BEFORE THE SUPREME COURT OF THE STATE OF NEVADA

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 8th Judicial District Court Case No. A-17-764562-J

REPLY IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION

Pursuant to this Court's Order Granting Motion filed November 7, 2018, Petitioner Nevada State Board of Architecture, Interior Design and Residential Design (hereinafter "Board"), by and through its attorney Louis Ling, provides the following reply in support of its Petition for Writ of Prohibition. This reply is made

and based on the documents on file in this matter and the following points and authorities.

I. POINTS AND AUTHORITIES

A. RESTATEMENT OF THE CASE AND THE THREE CRITICAL DATES

At issue in this matter was and is Mr. Rusk's post-hearing motion to vacate the Board's September 27, 2011 order that imposed discipline upon Mr. Rusk (hereinafter Petition/Motion). The purported basis for the Petition/Motion was a repackaging of previously refuted allegations of misconduct by the Board's staff and prosecuting counsel, which allegations Mr. Rusk rehearses once again in his Opposition. After a wending course of litigation, the post-hearing motion was finally before the Board on October 25, 2017.

Three undisputed facts govern the resolution of the instant matter:

(1) **October 25, 2017** – The Board conducted a proceeding regarding Mr. Rusk's Petition/Motion. At the conclusion of the proceeding, the Board unanimously adopted an oral motion by Boardmember Nathaniel Waugh to deny Mr. Rusk's Petition/Motion. Thereafter, the Board announced that a written order would be prepared and served upon the parties. *See* Petitioner's Appendix at APPX1.[1]

(2) **November 9, 2017** – Mr. Rusk filed the petition for judicial review at issue in this matter. Petitioner's Appendix at APPX2 – APPX4.

(3) **December 1, 2017** – The Board issued and served its written Order on Remand. Petitioner's Appendix at APPX5 – APPX11. The Order on

[1] The discussion can be found on page 67, line 20 through page 68, line 22.

> Remand contained findings of facts in 18 separately stated paragraphs spanning just over four pages (Petitioner's Appendix at APPX6 – APPX10), conclusions of law in three separately stated paragraphs (Petitioner's Appendix at APPX10), and an order that held: "IT IS HEREBY ORDERED that the Board's September 27, 2011 Order is affirmed and Petitioner's Motion to Vacate is denied in its entirety." (Petitioner's Appendix at APPX10).

This Court now knows from Mr. Rusk's Opposition that he intended his petition for judicial review to seek review of the Board's oral motion on October 25, 2017, and, therefore, tacitly that Mr. Rusk has not petitioned for judicial review of the Board's written Order on Remand (even though Mr. Rusk knew that such a written order would be prepared and served). Because Mr. Rusk's position is incorrect as a matter of law, the Board's Petition for Writ of Prohibition must be granted.

B. Only Strict Compliance With the Four Requisites of NRS 233B.130(2) Can Confer Subject Matter Jurisdiction And Nothing in Mr. Rusk's Opposition Refutes that the Board's Petition Should be Granted.

For every petition for judicial review subject to NRS ch. 233B, NRS 233B.130(2) sets out four requisites with which a party must strictly comply in order to confer subject matter jurisdiction on a district court:

> 2. Petitions for judicial review must:
> (a) Name as respondents the agency and all parties of record to the administrative proceeding;

(b) Be instituted by filing a petition in the district court in and for Carson City, in and for the county in which the aggrieved party resides or in and for the county where the agency proceeding occurred;

(c) Be served upon:

(1) The Attorney General, or a person designated by the Attorney General, at the Office of the Attorney General in Carson City; and

(2) The person serving in the office of administrative head of the named agency; and

(d) Be filed within 30 days after service of the final decision of the agency.

Three of the four requisites – namely NRS 233B.130(2)(a), (b), and (d) – have already been subject of this Court's rulings. In *Washoe County v. Otto*, 128 Nev. 424, 434-5, 282 P.3d 719, 727 (2012), this Court held that a party's failure to strictly comply with NRS 233B.130(2)(a) could not confer subject matter jurisdiction on a district court where the party failed to name all of the respondents in the party's petition for judicial review. In *Liberty Mutual v. Thomasson*, 130 Nev. ____, ____, 317 P.3d 831, 833 (2014), this Court held that a party's failure to strictly comply with NRS 233B.130(2)(b) could not confer subject matter jurisdiction on a district court where the party filed its petition for judicial review in the wrong court. In footnote 3 in *Thomasson*, this Court discussed its holding in *Otto*, stating:

> In *Civil Service Commission*, this court held that despite NRS 233B.130(2)(a) being mandatory and jurisdictional, failure to comply with that provision does not preclude judicial review. 118 Nev. at 189-90, 42 P.3d at 271. ***In Otto, we overruled that portion of the holding and held that failure to comply with either NRS 233B.130(2)(a) or (c) deprives the district court of jurisdiction to consider the***

> ***petition for judicial review***. 128 Nev. at ____, n.9, 282 P.3d at 725 n.9. (Emphasis supplied.)

It is important to note that the language in the present NRS 233B.130(2)(d) was the language that was in NRS 233B.130(2)(c) at the time of *Otto* and *Thomasson*. Therefore, this Court has already held that a failure to strictly comply with NRS 233B.130(2)(d) would also result in the district court's lacking subject matter jurisdiction over the matter.

Generally, "[c]ourts have no inherent appellate jurisdiction over official acts of administrative agencies except where the legislature has made some statutory provision for judicial review." *Otto*, 128 Nev. at 431, 282 P.3d at 724, *quoting Crane v. Continental Telephone*, 105 Nev. 399, 401, 775 P.2d 705, 706 (1989). "When a party seeks judicial review of an administrative decision, strict compliance with the statutory requirements for such review is a precondition to jurisdiction by the court of judicial review," and "[n]oncompliance with the requirements is grounds for dismissal." *Otto*, 128 Nev. at 431, 282 P.3d at 725, *quoting Kame v. Employment Security Dep't*, 105 Nev. 22, 25, 769 P.2d 66, 68 (1989). Per NRCP 12(h)(3), subject matter jurisdiction is not waivable and may be raised at any time in a proceeding.

The obvious intent of the Legislature evidenced in NRS 233B.130(2) is to assure that the party seeking judicial review of an administrative agency's decision: (1) identifies all of the parties to the matter (NRS 233B.130(2)(a)); (2) files the

matter in a district court that could rightfully have jurisdiction over the matter (NRS 233B.130(2)(b)); (3) serves all the parties and the Attorney General to assure that all know about and can respond to the matter (NRS 233B.130(2)(c)); and (4) identifies the action of the administrative agency at issue (NRS 233B.130(2)(d)).

So the question before this Court, therefore, is whether Mr. Rusk complied with NRS 233B.130(2)(d) when he filed his petition for judicial review 21 days ***before*** the Board issued its written Order on Remand. As facets of this question are examined, it will become obvious that Mr. Rusk's premature filing of his petition for judicial review did not confer subject matter jurisdiction on the district court. Following are six reasons why Mr. Rusk has failed to strictly comply with NRS 233B.130(2)(d) and, therefore, why the Board's Petition for Writ of Prohibition should be granted.

1. The Plain Language of NRS 233B.130(2)(d)

"When the language of a statute is plain and unambiguous, and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself." *Sarfo v. State of Nevada, Board of Medical Examiners*, 134 Nev. ____, ____, 134 Nev. Adv. Op. 85, page 9 (Nov. 1, 2018), *quoting Dykema v. Del Webb Cmtys, Inc.*, 132 Nev. Adv. Op. 82, 285 P.3d 977, 979 (2016). "'When interpreting a statute, we first look to its

language,' and when the language used has a certain and clear meaning, we will not look beyond it." *Otto*, 128 Nev. at 432, 282 P.3d at 725 (citations omitted).

NRS 233B.130(2)(d) provides that a petition for judicial review ***must*** "[b]e filed within 30 days after service of the final decision of the agency." "After" means after: "after" does not mean before. Thus, a petition for judicial review must be filed ***after*** service of the final decision. In the instant matter, the Board's written Order on Remand was issued and served on December 1, 2017, so a timely petition for judicial review thereof was due on January 2, 2018. No such petition was filed by Mr. Rusk, so no subject matter jurisdiction related thereto could be conferred per NRS 233B.130(2)(d). The Board's Petition for Writ of Prohibition should be granted.

2. The Full Transcript of the Board's Conclusion Shows that Mr. Rusk's Opposition Is Incorrect as a Matter of Fact.

To get around the application of the plain language of NRS 233B.130(2)(d), Mr. Rusk gives this Court a misleadingly truncated version of the transcript of the conclusion of the Board's October 25, 2017.[2] Following is the full transcript of the conclusion of the Board's hearing:

> MR. WAUGH [Board Member]: I'll make a motion. After reviewing the previous proceedings, previous evidence, and after

[2] Opposition, page 8, lines 8-13.

listening to both sides, I move that the Board uphold the September 27th Order and that Cases Nos. 08-080R and 11 – oh doesn't –

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

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

MS. LONG: That's fine.

MR. ERNY: Second.

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

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

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

MR. MICKEY: And we will adjourn.

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

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

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

Petitioner's Appendix at APPX1.[3]

As the transcript shows, Mr. Rusk knew when he left the hearing on October 25, 2017 that a written order addressing the denial of his Petition/Motion would be forthcoming and that, as his counsel verified, "nothing is effective and no time frames are running until I get the order." Therefore, Mr. Rusk's claims on pages 8 and 9 of his Opposition belie the actual events. For example, nothing in

[3] The discussion can be found on page 67, line 20 through page 68, line 22.

Boardmember Waugh's motion supports Mr. Rusk's representation on page 8, lines 14-17 that Boardmember Waugh intended to "adopt" the Board's original order as the order in the instant matter. Rather, as the complete transcript shows, the Board's President indicated unambiguously that a subsequent written order specifically addressing the denial of Mr. Rusk's Petition/Motion would be forthcoming.

Furthermore, because Mr. Rusk knew that a written order was forthcoming, Mr. Rusk's explanation that he was "faced with an oral denial of his motion without any extant writing for a period of time extending beyond the time during which he was required to file his Petition for Judicial Review" (*See* Opposition, at page 9, lines1-3) is factually inaccurate for two reasons. First, Mr. Rusk belies his own argument because he filed his Petition for Judicial Review a mere 15 days after the matter before the Board, meaning that he was at no risk at the time he filed and he could not have known at that time when the Board's written Order on Remand would be issued. Second, Mr. Rusk simply glosses over his counsel's confirmation that "nothing is effective and no time frames are running until I get the order," but he cannot now be allowed to feign a concern he did not have then. The Board could not have been clearer to Mr. Rusk that a written order addressing the denial

of his Petition/Motion would be composed and served and that nothing would happen regarding Mr. Rusk's matter until then.

Per the Board's clear indication on October 25, 2017, a written order would be written and served. The Board's written Order on Remand was issued and served on December 1, 2017. Within its pages are 18 paragraphs of findings of fact separately stated specifically related to the Board's consideration and deliberation of Mr. Rusk's post-hearing Petition/Motion and three paragraphs of conclusions of law separately stated that apply the law to the 18 paragraphs of facts. While Boardmember Waugh's oral motion could not and was not intended to satisfy the dictates of NRS 233B.125, the Board's subsequent written Order on Remand was intended to and did satisfy the dictates of NRS 233B.125. The Board's Order on Remand, therefore, is the only document from which Mr. Rusk could and should have sought judicial review pursuant to NRS 233B.130(2)(d). Mr. Rusk did not and has not sought judicial review of the written Order on Remand.

Mr. Rusk did not comply with NRS 233B.130(2)(d) as a matter of law or fact. The district court lacked subject matter jurisdiction, therefore, per the plain language of NRS 233B.130(2)(d).

3. Premature Petitions for Judicial Review Cannot Confer Subject Matter Jurisdiction Pursuant to *Johnson v. State.*

In its Order Directing Answer, Directing Supplementation of the Record, and Granting Emergency Motion for Stay filed October12, 2018 this Court said that "because NRS Chapter 233B is silent on premature petitions for judicial review, this issue may arise in other petitions for judicial review of agency decisions. . . ." There is a case that directly addresses this issue, namely *Johnson v. State*, 280 P.3d 749 (Idaho App. 2012). In *Johnson*, the Idaho Court of Appeals held that a prematurely filed petition for judicial review does not confer subject matter jurisdiction.

In *Johnson*, the licensee filed his 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 order denying the motion for reconsideration did the licensee file another petition for judicial review; instead, he relied upon his original, premature petition. Under such facts, 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, 280 P.3d at 754.

Because the facts and law are substantively indistinguishable from the facts and law in the instant matter, the holding in *Johnson* is readily applicable to the instant matter and would teach that the Board's Petition for Writ of Prohibition should be granted.

4. *Hyt v. Department of Commerce* and the Interpretation Therein of NRS 233B.125 Provide Mandatory Authority In this Matter.

The import of this Court's holding in *Department of Commerce v. Hyt*, 96 Nev. 494, 611 P.2d 1096 (1980) is unavoidable in the instant matter. In *Hyt*, this Court held that an administrative agency's oral pronouncement in a case is not the triggering event for the timely filing of a petition for judicial review and, instead, the triggering event is the subsequent filing of the written order. Because Mr. Rusk's tortured reading of *Hyt* renders this Court's opinion virtually unrecognizable, the Board is compelled to quote *Hyt* at length to assure that what this Court actually said and held guides the instant proceedings. This Court's analyzed and applied NRS 233B.125 as follows:

> We must determine what constitutes a decision by the Commission from which a licensee has ten days to appeal under NRS

> 645.760. ***Respondent argues that the oral pronouncement was the decision while appellant claims the written findings constituted the decision***. According to NRS 233B.125 a decision "shall be in writing or stated in the record." Thus, a decision may be either oral or written. ***But, this same statute provides, "A final decision shall include findings of fact and conclusions of law, separately stated."*** NRS 233B.125. *See Public Service Comm'n v. Continental Telephone Co.*, 94 Nev. 345, 350, 580 P.2d 467, 470 (1978).
>
> We have held that the purpose of NRS 233B.125 is to provide minimum procedural requirements to satisfy due process. *Bailey v. State*, 95 Nev. 378, 382, 594 P.2d 734, 737 (1979). ***Findings of an administrative agency are to be prepared in sufficient detail to permit judicial review.*** *Revert v. Ray*, 95 Nev. 782, 787, 603 P.2d 262, 264-65 (1979). Additionally, ***proper notice of an administrative decision is generally considered to be notice in writing***. *See Bailey v. State*, 95 Nev. at 381-82, 594 P.2d at 736-37.
>
> In this case, ***the oral pronouncement of the determination by the Commission was insufficient to constitute a final decision under NRS 233B.125. Specific findings of fact were not included and there was no announcement of an effective date of suspension which is to be included in a proper notice of decision under NRS 645.760(2). All of this was included in the March 1 findings***. (Emphases supplied.)

Hyt, 96 Nev. at 496, 611 P.2d at 1097-8.

This Court's holding in *Hyt* guides the consideration of the instant matter and refutes all of Mr. Rusk's arguments in his Opposition. For example, in his Opposition at pages 15-20, Mr. Rusk engages in a lengthy parsing of NRS 233B.125, which parsing is needless because this Court in *Hyt* had already interpreted NRS 233B.125 and its function. As this Court held in *Hyt*, the purpose of NRS 233B.125 is to assure due process, and the "[f]indings of an administrative agency

are to be prepared in sufficient detail to permit judicial review," generally in writing. *Hyt*, 96 Nev. at 496, 611 P.2d at 1098. Furthermore, while this Court acknowledged that the first sentence of NRS 233B.125 allows for an administrative agency's findings to be oral or in writing, the Court expressly quoted the second sentence of NRS 233B.125 which mandates that "A final decision shall contain findings of fact and conclusions of law, separately stated." *Hyt*, 96 Nev. at 496, 611 P.2d at 1098; NRS 233B.125.

Applying all of this Court's guidance from *Hyt* to the instant matter, it is plain that Boardmember Waugh's motion did not meet the requirements of NRS 233B.125 and *Hyt*. Boardmember Waugh's motion was:

> MR. WAUGH [Board Member]: I'll make a motion. After reviewing the previous proceedings, previous evidence, and after listening to both sides, I move that the Board uphold the September 27th Order and that Cases Nos. 08-080R and 11 – oh doesn't –
>
> MS. LONG [Deputy Attorney General]: That's it.
>
> MR. WAUGH: Okay. So I'll end. Do you want me to restate it correctly then?

Petitioner's Appendix at APPX1.[4] As is plain, Boardmember Waugh's motion contains no findings of fact or conclusions of law, separately stated, as is required by

[4] The motion can be found on page 67, line 20 through page 68, line 2.

NRS 233B.125 and *Hyt*. Boardmember. Waugh's motion is obviously lacking "sufficient detail to permit judicial review." *Hyt*, 96 Nev. at 496, 611 P.2d at 1098.

Therefore, in no way did Boardmember Waugh's motion satisfy NRS 233B.125 and *Hyt*, nor was it intended to. As the entirety of the transcript of the conclusion of the Board's matter shows, immediately after Boardmember Waugh's motion passed, the Board's President informed the parties that a written order would be drafted.[5] Thereafter, Mr. Rusk's present counsel asked the Board's Deputy Attorney General, "***So, I will get an order and nothing is effective and no time frames are running until I get the order.***" (Emphasis supplied.)[6] "That's correct," Mr. Rusk's counsel was told by the Board's Deputy Attorney General.[7] The Board could not have been clearer that Boardmember Waugh's summary pronouncement would be reduced to a written order and that "no time frames are running" until Mr. Rusk received the order.

Thus, Mr. Rusk's "irreconcilable conundrum with no guidance as to when the decision is final" (Opposition, page 14, lines 15-17) and his arguments of similar import are simply false and misrepresent the entirety of the record. As the entirety

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[5] Petitioner's Appendix at APPX1. The President's discussion with Mr. Rusk's counsel can be found on page 68, lines 11-20.

[6] *See* fn. 4.

[7] *See* fn. 4.

of the Board's conclusion makes clear, Mr. Rusk and his counsel left the Board's October 25, 2017 meeting with a clear and certain understanding that a written order would be forthcoming and that no time limits would run until the written order was served. To have been timely per NRS 233B.130(2)(d) and *Hyt*, all Mr. Rusk had to do was wait for the written order he knew was coming.

As a final note, the issue of timeliness of the filing of the petition for judicial review under NRS 233B.130(2)(d) was not at issue in *Hyt* because in *Hyt*, Mr. Hyt filed his initial petition for judicial review from the administrative agency's oral pronouncement but then filed a second petition for judicial review from the administrative agency's subsequent written order. *Hyt*, 96 Nev. at 496, 611 P.2d at 1097. Had Mr. Rusk done as Mr. Hyt did and either amended his petition for judicial review or filed a second petition for judicial review after the Board issued and served its written Order on Remand, Mr. Rusk would have complied with NRS 233B.130(2)(d) and the district court would have had subject matter jurisdiction to consider the matter. In failing to do as Mr. Hyt did, Mr. Rusk failed to invoke the subject matter jurisdiction of the district court under NRS 233B.130(2)(d) and the Board's Petition for Writ of Prohibition should be granted.

5. The *Windsor Hall* Case Supports the Board's Petition.

In his Opposition Mr. Rusk cites and spends a considerable number of words (Opposition, page 10, line 11 through page 13, line 3) discussing a Connecticut Supreme Court case, namely *Commission on Human Rights & Opportunities v. Windsor Hall Rest Home*, 653 A.2d 181 (1995). This is the first time that this particular case has been cited or discussed in the long history of the instant matter. The *Windsor Hall* opinion actually supports the Board's petition in a number of ways.

At issue in *Windsor Hall* was an administrative agency's oral pronouncement at an administrative hearing by which it dismissed the administrative matter. The question was whether the triggering event for the filing of a petition for judicial review was the oral pronouncement or whether the administrative agency's written order denying a motion for reconsideration issued months later was the triggering event. The statute at issue in *Windsor Hall* contained language similar to the first sentence of NRS 233B.125, namely that an order could be in writing or stated on the record. *Windsor Hall*, 653 A.2d at 185. It is true that the Connecticut Supreme Court ultimately held that the oral pronouncement in that matter constituted a final order for purposes of triggering the filing of petition for judicial review, but the oral pronouncement at issue in *Windsor Hall* was so substantively different from Boardmember Waugh's motion in the instant case as to make the *Windsor Hall*

holding meaningless in the instant matter. Below is a side-by-side comparison of the two oral pronouncements, first the one in *Windsor Hall* and second Boardmember Waugh's motion in the instant case:

Windsor Hill	***Rusk v. NSBAIDRD***
I'm going to grant [the] motion [to dismiss] and the basis . . . is that I agree that there has been no inference raised that [Couch] was discharged due to race. She was discharged due to perceived neglect for failing to chart crucial information that would have alerted the staff. I'm not going to comment on that there may be other negligence in terms of the disappearance or the losing of this patient at the shopping mall. However, the concern is that the administration of [the defendant's] facility is a team administration and it focuses on passing information. And how it's done is through charting. And Nurse Bourgault . . . did what she was supposed to do with respect to the finding of [a patient] walking down the street. And it was reasonable. And the follow-up of that does not raise the inference that because she was white that she was not fired. There has been absolutely no inference raised that there was any racial motivation in this at all. Granted, Mrs. Couch is a member of a protected class. But because she's a member of a protected class and happens to be fired doesn't raise the inference automatically that it was racially motivated. . . . You have an exception. You have your right to appeal. *Windsor Hall*, 653 A.2d at 183.	MR. WAUGH [Board Member]: I'll make a motion. After reviewing the previous proceedings, previous evidence, and after listening to both sides, I move that the Board uphold the September 27th Order and that Cases Nos. 08-080R and 11 – oh doesn't – MS. LONG [Deputy Attorney General]: That's it. MR. WAUGH: Okay. So I'll end. Do you want me to restate it correctly then? Petitioner' Appendix at APPX1, page 67, line 20 through page 68, line 3.

As can be seen, the oral pronouncement by the presiding officer in *Windsor Hill* contained all the requisites to satisfy due process, including detailed findings of fact and applications of the applicable law to those facts. Such an oral order would

satisfy the requirements set out in *Hyt*. A reviewing court could review the oral pronouncement in *Windsor Hill* and could readily compare the oral pronouncement to the facts developed at the hearing and the applicable law.

In stark contrast, Boardmember Waugh's oral motion contained none of the requirements of due process contained in NRS 233B.125. Boardmember Waugh set out no specific facts and made no legal conclusions. The motion was merely functional – motion denied. Unlike the oral order in *Windsor Hill*, no court could review Boardmember Waugh's oral motion. Rather, the Board's President made explicit that a written order that would comply with NRS 233B.125 would be issued at a later date.

The Board can agree that *Windsor Hill* was properly decided under its unique facts, but *Windsor Hill* provides no precedent or guidance to the instant matter. As this Court noted in *Hyt*, whether an administrative agency's order is made orally at hearing or in writing, the order will only satisfy due process if it complies with NRS 233B.125. *Windsor Hill* presents a case where the oral order contained the statutory requisites; the instant case presents a case where the oral motion did not. *Hyt* is mandatory precedent for the instant case; *Windsor Hill* is not. *Hyt* teaches that Mr. Rusk's attempt to seek judicial review of Boardmember Waugh's oral motion is

incorrect as a matter of law, and *Windsor Hill* supports a similar conclusion; the Board's Petition for Writ of Prohibition should be granted.

6. The *Ahern Rentals, Inc.* Case Does Not Apply.

Mr. Rusk attempts to find a way to say that "after" does not really mean "after" in NRS 233B.130(2)(d) by relying on the case of *Las Vegas Fetish & Fantasy Halloween Ball, Inc. v. Ahern Rentals, Inc.*, 124 Nev. 272, 182 P.3d 764 (2008). The reliance on this case is fundamentally unsound as a matter of law because the instant matter involves subject matter jurisdiction, whereas *Ahern Rentals* involves a procedural question of whether a bill of costs was timely provided.

What was and is at issue in the instant matter is whether Mr. Rusk's petition for judicial review, filed when and as it was, strictly complied with NRS 233B.130(2)(d) because if it did not, then the district court lacks subject matter jurisdiction and the matter cannot proceed. Compare this with what was at issue in *Ahern Rentals* – whether a memorandum of costs can be granted where it was filed before a judgment was entered. The granting of costs is a matter of judicial discretion, so leeway could be allowed in the interpretation and application of the statute at issue (NRS 18.110), whereas subject matter jurisdiction is not and never can be a matter of judicial discretion and is, rather, a matter outside judicial discretion. Nothing in *Ahern Rentals* compels Mr. Rusk's seeming argument that this

Court should ignore the plain language of NRS 233B.130(2)(d). For the purposes of subject matter jurisdiction, this Court has repeatedly held that the plain meaning of the four requisites in NRS 233B.130(2) must be strictly complied with by a petitioner to confer subject matter jurisdiction on a district court. For the purposes of conferring subject matter jurisdiction under NRS 233B.130(2)(d), "after" means after, ***not*** before: *Ahern Rentals* does not hold otherwise. The Board's Petition for Writ of Prohibition should be granted.

II. CONCLUSION AND REQUEST FOR RELIEF

The failure by a party to follow strictly the statutory requisites for the filing of a petition for judicial review deprives the district court of subject matter jurisdiction to hear the petition and the issuance of a writ of prohibition directing the district court to dismiss the matter is required. *Board of Review v. Second Judicial District Court of Nevada*, 133 Nev. ___, ___, 396 P.3d 795, 797 (2017). Just as this Court held in *Board of Review*, it must now issue the writ of prohibition sought by the Board because Mr. Rusk has not filed a petition for judicial review that complied with the jurisdictional requisites of NRS 233B.130(2). The only ruling issued by the Board that complied with NRS 233B.125 was the Board's written Order on Remand, issued and served on December 1, 2017. As has been shown in this Reply, if "after" means after and not before, then Mr. Rusk's petition for judicial review that was

filed 21 days before the Board's Order on Remand was filed and served did not strictly comply with NRS 233B.130(2)(d) and did not confer subject matter jurisdiction on the district court. In fact, per his Opposition, Mr. Rusk has not and did not intend to seek judicial review of the Board's Order on Remand. In other words, the most that can be said for Mr. Rusk's present petition for judicial review is that it timely sought review of an unreviewable oral motion. This is fatal to Mr. Rusk's instant petition for judicial review as a matter of law and fact.

Reinforcing this conclusion is the *Johnson* case which clearly held under substantially similar facts to the instant matter that a prematurely filed petition for judicial review cannot confer subject matter jurisdiction. Further reinforcing this conclusion is this Court's holding in *Hyt*, in which this Court clearly held that an oral pronouncement that did not contain separately stated findings of fact and conclusions of law was not the event that triggered the jurisdictional time limit such as is set out in NRS 233B.130(2)(d). In *Hyt*, this Court held that the subsequently issued written order was the event that triggered the jurisdictional time limit.

Try as he did in his Opposition, nothing in *Windsor Hill* or *Ahern Rentals* or in NRS 233B.125 or NRS 233B.130(2)(d) changes the inevitable conclusion that Mr. Rusk did not strictly comply with NRS 233B.130(2)(d). Mr. Rusk incorrectly filed his petition for judicial review seeking review of Boardmember Waugh's oral

motion. Mr. Rusk has not filed a petition for judicial review of the Board's written Order on Remand even though Mr. Rusk knew that the written order was forthcoming and that no time limits would commence until it was issued and served.

Under the undisputed facts of this matter and this Court's longstanding line of six cases discussed in the Board's Petition for Writ of Prohibition, as supplemented by the arguments made in this Reply, this Court should conclude that the Board's Petition for Writ of Prohibition must issue pursuant to NRS 34.320 instructing the Eighth Judicial District Court to desist or refrain from exercising subject matter jurisdiction over Mr. Rusk's petition for judicial review because the petition for judicial review was not timely filed and could not, as a matter of law, confer subject matter jurisdiction in the district court pursuant to NRS 233B.130(2)(d).

Signed this 12th day of November, 2018.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this REPLY IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

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

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

[**X**] Proportionately spaced, has a typeface of 14 points or more, and contains 5,552 words.

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

Dated this 12th day of November, 2018.

Louis Ling

_____

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CERTIFICATE OF SERVICE

I certify that I served on the below date a copy of the attached Reply in Support of Petition for Writ of Prohibition filed herewith upon the following:

By U.S. Mail postage prepaid:

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

Respondent

By the Court's e-filing and e-service system:

Robert Nersesian
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528 S. Eighth Street
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Counsel for Real Party in Interest Dennis Rusk

Dated this 12th day of November, 2018.

Louis Ling

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