**BEFORE THE SUPREME COURT OF THE STATE OF NEVADA**



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| NEVADA STATE BOARD OF ARCHITECTURE, INTERIOR DESIGN AND RESIDENTIAL DESIGN,<br><br>Petitioner,<br><br>vs.<br><br>EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, DEPARTMENT 25, HONORABLE KATHLEEN DELANEY,<br><br>Respondent<br><br>and<br><br>DENNIS RUSK,<br><br>Real Party in Interest. | Case No. 76792<br><br>Eighth Jud'l District Court<br>Case No. A-17-764562-J |

**PETITIONER'S SUPPLEMENTAL APPENDIX IN COMPLIANCE WITH ORDER DIRECTING ANSWER, DIRECTING SUPPLEMENTATION OF THE RECORD, AND GRANTING EMERGENCY MOTION FOR STAY**

**VOLUME 1**

Petitioner Nevada State Board of Architecture, Interior Design and Residential Design, by and through its attorney Louis Ling, submits this Supplemental Appendix in compliance with this Court's Order Directing Answer,

Directing Supplementation of the Record, and Granting Emergency Motion for Stay issued October 12, 2018.

**TABLE OF CONTENTS FOR VOLUME 1**



Signed this 17th day of October, 2018.

Louis Ling

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

**CERTIFICATE OF SERVICE**

I certify that I served on the below date a copy of the attached PETITIONER'S SUPPLEMENTAL APPENDIX IN COMPLIANCE WITH ORDER DIRECTING ANSWER, DIRECTING SUPPLEMENTATION OF THE RECORD, AND GRANTING EMERGENCY MOTION FOR STAY – VOLUME 1 filed herewith upon the following:

By U.S. Mail to the Respondent:

Judge Kathleen Delaney, Department 25
Eighth Judicial District Court
Regional Justice Center

200 Lewis Avenue
Las Vegas, Nevada 89155

By the Court's e-filing and e-service system to the Real Party in Interest:

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

Counsel for Real Party in Interest Dennis Rusk

Dated this 17th day of October, 2018.

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Nevada State Board of Architecture,
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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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| DENNIS E. RUSK, AND DENNIS E. RUSK ARCHITECT, LLC<br><br>Appellants/Petitioners,<br><br>vs.<br><br>NEVADA STATE BOARD OF ARCHITECTURE, INTERIOR DESIGN AND RESIDENTIAL DESIGN,<br><br>Appellee/Respondent. | Case No. A-17-764562-J<br><br>Dep't No. 29<br><br>**SECOND MOTION TO DISMISS** |

Respondent Nevada State Board of Architecture, Interior Design and Residential Design (the Board) moves this Court to dismiss the instant matter pursuant to NRCP 12(b)(1) and NRCP 12(h)(3). This motion is made and based upon the pleadings and papers on file herein and the following points and authorities.

**NOTICE OF HEARING**

PLEASE TAKE NOTICE that a hearing on Respondent's Motion to Dismiss has been scheduled in the above-captioned court for 9:00A a.m./p.m. on the 14 day of FEBRUARY, 2018.

Signed this _____ day of _____, 2018.

_____
COURT CLERK

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## I. POINTS AND AUTHORITIES

### A. Procedural History

On August 16 and September 1, 2011, the Board held a disciplinary hearing regarding Mr. Rusk in the matter of *Gina Spaulding, Executive Director, et al. v. Dennis Rusk*, Case Nos. 08-080R and 11-019R. Mr. Rusk attended the hearing and chose to represent himself. The matter was prosecuted by Board Counsel Louis Ling. The Board was represented and advised by Sophia Long, Deputy Attorney General.

On September 27, 2011, the Board issued Findings of Fact, Conclusions of Law, and Order (hereinafter Board Order). A true and correct copy of the Board Order is included as Exhibit A in the Appendix of Exhibits filed herewith.[1]

Mr. Rusk sought judicial review of the Board Order in the Eighth Judicial District Court (Case No. A-11-650646-J). The matter was assigned to the Honorable Ronald Israel, Department 28. In the judicial review proceedings, Mr. Rusk was represented by Richard Wilkin and Beau Sterling, and the Board was represented by Mr. Ling. The matter proceeded through various motions, full briefing, and oral argument before Judge Israel on June 20, 2012.

On August 28, 2012, Judge Israel issued his Findings of Fact, Conclusions of Law, and Order in Case No. A-11-650646-J (Israel Order), by which he affirmed *in toto* the Board Order. A true and correct copy of the Israel Order is included as Exhibit B in the Appendix.

Mr. Rusk appealed the Israel Order to the Nevada Supreme Court (Case No. 61884). On July 30, 2013, the Nevada Supreme Court issued an Order Dismissing Appeal (ODA). A true and correct copy of the ODA is Exhibit C in the Appendix. On March 27, 2014, the Nevada Supreme Court issued an Order Denying Rehearing, thus concluding the appeal and leaving the Israel Order intact.

On January 7, 2016, Mr. Rusk filed with the Board his Petition/Motion of Dennis Eugene Rusk Requesting That the Final Decision of the Board Be Vacated or Modified, Brought in the Nature of a Petition for Writ of Coram Nobis or Other Relief to Set Aside Order of Discipline or Alternatively, Remit Discipline, and Request/Motion for Appointment of Independent Counsel (hereinafter Rusk

[1] The documents contained in the Appendix are for the Court's convenience and use in the review of the Board's Second Motion to Dismiss and for no other purpose. If the Court determines that it has subject matter jurisdiction to proceed with this matter, the Board will provide a Record of Proceedings that will comply with NRS 233B.132 and NRS 622A.400.

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Motion). By the Rusk Motion, Mr. Rusk asked the Board to revisit certain evidentiary issues contained in the Board Order.

On January 11, 2017, the Board considered Mr. Rusk's Rusk Motion and the Board's Opposition and Countermotion. On February 8, 2017, the Board issued a written order by which it denied the Rusk Motion.

On February 8, 2017, Petitioners filed a matter entitled: "Petition of Dennis E. Rusk and Dennis E. Rusk Architect, LLC, for Issuance of a Writ of Mandamus, or Alternatively, Judicial Review of Action of the Nevada State Board of Architecture, Interior Design and Residential Design Taken in Reference to a Petition/Motion Filed by the Petitioners and Avoided/Determined Before Said Board on January 11, 2017." The matter was filed with the Eighth Judicial District Court, was given Case Number A-17-750672-W, and was assigned to Department 30 (Judge Weise presiding).

On June 27, 2017, Judge Weise issued his Order Determining Petitioner's Petition for Writ Issuance of a Writ of Mandamus, or Alternatively, Judicial Review or Action of the Nevada State Board of Architecture (Remand Order). By this Remand Order, Judge Weise ordered that the matter be remanded to the Board, and on remand the Board "shall assume jurisdiction and rule upon the Petitioner's NSBAIDRD Petition and consider whether it would be appropriate to vacate its prior decision based upon the newly discovered evidence consisting of the March 6, 2007 Schirmer Report and drawings." A true and correct copy of the Judge Weise's Order is Exhibit D in the Appendix.

On October 25, 2017, the Board conducted a review on remand of Mr. Rusk's ordered by Judge Weise. In the course of its review, the Board reviewed the written pleadings presented by the parties and received oral argument from counsel for both parties, but did not receive any testimony presented by either party, did not authorize cross-examination by either party, and received and reviewed only such new evidence in the form of documents that were attached to the pleadings of the party.

On November 9, 2017, Petitioners filed the instant Petition for Judicial Review (Case No. A-17-764562-J).

On December 1, 2017, the Board issued its Findings of Fact, Conclusions of Law, and Order Regarding Remand From Judge Weise to Determine Whether to Vacate its September 27, 2011 Board

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Order Based Upon the Newly Discovered Evidence Consisting of the March 6, 2007 Schirmer Report and Drawings (Board Order on Remand). The Board Order on Remand was served on the parties on December 1, 2017. A true and correct copy of the Board Order on Remand is Exhibit E in the Appendix.

## B. LEGAL ARGUMENT

As will be shown, this Court lacks subject matter jurisdiction over this matter for two interlocking reasons. First, assuming that this matter is appropriate for judicial review pursuant to the provisions of NRS ch. 233B (which it is not), it was not timely and correctly pursued. Second, assuming that the matter was timely and correctly pursued (which it was not), the Board Order on Remand is not a final order in a contested case and is not, therefore, subject to judicial review pursuant to the provisions of NRS ch. 233B. The two bases that demonstrate the lack of subject matter jurisdiction shall be discussed *seriatim*.

### 1. Standard of Review

NRCP 12(b)(1) allows for a matter to be dismissed for "lack of jurisdiction over the subject matter." NRCP 12(h)(3) provides: "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, ***the court shall dismiss the action***." (Emphasis supplied.)

### 2. The Instant Petition for Judicial Review Is Insufficient as a Matter of Law

NRS 233B.130(1) provides:

> 1. Any party who is:
> (a) Identified as a party of record by an agency in an administrative proceeding; and
> (b) Aggrieved by a final decision in a contested case,
> ➥ is entitled to judicial review of the decision.

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.) Similarly, NRS 622A.400(1) and (2) provide:

> 1. Except as otherwise provided in the Constitution of this State, a party ***may not seek*** any type of judicial intervention or review of a contested case ***until after the contested case results in a final decision of the regulatory body***.
> 2. Except as otherwise provided in this section, a party may seek judicial review of a final decision of the regulatory body in accordance with the provisions of chapter 233B of NRS that apply to a contested case.

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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 [NRS ch. 233B] procedural requirements." *Otto*, 128 Nev. at 432, 282 P.3d 719, 725 (2012). 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.

Both the *Otto* case and the *Thomasson* case are on point and instructive in the instant matter. In *Otto*, the petition for judicial review failed to properly name all of the parties as required by NRS 233B.130(2)(a) and was dismissed by the district court pursuant to NRCP 12(b)(1). The district court thereafter allowed the petitioner to amend the petition to name the proper parties, but the amended petition was filed four months after the 30-day time limit under NRS 233B.130(2)(c). The Nevada Supreme Court found that because the 30-day time limit was also jurisdictional, the district court erred in allowing the late filed amended petition, stating: "We agree with these authorities and similarly ***conclude that even if Washoe County's amended petition cured the jurisdictional defect, it does not relate back to the original petition because it was filed four months after the State Board's decision, well after the APA's 30-day time limit***." (Emphasis supplied.) *Otto*, 128 Nev. at 435, 282 P.3d at 727.

Similarly, in *Thomasson*, the petitioner timely filed a petition for judicial review, but not in a proper court as required by NRS 233B.130(2)(b). Upon a motion to dismiss based upon NRCP 12(b)(1), the district court did not dismiss the matter and, instead, transferred venue from its court (Second Judicial District) to the First Judicial District Court in Carson City. The Nevada Supreme Court reversed the decision of the district court and dismissed the petition, stating: "Furthermore, the 30-day period for filing such a petition in the proper county has passed, and thus the petition cannot be amended to correct the error." *Thomasson*, 130 Nev. at ___, 317 P.3d at 836.

A prematurely filed petition for judicial review does not confer subject matter jurisdiction. *Johnson v. State*, 153 Idaho 246, 280 P.3d 749 (Idaho App. 2012). In *Johnson*, the licensee filed his

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petition for judicial review four days after the completion of the hearing in his matter and one month before the hearing officer released a written decision. One month after the release of the written decision, the hearing officer denied in writing the licensee's motion for reconsideration. At no time after the written decision or the written decision denying the motion for reconsideration did the licensee file another petition for judicial review; instead, he relied upon his original and premature petition. Under such facts, the reviewing district court did not dismiss the matter for lack of subject matter jurisdiction as moved for by the state, but the Idaho Court of Appeals reversed the district court, holding:

> For the reasons stated above, we dismiss the district court's order vacating the hearing officer's decision. Johnson had twenty-eight days to file a petition for review of the hearing officer's decision and his time began to run on January 10, 2010, the date his motion for reconsideration was denied; it has since expired. ***Although this result appears harsh, jurisdiction for judicial review in this case is limited by the time period specified in I.C. § 67-5273(2) and applicable rules, and this Court has no authority to disregard those limits***. (Emphasis supplied.)

*Johnson*, 153 Idaho at 251, 280 P.3d at 754.

The above three cases teach that this matter must be dismissed for lack of subject matter jurisdiction. Mr. Rusk filed his Petition for Judicial Review on November 9, 2017. In his Petition, Mr. Rusk acknowledged that he knew that a written decision would be forthcoming, stating: "Although the Board counsel stated at the hearing that a written order would be provided, none has been received as of yet." Petition, at page 1, lines 25-26. The Board issued and served its Order on Remand on December 1, 2017. *See* Exhibit E in Appendix. Therefore, to timely and properly invoke this Court's subject matter jurisdiction in this matter, Mr. Rusk must have dismissed the instant matter and filed a new matter or must have amended his Petition in this matter no later than January 4, 2018. He did not do so.

Mr. Rusk's Petition did not invoke the subject matter jurisdiction of this Court because a timely petition for judicial review must "be filed within 30 days of ***after*** service of the final decision of the agency." (Emphasis supplied.) NRS 233B.130(2)(d). Pursuant to NRS 622A.400(1), Mr. Rusk could not seek "any type of judicial intervention or review of a contested case ***until after the contested case results in a final decision of the regulatory body***." Thus, as a matter of law, Mr. Rusk has failed to invoke this Court's subject matter jurisdiction.

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It is important to note that Mr. Rusk may not now seek to amend his premature and insufficient Petition to cure its defects and, thereby, invoke this Court's jurisdiction. In *Otto*, the Nevada Supreme Court foreclosed any such cure by amendment, holding: "Because Washoe County's original petition failed to invoke the district court's jurisdiction, ***it could not properly be amended outside of the filing deadline***." (Emphasis supplied.) *Otto*, 128 Nev. at 434-5, 282 P.3d at 727. In *Thomasson*, where the issue involved a petition filed in a jurisdiction that lacked venue, the Nevada Supreme Court similarly foreclosed amendment as a cure to the insufficient original petition, stating: "Furthermore, the 30-day period for filing such a petition in the proper county has passed, and thus ***the petition cannot be amended to correct the error***." (Emphasis supplied.) *Thomasson*, 130 Nev. at ___, 317 P.3d at 836.

As a final matter, it must be noted that when the Board filed its first motion to dismiss in this matter on December 21, 2017, it cited the *Johnson* case for the proposition that a prematurely filed petition for judicial review could not invoke the Court's subject matter jurisdiction. *See* Motion to Dismiss, at page 3, lines 4-6. Therefore, Mr. Rusk was on notice as of December 21, 2017 that he needed to take appropriate action to remedy the jurisdictional defect, and he had twelve days so to do. He did not do so, and he is now foreclosed from curing the jurisdictional defect pursuant to the *Otto* and *Thomasson* cases.

Therefore, assuming that this matter is appropriate for judicial review pursuant to the provisions of NRS ch. 233B (which it is not, as will be shown shortly), it was filed prematurely – which as a matter of law could not invoke this Court's subject matter jurisdiction – and the jurisdictional defect was not timely cured. As a matter of law, Mr. Rusk's Petition must be dismissed pursuant to NRCP 12(b)(1) for lack of subject matter jurisdiction.

**3. The Board's Order on Remand Was Not a Final Order in a Contested Case Subject to Judicial Review**

Only a person "aggrieved by a final decision in a contested case" may seek judicial review. NRS 233B.130(1)(b). NRS 233B.032 defines a contested case as follows: "'Contested case' means a proceeding, including but not restricted to rate making and licensing, in which the legal rights, duties or

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privileges of a party are required by law to be determined by an agency after an opportunity for hearing, or in which an administrative penalty may be imposed."

Not every determination, decision, or ruling by an administrative agency is a "contested case" subject to judicial review. *State v. Samantha, Inc.*, 133 Nev. Adv. Rep. 100 (Dec. 14, 2017); *Citizens for Honest & Responsible Gov't v. Heller,* 116 Nev. 939, 11 P.3d 121 (2000); *Nevada State Purchasing Div'n v. George's Equipment Co.*, 105 Nev. 798, 783 P.2d 949 (1989); *Private Investigators Licensing Bd. v. Atherley*, 98 Nev. 514, 654 P.2d 1019 (1982); *Tom v. Innovative Home Sys., LLC*, 132 Nev. _____, 368 P.3d 1219 (Nev. App. 2016). While none of the above cases dealt with a post-hearing motion to vacate reviewed on a court-ordered remand as is at issue in the instant matter, they are instructive in what they found ***not*** to constitute a "contested case":

(1) A denial of an application to operate a medical marijuana establishment was not a "contested case" where the statutory scheme under which the application was reviewed did not provide any post-denial process or hearing. *State v. Samantha, Inc.*, 133 Nev. Adv. Rep. 100, at 12-13.

(2) The review by the Secretary of State of a recall petition was not a "contested case" even where the review was governed by a statutory requirement for a hearing by which a final decision issued thereunder could be subject to judicial review because the governing statutes did not specifically so indicate, direct, or authorize that the statutorily authorized judicial review was subject to the provisions of NRS ch. 233B. *Heller*, 116 Nev. at 952, 11 P.3d at 129.

(3) A bid challenge hearing conducted by the State Purchasing Director pursuant to statutory requirements to hold a hearing was not a "contested case" because the procedures contemplated in the governing statute were not akin to those used in a contested matter and were meant to be "quick and easy." *George's Equipment*, 105 Nev. at 804, 783 P.2d at 952-3.

(4) A denial of an application for an occupational license where the governing statutes did not require notice and an opportunity for hearing prior to the licensing board's determination was not a "contested case" and the reviewing district court lacked subject matter jurisdiction in the case. *Atherley*, 98 Nev. at 515, 654 P.2d at 1019.

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(5) A notice to correct issued by a board investigator to a licensee pursuant to a regulation that did not require a notice of a hearing, the presentation of evidence or witnesses, or the creation of an administrative record was not a "contested case" subject to judicial review. *Tom*, 132 Nev. at ____, 368 P.3d 1226.

In the instant matter, on January 7, 2016, Mr. Rusk filed with the Board a lengthy post-hearing motion which was, in essence, a motion to vacate the Board's original Order (Exhibit A in Appendix) in the matter pursuant to NRS 622A.390(1)(c), which provides: "1. After the close of the hearing, a party may file only the following motions: . . . (c) A motion requesting that the final decision of the regulatory body be vacated or modified." No provision in NRS 622A.390 or elsewhere in NRS ch. 622A requires that the consideration of a post-hearing motions under NRS 622A.390 requires a notice of hearing, the allowance for the presentation of evidence and witnesses, the cross-examination of witnesses, the issuance of subpoenas to compel testimony, oral argument, or any other of the usual and ordinary requirements of a "contested case." Used properly, the post-hearing motions under NRS 622A.390 are made and determined just after the "close of the hearing," meaning that the hearing that ***was*** a contested case had just been completed. In fact, NRS 622A.390(4) expressly contemplates that a ruling on a post-hearing motion made thereunder could and would be made ***without*** a hearing of any kind, stating: "The regulatory body may authorize the president or chair of the regulatory body to rule on the motion. The hearing panel may authorize the chair or presiding officer of the hearing panel to rule on the motion."

The Board Order on Remand from which Mr. Rusk now attempts to seek judicial review is even one step further removed from anything contemplated in NRS 622A.390 or elsewhere in NRS chs. 233B or 622A because the Board Order on Remand (Exhibit E in Appendix) was the direct result of and response to Judge Weise's Order (Exhibit D in Appendix). Nothing in Judge Weise's order directed or required a hearing by the Board. Rather, Judge Weise directed that the Board "shall assume jurisdiction and rule upon the Petitioner's NSBAIDRD Petition and consider whether it would be appropriate to vacate its prior decision based upon the newly discovered evidence consisting of the March 6, 2007 Schirmer Report and drawings." *See* Exhibit D, at page 6, lines 5-8.

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That the Board ultimately allowed that both parties could submit supplemental briefs, that both parties could appear before the Board at a time certain to present oral arguments, and that the Board members could ask clarifying questions of Mr. Rusk and his counsel and the Board's staff in no way constituted the full array of procedures required by NRS ch. 233B for a matter to be a "contested case." Where the Board could have ruled upon Mr. Rusk's motion to vacate on remand from Judge Weise without any input from the parties and without any proceeding, the fact that it afforded more process than was required cannot convert the Board's proceeding to a "contested case" for the purposes of NRS ch. 233B.

Applying the Nevada Supreme Court's substantial body of case law to the instant matter shows that the Board's Order on Remand was not a "final decision in a contested case" that could within this Court's subject matter jurisdiction under NRS 233B.130(1)(b). Similar to the cases cited and discussed above, no provision in NRS 622A.390 or elsewhere in NRS chs. 233B or 622A required that the determination and disposition of a post-hearing motion on remand from a district judge be or is a "contested case." Furthermore, Judge Weise's order that remanded the matter to the Board and under which the Board acted did not require any particular process or procedure and, therefore, did not require that the Board's proceeding on remand fulfill the specific procedural rigors of a "contested case." The Board's proceeding on remand was an administrative act that was ***not*** a "contested case" under NRS ch. 233B, and the Board Order on Remand was ***not***, therefore, a "final order in a contested case; therefore, this Court lacks subject matter jurisdiction to review the Board's Order on Remand as a matter of law.

## II. CONCLUSION AND RELIEF REQUESTED

As has been shown, if the Board's Order on Remand was a final order in a contested case (which it was not), judicial review was not timely and correctly sought through the prematurely filed Petition in this matter. Even if Mr. Rusk's Petition had been timely and correct (which it was not), the Board's Order on Remand was not a "final order in a contested case." Mr. Rusk's Petition, therefore, did not and

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cannot confer subject matter jurisdiction on this Court under the provisions of NRS chs. 233B and 622A. The instant matter must be dismissed pursuant to NRCP 12(b)(1) and NRCP 12(h)(3).

Signed this 9th day of January, 2018.

/s/ Louis Ling

_____

LOUIS LING, Board Counsel
Nevada Bar No. 3101
Counsel for Appellee/Respondent

**CERTIFICATE OF SERVICE**

I certify that on this day I served via the Court's e-filing and e-service system and mailed via regular U.S. Mail the attached document to:

Robert A. Nersesian
Nersesian & Sankiewicz
528 South Eighth Street
Las Vegas, Nevada 89101

Dated this 9th day of January, 2018.

/s/ Louis Ling

_____

LOUIS LING, Board Counsel
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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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| Dennis E. Rusk, and Dennis E. Rusk Architect, LLC<br><br>Appellants/Petitioners,<br><br>vs.<br><br>Nevada State Board of Architecture, Interior Design and Residential Design<br><br>Appellee/Respondent. | Case No. A-17-764562-J<br>Dept. No. XXIX<br><br>Date of Hearing: February 14, 2018<br>Time of Hearing: 9:00 a.m. |

**APPELLANTS/PETITIONERS' OPPOSITION TO MOTION TO DISMISS**

NOW COME petitioners, Dennis E. Rusk, and Dennis E. Rusk, Architect, LLC (hereafter collectively "Rusk"), by and through their attorneys, Nersesian & Sankiewicz, and herewith oppose the Nevada State Board of Architecture, Interior Design, and Residential Design's ("Board's") Motion to Dismiss. This Opposition is based on the pleadings and papers on file to date, the attachments hereto, the following Memorandum of Points and Authorities, and any oral argument the Court hears.

**MEMORANDUM OF POINTS AND AUTHORITIES**

Contrary to the Board's Motion to Dismiss, the final decision of the Board became effective on October 25, 2017, and this final decision was promptly and properly brought before this court via Rusk's Petition for Judicial Review.

## I. FACTS

### A. PROCEDURAL FACTS

These proceedings stem from a decision of the Board entered on September 27, 2011. Exhibit 1. On January 7, 2016, Petitioners brought a Petition/Motion seeking to vacate this decision on the basis of prosecutorial misconduct and other grounds. Petition/Motion, ex. 2. On Petitioners' Petition/Motion to Vacate, the Board determined that it did not have jurisdiction, and denied the Petition/Motion to Vacate. Exhibit 3. Petitioner then filed a Petition for Writ of Mandamus or Alternatively Judicial Review following the denial of their Petition/Motion to Vacate entered by the Board. Exhibit 4. The District Court determined that the Board acted arbitrarily and capriciously, overruled the Board's determination that it lacked jurisdiction, and remanded the matter to the Board to determine the Petitioner's Petition for Writ of Mandamus or Alternatively Petition for Judicial Review. District Court Order, exhibit. 5, p. 6, ¶ 2. It is this decision of October 25, 2017 that is before this Court on Petitioners' Petition for Judicial Review.

On remand, the Board purportedly considered and decided Petitioner's Petition/Motion to Vacate, ex. 2. On this motion, a determination was made orally at the hearing on October 25, 2017, addressing the then remanded Petitioner's Petition/Motion to Vacate. See Reporter's Transcript, exhibit 6, pp. 67-68. Specifically, the following occurred on the record at the hearing:

> Member Waugh: "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 27 [2011] order . . .."
> Presiding Member Mickey: "Motion carries."[1]

Note that unlike court orders, oral rulings from and administrative board are effective when stated on the record, and this ruling was immediately effective. See NRS 233B.125. Thus, on the

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[1] "The responsibility of announcing, or declaring, the vote rests upon the chair . . ..
* * *
When a quorum is present, a majority vote, that is a majority of the votes cast, ignoring blanks, is sufficient for the adoption of any motion that is in order . . .." Robert's Rules of Order, Art. VIII, Vote, § 46.

record at the hearing a decision on the Petition/Motion to vacate was made, it adopted the ruling of September 27, 2011, and the matter before the Board was fully determined concerning Petitioners' Petition/Motion to vacate.

This Petition for Judicial Review was filed on November 9, 2017. Petitioners were jurisdictionally required to file the current Petition for Judicial Review within thirty days of the oral pronouncement of the Board's determination of Petitioners' Petition/Motion. NRS 233B.130(2)(d). That is, considering the passage of the motion affirming the prior decision of the Board on Petitioners' Petition/Motion to Vacate, the lack of relief and the final determination of the Board on the Petition/Motion was evident and complete when Mr. Mickey ruled that the motion to affirm the prior decision carried unanimously. Thus, Petitioner had until November 24, 2017, thirty days, to file a petition for judicial review, and the petition here is timely and appropriate.

Further, within the time to file a petition for judicial review of the final decision of the Board occurring on the passage of the motion to affirm the prior decision, no written decision was filed. The Board had an additional fifteen days to issue a written order and still allow Rusk to address the written decision on the Petition to Vacate determined on October 25, 2017 prior to the current Petition for Judicial Review being filed. Instead, the Board delayed further, and upon issuing a written decision placed Rusk in the impossible position of determining which decision created the appealable decision. Because, under the rules governing administrative proceedings, the decision of October 25, 2017, was entirely effective and constituted a final decision of the Board, Rusk has been placed in a position of having to not take the bait dangled by the written decision, which is now a phantom document, and rely upon the decision of October 25, 2017, oral ruling at the hearing.

## II. ANALYSIS

### A. THE PETITION FOR JUDICIAL REVIEW IS PROPERLY BEFORE THIS COURT

The Board's machinations concerning the current petition being premature because it pre-dates the written decision of the Board is in error. While that may be the benchmark in court matters, under the Nevada Administrative Procedures Act, the final order of the Board occurred on October 25, 2017, as rendered at the hearing of even date, and the written decision of the Board does not alter this immutable truth.

The September 27 [2011] order was adopted and became operative by motion at the hearing on October 25, 2017. See n.1. This adopted order contained findings of fact and conclusions of law, and was thusly compliant and effective as the final order of the Board under NRS 233B.125. ("A decision or order adverse to a party in a contested case must be in writing **or stated in the record**." (Emphasis added)). Simply, unlike in a court case, an oral pronouncement from an administrative body determining a contested case is valid and operative when made, and the time for Petitioners to file their Petition for Judicial Review commenced running on October 25, 2017.

The Board simply conflates the concept of an appealable order and a decision subject to a Petition for Judicial Review. Final appealable orders must be in writing. NRAP 4(a)(1). Final oral decisions of an administrative body are statutorily recognized as being effective when stated on the record. NRS 233B.125. In the transcript, exhibit 6, when Chairman Mickey declared that the motion of Member Waugh carried, the decision of the Board was made and fully effective.

The incongruity of the Board's position is highlighted by that which would have likely occurred had Petitioners not filed the current Petition for Judicial Review. There never would have been a written order. Instead, three months, six months or a year after the oral motion adopting the September 27 [2011] order and without written order, Petitioners would have filed a Petition for Judicial Review. The Board would then argue that the order was effective under NRS 233B.125 on October 25, 2017, and the jurisdictional time limit for judicial review had passed. Had the Board entered a prompt written order rather than a tardy order tailored in response to the then filed Petition for Judicial Review, perhaps it could have been addressed, but the only written

order was filed well after the time for appeal had already run, and the Petition for Judicial Review filed here was the proper, and only, Petition for Judicial Review to be filed following the determination of the Petitioners' Petition/Motion to vacate..

In any event, the motion carried at the October 25, 2017, hearing determined the contested case. Petitioners had thirty days from the adoption of this motion within which to file their Petition for Judicial Review. The current Petition was filed on November 9, 2017, within said thirty days. Before the Court is a timely and appropriate Petition for Judicial review, and the Board's claim that it was untimely is without basis.

These circumstances are highlighted by the omission of the Board within their brief at p. 3: 19-23. The Board describes the proceedings on October 25, 2017. There is absolutely no mention of the motion made and carried which determined Petitioners' Petition/Motion to Vacate, and this omission appears intentional and dissembling. Specifically, at the time of the Board's briefing, the Board was fully aware of this motion and its passage at the October 25, 2017 hearing. See Opposition to Motion to Dismiss before Judge Weiss, exhibit 7, pp. 3-4. Any proper statement of facts would necessarily include this critical event, but the Board fails to apprise the Court of Chairman Mickey's ruling making the motion adopting the September 27, 2011 order as affirmed and applicable.

And here, as based on an effective oral pronouncement from the Board at the hearing, as entered after the filing of the Petition for Judicial Review, the written order upon which the Board bases its motion is a phantom document as referred to at exhibit 7, p. 3. Simply, upon filing a valid petition for judicial review, the administrative agency issuing the decision loses jurisdiction over the matter. Friends of Croom Civic Ass'n v. Prince George's County Planning Bd., 2017 Md. App. LEXIS 486, *5, 2017 WL 1833206 (2017) ("The law is clear, however, that a petition for judicial review divests an administrative agency of jurisdiction . . .."); Christiansen v. Iowa Bd. of Educ. Examiners, 831 N.W.2d 179, 190 (Iowa 2013); accord Dep't of Revenue v. Hines, 2006 Ky. Unpub. LEXIS 19, *5, 2006 WL 2456404 (Ken. 2006); cf Foster v. Dingwall, 126 Nev. 49, 52, 228 P.3d 453, 454 (2010)(A timely appeal divests the subordinate body of jurisdiction). Facing a valid final decision, the Board is constrained from changing that decision

or acting dispositively on Petitioners' matter following the filing of this Petition for Judicial Review. Because the tardy written decision upon which the Board relies was entered without jurisdiction, it is void. Cox v. Eighth Judicial Dist. Court, 124 Nev. 918, 926, 193 P.3d 530, 535(2008).[2]

Nor can the Board find and solace or authority under the case it extensively relies upon; Washoe County v. Otto, 128 Nev. 424, 435, 282 P.3d 719, 727 (2012). In Otto, the core holding of the matter was the statement that, "Because Washoe County's original petition failed to invoke the district court's jurisdiction, it could not properly be amended outside of the filing deadline." Corollary to this holding, a petition which does invoke the district court's jurisdiction can be amended outside the filing deadline. The Petition here, relying upon the oral decision rendered at the hearing on October 26, 2017, met the statutory prerequisites to the filing of the Petition for Judicial review, and the Petition for Judicial Review falls outside the proscription of Otto.

In this respect, if the Court were to find that the phantom decision carried some weight, or was appropriately entered following the loss of jurisdiction of the Board, Petitioners' invocation of the timing and filing of a Petition for Judicial Review still met the prerequisites invoking this Court's proper jurisdiction. Specifically, there was an oral decision rendered at hearing which was effective and final upon rendition. Thus, applying Otto, if Petitioners are in error, and the subsequent written decision is also effective, the Petition for Judicial Review could be amended and would relate back.

Also, Petitioners' forthrightness with this tribunal should not be punished, but rather lauded and protected. The Board claims that the Petitioners knew a written decision was forthcoming. Board's Brief, p. 6: 16-18. First, in this respect, the Board misconstrues the acknowledgement of a prospective written order. Petitioners' statement that the Board represented that a subsequent written order would be made was to highlight that there had not

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[2] A statute, addressing the lack of jurisdiction following the Petition for Judicial Review also appears at NRS 233B.131(1) and (2). Specifically, the statute proscribes an exception to the loss of jurisdiction by the administrative agency when new evidence is introduced or desired to be introduced. This has not occurred, and under the doctrine of expresio unius est exclusion alterious, the Board has no jurisdiction to draft a new or revised decision or order post-Petition for Judicial Review

been such an order, and at fifteen days following the hearing, it did not appear that there would be one and the Board was ignoring its statement. This continued for another month, and at all times it appeared that there would be no order whatsoever. Petitioners' statement simply meant that there was no written order and the Board was ignoring its own representations. This presents the polar opposite of a statement that the Petitioners knew there was going to be a written order as the Board represents to this Court.

Meanwhile, Petitioners were operating as an aggrieved party under a valid oral decision on the record (unlike court orders, a then effective decision). Absent the filing of the Petition for Judicial Review, the Board could have, and apparently intended to, rely and apply this oral pronouncement forever and leave the Petitioners without any remedy. Clearly, Petitioners' statement concerning the lack of a written order (as opposed to knowing that there was going to be a written order), was to let the Court know that no written order existed nor was any forthcoming, again the opposite of the Board's statements.

The Board also attempts to claim that there is a lack of service of the Board's decision until the phantom written decision was entered and served. First, the Board misconstrues the statute that provides that the notice must be filed within thirty days after the written decision is entered. The misconstruction is that this is not jurisdictional, and also, that it means that at any time prior to thirty days after service of the decision, including prior to the service, but still after the effective date of the decision or oral rendering of the decision. Simply, the word "after" in NRS 233B.130(2)(d), does not create a window within which the event must occur, but rather, provides an end date within which the event must occur. Las Vegas Fetish & Fantasy Halloween Ball, Inc. v. Ahern Rentals, Inc., 124 Nev. 272, 278, 182 P.3d 764, 768 (2008)(Dispelling the Board's statutory analysis in the context of when a bill of costs must be filed). Despite this Nevada authority providing an unequivocal construction of how "after" is to be construed in a statute such as that at issue here, the Board twice highlights the term and its affect in direct conflict with the Nevada Supreme Court construction of the term. See Board's Brief, p. 4: 22-23, and p. 6: 23. Clearly, the Board's construction lacks any application to the current matter, and a

notice of appeal filed at any time prior to thirty days following the service of the written decision is timely and fulfills the jurisdictional prerequisite.

Moreover, the choice here is that the Board either serve upon the Petitioners a notice of the passage of the motion adopting the September 27, 2011 order, or that the actual passage of the motion, especially in this case, constitutes service. As noted above, an oral decision of the Board is effective and final upon being rendered, and no written decision is required. Review of exhibit 6 indicates that both the Petitioners and their attorney were present when the oral decision was rendered. Since oral determinations are effective, and statutes are to be construed reasonably, the only reasonable construction of the service requirement is that when the subject of the decision is told of the decision, service of the decision has occurred. In either event, concerning the oral rendition of the decision on Petitioners' Petition/Motion to Vacate, either it has not yet been served or it was served when Plaintiff heard the decision. Regardless, the Board's argument does not affect this proceeding. Petitioners are before this Court on a proper Petition for Judicial Review, the Board cannot ignore the effectiveness or finality of its order made at the hearing on October 25, 2017, and there is no basis upon which to dismiss the current proceeding.

**B. PETITIONERS ARE PROPERLY BEFORE THIS COURT ON A FINAL DECISION ON A CONTSTED CASE**

The denial of a motion to vacate is a final decision of a tribunal subject to a direct appeal (and correlatively, therefore, a petition for judicial review). See Fierro v. Johnson, 197 F.3d 147, 150, n.3 (1999); Kneefel v. McLaughlin (In re Custody of McLaughlin), 187 Ore. App. 1, 5, 67 P.3d 947, 950, (2003); Miller v. Madigan, 90 Okla. 17, 19, 215 P. 742, 743 (1923); Citibank, N.A. v. Unknown Heirs, 197 So. 3d 1214, 1215 (Fla. App. 2016); accord Mac Pherson v. State St. Bank & Trust Co., 452 F. Supp. 2d 133, 141 (2006); Ryan v. Rosenfeld, 3 Cal. 5th 124, 135, 395 P.3d 689, 696, 218 Cal. Rptr. 3d 654, 662 (2017); Nev. Rev. Stat. Ann. § 233B.125The Board's actions forced Petitioner to bring the present Petition for Judicial Review prior to the rendering of the written decision, and the written decision is, at this point, a phantom document.

Further, the Board's concept that the matter between the Board and Petitioner's was not a contested case strains credulity. It was most definitely a contested case. See Board's Briefing,

exhibits 8 and 9. Further, how could the Petitioners have received an affirmative directive in a matter which was not a contested case? See exhibit 5, p. 6 ("The Board shall assume jurisdiction and rule upon Petitioner's [ ] Petition") . It was a decision made within the parameters of the matter of Board v. Rusk. To claim that this is not a contested hearing is an exercise in Sophistry by the Board, and should be ignored.

The determination of licensure is, by definition, a contested case. This was also true in context. See Notice of Hearing, exhibit 10. Here the case was hotly contested at all stages including the determination of the Petition/Motion to Vacate.

The Board's authority is inapposite to this circumstance. A ruling was purportedly made in a proceeding where the Petitioners' challenged the propriety and due process of the prior actions in the same proceeding, which, at all times, was a contested matter. This is not an administrative ruling on the ordinary business of the administrative agency as the Board alludes, but a solidly contested matter resulting in an adverse decision directed at a specific individual for alleged misconduct which is being contested, even at this stage. Clearly, the matter before the Board was a contested matter, the motion carried on October 25, 2017, finally determined that matter, and the current Petition for Judicial Review is ordinary and proper in course under the Administrative Procedures Act. The Board's motion is not well founded and should be denied.

## III. CONCLUSION

Like the Board's reneging on the representation that a written order would be entered, the current attempt by the Board is an attempt to upset the ordinary process of judicial review of a final order in a contested case. Petitioners have a strong, if not overwhelming case, showing a denial of substantive due process which merits consideration by a Court, and judicial review of the actions of the Board in taking away Petitioners' license. Indeed, as the Petition will show, upon briefing, that the Board summarily affirmed this denial of due process while misrepresenting material facts and issues in order to avoid its processes being questioned and its

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credibility being challenged. The motion to dismiss should be denied.

DATED this 29th day of January, 2018.

Nersesian & Sankiewicz

/s/ Robert A. Nersesian
ROBERT A. NERSESIAN, ESQ.
Nevada Bar No. 2762
528 South Eighth Street
Las Vegas, Nevada 89101
Attorney for Appellants/Petitioners

**CERTIFICATE OF SERVICE**

I hereby certify that on the 29th day of January, 2018, I served a copy of the foregoing **APPELLANTS/PETITIONERS' OPPOSITION TO MOTION TO DISMISS** via email, and by depositing the same into the U.S. Mail in Las Vegas, Nevada, postage prepaid, addressed as follows:

Louis Ling
933 Grear Street
Reno, NV 89503

/s/ Rachel Stein
An employee of Nersesian & Sankiewicz

# EXHIBIT 1

# EXHIBIT 1

ORIGINAL

BEFORE THE NEVADA STATE BOARD OF

ARCHITECTURE, INTERIOR DESIGN AND RESIDENTIAL DESIGN

GINA SPAULDING, Executive Director, NEVADA STATE BOARD OF ARCHITECTURE, INTERIOR DESIGN AND RESIDENTIAL DESIGN,

Complainant

v.

DENNIS EUGENE RUSK, Registered Architect Number 1309 Dennis E. Rusk, Architect LLC

Respondent

Case Numbers: 08-080R and 11-019R



## FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

A hearing in this matter was held on August 16 and September 1, 2011 in Las Vegas, Nevada. Board Staff was represented by Louis Ling, Board Counsel, Mr. Rusk appeared and represented himself, and the Board was advised by Sophia Long, Deputy Attorney General. Board Staff presented the testimony of Don White, William Amor, Darren Dunckel, and Laura Bach. Mr. Rusk presented his own testimony and the testimony of Dr. Robert Fielden and David Dupont. Board Staff presented four exhibits that were entered into evidence in the matter, and Mr. Rusk presented three exhibits that were entered into evidence in the matter. Based upon the testimony and evidence presented and the presentations of the parties, the Nevada State Board of Architecture, Interior Design, and Residential Design (hereinafter the Board) makes the following findings of fact, conclusions of law, and order in this matter. Separate sections of findings of fact are made for each of the two cases that were combined for the purposes of hearing in this matter (Case Nos. 08-080R and 11-019R).

### FINDINGS OF FACT FOR CASE NO. 08-08R (The Verge Project)

1. In January 2005, Mr. Rusk entered into a contract Yossi Attia and Moshe Schnapp (hereinafter "the clients") to prepare conceptual drawings for a high-rise building they were interested in building on the corner of Bonanza and Main in downtown Las Vegas. The project was originally intended to be primarily for senior citizen housing with mixed

commercial use space. The contract was amended a number of times and the scope of the project changed so that the building, which would be known as the Verge, would consist of condominiums with mixed commercial space on the lower floors.

2. According to Mr. Rusk, this was the first high-rise he had ever attempted[1] and the first steel-framed structure he had ever designed. Mr. Rusk had proposed to his clients an unusual and rarely used structural system for constructing a high rise building in the Las Vegas area called a staggered truss system that he had represented would be less expensive to build and would allow virtually unlimited flexibility in terms of the design and placement of the condominium units because the staggered truss system required fewer support columns within the floor space on the condominium floors. According to Mr. Dunckel, the clients used Mr. Rusk's representations regarding the approximate budget to build the Verge in their project budgeting, planning, and financing. The clients also used Mr. Rusk's representations regarding the viability and flexibility of the staggered truss system in their marketing plan and constructability of the project.

3. By early 2007, the clients desired to begin the process of obtaining the various permits and approvals to begin construction of the Verge. Based upon Mr. Rusk's representations regarding the likely sequencing of the approvals and construction, the client began its marketing efforts in early 2007. The client's understanding was that the necessary approvals for the shell portion of the project would be received by June 2007. Therefore, the client projected breaking ground in July 2007, with initial occupancy to occur in late 2007.

4. Mr. Rusk represented to the clients that it would be quicker to submit the building as a shell building first and then to submit the plans for the various condominium units and commercial spaces in a subsequent submittal or submittals. The client agreed, so Mr. Rusk discussed with officials at the City of Las Vegas his notion of submitting the original submittal as a shell. The City of Las Vegas allowed Mr. Rusk to do so. On March 6 or 7, 2007, Mr. Rusk submitted his first set of design documents for the Verge to the City of Las Vegas

[1] In his closing statement, Mr. Rusk claimed that the Verge was not his first steel-structure, high-rise building, but his statements made in his closing statement cannot be accepted or treated as evidence.

ORIGINAL

BEFORE THE NEVADA STATE BOARD OF

ARCHITECTURE, INTERIOR DESIGN AND RESIDENTIAL DESIGN

GINA SPAULDING, Executive Director, NEVADA STATE BOARD OF ARCHITECTURE, INTERIOR DESIGN AND RESIDENTIAL DESIGN,

Complainant

v.

DENNIS EUGENE RUSK, Registered Architect Number 1309 Dennis E. Rusk, Architect LLC

Respondent

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## FINDINGS OF FACT FOR CASE NO. 08-08R (The Verge Project)

1. In January 2005, Mr. Rusk entered into a contract Yossi Attia and Moshe Schnapp (hereinafter "the clients") to prepare conceptual drawings for a high-rise building they were interested in building on the corner of Bonanza and Main in downtown Las Vegas. The project was originally intended to be primarily for senior citizen housing with mixed

Building Department.

5. On March 22, 2011, Mr. White, an Architectural Plans Examiner for the City of Las Vegas Building Department, issued Plan Review Comments (PRC). Over the six pages of the Plan Review Comments, Mr. White identified 24 specific deficiencies in the design documents submitted by Mr. Rusk. Most of Mr. White's comments focused on various elements of fire and life safety (FLS) design that were lacking in Mr. Rusk's design documents. At the hearing, Mr. White stated that the first set of design documents submitted were unbuildable and unapprovable because of their complete lack of FLS design and coordination. Mr. White stated that he knew that the first set of plans was for a shell building, but FLS design and engineering was still required for two reasons: (1) On several of the lower floors, Mr. Rusk had drawn occupiable space such as health club facilities, meeting rooms, a swimming pool, roof space to be used as terraces, and a restaurant; and (2) On the condominium floors where no condominium units had yet been drawn, the stairwells and other engineering elements were still required for proper FLS design and engineering because workmen on the project and subsequent residents would rely on the FLS design and engineering. Some of the issues were identified by Mr. White to be basic items that should be known by any competent architect. Other elements, particularly the various FLS elements that were lacking, would put any person in the building at substantial risk or death or injury if an emergency situation arose while that person was in the building.

6. In Mr. White's PRC document, the first substantive paragraph was entitled "NOTE" and stated as follows:

> Please review the Fire Life Safety Report (FLS report) for this project, prepared by Schirmer Engineering. Note the last paragraph of the Section 1 of the report, Introduction Statement. The last two sentences state: "This document is intended to serve as coordination for both the design and construction. Where conflicts occur between the report and the design documents, this report shall take precedence." There are several major discrepancies between the plans and this report that must be resolved. I have listed most of them in the body of this letter.

7. On May 21, 2007, Mr. Rusk submitted a second set of design documents. On May 23, 2007, Mr. White reviewed the second set of design documents and in an eight page PRC

found that ten of the items remained unresolved, one item was partially resolved, twelve of the items had been resolved, and seven new items were identified. Three items were related to accessible parking on the various parking floors. The remaining eighteen unresolved, partially resolved, or new issues were all related to FLS issues such as exiting, stairways and stairwells, fire-rated hallways and separations, and similar FLS design and engineering issues. Mr. White again started his second PRC with a reference to the FLS report prepared by Schirmer Engineering.

8. On July 19, 2007, Mr. Rusk submitted a third set of design documents. On August 9, 2007, Mr. White reviewed the third set of documents and in an eight page PRC found that seventeen of the eighteen issues that were unresolved or new in the previous PRC remained unresolved. Yet again, Mr. White started his third PRC with a reference to the FLS report prepared by Schirmer Engineering.

9. On September 4, 2007, Mr. Rusk submitted a fourth set of design documents. On September 13, 2007, Mr. White reviewed the fourth set of documents and in a six page PRC found that five of the seventeen outstanding issues remained unresolved. The unresolved issues remained FLS design and engineering elements. Yet again, Mr. White started his fourth PRC with a reference to the FLS report prepared by Schirmer Engineering.

10. On October 1, 2007, Mr. Rusk submitted a fifth set of design documents. On November 20, 2007, Mr. White reviewed the fifth set of documents and in a two page PRC, Mr. White indicated that all of the previous issues had been resolved at an express plan review meeting but that the design was still required to comply with the 2006 IECC and that no engineering documents had yet been provided to document the building's compliance with the 2006 IECC.

11. On December 6, 2007, Mr. Rusk submitted an Energy Conservation Code Comcheck Envelope report as required by Mr. White's fifth PRC.

12. Mr. Dunckel, President of and Marketing Manager for the Verge, explained that throughout the time that Mr. Rusk was trying to get his design documents approved, the client, based upon Mr. Rusk's representations, was moving forward with its marketing and

sales of condominium units in the Verge. The client built a sales office on a lot across the street from the Verge at considerable cost to the client. In June 2007, the Verge held a highly publicized sales event at which it began to take deposits from potential condominium owners. Mr. Dunckel related that the client was representing to the potential condominium owners that ground would be broken in July 2007 and occupancy would begin by the end of 2007. Mr. Dunckel further related that by August 2007, over 75% of the condominium units had earnest money deposits on them. Mr. Dunckel also related that as the timeline for breaking ground and obtaining the necessary approvals slid later and later into 2007, the finances for the project became jeopardized, and by the end of 2007, the client determined that financially the project was no longer feasible. The client made Mr. Rusk aware of the infeasibility of the project. A dispute arose between Mr. Rusk and the client over payment of Mr. Rusk's fees and payment of the fees of some of the design professionals on the project. Mr. Dunckel stated that by the end of 2007 and early 2008, the Verge project was "dead." Mr. Dunckel placed much of the blame for the failure of the Verge project upon Mr. Rusk and his inability to get the design drawings completed and approved by the City of Las Vegas. Finally, Mr. Dunckel explained that as a result of the infeasibility of the project, the client has returned most of the earnest money to the potential purchasers and the client filed bankruptcy on the project.

13. Mr. Amor, an expert witness put forward by Board Staff, testified that in his opinion Mr. Rusk's conduct related to the Verge was grossly negligent. Mr. Amor testified that in a project such as the Verge, the architect bears ultimate responsibility for all the design and engineering elements of the project, whether produced by the architect himself or as the result of coordination by the architect with the various other disciplines. Mr. Amor testified that when an architect submits a set of design documents for a building, the documents must be complete and completely code-compliant. Mr. Amor testified that an architect must know himself or herself whether the documents are complete and code-compliant because that is the architect's professional obligation, and an architect should not depend upon a plans examiner to catch issues of non-compliance. Mr. Amor believed that Mr. Rusk's first set of

design drawings was grossly deficient, and therefore that Mr. Rusk was grossly negligent, because the first set completely lacked any FLS design and engineering which would endanger any people who might go into the structure, whether workmen working on the building or eventual occupants. Mr. Amor believed that the number of additional sheets Mr. Rusk was required to submit after the first set is further evidence of Mr. Rusk's negligence because the issues Mr. Rusk was addressing throughout the review process were all issues that should have been addressed and should have been apparent in what should have been the first submittal. Mr. Amor also expressed concern that many of the issues that were not properly addressed by Mr. Rusk were basic architectural issues that all architects should readily know. Mr. Amor stated that new architects seeking licensure are tested upon many of these issues and if they are missed, the new architect will fail his or her examination.

14. Dr. Fielden testified as an expert witness on Mr. Rusk's behalf. Dr. Fielden testified that although Mr. Rusk's operational style was unconventional and not how he would practice, he found that Mr. Rusk's practice in the Verge matter was not below the standard of care for a Nevada architect. On cross-examination, though, Dr. Fielden admitted that, in fact, Mr. Rusk's practices were below the standard of care regarding the failure to incorporate the FLS report data into the design documents where Mr. Rusk had Schirmer Engineering's report and where Mr. Rusk failed to incorporate the FLS data in the report into his own design documents. Dr. Fielden admitted that on a project such as the Verge, the architect is the person ultimately responsible to assure that the design documents are complete, buildable, and approvable.

15. Regarding the Verge, Mr. Rusk testified that the Verge was his first steel-framed building and his first ever high-rise design. Mr. Rusk explained that he did not partner or collaborate with another architect or firm with experience with high-rise design because Mr. Rusk considered himself an "individualist architect" who did not collaborate or partner with other architects. Mr. Rusk explained that he was responsible for all of the coordination of all of the engineering and design disciplines except for Schirmer Engineering because Schirmer Engineering had been retained by the clients. Mr. Rusk explained that he met often (at least

weekly) with all representatives from all of the disciplines, including representatives from Schirmer Engineering. Mr. Rusk testified that he did not include Schirmer Engineering's report and engineering into his first set of design drawings because he did not receive the report until the day of the first submittal, but Mr. Rusk could not explain why he would submit design drawings that he knew at the time would be utterly deficient of FLS engineering and design. Mr. Rusk did not explain why he did not incorporate Schirmer Engineering's FLS report into his second submittal, even though by his own chronology he had the report by the time of the second submittal. Later, Mr. Rusk changed his testimony and claimed that he personally had filed Schirmer Engineering's drawings with the City of Las Vegas, though he offered no evidence or proof either that Schirmer Engineering had, in fact, ever created any drawings or that the drawings had ever been submitted to the City of Las Vegas. In view of Mr. White's continual and serial conclusions that Mr. Rusk's design documents lacked FLS engineering and design, Mr. Rusk's claim that he filed Schirmer Engineering's drawings appears untrue. Mr. Rusk asserted a number of times that his inability to get his design drawings approved was the fault of the client, the fault of Schirmer Engineering, and the fault of Mr. White because he did not understand how to review Mr. Rusk's shell-building concept.

16. Mr. Rusk's demeanor and answers under cross-examination and examination from the Board members raised questions about his credibility. Mr. Rusk was incapable of accepting any responsibility for his actions or his part in the ultimate failure of the Verge project even though he was the lead design professional on whom the ultimate responsibility for the entire project fell. The Board agrees with Mr. Amor's assessment that Mr. Rusk did not know that he did not know what he did not know. Mr. Rusk's arrogance and lack of knowledge and experience in this type of project worked against himself and his client's interests in this matter, resulting, ultimately, in a failed project and the disruption of the plans of numerous members of the public who had attempted to purchase condominiums in the Verge.

**FINDINGS OF FACT FOR CASE NO. 11-019R (The Cutting Project)**

17. In August 2010, David Cutting submitted to the Clark County Building Department

plans for a personal residence he intended to construct as an owner/builder. After being reviewed, the plans were rejected because they were not stamped by Mr. Rusk whose title block was on the detail sheets.

18. At hearing, Mr. Rusk admitted that subsequent to the rejection of the plans by the Clark County Building Department, he reviewed the plans and ultimately put the architectural portions of the plans on his title block and sealed them himself for resubmittal. According to Mr. Rusk, he did this as a favor to David Cutting's father, Clarence Cutting. Clarence Cutting was Mr. Rusk's longtime friend and client. Mr. Rusk stated that his original intent was just to provide David Cutting with some architectural detail sheets, but that upon learning that the Clark County Building Department would not file David Cutting's drawings unless they were placed upon a registered architect's title block and with his or her seal, Mr. Rusk decided to place the architectural drawings on his title block and to seal them. Mr. Rusk claimed to have reviewed David Cutting's drawings and claimed that he was satisfied that the drawings that he sealed were code compliant. Mr. Rusk acknowledged that if David Cutting's architectural drawings were insufficient that he, Mr. Rusk, became responsible for the deficiencies when he placed the drawing on his title block and sealed them. Oddly, though acknowledging such responsibility, Mr. Rusk insisted that he did not receive or review the comments from the Clark County Building Department because he understood that the responsibility for the review and addressing of such comments rested with David Cutting, not Mr. Rusk.

19. Laura Bach, an Investigator for the Board, testified that it is a violation of Nevada law for a Nevada-registered architect to place his seal on architectural drawings that he did not prepare and that were prepared without his responsible control. Ms. Bach testified that Mr. Rusk's placing of David Cutting's architectural drawings upon Mr. Rusk's title block and thereafter sealing them violated Nevada law because Mr. Rusk did not prepare the drawings himself nor was David Cutting in any way under Mr. Rusk's responsible control.

## CONCLUSIONS OF LAW

1. The Board has jurisdiction over this matter because Mr. Rusk is an architect registered by the Board (#1309).

2. Regarding the Verge project, Mr. Rusk's practice of architecture violated NRS 623.270(1)(c) and (f) and Rule of Conduct 1.1 as incorporated by NAC 623.900(1). We specifically conclude that Mr. Rusk's conduct throughout the course of events involved in the Verge project were negligent (as defined in NRS 623.270(5)(c)) and incompetent (as defined in NRS 623.270(5)(b)) under NRS 623.270(1)(c), but we also conclude that Mr. Rusk's conduct did not rise to the level of gross incompetence (as defined in NRS 623.270(5)(a)).

3. Regarding the Cutting project, Mr. Rusk's practice of architecture violated NRS 623.270(1)(d) and (f) and Rule of Conduct 1.1 as incorporated by NAC 623.900(1). We specifically conclude that Mr. Rusk's conduct did not violate NRS 623.270(1)(c).

**ORDER**

Based upon the foregoing findings of fact and conclusions of law, the Board orders the following as the discipline in this matter made pursuant to NRS 623.270(1):

1. Mr. Rusk shall pay a total fine of $13,000.00 ($10,000.00 for Case No. 08-080R and $3,000.00 for Case No. 11-019R). The repayment terms shall be negotiated by and between Mr. Rusk and Board staff upon such terms and conditions as are acceptable to Board staff.

2. Mr. Rusk shall pay the Board's fees and costs of investigation and prosecution of this matter in a total amount of $17,698.57. The repayment terms shall be negotiated by and between Mr. Rusk and Board staff upon such terms and conditions as are acceptable to Board staff.

3. All monies paid by Mr. Rusk in satisfaction of the fines ordered in paragraph #1 and the fees and costs ordered in paragraph #2 shall be first applied to the satisfaction of the fees and costs ordered in paragraph #2 until those have been paid in full, at which time all subsequent payments shall be applied to the fines ordered in paragraph #1 until those have been paid in full.

4. Mr. Rusk's registration as an architect (#1309) shall be placed on probation for three years from the effective date of this Order subject to the following terms and conditions:

(a) Mr. Rusk shall take and satisfactorily pass the following five ICC courses: (i) B1-Residential Building Inspector; (ii) B2-Commercial Building Inspector; (iii) 21-Accessibility

Inspector/Plans Examiner; (iv) 66-Fire Inspector I; and (v) 67-Fire Inspector II.

(b) Mr. Rusk shall submit written evidence of his satisfactory completion of the five courses listed in paragraph (4)(a) to the Board's office no later than March 21, 2012 so that those materials may be included in the Board's packet for its meeting on March 21, 2012. Mr. Rusk shall personally appear at the Board's meeting on January 18, 2012 to update the Board on his efforts to comply with the coursework required. If Mr. Rusk anticipates that he may not be able to complete the required coursework by March 21, 2012, then at the meeting on January 18, 2012, Mr. Rusk must present probable cause why he needs additional time beyond March 21, 2012 in which to complete the coursework. The Board, in its sole discretion, may grant Mr. Rusk additional time within which to complete some of the coursework based upon Mr. Rusk's presentation and reasons stated on January 18, 2012.

(c) If Mr. Rusk does not submit to the Board's office written evidence of his satisfactory completion of the five courses listed in paragraph (4)(a) either by March 21, 2012 or by the extended deadline set by the Board at its January 18, 2012 meeting (if the Board grants such an extension), then Mr. Rusk's registration shall be suspended on the next day without further action of the Board and shall be suspended thereafter for a period of six months. If Mr. Rusk does not complete the coursework by the end of the six-month suspension period, his registration shall continue to be suspended until such time as he provides written evidence of satisfactory completion of all ordered coursework.

(d) During the period of probation, Mr. Rusk shall submit to the Board office any and all contracts for architectural services for work or a project to be completed in Nevada either before he executes a contract or within five business days of executing a contract. Within five business days after receiving any such contract, the Board's staff and the Board's investigating board member shall review the scope of the work proposed in the contract to determine whether it is of the type and scope that Mr. Rusk has historically performed or whether the scope of work is unusual for its size, complexity, special design or engineering considerations, or any other similar factors that would give the Board's staff and the Board's investigating board member cause to be concerned whether Mr. Rusk could safely,

competently, and professionally complete the scope of the work. If the Board's staff and the investigating board member determine that Mr. Rusk can safely, competently, and professionally complete the scope of work on his own, the Board's staff shall notify Mr. Rusk in writing that he may proceed with the contract without any assistance or consultation.

(e) If the Board's staff and the investigating board member determine that Mr. Rusk cannot safely, competently, and professionally complete the scope of work on his own, the Board's staff shall so inform Mr. Rusk and Mr. Rusk shall not be allowed to proceed with the contract unless and until he and the Board's staff and investigating board member identify a Nevada registered architect (hereinafter known as the "peer reviewer") who will collaborate with, consult with, and advise Mr. Rusk on the scope of work, which peer reviewer can be retained as a partner, collaborator, or peer reviewer or mentor. The peer reviewer will be a Nevada registered architect who has experience, knowledge, and expertise in work of a similar type and nature of the work Mr. Rusk proposes to undertake. The peer reviewer will consult with and advise Mr. Rusk to assure that Mr. Rusk's work in the completion of the scope of work is done safely, competently, and professionally, including that the work is in compliance with all applicable statutes, regulations, ordinances, and codes. Mr. Rusk must work cooperatively with the peer reviewer and provide him or her with access to whatever records, drawings, reports, and other work product to allow the peer reviewer to assure that Mr. Rusk is safely, competently, and professionally completing the tasks necessary for the scope of work. The peer reviewer shall report on Mr. Rusk's progress with the scope of work on at least a quarterly basis, and shall report any difficulties and concerns with Mr. Rusk's compliance with this paragraph as those difficulties or concerns might arise. Mr. Rusk will be responsible for the payment of all costs associated with the compliance with this paragraph.

(f) During the period of probation, Mr. Rusk shall comply with all statutes, regulations, ordinances, and codes applicable to the practice of architecture in Nevada.

(g) If Mr. Rusk has not paid all of the fines and fees and costs ordered herein pursuant to paragraphs 2 and 3 or has not otherwise complied with all the terms and conditions of the probation as ordered within the period of probation, his architect's registration shall remain on

probation and all terms and conditions of the probation shall be extended until Mr. Rusk has paid in full all the fines and fees and costs ordered or he has otherwise complied with the terms and conditions of the probation as ordered.

5. In the event Mr. Rusk fails to materially comply with any term of this Order, Mr. Rusk's architect's registration in the State of Nevada shall be immediately suspended without any action of the Board other than the issuance of an Order of Suspension by the Executive Director. Upon complying with the term, Mr. Rusk's architect's registration in the State of Nevada will be automatically reinstated, assuming all other provisions of the Order are in compliance. Additionally, Mr. Rusk's failure to comply with any term or condition of this Order may result in further discipline by the Board, up to and potentially including revocation of his license. Board staff may take any and all actions it deems necessary to collect any sums ordered that remain unpaid. If Board staff is required to pursue judicial action to effect such collections, it shall be entitled to recover its attorney's fees and costs incurred in pursuing such judicial action.

SIGNED AND EFFECTIVE this 27th day of September, 2011.

NEVADA STATE BOARD OF ARCHITECTURE,
INTERIOR DESIGN AND RESIDENTIAL DESIGN

By: _____
Greg L. Erny, Chairman

# EXHIBIT 2

# EXHIBIT 2

PET
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Nevada Bar No. 2762
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**BEFORE THE NEVADA STATE BOARD OF**

**ARCHITECTURE, INTERIOR DESIGN AND RESIDENTIAL DESIGN**

| | |
|---|---|
| GINA SPAULDING, Executive Director, NEVADA STATE BOARD OF ARCHITECTURE, INTERIOR DESIGN AND RESIDENTIAL DESIGN, Complainant, vs. DENNIS EUGENE RUSK, Registered Architect Number 1309 Dennis E. Rusk, Architect LLC Respondent. | Case No. 08-080R and 11-019R |

**PETITION/MOTION OF DENNIS EUGENE RUSK REQUESTING THAT THE FINAL DECISION OF THE BOARD BE VACATED OR MODIFIED, BROUGHT IN THE NATURE OF A PETITION FOR WRIT OF CORAM NOBIS OR OTHER RELIEF TO SET ASIDE ORDER OF DISCIPLINE OR ALTERNATIVELY, REMIT DISCIPLINE, AND REQUEST/MOTION FOR APPOINTMENT OF INDEPENDENT COUNSEL**

NOW COMES Dennis E. Rusk ("Petitioner"), and herewith petitions and moves pursuant to NRS 622A.390(1)(c) that this tribunal set aside order of discipline, or alternatively, remit the current discipline imposed on Petitioner. This petition and motion is based on the pleadings and papers on file to date, the attachments hereto, the following memorandum of points and authorities, and any hearing or oral argument or evidentiary hearing the Board directs. Further, it is the understanding that legal counsel for the Board is Louis Ling, and the following calls into question the legal ethics, honesty, and prosecutorial conduct of Ling.

This, together with recent disclosure of these facts to the State Bar of Nevada, calls into question the independence of Ling such that his continuing representation of the Board or actions as prosecutor in this action are subject to a conflict of interest and otherwise contraindicated. In this respect, it is requested that the following be reviewed and addressed by independent counsel as much of what is addressed requires a review of Ling's actions, and even an investigation of Ling's conduct.

## MEMORANDUM OF POINTS AND AUTHORITIES

## I. APPOINTMENT OF INDEPENDENT COUNSEL

The Rules of Professional Responsibility for attorneys in the State of Nevada require that, commensurate with this Petition/Motion, the undersigned also file a disclosure with the State Bar of Nevada setting forth any alleged defalcations of Louis Ling ("Ling") regarding his professional responsibilities. NV ST RPC Rule 8.3, accord, Iowa State Bar Assoc. Committed on Ethics & Practice Guidelines, Opinion 14.02 (2014) (construing a functionally identical provision and noting that on the filing of papers questioning a lawyer's ethics, disclosure to the state bar is mandatory). This disclosure is filed commensurately herewith, and a copy is attached as exhibit A.

As noted by the Supreme Court of the State of Washington,

> A prosecutor is "a quasi-judicial officer. He represents the state, and in the interest of justice must act impartially." *State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096, 21 L. Ed. 2d 787, 89 S. Ct. 886 (1969). If a prosecutor's interest in a criminal defendant or in the subject matter of the defendant's case materially limits his or her ability to prosecute a matter impartially, then the prosecutor is disqualified from litigating the matter, and the prosecutor's staff may be disqualified as well. *See generally State v. Stenger*, 111 Wn.2d 516, 520-23, 760 P.2d 357 (1988).

*State v. Ladenburg*, 67 Wn. App. 749 (Wash. Ct. App. 1992). Indeed, allowing Ling to proceed with this prosecution may well be constitutionally restricted. *Accord Bordenkircher v. Hayes*,

434 U.S. 357, 365 (U.S. 1978) ("There is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse. And broad though that discretion may be, there are undoubtedly constitutional limits upon its exercise.").

The disqualification of a prosecutor rests with the sound discretion of the tribunal. In exercising that discretion, the tribunal should consider all the facts and circumstances and determine whether the prosecutorial function could be carried out impartially. Collier v. Legakes, 98 Nev. 307, 309-10, 646 P.2d 1219, 1220 (1982) overruled on other grounds by State v. Eighth Jud. Dist. Ct. (Zogheib), 130 Nev. Adv. Op. 18, 321 P.3d 882 (2014). Here, by the contents of this petition, and by the contents of the report to the State Bar of Nevada, Ling is put in a position of having to justify his actions. As the evidence below clearly demonstrates, Ling omitted certain critical exculpatory evidence from his presentation even though he subsequently acknowledged that he knew of its existence. His personal interests are squarely opposed to petitioner's requests under the law as herein forwarded. The inability of Ling to carry out his functions impartially is patent, and an independently appointed prosecutor/attorney for the Board is required in this matter with respect to these post-decision proceedings.

## II. JURISDICTION AND AUTHORITY

Under the common law, a tribunal always has authority to modify or address its judgments. Ruben v. Am. & Foreign Ins. Co., 185 A.D.2d 63, 68, 592 N.Y.S.2d 167, 170 (1992); People v. Shorts, 32 Cal. 2d 502, 506, 197 P.2d 330, 332 (1948). In Nevada, this is further expanded in that the Nevada Supreme Court has recognized the continuing validity of a writ of coram nobis with respect to tribunals. Trujillo v. State, 129 Nev. Adv. Op. 75, 310 P.3d 594 (2013), as modified (Dec. 30, 2013). Further, and most importantly, NRS 622A.390(1), grants Petitioner the authority to bring the current motion to vacate, and mandates that the motion be considered.

Professional disciplinary proceedings are quasi criminal. In re Ruffalo, 390 U.S. 544, 551, 88 S. Ct. 1222, 1226, 20 L. Ed. 2d 117 (1968); Charlton v. F.T.C., 543 F.2d 903, 906 (D.C. Cir. 1976) ("Disciplinary proceedings 'are adversary proceedings of a quasi-criminal nature,' and '(d)isbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer.'"); In re Berkhimer, 593 Pa. 366, 371, 930 A.2d 1255, 1258 (2007); In re Smith, 123 F. Supp. 2d 351 (N.D. Tex. 2000) aff'd, 275 F.3d 42 (5th Cir. 2001), accord Dutchess Bus. Servs., Inc. v. Nevada State Bd. of Pharmacy, 124 Nev. 701, 191 P.3d 1159 (2008); State Bar of Nevada v. Claiborne, 104 Nev. 115, 225, 756 P.2d 464, 535 (1988). Obviously, the disciplinary action taken here is directly analogous to the disbarment proceedings for attorney's referenced above, and would carry with it the identical constitutional and legal perspectives and responsibilities.

As the decision here was rendered in a quasi-criminal context, the protections afforded criminal defendants are also afforded Petitioner. Coram nobis, the review of a conviction by the rendering tribunal, in context, is obviously one of these protections. Moreover, under NRS 622A.390(1)(c), the legislature has obviously seen fit to allow for motions challenging the entire precept of the legitimacy of the prosecution through petitioning to have the decision vacated, and this is such a motion.

Seeking vacation of the decision is under the express grant of such authority under NRS 622A.390(1)(c), where the Board has continuing authority to vacate its prior determinations and sentences. As the following demonstrates, the original decision of this tribunal was on less than a thorough record which was purposely doctored by the prosecutor, denied substantive due process to the Petitioner, has imposed sanctions outside the scope of the jurisdiction of the tribunal, and arguably most importantly, premised its decision on false precepts including false statements of law presented by prosecutorial staff, and false, if not outright perjured testimony of the Board's percipient witnesses, as knowingly fostered by the prosecutor, Ling.

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## III. NATURE OF THE REMEDY SOUGHT

As mentioned, Nevada has expressly held that coram nobis remains a viable course of proceeding on matters of criminal conviction. Trujillo v. State, 129 Nev. Adv. Op. 75, 310 P.3d 594 (2013), as modified (Dec. 30, 2013). The proceeding against Petitioner was quasi-criminal in nature. In re Ruffalo, 390 U.S. 544, 551 (1968); Javits v. Stevens, 382 F. Supp. 131, 138 (S.D.N.Y. 1974) ("Disciplinary proceedings are quasi-criminal in nature . . . ."); cf Flamingo Paradise Gaming, LLC v. Chanos, 125 Nev. 502, 518, n.12, 217 P.3d 546, 557, n.2 (2009) (Recognizing a proceeding with fines and professional licensure at issue is quasi-criminal).

A quasi-criminal proceeding must be conducted in a way to preserve and protect a defendant's due process rights, and a failure of due process requires reversal or remission of a conviction. M.J.T. v. A.V.B., No. A-0997-12T1, 2013 WL 3744050, at *8 (N.J. Super. Ct. App. Div. July 18, 2013). As to administrative proceedings involving professional licensure, it has been held that due process rights owed a subject charged in a quasi-criminal proceeding includes the right to confront and impeach the witnesses against him. Rinaker v. Superior Court, 62 Cal. App. 4th 155, 165, 74 Cal. Rptr. 2d 464, 469 (1998). Also included is the Fifth Amendment right against self incrimination. Fowler v. Vincent, 366 F. Supp. 1224, 1226 (S.D.N.Y. 1973). Further, the due process requirement that conviction exceed proof beyond that of a preponderance of the evidence applies in quasi-criminal proceedings. Sealed Appellant 1 v. Sealed Appellee 1, 211 F.3d 252, 254 (5th Cir. 2000). In short, practically the full panoply of due process rights under criminal proceedings are extended to some degree to quasi-criminal administrative proceedings as well.

And above all, all this indicates that in a quasi-criminal proceeding, substantive due process must be granted the subject of a quasi-criminal proceeding. Here a denial of both procedural due process and substantive due process are implicated in the conviction of Petitioner. "[S]ubstantive due process is violated when the government interferes with fundamental rights . . . ." Hodges v. Valley View Cmty. Unit Sch. Dist. 365U, No. 11 C 8418, 2013 WL 5289059, at *2 (N.D. Ill. Sept. 18, 2013) aff'd sub nom. Friend v. Valley View Cmty. Unit Sch. Dist. 365U,

789 F.3d 707 (7th Cir. 2015), reh'g denied (July 14, 2015). "A [persons] right to substantive due process is violated when the behavior of the state actor is so egregious it may be said to shock the conscience." Stahl v. Main, No. CIV A 07-4123 (SRC), 2008 WL 2446816, at *3 (D.N.J. June 16, 2008); Cnty. of Sacramento v. Lewis, 523 U.S. 833, 847, 118 S. Ct. 1708, 1717, 140 L. Ed. 2d 1043 (1998). Petitioner's interest in his professional license is a property interest entitled to these substantive due process protections and requirements. See Painter v. Abels, 998 P.2d 931, 940 (Wyo.2000); Johnson v. Bd. of Governors, 913 P.2d 1339, 1345 (Okla.1996); see also Wash. State Med. Disciplinary Bd. v. Johnston, 99 Wash.2d 466, 474, 663 P.2d 457 (1983); Nguyen v. State, Dep't of Health Med. Quality Assurance Comm'n, 144 Wash. 2d 516, 523, 29 P.3d 689, 692 (2001).

With these rights and the prior proceeding in mind, Petitioner seeks a remedy analogous to coram nobis, either reversing the order of discipline, vacating the order and directing a new hearing, or modifying the punishment and findings concerning Petitioner. The grounds for vacation of the order, the relief allowable under NRS 62A.390(1), are varied, and include:

1. Fraud on the tribunal;[1]
2. Surprise;
3. Excusable neglect;[2]
4. The judgment is void;[3]
5. Prosecutorial misconduct;[4] and
6. Knowing use of false testimony to gain the conviction.[5]

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[1] See NC-DSH, Inc. v. Garner, 125 Nev. 647, 218 P.3d 853 (2009)
[2] See Bruno v. Schoch, 94 Nev. 712, 582 P.2d 796 (1978)
[3] Scheeline Banking & Trust Co. v. Stockgrowers' & Ranchers' Bank of Reno, 54 Nev. 346, 16 P.2d 368 (1932)
[4] Jones v. State, 101 Nev. 573, 577, 707 P.2d 1128, 1131 (1985)
[5] State v. Jones, 43,053 (La. App. 2 Cir. 2/20/08), 982 So. 2d 105 writ denied, 2008-0710 (La. 10/10/08), 993 So. 2d 1282 (La. 2008)

In this matter, each of the foregoing exist, and considering the depth of the demonstrable shortcomings of the proceedings, these failures require that the order of discipline be vacated or substantially modified.

One other factor should be noted here. There is no laches or timing statute affecting the Petitioner's right to bring this petition/motion. This is clearly shown on the face of the statute where the methods of calling into question the judgment are expressly listed as 1) request for rehearing, 2) a request for reconsideration, 3) a motion to vacate, or 4) a motion to modify the order. NRS 622A.390. Also expressly stated is a time limit for the bringing of a motion for rehearing or reconsideration, and patently absent is any time limit for bringing a motion vacate or to modify the order. Under the rule of expressio unius est exclusio alterius (the expression of one thing is the exclusion of another), the statute allows for the bringing of the motion to vacate or modify at any time after a sanction is ordered. Accord Dep't of Taxation v. DaimlerChrysler Servs. N. Am., LLC, 121 Nev. 541, 548, 119 P.3d 135, 139 (2005); Galloway v. Truesdell, 83 Nev. 13, 25, 422 P.2d 237, 246 (1967) ("Every positive direction contains an implication against anything contrary to it, or which would frustrate or disappoint the purpose of that provision."). Thus, the within motion/petition is timely, and ripe for consideration.

## III. FACTS RELEVANT TO THE CURRENT PETITION/MOTION

Petitioner is, and was, a licensed architect within the State of Nevada and various other jurisdictions. His history in the profession spans decades.

Petitioner was commissioned to design a project known as Verge. This project design incorporated a unique structural design referred to as "staggered truss." Although exceedingly rare at the time of the commission, despite a worldwide recession quashing most high-rise

construction, numerous projects using this system have been undertaken of late.[6] In short, staggered truss construction is a burgeoning trend.

Petitioner completed the design, and submitted it to the City of Las Vegas for approval. He sought to do this under a provision of the law allowing for phased construction with a permit for a shell ("a shell permit") allowing for commencement of construction. At the time, although expressly allowed under the law, the only published standards adopted for phased construction in Southern Nevada commenced under a shell permit were those propounded by Clark County. See exhibit B as an exemplar. Nonetheless, Petitioner, assuming that the law would apply as written, and an allowable shell permit authorized the submission of the design of a "shell" would result in a building permit to commence construction, submitted a shell design for Verge.

With this submission, Petitioner also included engineering and fire/life safety plans compiled by a third party professional engineering firm coordinating with Petitioner. With reference to the current proceedings, the most relevant fact is that **fire/life safety engineering and plans were submitted with the initial filing**. Exhibit C. Note that this submission includes the file stamp for the City of Las Vegas showing that the submission was on March 6, 2006, commensurate with the filing of the initial plans by Petitioner. The set filed with the plans was the only set that Petitioner had at the time of filing the plans as the date supplied by

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[6] For example, an internet search shows the following projects completed or on line since the Verge commission, with the same search showing that the staggered truss design was adopted for purposes of cost savings, lightness, and versatility:
Staybridge Suites, Chicago, 2008
169 Nguyen Ngoc Vu – Hanoi. (21 floors) 2013
Westin Boston Waterfront Hotel, 2006
Toronto Christian Resource Centre Housing Project, 2012 (citing construction savings to system)
Godfrey Hotel, Chicago, 2015 (citing to speed of construction and cost savings from staggered truss system)
Hocking College residence halls, Ohio, 2008
Bookmen Stacks Building, Minneapolis, 2005
Fordham University Law School Building, New York, Under Construction
Project Resettlement Ward 11 – District 6 – Ho Chi Minh City, 2013

Schermer Engineering, as noted on the plans, did not leave sufficient time for a duplicate set to be made. Rusk testimony, Record of Proceedings, [7]

With respect to this fire/life/safety submission, review of exhibit C shows that it was fully coordinated with Petitioner's plans as the fire/life safety elements were overlaid on plans drafted by Petitioner, and the submission specifically stated that these were the plans governing over any discrepancy between the pre-fire/life safety plans and the plans separately submitted by Petitioner. Exhibit A, p. B 010. These plans, exhibit C, were not included in the Board's proofs at the hearing. Moreover, the plans submitted in exhibit C were not provided by the Board to the Board's expert for his review of the plans. Decision and Order, exhibit , ¶ 13, Record of Testimony, Testimony of Amor,Vol. 4, p. 176, Statement of Member Klai, .

The fact that these were in the Board's possession was not discovered until after the hearing. Pointedly, in related civil litigation the deposition of the Board, duces tecum, was taken, and the Board's files were reviewed at the Board's premises. Within that review, exhibit C was discovered. These were reduced to a disc by the Board pursuant to the deposition, and are here presented. If authentication be needed beyond the authentication statement at the end of this document, the undersigned retains the disc supplied by the Board of the files it held in its possession. In short, in the Board's files the fire/life safety plans on file at the time of Petitioner's initial submission of the Verge plans, and these were found to be in the possession of the Board and timely filed.

At the hearing, Ling, the prosecutor, made much of the absence of the fire/life safety plans, effectively accusing Petitioner of ignoring the requirement. This was highlighted in his cross examination of Petitioner, and in his closing argument in relevant part, as follows:

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[7] The entire record of proceedings in six volumes in two binders is separately filed herewwith.

Ling: I just want to make sure the record is crystal clear on this -- to submit the first set of documents, which is Exhibit B,[8] and not to have addressed the fire life safety issues?
Rusk: I did.
Ling: They're not in Exhibit B; correct?
Rusk: I did by submitting the fire life safety report and the fire life safety documents as part of my package.
Ling: But there's no proof here today. There's no evidence before the Board?
Rusk: And there's no proof that I didn't submit it. I did.
* * *
Ling: If you don't satisfy him, you don't get a permit.[?]
Rusk: No, that is not correct because you're assuming that I did not make sure that the life safety drawings were submitted to the building department. They were.
Ling: They're not here.
Rusk: You did not review them.
Ling: They're not here.[9]
* * *
Ling: [The fire/life/safety submission is] not before this board. They are not part of those documents [the plans submitted by Ling as the plans submitted by Rusk] . . .
Rusk: Are you asking me a question. No, that is not correct. If the Board decided not to pick up the life safety documents from the building department, of course, they didn't review them.[10] But that doesn't mean that they didn't exist . . . . They, in fact, did exist. And those life safety documents address the fire alarm system, the smoke alarm system and those issues.
* * *
Ling: I'm talking at the early stages.
Rusk: At the very early stages, they were turned in. They were not reviewed, but they were there. They were at the building department. I physically turned them in. I put them in my package. They were there.
Ling: There's no evidence of that today, is there? **All we have is your word**.
I don't have any more questions.

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[8] This exhibit B from the hearing appears in the Record of Proceedings, vol. 2.

[9] Note that this statement by Ling in failing to acknowledge that he had, in fact, reviewed the fire/life safety engineering appearing in exhibit B had the effect of directly misleading the Board to the effect that they did not exist. In fact, Ling acknowledged in a later proceeding that he was aware of these plans submitted with Rusk's initial submittal to the City of Las Vegas Building Department. Exhibit D, p. 22.

[10] This is obviously Petitioner being surprised by the fact that the fire/life safety plans were not in exhibit B as submitted by Ling as Petitioner's initial submittal. He was searching for an explanation as to why they would be absent, and clearly surmised that Ling had failed to retrieve them or that the reviewer had failed to see them. As shown below, Petitioner's perspective was in error, as was his inclination to provide a reasonable non-devious explanation for their absence. In fact, Ling had the plans and knew that the plans existed, but failed to disclose them to the Board.

Transcript of Proceedings, Vol. 5, pp. 128-131. Ling also highlighted that they were nowhere to be found in the documents comprising Petitioner's submission as presented to the Board by him as an exhibit, thusly stating that they were not filed. This is especially pertinent because Board staff represented at the hearing that the initial submission by Petitioner was included as the exhibit before the Board further supporting the false presentation that there were no such documents. See Bach statement, Record of Proceedings, vol. 5, p. 70 (Stating that only the initial set of plans were reviewed which would have necessarily included exhibit B at the hearing). Ling also falsely positively states that it is known that the contents of exhibit C, attached, was never submitted. Record of Proceedings, vol. 5, p. 97. That is, Ling affirmatively represented in the prosecution of Petitioner that exhibit C, attached, did not exist, while he actually knew that it did exist.

At another point in the proceedings, Petitioner sought to cross examine the Board's expert on the contents of that which he knew he had filed (exhibit C), and Ling interjected as follows:

> "Mr. Chairman, I need to object. Two grounds. First and foremost, we're doing it again. We're assuming a bunch of evidence or a bunch of facts that aren't in evidence before you. . . . To the extent that he wanted to also get in a bunch of information that isn't in fact evidence and isn't likely to be in evidence in this case, I think that that question is objectionable."

Record of Proceedings, vol. 4, p. 188. As Ling had the very information about which he was objecting in his possession, and had removed it from the proceedings and failed to disclose it to Petitioner, Ling's intent is clear.[11] He is seeking to make sure that the relevant and determinative information, only known to him and Board staff, not get in the way of his prosecution and

[11] Also note that had Ling actually disclosed exhibit B to the Board's expert, Amorr, the questions posed by Petitioner would not have been without foundation, and Ling could only make his objection because he had misled the Board's expert through omission of relevant documents.

conviction of Petitioner. In other words, he wanted to make sure that the record was not messed up by the truth actually known to him; a clear violation of prosecutorial ethics.

In actuality, the objection by Ling was the perfect and appropriate time for Ling to apologize for the defalcations to that point, admit that the questions asked by Petitioner were relevant in light of the information Ling had withheld from the process, produce exhibit C, attached, and assure that the Board had the actual facts and truth rather than the false record he constructed. Like failing to pipe in when Member Klai noted the absence, he continued to actively keep secret the fact that most of his prosecution on the Verge project was premised on a fallacy he created, yet had the ability to correct. See Klai statement, supra, p. 14. Instead, he relied on his withholding of evidence and tampering with evidence, increased his leverage, and further prejudiced Petitioner's case and justice through his actions.

And finally, Ling then highlighted the alleged lack of fire/life safety engineering in Petitioner's submissions in his closing argument, stating, "If you believe Mr. Rusk, then somewhere, somehow there was a whole set of fire life safety documents that we haven't seen, that aren't part of his original submittal." Transcript of Proceedings, Vol. 5, p. 157. Clearly, it was Ling's goal to accuse Petitioner of failing to submit fire/life safety engineering plans with his initial submission, and to present the absence as his argument concerning Petitioner's alleged failures. In short, Petitioner was convicted on Lings false presentation that Petitioner did not submit fire/life safety engineering with his initial submission.

One other set of facts also impacts the substantive due process failures concerning Petitioner. There were two particular factors the Board found important in determining that Petitioner was negligent concerning the Verge project as indicated in the decision. The first, and most critical, was the finding of the failure of Petitioner to include fire/life safety plans in his initial submittal (now proven false), and the second was that Petitioner lacked any credibility and

could not be believed when he stated that the fire/live safety engineering and plans had been submitted. As noted in the Decision, exhibit E, pp. 5-6, ¶ 13, "Mr. Amor believed that Mr. Rusk's first set of design drawings was grossly deficient, and therefore that Mr. Rusk was grossly negligent because the first set completely lacked any FLS [fire/life safety] design and engineering which would endanger any people who might go into the structure . . . ." With the subsequently discovered exhibit C, withheld from the proceeding and the expert by Ling, clearly this conclusion was insupportable and based on false evidence orchestrated by the prosecutor. As to credibility, see exhibit D, p. 7, ¶ 16. It is especially pertinent that the Board determined that they agree with Amor that "Rusk did not know what he did not know . . . ." Pointedly and gaulingly, it is now shown that it was Amor who "did not know what he did not know" as Ling had failed to disclose exhibit C to Amor.

This was untrue, devious, intentionally misleading, and downright evil concerning Ling's status as a prosecuting attorney in the quasi-criminal proceeding against Petitioner. Pointedly, Ling knew, at all relevant times, that exhibit C was, in fact, submitted by Petitioner with his initial filing. Note that Ling states, at least twice, that the drawings were not at the Board's offices ("they're not here"). But they were, and that's where they were inspected in the later deposition. And most importantly, Ling now admits that he knew, at all relevant times, that the fire/life safety plans were made with the initial submittal by Petitioner. Attached as exhibit D is the brief filed by Ling in District Court. There, Ling states,

> "Board Counsel was obliged to introduce such evidence and testimony as he deemed necessary and appropriate to prove the allegations made against Mr. Rusk. Mr. Rusk was obliged to introduce such evidence and testimony he deemed necessary and appropriate to defend himself against the allegations made against him, and this obligation inhered even where Mr. Rusk decided to represent himself. **The Board Counsel determined that the Schirmer Engineering documents were not necessary to prove that Mr. Rusk was negligent or incompetent, so he did not introduce them.**"

Exhibit D, p. 22: 22-27 (emphasis added). That is, Ling acknowledged that he knew of the contemporaneous submission by Petitioner, but did not disclose it to this tribunal.

The Board may recall that the decision was premised on the failure of Petitioner to submit the fire/life safety plans with his initial submission. Petitioner's credibility was challenged and determined wanting on the very precept that he must be lying about the submission hidden by Ling. The argument was so forceful that in deliberations the following was stated by Member Klei:

> Member Klai: Is there room for any question at all? I find it [a] little bit baffling. If this matter has been before us for three years and if the fire and life safety drawings are that critical to the matter and seem they are the cusp of all our concerns with regard to negligence and competence and everything else, that the Respondent[12] **and/or our Staff didn't take it upon themselves to bring these drawings forward if they truly existed from the date of June of '07, and bring it forward again, beyond just the architecture drawings we've seen here today.**

Record of Proceedings, vol., p. . The answer to Klai's query is clear. Ling didn't bring them forward in order that he could falsely argue, and successfully so, that Petitioner had never made the submission.

Another factor considering the Board's decision and Ling's obstruction in preventing Petitioner from properly defending the matters at the hearing was the absence of any guidance of the standard of care concerning shell building plans and approvals. Shell building submittals are expressly authorized by the building code. IBC § 106. There were no published guidelines as to what will suffice for the City of Las Vegas, but the County of Clark had published such requirements at the time of the hearing. See exhibit B. Petitioner sought to introduce this document, but the Board ruled, at Ling's prompting, that the submission was irrelevant to the

[12] As to the alleged failure of Petitioner to bring them forward, the only file stamped copy was in the possession of Ling, never disclosed to Petitioner, and was assumed by Petitioner, as he had a right to assume, that the prosecutor [Ling] had fully disclosed, rather than tampered with, Petitioner's initial submission.

issues before the Board because the submittal was of a later publication by a different jurisdiction, albeit another Southern Nevada Jurisdiction. As shown below, Ling's proffer was disingenuous.

## IV. ANALYSIS

### A. THE MOST GLARING ISSUE IS THE FRAUD ON THIS TRIBUNAL BY THE PROSECUTOR IN GAINING THE CONVICTION AND SANCTIONS AGAINST PETITIONER

#### 1. THE CRITICAL NATURE OF THE ALLEGED LACK OF FIRE/LIFE/SAFETY PLANS IN THE DECISION

Due to post-decision research and discovery, it is now incontrovertible that Petitioner supplied fire/life/safety plans and engineering with his initial submission to the City of Las Vegas. Exhibit C. This is put up-front and first in order that the Board can grasp the gravity of the injustice imposed by its order. Following this section are a plethora of additional examples of irregularities warranting the vacation of the order of discipline, but Petitioner trusts that this most extreme example will provide a solid backdrop to what actually occurred in the proceeding against Petitioner, and why the discipline should either be vacated or modified.

In the context of the proceedings it was glaringly apparent that one factor appeared most critical to the Board in its decision—Petitioner's alleged failure to provide fire/life/safety plans with his initial submission. Leading the decision of the Board is a two-fold finding that Petitioner was other than credible, and that he submitted his initial plans for review to the City of Las Vegas without required fire and life safety considerations. See Order, Exhibit A, Findings of Fact, ¶ 13 ("[T]he first set [of plans submitted] **completely lacked any FLS design and engineering** . . . ."), ¶ 15 ("Mr. Rusk . . . offered no evidence or proof either that Schirmer Engineering had, in fact, ever created any drawings or that the drawings had ever been submitted to the City of Las Vegas."), and "Mr. **Rusk's claim that he filed Schirmer Engineering's drawings appears untrue.**" (Emphasis added). In fact, and demonstrably so, Petitioner's

statements were completely true, the prosecutor and Board staff in this matter, apparently deviously concerning staff and the prosecutor, held the engineering drawings back and fraudulently prosecuted the case, and the Board was grossly misled towards gaining a conviction of Petitioner.

This is further exemplified and amplified by the nature of the questioning of Petitioner, and the statements by the Board in deliberations. First, Ling made it clear that he was accusing Petitioner of having not submitted the fire/life/safety drawings at the hearing. Testimony of Petitioner elicited by Ling, p. 10, supra, Transcript of proceedings, Vol. 5, pp. 128-131. Ling then highlighted this in his closing argument, stating, "If you believe Mr. Rusk, then somewhere, somehow there was a whole set of fire life safety documents that we haven't seen, that aren't part of his original submittal." Transcript of proceedings, Vol. 5, p. 157. Clearly, it was Ling's goal to falsely accuse Petitioner of failing to submit fire/life/safety engineering with his initial submission, and then, through doctoring evidence and misrepresenting facts to the Board, gain a conviction on this fabricated absence of fire/life safety planning.

The Board very strongly picked up on these alleged proofs, and in their deliberations, demonstrated the critical nature of this alleged oversight in their conclusions. Specifically, the following was stated:

> Member Klai: Is there room for any question at all? I find it [a] little bit baffling. If this matter has been before us for three years and **if the fire and life safety drawings are that critical to the matter and seem they are the cusp of all our concerns with regard to negligence and competence and everything else,** that the Respondent and/or our Staff didn't take it upon themselves to bring these drawings forward if they truly existed from the date of June of '07, and bring it forward again, beyond just the architecture drawings we've seen here today.

Transcript of proceedings, Vol. 5, p. 179 (emphasis added). This, when coupled with the decision at p. 7, ¶ 16, clearly demonstrates that this false premise, fostered and caused directly by

the knowing omissions and failure to correct the record by the prosecutor, that the within conviction and attendant sanctions were caused by prosecutorial misconduct.

## 2. THE NATURE OF THE PROSECUTORIAL MISCONDUCT AND FRAUD UPON THIS TRIBUNAL

It is now evident that in his prosecution of Petitioner, Ling violated the following rules of professional conduct: NV ST RPC Rule 3.1; NV ST RPC Rule 3.3; NV ST RPC Rule 3.4; NV ST RPC Rule 3.8; NV ST RPC Rule 4.1; and NV ST RPC Rule 8.4. Highlighting these violations is Ling's representation at the hearing stating, "We do know it [the fire/life safety engineering] wasn't submitted . . . ." Record of Proceedings, vol. 5, p. 97: 2. He argued this at closing. And all the while, he knew that the documents existed. Exhibit D, p. 22. Prosecutorial misconduct coupled with substantial prejudice to the party charged sufficiently provides a violation of substantive due process. United States v. Kearns, 5 F.3d 1251, 1254 (9th Cir. 1993).

And Ling presented this alleged, yet false, failure with great aplomb, as the decision reflects that the Board found that Petitioner was not credible, essentially lying about the submission, and as he was unbelievable. The Decision also thusly finds that the documents now attached as exhibit C were not filed with Petitioner's initial submittal of plans to the City. On this basis it was concluded that there was a failure to file that which was now indisputably filed as shown by exhibit C. The decision also finds Petitioner negligent for failing to submit this very document now shown to have been timely submitted, and, at all times, known by Ling to have been filed. Ling also apparently chose to doctor the evidence submitted, exempting the fire/life safety documents from the exhibit B, Record of Proceedings, vol. 2, he presented at the hearing. And then he withheld them from review by his expert thusly eliciting false testimony from the expert on numerous occasions due to this submission. All of this was obviously contrived to present a false picture of events to the Board in order to gain a conviction of Petitioner.

In undertaking these actions, Ling fell far short on his following ethical obligations:

> A lawyer shall not bring . . . a proceeding, or assert or controvert an issue therein, unless there is a basis in law **and fact** for doing so that is not frivolous . . . ." NV ST RPC Rule 3.1 (emphasis added);

"Offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." NV ST RPC Rule 3.3

"[A lawyer shall not] [f]alsify evidence, counsel or assist a witness to testify falsely . . . ." NV ST RPC Rule 3.4

As a criminal prosecutor, "[m]ake timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense . . . . " NV ST RPC Rule 3.8

"Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client . . . ." NV ST RPC Rule 4.1

"Engage in conduct that is prejudicial to the administration of justice." NV ST RPC Rule 8.4

Most of the failures are evident, but some require explanation.

On the failure to disclose a material fact to a third person, Ling engaged Mr. Amor, his expert. In providing the information to Amor for Amor to form his expert opinions, Ling omitted the contents of exhibit C. Amor never had an opportunity to review Petitioner's entire submittal, although Amor did not know there were omissions. Compare Record of Proceedings, vol. 4, p. 176 and exhibit A attached. On this basis, Ling elicited testimony from Amor stating that functionally all of exhibit C, submitted contemporaneously with those plans Ling selected to admit, was absent from Petitioner's initial submission, and that submission was grossly negligent. Record of Proceedings, vol. 4, pp. 152-156.

Also of note in this respect is Ling's question to Amor on the issue as follows: "The first set of documents you reviewed, which was the March 6 or March 7 submittal had 72 sheets, correct?" Record of Proceedings, vol. 4, p. 152: 12-14. Amor responded affirmatively. Ling did two fraudulent things here. First, he mischaracterized the documents Amor reviewed as "the March 6 or March 7 submittal." The now demonstratively filed exhibit C was part of that submittal, so Ling mischaracterized the documents Amor was provided as "the submittal," when it was a substantially and substantively redacted portion of the submittal, and Ling knew this.

Ling then, even more deviously, presented the number of drawings submitted by Petitioner as totaling "72 sheets." Simple review of the file stamped exhibit C shows that Petitioner's initial submittal had at least twenty-five more drawings submitted. It is unknown how many other drawings Ling removed from the purported submittal in order to bolster his case against Petitioner, but these twenty-five omitted drawings are patently evident. He then used the discrepancy between the number of sheets submitted with the initial submittal and the final submittal purporting to show that Petitioner's initial submittal was grossly deficient, and having the expert confirm this. Id.[13] In short, despite knowing the true facts, Ling underrepresented this alleged deficiency in the number of needed drawings by a factor approaching 50% to the witness, and correlatively to the Board, and then relied on this very same kited false showing to argue that Petitioner's conduct violated his ethical duties.

Further, as noted above, the proceeding against Petitioner was quasi-criminal, which, by title and constitutional parameters, is a class of criminal proceeding. Ling's duty was to disclose to Petitioner all exculpatory evidence. NV ST RPC Rule 3.8. Ling did not merely violate this proscription, he went the other way and actively relied upon Petitioner's lack of knowledge of the exculpatory evidence to gain a conviction of Petitioner. And he succeeded to the point of actively misleading the Board from the true facts.

In all forums, fraud upon the tribunal is grounds for vacating a judgment of the tribunal. The fabrication of evidence with the participation of the attorney (here prosecutor) is the sine qua non of fraud on a tribunal. See Occhiuto v. Occhiuto, 97 Nev. 143, 146, 625 P.2d 568, 570 (1981). Exhibit B in the hearing before the Board, Record of Proceedings, vol. 2, was fabricated evidence as it constituted a redacted initial submission by Petitioner represented by the

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[13] In another section of testimony, Amor obliquely acknowledged that had he seen exhibit C, Petitioner may have been compliant with the very factors he testified were absent in his review. Record of Proceedings, vol. 4, p. 187: 12-20

prosecutor and his expert as the entire initial submission by Petitioner. Also fabricated, apparently solely through Ling and likely without knowledge of the witness, was the testimony of Amor to the effect that Petitioner was negligent in failing to submit the contents of exhibit C with his initial submission. The only way this could be elicited from Amor was through Ling's withholding of exhibit C, attached, from Amor and informing Amor that he had received the entire submission. This, too, was fabricated evidence constructed by Ling.

Then there is the number of plan-sheets submitted in the original submission. Ling submitted seventy-five sheets in his exhibit B at the hearing,[14] omitting the twenty-five sheets in exhibit C attached, and represented through his witnesses that this was the entire submission. Accord Record of Proceedings, vol. 2. Fraud upon the Board in Ling's presentation is patent.

Approaching a half-century ago, it was noted in our courts that, "[m]ore than a century of admonitions has failed to engender in all who serve as prosecutors that instinct for propriety and fairness which their public duty obviously demands." Moser v. State, 91 Nev. 809, 815, 544 P.2d 424, 428 (1975) holding modified by Collman v. State, 116 Nev. 687, 7 P.3d 426 (2000) (Gunderson concurring). Apparently this now, through Ling's actions, approaches a century and one-half of prosecutors ignoring their fealty to justice and their duties as prosecutors, and Ling jettisoned these responsibilities to gain a conviction on materially misleading evidence, the falsity of which, himself, had a hand in creating and fostering.

Conduct such as that shown of Ling in this matter are not merely aggressive advocacy. When, as here, the State is seeking to adversely impact the rights of a citizen, the prosecutor is not "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all." In this sense, his duty is not to win a case, but assure that justice shall be done. Hunt v. Houston, No.

[14] Ling stated seventy-two sheets at the hearing although exhibit B at the hearing included seventy-four sheets.

4:98CV2354, 2008 WL 822401, at *29 (D. Neb. Mar. 26, 2008), citing to Berger v. United States, 295 U.S. 78, 88 (1935). Obviously, falsifying evidence, hiding evidence, and eliciting false testimony is a base violation of this stricture.

Indeed, it is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the due process protections of the Fourteenth Amendment. Mooney v. Holohan, 294 U.S. 103 (1935); Pyle v. State of Kansas, 317 U.S. 213 (1942); Curran v. State of Delaware, 3 Cir., 259 F.2d 707 (1958). This also includes falsified evidence which causes a false impression of the charged party's credibility. Napue v. People of State of Ill., 360 U.S. 264, 269 (1959). In addition, once it is known to the prosecutor that he elicited false testimony, he holds "the responsibility and duty to correct what he knows to be false and elicit the truth. That the [prosecutor's] silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair." Id. At 270. Ling reveled in Amor's testimony reliant on the absence of what is now attached as exhibit C, he knew exhibit C existed, and he not only stood silent, but actually fostered and created the false presentation to the Board. This is a structural defect in the proceedings so egregious that it commands that the conviction of Petitioner be vacated. See State v. White, 81 S.W.3d 561, 570 (Mo. Ct. App. 2002) (Failure of a prosecutor to promptly correct testimony known to be in error is systemic misconduct by the prosecutor).

It should also be noted that review of the complaint in this matter does not provide any indication that the Petitioner was being charged with any failure to submit FLS ("Fire, Live, Safety") plans and engineering, only that the submitted plans may have appeared deficient. Nonetheless, this obviously became a great and central bone of contention at the hearing, as expressly noted by member Klai, with the Prosecutor putting on a case that there were no such drawings. Further to the above, as is evident from the testimony of the Board's expert, Mr.

Amor, the drawings that he was provided to review "completely lacked any FLS design and engineering . . . ."[15] As the prosecution's expert, Mr. Amor would have necessarily been provided the drawings he reviewed by the prosecution team, and by his statement, it is evident that there were no FLS plans and engineering provided to him by the prosecutor. Second, exhibits B and C at the hearing, as discussed in the transcript record, were the exhibits submitted by the prosecutor as exhibits, and while purportedly comprising Petitioner's first and last submission to the City, they did not contain any FLS drawings now discovered to have been extant during the hearing. Simply, Petitioner had submitted such drawings, and they were obviously purposefully removed by Ling and staff from the submission to the Board and withheld from the Board's expert in the formulation of this expert's opinion.

Further, as to materiality warranting that the decision be vacated, obviously, with the fire/life safety drawings and engineering being in the Board's possession and now expressly admitted by Ling to have existed, this conclusively demonstrates that the finding by the Board that Peitioner was lying about having submitted these very documents to plan review was absolutely wrong. It also shows that the Board's conclusion that there was a failure in submitting such documents is in error. These are the two lynchpins of the decision, exhibit E. In short, the existence and discovery of exhibit C demonstrates that the core basis referenced by the Board for its decision against Petitioner are, in a word, wrong. In light of the finding and reliance by the Board on the Board's expert's sworn testimony that he had never seen such documents together with the implication that they did not exist (and Ling's affirmative statement that they did not exist), it also shows that the Prosecutor's submission was going to be selective and intentionally omit the fire/life safety design drawings. Nor could Petitioner foresee that the

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[15] This would have been the testimony and "evidence" for the Board's conclusion that these items were missing in the initial presentation of the plans for Verge to the City of Las Vegas for review.

Prosecutor and staff would interface with their expert and omit critical information from Peitioner's submittals.

It is also established that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the trier of fact. Riley v. State, 93 Nev. 461, 462, 567 P.2d 475, 476 (1977). While possibly not perjury, Amor's statements concerning the absence of fire/life safety plans is certainly false, and known to be false by Ling at the time he elicited this testimony. There is no material distinction between perjured testimony and false testimony created through a prosecutor intentionally withholding evidence from a retained expert. Surely, a prosecutor withholding information and relying upon its absence is also similarly implicated and carries with it the analogous result. Further, prosecutorial misconduct coupled with substantial prejudice to the person charged sufficiently provides a violation of substantive due process. United States v. Kearns, 5 F.3d 1251, 1254 (9th Cir. 1993).

**B. LING MISLED THE BOARD AS TO THE STANDARD OF CARE THROUGH IMPROPER OBJECTIONS**

Petitioner was told that he could not cross-examine a Board witness with documents that had not yet been admitted. When he attempted to admit the document, shell building guidelines for Clark County, exhibit B, Ling objected to the guidelines as irrelevant. The Board agreed. Record of Proceedings, vol. 4, pp. 174-175. They were irrelevant, per the Board's rationale, because they addressed Clark County rather than the City of Las Vegas.

Relevant evidence is evidence that makes a fact of consequence more or less likely in light of that evidence. NRS 48.015. Facts of consequence affected by exhibit B include:

a. Whether phased construction is allowable under the UBC;

b. What is necessary to submit for approval of a phase;

c. Impeachment of Ling's contention that the UBC does not allow for phased construction;

d. Impeachment of Amor's testimony that to allow for phased submission and construction is nothing more than allowing for a sculpture to be built, and this is clearly inappropriate;

e. The actual requirements of that which should be submitted to construct a phase which is given a certificate of completion;

f. The fact that there is a distinction between a certificate of completion and a certificate of occupancy, and that the existence of a certificate of completion in addition to an ultimate certificate of occupancy itself demonstrates the propriety of a shell building submittal; and

g. Whether Petitioner's submittal met the standard of care in the greater Las Vegas Valley.

Indeed, Petitioner covered many of these bases in his proffer attendant to his request for admission. Id. Clearly, the fact that the County of Clark building department, applying the same code as that applicable in the City of Las Vegas, recognizes the propriety of Petitioner's actions under that that code is relevant to all of these questions, and actually, critically relevant.[16] Also

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[16] Note that Petitioner attempted to cross-examine the testimony of a material witness based on this document as well, but was refused by the Board. Record of Proceedings, Vol. 4, p. 77. While this portion may not necessarily be ascribed to prosecutorial misconduct, Ling allowed this evidentiary error to stand without correction. Cross-examination about documents not yet in evidence is perfectly allowable and proper. See S. Illinois Airport Auth. v. Smith, 267 Ill. App. 3d 201, 641 N.E.2d 1240 (1994) (Recognizing the propriety of questioning on unadmitted public records on cross-examination); State v. Medway, No. A-0929-12T3, 2014 WL 5365626, at *3 (N.J. Super. Ct. App. Div. Oct. 23, 2014); Ault v. Miller, No. 05 CV 3115 (RJD), 2008 WL 3890373, at *4 (E.D.N.Y. Aug. 19, 2008); Lear Auto. Dearborn, Inc. v. Johnson Controls, Inc., No. 04-73461, 2011 WL 64305, at *4 (E.D. Mich. Jan. 10, 2011). Indeed, use of documents for impeachment on cross examination is perfectly ordinary. See Christou v. United States, No. 1:06-CR-483-WSD-LTW, 2012 WL 279854, at *3 (N.D. Ga. Jan. 31, 2012). Truly, in addressing an expert witness retained and presented by the prosecution, denying the accused the ability to openly cross-examine denies due process as that witness only appears in the prosecution's case in chief.