

BEFORE THE SUPREME COURT OF THE STATE OF NEVADA

NEVADA STATE BOARD OF)	Electronically Filed
ARCHITECTURE, INTERIOR DESIGN)	Oct 08 2018 08:11 a.m.
AND RESIDENTIAL DESIGN,)	Elizabeth A. Brown
)	Clerk of Supreme Court
Petitioner,)	
)	Case No. 76792
vs.)	
)	8 th Judicial District Court
EIGHTH JUDICIAL DISTRICT COURT)	Case No. A-17-764562-J
OF THE STATE OF NEVADA,)	
DEPARTMENT 25, HONORABLE)	
KATHLEEN DELANEY,)	
)	
Respondent)	
)	
and)	
)	
DENNIS RUSK,)	
)	
Real Party in Interest.)	
-----)	

EMERGENCY MOTION UNDER NRAP 27(e) TO STAY THE DISTRICT
COURT'S OCTOBER 5, 2018 ORDER PENDING DECISION ON
PETITIONER'S PETITION FOR WRIT OF PROHIBITION

RELIEF REQUESTED BY OCTOBER 12, 2018

Submitted by:
Louis Ling, Nevada Bar No. 3101
933 Gear Street
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(775) 233-9099
Attorney for Petitioner

Petitioner Nevada State Board of Architecture, Interior Design and Residential Design (hereinafter “Board”), by and through its attorney Louis Ling, moves this Court for an emergency stay of the order of the Eighth Judicial District Court, Department 25, which needs to be issued by October 12, 2018 because the Board has been ordered to produce the Record of Proceedings in the matter no later than October 15, 2018. By its Order, the District Court has ordered the parties to commence substantive proceedings in the petition for judicial review proceedings over which the District Court does not have subject matter jurisdiction. This emergency motion is made and based upon the NRAP 27(e) Certificate following, the pleadings and papers on file herein, and the following points and authorities.

I. POINTS AND AUTHORITIES

A. COURSE OF PROCEEDINGS PERTINENT TO THE EMERGENCY MOTION

In its Petition for Writ of Prohibition, the Board set out the complete pertinent procedural history of the matter. For the purposes of the instant emergency motion, only the following proceedings are pertinent:

On October 25, 2017, the Board conducted a remand proceeding as ordered by the Eighth Judicial District Court, Department 30 by which the Board heard and ruled upon Mr. Rusk’s Petition/Motion. At the conclusion of the proceeding, the

Board made and passed unanimously a motion denying Mr. Rusk's requested relief.

The motion and the brief discussion that ensued follows:

MR. WAUGH [Board Member]: I'll make a motion. After reviewing the previous proceedings, previous evidence, and after listening to both sides, I move that the Board uphold the September 27th Order and that Cases Nos. 08-080R and 11 – oh doesn't –

MS. LONG [Deputy Attorney General]: That's it.

MR. WAUGH: Okay. So I'll end. Do you want me to restate it correctly then?

MS. LONG: That's fine.

MR. ERNY: Second.

MR. MICKEY: Any discussion, further discussion on the motion? I'll call for a vote. All those in favor? (All members join in ayes.)

MR. MICKEY: Anybody opposed? Motion carries. *With that, I believe that the next step is that we must draw up an order. So he if – I – I can't if you would get that please and we could go ahead and get the order drafted.* Thank you.

MR. NERSESIAN [Mr. Rusk's Counsel]: Thank you.

MR. MICKEY: And we will adjourn.

MR. NERSESIAN: *So I will get an order and nothing is effective and no time frames are running until I get the order?*

MS. LONG: *That's correct.*

MR. NERSESIAN: Okay. Can I get a copy of the transcript please? Thank you. Thank you all. (Emphasis supplied.)¹

On November 9, 2017 – only 15 days after the Board's proceeding and without waiting for the written order that he knew was coming – Mr. Rusk filed the

¹ A copy of the pages 66-69 of the transcript of the proceedings on October 25, 2017 is contained in Petitioner's Appendix at APPX1. The above discussion can be found on page 67, line 20 through page 68, line 22.

instant Petition for Judicial Review in the Eighth Judicial District Court (Case No. A-17-764562-J)).²

On December 1, 2017 – 22 days *after* Mr. Rusk filed his Petition for Judicial Review – the Board issued its written Order on Remand. The Board Order on Remand was served on the parties on December 1, 2017.³

On August 9, 2018, the District Court issued its Order Regarding Respondent's Motion to Dismiss and Motion to Strike (8th JD Order). The 8th JD Order ruled that the district court had subject matter jurisdiction in the matter.⁴

On October 5, 2018, the District Court issued its Order Regarding Respondent's Motion to Stay and Petitioners' Motion To [sic] For Default Or Alternative Relief (Order Denying Stay), denying the Board's motion to stay its proceedings until this Court could decide the Board's Petition for Writ of Prohibition.⁵ By the Order Denying Stay, the Board was ordered to produce the Record of Proceedings by October 15, 2018 so that briefing could be scheduled.

² A copy of the Petition for Judicial Review is contained in Petitioner's Appendix at APPX2 – APPX4.

³ A copy of the Board Order on Remand is contained in Petitioner's Appendix at APPX5 – APPX11.

⁴ A copy of the 8th JD Order is contained in Petitioner's Appendix at APPX12 – APPX14.

⁵ A copy of the Order Denying Stay is attached hereto as Attachment 1.

B. STANDARD OF REVIEW

NRAP 8(c) provides that in deciding whether to grant a stay, this Court will consider the following factors:

(1) Whether the object of the appeal or writ petition will be defeated if the stay of injunction is denied; (2) whether appellant/petitioner will suffer irreparable or serious injury if the stay or injunction is denied; (3) whether respondent real party in interest will suffer irreparable or serious injury if the stay or injunction is granted; and (4) whether appellant/petitioner is likely to prevail on the merits in the appeal or writ petition.

Where a petition for judicial review matter presents the issue of a district court's lack of subject matter jurisdiction, the Supreme Court will give that case immediate consideration and a petition seeking a writ related thereto is the proper means. *Board of Review v. Second Judicial District Court of Nevada*, 133 Nev. ___, ___, 396 P.3d 795, 797 (2017). The failure by a party to follow the statutory requisites for the filing of a petition for judicial review deprives the district court of subject matter jurisdiction to hear the petition and the issuance of a writ of prohibition directing the district court to dismiss the matter is required. *Board of Review*, 133 Nev. at ___, 396 P.3d at 797. If a district court lacks subject matter jurisdiction, its rulings and actions are void. *Landreth v. Malik*, 127 Nev. 175, 180, 251 P.3d 163, 166 (2011).

C. LEGAL ARGUMENT

Per NRS 233B.130(2)(d), a petition for judicial review ***must*** “be filed within 30 days ***after service of the final decision of the agency.***” (Emphasis supplied.) For purposes of triggering the timing for filing of a petition for judicial review, the “final decision” of an agency is its written order, not its oral pronouncement at the hearing of the matter. *Department of Commerce v. Hyt*, 96 Nev. 494, 497, 611 P.2d 1096, 1097 (1980). The provisions of NRS 233B.130(2) are mandatory and jurisdictional. *Liberty Mutual v. Thomasson*, 130 Nev. ____, ____, 317 P.3d 831, 833 (2014); *Washoe County v. Otto*, 128 Nev. 424, 434-5, 282 P.3d 719, 727 (2012). “[T]o invoke a district court’s jurisdiction to consider a petition for judicial review, ***the petitioner must strictly comply*** with the APA’s procedural requirements.” (Emphasis supplied.) *Otto*, 128 Nev. at 432, 282 P.3d at 725. NRS 233B.130(2)(c) is a mandatory jurisdictional requirement, and noncompliance with the jurisdictional requirements in NRS 233B.130(2) “***is grounds for dismissal.***” (Emphasis supplied.) *Liberty Mutual v. Thomasson*, 130 Nev. at ____, 317 P.3d at 834.

This Court has six times found that the failure by a party in a petition for judicial review matter to strictly comply with statutory filing requisites deprived district courts of subject matter jurisdiction as follows:

(a) Failure to name or serve the claimant in the initial petition for judicial review. *Board of Review*, 133 Nev. at ____, 396 P.3d at 796.

(b) Filing the petition for judicial review in the incorrect district court. *Thomasson*, 130 Nev. at ____, 317 P.3d at 832; *Caruso v. Nevada Employment Security Department*, 103 Nev. 75, 734 P.2d 224 (1987); *Scott v. Nevada Employment Security Department*, 70 Nev. 555, 557, 278 P.2d 602 (1954).

(c) Failure to name all parties of record in the initial petition for judicial review. *Otto*, 128 Nev. at 426, 282 P.3d at 721.

(d) Failure to timely file the initial petition for judicial review, even where the petitioner was *in proper person*. *Kame v. Employment Security Department*, 105 Nev. 22, 23, 769 P.2d 66 (1989).

In each of the above six cases, the petitioners seeking judicial review believed that they had substantive and important grounds by which to challenge the administrative agency's rulings, and in each case, this Court held that each petitioners' failures to strictly comply with the statutory requisites in the initial filing by the petitioners deprived the respective district courts of subject matter jurisdiction. Similarly, Mr. Rusk's instant petition for judicial review is deficient and must be dismissed as a matter of law.

Put as plainly as possible, there is no petition for judicial review before the District Court of the Board's written Order on Remand. The Order on Remand was issued on December 1, 2017, so a petition for judicial review that would satisfy the timing requisite of NRS 233B.130(2)(d) must have been filed by January 2, 2018. No such petition for judicial was filed by January 2, 2018 or ever thereafter. Per the six cases discussed above, there was and is no timely filed petition for judicial review pursuant to NRS 233B.130(2)(d) that could confer subject matter jurisdiction on the District Court.

It is true that Mr. Rusk filed a petition for judicial review from the Board's oral motion on November 9, 2017, approximately three weeks *before* the Board issued its written Order on Remand.⁶ By his petition for judicial review he sought review and reversal of the decision that the Board made "on October 25, 2017 and *orally determining*" Mr. Rusk's Petition/Motion.⁷ Mr. Rusk acknowledged "that a written order would be provided," but that "*the oral determination remains made, though not documented,*" and so he was seeking judicial review thereof at that time.⁸ Mr. Rusk persisted in arguing that he was seeking judicial review of the Board's oral motion before Department 25 in the instant matter.

⁶ See Petitioner's Appendix, APPX 2-4.

⁷ Petitioner's Appendix, APPX 2, lines 19-24.

⁸ Petitioner's Appendix, APPX 2, lines 25-28.

Mr. Rusk's seeking review of the Board's oral pronouncement is wrong per this Court's holding in *Department of Commerce v. Hyt*, 96 Nev. 494, 611 P.2d 1096 (1980). In *Hyt*, this Court framed the issue simply: "We must determine what constitutes a decision by the Commission from which a licensee has ten days to appeal under NRS 645.760. Respondent argues that the oral pronouncement was the decision while appellant claims the written findings constituted the decision." *Hyt*, 96 Nev. at 496, 611 P.2d at 1097. After discussion, this Court answered the question it raised by holding: "***The written findings of fact and conclusions of law constitute the final decision.*** (Emphasis supplied.) *Hyt*, 96 Nev. at 497, 611 P.2d at 1097. Since the Board's written Order on Remand was the triggering event, Mr. Rusk's filing of the instant petition three weeks ***before*** the Board issued its written Order on Remand could not invoke the District Court's subject matter jurisdiction under NRS 233B.130(2)(d), *Hyt*, and the six cases from this Court discussed above.

With the above established as a matter of law and fact, the Board's instant emergency petition satisfies the four requisites in NRAP 8(c).

First, the object of the Board's Petition for Writ of Prohibition is to avoid any substantive litigation of Mr. Rusk's petition for judicial review where he has not invoked the subject matter jurisdiction of the District Court. In *Fritz Hansen A/S v.*

Eighth Jud'l Dist. Ct., 116 Nev. 650, 6 P.3d 982 (2000) this Court stressed that the purpose of NRCP 12(b) motions was to allow jurisdictional matters to be tested before any substantive litigation occurred. Obviously, the relief available per NRCP 12(h)(3), *Fritz*, and *Board of Review* would be illusory absent the emergency stay sought herein. Simply put, no subject matter jurisdiction, no further proceedings: only the requested stay assures this.

Second, in *Board of Review*, this Court indicated that a matter involving a lack of subject matter jurisdiction is of such import that it would be deemed properly before the Court and would mandate prompt review on the merits. *Board of Review*, 133 Nev. at ____, 396 P.3d 797. In granting the Board of Review's petition for writ of prohibition, this Court acknowledged that it could only grant such extraordinary relief where there was "no plain, adequate, or speedy remedy in the ordinary course of law." *Board of Review*, 133 Nev. at ____, 396 P.3d at 797. Put practically, without the requested emergency stay, this Court's eventual ruling on the Petition for Writ of Prohibition would likely come amidst active litigation, including the filing of a Record of Proceedings, an Opening Brief, an Answering Brief, a Reply Brief, and an eventual oral argument. Why should either party desire to expend significant resources only to have their efforts voided midstream by this Court? Where the District Court's very authority to rule is at issue, it seems plain that the

Board would suffer irreparable and serious injury (as would Mr. Rusk) by being forced to litigate a matter over which the District Court has no lawful authority to act.

Third, of course Mr. Rusk will claim that he will be irreparably or seriously injured by the requested emergency stay, but the stay is only until this Court can rule on the Board's Petition for Writ of Prohibition, and where this Court has already indicated in *Board of Review* that such matters necessitate this Court's immediate attention, it should be expected that this Court will give this matter its "immediate attention," thus mitigating any potential injury Mr. Rusk might suffer.

Fourth, in *Fritz* this Court stated that the "likelihood of success" element of NRAP 8(c)(4) can be satisfied where the movant can present "a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay." *Fritz*, 116 Nev. at 659, 6 P.3d at 987. As the above discussion shows, the Board has raised as serious a legal question as can be raised before a district court, namely whether that court has subject matter jurisdiction to act in the matter. The Board has shown that as a matter of law this Court has six times previously ruled that a petition for judicial review cannot invoke a district court's subject matter jurisdiction where even a single statutory requisite is missing from the petition. In a case such as this, where the

petition has failed to invoke the district court's subject matter jurisdiction, the balance of equities weighs entirely in favor of the Board's requested emergency stay.

VI. CONCLUSION AND REQUEST FOR RELIEF

The requested emergency stay is necessary to prevent the District Court's taking any further substantive acts in the instant matter where it lacks the subject matter so to do. Where the District Court's very power to take any action is at issue, NRAP 8(c), *Fritz, Board of Review*, and the other five cases discussed above all indicate that the brief stay sought herein until this Court can rule on the substance of the Board's Petition for Judicial Review seems the only prudent course for all involved. Per NRAP 27(e), an emergency stay should issue no later than October 12, 2018.

Signed this 6th day of October, 2018.

Louis Ling

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Attorney for Petitioner Nevada State Board
of Architecture, Interior Design and
Residential Design

NRAP 27(e) CERTIFICATE

I, LOUIS LING, counsel for movant Board, hereby certify pursuant to NRAP 27(e)(3) and (4) as follows:

(A) The contact information for counsel for Real Party in Interest Dennis Rusk is: Mr. Robert Nersesian, Nersesian & Sankiewicz, 528 South Eighth Street, Las Vegas, Nevada 89101, Telephone: (702) 385-5454, Fax: (702) 385-7667, E-mail: vegaslegal@aol.com.

(B) The facts showing the existence and nature of the emergency are that on October 5, 2018, the Eighth Judicial District Court, Department 25, issued an order by which the District Court ordered that the Board produce the Record of Proceedings no later than October 15, 2018 so that the briefing schedule for the underlying petition for judicial review can commence. Up to this point in the case, the District Court has only heard and ruled upon the Board's preliminary motions to dismiss based upon NRCP 12(b)(1) based upon the District Court's lacking subject matter jurisdiction over the matter as a matter of law. Because the District Court lacks subject matter jurisdiction over the matter, it has no authority to proceed and all substantive proceedings that will flow from the District Court's October 5, 2018 order will be void. Only the emergency stay sought by this motion

will prevent the irreparable harm of the parties' litigating a matter before a Court that has no jurisdiction in the matter.

(C) Counsel for Real Party in Interest Mr. Rusk was notified through this Court's e-filing and service system. Additionally, within minutes of this motion being filed by the clerk of this Court, the Board provided a file-stamped copy of this motion to opposing counsel via e-mail at the e-mail address by which the parties routinely correspond, namely, vegaslegal@aol.com.

(4) The Board sought a stay with the District Court and argued the same grounds before the District Court that are now being asserted before this Court. It is the District Court's denial of the Board's motion to stay and subsequent order that compels this emergency motion.

Dated this 6th day of October, 2018.

Louis Ling

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this EMERGENCY MOTION UNDER NRAP 27(e) TO STAY THE DISTRICT COURT'S OCTOBER 5, 2018 ORDER PENDING DECISION ON PETITIONER'S PETITION FOR WRIT OF PROHIBITION complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] It has been prepared in a proportionally spaced typeface using Microsoft Word for Macintosh 2008, Version 12.3.6 in Goudy Old Style 14 Point type.

2. I further certify that this petition complies with the page- or type-volume limitations of NRAP 40 or 40A because it is:

[X] Proportionately spaced, has a typeface of 14 points or more, and contains 2,521 words, which at 466 words per page (see NRAP 32(7)(a)(i) and (ii)) is the equivalent of 5½ pages of text.

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

Dated this 6th day of October, 2018.

Louis Ling

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CERTIFICATE OF SERVICE

I certify that I served on the below date a copy of the attached EMERGENCY MOTION UNDER NRAP 27(e) TO STAY THE DISTRICT COURT'S OCTOBER 6, 2018 ORDER PENDING DECISION ON PETITIONER'S PETITION FOR WRIT OF PROHIBITION filed herewith upon the following:

By U.S. Mail:

Judge Kathleen Delaney, Department 25
Eighth Judicial District Court
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155

Respondent

By the Court's e-filing and e-service system and U.S. Mail:

Robert Nersesian
Nersesian & Sankiewicz
528 S. Eighth Street
Las Vegas, Nevada 89128

Counsel for Real Party in Interest Dennis
Rusk

Dated this 6th day of October, 2018.

Louis Ling

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ATTACHMENT 1

ATTACHMENT 1



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DISTRICT COURT
CLARK COUNTY, NEVADA

Dennis E. Rusk, and Dennis E. Rusk)	
Architect, LLC)	
)	Case No. A-17-764562-J
Appellants/Petitioners,)	Dept. No. 25
)	
vs.)	
)	
Nevada State Board of Architecture,)	
Interior Design and Residential Design)	
)	
Appellee/Respondent.)	

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that the Order Regarding Respondent's Motion to Stay and
Petitioners' Motion to for Default or Alternative Relief was entered on the 5th day of October,
2018. A copy of the Order is attached hereto.

DATED this 5th day of October, 2018

NERSESIAN & SANKIEWICZ

/s/ Robert A. Nersesian

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**DISTRICT COURT
CLARK COUNTY, NEVADA**

Dennis E. Rusk, and Dennis E. Rusk
Architect, LLC

Appellants/Petitioners,

vs.

Nevada State Board of Architecture,
Interior Design and Residential Design

Appellee/Respondent.

) Case No. A-17-764562-J

) Dept. No. XXIX ☒ (25)

) Date of Hearing: February 14, 2018

) Time of Hearing: 9:00 a.m.

**ORDER REGARDING RESPONDENT'S MOTION
TO STAY AND PETITIONERS' MOTION TO FOR
DEFAULT OR ALTERNATIVE RELIEF**

The motions of Nevada State Board of Architecture, Interior Design and Residential Design ("NSBAIDRD") for stay and the motion of Petitioners for entry of default or alternative relief to proceed with briefing having come on for hearing, the Court having read the papers filed in support and opposition, having heard oral argument, and being otherwise fully advised in the premises,

NOW THEREFORE,

IT IS HEREBY ORDERED:

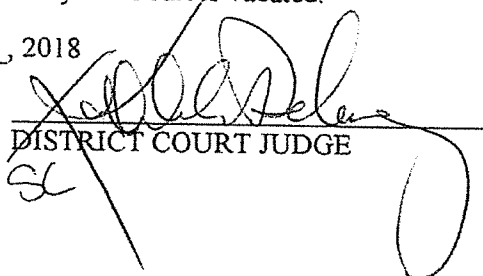
- 1) Respondent's motion to stay proceedings is denied;
- 2) Petitioners motion to enter default is denied;
- 3) Petitioner is granted the alternative relief that the matter proceed with briefing, and to facilitate this order:

Nersesian & Sankiewicz
528 SOUTH EIGHTH STREET
LAS VEGAS NEVADA 89101

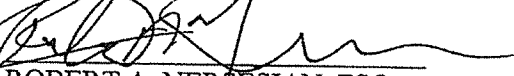
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- a. Respondent shall, within ten days of the entry of this order file the entire record of the proceedings undertaken before NSBAIDRD in the prior proceedings heard by NSBAIDRD on October 25, 2018, said record comprised as indicated in NRS 233B.131(1)(b).
 - b. Upon receipt of the record as filed by Respondent, the Court will assign and direct a briefing schedule to be applied to the Petitioners' Petition.
- 4) The prior briefing schedule directed by the Court is vacated.


Dated this 2nd day of OCTOBER, 2018


DISTRICT COURT JUDGE

Respectfully submitted:
Nersesian & Sankiewicz


ROBERT A. NERSESIAN, ESQ.
Nevada Bar No. 2762
528 South Eighth Street
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Attorney for Appellants/Petitioners

Approved as to form:


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Attorney for Respondent