

BEFORE THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

NEVADA STATE BOARD OF)
ARCHITECTURE, INTERIOR DESIGN)
AND RESIDENTIAL DESIGN,)

Petitioner,)

vs.)

EIGHTH JUDICIAL DISTRICT COURT)
OF THE STATE OF NEVADA,)
DEPARTMENT 25, HONORABLE)
KATHLEEN DELANEY,)

Respondent)

and)

DENNIS RUSK,)

Real Party in Interest.)

-----)

Case No. 76792

Eighth Jud'l District Court
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 7

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.

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| Reply in Support of Motion to Stay | APPX289 – APPX298 |

Signed this 17th day of October, 2018.

Louis Ling

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
7 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.

Louis Ling

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

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

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

26 CONCLUSIONS OF LAW

27 1. The Board has jurisdiction over this matter because Mr. Rusk is an architect
28 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

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

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

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

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

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

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

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

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

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

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

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

16
17 NEVADA STATE BOARD OF ARCHITECTURE,
18 INTERIOR DESIGN AND RESIDENTIAL DESIGN

19
20 By: 
21 Greg L. Erny, Chairman
22
23
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27
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Exhibit 2

Exhibit 2

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Mandamus

COURT MINUTES

May 22, 2017

A-17-750672-W Dennis Rusk, Plaintiff(s)
vs.
Nevada State Board of Architecture Interior Design and Residential Design,
Defendant(s)

May 22, 2017 **10:30 AM** **Bench Trial**

HEARD BY: Wiese, Jerry A. COURTROOM: RJC Courtroom 14A

COURT CLERK: Alice Jacobson

RECORDED:

REPORTER: Kristy Clark

**PARTIES
PRESENT:**

JOURNAL ENTRIES

The above-referenced matter came on for an Evidentiary Hearing before Judge Jerry Wiese on May 22, 2017. This Evidentiary Hearing was scheduled, following the Plaintiff's Petition for Judicial Review of a Decision of the Board of Architecture denying his Motion to Vacate their prior decision. Although there is some issue about whether the Motion to Vacate was considered a Motion for Rehearing or Reconsideration, or whether it was to be considered a Writ of Coram Nobis, this Court is treating it as a Motion to Vacate. The Board denied Mr. Rusk's Motion, and he subsequently filed what this Court is considering a Petition for Judicial Review. The gist of Mr. Rusk's argument is that when he appeared before the Board of Architecture in 2011, the Board had a copy of the Schirmer Fire Life Safety Report, but Mr. Ling (counsel for the Board), did not disclose it, did not present it to the board, and actually argued that fire life safety (FLS) plans did not exist. Following the 2011 Board's decision against Mr. Rusk, he filed a Petition for Judicial Review, which was assigned to Judge Israel. The PJR was denied, and Mr. Rusk appealed to the Nevada Supreme Court. Mr. Rusk did not obtain any relief at the Supreme Court, and consequently, his case was completed. Subsequently, pursuant to a Subpoena Duces Tecum, the Board of Architecture produced the FLS report (the Schirmer Report), that Mr. Ling had argued did not exist. Mr. Rusk's most recent Motion to Vacate with the

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Minutes Date: May 22, 2017

Board of Architecture, was premised upon the argument that the Board's decision was based upon the Board's belief that there were no FLS plans, which belief was based at least in part on Mr. Ling's alleged prosecutorial misconduct in hiding the subject Schirmer report from the Board.

In the Board's Findings of Fact, Conclusions of Law, and Order, the Board indicated the following:

. . . 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.

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. . . .

(Pg. 7 of the Board's Findings of Fact, Conclusions of Law, and Order, dated 9/27/11).

At the hearing before the Board, Mr. Rusk was emphatic that he had submitted the Schirmer FLS documents, but Mr. Ling said, There's no evidence of that today, is there? All we have is your word. Further, Mr. Ling stated to the Board, 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.

The Board presented evidence at the Evidentiary Hearing suggesting that the Board was aware of the 2006 Schirmer report, that such report was in the Board's file all along, and that it wasn't the existence of the report and drawings, but the failure to coordinate the FLS information into Mr. Rusk's documents, that resulted in the prior finding. While this may be true, the Board's Findings of Fact, Conclusions of Law, and Order, seem to indicate otherwise.

Based on the Court's review of the previous proceedings, the transcript of the hearing before the Board, and the testimony and evidence submitted as part of the Evidentiary Hearing, this Court finds and concludes that there is at least some evidence that what was submitted to the Board in their hearing, did not include the Schirmer FLS documents which were subsequently produced to Mr. Nersesian and Mr. Rusk. Because the Board's decision was based at least in part on the finding that Mr. Rusk had not submitted the Schirmer FLS documents, it seems that new evidence, which was apparently withheld, may be relevant to the Board's determination.

NRS 233B.135 indicates that this Court's review of a final decision of an agency must be

confined to the record, but in cases concerning alleged irregularities in procedure before an agency that are not shown in the record, the court may receive evidence concerning the irregularities. This Court believes that the withholding of the file stamped Schirmer FLS documents constituted such an irregularity, and this is why the Court held an Evidentiary Hearing. The statute indicates that this Court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact. The Court may remand or affirm the final decision or set it aside in whole or in part if substantial rights of the petitioner have been prejudiced because the final decision of the agency is a) in violation of constitutional or statutory provisions; b) in excess of the statutory authority of the agency; c) made upon unlawful procedure; d) affected by other error of law; e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or f) arbitrary or capricious or characterized by abuse of discretion. (NRS 233B.135) [T]o be arbitrary and capricious, the decision of the administrative agency must be in disregard of the facts and the circumstances involved. *Meadow v. Civil Service Bd. Of Las Vegas Metro. Police Dep t*, 105 Nev. 624, 627, 781 P.2d 772 (1989).

Based upon the evidence submitted, and the fact that the March 6, 2007, Schirmer Report, with attached drawings was apparently not before the Board when it conducted its hearing in 2011, this Court finds that it was clearly erroneous and arbitrary and capricious for the Board to refuse to consider such evidence, when presented with Mr. Rusk's Motion to Vacate.

Consequently, the Petition for Judicial Review is hereby GRANTED, and this Court hereby REMANDS this matter to the Board, to 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.

Counsel for Petitioner is to prepare an Order consistent with the foregoing, have it approved as to form and content by opposing counsel, and submit it to this Court for signature within 10 days.

RIS
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Attorney for Appellee/Respondent
Nevada State Board of Architecture,
Interior Design and Residential Design

DISTRICT COURT
CLARK COUNTY, NEVADA

| | | |
|---|---|---|
| DENNIS E. RUSK, AND DENNIS E. RUSK ARCHITECT, LLC |) | Case No. A-17-764562-J |
| Appellants/Petitioners, |) | Dep't No. 29 |
| vs. |) | |
| NEVADA STATE BOARD OF ARCHITECTURE, INTERIOR DESIGN AND RESIDENTIAL DESIGN, |) | REPLY IN SUPPORT OF MOTION TO STAY (First Request) |
| Appellee/Respondent. |) | |
| _____ |) | |

Respondent Nevada State Board of Architecture, Interior Design and Residential Design (the Board) provides its reply in support of its motion to this Court to stay further proceedings in this matter until the pending Petition for Writ of Prohibition (Supreme Court Case No. 76792) is resolved by the Nevada Supreme Court. This reply is made and based upon the pleadings and papers on file herein and the following points and authorities.

I. POINTS AND AUTHORITIES

NRAP 8(a)(1)(A) provides that a party such as the Board must first move for a stay in the district court when the party seeks “(A) *a stay of the judgment or order or, or proceedings in, a district court pending appeal or resolution of a petition to the Supreme Court or Court of Appeals for an extraordinary writ.*” (Emphasis supplied.) Because NRAP 8(a)(1)(A) mandates that the Board pursue the instant motion to stay first before this Court, the Board did not interpose the instant motion for

1 purposes of delay, but, rather, did so in compliance with the Supreme Court's rules. NRAP 8(a)(1)(A)
2 sets forth the process, and the Board is following it.

3 Of the six defenses available under NRCP 12, only the defense of lack of subject matter
4 jurisdiction is non-waivable per NRCP 12(h). Particularly, NRCP 12(h)(3) makes a motion for lack of it
5 non-waivable and mandates dismissal in all such cases at any time in the proceedings, stating, "**Whenever**
6 it appears by suggestion of the parties or otherwise that the court lack jurisdiction of the subject matter,
7 the court **shall dismiss the action.**" (Emphasis supplied.) As the Nevada Supreme Court held in *Landreth*
8 *v. Malik*, 127 Nev. 175, 251 P.3d 163 (2011), a lack of subject matter jurisdiction (NRCP 12(b)(1)) is also
9 the only of the six defenses that can render all subsequent action by a district court **void**: "As an initial
10 matter, whether a court lacks subject matter jurisdiction 'can be raised by the parties at any time, or sua
11 sponte by a court of review, and cannot be conferred by the parties.' *Swan v. Swan*, 106 Nev. 464, 469,
12 796 P.2d 221, 224 (1990). **However, if the district court lacks subject matter jurisdiction, the judgment**
13 **is rendered void.** *State Indus. Ins. System v. Sleeper*, 100 Nev. 267, 269, 679 P.2d 1273, 1274 (1984)."
14 (Emphasis supplied). *Landreth*, 127 Nev. at 180, 251 P.3d at 166.

15 The distinction between a motion to dismiss brought under NRCP 12(b)(1) and any of the other
16 five NRCP 12 defenses is determinative in the instant matter. The Board has been pursuing its assertion
17 under NRCP 12(b)(1) that Mr. Rusk's prematurely filed petition for judicial review cannot confer subject
18 matter jurisdiction on this Court. The Board bases its course of proceedings on *Board of Review v. Second*
19 *Jud'l Dist. Ct.*, 133 Nev. _____, 396 P.3d 795 (2017). At issue before the Nevada Supreme Court in *Board*
20 *of Review* was a petition for writ of prohibition filed by a Nevada administrative agency similar to the
21 Board, namely the Board of Review of the Nevada Department of Employment, Training and
22 Rehabilitation, when a district court did not dismiss the petition for judicial review where the petitioner
23 had not strictly complied with the statute governing its filing (in that case, NRS 612.530(1)). Similar to
24 the instant case, the basis of the Board of Review's motion to dismiss before the district court was that the
25 district court lacked subject matter jurisdiction because the initial petition did not conform to the
26 statutory requisites to confer subject matter jurisdiction. Similar to the instant case, when the district
27 court denied the motion to dismiss, the Board of Review pursued a petition for a writ of prohibition.
28

1 The Nevada Supreme Court expressly found that the petition for a writ of prohibition was
2 properly before it because the issue involved subject matter jurisdiction, stating:

3 A writ of mandamus is available to compel the performance of an act that the law
4 requires or to control an arbitrary or capricious exercise of discretion. NRS 34.160; *Int'l*
5 *Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558
6 (2008). Further, a writ of prohibition may be warranted when a district court acts without
7 or in excess of its jurisdiction. NRS 34.320; *Smith v. Eighth Judicial Dist. Court*, 107 Nev.
8 674, 677, 818 P.2d 849, 851 (1991). ***Where there is no plain, speedy, and adequate***
9 ***remedy in the ordinary course of law, extraordinary relief may be available.*** NRS
10 34.170; NRS 34.330; *Smith*, 107 Nev. at 677, 818 P.2d at 851. Whether a writ of
11 mandamus or prohibition will be considered is within this court's sole discretion. *Smith*,
12 107 Nev. at 677, 818 P.2d at 851. ***This case presents an issue of subject matter***
13 ***jurisdiction, necessitating our immediate consideration, and warrants discussion based***
14 ***on the merits.*** Therefore, this petition for extraordinary relief is properly before us.
15 (Emphasis supplied.)

16 *Board of Review*, 133 Nev. at ____, 396 P.3d 797. In granting the extraordinary relief sought, the Nevada
17 Supreme Court necessarily found that because the matter involved a lack of subject matter jurisdiction,
18 there was "no plain, adequate, or speedy remedy in the ordinary course of law." *Board of Review*, 133 Nev.
19 at ____, 396 P.3d at 797. Equally importantly to the instant motion, the Nevada Supreme Court also
20 found that a petition for a writ of prohibition based upon a district court's denial of a motion to dismiss
21 for lack of subject matter jurisdiction was "properly before" the Court. *Board of Review*, 133 Nev. at ____,
22 396 P.3d 797. It can be expected, therefore, that the Board's instant Petition for Writ of Prohibition will
23 equally be deemed "properly before" the Nevada Supreme Court and that the Court will give the Board's
24 petition its "immediate consideration" for a discussion and ruling "based on the merits." *Board of Review*,
25 133 Nev. at ____, 396 P.3d 797.

26 The *Board of Review* case is the most recent of a long line of cases in which district courts were
27 found to lack subject matter jurisdiction in petitions for judicial review where one of the parties failed to
28 strictly comply with the statutory requisites for the filing of a petition for judicial review. See *Board of*
Review v. Second Judicial District Court, 133 Nev. ____, 396 P.3d 795 (2017); *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); *Kame v. Employment Security Department*, 105 Nev. 22, 769 P.2d 66 (1989); *Caruso v.*
Nevada Employment Security Department, 103 Nev. 75, 734 P.2d 224 (1987); *Scott v. Nevada Employment*

1 Security Department, 70 Nev. 555, 278 P.2d 602 (1954). With 64 years of cases substantively similar to the
2 instant matter, the Board was and is obliged to test this Court's subject matter jurisdiction: failure so to
3 do might result in great expenditure by the parties and the Court in a proceeding that is ultimately
4 determined to have been void all along. Prudence dictated, therefore, that the Board pursue its relief to
5 its end **before** any other substantive acts occurred so that nothing would be wasted on a void enterprise.

6 Mr. Rusk's Opposition relies on *Fritz Hansen A/S v. Eighth Jud'l Dist. Ct.*, 116 Nev. 650, 6 P.3d
7 982 (2000), but *Fritz* is readily and substantively distinguishable from the instant matter. The *Fritz* case is
8 best known as being the case that abolished the special appearance/general appearance distinction where
9 a lack of personal jurisdiction or personal service was at issue, holding that any objections to personal
10 jurisdiction or lack of service of process can be raised pre-answer through a motion to dismiss made
11 pursuant to NRCP 12(b). *Fritz*, 116 Nev. at 656, 6 P.3d at 985-6. In so doing, the Supreme Court once
12 and for all removed the "trap for the unwary" that was the special appearance/general appearance
13 doctrine. *Fritz*, 116 Nev. at 656, 6 P.3d at 985.

14 In *Fritz*, the Nevada Supreme Court also analyzed whether it would grant a stay under NRAP 8
15 during the pendency of the petition for writ of prohibition at issue and after the district court denied a
16 motion to stay. *Fritz* is readily and substantively distinguishable. First, the defenses of lack of personal
17 jurisdiction or lack of service are waivable; whereas, the defense of lack of subject matter jurisdiction is
18 **non-waivable**. Second, because personal jurisdiction questions often turn on factual issues, they will
19 often be subject to fact-finding performed either pretrial or at trial, and all such factual determinations
20 can adequately be reviewed on a subsequent appeal; whereas, a lack of subject matter is a legal
21 determination that is not fact dependent and cannot be adequately tested on appeal because all district
22 court proceedings in such matters are **void** and a subsequent appeal would simply be too late to correct
23 the harm done. Third, in a part of *Fritz* not disclosed by Mr. Rusk, the "likelihood of success" can be
24 where the movant can present "a substantial case on the merits when a serious legal question is involved
25 and show that the balance of equities weighs heavily in favor of granting the stay." *Fritz*, 116 Nev. at 659,
26 6 P.3d at 987. Fourth, because *Fritz* only addresses motions to stay in matters involving waivable defenses
27 that are fact based, not one of the 35 cases or matters in which it has been cited involved a defense of a
28

1 lack of subject matter jurisdiction or a matter involving a petition for judicial review.

2 Because subject matter jurisdiction cannot be waived and because any proceeding where subject
3 matter jurisdiction is lacking is void, all of the analysis of *Fritz* is inapposite. In *Board of Review* – decided
4 seventeen years after *Fritz* – the Nevada Supreme Court implicitly recognized that a petition for a writ of
5 prohibition is proper where a lack of subject matter jurisdiction is at issue because there is no other
6 adequate remedy at law. *Board of Review*, 133 Nev. at ____, 396 P.3d 797. As the Nevada Supreme
7 Court stressed in *Board of Review*, a case involving an issue of subject matter jurisdiction necessitates “**our**
8 **immediate consideration, and warrants discussion based on the merits.**” *Board of Review*, 133 Nev. at
9 ____, 396 P.3d 797. Thus, unlike in *Fritz*, where an appeal could correct an erroneous ruling of subject
10 matter jurisdiction, in the instant case the “object of the appeal or writ petition will be defeated if the stay
11 is denied.” NRAP 8(c)(1). Where the purpose of the stay is to temporarily halt the instant proceedings
12 only until the Nevada Supreme Court can determine whether this Court even has subject matter
13 jurisdiction to proceed, the lack of such a stay would entirely defeat the purpose of the Petition for Writ
14 of Prohibition. In other words, where the question before this Court and the Nevada Supreme Court is
15 of such moment and fundament – namely whether this Court can hear this case at all – that question can
16 and must be answered in finality before any further proceeding before this Court should occur.

17 Similarly, unlike in *Fritz*, in the instant case, the Board has raised a serious legal question such
18 that the balance of equities weighs heavily in favor of the granting of the stay sought by the Board. NRAP
19 8(c)(3) and (4); *Fritz*, 116 Nev. at 659, 6 P.3d at 987. As the Board has already shown, in *Department of*
20 *Commerce v. Hyt*, 96 Nev. 494, 611 P.2d 1096 (1980), the Nevada Supreme Court has held that an
21 administrative agency’s oral pronouncement in a case is not the triggering event for the timely filing of a
22 petition for judicial review and, instead, the triggering event is the subsequent filing of the written order.
23 In *Hyt*, the Nevada Supreme Court framed the issue simply: “We must determine what constitutes a
24 decision by the Commission from which a licensee has ten days to appeal under NRS 645.760.
25 Respondent argues that the oral pronouncement was the decision while appellant claims the written
26 findings constituted the decision.” *Hyt*, 96 Nev. at 496, 611 P.2d at 1097. After discussion, the Nevada
27 Supreme Court answered the question it raised by holding: “**An administrative agency should not be**
28

1 *penalized for announcing its conclusion at the end of a hearing* by requiring the agency to compile a
 2 complete transcript within thirty days of that date. *The written findings of fact and conclusions of law*
 3 *constitute the final decision.* (Emphasis supplied.) *Hyt*, 96 Nev. at 497, 611 P.2d at 1097.¹ Since the
 4 written opinion is the triggering event, Mr. Rusk's filing of the instant petition three weeks *before* the
 5 Board issued its written Order on Remand could not invoke this Court's subject matter jurisdiction
 6 under NRS 233B.130(2)(d), NRS 622A.400(1) and (2), and at least six cases from the Nevada Supreme
 7 Court, namely *Board of Review*, *Thomasson*, *Otto*, *Kame*, *Caruso*, and *Scott*.

8 To fully illustrate the point, Mr. Rusk's truncated version of the Board's ruling presented
 9 on page 6, lines 7-8 of his Opposition is misleading and disingenuous. Here is the complete and
 10 pertinent portion of the Board's proceeding:

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

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

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

16 MS. LONG: That's fine.

17 MR. ERNY [Board Member]: Second.

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

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

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

24 MR. MICKEY: And we will adjourn.

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

27 MS. LONG: *That's correct.*

28 ¹ Mr. Rusk has argued that *Hyt* was distinguishable because the administrative agency's oral pronouncement in *Hyt* was "informal" and Mr. Waugh's oral motion was somehow substantively different. This misrepresents the Nevada Supreme Court's description of the administrative proceedings in *Hyt*, so for completeness' sake the Nevada Supreme Court's description is set out in full:

In September of 1978, the Real Estate Division filed a complaint against respondent based upon his alleged improper conduct as a real estate salesman. After a hearing on January 8, 1979, the Real Estate Advisory Commission decided to suspend respondent's license. The informal decision to suspend was stated orally at the hearing and did not include the effective date of suspension nor findings of fact and law.

Hyt, 96 Nev. at 495, 611 P.2d at 1097. As can be seen, the process described in *Hyt* was substantively identical to the process in the instant case, namely that an administrative proceeding was held, a summary oral pronouncement was made by the administrative body, and a subsequent detailed written order was issued later. The Court's use of the word "informal" to describe the decision of the administrative agency in *Hyt* only indicated that the decision was oral and did not contain all the statutory requisites that would be later provided in the subsequent written order.

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

3 Reporter's Transcript on October 25, 2017 page 67, line 20 through page 68, line 22. A copy of
4 the pertinent pages from the Reporter's Transcript are attached hereto as Attachment A. So
5 when Mr. Nersesian and Mr. Rusk left the Board's proceeding on October 25, 2017, they **KNEW**
6 that the Board would be issuing a written order from which they could seek judicial review, with
7 Mr. Nersesian even confirming with the Board: "So I will get an order and nothing is effective
8 and no time frames are running until I get the order." Mr. Rusk's argument before this Court
9 that Mr. Waugh's motion was the triggering event belies Mr. Nersesian's own understanding on
10 October 25, 2017. Worse yet, nothing in Mr. Waugh's summary motion could possibly
11 constitute findings of fact and conclusions of law sufficient for this Court's review, as is required
12 by NRS 233B.125.

13 Mr. Rusk did not file an amended petition for judicial review or a new petition for judicial
14 review after the Board issued its written Order on Remand (as Mr. Hyt did in *Hyt*). Therefore,
15 there is **NO** petition for judicial review of the Board's written Order on Remand. Obviously, as
16 the above law and circumstances demonstrate, the Board has raised a serious legal question -
17 namely whether this case can even proceed - such that the balance of equities weighs heavily in
18 favor of the granting of the stay sought by the Board. NRAP 8(c)(3) and (4); *Fritz*, 116 Nev. at
19 659, 6 P.3d at 987.

20 The instant motion for stay, therefore, should be granted so this matter can be reviewed in
21 conformance with *Board of Review*. The instant matter involves the very fundament upon which all
22 judicial action rests, namely whether the court has jurisdiction over the subject matter. Subject matter
23 jurisdiction is so foundational that NRCP 12(h)(3) makes it non-waivable and mandates dismissal in all
24 such cases at any time in the proceedings. Where subject matter jurisdiction is essential and in question,
25 a district court should not and cannot proceed until the question is fully and finally resolved. *Board of*
26 *Review* and NRCP 12(h)(3) cannot be read any other way.

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II. CONCLUSION AND RELIEF SOUGHT

As has been shown, only the stay sought by the Board will promote the necessary review of this Court's fundamental authority to proceed, namely whether this Court has subject matter jurisdiction. The Board is pursuing precisely the course set out in *Board of Review* where a district court's lack of subject matter jurisdiction is at issue. A denial of the requested stay will utterly defeat the Board's meritorious purpose of testing whether this Court has subject matter jurisdiction to proceed, which is cause to grant the stay per NRAP 8(c)(1). Furthermore, per NRAP 8(c)(3), the Board has demonstrated that it has raised a serious question of law – in fact the most serious because it is foundational to this Court's very authority to act – and that the merits weigh heavily in favor of the stay sought. The Board, therefore, moves for this Court's order indefinitely staying and extending the filing of any additional documents in this matter until the Supreme Court rules upon the Board's Petition.

Signed this 24th day of September, 2018.

/s/ Louis Ling

LOUIS LING, Board Counsel
Nevada Bar No. 3101
Counsel for Nevada State Board of Architecture,
Interior Design and Residential Design

CERTIFICATE OF SERVICE

I certify that on this day I served via the Court's e-filing and e-service system the attached document to:

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

Dated this 24th day of September, 2018.

/s/ Louis Ling

LOUIS LING, Board Counsel
Nevada Bar No. 3101
Counsel for Nevada State Board of Architecture,
Interior Design and Residential Design

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ATTACHMENT A

TRANSCRIPT OF PROCEEDINGS - 10/25/2017

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| <p style="text-align: right;">Page 66</p> <p>1 February 6th. It just elaborated a lot of things in more 2 detail. So that's kind of where I was seeing some things. 3 But especially from the understanding that the -- 4 what was presented in that original memo that it was part of 5 the expressed plan review, the intent that those -- City of 6 Las Vegas is doing that for issuing a building permit. 7 Even the way that the process is set up for 8 initial reviews, submit the drawings one week prior to the 9 appointment and then being able to go through and review it 10 with all the code officials, letters are usually issued and 11 then returned very shortly. Sometimes basically within one 12 to four days. So those are some of the things when I look 13 at this was set up as part of the original expressed plan. 14 MR. ERNY: Are we ready for a motion? 15 MR. MICKEY: Before we make a motion, there are 16 two things probably. 17 Okay. Let me make a reminder. And I want to read 18 it exactly from Judge Wiese's minutes, so I don't say it 19 incorrectly. So just as a reminder, just so everybody is 20 clear with this, and this is from the court minutes from 21 May 22nd, 2017, and this is a petition, "For the judicial 22 review is hereby granted and the Court hereby remands this 23 matter to the Board to consider whether it would be 24 appropriate to vacate its prior decision based upon the 25 newly discovered evidence consisting of the March 6th, 2007</p> | <p style="text-align: right;">Page 68</p> <p>1 MR. WAUGH: Okay. So I'll end. 2 Do you want me to restate it correctly then? 3 MS. LONG: That's fine. 4 MR. ERNY: Second. 5 MR. MICKEY: Any discussion, further discussion on 6 the motion? 7 I'll call for a vote. All those in favor? 8 (All members join in ayes.) 9 MR. MICKEY: Anybody opposed? 10 Motion carries. 11 With that, I believe the next step is that we must 12 draw up an order. So he if -- I -- I can't if you would get 13 that please and we could go ahead and get the order crafted. 14 Thank you. 15 MR. NERSESIAN: Thank you. 16 MR. MICKEY: And we will adjourn. 17 MR. NERSESIAN: So I will get an order and nothing 18 is effective and no time frames are running until I get the 19 order? 20 MS. LONG: That's correct. 21 MR. NERSESIAN: Okay. Can I get a copy of the 22 transcript please? Thank you. Thank you all. 23 MR. MICKEY: Thank you everybody. 24 MR. NERSESIAN: And how you can find that a 25 finding that Mr. Rusk is a liar was not material --</p> |
| <p style="text-align: right;">Page 67</p> <p>1 Schirmer Report and drawings." 2 So that is the minutes and the order that we have 3 received from the judge. 4 And then, also, today -- I'm not going to say this 5 correctly. Yeah. There were some other items out there for 6 prosecutorial misconduct and regarding to the Schirmer 7 Report and whether you decide to take that into 8 consideration or not. 9 MS. LONG: Just to clarify, you know, the Board 10 doesn't -- you know, prosecutorial misconduct is for the 11 licensing, the Board that issued the attorney license. So 12 you're not here to regulate attorneys. However, if you do 13 feel that, you know, statements made during the original 14 hearing were material and materially affect, I guess, the 15 hearing, the original hearing, then you can pretty much take 16 that into account in your motion. 17 MR. MICKEY: So anything else for deliberations 18 for anybody? 19 All right. With that, the desire for action. 20 MR. WAUGH: I'll make a motion. 21 After reviewing the previous proceedings, previous 22 evidence, and after listening to both sides, I move that the 23 Board uphold the September 27th Order and that Cases Nos. 24 08-080R and 11 -- oh, doesn't -- 25 MS. LONG: That's it.</p> | <p style="text-align: right;">Page 69</p> <p>1 THE COURT REPORTER: Are we still on? 2 MS. LONG: Yes. 3 MR. NERSESIAN: -- to that decision is beyond me. 4 And that's the only question. So we'll see you in court. 5 MR. MICKEY: So with that, I will make an official 6 announcement that we are done with Item No. 4. 7 MR. NERSESIAN: I'm sorry about that outburst. 8 Thank you. Seriously, I apologize. Shouldn't have said 9 that, but I did. 10 MR. MICKEY: Can we take a five-minute break to 11 reorganize ourselves to continue on with our agenda, and 12 we'll finish everything up and make sure everybody can get 13 on with their day. Thank you. 14 (The proceeding was concluded at 15 4:25 p.m.) 16 ///// 17 ///// 18 ///// 19 ///// 20 ///// 21 ///// 22 ///// 23 ///// 24 ///// 25 /////</p> |