IN 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, and DENNIS RUSK, and Dennis E. Rusk, Architect, LLC Real Parties in Interest.	Supreme Court Case No.: 76792 District Court Case No.: A761538

Real Parties in Interest's Petition for *En Banc* Reconsideration of this Court's Panel Decision

Submitted by:
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II. PETITION

Petitioner, Dennis E. Rusk and Dennis E. Rusk Architect, LLC (collectively, "Architect") herewith petitions for *en banc* consideration pursuant to NRAP 40A for Review of the Opinion and Denial of Petition for Rehearing entered by a panel of this Court on October 4, 2019 and November 20, 2019, respectively. This Petition is based on the following analysis as well as the decisions referenced and any review of the record this Court directs or undertakes.

II. ISSUES BEFORE THIS COURT IN THE PETITION FOR WRIT

1. When the applicable statute binds a litigant in an administrative proceeding to an "oral" decision of the administrative board, and the administrative board orally renders the binding decision, does that ruling commence the running of the time to file a petition for judicial review?

2. Considering the foregoing issue, does a written decision of the administrative board served following the time for filing a petition for judicial review on the "oral" decision alter the time for filing a petition for judicial review?

3. In accord with Las Vegas Fetish & Fantasy Halloween Ball, Inc. v. Ahern Rentals, Inc., 124 Nev. 272, 182 P.3d 764 (2008), does language in a statute providing that certain action be undertaken "within [**x**] days after" a certain event provide a deadline or a window to take such action. Specifically, Fetish expressly provided that the language, by its unambiguous meaning, provides a deadline,

while the Nevada Court of Appeals held, in this case, that the identical language creates a window for the prescribed action and not merely deadline.

4. Is due process violated when a statute creates a trap where, if the Petitioner follows the statute in one respect jurisdiction is arguably destroyed, while if the litigant follows it in the alternative method, a different compelling argument destroys jurisdiction, violate the due process of the Petitioner. I.e., does a statute which applies directly conflicting requirements on a litigant in order for a proceeding to survive violate due process?

III. FACTS AND BACKGROUND

Per an order of the District Court, the Nevada State Board of Architecture Interior Design, and Residential Design ("Board") was directed to hold a hearing on Petitioner's Petition for Writ of Mandamus. Plaintiff was seeking reinstatement of his license largely on allegations of prosecutorial misconduct in a prior proceeding stripping him of his license. That prior proceeding had resulted in a ten page decision with analysis. An abbreviated procedure was held before the Board in the nature of oral argument on briefs, at the conclusion of which the Board entered an oral decision as follows:

> MR. WAUGH: I'll make a motion. After reviewing the previous proceedings. After reviewing the previous proceedings, previous evidence, and after listening to both sides, I move that the Board uphold the September 27 [2011] order . . .."
> 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)

With this formal motion made and carried, the prior decision found at R. App. pp. 4-14 was expressly upheld and adopted. See P. App. p. 1 at pp. 67-68. Thus, Petitioner was denied the relief he sought before the Board.

Petitioner filed a petition for judicial review on this motion made and carried at the formal meeting of the Board. More than thirty days after this determination, the Board filed a written order denying the Petitioner's writ. Petitioner, believing he had complied with the express prerequisites to perfecting his Petition for Judicial Review did not respond to this written decision, contending that it was a phantom order/mere formality following the final order. Following thirty days after the filing of the written decision, the Board moved to dismiss the Petitioner's Petition for Judicial Review contending that it was premature and therefore untimely. The District Court by the Hon. Judge Jones denied this motion on the basis of a timely appeal, and the Hon. Judge Delaney signed the order. The Board filed a Petition for Writ of Prohibition, and a three judge panel of this Court reversed Judges Jones and Delaney. This Petition follows that denial.

IV. ANALYSIS

A. GROUNDS PURSUANT TO NRAP 40A

The specified grounds for review within NRS 40A(a) are:

> **(1)** Reconsideration by the full court is necessary to secure or maintain uniformity of decisions of the Supreme Court or Court of Appeals, or

(2) The proceeding involves a substantial precedential, constitutional or public policy issue.

Before the Court is the rare case falling squarely within both of the specified parameters. Also, in this case, the construction applied severely impacts the due process due the Petitioner, providing an additional ground for review as public policy commands fairness in proceedings.

B. THE PANEL OPINION CREATES AN IRRECONCILABLE CONFLICT WITH A PRIOR PANEL DECISION OF THIS COURT

In a prior decision, Las Vegas Fetish & Fantasy Halloween Ball, Inc. v. Ahern Rentals, Inc., 124 Nev. 272, 278, 182 P.3d 764, 768 (2008), this Court construed the following language from NRS 18.110: "[A] party who claims costs must file a memorandum . . . **within 5 days after** the entry of judgment." (Emphasis added). In the present matter, the panel rendering the decision construed the following language from NRS 233B.130(d): [Petitions for judicial review must] "[b]e filed **within 30 days after** service of the final decision of the agency." (Emphasis added). The scope of the time to file is identical between the two statutes, to wit: "[W]ithin [x] days after . . .." Nonetheless, relying upon the identical rule of construction ("plain meaning"), in Fetish this Court held that the highlighted language provided a deadline and not a window.[1] Fetish at 278, 768.

[1]As stated in that opinion, "[The costs] statute plainly sets a deadline for an application of costs--*i.e.*, five days after the entry of judgment. The statute does not, as LVFF contends, establish a short, five-day window during which a prevailing party may file its memorandum."

In contrast, the panel effectively held that the time to file a notice of appeal is a window rather than a deadline. Panel Opinion, n. 2.[2]

Review in this matter is appropriate and necessary to secure and maintain uniformity of the decisions of the Nevada Supreme Court Nevada Court. It is next to impossible to fathom a conflict of greater import than a prior Supreme Court panel opinion conflicting with a panel opinion holding that identical language in a statute means something entirely different than the prior decision. And here, with the language at issue ('within [x] days after') appears in Nevada statutes over 2000 times. Is each instance of the use of the language creates an ambiguity which foreseeably creates the requirement of an *ad hoc* determination by this Court as to whether an arguably premature action missing a window but satisfying a deadline is, or is not, timely.[3]

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[2] The Panel Opinion also attempted to distinguish the question in Fetish by asserting that the statutory language in Fetish was not jurisdictional while the Panel Decision determined a jurisdictional issue. Panel Opinion, n. 2. Contrary to the Panel Opinion here, the Opinion in Fetish did not mention jurisdiction, and was divorced from any jurisdictional imprimatur. Rather, it expressly held that the language provided a deadline without any outside consideration of jurisdiction or other issues beyond the fact that the language at issue "**plainly**" provided a deadline, not a window. If the language in Fetish "plainly" provides a deadline, not a window, it is incongruous for the language in NRS 233B.130(d) to not also provide a deadline, not a window.

[3] *See e.g.* NRS 31.950; NRS 278.02788; NRS 318.492; and NRS 217.117 for exemplars of statutes where the current circumstance can again arise, and the conflict provide no guidance beyond the best guess of the litigant as to which standard will apply.

C. THE METHODOLOGY FOR ADDRESSING THE CATCH-22 UNDER WHICH PETITIONER LABORED PRESENT ISSUES OF SUBSTANTIAL PRECEDENTIAL AND PUBLIC POLICY CONCERN

Petitioner was indisputably subjected to a determination by the Board which foreclosed his licensure as of the motion by member Waugh being carried at the public hearing. *Supra* at p. 2. Most importantly, it is expressly recognized that in the context of the Administrative Procedures Act, an oral/verbal decision is binding and properly rendered. NRS 233B.125(Stating that the decision "must be in writing **or stated in the record.**" (Emphasis added)). Thus, from the time Waugh's motion carried, Petitioner's rights were fully determined.

Contrary to the circumstance of a decision of a Board, courts in Nevada speak only through their written orders. And here, contrary to a court order, a decision "stated in the record" is expressly binding. Jurisdictional statutes and court rules are to be construed liberally towards finding jurisdiction. Am. Express *Tax & Bus. Servs. v. Tex. State Bd. of Pub. Accountancy*, NO. 03-97-00533-CV, 1998 Tex. App. LEXIS 3213, at *8 (Tex. App. May 29, 1998); *Wells v. State*, No. M2002-01958-COA-R3-CV, 2003 Tenn. App. LEXIS 559, at *3 (Ct. App. Aug. 8, 2003) (In so far as "the particular grant of jurisdiction is ambiguous and admits of several constructions, and (2) the "most favorable view in support of the petitioner's claim" is not clearly contrary to the statutory language used . . .."); *Stuckey v. Stuckey*, 434 So. 2d 513, 515 (La. Ct. App. 1983*); accord NRDC v. Abraham*, 355 F.3d 179, 193 (2d Cir. 2004)("[W]hen there is a specific statutory

grant of jurisdiction to the court of appeals, it should be construed in favor of review by the court of appeals."); *Mitchell v. Scott Wetzel Servs.*, 227 Cal. App. 3d 1474, 1480, 278 Cal. Rptr. 474, 477 (1991) ("[A]ll doubt should be resolved in favor of finding jurisdiction," said in the context of a worker's compensation claim). The status of the Board's decision on the record is an issue of first impression in Nevada, and considering the multitude of boards and their various applications of the Administrative Procedures Act, coupled with the nature of jurisdictional questions as referenced, the current circumstance warrants full review. This is necessary to give guidance to those impacted by the administrative rulings as well as to give clear guidance and a workable system to the administrative bodies as they render decisions on behalf of the State.

Also, public policy warrants that the Petitioner and others similarly situated not be punished by a failure of an administrative agency or the vagaries of litigation rules. Petitioner was faced with a decision clearly falling within the binding strictures of NRS 233B.125, and filed a notice of appeal therefrom. Had Petitioner waited for a written decision (which may or may not ever be issued) as the Panel Opinion suggests, the Board and its counsel could have convincingly argued that thirty days after the determining carried motion any right to appeal had expired, and Petitioner would have been left with no remedy. Most important here is that that argument does not go away with the filing of the later written decision. The Board, in waiting more than thirty days to provide a writing, waives nothing

and if the carried motion was the effective order, Petitioner would have still not timely filed his notice of appeal. Simply, by waiting more than thirty days to render a written decision, the Board and its counsel assured itself that it would always have an argument that the Petitioner had failed to perfect its appeal by not filing timely unless the Petitioner filed the appeal off of the carried motion on the record at the hearing. Petitioner should not be prejudiced by following the only course which the statutes allow.

Conversely, the Panel Opinion and the Board appear to argue that the course for Petitioner was to file either a new notice of appeal or amend the prior notice of appeal once the written decision was made. This would solve nothing because, if Petitioner files a new notice of appeal, the prior notice is abandoned and becomes a nullity. That is, it must be given effect, or there is every possibility of no appealable resolution ever being made. *See Commission on Human Rights & Opportunities nv. Windsor Hall Rest Home,* 653 A.2d 181 (Conn. 1995)(absent giving finality to the oral decision, there is no mechanism under which a final decision ever occurs).[4] And should the Petitioner have attempted to amend the original notice, this, too, would have been ineffective. *Washoe Cty. v. Otto*, 128 Nev. 424, 435, 282 P.3d 719, 727 (2012)("Washoe County's original petition failed

[4] This appears especially poignant here where the Board awaited the filing of the notice of appeal and awaited the running of the appeal period on the oral decision past the time for an effective appeal, thereby leaving Petitioner and the process in limbo.

to invoke the district court's jurisdiction, it could not properly be amended outside of the filing deadline."). In short, the Board, through delaying a written decision past the time to appeal the oral decision, removed all ability for the Petitioner to secure his rights to appeal. A statute violates due process if it is so vague that it fails to give persons of ordinary intelligence fair notice of what conduct is prohibited . . .." *Hernandez v. State*, 118 Nev. 513, 524, 50 P.3d 1100, 1108 (2002).

One other issue of import impacting important public policy is the Panel Opinion's construction of the statute requiring findings. The order was expressly adopted by the Board in Waugh's motion where the prior decision was upheld. That decision included pages of analysis. R. App. pp. 4-14. The Panel Opinion appears to hold that the analysis in the tardy written order of the Board is primary, when, in fact, they are competing at best. Simply, the decision at the hearing provided everything prerequisite to filing a notice of appeal even ignoring the balance of the foregoing analysis.

From a public policy perspective, it strains all concepts of fairness to subject Petitioner to a decision which meets all the requirements of appealability, and then, after a notice of appeal is filed thereon, change the rules. Again, had Petitioner not filed the notice of appeal within thirty days of the verbal decision, he was subject to dismissal of his appeal if he took any action on the tardy and conspicuously convenient written order. That's not justice, and considering the holding in *Fetish*,

supra, that should have been a safe harbor for Petitioner and other similarly situated litigants. Nonetheless, the current Panel Opinion destroys this sole logical course after the fact.

Lastly, the Panel Opinion suggests that the oral decision could not be relied upon because a written decision was contemplated. This being said, in the context of the Panel Opinion, the Board then made two decisions where, clearly, one was contemplated. If the first opinion was deficient, despite the findings of the Board's prior decision being verbally upheld, then the failure here is the Board's failure to specify grounds for the decision, not the Petitioner's failure in accepting this final determination as, in fact, final.

V. CONCLUSION

Petitioner was faced with a statute rendering oral decisions appealable. He was also faced with an on-point case holding that the language at issue would provide a "**deadline**" and not a window, for time to file a notice of appeal. Petitioner filed his notice of appeal within thirty days of being faced with a binding decision on his petition before the Board, thusly complying with the statute. Petitioner filed his notice of appeal prior to thirty days following the written findings. Having met the statutory prerequisite, and the timing under case law, Petitioner now asks that this Court consider his arguments *en banc* and allow briefing on this apparent injustice as well as fix the irreconcilable ambiguities involving appeals from administrative procedures facing not only the Petitioner,

but the dozens of Boards and thousands of prospective litigants subject to these rules.

Dated this 4th day of December, 2019.

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VI. CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirement of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced type face using Word 2010 in fourteen-point Times New Roman.
2. I further certify that this brief complies with the type-volume limitations of NRAP 40A(d) because, it is proportionately spaced, has a typeface of 14 points or more and contains 4667 words (3411 words to be precise).
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 brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 4th day of December, 2019.

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VII. PROOF OF SERVICE

I hereby certify that on this 4th day of December, 2019, the undersigned served the above **Real Parties in Interest's Petition for *En Banc* Reconsideration of this Court's Panel Decision** upon the following counsel through the electronic filing system maintained by this Court:

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