].” *Reno Newspapers v. Gibbons*, 127
7 Nev. __; 266 P.3d 623, 626 (2011).

8
9 Moreover, in *Las Vegas Police Department v. Blackjack Bonding*, 303 P.3d 608 (Nev.
10 2015), the Nevada Supreme Court analyzed separately the question of whether a record was a
11 public record from the question of whether the government entity had the ability to access those
12 public records. *Id.* at 612-613. The Supreme Court’s determination that the records at issue
13 were public records rested on the nature of the record; i.e. did it pertain to a matter of public
14 interest. *Id.* There is no dispute here that the records requested here pertain to a matter of
15 public interest (Comstock Mining Inc.’s (“CMI”) land use application) and during the
16 performance of public officials’ public duties (consideration of CMI’s application). There is no
17 reasonable dispute that the records at issue herein by their nature are public records regarding a
18 matter of public interest.
19

20 **B. Lyon County Cannot Rely On Facially Inapplicable NAC Definition**

21
22 The Legislature addresses multiple distinct topics in the NPRA, such as: the requirements
23 to disclose public records (NRS 239.001 to 239.030); the reproduction of records (NRS 239.051
24 to 239.070); the disposal of obsolete records (NRS 239.073 to 239.125); and the restoration of
25 lost or destroyed records (NRS 239.130 to 239.290). Under the provisions for the disposal of
26 obsolete records, the Legislature provided: “[t]he State Library and Archives Administrator
27 shall adopt regulations to carry out a program to establish and approve minimum periods of
28

1 retention for records of local governments." Under this limited grant, and for the specific
2 purpose of records retention, the State Library and Archives Administrator ("Administrator")
3 promulgated a set of regulations, Nevada Administrative Code ("NAC") sections 239.011-
4 239.165, to help guide local governments in the administration of their record retention
5 programs. In a prior version of these regulations, the Administrator defined, for purposes of
6 local government retention, what "public record" was (This definition has since been deleted).
7 (Lyon County's Response at Exhibit 9) Lyon County seizes upon this deleted definition to limit
8 its obligation to disclose public records under an entirely distinct section of the NPRA. (See
9 Answering Brief at 6)

11 However, the Administrator lacks entirely the authority to otherwise limit the application
12 of NRS 239.010. NRS Section 239.125 provides the Administrator with authority to
13 implement the local government retention obligations under NPRA, not their obligation to
14 disclose records. *Id.* The regulation cited by Lyon County has no force or effect to limit NRS
15 239.010 disclosure obligations. Moreover, in *LVPD v. Blackjack Bonding*, *supra*, the Supreme
16 Court analyzed separately whether a record was public under NRS 239.010 and NAC 239.091.
17 The Supreme Court specifically noted that, because it found the records in question to be public
18 under NRS 239.010, the Court need not consider whether it was public under NAC 239.010.
19 *LVPD v. Blackjack Bonding*, 303 P.3d at 613, n. 3. Thus, the deleted NAC 239.091 did not
20 limit NRS 239.010's application but provided a separate basis for finding a record public.
21 Furthermore, even if one were to use the definition provided in the deleted NAC 239.091, the
22 records sought were either created or received by a government entity in the performance of
23 their public duties paid for with public funds; because the public pays the Lyon County
24 Commissioners to perform their official duties, they would still be required to produce the
25 requested records. The records sought by CRA are public even under NAC 239.091 (which
26
27
28

1 must be construed liberally to promote disclosure per NRS 239.001). Finally, NAC 239.010 has
2 since been deleted and should provide no authority to limit NRS Section 239.010's reach to
3 otherwise public records.

4 **B. Records Need Not Be Subject to Immediate Inspection To Be Public**

5 Lyon County officials voluntarily chose to conduct their public business using personal
6 rather than official equipment, e.g., personal email addresses rather than the ones Lyon County
7 provided. Lyon County argues as a result of this choice, these email records lose their public
8 record status because they are not "open at all times during office hours to inspection by any
9 person" as allegedly required by NRS 239.010(1). (Lyon County Answering Brief at 2.) Lyon
10 County asserts that because their officials' homes or business are private and do not have
11 regular business hours, the records – otherwise public – become private. *Id.* Lyon County's
12 literal reading would exclude all records not open to immediate inspection. Again, this result is
13 contrary to the Legislative and Supreme Court mandates to expansively interpret the NPRA to
14 favor disclosure.
15

16
17 The NPRA requirement to have records open to inspection does not function to limit what
18 records are public records, put rather as a specific right to one method of the public to access to
19 such records. Immediate inspection has not been required under NRS 239.010(1). Public
20 agencies are able to schedule times and places for inspection for a variety of reasons including
21 aggregation of records, privilege review, etc. NRS 239.0107 provides the time periods under
22 which inspection must occur for public records under the legal custody or control of a
23 government entity, which as Lyon County admits, is defined to include individual
24 Commissioners and staff. Per the NPRA, the records CRA requested may be brought to Lyon
25 County offices for inspection within 5 business days. No invasion of Commissioner homes or
26 business need occur or is sought by CRA.
27
28

1 **C. Lyon County Presents No Evidence Commissioners Cannot Access Records**
2 **On Their Personal Devices or Accounts**

3 Lyon County next argues that the records CRA seeks may be stored on servers of third
4 parties and therefore may not be within the “legal custody or control” of a Commissioner, and
5 therefore are not public records. (Lyon County Answering Brief at 7-8) As an initial matter,
6 this argument does not reach to records stored on or that could be accessed by the
7 Commissioners’ on their personal devices. The individual Commissioners would clearly have
8 access to and control of those records. Under NRS 239.010(4) these public records must be
9 produced.
10

11 Next, Lyon County seeks to shift the burden of proof to Petitioners. Here the County
12 refused to produce these public records and also failed to prove that the records are not within
13 the legal custody or control of the Commissioners or employees. Lyon County admits that the
14 terms of contracts that the Commissioners have for the use of their personal devices are
15 “unknown” and it is therefore not clear if the records are under the Commissioners’ control.
16 (Lyon County also complains that it would be burdensome to research each contract.)
17 Answering Brief at 8. It is well settled under Nevada law that in order to avoid producing these
18 otherwise clearly public records, it is Lyon County’s burden to prove that its Commissioners or
19 employees lack adequate control over them. *PERS v. Reno Newspapers, Inc.*, 313 P.3d 221 ,
20 223-224 (2013); NRS 239.0107. Since Lyon County admits that it does not know whether the
21 Commissioners lack control to access these records, they cannot meet this burden and
22 categorical claim all of them are public by pleading ignorance.
23

24 Moreover, when faced with these same arguments, other Courts have imposed a simple
25 good faith effort test. For example, in *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45
26 (Wash. 2015), the Washington Supreme Court held that records on personal devices regarding
27 public matters where indeed public:
28

1 Of course, the public's statutory right to public records does not extinguish
2 an individual's constitutional rights in private information. But we do not
3 read the [Public Records Act] as a zero-sum choice between personal
4 liberty and government accountability. Instead, we turn to well-settled
5 principles of public disclosure law and hold that an employee's good-faith
6 search for public records on his or her personal device can satisfy an
7 agency's obligations under the PRA. *Id.*

8 Lyon County seeks to avoid its responsibility to the public to make reasonable efforts to
9 produce public records as a result of their decision to use their personal devices in the course of
10 conducting public business.

11 **D. Records Need Not Be "Official Actions" In Order to Be Public**

12 Lyon County advances a radical rereading of the NPRL: i.e. using the State Archivist's
13 definition of official record for retention purposes, Lyon County argues that any record that
14 does not represent "the record of official action" is not public. (Lyon County Answering Brief
15 at 9) Under this theory Lyon County contends that no emails, texts, letters, memos, documents,
16 etc., that do not memorialize an "official action" are not public, but are instead "nonrecord
17 materials." *Id.* Such a construction does not comport with the Lyon County's own response to
18 CRA's NPRA request and also contradicts numerous Nevada Supreme Court decisions. Lyon
19 County's argument on this point also illustrates the inapplicability of the old and present NAC
20 definitions for disclosure purposes, which cannot be read to support Lyon County's position.

21 Lyon County admits public records responsive to CRA's request include "cellular records,"
22 "emails" and other documents kept by Lyon County, even those these records are not "records
23 of official action." (Lyon County Answering Brief at 3) Lyon County is required to make this
24 admission because the Nevada Supreme Court has ruled that all such records fall within scope
25 of the the NPRA. See e.g. *Blackjack Bonding*, supra (phone records), *Reno Newspapers, Inc. v.*
26 *Gibbons*, __ Nev. __, 266 P.3d 623 (2011) (pertaining to emails); *DR Partners v. Board of*
27 *County Commissioners*, 116 Nev. 616, 6 P.3d 465 (2000) (pertaining to phone records); *Reno*

1 *Newspapers, Inc. v. Sheriff*, 126 Nev., 234 P.3d (pertaining to concealed carry gun permit
2 documents). Contrary to Lyon County's representation, NAC 239.101 does not limit the
3 definition of public records to just "records of official action." The State Archivist broadly
4 defines records as "including, without limitation, all documents, papers, letters, bound ledger
5 volumes, maps, charts, blueprints, drawings, photographs, films. . . , recorded media, financial
6 statements, statistical tabulations and other documentary materials or information, regardless of
7 physical form or characteristic." CRA seeks records produced or received by Commissioners or
8 other employees in the course of their official duties. No definition in the NAC reasonably
9 limits the NPRA's reach to just a limited class of documents reflecting just an official action.
10

11 **E. "Privacy", "Practical Limitations" Or The Deliberative Process Privilege**
12 **Cannot Categorically Preclude Release Of All The Public Records**

13 With certain expressly enumerated exceptions, NRS 239.010(1) provides that "all" records
14 of a government entity are subject to disclosure under the NPRL. Notwithstanding this broad
15 statutory language, Lyon County argues that since all conversations among Commissioners or
16 with constituents are not subject to the Nevada Open Meeting Law (NRS Chapter 241), this
17 Court should create a "privacy" exception to the NPRA that covers all records of those
18 "nonpublic" conversations. Answering Brief at 11. Lyon County cites no authority for such a
19 sweeping exception. None exists in Nevada law.
20

21 Instead, a government entity may only withhold a public record under two criteria:

22 At the outset, the Act establishes that "all public books and public records
23 of governmental entities must remain open to the public, unless
24 'otherwise declared by law to be confidential.' " *Reno Newspapers, Inc.*
25 *v. Gibbons*, 127 Nev. —, —, 266 P.3d 623, 626 (2011) (quoting
26 NRS 239.010(1)). The Act's purpose is to promote government
27 transparency and accountability by facilitating public access to
28 information regarding government activities. *Id.* "Generally, when 'the
language of a statute is plain and unambiguous, ... the courts are not
permitted to search for its meaning beyond the statute itself.' " *Chanos v.*
Nev. Tax Comm'n, 124 Nev. 232, 240, 181 P.3d 675, 680 (2008) (quoting
State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co., 116 Nev. 290, 293,

1 995 P.2d 482, 485 (2000)). Moreover, in order to advance the Act's
2 public access goal, the Act's "provisions must be liberally construed to
3 maximize the public's right of access," and "any limitations or
4 restrictions on [that] access must be narrowly construed." *Gibbons*, 127
5 Nev. at —, 266 P.3d at 626 (citing NRS 239.001(2)-(3)). Accordingly,
6 this court begins its analysis of claims of confidentiality under the Act
7 with a presumption in favor of *224 disclosure. *Id.* at —, 266 P.3d at
8 628. The state entity bears the burden of overcoming this presumption of
9 openness by proving by a preponderance of the evidence that the
10 requested records are confidential. *Id.* at —, 266 P.3d at 628. The state
11 entity may either show that a statutory provision declares the record
12 confidential, or, in the absence of such a provision, "that its interest in
13 nondisclosure clearly outweighs the public's interest in access." *Id.* at 266
14 P.3d at 628.

15 *PERS v. Reno Newspapers, Inc.*, 313 P.3d 221, 223-224 (Nev. 2013).

16 Since Lyon County cites to no statute to keep records of communications among
17 Commissioners and with constituents confidential, Lyon County must support any claim of
18 "privacy" on the balancing test. Lyon County, however, made no claim of confidentiality when
19 it denied CRA's record quest as to the disputed class of documents. (See Respondent Lyon
20 County Commissioners Exhibit 6, at unpaginated page 14 (May 2, 2014 letter from Lyon
21 County District Attorney) Nor did Lyon County add these documents to its privilege log as
22 required under *PERS v. Reno Newspapers*. *Id.* Furthermore, under *PERS*, any claims of
23 confidentiality must be based on a particular nature of the individual record. *Id.*, at 628
24 ("Finally, our case law stresses that the state entity cannot meet this burden with a non-
25 particularized showing, *DR Partners*, 116 Nev. at 627-28, 6 P.3d at 472-73, or by expressing
26 hypothetical concerns. *Reno Newspapers v. Sheriff*, 126 Nev. at —, 234 P.3d at 927.") Since
27 Lyon County failed to assert any basis for confidentiality nor provide a log of the individual
28 documents, it cannot now rely on an a categorical claim of "privacy" or deliberative process
privilege.

1 Even if the Court were to consider the merits of Lyon County's categorical confidentiality
2 arguments it should reject them. Lyon County bears the burden of the proving that its interest
3 in nondisclosure "clearly outweighs the public's interest in access." *PERS*, 313 P.3d at 628.
4 Other Nevada Supreme Court cases demonstrate what a high bar this test is for governments
5 because of the strong interest in disclosure underlying the NPRL. For example, in *Donrey of*
6 *Nevada v. Bradshaw*, 106 Nev., 630, 798 P.2d 144 (1990), the Court held a police investigative
7 report of public bribery should have been disclosed. In *DR Partners v. Board of County*
8 *Commissioners*, 116 Nev. 616, 6 P.3d 465 (2000), the Court held that a local county could not
9 redact phone numbers from cellular telephone logs based on a general assertion of deliberative
10 process privilege.² In *Reno Newspapers v. Sheriff*, 234 P.3d 922 (Nev. 2010), the Court ordered
11 the disclosure of the identity of concealed carry firearms permits holders and any subsequent
12 records of investigations, suspensions or revocations. In each of these cases, public records
13 more considerably more private than the discussions of public matters at issue here but were
14 held not to be subject to the NPRA. Lyon County failed to provide evidence as to why these
15 particular records would outweigh the overwhelming policy in NPRL of public disclosure,
16 particularly where it has already disclosed emails among Commissioners and with staff and
17 constituents that happened to already have been in the possession of the central administration.

20 Finally, Lyon County argues, without citation to evidence, its two information technology
21 ("IT") staff persons are already overwhelmed and would be further burdened by responding to
22 CRA's request. Even if Lyon County has relied on its Commissioners and employees to use
23 their personal electronic devices and addresses in order to save on IT costs; it should not be
24

26 ² Lyon County makes an argument that all records of communication are protected by the
27 deliberative process privilege because the Nevada Supreme Court only ruled that identifying
28 telephone numbers were not. (Lyon County Answering Brief at 12) As described above, such a
generic argument fails to meet the test for privilege assertion that each document be both pre-
decisional and deliberative and should therefore be rejected.

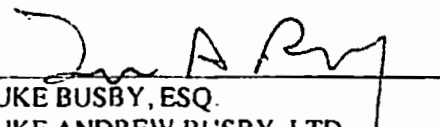
1 allowed to now claim that because it shifted this public function to personal devices, it should
2 be excused from treating them just like it does for those records maintained by the County itself.
3 Moreover, as indicated in *Blackjack Bonding*, costs may be mitigated through fees and therefor
4 Lyon County's theoretical concern "fails to demonstrate that the requested disclosure is
5 financially burdensome." *Id.*, 343 P.3d at 614.
6

7 III. CONCLUSION

8 The Nevada Supreme Court has emphasized time and again that disclosure of public
9 records is the norm. The Lyon County Commissioners and employees used their personal
10 electronic devices and addresses to conduct official County business. In its Answering Brief,
11 Lyon County provides no persuasive argument to upend NPRL to label government records
12 private because of the nature of device on which the government record was created, received or
13 stored rather than the character of the record itself. CRA therefore respectfully requests that the
14 Court grant its Petition and order Lyon County to provide the withheld records.
15

16 Dated: February 1st, 2016.

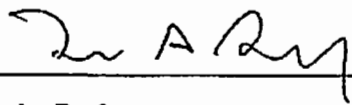
17 Respectfully submitted.

18
19 By 
20 LUKE BUSBY, ESQ.
21 LUKE ANDREW BUSBY, LTD.
22 216 East Liberty St.
23 Reno, NV 89501
24 775-453-0112
25 f- 775-403-2192
26 luke@lukeandrewbusbyltd.com
27 Attorney for Petitioners CRA and Joe McCarthy
28

CERTIFICATE OF SERVICE

Pursuant to NRS 239B.030, the undersigned affirms that the preceding document does not contain the social security number of any person. I hereby certify that the foregoing Reply Brief In Support of Petition for Writ of Mandate was served on the parties on February 1st, 2016.

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



Luke Busby

FILED

2016 JUN 14 AM 9:34

TANYA SCEISINE
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

Victoria Tovar DEPUTY

Case No. 14-CV-01304
Dept. IV

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

COMSTOCK RESIDENT ASSOCIATION
AND JOE McCARTHY,

**ORDER DENYING
PETITION**

Petitioners,

vs.

LYON COUNTY BOARD OF
COMMISSIONERS et al.

Defendant.

On November 30, 2015, the Petitioner, Comstock Residents Association ("CRA"), filed a Writ of Mandamus requesting this Court to compel Lyon County Commissioners to be in compliance with the provisions of Nevada's Public Records Act ("NPRA"). On January 4, 2016, Respondents, Lyon County, filed a Response. On April 14, 2016, the Court held a Hearing on the matter and took the issue under submission

FACTUAL BACKGROUND

CRA brings this action to compel the Lyon County Board of County Commissioners to comply with their nondiscretionary duty under the NPRA in response to a request for all records related to Comstock Mining Inc's. ("CMI") application with Lyon County. Petitioner contends Lyon County refuses to produce responsive public records created or received in the course of their public duties located on individual commissioner's private electronic devices.

1 CMI filed an application with Lyon County to change land use designations zoning within Silver
2 City from more urban to more rural, to allow mining exploration. The County held a public meeting and
3 heard hours of testimony before granting the application.

4 CRA contends during the County's review of CMI's application, the commissioners and other
5 members of Lyon County communicated with CMI representatives through their personal devices.

6 CMI also contends that Lyon County Commissioner, Vita Keller, communicated with CMI using
7 her personal devices because the record is absent with regard to her last minute proposal during the
8 hearing. She has admitted that these conversations took place.

9 On February 11, 2014, Petitioners submitted to the Lyon County Board of County Commissions
10 and Lyon County staff, a request for all public records pursuant to the NPRA related to CMI's
11 Application for Master Plan Amendment and Zoning change. The request included disclosure of all
12 records of communication regarding CMI's application, to or from the Lyon County Commissioners and
13 CMI representatives, regardless of whether such communication occurred on devices owned by Lyon
14 County or personally by the Lyon County Commissioners.

15 Lyon County responded to the Petitioner's demand by disclosing all of the records relating to the
16 CMI application. Lyon County did not disclose private cell phone and e-mail records owned by the
17 commissioners. Lyon County explained the commissioners do not retain county issued cell phones.
18 Private cell phone and e-mail records, personally owned by the commissioners, are not maintained by
19 Lyon County.

20 It should be noted the request made by the Petitioners has language that includes the employees of
21 Lyon County, not just the Commissioners.

22
23 **QUESTION PRESENTED**

24 Should the Court compel the Lyon County commissioners to disclose their personal e-mail and
25 cell phone records to CRA relating to the CMI application?
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5 The Petitioners argue the NPRA applies to all "public records" regardless of the means of
6 creation. According to the Petitioners, the provisions of NRS § 239.010 requires a broad interpretation
7 that any elected official who uses his/her personal devices to conduct public business must disclose the
8 records created as "public records." The Petitioners cite to Nevada case law stating the Nevada Supreme
9 Court has instructed that all governmental entities public books and public records must remain open to
10 the public, unless "otherwise declared by law to be confidential." NRS 239.010. The purpose of this
11 statute is to promote a transparent governmental entity.

12 The Petitioners assert the NPRA defines a "governmental entity" as an elected or appointed
13 official of this State. NRS § 239.005. Thus the plain language of the NPRA defines "governmental
14 entity" to include elected officers of a political subsidiary. Id.

15 The Petitioners assert this is a straight forward interpretation of the statute. They argue Lyon
16 County's interpretation allows public officials to conduct public business on their personal devices,
17 thereby avoiding compliance with the statute. The Petitioners assert that the language of the statute
18 compels Lyon County Commissioners to disclose their personal cell phone and e-mail records. The
19 Petitioners state when a statute is plain and unambiguous, the Court must give the language its ordinary
20 meaning. Nevada State Democratic Party v. Nevada Republican Party, 256 P.3d 1, 4 (2011). The
21 Petitioners then contend the Court should disregard the Respondents claim that the administrators, or the
22 county office, do not possess such records. The Petitioners state the NPRA does not make any distinction
23 between an administrator's office records and the records of elected officials.

24 The Petitioners cite to other jurisdictions holdings that individual records are public records.

25 Lyon County makes the following arguments. The Respondents assert private e-mail and cell
26 phone records of elected officials are not "public records" because: (1) they are not "public records"
27 under the NRPA; (2) privacy interests weigh against disclosure; (3) practical limitations preclude the
28

1 Court from declaring all records "public records"; (4) the records are confidential under the deliberative
2 process privilege.

3 The Respondents stipulate that: NRS chapter 239 requires all books and "public records" of a
4 governmental entity be open for inspections; the provisions of the NPRA are designed to promote
5 governmental accountability; nondisclosure is the exception to the general rule; and elected officials fall
6 under the provisions of the NPRA. However, the Respondents state the issue is whether the specific
7 information requested is "public record."

8 The Respondents first argue private cell phone and email records are not "public records" under
9 the NPRA because: a) "public records" must be paid for with public money; b) the records sought are not
10 open to public inspection; c) the records are not in control of the Commissioners or County; d) the
11 communications are not official actions, and are not required by law to be public; and e) Nevada law does
12 not support that the requested documents be defined as "public records."

13 The Respondents argue the NPRA does not define "public record." The Respondents cite to the
14 Nevada Administrative Code which defined "public record" as "a record of a local governmental entity
15 that is created, received or kept in the performance of a duty and paid for with public money." However,
16 this definition was repealed in October of 2014. The Respondents argue at the time of the request it was
17 clear what a "public record" was. Further, private e-mails and cell phones of the Lyon County
18 Commissioners are not paid for with public money. Therefore, they are not "public records."

19 The Respondents state the Commissioners are entitled to rely on the law as it existed at the time.
20 Ruling in the alternative creates a burden on the government which does not exist.

21 The Respondents assert "public records" must be left open at all times for inspection by the
22 public. The Respondents argue private cell phone and/or e-mail records are not "public records" because
23 they are not on the books thus not open for inspection. The Respondents further claim that interpreting
24 the statute this way would require all "private" records of a government official to be subject to the
25 NPRA rendering an absurd result.

26 The Respondents cite to NRS § 239.010(4) which states an officer or employee who has legal
27 custody or control of a record shall not refuse to provide a copy. The Respondents claim the specific
28 information requested is not in the office's control, thus they are not required to produce that information.

1 The Respondents argue notes or any communication between the Commissioners with clients or
2 other parties do not fall under the provisions of NAC § 239.101. The statute states an office or
3 department of a local governmental entity is defined as an "office, department, board, commission,
4 committee, agency or any other subdivision of a local government entity where records and made
5 received or kept." NAC § 239.061. "Non-record materials" is any other documentation that does not
6 serve as the record of an official action of a local governmental entity. NAC § 239.051. The Respondents
7 argue private e-mail and cell phone records cannot be records because holding that they are render any
8 notes or communication of any Lyon County employee as a "public record."

9 In support of this claim, the Respondents cite to a string of Nevada cases, which does not answer
10 the question of private e-mail accounts or private cell phones. They state the Petitioners are asking the
11 Court to do something that has not been done in Nevada before. The Respondents claim such a question
12 should be left to the legislature to decide.

13 The Respondents make their sixth argument that privacy interest weigh against disclosure. They
14 cite to NRS § 241.015 which states the Nevada Open Meeting Law permits private conversation about
15 county business by less than a majority of its members. They assert this could have a chilling effect on
16 citizens who wish to exercise their constitutional right and talk to their representatives.

17 Finally, the Respondents claim the records are confidential pursuant to the deliberative process
18 privilege. DR Partners v. Bd. of Cty. Comm'rs of Clark Cty., 116 Nev. 616, 619, 6 P.3d 465, 467 (2000).

19 20 CONCLUSIONS OF LAW AND FACT

21 The Court agrees with the Respondent's arguments regarding this matter. The Court concludes
22 that the Petitioners are asking for records which are not paid for with public money. Specifically they are
23 requesting the Lyon County Commissioner's private cell phone and e-mail records. These record are
24 created by a third party phone and internet provider paid for by the Commissioner's private accounts.
25 Thus, the records in question where not paid for with public money which tends to show that these record
26 are not public.

27 Further, the Court agrees the records sought are not open to public inspection. Any member of the
28 public could inspect the records at the County Commissioner's office. However, not even the County

1 Commissioner employees themselves can inspect the Commissioner's personal records. In addition the
2 records sought are not in control of the public agencies.

3 The Court also agrees the records sought are not official actions of the County. Thus the
4 Petitioners are seeking all communications between the Lyon County Commissioner's and members of
5 the public. Such a request is beyond the provisions of the NPRC.

6 Finally, The Court does not believe it has authority to order personal information of the Lyon
7 County Commissioners be disclosed to the Petitioners. There are multiple privacy concerns which the
8 Court is concerned with. Such an action must be clearly supported by law which the Court finds it is not.
9 If the legislature intended the provisions of the NPRC to have such reaching consequences, then the
10 Court concludes the Legislature could have easily included language supporting such an assertion.

11 The Court is aware that this holding may cause public employees to skirt the provisions of the
12 NPRC by conducting business on their private devices. Such a concern is for the Legislature to address.

13
14 Therefore, good cause appearing, the Petitioner's Petition is **DENIED**

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16 Dated this 10th day of June, 2016.

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20 SENIOR DISTRICT COURT JUDGE
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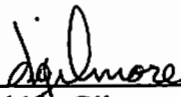
1 CERTIFICATE OF SERVICE

2 I hereby certify that I, Debbie Gilmore, am an employee of the Third Judicial District Court,
3 and that on this date pursuant to NRCP 5(b), I mailed at Yerington, Nevada, a true copy of the foregoing
4 document addressed to:

5
6 Lyon County District Attorney's Office
7 31 S. Main St.
8 Yerington, NV 89447

9 John Marshall, Esq.
10 570 Marsh Ave.
11 Reno, NV 89509

12 DATED: This 14th day of June, 2016.

13 
14 Debbie Gilmore

1 Case No. 14-CV-01304

2 Dept. No. Senior Judge

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

FILED

2016 JUN 15 PM 2:30

TANYA SCEIRINE
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

Andrea Anderson DEPUTY

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

9 COMSTOCK RESIDENTS ASSOCIATION,
10 JOE McCARTHY,

11 Plaintiffs/Petitioners,

12 vs.

13 LYON COUNTY BOARD OF COMMISSIONERS
14 et al;

15 Defendants/Respondents.

16 **NOTICE OF ENTRY OF ORDER**

17 Please take notice that the Court entered its Order Denying Petition for Writ of
18 Mandamus on June 14, 2016. A copy of the Order is attached hereto.

19 DATED this 14th day of June, 2016.

20 STEPHEN B. RYE
21 DISTRICT ATTORNEY

22 By: *Stephen B. Rye*

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

28 Attorney for Respondent/Defendant
Lyon County Board of Commissioners

Certificate of Service

The undersigned, an employee of the Lyon County District Attorney, certifies that on the 14th day of June, 2016, a copy of the foregoing Notice of Entry of Order and Order was mailed, postage prepaid, by placing the same in the mail receptacle at Lyon County Administrative Offices, addressed to:

Luke Andrew Busby, Esq.
216 East Liberty St.
Reno, NV 89501

Dated this 14th day of June, 2016.


Employee

FILED

Case No. 14-CV-01304
Dept. IV

2016 JUN 14 AM 9:35

TANYA SCEIRINE
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

Victoria Tovar DEPUTY

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
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27 Further, the Court agrees the records sought are not open to public inspection. Any member of the
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3 The Court also agrees the records sought are not official actions of the County. Thus the
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6 Finally, The Court does not believe it has authority to order personal information of the Lyon
7 County Commissioners be disclosed to the Petitioners. There are multiple privacy concerns which the
8 Court is concerned with. Such an action must be clearly supported by law which the Court finds it is not.
9 If the legislature intended the provisions of the NPRC to have such reaching consequences, then the
10 Court concludes the Legislature could have easily included language supporting such an assertion.

11 The Court is aware that this holding may cause public employees to skirt the provisions of the
12 NPRC by conducting business on their private devices. Such a concern is for the Legislature to address.

13
14 Therefore, good cause appearing, the Petitioner's Petition is **DENIED**

15
16 Dated this 10th day of June, 2016.

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20 SENIOR DISTRICT COURT JUDGE
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1 CERTIFICATE OF SERVICE

2 I hereby certify that I, Debbie Gilmore, am an employee of the Third Judicial District Court,
3 and that on this date pursuant to NRCP 5(b), I mailed at Yerington, Nevada, a true copy of the foregoing
4 document addressed to:

5
6 Lyon County District Attorney's Office
7 31 S. Main St.
8 Yerington, NV 89447

9 John Marshall, Esq.
10 570 Marsh Ave.
11 Reno, NV 89509

12 DATED: This 14th day of June, 2016.

13 Debbie Gilmore
14 Debbie Gilmore
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Case No. 14-CV-01304

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE
OF NEVADA IN AND FOR THE COUNTY OF LYON
BEFORE THE HONORABLE STEVEN R. KOSACH

-o0o-

COMSTOCK RESIDENTS)
ASSOCIATION, JOE MCCARTHY,)
Appellants,)
vs.)
LYON COUNTY BOARD OF)
COMMISSIONERS,)
Respondents.)

JAVS TRANSCRIPT OF PROCEEDINGS
ORAL ARGUMENT
APRIL 14, 2016
YERINGTON, NEVADA

For Appellants: Luke Andrew Busby, Esq.

For Respondents: Steven B, Rye, Esq.

Transcribed by: Capitol Reporters
Nicole Hansen

1 YERINGTON, NEVADA; APRIL 14, 2016; 1:20 P.M.

2 -oOo-

3
4 THE COURT: Good afternoon to you all. This
5 is Case No. 14-CV-01304, entitled Comstock Residents
6 Association, Gail Sherman, Joe McCarthy, represented by
7 Mr. Luke Busby. Good afternoon, Mr. Busby.

8 MR. BUSBY: Good afternoon, Your Honor.

9 THE COURT: Nice seeing you -- versus Lyon
10 County Board of Commissioners, represented by Lyon County
11 District Attorney Mr. Steve Rye. Good afternoon to you,
12 Mr. Rye.

13 MR. RYE: Thank you, Your Honor.

14 THE COURT: And this is the time that we set
15 for oral argument in the writ of mandate. I've read the
16 petition, response reply, and I've been asked if this is
17 going to be an evidentiary hearing. I don't feel that I
18 need an evidentiary hearing, but if after we conclude
19 this hearing if the People decide that they need
20 witnesses or something like that, just let me know, and
21 we'll do it. But right now, what I want you to do is
22 just sum up your arguments, tell me any supplements, if
23 you have any, tell me any new law, if there is any new
24 law that you found, but I'm ready to proceed. So we'll

1 start with you, Mr. Busby.

2 MR. BUSBY: Thank you, Your Honor. I'd just
3 like to hit a few of the highlights covered in the brief
4 and kind of elucidate a few things, if I may. Going
5 through the who's and what's of this case, we provided a
6 public records request on the County and the individual
7 commissioners. I don't think there's actually a dispute
8 as to whether those entities were covered by Chapter 239
9 of Nevada Revised Statute. They clearly are.

10 Now, what is the request for? We asked for
11 public records related to a zoning change that the
12 Commission voted on in Lyon County affecting Silver City
13 about which my clients are deeply interested. I don't
14 think there is really any dispute as to whether the
15 subject matter of the request is also covered by the
16 public records act. A change in zoning law is clearly a
17 State action. Any records that are related to that
18 action that aren't otherwise deemed confidential by
19 statute or other rule of law are subject to disclosure.

20 The basis for Lyon County's denial of the
21 specific records we seek the court order be produced was
22 that they weren't in the County's possession, that they
23 were in the possession of the individual commissioner's
24 personal communication devices. It's our position quite

1 clearly that whether or not a public record exists on a
2 personal communication device or not does not make such a
3 record a non-public record. The use of a private device
4 to transmit or to store public record does not render
5 that record nonpublic.

6 This is actually included in the statutory
7 scheme of the Public Records Act at NRS 239.001 Sub 4,
8 which states, quote, "The use of private entities in the
9 provision of public services must not deprive members of
10 the public access to inspect and copy books and records
11 relating to the provision of those services." And
12 there's actually a Nevada case that's very clearly on
13 point on this issue, Las Vegas Metropolitan Police
14 Department v. Blackjack. The Supreme Court ruled that
15 the ability to access those records means that they're
16 under the control of the government entity that is being
17 requested to produce such records. In that case, it was
18 prison phone records which were maintained by a private
19 contractor for the prison.

20 Now, we, in our records requests and our
21 petition to the Court, presume that the commissioners
22 have access to their own e-mail accounts and are
23 therefore capable of accessing the requested records by
24 doing a basic search, a good-faith search of the records

1 that they do have access to, which is what we're asking
2 the Court to order the commissioners to do and to
3 produce.

4 Now, we know that the personal e-mail
5 addresses of the commissioners were used to conduct
6 public business. I don't believe that's really in
7 dispute either. If at the time of the request you went
8 to Lyon County's web page and looked for the contact
9 information of the commissioners, clicked on the link, it
10 would send you to their personal e-mail address. Now,
11 that's changed since that time. Now they have Lyon
12 County e-mail addresses, but that's how the public could
13 communicate with the commissioners.

14 The primary case that's really on point here
15 is from out of state. It's from Washington. It's the
16 Pierce County case. The facts are the same, essentially,
17 on all critical points. Washington's public records law
18 is quite similar to Nevada's. That Court held that, "We
19 turn to well-settled principles of public disclosure and
20 hold that employees' good-faith search for public records
21 on his or her personal device can satisfy an agency's
22 obligations under the PRA."

23 Now, the County's made various arguments
24 against disclosure. Those, I think, are a testament to

1 the intelligence of my opposing counsel here, but
2 unfortunately, I don't think they ultimately resolve the
3 issue in their favor because none of the purported
4 reasons or exceptions for failure to disclose the records
5 hold water, frankly. There's no statute that says that
6 the records don't have to be produced, and there's no
7 other test that exists which would preclude production.
8 There are some exceptions to the public records law in
9 Nevada that are created by the Court. The biggest
10 example is the Don Ray exception.

11 If there's a criminal investigation that's
12 ongoing, you make a public records request for the
13 investigative file. They're not going to give it to you.
14 The police are not going to give it to you. The Nevada
15 Supreme Court has said there's very compelling reasons
16 why that shouldn't be disclosed even though it's not part
17 of Nevada Public Records Act, but that's clearly not the
18 case here. This is a decision that's already been made,
19 the zoning change. There's no other Court-created
20 exception under law which would prevent the withholding
21 of those records.

22 There's also -- the County asked that the
23 Court make a deliberative exception to the rule based on
24 the fact that certain aspects of public meetings don't

1 have to be public under the open meeting law. If you do
2 have less than a quorum of meeting of a commission, they
3 can sit down and talk about issues amongst themselves.
4 We don't think that creates or should create an exception
5 to the requirement to otherwise disclose public records
6 related to a decision. You know, obviously, we can't ask
7 for a conversation if there's no record memorializing the
8 conversation. But if there's an e-mail, a text message
9 related to the State action, the official public
10 function, it's our position that the Public Records Act
11 clearly requires disclosure of those documents. But
12 Judge, I hope that provides answers to the questions you
13 have.

14 THE COURT: Thank you. Mr. Rye?

15 MR. RYE: Thank you, Your Honor. I guess the
16 issue in this case is maybe a little bit broader than the
17 petitioners would suggest, and I think the first thing
18 for the Court to look at is the actual request in this
19 case which is a concern for the County. And in the
20 letter that was sent on February 11th, 2014, initially,
21 it said, "Request access to any and all records related
22 to Comstock Mining, Inc. application for master plan
23 amendment zone change. This includes but is not limited
24 to any and all records of communications between Comstock

1 Mining, Inc. and members of the Lyon County Board of
2 Commissioners and Lyon County staff, included but not
3 limited to phone recordings, e-mails, internal
4 documents," goes through a list of things, and then at
5 the end says, "regardless of whether on private or public
6 devices."

7 And then there was a follow-up e-mail. There
8 was some discussion back and forth, and this is also in
9 the exhibits that were filed, and on March 21st, the
10 request was expanded. "Please treat my e-mail of
11 yesterday as expanding that request to include all
12 records of communication with Comstock Mining,
13 Incorporated from January 1st, 2010 to the present." So
14 the request is, if you take it literally, is three years
15 of records with not only the Board of County
16 Commissioners, but County staff. We believe 341
17 employees and 125 elected and appointed officials would
18 fall under that umbrella.

19 That's important for the County and the
20 Court, we believe, because it does bring some practical
21 realities of life into your analysis of the law and how
22 it applies to this case. The scope of the request is
23 obviously very broad.

24 Now, we don't -- there's some confusion that

1 we don't want to provide these records or whatever. What
2 happened in the case is we provided thousands of pages of
3 records, e-mails, phone records, and even some records
4 from private accounts of county commissioners, so it was
5 not an intentional circumvention of the Public Records
6 Act.

7 We understand it's important to have
8 disclosure, those kinds of things. The question is,
9 though, what are the limits of that? There have to be
10 limits on what are public records and what has to be
11 disclosed. A lot of the discussion is we need to get
12 these County Commission records, and I think what the
13 petitioners were looking for was probably a pretty
14 concrete set of records, but that's not what the request
15 was, and that created problems for the County in saying,
16 "Are we going to respond and spend time to see if these
17 records exist? If they do, what do we do with it?" And
18 that's the primary reason that the County is here today,
19 to argue that this request does not encompass public
20 records. It's much broader than that, and the petition
21 should be denied.

22 We're not the only entity to deal with this.
23 You've probably seen in the paper in the last couple of
24 weeks the Nevada legislature has received a request from

1 the Associated Press, and they denied it for private
2 e-mail communications. Granted, it's legislators, so
3 it's a different issue, but certainly, this issue is not
4 resolved and will continue to develop in Nevada.

5 Now, I would agree we probably don't need an
6 evidentiary hearing unless the Court decides that there
7 are issues which require facts that we haven't provided.
8 The County is certainly willing to do that, provide
9 information on IT capabilities, records, all of that kind
10 of thing if the Court needs it. I'm not sure that's
11 necessary, but if you decide, we're certainly willing to
12 do that.

13 So the law in this case, Chapter 239, what we
14 agree on for sure, the Nevada Public Records Act applies
15 to the County, County Commissioners and County staff.
16 There's no dispute about that. The Public Records Act is
17 to be liberally construed, as the petitioners pointed
18 out. No question about that. What we don't agree on is
19 are the items requested actually public records, and are
20 they subject to disclosure? We don't believe they're
21 public records. In our brief, we cited an NAC that has
22 since been repealed, but at the time this request was
23 made, it was still in force, and what it said is, public
24 records are records that are essentially paid for with

1 public money.

2 And that was changed, but I think it's
3 important for the Court to consider that because how the
4 County acts at that time is based on, in part, on what
5 those regulations are. The petitioners argue it doesn't
6 apply because it deals with the administration of public
7 records, that the administrative code governs rules that
8 are dictated by the State to local governments, that you
9 should handle your records in this way, you should retain
10 them for a certain period of time, and you should do
11 certain things with your public records, and there are
12 definitions and other things included in there.

13 The problem with that argument is that
14 unfortunately, local governments rely heavily on those
15 provisions. We determine what is public records, how
16 long we retain things, where we retain them, and all of
17 those kinds of things based on guidelines we receive from
18 the State, largely through the administrative code and
19 the State library and archives, and so it's important
20 that you keep that in mind when you consider it.

21 If you don't look to the administrative code
22 for a definition of public records, there's nothing in
23 NRS that defines a public record. So one thing other
24 courts have done, Arkansas and some other states, is

1 they've looked to just a common definition of public
2 record in Webster's dictionary, and three things come up.
3 A record required by law to be made and kept. Seems
4 pretty obvious. A record made by a public officer in the
5 course of his legal duty to make it where there's
6 actually a responsibility to make that record. Clerks,
7 other government entities, you have to make records as
8 you do it, or a record filed in a public office and open
9 to public inspection, and that comes from Webster's
10 dictionary.

11 And the Arkansas Supreme Court explained the
12 definition when they used it in the case, which was
13 McMahan versus Board of Trustees of the University of
14 Arkansas where they said the Freedom of Information Act
15 does not itself provide that any particular records shall
16 be kept. It only provides that records which are
17 required by some statute other than the Freedom of
18 Information Act to be made and kept shall be open to
19 public inspection. There's no semblance of ambiguity in
20 this provision and whether the statute be construed
21 narrowly or broadly. The italicized phrase can only mean
22 one thing. And so it says if they're not public records,
23 just because they're made by a public official doesn't
24 mean they need to be kept and disclosed and subject to

1 disclosure.

2 Washington -- I know Mr. Busby cited a
3 Washington case and another case, there, Cowles
4 Publishing Company versus Murphy. They rejected the
5 notion that documents are public or private simply
6 because the person that handles them is or is not a
7 public servant. Now, so we would just say simply that
8 these aren't public records, especially as it regards the
9 commissioners. There's nothing in the law that requires
10 them to keep their communications with constituents,
11 other things like that. In fact, generally, they don't.
12 They're not filed anywhere with the County. They're not
13 kept, whether it's a handwritten note...

14 What's the difference between an e-mail or a
15 handwritten note? A constituent sees a County
16 Commissioner at a social gathering or even a county event
17 or whatever, gives them a handwritten note. Is the
18 commissioner required to keep that as a public record?
19 How long do they keep it? Where do they keep it? How do
20 they handle it? Why is an e-mail different? An e-mail
21 should be no different. It's a different technology.
22 Why is a phone record, a text message, something like
23 that different? Then I go to the next step.

24 I think Mr. Busby talked about conversations,

1 and I think everybody agrees. If you have a conversation
2 with a staff -- County staffer or an elected official,
3 they don't have to document that and make it a public
4 record. That's just part of doing County business. It's
5 not a legal duty to record that or anything. Why is it
6 different? Because it is recorded as an e-mail. There's
7 a number of examples you can use that I think make it
8 pretty complicated to call any communication related to
9 County business a public record, and that's what the
10 petitioners want you to do.

11 The next issue which is problematic for the
12 county is, are these documents open to inspection? And
13 this is one thing the Public Records Act does say, is
14 that documents that are open to public inspection. And
15 you're not able to do that in this case, especially with
16 County staff members and County commissioners. One
17 example in this case is Commissioner Hastings. And I
18 think in some of the documents, it's pointed out maybe
19 the answer to the petition, but he was employed full time
20 with a business, I believe, in Sparks during the course
21 of these events, and he had a business-provided cell
22 phone that he used for personal business and County
23 business and his work. He didn't receive the bills, did
24 not have access to the bills, didn't know whether he

1 could even get the bills.

2 So what about e-mails sent from a work
3 computer if county commissioners in these rural areas are
4 part-time employees, they have other jobs, they have
5 other things. How do you determine what's open to
6 disclosure and what's required to be kept? And how do
7 you enforce that? What if there's some kind of problem
8 with the business, for instance, now Commissioner
9 Hastings no longer has that same employer. How does he
10 get those records at this point? Can he get those
11 records? Those are practical considerations that I think
12 require a reasonable interpretation of what it means to
13 be open to inspection, which is a requirement for it to
14 be a public record subject to disclosure in Nevada.

15 Legal custody or control of the records.
16 Again, these are some of these records, although we
17 speculate, they can search their e-mails, they can do
18 this kind of thing, we don't know that. There's no
19 evidence in the record to suggest that. And who has
20 custody and control? Does the phone company have custody
21 and control of those records? Does the Internet
22 provider? Does the e-mail provider? And is there some
23 kind of contractual relationship that limits that? Can
24 we limit it with one commissioner versus one County

1 employee? What kind of parameters do you put on it?

2 The petitioners have referred to the
3 Blackjack case, which we believe is good law and is
4 distinguished from this case in an important basis in
5 that the Court said the government entities' duty to
6 disclose a public record applies to records within the
7 entity's custody or control. And in Blackjack, they had,
8 with this program for the detention center phone, they
9 had the ability to get -- "they" being Las Vegas
10 Metropolitan Police Department, had the ability to get
11 call detail records for use in administrative and
12 investigation purposes.

13 In this case, the County has no ability --
14 and perhaps even employees and County Commissioner -- to
15 get those records. They could do that under the terms of
16 their contract in Blackjack, and they could also, it
17 sounded like from the case, do it without even involving
18 the provider of those services. In the PERS case, the
19 Supreme Court said -- and this is important also, we
20 believe, is that the county or in this case the county
21 commissioners or staff members are not required to go
22 through individual files and compile info into a relevant
23 format that meets a public records request. And that's
24 essentially what would be provided. What if these

1 private e-mails are shared with a spouse, other
2 individuals? What if they use the same e-mail account,
3 same cellular phone? There's a lot of issues that come
4 up when you start dealing with these private accounts and
5 private devices.

6 We believe that certainly, Nevada needs to
7 address this more clearly, but no case clearly has said
8 that it's a public record if it's done on a private
9 device, and we don't believe that's the Court's job here,
10 that that's the legislature's job. If they need to
11 adjust the law to make it clear, then they should do
12 that, not the Court. The Supreme Court hasn't done it
13 yet, and we don't believe the district court should do it
14 at this point. The legislature has defined the Public
15 Records Act, and if they need to refine it, they should
16 do it.

17 The next question, I guess, if you decide
18 they are public records then, are they subject to
19 disclosure? And again, Lyon County says that they're
20 not. Mr. Busby is correct that we didn't provide a
21 privilege log. We didn't do some of the prelitigation
22 requirements. And maybe our response, the County's
23 response was a little bit too simplistic. However, there
24 are a couple of reasons, I think, that explain that

1 conduct. Number one is, we did not go out to everybody's
2 private e-mails and everything else and do a search. In
3 order for us to --

4 THE COURT: "Everybody" meaning the
5 commissioners?

6 MR. RYE: Commissioners or County staff.
7 Remember the request is --

8 THE COURT: Or County staff.

9 MR. RYE: -- County staff, too. So we did
10 not do that. So we're not in a position to provide a log
11 because frankly, we haven't done that search, looked at
12 the records and said these are not subject to disclosure
13 because they're delivered and process privileged or
14 they're confidential or they include confidential
15 information, so we have not gone through that step. And
16 so that's why we haven't provided that information to the
17 petitioners, just because we never got there. We said
18 they're not public records under the statute, gave that
19 reason. We haven't gotten to the next step on
20 disclosure.

21 We also believe that the Court needs to be
22 cautious in ordering disclosure of these records in that
23 one of the important interests, especially for county
24 commissioners, is to be able to have frank communication

1 with staff regarding issues that are before them and also
2 with constituents, that we want constituents to be able
3 to contact their elected officials without worry that
4 everybody is going to be able to see that, to discuss
5 issues that are important that are in the public
6 interest. Certainly, there are situations where there
7 might be a need to disclose that, but as a general rule,
8 we believe that's a bad idea. We've gone over the cases.

9 I think it's important when you think of
10 what's subject to disclosure, review the Gibbons case,
11 which was a request for e-mails that were on the
12 Governor's State e-mail account. And it came down to 104
13 e-mails that they reviewed, and only a fraction were
14 deemed public records. There was some litigation that
15 was remanded back, but I believe there was only a
16 fraction that were actually public records in that
17 instance, and there was nothing to do with the private
18 e-mail.

19 It's a particularly important case, we
20 believe, because what the Court, Supreme Court did is
21 remand and direct -- I think it was the State to provide
22 a log and then litigate whether those issues apply and
23 whether they're actually public records subject to
24 disclosure.

1 So if the Court is inclined to say yes, these
2 are public records or you need to look further, we would
3 request that at least you give us a chance to compile
4 those records, and if some are privileged, still invoke
5 that privilege. Just because we haven't done it at this
6 point, I don't think precludes us from doing that at a
7 later point. Then I know that would mean more hearings
8 probably for this Court, but I think it's appropriate
9 under the law that the Court would consider whether or
10 not if you decided yeah, County Commissioner private
11 e-mails are public records, we need to go to that next
12 step. Are these ones subject to disclosure?

13 Why does all of this matter for the County?
14 It's not to thwart the public record process. It's not
15 to try to hide anything. It's, like I mentioned earlier,
16 there's 341 employees, 125 board members in a rural
17 county that does not have a lot of resources. And if we
18 accept the proposition that any private e-mail, private
19 cellular phone is subject to search and review in
20 response to public records request, it is undoable.

21 Now, I understand financial burden is not a
22 reason to -- you can't disregard the law. But when the
23 law is not clear, I think you need to consider that. And
24 records requests often are burdensome, understanding

1 they're a necessary and important part of the government
2 process. However, remember that when you rule in this
3 case, it's not just this case. Does not mean the next
4 public records request, we are required to go to every
5 private e-mail and cellular phone in the county, contact
6 every employee and say, "Have you had any communications
7 related to this?" And I don't think that's the intent of
8 the law, and practically, it will not work.

9 THE COURT: On that point --

10 MR. RYE: I think that's all I have.

11 THE COURT: Excuse me. On that point, have
12 you two discussed, prior to this hearing, prior to as
13 you're briefing, have you two discussed limiting? In
14 other words, what do you want? What do petitioners want?
15 What is the specifics of what they want? Can you find
16 out in discovery? Do you want the Court to look at it in
17 camera what you want? I mean, you know, that kind of
18 thing. What -- define it for me.

19 MR. BUSBY: Your Honor --

20 THE COURT: If it's an it.

21 MR. BUSBY: It is an it.

22 THE COURT: Find out.

23 MR. BUSBY: The primary impetus behind the
24 public will records request is there's actually evidence

1 from the hearings, the administrative hearings at the
2 county commission, there were conversations going on that
3 the public wasn't privy to, conversations with -- between
4 the commissioners and agents of Comstock Mining. That's
5 really the focus of the public records request, and
6 that's why we're so interested in obtaining those
7 records.

8 You know, we're not asking that every single
9 County employee's personal cell phone records be subject
10 to thorough examination and review. We're only asking
11 for these particular people because we have good reasons
12 to believe that such records exist, namely the
13 commissioner said they exist, and the commissioners were
14 using their personal e-mail addresses and personal
15 devices to conduct public business in this particular
16 case. So that's really the thrust of the request.

17 (Inaudible.)

18 THE COURT: Yeah, it does. So discussion of
19 County commissioners with members of the Comstock;
20 correct?

21 MR. BUSBY: Well --

22 THE COURT: I'm not trying to limit you, but
23 I'm kind of maybe repeating it myself to get it straight
24 in my mind.

1 MR. BUSBY: Well, that's really the thrust
2 behind the request, but it was brought up to Compass
3 Communications to the issue that was before the
4 Commission, which was approval of Comstock Mining's
5 requested zoning change like everything has. And we're
6 not asking for their e-mail communications with their
7 attorneys. That's clearly confidential by statute.
8 There's some other statutory exception to disclosure of
9 those rules or of those e-mails. We can't get those. We
10 understand that.

11 But clearly, communications with the CEO of
12 Comstock Mining and the County commissioners related to
13 an issue of public concern that the commissioners are
14 going to vote on is a matter of distinct and important
15 public interest that is subject to disclosure of the
16 public records law.

17 THE COURT: Now, Mr. Rye, you mentioned are
18 they open for public inspection? "They" meaning
19 communications by the County commissioners with,
20 allegedly, with Comstock. And that's the point that you
21 said they're not open for public inspection.

22 MR. RYE: Yeah, we don't believe those are
23 open for public inspection.

24 THE COURT: Why not?

1 MR. RYE: Well, they're on private devices,
2 maybe. I mean, we don't know for sure. I don't -- I'm
3 not a technology person, so I don't know where those are
4 stored.

5 THE COURT: Neither am I, and that's why I'm
6 asking these questions, you know, what do you want?

7 MR. RYE: Right. So I don't know where
8 they're stored, whether they're stored on some server as
9 Google or whatever. So we -- the County doesn't believe
10 those are open to public inspection as described in the
11 Public Records Act.

12 Now, Mr. Busby correctly says well, all they
13 have to do is search and see if they're there, and if
14 they are, then make them available for inspection within
15 five days. I don't know that that is the same thing as
16 being public records open to inspection. And I
17 understand maybe that language doesn't fit modern
18 technology, but a more reasonable interpretation in my
19 mind is those are readily available for inspection.
20 Yeah, it can take days to find them or whatever, but that
21 they're maintained someplace where they can be retrieved
22 without a third party, that sort of thing. And so that's
23 why we think they're not open to inspection.

24 MR. BUSBY: Your Honor, if I may respond very

1 briefly. I think that kind of -- courts in Nevada have
2 already said that e-mails are public records. They've
3 said that in the first case, they've said that in the
4 Gibbons case.

5 The real danger that we're facing here is if
6 a Court were to determine that use of a private e-mail
7 account to conduct public business made anything it did
8 on that account not a public record, then that would
9 create such a huge loophole in the public records law
10 that any public official would be able to walk right
11 through it and completely avoid compliance with the
12 public records law by using their private e-mail account.
13 And that's, I think, clearly contrary to the intent of
14 the law as expressed by the legislature and case law such
15 as the (inaudible.)

16 MR. RYE: So just a couple -- do you mind if
17 I respond to those comments --

18 THE COURT: Not at all.

19 MR. RYE: -- briefly? So I guess just a
20 couple quick points on that. First, Gibbons and PERS,
21 that is right, that they say e-mails are public records.
22 But not all e-mails are public records though. Neither
23 case states that.

24 The other important thing is those cases

1 involved e-mails on the State facilities, State devices.
2 Governor Gibbons, on his State-accessed e-mail. There
3 was no mention of private e-mail accounts. Same thing
4 with PERS. It was PERS records that were maintained by
5 that agency. So I think that's an important distinction
6 that you need to consider when you decide whether or not
7 private e-mails fall under this umbrella.

8 There's no question that whether a County
9 Commissioner or some other employee may hide information
10 to circumvent the Public Records Act is a serious
11 concern, but is that a concern that the Court addresses
12 or the legislature addresses? And I think Mr. Busby or
13 the petitioners pointed out that this probably happens
14 quite a bit in Nevada. People use private cell phones
15 and private e-mails to communicate. That's just the way
16 things are in 2016. Does that mean it's right? Does
17 that mean all of those communications are subject to the
18 Public Records Act? No to both of those. But that's not
19 a question that we think should be judicially decided.
20 Those parameters should be set by the legislature, and
21 you should rely on the cases that have already been
22 decided, none of which clearly point out that the
23 information sought are public records in this case.

24 MR. BUSBY: If I may, Your Honor. It's our

1 position that the legislature has addressed the issue.
2 In NRS 239.001 sub 4, it states the use of private
3 entities in the provision of public services must not
4 deprive members of the public access to inspect and to
5 copy books and records relating to the provision of those
6 services. Therefore, the choice to use their personal
7 e-mail accounts to conduct public business was clearly
8 the Lyon County commissioners in this instance.

9 THE COURT: Repeat that. Your voice trailed
10 off.

11 MR. BUSBY: Oh. The Lyon County
12 commissioners clearly chose to use their personal
13 communication devices and e-mail addresses to conduct
14 public business in this case.

15 THE COURT: Because they don't have public
16 ones, right? There's not two devices, one private that
17 I'm conducting my business, two is -- apples and oranges
18 -- is some device that Lyon County provides that is only
19 used for Lyon County business, right? That's what you're
20 saying?

21 MR. BUSBY: In this circumstance, it's my
22 understanding that they only have one device, which is
23 their personal device.

24 THE COURT: Okay.

1 MR. BUSBY: And therefore, they were clearly
2 using a private entity, whatever e-mail service they were
3 using in the provision of the public service, which falls
4 right under that statutory rule which says, okay. State
5 agencies, anyone who is covered by the Public Records
6 Act, you can use private contractors to maintain your
7 data, to do your e-mail addresses, whatever you want, but
8 you can't use that as a defense to providing public
9 records. So it's our position that the legislature has
10 indeed dealt with the issue.

11 And just to be clear where we are in the
12 proceedings, Lyon County's response to the records
13 request of CRA was categorical. It was the
14 communications that you saw are on private devices.
15 Therefore, we can't provide them. They're not under the
16 county administration's control, you know. They're not
17 public records, essentially. Well, that position is
18 inconsistent with the act itself because it says that the
19 individual elected officials are covered by the act, so
20 they have an individual obligation to disclose the
21 records independent of county administration's obligation
22 to disclose what records it has. And that's another
23 important part of the case, Your Honor.

24 THE COURT: Is there a -- is there a lawsuit

1 filed by Comstock Mining, or is there an ongoing lawsuit
2 to -- when I say "lawsuit," is there a proceeding to --
3 let me rephrase. Because I, in a sense, I don't know how
4 to define it. But apparently, Comstock Mining asked for
5 a zoning change; correct?

6 MR. BUSBY: That is correct, Your Honor.

7 THE COURT: And the Lyon County commissioners
8 allowed for it.

9 MR. BUSBY: Indeed.

10 THE COURT: Voted in favor of a zoning
11 change.

12 MR. BUSBY: Yes, Your Honor.

13 THE COURT: So Comstock Mining can what,
14 follow the vein, explore -- what was the purpose of the
15 zoning change?

16 MR. BUSBY: It's my understanding that
17 they're actually reprocessing old ore on a preexisting
18 mining site in Silver City.

19 THE COURT: And that's what I mean about
20 following the vein.

21 MR. BUSBY: Yes.

22 THE COURT: Okay. All right. Now, and you
23 want to know, Comstock Residents Association, who
24 apparently, my words, apparently didn't want the zoning

1 change. Right?

2 MR. BUSBY: Correct, Your Honor.

3 THE COURT: So Comstock Residents
4 Association, is it a homeowners association or is it the
5 residents association? They group together and --

6 MR. BUSBY: Correct.

7 THE COURT: And they opposed the zoning
8 change. So they want -- the Comstock residents want to
9 know of any and all discussions that County commissioners
10 wanted to have or did have allegedly, with the CEO or
11 members of Comstock Mining; correct?

12 MR. BUSBY: Yes, or other parties related to
13 the zoning change that was sought.

14 THE COURT: And this included the device of
15 the commissioners.

16 MR. BUSBY: Correct.

17 THE COURT: Which is personal.

18 MR. BUSBY: Yes, Your Honor.

19 THE COURT: Okay. What difference is that,
20 Mr. Rye, from the Gibbons when the Supreme Court said you
21 get a fraction of it. Do you see what I'm saying? What
22 -- do you oppose the fraction of them or all of -- I
23 don't mean all of the discussions. I don't care whether
24 the commissioners talking to their kid, "I'll pick you up

1 at 3:00 o'clock after school." I don't care about that,
2 of course.

3 But if it boils down to -- if the issue boils
4 down to the residents want to know about discussions the
5 County commissioners had, and I use plural, with members
6 or Comstock Mining or the CEO, why is there -- I
7 shouldn't say why is there opposition. How onerous is
8 that in your mind? Or why is that -- why is that not
9 covered by the Public Records Act?

10 MR. RYE: Well, why is it not covered by the
11 Public Records Act, we believe, is because those records
12 are not necessarily in the custody or control of the
13 County commissioners or the employees with whom the
14 request is made.

15 THE COURT: Okay. So --

16 MR. RYE: That's --

17 THE COURT: -- in a sense --

18 MR. RYE: -- then the difference with Gibbons
19 is that was a State computer --

20 THE COURT: Okay.

21 MR. RYE: -- they accessed it.

22 THE COURT: I understand.

23 MR. RYE: Same thing with PERS. State
24 computer, they accessed it. Now, and we, the County's

1 position is that it would be -- it is more appropriate
2 for the legislature to address that issue rather than
3 trying to include it in the Public Records Act where we
4 don't think it's included. And the provision that
5 Mr. Busby cites, I have a little different reading of it
6 where it says private entities in provision of public
7 services. I view that as a third-party contractor like
8 the phone provider for the Clark County Jail. Just
9 because you use a third-party provider does not mean
10 those records aren't public records. You can get to
11 them.

12 I think -- I don't think that addresses a
13 county commissioner's private e-mail or private telephone
14 records. The Court can interpret that how you see fit.
15 The second question the Court asked is --

16 THE COURT: And by the way, excuse me for
17 interrupting because I have to say it. Isn't one of the
18 presidential candidates going through this very same
19 issue as we speak? I had to say it.

20 MR. RYE: Yeah. Yes.

21 THE COURT: The server or, you know, I'm not
22 technologically advanced. The server versus private, and
23 Secretary Clinton says, "No."

24 MR. RYE: Yeah, I think it's a similar thing.

1 THE COURT: Yeah.

2 MR. RYE: I don't -- although I think that
3 one difference -- and yeah, I think it's similar
4 probably. I don't know all of the details of that, but
5 it sounds over the news like it's similar.

6 THE COURT: Should I follow that case all the
7 way through the campaign? Please. But it's -- I
8 understand it's serious. I do.

9 MR. RYE: It is serious.

10 THE COURT: Because if you say -- if you say
11 that a County Commissioner cannot talk to the CEO of
12 Comstock Mining prior to a vote, for example, on the
13 zoning change, I think that's a major issue or members of
14 the County commissioners privately discussing on their
15 personal device, which could be public --

16 MR. RYE: Right.

17 THE COURT: -- with the CEO of the Comstock
18 Mining.

19 MR. RYE: Right. And the second question he
20 asks is how burdensome is that? And mentioned early on,
21 one of the concerns for the County is the scope in this
22 request. But not only this request, but what we do from
23 here on forward. If the Court says all private devices,
24 you have to search them for public records, that, we

1 believe, is not doable.

2 And the example we give is Commissioner
3 Hastings in this particular case, who had a job, did
4 things with a work phone, perhaps with a work-related
5 computer, those are issues that we think are addressed by
6 Brightline rules that you can't use private devices do
7 conduct County business or things like that which are
8 better left to the legislature. So the County is
9 concerned by a potential burden. I know that's not going
10 to drive the Court's decision, but there are some burdens
11 that we don't think we could address if every private
12 device was deemed searchable for public records requests.

13 THE COURT: Am I incorrect in regards to
14 Secretary Clinton as far as the analogy?

15 MR. BUSBY: I think it's a very apt analogy,
16 Your Honor, based on my limited understanding of that
17 case. It was a Secretary of State. She's clearly a
18 public official. She was conducting the public's
19 business through an e-mail address that she maintained on
20 a private server with a private account. It's my
21 understanding that because those records related to her
22 service to the nation as Secretary of State that they
23 were public records, that they shouldn't have been
24 maintained on a private account. There were some

1 confidentiality issues, national security issues involved
2 in that case as well. Of course that's not the issue
3 here, but the underlying problem is the same.

4 When you choose, as a public official, to
5 engage in the public's business using your personal
6 communication device, then because of these preexisting
7 public records law, you're the one exposing yourself to
8 the risk that someone may seek those records someday and
9 you, because you're subject to public disclosure laws,
10 will be forced to comply regardless of the difficulty of
11 doing so.

12 It's no different than an employee of a
13 company who is conducting business on behalf of that
14 company. The employer clearly has the right to know what
15 the employee is doing on the employer's behalf. Public
16 servants who are subject to the public records law are no
17 different. They are employees of the public and are
18 therefore subject to disclosure such that we know what
19 they're doing. So we don't think that, you know, using a
20 private e-mail account to or a private device to conduct
21 public business, number one, is an excuse for
22 non-compliance with the public records request or should
23 be because of the extreme moral hazard that that would
24 create where every public official from here on out would

1 refuse to use a state-provided e-mail address to conduct
2 public business because they know that if they used a
3 private address, it would all be completely confidential
4 forever.

5 THE COURT: Well, it would be a Brightline
6 though. Don't use the public device for public --
7 excuse me, other than public purposes. Don't use the
8 public device for personal business.

9 MR. BUSBY: Well, I think that in the Gibbons
10 case, Your Honor, the Court addressed that issue pretty
11 squarely. It said, you know, there are circumstances in
12 which public officials will send an e-mail to their
13 spouse, significant other, saying, "Pick up the kids at
14 3:00 o'clock." In that case, it's not a public record or
15 in the case where you're communicating with your
16 attorney, if you maintain a privilege log, if you have an
17 exception under the statute or other Court-created
18 exception to the public records rule, those aren't
19 subject to disclosure.

20 But in this case, we don't have any of that.
21 We have knowledge of existence of the use of public or
22 the use of personal e-mail accounts, devices to conduct
23 public business. But other than that, it's, you know,
24 the content of those communications, we have no idea what

1 they are. We have no idea how many there are, etcetera.

2 THE COURT: Is there a lawsuit by the
3 Comstock Residents Association against either County
4 commissioners or against Comstock Mining?

5 MR. BUSBY: Yes, Your Honor. That suit is
6 currently pending before the Nevada Supreme Court on
7 review. It's a case where Comstock Residents Association
8 is contesting the decision to change the zone to allow
9 Comstock Mining to conduct its --

10 THE COURT: And is that here at the Third
11 Judicial District?

12 MR. BUSBY: It's at the Supreme Court, Your
13 Honor.

14 MR. RYE: The Third Judicial District Court
15 decided in favor of the County. It was appealed by
16 Comstock Residents to the Supreme Court, and all of the
17 briefs have been submitted. It's before the Supreme
18 Court.

19 THE COURT: Remember when I came on early in
20 this. I think it was (inaudible) -- when I say early, in
21 my appearances, there was a companion case. There was
22 Judge Estes, Senior Judge Estes.

23 MR. RYE: Right.

24 THE COURT: Is that the case we're talking

1 about?

2 MR. RYE: That's the case.

3 THE COURT: That's the one up in the Supreme
4 Court?

5 MR. RYE: Yes, Your Honor.

6 THE COURT: It's interesting because, you
7 know, I'm 26 years on the bench. There are some cases
8 that you know no matter which way you go, it's going to
9 get appealed, and I'm not afraid of that. I have no
10 problems with that, but by the same token, when I start
11 thinking about that case, it's a Churchill County case;
12 correct?

13 MR. RYE: It's a Lyon County case.

14 THE COURT: Oh, it's a Lyon County case.

15 MR. RYE: Yes.

16 THE COURT: Just different -- what?
17 Different area? A different area?

18 MR. RYE: Same area.

19 THE COURT: Same area. Then why was this
20 brought and not joined into that one?

21 MR. RYE: It was joined -- tried to be joined
22 initially, and Judge Estes denied that request.

23 THE COURT: Denied the joinder.

24 MR. RYE: Denied the joinder, and so Comstock

1 residents filed a separate action, and that case was
2 assigned to you.

3 THE COURT: How long has that case, Judge
4 Estes's case, if you will, how long has that case been in
5 the Supreme Court? Does anybody know?

6 MR. RYE: Probably close to a year. I
7 don't --

8 MR. BUSBY: A year. Over a year maybe.

9 THE COURT: And I'm not going to play a game
10 by waiting, but by the same token, it might conclude
11 everything. I don't know. I respect Judge Estes. I
12 respect the Supreme Court. I understand my duty and
13 responsibility. I'm more of a person that, you know, my
14 gut feeling is I make a call, and if it gets appealed, so
15 be it. But I don't want to cost people money and fees
16 and time and everything else. Have you -- irrespective
17 of that case, and you're involved in it, right, Mr. Rye?

18 MR. RYE: Yes, Your Honor.

19 THE COURT: Irrespective of Judge Estes's
20 case, have you two discussed limiting the request to
21 specific matters, or do you think that if you do allow
22 for discussions with the CEO saying that you'll just give
23 up that other case? Do you see what I mean? In a sense,
24 I'm talking tactics. I don't mean to put you on the

1 spot. Obviously, I'm thinking out loud like we're at a
2 roundtable discussing whether or not to follow a lawsuit
3 or how to proceed. And you don't have to answer it. But
4 have you discussed limiting the scope, both of you?

5 MR. BUSBY: If I may, Your Honor. The denial
6 of the request was pretty categorical. It was, you know,
7 as the County, we're not responsible for personal
8 devices. We have no control over these, what you're
9 seeking. So the answer to your question is no, Your
10 Honor.

11 THE COURT: Okay. What would be the request?
12 You asked me yesterday on the phone. What would you
13 bring forward to convince me to rule in your favor if you
14 had a witness or evidence?

15 MR. BUSBY: Your Honor, respectfully, we
16 don't really think that an evidentiary hearing at this
17 point in the proceedings is going to change the status of
18 the dispute because the issue was over Lyon County saying
19 these aren't public records. So we're asking the Court
20 to say, "Yes, they are." And we don't think any amount
21 of evidence we could produce or Mr. Rye would produce
22 could change that fact. It may be if the Court ordered
23 Commissioner Hastings to produce -- it says yes, these
24 are public records. You need to produce them.

1 If Commissioner Hastings comes back and says,
2 "Look. I left that job. I no longer have control.
3 Here's some evidence showing that I tried to get ahold of
4 that communication device or the records. I couldn't do
5 it." That would be a separate issue, and we could
6 evaluate how to proceed based on that response. But
7 until the Court says these are public records, we don't
8 really see the point of taking any evidence yet.

9 THE COURT: How about you, Mr. Rye?

10 MR. RYE: Your Honor, I believe that the
11 County commissioners may provide some insight as to what
12 their communications would be and what was done on the
13 private devices, which could affect your decision. And
14 also, Commissioner Hastings, with his work situation,
15 that sort of thing. And that's one of the dilemmas is,
16 you know, is it every private device? And if it's not,
17 how do you get to that point? And so, you know, part of
18 the evidence we would present perhaps would be some of
19 those technological issues.

20 It doesn't make sense to me that you can say
21 those are all public records, but one elected official
22 can say, "Well, I was doing it on my wife's device, and
23 so I don't have any ability to get it." And how do you
24 distinguish between that kind of thing? And it seems to

1 me that you run into a lot of problems that just -- that
2 tend to create issues that are not easily resolved with a
3 court decision. And that's one of the -- and so the
4 evidence would include some of those things, you know,
5 were other people using the e-mail? How do I know that
6 you sent this one? And, you know, I'm sure there's names
7 and things on them, so that may not be an issue, but I
8 honestly don't know the answer to all of those questions.

9 THE COURT: Am I correct -- this is
10 interesting. I was on the bench in Reno District Court
11 from 1991 through 2012. And this law came about what,
12 what year? '6, '7, '8? 2000 -- I'm going to guess
13 around 2008. Am I right?

14 MR. BUSBY: Your Honor, based on my -- the
15 statutory history goes back to the 1970s.

16 THE COURT: Oh, really?

17 MR. BUSBY: But I have -- there have been
18 pretty radical changes in the law over time. I'm looking
19 at the annotations for public records. The definition
20 section existed in 1977. It looks like in 2007, the law
21 changed pretty radically and then again in 2011, so I
22 believe that would be the change you're referring to.

23 THE COURT: Okay. All right. Actually,
24 where I was going is because I'm an attorney, because

1 district court judges are attorneys, they're judges, I
2 I'm thinking that, my God. Personally, I wouldn't want
3 anything on my cell phone. And I said this -- I said
4 this before. When I took the bench, and you've got to
5 remember back in '91, I took the bench because I didn't
6 want any more phone calls. Interesting. But when I say
7 "interesting," then I got a cell phone, so you want to
8 know what's going on as far as family and that type of
9 thing. But where I'm going is, is the judiciary immune
10 from this -- from the Public Records Act? Of course
11 attorney/client communication is, but is the judiciary?

12 We had a meeting, for example, we had a --
13 we would have a judge's meeting once a month where all 15
14 of us or 14 or 13 or 12, you know, men would have a
15 meeting. And my goodness sakes. The discussions at
16 those meetings I hope were not subject to the public
17 records then. So I'm asking -- it's not rhetorical, but
18 I'm asking the question. Is the judiciary subject to the
19 Public Records Act and judiciary -- judges' devices?

20 MR. RYE: Well, so --

21 MR. BUSBY: Go ahead.

22 MR. RYE: That is -- I think if you read the
23 language, you could certainly claim that the judiciary is
24 subject to it because it says that, "Governmental entity

1 means an elected or appointed officer of this State,"
2 which a judge is for sure, or a "department, division,
3 authority or other unit of government of this State
4 including without limitation." It goes on. So there's a
5 good argument that it is.

6 The issue, I think, becomes with the
7 judiciary, which is not spelled out, is a separations of
8 power argument that you may have that the County
9 commissioners don't get the benefit of. And so I think
10 there are definitely questions as to whether the
11 judiciary would apply. But that is a concern, and in the
12 plain reading of the statute, it would make court staff
13 and others subject to that same request on private cell
14 devices. And we would view that as true in this case,
15 that we didn't get to that point, but when they asked for
16 County staff communications with Comstock Mining, we
17 would think that would include court staff. Does it? I
18 don't know.

19 THE COURT: Are there any other similar
20 issues, or is it all the main issue of discussion of the
21 County commissioners or commissioner on their personal
22 devices with members of Comstock? Any other issues like
23 that? I mean, are we talking about staff? Sure. If
24 you're -- I'm answering my own question. Sure, if staff

1 is talking to Comstock Mining.

2 MR. BUSBY: Your Honor, in this case, the
3 request for the writ is more particularized, and it's
4 based on the facts and circumstances that we encountered
5 in this case, which is number one, we knew that the
6 County commissioners were using their personal accounts
7 and devices to conduct public business, and we know that
8 because of the contents of other responses we got, such
9 as communications with County staff that were using
10 County e-mail addresses.

11 There are some of those e-mails that contain
12 the private addresses of the commissioners as they were
13 included on the website. So in response to the public
14 records request, we got a lot of information, but it was
15 very clear that there was a big chunk of it that was
16 missing. And the denial that we got from the County
17 said, you know, pretty plainly, you know, these were
18 personal devices, personal accounts. Therefore, they're
19 not subject to disclosure.

20 And so that's really the thrust of what we're
21 trying to get the Court to do is, you know, a search of
22 these accounts, a good-faith search of these accounts and
23 devices such that we can have the full picture that we
24 sought in the original request. So it wouldn't just be

1 limited to, you know, a particular commissioner's
2 communications with the CEO of Comstock. It would be any
3 communications that they had that were related to the
4 issue that they were dealing with is should we, you know,
5 approve the zoning change? And, you know, those
6 communications could be with County staff. They could be
7 with Comstock Mining representatives. That seems the
8 most likely, you know, people that they were talking to,
9 members of the community. We believe otherwise, they
10 would have been subject to disclosure under the rule.

11 THE COURT: I know they're in the brief, but
12 give me -- cite me Las Vegas Metropolitan versus
13 Blackjack. Would you give me the cite, please?

14 MR. BUSBY: Oh, yes, Your Honor.

15 THE COURT: I don't have the briefs with me
16 on the bench, so I want to write them down in my notes
17 because I am putting things in context.

18 MR. BUSBY: Your Honor, it is 303 P 3D 608.

19 THE COURT: 608?

20 MR. BUSBY: Correct.

21 THE COURT: And Pierce County, the Washington
22 case?

23 MR. BUSBY: Rolling through, Your Honor.

24 Just a moment. That is 183, Wn.2d --

1 THE COURT: Wn.?

2 MR. BUSBY: Yes. 863. And I'm sorry, Your
3 Honor. I'll give you the Pacific Reporter as well. 357
4 P.3d 45.

5 THE COURT: 45?

6 MR. BUSBY: Correct, Your Honor.

7 THE COURT: And the PERS case? PERS is
8 Public Employees Retirement System, right?

9 MR. BUSBY: Yes, Your Honor. That is 313
10 P.3d 221.

11 THE COURT: And Gibbons?

12 MR. BUSBY: That is 266 P.3d 623.

13 THE COURT: There was a California case that
14 was cited. Mr. Dragon (pho.) is helping me, working with
15 me on this, and there's a California case out there.

16 MR. RYE: Is it the City of San Jose case?

17 THE COURT: Is it? Yeah. Cite that for me.

18 MR. BUSBY: One minute, Your Honor.

19 MR. RYE: I have 225 Cal.App.4th 75.

20 MR. BUSBY: That's what I have as well, Your
21 Honor.

22 MR. RYE: And that case is on appeal to the
23 California Supreme Court.

24 THE COURT: Okay. You can see an evolution,

1 interesting, and been here before. This ain't my first
2 rodeo, so don't worry about that as far as deciding a
3 case. But I've been working on the bench, you know, 26
4 years, three or four times and, you know, just like you
5 two. "Okay. Give me what you got. I'll make a call."
6 You know, because I know it's going to the Supreme Court
7 if you don't like it.

8 And I'm saying it because -- but I have to
9 say in all sincerity, I'm taking it serious and I want to
10 make a good call because I think -- Judge Hardesty spoke
11 at my retirement. He was -- my retirement dinner, and he
12 was the keynote speaker, if you will. And I know 34,000
13 cases, I was appealed 341 times and I was affirmed 334
14 times, so I'm proud of that. And he said -- he said in
15 one of the cases that I was overturned was his law
16 firm's. He said that to the audience. Okay. Anything
17 else?

18 MR. BUSBY: I have nothing further, Your
19 Honor.

20 MR. RYE: No, Your Honor.

21 THE COURT: Pleasant drive. Beautiful. It's
22 green. It's so beautifully green.

23 MR. BUSBY: I apologize for my hair, Your
24 Honor. I have a convertible. I very much enjoyed the

1 drive down today.

2 THE COURT: Oh, that's -- yeah. Which way
3 did you come?

4 MR. BUSBY: Through Fernley from Reno.

5 THE COURT: Yeah, see, I came through Dayton
6 this time because I just love the drive from Reno to
7 Carson. It's just absolutely amazing. And then coming
8 in this way, but going back, I might go back. You say
9 it's green?

10 MR. BUSBY: Quite green, Your Honor.

11 THE COURT: Even from Silver Springs to
12 Fernley?

13 MR. BUSBY: Yes.

14 THE COURT: Really?

15 MR. BUSBY: It looks like Montana.

16 THE COURT: I'll have to do it then. Well,
17 thank you very much, and we'll get a written decision to
18 you.

19 MR. BUSBY: Thank you, Your Honor.

20 THE COURT: Thank you.

21 (The proceedings concluded at 2:26 p.m.)

22 -o0o-

1 STATE OF NEVADA)

2)

3 CARSON CITY)

4

5 I, Nicole Hansen, Transcriptionist for the
6 Third Judicial District Court of the State of Nevada, in
7 and for Lyon County, do hereby certify:

8 That I took stenotype notes of the
9 proceedings entitled herein from a JAVS CD, and
10 thereafter transcribed the same into typewriting as
11 herein appears;

12 That the foregoing transcript is a full, true
13 and correct transcription of my stenotype notes of said
14 proceedings.

15 DATED: At Carson City, Nevada, this 21st day
16 of July, 2016.

Nicole J. Alexander

17

Nicole Hansen, Transcriptionist.

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FILED

2016 JUL -1 PM 3:55

TANYA SCEIRINE
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

DeAnn Peoples DEPUTY

Case No. 14-CV-01304

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

Luke Andrew Busby, Ltd.
Nevada State Bar No. 10319
216 East Liberty St.
Reno, NV 89501
775-453-0112
luke@lukeandrewbusbyltd.com
Attorney for the Petitioners

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

COMSTOCK RESIDENTS ASSOCIATION,
JOE McCARTHY

Petitioners,

v.

LYON COUNTY BOARD OF
COMMISSIONERS; COMSTOCK
MINING INCORPORATED

Respondents,

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

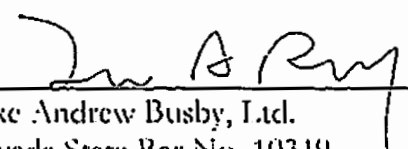
Notice is hereby given that the Comstock Residents Association and Joe McCarthy,
Petitioners above named, hereby appeal to the Supreme Court of Nevada from the following
final judgment and orders entered in this action:

1. Order Denying Petition, entered on June 14, 2016, attached hereto as Exhibit A.

1 Dated: July 1, 2016.

2 Respectfully submitted.

3
4
5 By


Luke Andrew Busby, Ltd.

Nevada State Bar No. 10319

216 East Liberty St.

Reno, NV 89501

775-453-0112

luke@lukeandrewbusbyltd.com

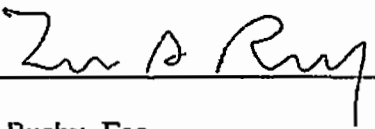
Attorney for the Petitioners

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Notice of Appeal was served on the parties by personal service and/or mailing a copy thereof on the 1st of July, 2016, by United States mail, postage prepaid to:

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



Luke Busby, Esq.

Exhibit A

Exhibit A

JA 244

1 Case No. 14-CV-01304
2 Dept. IV

FILED

2016 JUN 14 AM 9:35

TANYA SCEIRINE
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

Victoria Tovar DEPUTY

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

9 COMSTOCK RESIDENT ASSOCIATION
10 AND JOE McCARTHY,

ORDER DENYING
PETITION

11 Petitioners,

12 vs.

13 LYON COUNTY BOARD OF
14 COMMISSIONERS et al.

15 Defendant.
16

17 On November 30, 2015, the Petitioner, Comstock Residents Association ("CRA"), filed a Writ of
18 Mandamus requesting this Court to compel Lyon County Commissioners to be in compliance with the
19 provisions of Nevada's Public Records Act ("NPRA"). On January 4, 2016, Respondents, Lyon County,
20 filed a Response. On April 14, 2016, the Court held a Hearing on the matter and took the issue under
21 submission

22 FACTUAL BACKGROUND

23 CRA brings this action to compel the Lyon County Board of County Commissioners to comply
24 with their nondiscretionary duty under the NPRA in response to a request for all records related to
25 Comstock Mining Inc's. ("CMI") application with Lyon County. Petitioner contends Lyon County
26 refuses to produce responsive public records created or received in the course of their public duties
27 located on individual commissioner's private electronic devices.
28

1 CMI filed an application with Lyon County to change land use designations zoning within Silver
2 City from more urban to more rural, to allow mining exploration. The County held a public meeting and
3 heard hours of testimony before granting the application.

4 CRA contends during the County's review of CMI's application, the commissioners and other
5 members of Lyon County communicated with CMI representatives through their personal devices.

6 CMI also contends that Lyon County Commissioner, Vita Keller, communicated with CMI using
7 her personal devices because the record is absent with regard to her last minute proposal during the
8 hearing. She has admitted that these conversations took place.

9 On February 11, 2014, Petitioners submitted to the Lyon County Board of County Commissions
10 and Lyon County staff, a request for all public records pursuant to the NPRA related to CMI's
11 Application for Master Plan Amendment and Zoning change. The request included disclosure of all
12 records of communication regarding CMI's application, to or from the Lyon County Commissioners and
13 CMI representatives, regardless of whether such communication occurred on devices owned by Lyon
14 County or personally by the Lyon County Commissioners.

15 Lyon County responded to the Petitioner's demand by disclosing all of the records relating to the
16 CMI application. Lyon County did not disclose private cell phone and e-mail records owned by the
17 commissioners. Lyon County explained the commissioners do not retain county issued cell phones.
18 Private cell phone and e-mail records, personally owned by the commissioners, are not maintained by
19 Lyon County.

20 It should be noted the request made by the Petitioners has language that includes the employees of
21 Lyon County, not just the Commissioners.

22
23 QUESTION PRESENTED

24 Should the Court compel the Lyon County commissioners to disclose their personal e-mail and
25 cell phone records to CRA relating to the CMI application?
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5 The Petitioners argue the NPRA applies to all "public records" regardless of the means of
6 creation. According to the Petitioners, the provisions of NRS § 239.010 requires a broad interpretation
7 that any elected official who uses his/her personal devices to conduct public business must disclose the
8 records created as "public records." The Petitioners cite to Nevada case law stating the Nevada Supreme
9 Court has instructed that all governmental entities public books and public records must remain open to
10 the public, unless "otherwise declared by law to be confidential." NRS 239.010. The purpose of this
11 statute is to promote a transparent governmental entity.

12 The Petitioners assert the NPRA defines a "governmental entity" as an elected or appointed
13 official of this State. NRS § 239.005. Thus the plain language of the NPRA defines "governmental
14 entity" to include elected officers of a political subsidiary. Id.

15 The Petitioners assert this is a straight forward interpretation of the statute. They argue Lyon
16 County's interpretation allows public officials to conduct public business on their personal devices,
17 thereby avoiding compliance with the statute. The Petitioners assert that the language of the statute
18 compels Lyon County Commissioners to disclose their personal cell phone and e-mail records. The
19 Petitioners state when a statute is plain and unambiguous, the Court must give the language its ordinary
20 meaning. Nevada State Democratic Party v. Nevada Republican Party, 256 P.3d 1, 4 (2011). The
21 Petitioners then contend the Court should disregard the Respondents claim that the administrators, or the
22 county office, do not possess such records. The Petitioners state the NPRA does not make any distinction
23 between an administrator's office records and the records of elected officials.

24 The Petitioners cite to other jurisdictions holdings that individual records are public records.

25 Lyon County makes the following arguments. The Respondents assert private e-mail and cell
26 phone records of elected officials are not "public records" because: (1) they are not "public records"
27 under the NRPA; (2) privacy interests weigh against disclosure; (3) practical limitations preclude the
28

1 Court from declaring all records "public records"; (4) the records are confidential under the deliberative
2 process privilege.

3 The Respondents stipulate that: NRS chapter 239 requires all books and "public records" of a
4 governmental entity be open for inspections; the provisions of the NPRA are designed to promote
5 governmental accountability; nondisclosure is the exception to the general rule; and elected officials fall
6 under the provisions of the NPRA. However, the Respondents state the issue is whether the specific
7 information requested is "public record."

8 The Respondents first argue private cell phone and email records are not "public records" under
9 the NPRA because: a) "public records" must be paid for with public money; b) the records sought are not
10 open to public inspection; c) the records are not in control of the Commissioners or County; d) the
11 communications are not official actions, and are not required by law to be public; and e) Nevada law does
12 not support that the requested documents be defined as "public records."

13 The Respondents argue the NPRA does not define "public record." The Respondents cite to the
14 Nevada Administrative Code which defined "public record" as "a record of a local governmental entity
15 that is created, received or kept in the performance of a duty and paid for with public money." However,
16 this definition was repealed in October of 2014. The Respondents argue at the time of the request it was
17 clear what a "public record" was. Further, private e-mails and cell phones of the Lyon County
18 Commissioners are not paid for with public money. Therefore, they are not "public records."

19 The Respondents state the Commissioners are entitled to rely on the law as it existed at the time.
20 Ruling in the alternative creates a burden on the government which does not exist.

21 The Respondents assert "public records" must be left open at all times for inspection by the
22 public. The Respondents argue private cell phone and/or e-mail records are not "public records" because
23 they are not on the books thus not open for inspection. The Respondents further claim that interpreting
24 the statute this way would require all "private" records of a government official to be subject to the
25 NPRA rendering an absurd result.

26 The Respondents cite to NRS § 239.010(4) which states an officer or employee who has legal
27 custody or control of a record shall not refuse to provide a copy. The Respondents claim the specific
28 information requested is not in the office's control, thus they are not required to produce that information.

1 The Respondents argue notes or any communication between the Commissioners with clients or
2 other parties do not fall under the provisions of NAC § 239.101. The statute states an office or
3 department of a local governmental entity is defined as an "office, department, board, commission,
4 committee, agency or any other subdivision of a local government entity where records and made
5 received or kept." NAC § 239.061. "Non-record materials" is any other documentation that does not
6 serve as the record of an official action of a local governmental entity. NAC § 239.051. The Respondents
7 argue private e-mail and cell phone records cannot be records because holding that they are render any
8 notes or communication of any Lyon County employee as a "public record."

9 In support of this claim, the Respondents cite to a string of Nevada cases, which does not answer
10 the question of private e-mail accounts or private cell phones. They state the Petitioners are asking the
11 Court to do something that has not been done in Nevada before. The Respondents claim such a question
12 should be left to the legislature to decide.

13 The Respondents make their sixth argument that privacy interest weigh against disclosure. They
14 cite to NRS § 241.015 which states the Nevada Open Meeting Law permits private conversation about
15 county business by less than a majority of its members. They assert this could have a chilling effect on
16 citizens who wish to exercise their constitutional right and talk to their representatives.

17 Finally, the Respondents claim the records are confidential pursuant to the deliberative process
18 privilege. DR Partners v. Bd. of Cty. Comm'rs of Clark Cty., 116 Nev. 616, 619, 6 P.3d 465, 467 (2000).

20 CONCLUSIONS OF LAW AND FACT

21 The Court agrees with the Respondent's arguments regarding this matter. The Court concludes
22 that the Petitioners are asking for records which are not paid for with public money. Specifically they are
23 requesting the Lyon County Commissioner's private cell phone and e-mail records. These record are
24 created by a third party phone and internet provider paid for by the Commissioner's private accounts.
25 Thus, the records in question where not paid for with public money which tends to show that these record
26 are not public.

27 Further, the Court agrees the records sought are not open to public inspection. Any member of the
28 public could inspect the records at the County Commissioner's office. However, not even the County

1 Commissioner employees themselves can inspect the Commissioner's personal records. In addition the
2 records sought are not in control of the public agencies.

3 The Court also agrees the records sought are not official actions of the County. Thus the
4 Petitioners are seeking all communications between the Lyon County Commissioner's and members of
5 the public. Such a request is beyond the provisions of the NPRC.

6 Finally, The Court does not believe it has authority to order personal information of the Lyon
7 County Commissioners be disclosed to the Petitioners. There are multiple privacy concerns which the
8 Court is concerned with. Such an action must be clearly supported by law which the Court finds it is not.
9 If the legislature intended the provisions of the NPRC to have such reaching consequences, then the
10 Court concludes the Legislature could have easily included language supporting such an assertion.

11 The Court is aware that this holding may cause public employees to skirt the provisions of the
12 NPRC by conducting business on their private devices. Such a concern is for the Legislature to address.

13
14 Therefore, good cause appearing, the Petitioner's Petition is DENIED

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16 Dated this 10th day of June, 2016.

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20 SENIOR DISTRICT COURT JUDGE
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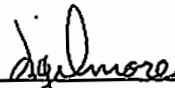
1 CERTIFICATE OF SERVICE

2 I hereby certify that I, Debbie Gilmore, am an employee of the Third Judicial District Court,
3 and that on this date pursuant to NRCP 5(b), I mailed at Yerington, Nevada, a true copy of the foregoing
4 document addressed to:

5
6 Lyon County District Attorney's Office
7 31 S. Main St.
8 Yerington, NV 89447

9 John Marshall, Esq.
10 570 Marsh Ave.
11 Reno, NV 89509

12 DATED: This 14th day of June, 2016.

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14 Debbie Gilmore
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24
25
26
27
28

1 Luke Busby, Esq.
2 Nevada Bar No. 10319
3 216 East Liberty St.
4 Reno, NV 89501
5 775-453-0112
6 luke@lukeandrewbusbyltd.com
7 *Attorney for Appellants Comstock*
8 *Residents Association & Joe McCarthy*

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Nov 07 2016 08:32 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

9 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

10 COMSTOCK RESIDENTS
11 ASSOCIATION, JOE MCCARTHY,

12 Appellants,

CASE NO. 70738

13
14 vs.

15 LYON COUNTY BOARD OF
16 COMMISSIONERS,
17

18 Defendant-Respondent,
19 _____/

20
21 **JOINT APPENDIX**
22

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1 By: Stephen B. Rye Dated: 11-4-2016

2 Stephen B. Rye
3 Nevada State Bar No. 5761
4 District Attorney
5 31 S. Main Street
6 Yerington, NV 89447
7 srye@lyon-county.org

8 By: Luke A. Busby Dated: 11-4-2016

9 Luke Busby
10 Nevada State Bar No. 10319
11 216 East Liberty St.
12 Reno, NV 89501
13 775-453-0112
14 luke@lukeandrewbusbyltd.com
15 Attorney for the Appellants
16
17
18
19
20
21
22
23
24
25
26
27
28