

IN THE SUPREME COURT OF THE STATE OF NEVADA

INDICATE FULL CAPTION:

SILVERWING DEVELOPMENT, a Nevada corporation; and J CARTER WITT, III, an individual,
Appellants,
vs.
NEVADA STATE CONTRACTORS BOARD,
Respondent.

No. 79134

DOCKETING STATEMENT
CIVIL APPEALS

Electronically Filed
Jul 26 2019 09:16 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

GENERAL INFORMATION

Appellants must complete this docketing statement in compliance with NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment and assignment to the Court of Appeals, and compiling statistical information.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. See KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

Revised December 2015

1. Judicial District Second Department 10
County Washoe Judge Honorable Elliott A. Sattler
District Ct. Case No. CV1800128

2. Attorney filing this docketing statement:

Attorney Michael S. Kimmel Telephone 775.786.8000
Firm Hoy Chrissinger Kimmel Vallas PC
Address 50 West Liberty Street
Suite 840
Reno, Nevada 89501

Client(s) SILVERWING DEVELOPMENT and J CARTER WITT, III.

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. Attorney(s) representing respondents(s):

Attorney Noah G. Allison Telephone 702.933.4444
Firm The Allison Law Firm Chtd.
Address 3191 East Warm Springs Road
Las Vegas, Nevada 89120

Client(s) Nevada State Contractors Board

Attorney _____ Telephone _____

Firm _____

Address _____

Client(s) _____

(List additional counsel on separate sheet if necessary)

4. Nature of disposition below (check all that apply):

- | | |
|--|---|
| <input type="checkbox"/> Judgment after bench trial | <input type="checkbox"/> Dismissal: |
| <input type="checkbox"/> Judgment after jury verdict | <input type="checkbox"/> Lack of jurisdiction |
| <input type="checkbox"/> Summary judgment | <input type="checkbox"/> Failure to state a claim |
| <input type="checkbox"/> Default judgment | <input type="checkbox"/> Failure to prosecute |
| <input type="checkbox"/> Grant/Denial of NRCP 60(b) relief | <input type="checkbox"/> Other (specify): _____ |
| <input type="checkbox"/> Grant/Denial of injunction | <input type="checkbox"/> Divorce Decree: |
| <input type="checkbox"/> Grant/Denial of declaratory relief | <input type="checkbox"/> Original <input type="checkbox"/> Modification |
| <input checked="" type="checkbox"/> Review of agency determination | <input type="checkbox"/> Other disposition (specify): _____ |

5. Does this appeal raise issues concerning any of the following?

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

N/A

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

N/A

8. Nature of the action. Briefly describe the nature of the action and the result below:

See Attachment.

9. Issues on appeal. State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

See Attachment.

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

None of which Appellants are aware.

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☐ N/A

☐ Yes

☒ No

If not, explain: As required by NRS 233B.130(2)(c)(1), the Attorney General (at the time, Adam P. Laxalt) was served with the Petition for Judicial Review filed with the District Court.

The Nevada State Contractors Board (a state agency) is a party to this appeal.

12. Other issues. Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☒ An issue arising under the United States and/or Nevada Constitutions

☒ A substantial issue of first impression

☒ An issue of public policy

☒ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain: NRS 624.220(2) violates due process and equal protection rights. The Nevada State Contractors Boards' attempt to issue an advisory opinion is an unconstitutional delegation of Legislative Authority. Appellants are aware of no case, statute, or regulation interpreting the phrases "single construction site" or "subdivision site" as used in NRS 624.220(2). Nevada already suffers a shortage of available labor for construction, and the NSCB's position regarding the statute exacerbates that situation.

13. Assignment to the Court of Appeals or retention in the Supreme Court. Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

This matter is presumptively retained by the Supreme Court pursuant to NRAP 17(a)(11)-(12). NRS 624.220(2) does not give persons of ordinary intelligence a reasonable opportunity to know what is prohibited. As applied by the NSCB, a licensee is precluded, in perpetuity, from performing work for the same client in a subdivision once a license limit had been reached, regardless of whether the new work was performed decades later under a completely separate permit on a completely separate building. NRS 624.220(2) unconstitutionally aggregates work for some, but not all, licensees of the same monetary class. There is statewide public importance to the application of licensing law.

14. Trial. If this action proceeded to trial, how many days did the trial last? 1

Was it a bench or jury trial? The District Court determined all issues after the hearing.

15. Judicial Disqualification. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?

No.

TIMELINESS OF NOTICE OF APPEAL

16. Date of entry of written judgment or order appealed from June 21, 2019

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

17. Date written notice of entry of judgment or order was served July 3, 2019

Was service by:

☐ Delivery

☒ Mail/electronic/fax

18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b) Date of filing _____

☐ NRCP 52(b) Date of filing _____

☐ NRCP 59 Date of filing _____

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. See AA Primo Builders v. Washington, 126 Nev. ____, 245 P.3d 1190 (2010).

(b) Date of entry of written order resolving tolling motion _____

(c) Date written notice of entry of order resolving tolling motion was served _____

Was service by:

☐ Delivery

☐ Mail

19. Date notice of appeal filed July 3, 2019

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

20. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other

NRAP 4(a)(1)

SUBSTANTIVE APPEALABILITY

21. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a)

- | | |
|--|--|
| <input type="checkbox"/> NRAP 3A(b)(1) | <input type="checkbox"/> NRS 38.205 |
| <input type="checkbox"/> NRAP 3A(b)(2) | <input checked="" type="checkbox"/> NRS 233B.150 |
| <input type="checkbox"/> NRAP 3A(b)(3) | <input type="checkbox"/> NRS 703.376 |
| <input type="checkbox"/> Other (specify) _____ | |

(b) Explain how each authority provides a basis for appeal from the judgment or order:

The District Court entered a final Order Denying Petition for Judicial Review on June 21, 2019. NRS 233B.150 provides that "[a]n aggrieved party may obtain a review of any final judgment of the district court by appeal to the appellate court of competent jurisdiction...", and that "[t]he appeal shall be taken as in other civil cases."

22. List all parties involved in the action or consolidated actions in the district court:

(a) Parties:

Silverwing Development, a Nevada corporation, Petitioner below and Appellant here.

J CARTER WITT, III, an individual, Petitioner below and Appellant here.

NEVADA STATE CONTRACTORS BOARD, Respondent below and Respondent here.

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

N/A

23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

See Attachment

24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

☒ Yes

☐ No

25. If you answered "No" to question 24, complete the following:

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☐ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☐ No

26. If you answered "No" to any part of question 25, explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b)):

27. Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Silverwing Development, J Carter Witt
Name of appellant

Michael S. Kimmel
Name of counsel of record

July 25, 2019
Date


Signature of counsel of record

Washoe County, Nevada
State and county where signed

CERTIFICATE OF SERVICE

I certify that on the 26 day of July, 2019, I served a copy of this completed docketing statement upon all counsel of record:

- ☐ By personally serving it upon him/her; or
- ☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

Noah G. Allison
3191 East Warm Springs Road
Las Vegas, Nevada 89120
Attorney for NSCB

Hon. Janet L. Chubb
50 W. Liberty Suite 700
Reno, Nevada 89501
Settlement Judge

Dated this 26 day of July, 2019


Signature

Attachment to Docketing Statement – Civil Appeals – Case No. 79134

8. Nature of action. Briefly describe the nature of the action and the result below.

The Nevada State Contractors Board ("NSCB") filed its Complaint alleging four causes of action against Silverwing on July 14, 2017. The first and second causes of action alleged 30 violations each, premised on the application of NRS 624.220(2). The third and fourth causes of action alleged 3 violations each, premised on the use of a B-2 residential and small commercial contractor as a framing subcontractor.

Silverwing answered the Complaint on August 24, 2017, challenging the constitutionality of NRS 624.220(2). The contested administrative hearing was held on September 28, 2017. Through Decision dated December 21, 2017 (the "ALJ Decision"), the ALJ found that Silverwing did not intend to evade the law but, nonetheless, had "knowingly" violated the law with respect to the allegations in the first and third causes of action. Silverwing was ordered to pay the minimum fine of \$1,000, per violation, or a total of \$33,000, plus \$28,739 for the NSCB's attorney fees and costs. The ALJ also dismissed the second and fourth causes of action.

Silverwing then filed a petition for judicial review, raising constitutional challenges to the statute and to the administrative decision. On June 21, 2019, the District Court denied the petition.

9. Issues on Appeal. State concisely the principal issue(s) in this appeal.

First Issue on Appeal:

Nevada and federal law preclude the enforcement of an unconstitutionally vague statute as a violation of due process. Here, the NSCB Complaint was based on the license limitation imposed by NRS 624.220(2). That statute imposes a monetary limit as the "maximum contract a licensed contractor may undertake on one or more construction contracts on a single construction site or subdivision site for a single client." *Id.* The first issue presented for review is whether, as a matter of law, NRS 624.220(2) violates Article I, Section 8(5) of the Constitution of the State of Nevada and/or Section I of the Fourteenth Amendment to the United States Constitution.

Second Issue on Appeal:

Section One of the Fourteenth Amendment of the United States Constitution forbids laws that deny any person equal protection of the laws. Similarly, Article 4, Section 21 of the Nevada Constitution requires that all laws be "general and of uniform operation throughout the State." Here, the NSCB Complaint was based on the license limitation imposed by NRS 624.220(2), which treats similarly licensed contractors differently based upon whether they work "on a single construction site or subdivision site for a single client" or choose to work for multiple separate clients

or on separate construction sites. The second issue presented for review is whether, as a matter of law, NRS 624.220(2) violates Article I, Section 8(5) of the Constitution of the State of Nevada and/or Section I of the Fourteenth Amendment to the United States Constitution.

Third Issue on Appeal:

Nevada and federal law preclude the legislative branch from delegating its power to legislate. Here, the NSCB has used its advisory opinion process to unilaterally create conditions or criteria for analyzing an admittedly ambiguous statute (NRS 624.220(2)) for potential violation. The third issue presented for review is whether, as a matter of law, the NSCB's December 14, 2015 Advisory Opinion violates Article 3, Section 1 of the Constitution of the State of Nevada and/or Article I, Section I of the United States Constitution.

Fourth Issue on Appeal:

Nevada law precludes the aggregation of projects for determining whether a license limit has been exceeded where the work to be aggregated is not performed on a "single construction site" or "subdivision site". NRS 624.220(2). Here, the Administrative Law Judge ("ALJ") ruled the projects were statutory subdivisions under NRS 278.320(1) and could therefore be treated as a "subdivision site" under NRS 624.220(2). The final issue presented for review is whether that decision is supported by substantial evidence when none of the projects divided land, or contemplated the division of land, into five or more parts as required by NRS 278.320(1) to constitute a statutory subdivision.

23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third party claims and the date of formal disposition of each claim.

NSCB Claims:

First Cause of Action: 30 violations of NRS 624.3015(3). Formal disposition occurred on June 21, 2019 through District Court Order Denying Petition for Judicial Review. The disposition of this cause of action **is** part of the appeal.

Second Cause of Action: 30 violations of NRS 624.3013(5). This cause of action was dismissed by the ALJ through order dated December 21, 2017 and **is not** part of the appeal.

Third Cause of Action: 3 violations of NRS 624.3015(3). Formal disposition occurred on June 21, 2019 through District Court Order Denying Petition for Judicial Review. The disposition of this cause of action **is not** part of the appeal.

Fourth Cause of Action: 3 violations of NRS 624.3013(5). This cause of action was dismissed by the ALJ through order dated December 21, 2017 and **is not** part of the appeal.

27. Attach file-stamped copies of the following documents:

- * The latest-filed complaint, counterclaims, cross-claims, and third party claims

The following are attached:

Exhibit 1 NSCB Complaint (July 14, 2017)

- * Any tolling motion(s) and order(s) resolving tolling motions

N/A

- * Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal

N/A

- * Any other order challenged on appeal

The following are attached:

Exhibit 2 NSCB Decision (December 21, 2017)
Exhibit 3 Order Regarding Petition for Judicial Review (November 8, 2018)
Exhibit 4 NSCB Clarification on Remand of Decision Entered December 17, 2017 (January 18, 2019)
Exhibit 5 Order Denying Petition for Judicial Review (June 21, 2019)

- * Notices of entry for each attached order

The following are attached:

There is no NEO for the December 21, 2017 NSCB Decision

Exhibit 6 NEO for Order Regarding Petition for Judicial Review (November 15, 2018)

- Exhibit 7 NEO for Clarification on Remand of Decision Entered
December 17, 2017 (January 24, 2019)
- Exhibit 8 NEO for Order Denying Petition for Judicial Review (July 3,
2019)

1 **NEVADA STATE CONTRACTORS BOARD**

2 **5390 KIETZKE LANE, SUITE 102**

3 **RENO, NEVADA 89511**

4 IN THE MATTER OF:) Investigative Case No. 30042873
5)
6 **SILVERWING DEVELOPMENT,**)
7 **J. CARTER WITT, III, PRESIDENT AND**) **NOTICE OF HEARING, COMPLAINT, AND**
8 **QUALIFIED INDIVIDUAL,**) **REQUIREMENT TO ANSWER**
9 **LICENSE NO. 44017,**)
10 **RESPONDENT.**) **HEARING DATE: SEPTEMBER 6, 2017**
11 **TIME: 8:30 a.m.**

12 **To: SILVERWING DEVELOPMENT**
13 **J. CARTER WITT, III, PRESIDENT AND QUALIFIED INDIVIDUAL**
14 **245 EAST LIBERTY STREET, SUITE 215**
15 **RENO, NEVADA 89501 US/CERTIFIED MAIL: 9171 9690 0935 0138 3065 45**

16 **NOTICE OF HEARING**

17 NOTICE IS HEREBY GIVEN, in accordance with the provisions of the Administrative
18 Procedures Act, Nevada Revised Statutes ("NRS") Chapter 233B; the State Contractor's Act of
19 the State of Nevada, NRS Chapter 624; and the Nevada Administrative Code ("NAC") Chapter
20 624, that the Nevada State Contractors Board ("NSCB" or "Board") has issued a Complaint
21 against the Licensee, and will hold a hearing on **SEPTEMBER 6, 2017**, at **8:30 a.m.**, at the
22 office of the Board, 5390 Kietzke Lane, Reno, Nevada 89511.

23 **COMPLAINT**

24 The Executive Officer of the Nevada State Contractors Board complains against
25 **SILVERWING DEVELOPMENT**, as follows:

- 26 1. The Nevada State Contractors Board is the state agency charged with regulating
27 the practice of contracting pursuant to Chapter 624, Nevada Revised Statutes ("NRS").
- 28 2. **SILVERWING DEVELOPMENT** ("Respondent") is now, and was at all times
alleged herein, a licensed contractor in the State of Nevada, license number 44017, Class B
(General Building), issued on December 5, 1997, with an unlimited monetary license limit.
License number 44017 is held as a corporation with J. Carter Witt, III as President and
Qualified Individual. As of July 11, 2017, the license is active.

3. The address of record is 245 East Liberty Street, Suite 215, Reno, Nevada 89501.

FIRST CAUSE OF ACTION

4. The Respondent Silverwing Development, license number 44017, entered into contracts with the following subcontractors for a project identified as Fountainhouse at Victorian Square, Sparks, Nevada ("Fountainhouse Project").

5. On or about December 23, 2015, the Respondent entered into contract with Preferred Window Products, license numbers 78698 and 81739, to supply and install windows for a project identified as the Fountainhouse Project for a base contract amount of \$299,700.00. With contract change orders, the total contract amount is \$305,430.20. This contract is \$80,430.00 in excess of the contractor's monetary limit of \$225,000.00.

6. On or about January 11, 2016 thru August 1, 2016, the Respondent entered into five (5) contracts with A. B. C. Builders, license number 36034, to supply and install doors, trim and hardware for a project identified as the Fountainhouse Project for the contracted amounts of \$79,357.00, \$147,840.00, \$147,840.00, \$147,840.00 and \$147,840.00 making the total contract amount \$670,717.00. This contract is \$520,717.00 in excess of the contractor's monetary limit of \$150,000.00.

7. On or about December 28, 2015 thru July 1, 2016, the Respondent entered into two (2) contracts with Reno Tahoe Cabinets, license numbers 71762A and 71762B, to supply and install cabinets for a project identified as the Fountainhouse Project for the contracted amounts of \$105,174.00 and \$102,654.00 making the total contract amount \$207,828.00. This contract is \$97,828.00 in excess of the contractor's monetary limit of \$110,000.00.

8. On or about April 1, 2016 thru September 1, 2016, the Respondent entered into four (4) contracts with Systems of Nevada, Inc., license numbers 39080 and 42143, to supply and install fire alarms and low voltage for a project identified as the Fountainhouse Project for the contracted amounts of \$27,300.00, \$32,950.00, \$27,300.00 and \$27,300.00 making the total contract amount \$114,850.00. This contract is \$79,850.00 in excess of the contractor's monetary limit of \$35,000.00.

1 9. On or about October 23, 2015, the Respondent entered into contract with
2 R. D. R. Production Builders, license numbers 50382, to supply and install framing for a
3 project identified as the Fountainhouse Project for a base contract amount of \$1,076,083.00.
4 With contract extensions, the total contract amount is \$5,127,771.00. This contract is
5 \$3,927,771.00 in excess of the contractor's monetary limit of \$1,200,000.00.

6 10. On or about October 19, 2015, the Respondent entered into contract with
7 H. T. A. Plumbing and Mechanical, Inc., license number 49199, to supply and install plumbing
8 for a project identified as the Fountainhouse Project for a base contract amount of
9 \$1,988,670.00. With a contract extension, the total contract amount is \$2,005,070.00. This
10 contract is \$5,070.00 in excess of the contractor's monetary limit of \$2,000,000.00.

11 11. The Respondent entered into contracts with the following subcontractors for a
12 project identified as the Bungalows at Sky Vista in Reno, Nevada ("Bungalows Project").

13 12. On or about November 20, 2013, the Respondent entered into a contract with
14 Zephyr Plumbing, Inc., license number 74199, to supply and install plumbing for a project
15 identified as the Bungalows Project for a base contract amount of \$1,086,597.00. With contract
16 extensions, the total contract amount is \$1,948,637.00. This contract is \$1,598,637.00 in
17 excess of the contractor's monetary limit of \$350,000.00.

18 13. On or about December 16, 2013, the Respondent entered into a contract with
19 High Voltage Electric, LLC, license number 76573, to supply and install electrical for a project
20 identified as the Bungalows Project for a base contract amount of \$713,030.00. With contract
21 change orders and a contract extension, the total contract amount is \$1,258,710.12. This
22 contract is \$58,710.12 in excess of the contractor's monetary limit of \$1,200,000.00.

23 14. On or about December 18, 2013, the Respondent entered into a contract with
24 Buttacavoli Development Co., license numbers 78035 and 78034, to supply and install
25 windows for a project identified as the Bungalows Project for a contract amount of
26 \$226,768.00. This contract is \$206,768.00 in excess of the contractor's monetary limit of
27 \$20,000.00.

28 15. On or about December 16, 2013, the Respondent entered into a contract with
Jims Cabinet and Installation, license number 42668, to supply and install cabinets for a

1 project identified as the Bungalows Project for a contract amount of \$428,440.00. This contract
2 is \$178,440.00 in excess of the contractor's monetary limit of \$250,000.00.

3 16. On or about October 24, 2014, the Respondent entered into a contract with
4 Reno Tahoe Cabinets, license numbers 71762A and 71762B, to supply and install cabinets for
5 a project identified as the Bungalows Project for a contract amount of \$373,545.00. This
6 contract is \$263,545.00 in excess of the contractor's monetary limit of \$110,000.00.

7 17. On or about December 11, 2013, the Respondent entered into a contract with
8 U. S. Granite Nevada, license number 63194, to supply and install solid surface countertops
9 for a project identified as the Bungalows Project for a base contract amount of \$386,242.00.
10 With contract extensions, the total contract amount is \$694,607.00. This contract is
11 \$344,607.00 in excess of the contractor's monetary limit of \$350,000.00.

12 18. On or about April 16, 2014, the Respondent entered into a contract with
13 Systems of Nevada, Inc., license numbers 39080 and 42143, to supply and install fire alarms
14 for a project identified as the Bungalows Project for a base contract amount of \$14,802.58.
15 With contract change orders and a contract extension, the total contract amount is
16 \$99,558.24. This contract is \$64,558.24 in excess of the contractor's monetary limit of
17 \$35,000.00.

18 19. On or about January 13, 2014, the Respondent entered into a contract with
19 Summerscape, LLC, license number 77869, to supply and install landscaping for a project
20 identified as the Bungalows Project for a base contract amount of \$188,398.00. With contract
21 extensions, the total contract amount is \$722,166.00. This contract is \$522,166.00 in excess
22 of the contractor's monetary limit of \$200,000.00.

23 20. On or about December 13, 2013, the Respondent entered into contract with
24 Infinity Painting & Decorating, Inc., license number 54871A, to supply and install painting for
25 a project identified as the Bungalows Project for a base contract amount of \$69,050.00. With
26 contract change orders and contract extensions, the total contract amount is \$631,523.00.
27 This contract is \$431,523.00 in excess of the contractor's monetary limit of \$200,000.00.

28 21. On or about November 25, 2013, the Respondent entered into a contract with
Burke Roofing, Inc., license number 75735, to supply and install roofing for a project identified

1 as the Bungalows Project for a base contract amount of \$101,050.00. With contract extensions,
2 the total contract amount is \$930,252.00. This contract is \$780,252.00 in excess of the
3 contractor's monetary limit of \$150,000.00.

4 22. The Respondent entered into contracts with the following subcontractors for a
5 project identified as the Edgewater at Virginia Lake Condos in Reno, Nevada ("Edgewater
6 Condos Project").

7 23. On or about November 24, 2014, the Respondent entered into a contract with
8 A. B. C. Builders, Inc., license number 36034, to supply and install doors, trim and hardware
9 for a project identified as the Edgewater Condos Project for a base contract amount of
10 \$141,060.00. With contract change orders, the total contract amount is \$152,310.00. This
11 contract is \$2,310.00 in excess of the contractor's monetary limit of \$150,000.00.

12 24. On or about October 28, 2014, the Respondent entered into a contract with
13 Reno Tahoe Cabinets, license numbers 71762A and 71762B, to supply and install cabinets for
14 a project identified as the Edgewater Condos Project for a base contract amount of
15 \$187,632.00. This contract is \$77,632.00 in excess of the contractor's monetary limit of
16 \$110,000.00.

17 25. On or about October 2, 2014, the Respondent entered into a contract with
18 Zephyr Plumbing, Inc., license number 74199, to supply and install plumbing for a project
19 identified as the Edgewater Condos Project for a base contract amount of \$426,402.00. With
20 contract change orders, the total contract amount is \$443,138.00. This contract is \$93,138.00
21 in excess of the contractor's monetary limit of \$350,000.00.

22 26. On or about November 11, 2014, the Respondent entered into contract with
23 R. D. R. Production Builders, license number 50382, to supply and install framing for a project
24 identified as the Edgewater Condos Project for a base contract amount of \$1,178,296.00. With
25 contract extensions, the total contract amount is \$1,767,444.00. This contract is \$567,444.00
26 in excess of the contractor's monetary limit of \$1,200,000.00.

27 27. On or about December 9, 2014, the Respondent entered into a contract with
28 Infinity Painting & Decorating, Inc., license number 54871A, to supply and install painting for
a project identified as the Edgewater Condos Project for a base contract amount of

1 \$173,875.00. With contract change orders, the total contract amount is \$222,750.00. This
2 contract is \$22,750.00 in excess of the contractor's monetary limit of \$200,000.00.

3 28. The Respondent entered into contracts with the following subcontractors for a
4 project identified as the Edgewater at Virginia Lake Apartments in Reno, Nevada ("Edgewater
5 Apartments Project").

6 29. On or about December 10, 2014, the Respondent entered into a contract with
7 Preferred Window Products, license numbers 78698 and 81739, to supply and install windows
8 for a project identified as the Edgewater Apartments Project for a contract amount of
9 \$504,580.00. This contract is \$279,580.00 in excess of the contractor's monetary limit of
10 \$225,000.00.

11 30. On or about December 9, 2014, the Respondent entered into a contract with
12 A. B. C. Builders, Inc., license numbers 36034, to supply and install doors, trim and hardware
13 for a project identified as the Edgewater Apartments Project for a base contract amount of
14 \$537,240.00. With contract change orders, the total contract amount is \$583,805.00. This
15 contract is \$433,805.00 in excess of the contractor's monetary limit of \$150,000.00.

16 31. On or about December 9, 2014, the Respondent entered into a contract with
17 Reno Tahoe Cabinets, license numbers 71762A and 71762B, to supply and install cabinets for
18 a project identified as the Edgewater Apartments Project for a contract amount of \$604,243.00.
19 This contract is \$494,243.00 in excess of the contractor's monetary limit of \$110,000.00.

20 32. On or about November 18, 2014, the Respondent entered into a contract with
21 U. S. Granite Nevada, license number 63194, to supply and install solid surface countertops
22 for a project identified as the Edgewater Apartments Project for a contract amount of
23 \$502,209.00. This contract is \$152,209.00 in excess of the contractor's monetary limit of
24 \$350,000.00.

25 33. On or about November 18, 2014, the Respondent entered into a contract with
26 Systems of Nevada, Inc., license numbers 39080 and 42143, to supply and install fire alarms
27 and low voltage for a project identified as the Edgewater Apartments Project for a contract
28 amount of \$95,437.45. This contract is \$60,437.45 in excess of the contractor's monetary limit
of \$35,000.00.

1 34. On or about October 2, 2014, the Respondent entered into a contract with
2 Zephyr Plumbing, Inc., license number 74199, to supply and install plumbing for a project
3 identified as the Edgewater Apartments Project for a base contract amount of \$1,943,779.00.
4 With contract change orders, the total contract amount is \$1,961,479.00. This contract is
5 \$1,611,479.00 in excess of the contractor's monetary limit of \$350,000.00.

6 35. On or about November 11, 2014, the Respondent entered into a contract with
7 R. D. R. Production Builders, license number 53082, to supply and install framing for a project
8 identified as the Edgewater Apartments Project for a base contract amount of \$1,127,967.00.
9 With contract extensions, the total contract amount is \$4,160,703.00. This contract is
10 \$2,960,703.00 in excess of the contractor's monetary limit of \$1,200,000.00.

11 36. On or about December 9, 2014, the Respondent entered into a contract with
12 Infinity Painting & Decorating, Inc., license number 54871A, to supply and install painting for
13 a project identified as the Edgewater Apartments Project for a base contract amount of
14 \$159,565.00. With contract extensions, the total contract amount is \$565,994.50. This
15 contract is \$365,994.50 in excess of the contractor's monetary limit of \$200,000.00.

16 37. On or about November 20, 2014, the Respondent entered into a contract with
17 Burke Roofing, Inc., license number 75735, to supply and install roofing for a project identified
18 as the Edgewater Apartments Project for a base contract amount of \$137,240.00. With
19 contract extensions, the total contract amount is \$246,170.00. This contract is \$96,170.00 in
20 excess of the contractor's monetary limit of \$150,000.00.

21 38. Based upon the foregoing, the Respondent has thirty (30) times violated NRS
22 624.3015(3) by knowingly bidding to contract or entering into a contract with a contractor for
23 work in excess of his limit or beyond the scope of his license.

24 **SECOND CAUSE OF ACTION**

25 39. Based upon the above paragraphs, the Respondent has thirty (30) times violated
26 NRS 624.3013(5) by failing to ascertain that each person whose bid on a construction project
27 the licensee considers is appropriately licensed as required by NAC 624.640(6).
28

1 **THIRD CAUSE OF ACTION**

2 40. On or about October 23, 2015, the Respondent, an actively licensed Nevada
3 classification B (General Building) contractor, entered into contract with R. D. R. Production
4 Builders, license number 50384, an actively licensed Nevada classification B-2 (Residential &
5 Small Commercial) contractor, to supply and install framing for a project identified as the
6 Fountainhouse Project, which would require a C-3 license.

7 41. On or about November 11, 2014, the Respondent, an actively licensed Nevada
8 classification B (General Building) contractor, entered into contract with R. D. R. Production
9 Builders, license number 50384, an actively licensed Nevada classification B-2 (Residential &
10 Small Commercial) contractor, to supply and install framing for a project identified as the
11 Edgewater Condos Project, which would require a C-3 license.

12 42. On or about November 11, 2014, the Respondent, an actively licensed Nevada
13 classification B (General Building) contractor, entered into contract with R. D. R. Production
14 Builders, license number 50384, an actively licensed Nevada classification B-2 (Residential &
15 Small Commercial) contractor, to supply and install framing for a project identified as the
16 Edgewater Apartments Project, which would require a C-3 license.

17 43. Based upon the foregoing, the Respondent has three (3) times violated NRS
18 624.3015(3) by knowingly bidding to contract or entering into a contract with a contractor for
19 work in excess of his limit or beyond the scope of his license.

20 **FOURTH CAUSE OF ACTION**

21 44. Based upon the above paragraphs, the Respondent has three (3) times violated
22 NRS 624.3013(5) by failing to ascertain that each person whose bid on a construction project
23 the licensee considers is appropriately licensed as required by NAC 624.640(6).

24 / / /

25 / / /

26 / / /

27

28

WHEREFORE, the Executive Officer of the Board, Margi Grein, respectfully requests that the Nevada State Contractors Board take disciplinary action and impose the costs of the investigation of this action against the Respondent.

DATED this 14 day of July, 2017

Margi A. Grein
MARGI A. GREIN, EXECUTIVE OFFICER
NEVADA STATE CONTRACTORS BOARD

1 **STATEMENT OF RESPONDENT'S OBLIGATIONS AND RIGHTS**

2 As the Respondent in this action, you have the following rights:

- 3 1. A hearing regarding this matter will be held at the following date and place:

4 **SEPTEMBER 6, 2017** at 8:30 a.m. or as soon thereafter as possible

5 Nevada State Contractors Board

6 5390 Kietzke Lane, Suite 102

7 Reno, Nevada 89511

8 The intent of the hearing of this matter is to determine whether the allegations made
9 against you in the Complaint have been proven by substantial evidence, and if so,
10 what discipline is appropriate.

- 11
12 2. You may appear at the hearing of this matter. You may be represented by your
13 counsel of choice. The hearing shall be conducted at an open and public meeting of
14 the Board and shall be conducted in conformance with NRS chapter 233B and 624
15 and NAC chapter 624, including your right to present testimony and evidence in
16 support of your case and your right to cross-examine witnesses presented by the
17 Board's counsel.

- 18
19 3. The Board shall attempt to hold your hearing at the time set, but you should be
20 aware that the Board retains the discretion to conduct its meeting as it deems best
21 and your case may be heard later than the time set.

- 22 4. Pursuant to NAC 624.713(1)(b) and (2), you must file a written Answer to the
23 Complaint by **AUGUST 3, 2017**, at the office of the Board, attention: Executive
24 Officer. In the Answer, you must admit or deny each allegation made in the
25 Complaint, or you may state that you have insufficient information to admit or deny
26 a particular allegation. Pursuant to NAC 624.713(1)(c), you are only entitled to a
27 hearing in this matter if you file an Answer. Pursuant to NAC 624.713(1)(d), your
28 failure to file a written Answer at the office of the Board may result in the Board

1 judgment against you and in the Board taking disciplinary action against your
2 license.

- 3
- 4 5. Pursuant to NAC 624.7276, should you require the issuance of subpoenas for any
5 witnesses, you must apply to the Board in writing, include a statement of the facts
6 that demonstrate the reasons why the subpoena is necessary, and the application
7 must be received by the Board at least ten (10) business days before the hearing for
8 which the subpoena is issued. If the Board issues the subpoena, you shall serve a
9 copy of the subpoena on all other parties in the matter prescribed by Rule 45(c) of
10 the Nevada Rules of Civil Procedure, file proof of such service with the Board, and
11 pay the costs related to the issuance and service of the subpoena.
- 12
- 13 6. Should you choose not to appear at the hearing of the matter, the Board may enter
14 a default against you and still proceed with the hearing of the matter in your
15 absence pursuant to NAC 624.716.
- 16
- 17 7. At the time of the hearing, it is the Board's intention to take official notice of the
18 following documents pursuant to NRS 233B.123(5): All matters contained in the
19 Respondent's file, including, but not limited to, credit reports, judicial records, staff
20 memoranda, references, prior records pertaining to the licensee, officers or
21 associates thereof, and all previous hearing files and transcripts, notices (including
22 exhibits), findings of fact, conclusions of law, and decision and order. An informal
23 exchange of documents will be utilized; however, should Respondent want to use
24 any new documentary evidence, in addition to the ones listed above, at the hearing,
25 Respondent must identify each document and provide copies of those documents to
26 the Board at least ten (10) business days before the hearing.
- 27
- 28 8. Pursuant to NRS 233B.123 (5), the Board's experience, technical competence and
specialized knowledge will be utilized in evaluating this matter.

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9. You are further advised and notified that in the event of any finding of a charged violation, your prior disciplinary record may be considered in mitigation or in aggravation when determining appropriate disposition of this matter.

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Nevada State Contractors Board and that I served the attached **NOTICE OF HEARING, COMPLAINT, AND REQUIREMENT TO ANSWER** in the above entitled matter by placing a true copy thereof, enclosed in a sealed envelope with postage prepaid thereon, in the United States Post Office mail, addressed as follows:

**ELIZABETH G. WITT
9650 GATEWAY DRIVE, STE 201
RENO, NV 89521**

US/CERTIFIED MAIL: 9171 9690 0935 0138 3065 38

**HEATHER A. JAMES, ESQ.
LAXALT & NOMURA, LTD.
9600 GATEWAY DRIVE
RENO, NV 89521**

US/CERTIFIED MAIL: 9171 9690 0935 0138 3065 21

**PREFERRED WINDOW PRODUCTS
1855 OLYMPIC BLVD, STE 225
WALNUT CREEK, CA 94596**

**ABC BUILDERS
7318 DIAMOND OAKS CT
SPARKS, NV 89436**

**RENO TAHOE CABINETS & MORE
4792 LONGLEY LANE
RENO, NV 89502**

**SYSTEMS OF NEVADA, INC.
1220 E. GREG STREET, #4
SPARKS, NV 89431**

**R. D. R. PRODUCTION BUILDERS
1806 W KETTLEMAN LANE, STE F
LODI, CA 95242**

**HTA PLUMBING & MECHANICAL
2049 PABCO RD
HENDERSON, NV 89011**

**ZEPHYR PLUMBING
1080 LINDA WAY #3
SPARKS, NV 89431**

**HIGH VOLTAGE ELECTRIC
9 E. FREEPORT BLVD
SPARKS, NV 89431**

**BUTTACAVOLI DEV COMPANY
1015 YUBA ST
MARYSVILLE, CA 95901**

**JIMS CABINETS AND INSTALLATION
2790 WRONDEL WAY, STE 197
RENO, NV 89502**

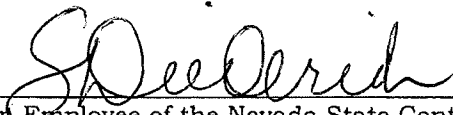
**US GRANITE NEVADA
5350 CAPITAL CT #102
RENO, NV 89502**

**SUMMERSCAPE, LLC
5295 COGGINS RD
RENO, NV 89506**

**INFINITY PAINTING & DECORATING
625 SPICE ISLANDS DRIVE, STE G
SPARKS, NV 89431**

**BURKE ROOFING, INC.
109 SHADOW MOUNTAIN DRIVE
FERNLEY, NV 89408**

I declare under penalty of perjury that the foregoing is true and correct and executed this 14 day of July, 2017.


An Employee of the Nevada State Contractors Board

RENO, NEVADA 89511

DECISION

charges Silverwing with failing to ascertain that each person whose bid on a construction project the licensee considered was appropriately licensed as required by NAC 624.640(6).

Silverwing filed an Answer to the Board's Complaint on August 24, 2017, in which it responds to each allegation contained therein. Silverwing also asserts both facial and as-applied challenges to the constitutionality of NRS 624.220(2), the statute under which the charges set forth in the First and Second Causes of Action of the Board's Complaint are predicated. Silverwing further denies that it "knowingly" entered into a contract with a contractor for work in excess of that contractor's monetary limit, or for work beyond the scope of the contractor's license. Finally, Silverwing contends that to the extent it is found to have committed any violation, Silverwing's exemplary record should be considered when deciding the appropriate disciplinary action.

An evidentiary hearing was conducted on September 28, 2017, at which the testimony of Board Compliance Officer, Jeff Gore, and Respondent Witt was presented, and the arguments of counsel were heard. The Board was represented by Noah G. Allison, Prosecuting Attorney for the Board, and Respondents were represented by Michael S. Kimmel, Esq. Post-hearing briefing was completed on November 16, 2017. Based upon the evidence adduced at the hearing, and the arguments of counsel, the undersigned hereby makes the following findings and Order:

DISCUSSION

The legal arguments advanced by the parties concerning whether NRS 624.220(2) violates the due process or equal protection clauses of the United States Constitution on its face, or as-applied by the Board to Silverwing, is best understood in the context of the facts from which the dispute arises. NRS 624.220(2) provides:

The Board shall limit the field and scope of the operations of a licensed contractor by establishing a monetary limit on a contractor's license, and the limit must be the maximum contract a licensed contractor may undertake on one or more construction contracts on a single construction site or subdivision site for a single client. The Board

may take any other action designed to limit the field and scope of the operations of a contractor as may be necessary to protect the health, safety and general welfare of the public. The limit must be determined after consideration of the factors set forth in NRS 624.260 to 624.265, inclusive.

The overarching theme of the State Contractor's Act of the State of Nevada, NRS Chapter 624 is reflected in the Legislative declaration at NRS 624.005 which provides that the provisions of the chapter relating to the discipline of licensees are intended to promote public confidence and trust in the competence and integrity of licensees and to protect the health, safety and welfare of the public. Consistent with that theme, the statutory provisions set forth in NRS 624.260 to 624.265, speak to a variety of subjects concerning the experience, knowledge, financial responsibility, and character of licensed contractors. Pursuant to NRS 624.160, the State Contractors Board is charged with enforcing the provisions of Chapter 624.

Silverwing's challenge to the constitutionality of NRS 624.220(2), is potentially dispositive of the charges contained in the first two causes of action in the Complaint, and must be evaluated based on the evidence adduced at the hearing of September 28, 2017. The undersigned Administrative Law Judge finds the evidence received largely comports with the factual allegations set forth in the Complaint.

It is undisputed that at the times alleged in the Complaint, Silverwing was the general contractor developing four residential projects known as the Fountainhouse at Victorian Square, the Bungalows at Sky Vista, the Edgewater at Virginia Lake Condos, and the Edgewater at Virginia Lake Apartments. Each project involved numerous contracts entered between Silverwing and various licensed subcontractors to perform construction work on the respective sites. Although Silverwing's Class B General Contractors license had an unlimited monetary license limit, the various subcontractors with which Silverwing contracted each held licenses containing a wide range of monetary limits.

The Board called two witnesses at the hearing conducted September 28, 2017. Board Compliance Investigator, Jeff Gore, testified that he was responsible for investigating the contracting activity of Silverwing relating to the four projects which he initiated based on an

anonymous complaint regarding Zephyr Plumbing's bidding over its license limit on subcontracts for Silverwing's Bungalows and Edgewater Projects. Zephyr was cited and paid a fine. Gore testified that as he continued his investigation, he discovered each of the subcontracts outlined in the Complaint. Gore explained that while individual subcontracts may have been within the monetary limits of the subcontractor involved, when he aggregated the subcontracts for individual subcontractors on one or more of the four Silverwing Projects, if they exceeded the monetary limits of a subcontractor, he treated them as in violation of NRS 624.3015(3).

All the subcontracts in question were received as exhibits. Gore illustrated his testimony relating to aggregation of subcontracts by referring to the five subcontracts in paragraph 6 of the Complaint allegedly entered between Silverwing and A.B.C. Builders on the Fountainhouse Project between January and August 2006. A.B.C. Builders license had a monetary limit of \$150,000. Four of the separate subcontracts with Silverwing were for \$147,840, and a fifth was for \$79,357.00. Aggregating the subcontracts to a sum of \$670,717.00, Gore found A.B.C. Builders had exceeded its monetary license limit by \$520,717.00. Gore further testified that in some instances the monetary license limits for subcontractors on the Silverwing projects also were exceeded by extensions and change orders.

On cross examination, Gore testified that the \$150,000 limit on A.B.C. Builder's license would not have been violated if it entered a \$100,000 subcontract with Silverwing for a project in Las Vegas, and another for \$100,000 for a project in Reno. Gore testified that his opinion would be the same if the two projects were in geographically different locations in the greater Reno area. Gore acknowledged that in assessing whether a contractor's monetary license limit is exceeded, he does not simply look at the amount of the subcontract, but at where the project is being built.

Gore further testified that the four Silverwing Projects were each comprised of multiple separate buildings, each of which required a separate building permit from the City of Reno bearing progressive issuance dates as the build out of the Projects progressed.

When asked whether he would consider subcontracts for a construction project on opposite sides of Kietzke Lane in Reno to be a single "construction site," however, Gore testified that it

would depend on other factors such as when the construction was occurring; whether it was for the same general contractor; when surveys were done; when utilities were installed; when construction equipment was mobilized; and the specific geographical relationship of the sites, among others. Gore explained that his determination of whether subcontracts were for a single or multiple construction sites was based on his 21 years of experience in commercial construction before joining the Board as an Investigator, and acknowledged that he was unaware of any definition of “single construction site,” or “subdivision site,” in the NRS or the NAC, nor were there any official manuals or guide books on the subject to his knowledge.

The Board next called Silverwing’s President, J. Carter Witt, III, who testified that he is an owner/developer who owns his own general contracting company, Silverwing, and has developed 100 to 150 projects in several States, including Nevada. He estimated his company has constructed approximately 3,000 homes, 3,000 apartments, and about \$1 to \$2 billion in commercial properties. Witt further testified that none of the four Projects at issue in this case were subdivided into five or more pieces for sale.

Witt explained his understanding of why he thought Silverwing was permitted to enter subcontracts which did not violate a subcontractor’s monetary license limit by describing the Fountainhouse at Victorian Square Project in Sparks, Nevada. Witt testified the Fountainhouse Project includes 10 residential buildings and one clubhouse, which he views as 11 separate sites of construction, and is so reflected in the contracts involved. He described the actual construction of the Projects as sequential. When a foundation for one structure is finished, the foundation for the next structure begins, and framing commences on the first structure, and so on until the build out of the Project is complete. Consistent with his explanation regarding the Fountainhouse Project, Witt testified that he viewed each building within each of the other 3 Projects at issue in the Complaint as separate construction sites. Witt considered this important because in the event of a downturn in the economy such as that in 2007 and 2008, Silverwing could stop additional construction if the economic realities of the moment required it.

With regard to the allegations in the Third and Fourth Causes of Action that Silverwing knowingly entered a subcontract for work beyond the scope of the subcontractor’s license, Witt

acknowledged the hiring of R.D.R. Production Builders to perform framing work as alleged without ascertaining that R.D.R. had only an B-2 license rather than a qualifying Class C-3 license. Witt stressed, however, that this error was not knowing or intentional.

This Order will first address the allegations in the Third and Fourth Causes of Action which are amenable to resolution without considering Silverwing's constitutional challenges to NRS 624.220(2).

Silverwing does not dispute that by contracting with R.D.R. Production Builders as alleged in Counts 3 and 4, its conduct violated the provisions of NRS 624.3015(3), 624.3013(5), and NAC 624.640(6). It disputes only that it acted "knowingly" or with intent to "evade the law." To be subject to discipline for the violations alleged, however, there is no requirement that Silverwing acted with intent to evade the law. The question is whether Silverwing acted "knowingly" as that term is defined in NRS 624.024 which provides in pertinent part that, "'Knowingly' imports a knowledge that the facts exist which constitute the act or omission, and does not require knowledge of the prohibition against the act or omission." Under the applicable standard, the undersigned ALJ finds Silverwing knowingly violated NRS 624.3015(3), NRS 624.3013(5), and NAC 624.640(6) as charged in the Third and Fourth Causes of Action.

The parties do not seriously dispute what the evidence shows with respect to the factual allegations in the First and Second Causes of Action. Instead, the principal focus of the briefing and arguments of the parties relates to statutory construction, and Silverwing's challenge to the constitutionality of NRS 624.220(2). If Silverwing's constitutional challenge to the NRS 624.220(2) is upheld, either facially, or as-applied, the violations charged in the First and Second Causes of Action cannot be sustained.

There are limits on the authority of an administrative agency, and thus on an administrative law judge for that agency to consider the constitutionality of a legislative act on its face. This tribunal has no authority to declare unconstitutional the statutes which it is established to administer and enforce. *Malecon Tobacco, L.L.C. v. State ex rel. Dep't of Taxation*, 59 P.3d 474, 476-77 (2002); and *Déjà Vu Showgirls v. State Dept. of Tax.*, 334 P.3d 392, 397 (2014). However,

while facial constitutional challenges to a statute may not be adjudicated by an administrative tribunal, as-applied challenges hinging on factual determinations should be addressed first by the administrative agency charged with enforcing the statute. *Id.* Therefore, while Silverwing's facial constitutional challenge to NRS 624.220(2) may not be considered in this administrative proceeding, its as-applied challenges may, and are addressed below.

NRS 624.220(2) directs that the Board shall limit the operations of a licensed contractor by establishing monetary limits on the contractor's license thereby defining the maximum contract a licensed contractor may undertake on one or more construction contracts on a "single construction site" or "subdivision site" for a single client. The terms "single construction site" and "subdivision site" are not defined in the Nevada Revised Statutes or the Nevada Administrative Code, and as the Board's Compliance Investigator, Jeff Gore, testified, there are no internal written guidelines or manuals defining those terms. Silverwing argues that this renders the statute unconstitutionally vague as-applied to Silverwing, because Investigator Gore relied on his own personal subjective experience as the guiding factor to determine whether the work at issue involved a single construction site, or a subdivision site. The undersigned ALJ disagrees.

The term "subdivision site" is not impermissibly vague as applied to Silverwing and thus does not violate due process. To the extent the term "subdivision site" could be deemed to be ambiguous, the Board properly invokes NRS 278.320(1) which defines "subdivision" as "any land, vacant or improved, which is divided or proposed to be divided into five or more lots, parcels, sites, units or plots, for the purpose of any transfer or development, or for any proposed transfer or development." Adding the word "site" simply defines the physical location where a specified subdivision exists. As argued by the Board, this statutory construction of "subdivision site" provides a "real-world context" by identifying a geographic location. The undersigned ALJ finds the Board's interpretation of the term "subdivision site" is entirely reasonable construction of the statute. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

The record adduced establishes that construction of the Fountainhouse at Victorian Square development occurred within the geographic boundaries of the "Official Plat of Fountainhouse at

Victorian Square a Condominium Subdivision” after the plat was recorded on November 16, 2015. The “Subdivision Summary” for the Fountainhouse Project stated that the plat divided the land, or at a minimum, proposed to divide the land into 220 “Total Units.” Similar descriptions were provided in the Official Plats and “Subdivision Summaries” for the Bungalows at Sky Vista, and the Edgewater at Virginia Lake development.

The undersigned ALJ concludes the Silverwing Projects were individual “subdivision sites” as the term is used in NRS 624.220(2), and were properly treated as such by the Board through its Inspector, Jeff Gore. Because reference to the term single “subdivision site” describes the geographic location where the subdivision exists, the undersigned also finds reasonable Gore’s action in aggregating the subcontracts entered by Silverwing with separate contractors in determining whether the subcontractor’s monetary license limit had been exceeded. Additionally, Gore’s testimony on cross-examination regarding how he would treat subcontracts with a single general contractor at locations at opposite ends of the State of Nevada, or at opposite ends of Reno, or even on opposite sides of Kitzke Lane, do not change the result. The subdivision sites at issue in this case bore no such demarcations.

Finding that the Silverwing Projects were single “subdivision sites” subject to the provisions of NRS 624.220(2), the undersigned concludes it is unnecessary to consider Silverwing’s constitutional challenge to the term “single construction site.” The Board already has addressed the issue of a recognized ambiguity in that phrase in its “Tesla Advisory Opinion” issued December 14, 2015. Although the Board’s approach to harmonizing the meaning of the phrase “single construction site” with the Legislature’s intent for creating license limits is instructive, the issues presented in the Tesla matter are not the issues presented here.

The undersigned ALJ further concludes that for the reasons discussed with respect to the Third and Fourth Causes of Action above, under NRS 624.024, Silverwing acted knowingly with regard to each of the 30 violations alleged in the First and Second Causes of Action.

Silverwing also makes the argument that NRS 624.220(2) unconstitutionally treats similarly situated licensed contractors and their clients differently in violation of the equal

protection clause of the United States Constitution. The undersigned finds this to be a facial challenge to the constitutionality of the statute rather than a cognizable as-applied challenge. Therefore, the undersigned ALJ lacks authority to adjudicate it.

Having found the Silverwing Projects were “subdivision sites” within the meaning of NRS 624.220(2), the undersigned ALJ finds that the license limit for each subcontractor was the maximum contract they could undertake on one or multiple contracts with Silverwing on each subdivision site. Each subcontractor cited paid a penalty for exceeding their monetary license limit, and Silverwing likewise is subject to a penalty for each of the 30 separate license limit violations it knowingly committed which within the three subdivision sites that encompassed the four Projects as alleged in the First and Second Causes of Action.

With respect to penalty for the foregoing violations, the Board states in its Closing Brief that in the event the violations are sustained as to each of the four Causes of Action, the Board will “drop” the charges under NRS 624.3013(5) set forth in the Second and Fourth Causes of Action. As to the First and Third Causes of Action under NRS 624.3015(3), the Board seeks a fine in the minimal allowable amount of \$1,000 for each of the 33 violations pursuant to NRS 624.300(3)(a) and NAC 624.7251. Silverwing responds that to the extent the ALJ finds there has been a violation of any kind, Silverwing’s exemplary record should be considered in deciding the appropriate disposition of this matter.

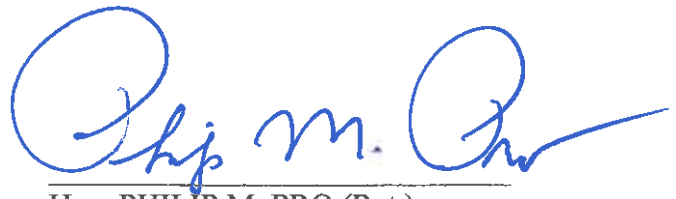
The record adduced at the hearing conducted September 28, 2017, establishes that Silverwing has an unblemished record as the holder of Class B General Contractors license since 1997. Additionally, the record is clear that although the violations found were knowingly committed under the standard enunciated in NRS 624.024, Silverwing did not act with the intent of evade the law. These are legitimate mitigating factors which warrant imposition of the lowest fine permitted under applicable law.

IT IS THEREFORE ORDERED that Respondent Silverwing shall pay the minimum fine of \$1,000 per violation, or a total of \$33,000, said penalties to be paid within 30 days of the date of this Order.

IT IS FURTHER ORDERED that the violations set forth in the Second and Fourth Causes of action are hereby Dismissed on Motion of the Board.

IT IS FURTHER ORDERED that Respondent Silverwing shall pay the sum of \$28,739.00 as attorney's fees and costs, and that such sum also shall be paid within 30 days of the date of this Order.

December 21, 2017

A handwritten signature in blue ink, appearing to read "Philip M. Pro", is written over a horizontal line.

Hon. PHILIP M. PRO (Ret.)
Administrative Law Judge

PROOF OF SERVICE BY EMAIL & U.S. MAIL

Re: Nevada State Contractors Board vs. Silverwing Construction
Reference No. 1260004455

I, Michelle Samaniego, not a party to the within action, hereby declare that on December 22, 2017, I served the attached DECISION on the parties in the within action by Email and by depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, at Las Vegas, NEVADA, addressed as follows:

Noah G. Allison Esq.
Allison Law Firm Chtd.
3191 E. Warm Springs Rd.
Las Vegas, NV 89120
Phone: 702-933-4444
noah@allisonnevada.com
Parties Represented:
Nevada State Contractors Board

Michael Kimmel Esq.
Hoy Chrissinger Kimmel PC
50 West Liberty Street
Suite 840
Reno, NV 89501
Phone: 775-786-8000
mkimmel@nevadalaw.com
Parties Represented:
Silverwing Construction

Ms. Margi A. Grein
Nevada State Contractors Board
2310 Corporate Circle, Suite 200
Henderson, NV 89074
Phone: 702-486-1111
Mgrein@NSCB.State.nv.us
Parties Represented:
Nevada State Contractors Board

I declare under penalty of perjury the foregoing to be true and correct. Executed at Las Vegas,
NEVADA on December 22, 2017.


Michelle Samaniego
MSamaniego@jamsadr.com

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

SILVERWING DEVELOPMENT,
a Nevada corporation; J CARTER
WITT III, an individual,

Petitioners,

Case No.: CV18-00128

vs.

Dept. No.: 10

NEVADA STATE CONTRACTORS
BOARD,

Respondent.

ORDER REGARDING PETITION FOR JUDICIAL REVIEW

Presently before the Court is the PETITION FOR JUDICIAL REVIEW ("the Petition").
The Petition was filed by Petitioners, SILVERWING DEVELOPMENT and J CARTER WITT III
(collectively "the Petitioners") on January 17, 2018. The Petitioners filed PETITIONERS'
OPENING BRIEF ("the Petitioners' Brief") on April 3, 2018. Respondent NEVADA STATE
CONTRACTORS BOARD ("the Respondent") filed RESPONDENT'S ANSWERING BRIEF

1 (“the Respondent’s Brief”) on May 10, 2018.¹ The Petitioners filed the REPLY TO
2 RESPONDENT’S ANSWERING BRIEF (“the Petitioner’s Reply”) on June 15, 2018. The Court
3 held a hearing on the matter on September 4, 2018, and took the matter under advisement.
4

5 The Petitioners seek judicial review of the Respondent’s decision on December 21, 2017,
6 finding the Petitioners violated NRS 624.3013(5) and imposing a \$33,000 fine. The Petition Ex. 1
7 9. The Petitioners make four arguments: 1) NRS 624.220(2) violates the Petitioners’ due process
8 rights because it is unconstitutionally vague and unconstitutional as-applied; 2) NRS 624.220(2)
9 violates the Petitioners’ right to equal protection because similarly situated licensees were treated
10 differently; 3) the use of an advisory opinion discussing the ambiguity of “single construction site”
11 in NRS 624.220(2), (“the Tesla Opinion”), constituted an unconstitutional delegation of legislative
12 authority;² and 4) there is not sufficient evidence to support the conclusion that the projects at issue
13 are “subdivisions.” The Petitioner’s Brief 8:6-7; 14:5-7; 17:13-15; 19:15-16. The Respondent
14 argues: 1) the Administrative Law Judge, the Honorable Phillip M. Pro (Ret.) (“Judge Pro”),
15 properly invoked and applied NRS 278.320(1) to define “subdivision site;” 2) NRS 624.220(2) is
16 not unconstitutionally vague because it is clear to individuals of ordinary intelligence and provides
17 specific standards for enforcement; and 3) NRS 624.220(2) does not violate the Equal Protection
18 Clause because it is rationally related to the legitimate purpose of ensuring the financial
19 responsibility of contractors. The Respondent’s Brief 20:5-6; 22:15; 23:23-25; 25:1-2, 22-24. The
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24 ¹ The Southern Nevada Painters and Decorators and Glaziers Labor-Management Cooperation Committee, Nevada
25 Chapter Associated General Contractors, Nevada Association of Mechanical Contractors, Southern Nevada Chapter of
26 National Electronic Contractors’ Association, Southern Nevada Home Builders Association, Nevada Contractor’s
27 Association, Mechanical Contractor’s Association of Las Vegas, Nevada Subcontractor’s Association, Sheet Metal and
Air Conditioning Contractors’ National Association of Southern Nevada and Associated Builders and Contractors, Inc.
were permitted to participate as amicus curiae.

28 ² The Court will not consider this argument because the Petitioner was disciplined under the “subdivision site” language
in NRS 624.220(2), not the “single construction site” language addressed in the Tesla Opinion.

1 Petitioner makes four arguments in response: 1) *Chevron*³ deference cannot save an
2 unconstitutionally vague statute; 2) Judge Pro's interpretation of NRS 624.220(2) was unreasonable
3 because it impermissibly equates "subdivision" and "subdivision site;" 3) severing "subdivision
4 site" from the statute does not cure the statute's unconstitutionality; and 4) the statute is not
5 rationally related to contractor solvency. The Petitioner's Reply 3:5-14, 20-27; 6:5-8, 15.
6

7 NRS 233B.135 provides:
8

9 1. Judicial review of a final decision of an agency must be:

10 (a) Conducted by the court without a jury; and

11 (b) Confined to the record.

12 In cases concerning alleged irregularities in procedure before an agency that are not
13 shown in the record, the court may receive evidence concerning the irregularities.

14 2. The final decision of the agency shall be deemed reasonable and lawful until
15 reversed or set aside in whole or in part by the court. The burden of proof is on the
16 party attacking or resisting the decision to show that the final decision is invalid
17 pursuant to subsection 3.

18 3. The court shall not substitute its judgment for that of the agency as to the weight
19 of evidence on a question of fact. The court may remand or affirm the final decision
20 or set it aside in whole or in part if substantial rights of the petitioner have been
21 prejudiced because the final decision of the agency is:

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25 //

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27 ³ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778 (1984) (holding agency
28 interpretation of statute it administers will be upheld where Congress has not spoken on issue and interpretation is based
on permissible construction of statute).

- (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.

4. As used in this section, "substantial evidence" means evidence which a reasonable mind might accept as adequate to support a conclusion.

NRS 624.220(2) provides in relevant part:

The [Nevada State Contractors] Board shall limit the field and scope of the operations of a licensed contractor by establishing a monetary limit on a contractor's license, and the limit must be the maximum contract a licensed contractor may undertake on one or more construction contracts on a single construction site or subdivision site for a single client.

NRS 624.3015(3) provides that "knowingly bidding to contract or entering into a contract with a contractor for work in excess of his or her limit or beyond the scope of his or her license" is a cause for disciplinary action.

Judge Pro found the Petitioner in violation of NRS 624.3015(3), for knowingly entering into a contract with a contractor for work in excess of its monetary limit, as enumerated in NRS 624.220(2).⁴ The Motion Ex. 1 8. Judge Pro determined that each of the Petitioner's four projects were "subdivision sites" and that the license limit for each individual subcontractor was the maximum contract amount for the project, not the maximum amount for an individual contract. *Id.* Judge Pro determined that, while the individual contract bids did not exceed each subcontractor's license limit, the aggregate amount of the bids did exceed the limit. *Id.* Judge Pro concluded the

⁴ The Respondent voluntarily dismissed the second cause of action, which alleged violations of NRS 624.3013(5). NRS 624.3013(5) prohibits failing to ascertain that each person whose bid on a construction project the licensee considered is appropriately licensed as required by NAC 624.640(6). The Respondent also voluntarily dismissed the fourth cause of action, which alleged violations of NAC 624.640(6).

1 projects were “subdivision sites” by borrowing the definition of “subdivision” from NRS
2 278.320(1) and defining site as “the physical location where a specified subdivision exists.” *Id.* at
3 7. Judge Pro did not rule on the constitutionality of NRS 624.220(2). Judge Pro imposed a fine of
4 \$33,000. *Id.* at 9.
5

6 Both the United States Constitution and the Nevada Constitution protect the right to due
7 process under the law. “Statutes are presumed to be valid, and the challenger bears the burden of
8 showing that a statute is unconstitutional.” *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev.
9 502, 509, 217 P.3d 546, 551 (2009) (citing *Silvar v. Eighth Jud. Dist. Ct.*, 122 Nev. 289, 292, 129
10 P.3d 682, 684 (2006)). Where a challenger alleges a statute is facially vague and violates the Due
11 Process Clause, courts apply a two factor test. A statute is unconstitutionally vague on its face if it:
12 “1) fails to provide notice sufficient to enable persons of ordinary intelligence to understand what
13 conduct is prohibited; and 2) lacks specific standards, thereby encouraging, authorizing or even
14 failing to prevent arbitrary and discriminatory enforcement.” *Flamingo Paradise*, 125 Nev. at 510,
15 217 P.3d at 551-52 (citing *Silvar*, 122 Nev. at 23, 129 P.3d at 685). A civil statute must be
16 impermissibly vague in all of its applications in order to be unconstitutionally vague. *Flamingo*
17 *Paradise*, 125 Nev. at 512, 217 P.3d at 553 (internal citations omitted). If a civil statute provides
18 sufficient guidance to at least some prohibited conduct and the standards of enforcement for that
19 conduct, it will survive a facial challenge. *Flamingo Paradise*, 125 Nev. at 513, 217 P.3d at 554
20 (citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497, 102 S. Ct.
21 1186, 1193 (1962)).
22

23 NRS 624.220(2) is not unconstitutionally vague on its face because it is a civil statute which
24 is not impermissibly vague in all applications. For example, the statute provides sufficient notice
25 that a single contract for single client which exceeds the contractor’s license violates the statute. It
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1 also provides adequate notice that multiple contracts for a single client for separate projects which
2 exceed the contractor's license do not violate the statute. Although the standards for multiple
3 contracts on a single project are less clear, this scenario is merely one of several covered by the
4 statute. Because it provides sufficient guidance to at least some prohibited conduct and the
5 applicable standards of enforcement, NRS 624.220(2) is not unconstitutionally vague on its face
6 and does not infringe upon substantive due process.
7

8 An individual may challenge the constitutionality of a statute as-applied and argue that the
9 application in a particular case resulted in a substantive due process violation. *State v. Eighth Jud.*
10 *Dist. Ct. (Logan D.)*, 129 Nev. 492, 501, 306 P.3d 369, 375 (2013). "When undertaking a
11 substantive due process analysis, a statute that does not infringe upon a fundamental right will be
12 upheld if it is rationally related to a legitimate government purpose." *Logan D.*, 129 Nev. at 501,
13 306 P.3d at 375-76 (explaining Legislature is not required to articulate its purpose behind statutory
14 enactment).
15

16 NRS 620.220(2) is not unconstitutional as applied to the Petitioner because it is rationally
17 related to the safety and health of the public as well as fiscally responsible construction. License
18 limits are determined by the Respondent after considering a number of factors relating to the
19 contractor: financial responsibility, experience and general knowledge of applicable laws. NRS
20 624.260. *See also* The Respondent's Brief Ex. I Sen. Judiciary Comm. Minutes 3, 6, 7. The
21 license limit is intended to prevent less experienced and less solvent contractors from
22 overcommitting to a single contract, thus creating the risk of non-payment to creditors. *Cf. Gur-*
23 *Kovic v. State Contractors Bd.*, 95 Nev. 489, 491, 596 P.2d 850, 851 (1979) (upholding reprimand
24 of contractor who submitted separate bids for single project and exceeded license limit). Although
25 not explicitly stated in NRS 620.220(2), the purpose of the statute is to promote risk diversification
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1 and public confidence in contractors. *See* NRS 624.005 (explaining purpose of NRS Chapter 624 is
2 to “promote public confidence and trust in the competence and integrity of licensees and to protect
3 the health, safety and welfare of the public”). By imposing strict license limits on the work that can
4 be done for a single client, the Legislature promotes financially responsible construction and
5 ensures that contractors are able to pay their creditors. For these reasons, NRS 620.220(2) does not
6 violate the Petitioner’s substantive due process rights.
7

8 Both the United States Constitution and the Nevada Constitution guarantee individuals
9 equal protection under the law. U.S. CONST. amend XIV; Art. 4, §21 NEV. CONST. The threshold
10 inquiry in an equal protection challenge is whether the statute is discriminatory on its face. *Rico v.*
11 *Rodriguez*, 121 Nev. 695, 703, 120 P.3d 812, 817 (2005). A statute which treats similarly situated
12 individuals differently implicates equal protection. *Id.* The level of scrutiny used varies depending
13 on the class implicated in the statute. *Id.* The rational basis test is used where the statute does not
14 implicate a suspect class, a fundamental right or a quasi-suspect class. *Id.* The statute will be
15 upheld if it is rationally related to a legitimate government interest. *Id.*
16
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18 On its face, NRS 624.220(2) is facially neutral and does not treat similarly situated licensed
19 contractors differently. Each licensed contractor is bound by his or her respective license limits in
20 regards to the contract work performed for a single client. Even if the statute had created a
21 classification, the statute would survive rational basis review because it is rationally related to
22 promoting responsible construction and contractor solvency. NRS 624.260. *See also* The
23 Respondent’s Brief Ex. I Sen. Judiciary Comm. Minutes 3, 6, 7. For these reasons, NRS
24 624.220(2) does not violate the Petitioner’s right to equal protection.
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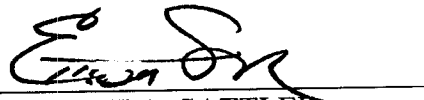
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1 While a district court cannot substitute its opinion for the agency's opinion on a question of
2 fact, questions of law are reviewed for clear error. NRS 233B.135(3). Statutory interpretation is a
3 question of law. *Taylor v. Dep't of Health and Human Servs.*, 129 Nev. 928, 930, 314 P.3d 949,
4 951 (2013). The district court defers to the agency's interpretation of its governing statutes, as long
5 as the interpretation is "within the language of the statute." *Taylor*, 129 Nev. at 930, 314 P.3d at
6 951 (citing *Dutchess Bus. Servs., Inc. v. Nev. State Bd. of Pharmacy*, 124 Nev. 701, 709, 191 P.3d
7 1159, 1165 (2008)). Statutory interpretation must be conducted reasonably "in light of the policy
8 and spirit of the law" and to "avoid absurd results." *Flamingo Paradise*, 125 Nev. at 509, 217 P.3d
9 at 551 (citing *Desert Valley Water Co. v. State, Eng'r*, 104 Nev. 718, 720, 766 P.2d 886, 886-87
10 (1988)). Statutes should not be interpreted to "render words or phrases superfluous." *Flamingo*
11 *Paradise*, 125 Nev. at 509, 217 P.3d at 551 (citing *Mangarella v. State*, 117 Nev. 130, 133, 17 P.3d
12 989, 991 (2001)).

13 Judge Pro's decision to use the definition of "subdivision" from NRS 278.320(1) to clarify
14 NRS 624.220(2) was entirely reasonable; however, his method of determining that the Petitioner's
15 individual projects were "subdivision sites" is unclear from his decision. "Subdivision" is defined
16 as "any land, vacant or improved, which is divided or proposed to be divided into five or more lots,
17 parcels, *sites*, units or plots, for the purpose of any transfer or development, or any proposed
18 transfer or development." NRS 278.320(1) (emphasis added). Judge Pro reasoned that "site" was
19 the geographic location of the subdivision and determined that each of the Petitioner's projects
20 were "subdivision sites." The manner by which Judge Pro reached this conclusion is unclear to the
21 Court. The referenced statute already contemplates a geographic location; therefore the Court is
22 unclear how Judge Pro resolved this issue. In order to give proper deference to Judge Pro's
23 determination and to effectively consider the Petition, the matter is remanded for clarification.
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1 **IT IS ORDERED** that the matter is remanded for clarification in accordance with this
2 Order.

3 DATED this 8 day of November, 2018.

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6 ELLIOTT A. SATTLER
7 District Judge

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NEVADA STATE CONTRACTORS BOARD

5390 KIETZKE LANE

RENO, NEVADA 89511

IN THE MATTER OF:

**SILVERWING DEVELOPMENT,
J. CARTER WITT III, President and
Qualified Individual, License No. 44017,**

RESPONDENT.

Investigative Case No. 30042873

**CLARIFICATION ON REMAND
OF DECISION ENTERED
DECEMBER 17, 2017**

On November 8, 2018, the Honorable Elliott A. Sattler, District Judge, in the Second Judicial District Court of the State of Nevada in and for the County of Washoe, entered an Order Regarding Petition for Judicial Review of the Decision rendered December 21, 2017, by the undersigned Administrative Law Judge in disciplinary proceedings before the Nevada State Contractors Board. Judge Sattler's Order remands for clarification on the following issue:

Judge Pro's decision to use the definition of "subdivision" from NRS 278.320(1) to clarify NRS 624.220(2) was entirely reasonable; however, his method of determining that the Petitioner's individual projects were "subdivision sites" is unclear from his decision. "Subdivision" is defined as "any land, vacant or improved, which is divided or proposed to be divided into five or more lots, parcels, *sites*, units or plots, for the purpose of any transfer or development, or any proposed transfer or development." NRS 278.320(1) (emphasis added). Judge Pro reasoned that "site" was the geographic location of the subdivision and determined that each of the Petitioner's projects were "subdivision sites." The manner by which Judge Pro reached this conclusion is unclear to the Court. The referenced statute already contemplates a geographic location, therefore, the Court is unclear how Judge Pro resolved this issue.

Given the opportunity to review on remand the findings set forth in my Decision of December 21, 2017, the cause of confusion is apparent, and the opportunity for clarification is welcome. In attempting to provide the clarification Ordered, I understand I am properly restricted to the evidentiary record and arguments presented at the time the Decision was rendered.

As noted by the Court, I invoked the definition of "subdivision" provided by NRS 278.320 (1) to construe NRS 624.220(2) as it applied to the facts presented in this case. Among other things, under NRS 278.320(1), the term "subdivision" includes any land which is divided, or proposed to be divided, into five or more "sites" for the purpose of any transfer or development. Additionally, NRS 624.220(2) mandates that the Board limit scope of operations of a licensed contractor by establishing a monetary limit on a contractor's license. Further, that limit must be the maximum contract a contractor may undertake on "one or more construction contracts on a single construction site or *subdivision site* for a single client."

To state, as the Legislature has, that a "*subdivision site*" is a "site" wherein a "subdivision" is located, and to say also that a "subdivision" is comprised of land which is divided into five or more "sites" is arguably circular and engenders some ambiguity. However, ambiguity does not always rise to the level of Constitutional infirmity.

As Justice Holmes recognized more than a century ago in considering whether the word "income" used in the United States Constitution means the same thing as the word "income" used in the Income Tax Act of 1913, "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne v. Eisner*, 245 U.S. 418, 425 (1918). Although the issues presented in the instant case are not analogous to those confronted by the Court in *Towne*, the principle expressed by Holmes is useful.

In attempting to reconcile the Legislature's use of the word "site" in the two statutes in question, I reasoned that any reconciliation must lie in the evidence presented at the hearing conducted on September 28, 2017, and the way in which the words were reasonably understood and applied by the person charged with responsibility for enforcing the statutory mandate.

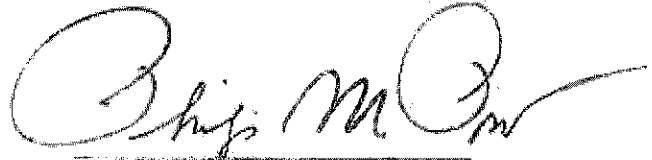
Specifically, I relied upon the testimony of the Board's Compliance Officer, Jeff Gore, which I recounted at pages 3 through 5 of the Decision entered December 21, 2017.

NRS 624.220(2) provides:

The Board shall limit the field and scope of the operations of a licensed contractor by establishing a monetary limit on a contractor's license, and the limit must be the maximum contract a licensed contractor may undertake on one or more construction contracts on a single construction site or subdivision site for a single client. The Board may take any other action designed to limit the field and scope of the operations of a contractor as may be necessary to protect the health, safety and general welfare of the public. The limit must be determined after consideration of the factors set forth in NRS 624.260 to 624.265, inclusive.

In sum, in making the finding remanded for clarification, I resolved any ambiguity in favor my understanding of the contemporaneous assessments and conduct of the Board's Compliance Officer charged with the responsibility for carrying out the provisions of NRS Chapter 624 for the benefit and protection of the public.

January 18, 2019

A handwritten signature in black ink, appearing to read "Philip M. Pro", written over a horizontal line.

Hon. Philip M. Pro (Ret.)
Administrative Law Judge

PROOF OF SERVICE BY EMAIL & U.S. MAIL

Re: Nevada State Contractors Board vs. Silverwing Construction
Reference No. 1260004455


I, Mara Satterthwaite, Esq., not a party to the within action, hereby declare that on January 22, 2019, I served the attached CLARIFICATION ON REMAND OF DECISION ENTERED DECEMBER 17, 2017 on the parties in the within action by Email and by depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, at Las Vegas, NEVADA, addressed as follows:

Mr. Paul A. Rozario
Ms. Margi A. Grein
Nevada State Contractors Board
2310 Corporate Circle, Suite 200
Henderson, NV 89074
Phone: 702-486-1109
prozario@nscb.state.nv.us
Mgrein@NSCB.State.nv.us
Parties Represented:
Nevada State Contractors Board

Mr. Noah G. Allison
The Allison Law Firm Chtd.
3191 E. Warm Springs Rd.
Las Vegas, NV 89120
Phone: 702-933-4444
noah@allisonnevada.com

Mr. Michael S. Kimmel
Hoy Chrissinger Kimmel, PC
3753 Howard Hughes Pkwy
Suite 200
Las Vegas, NV 89169
mkimmel@nevadalaw.com

I declare under penalty of perjury the foregoing to be true and correct. Executed at Las Vegas, NEVADA on January 22, 2019.



Mara Satterthwaite, Esq.
msatterthwaite@jamsadr.com

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

SILVERWING DEVELOPMENT,
a Nevada corporation; J CARTER
WITT III, an individual,

Petitioners,

Case No.: CV18-00128

vs.

Dept. No.: 10

NEVADA STATE CONTRACTORS
BOARD,

Respondent.

ORDER DENYING PETITION FOR JUDICIAL REVIEW

Presently before the Court is the PETITION FOR JUDICIAL REVIEW (“the Petition”).

The Petition was filed by Petitioners, SILVERWING DEVELOPMENT and J CARTER WITT III (collectively “the Petitioners”) on January 17, 2018. The Petitioners filed PETITIONERS’ OPENING BRIEF (“the Petitioners’ Brief”) on April 3, 2018. Respondent NEVADA STATE CONTRACTORS BOARD (“the Respondent”) filed RESPONDENT’S ANSWERING BRIEF (“the Respondent’s Brief”) on May 10, 2018.¹ The Petitioners filed the REPLY TO RESPONDENT’S ANSWERING BRIEF (“the Petitioner’s Reply”) on June 15, 2018. The Court held a hearing on the matter on September 4, 2018, and took the matter under advisement.

¹ The Southern Nevada Painters and Decorators and Glaziers Labor-Management Cooperation Committee, Nevada Chapter Associated General Contractors, Nevada Association of Mechanical Contractors, Southern Nevada Chapter of National Electronic Contractors’ Association, Southern Nevada Home Builders Association, Nevada Contractor’s

1 The Petitioners seek judicial review of the Respondent's decision finding the Petitioners in
2 violation of NRS 624.3013(5) and imposing a \$33,000.00 fine. The Petition Ex. 1, p. 9. The
3 Petitioners make four arguments: 1) NRS 624.220(2)² violates the Petitioners' due process rights
4 because it is unconstitutionally vague and unconstitutional as-applied; 2) NRS 624.220(2) violates
5 the Petitioners' right to equal protection because similarly situated licensees were treated
6 differently; 3) the use of an advisory opinion discussing the ambiguity of "single construction site"
7 in NRS 624.220(2), ("the Tesla Opinion"), constituted an unconstitutional delegation of legislative
8 authority; and 4) there is insufficient evidence to support the conclusion the projects at issue are
9 "subdivisions." The Petitioner's Brief 8:6-7; 14:5-7; 17:13-15; 19:15-16. The Respondent argues:
10 1) the Administrative Law Judge, the Honorable Phillip M. Pro (Ret.) ("Judge Pro"), properly
11 invoked and applied NRS 278.320(1) to define "subdivision site;" 2) NRS 624.220(2) is not
12 unconstitutionally vague because it is clear to individuals of ordinary intelligence and provides
13 specific standards for its enforcement; and 3) NRS 624.220(2) does not violate the Equal Protection
14 Clause because it is rationally related to the legitimate purpose of ensuring the financial
15 responsibility of contractors. The Respondent's Brief 20:5-6; 22:15; 23:23-25; 25:1-2, 22-24. The
16 Petitioner makes four arguments in response: 1) *Chevron*³ deference cannot save an
17 unconstitutionally vague statute; 2) Judge Pro's interpretation of NRS 624.220(2) was unreasonable
18 because it impermissibly equates "subdivision" and "subdivision site;" 3) severing "subdivision

19 Association, Mechanical Contractor's Association of Las Vegas, Nevada Subcontractor's Association, Sheet Metal and
20 Air Conditioning Contractors' National Association of Southern Nevada and Associated Builders and Contractors, Inc.
21 were permitted to participate as amici curiae.

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25 ² This statute requires the Respondent to establish monetary limits for contractor licenses, with the limit being "the
26 maximum contract a licensed contractor may undertake on one or more construction contracts on a single construction
27 site or subdivision site for a single client." NRS 624.220(2).

28 ³ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984) (holding agency
interpretation of statute it administers will be upheld where Congress has not spoken on issue and interpretation is based
on permissible construction of statute).

1 site” from the statute does not cure the statute’s unconstitutionality; and 4) the statute is not
2 rationally related to contractor solvency. The Petitioner’s Reply 3:5-14, 20-27; 6:5-8, 15.

3 NRS 624.3015(3) provides that “knowingly bidding to contract or entering into a contract
4 with a contractor for work in excess of his or her limit or beyond the scope of his or her license” is
5 a cause for disciplinary action. On December 17, 2017, Judge Pro filed the Decision (“the
6 Decision”) which disciplined the Petitioner. Judge Pro found the Petitioner in violation of NRS
7 624.3015(3), for knowingly entering into a contract with a contractor for work in excess of its
8 monetary limit, as enumerated in NRS 624.220(2).⁴ The Decision, p. 8. Judge Pro found the
9 Respondent’s definition of “subdivision site” to be reasonable and entitled to deference, and he
10 determined that the subcontracts were properly aggregated to determine compliance with NRS
11 624.220(2). *Id.* Judge Pro did not rule on the constitutionality of NRS 624.220(2). Judge Pro
12 imposed a fine of \$33,000. *Id.* at 9.

13 After reviewing the record, the Court entered the ORDER REGARDING PETITION FOR
14 JUDICIAL REVIEW on November 8, 2018 (“the November Order”). The November Order denied
15 the first two arguments in the Petition, finding NRS 624.220(2) violated neither due process nor
16 equal protection.⁵ The November Order 5-7. In regards to the fourth argument, the Court entered a
17 limited remand, requesting Judge Pro clarify his determination that the Respondent’s definition of
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25 ⁴ The Respondent voluntarily dismissed the second cause of action, which alleged violations of NRS 624.3013(5). NRS
26 624.3013(5) prohibits failing to ascertain that each person whose bid on a construction project the licensee considered is
27 appropriately licensed as required by NAC 624.640(6). The Respondent also voluntarily dismissed the fourth cause of
28 action, which alleged violations of NAC 624.640(6).

⁵ The third argument was not considered because the Petitioner was not disciplined under the “single construction site”
language of NRS 624.220(2).

1 “subdivision site” was a reasonable construction of the statute. Judge Pro entered the
2 CLARIFICATION ON REMAND OF DECISION ENTERED DECEMBER 17, 2017 (“the
3 Clarification”), on January 18, 2019.

4
5 In the Clarification, Judge Pro explained that he reconciled the word “site” in NRS
6 278.320(1) and NRS 624.220(2) by using evidence presented during the hearing on September 28,
7 2017, and by gauging the Respondent’s understanding the term. The Clarification 2: ¶ 5. Judge
8 Pro relied primarily on the testimony of Compliance Officer Jeff Gore (“Mr. Gore”) regarding the
9 importance of geographical location in the determination of whether a project was a “subdivision
10 site.” Judge Pro also resolved any ambiguity in favor of the Respondent’s understanding, as
11 adduced through Mr. Gore’s testimony. The Clarification 3: ¶ 3.

12
13 After reviewing the Clarification, the Court entered the ORDER PERMITTING
14 SUPPLEMENTAL BRIEFING on April 9, 2019 (“the April Order”). The April Order allowed the
15 Petitioners and the Respondent to submit limited supplemental briefing in response to the
16 Clarification. The Respondent filed RESPONDENT’S SUPPLEMENTAL BRIEF (“the RSB”) on
17 April 30, 2019. The Petitioners filed the SUPPLEMENTAL BRIEF (“the PSB”) on April 30,
18 2019, and contemporaneously submitted the additional briefing for the Court’s consideration. In
19 the RSB, the Respondent contends the Clarification reinforces that the Decision merits *Chevron*
20 deference. The RSB 3-4. The Petitioners contend the Clarification emphasizes the clear error of
21 law and the constitutional infirmity of NRS 624.220(2). The PSB 2:22-26; 4:22-24; 5:1-18.
22 Having resolved all other issues in the November Order, this Order is limited to the merits of the
23 Petition as it relates to the Respondent’s construction of NRS 624.220(2) and the corresponding
24 definition of “subdivision site.”
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1 NRS 233B.135 provides:

2 1. Judicial review of a final decision of an agency must be:

3 (a) Conducted by the court without a jury; and

4 (b) Confined to the record.

5
6 In cases concerning alleged irregularities in procedure before an agency that are not
7 shown in the record, the court may receive evidence concerning the irregularities.

8 2. The final decision of the agency shall be deemed reasonable and lawful until
9 reversed or set aside in whole or in part by the court. The burden of proof is on
10 the party attacking or resisting the decision to show that the final decision is
11 invalid pursuant to subsection 3.

12 3. The court shall not substitute its judgment for that of the agency as to the weight
13 of evidence on a question of fact. The court may remand or affirm the final
14 decision or set it aside in whole or in part if substantial rights of the petitioner
15 have been prejudiced because the final decision of the agency is:

16 (a) In violation of constitutional or statutory provisions;

17 (b) In excess of the statutory authority of the agency;

18 (c) Made upon unlawful procedure;

19 (d) Affected by other error of law;

20 (e) Clearly erroneous in view of the reliable, probative and substantial
21 evidence on the whole record; or

22 (f) Arbitrary or capricious or characterized by abuse of discretion.

23 4. As used in this section, "substantial evidence" means evidence which a reasonable
24 mind might accept as adequate to support a conclusion.

25 A district court cannot substitute its opinion for the agency's opinion on a question of fact. NRS
26 233B.135(3). Although statutory interpretation is a question of law, the district court defers to the
27 agency's interpretation of its governing statutes, as long as the interpretation is "within the
28 language of the statute." *Dep't of Corr. v. Ludwick*, 135 Nev. Adv. Op. 12, 2019 WL 1967162, at
*2 (May 2, 2019) (internal citations omitted). *See also N. Lake Tahoe Fire Prot. Dist. v. Bd. of*

1 *Admin. of Subsequent Injury Account*, 134 Nev. Adv. Op. 93, 431 P.3d 39, 42 (2018) (quoting
2 *Collins Disc. Liquors & Vending v. State*, 106 Nev. 766, 768, 802 P.2d 4, 5 (1990) (“[C]ourts
3 should not substitute their own construction of a statutory provision for a reasonable interpretation
4 made by an agency.”). Deference is not warranted if the regulation “conflicts with existing
5 statutory provisions or exceeds the statutory authority of the agency.” *Nev. Attorney for Injured*
6 *Workers v. Nev. Self-Insurers Ass’n*, 126 Nev. 74, 83, 225 P.3d 1265, 1271 (2010) (citing *State Div.*
7 *of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 293, 995 P.2d 482, 485 (2000)).
8

9 The Court will deny the remaining argument in the Petition because the Respondent’s
10 interpretation of NRS 624.220(2) is a reasonable construction of the language within the statute. In
11 attempting to ascertain the definition of “subdivision site,” the Respondent properly referred to
12 other legislative pronouncements, instead of generating its own definition. In this vein, the
13 Respondent referred to NRS 278.320(1), a zoning and planning statute.⁶ However, the Respondent
14 contemporaneously recognized the different role of the word “site” in NRS 278.320(1) and NRS
15 624.220(2). While “site” was a method of division in NRS 278.320(1), the Respondent determined
16 “site” more properly denoted location, rather than size, in NRS 624.220(1). Mr. Gore’s testimony
17 emphasized the important role geographic location plays in determining whether a project is a
18 single subdivision site. For all of these reasons, the Respondent supplied a reasonable definition of
19 “subdivision site” to which Judge Pro appropriately deferred.
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23 Second, the Respondent’s definition of “subdivision site” does not conflict with other
24 statutory provisions and does not exceed the Respondent’s statutory authority. As adduced during
25 the hearing before Judge Pro, “subdivision site” is not defined anywhere in NRS Chapter 624 or in
26

27 ⁶ From the Court’s review, the only other definition of “subdivision” is found NRS 119.110. “Subdivision” is defined as
28 “any land or tract of land in another state, in this state or in a foreign country from which a sale is attempted, which is
divided or proposed to be divided over any period in 35 or more lots, parcels, units or interests” NRS 119.110
governs the sale of subdivided land.

1 an applicable regulation. *Contra Local Gov't Emp.-Mgmt. Relations Bd. v. Educ. Support Emps.*
2 *Ass'n*, 134 Nev. Adv. Op. 86, 429 P.3d 658, 662-63 (2018) (reversing agency's interpretation of
3 statute where clearly contradicted by statutory language and applicable regulation). Additionally,
4 NRS 624.160 vests the Respondent "with all of the functions and duties relating to the
5 administration of this chapter," including contractor discipline. As such, the Respondent is
6 empowered to interpret and enforce NRS 624.220. For these reasons, the Respondent's definition
7 of "subdivision site" does not conflict with other statutory provisions and does not exceed the
8 Respondent's statutory authority.
9

10
11 **IT IS ORDERED** that the PETITION FOR JUDICIAL REVIEW is hereby **DENIED**.

12 **DATED** this 21 day of June, 2019.

13
14 
15 ELLIOTT A. SATTLER
16 District Judge
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1 **CERTIFICATE OF MAILING**

2 Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court
3 of the State of Nevada, County of Washoe; that on this ____ day of June, 2019, I deposited in the
4 County mailing system for postage and mailing with the United States Postal Service in Reno,
5 Nevada, a true copy of the attached document addressed to:
6
7

8 **CERTIFICATE OF ELECTRONIC SERVICE**

9 I hereby certify that I am an employee of the Second Judicial District Court of the State of
10 Nevada, in and for the County of Washoe; that on the 21 day of June, 2019, I electronically filed
11 the foregoing with the Clerk of the Court by using the ECF system which will send a notice of
12 electronic filing to the following:
13

14 MICHAEL S. KIMMEL, ESQ.

15 THEODORE CHRISSINGER, ESQ.

16 NOAH G. ALLISON, ESQ.

17 PHILLIP MANNELLY, ESQ.

18 EVAN JAMES, ESQ.
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27
28


Sheila Mansfield
Judicial Assistant

1 **NEOJ**

2 THE ALLISON LAW FIRM CHTD.

3 Noah G. Allison (Bar #6202)

4 3191 East Warm Springs Road

5 Las Vegas, Nevada 89120-3147

6 Tel (702) 933-4444

7 Fax (702) 933-4445

8 noah@allisonnevada.com

9 *Attorneys for Nevada State Contractors Board*

10 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

11 **IN AND FOR THE COUNTY OF WASHOE**

12 SILVERWING DEVELOPMENT, a Nevada
13 corporation; J CARTER WITT III, an
14 individual,

15 Petitioners,

16 vs.

17 NEVADA STATE CONTRACTORS
18 BOARD,

19 Respondent.

Case No.: CV18-00128

Dept.: 10

**NOTICE OF ENTRY OF ORDER
REGARDING PETITION FOR JUDICIAL
REVIEW**

20 PLEASE TAKE NOTICE that an Order Regarding Petition for Judicial Review was filed with the
21 court on the 8th day of November, 2018 a copy of which is attached hereto.

22 **AFFIRMATION**

23 The undersigned hereby affirms that the preceding does not contain the personal information of
24 any person.

25 DATED this 14th day of November, 2018.

26 THE ALLISON LAW FIRM CHTD.

27 By: 

28 Noah G. Allison (Bar #6202)
3191 East Warm Springs Road
Las Vegas, Nevada 89120-314
*Attorney for Nevada State
Contractors Board*



CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of November, 2018, I electronically filed the foregoing with the Clerk of the Court by using the electronic filing system which will send a notice of electronic filing to the following:

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MICHAEL KIMMEL, ESQ. for SILVERWING DEVELOPMENT et al

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An employee of THE ALLISON LAW FIRM CHTD.

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

SILVERWING DEVELOPMENT,
a Nevada corporation; J CARTER
WITT III, an individual,

Petitioners,

Case No.: CV18-00128

vs.

Dept. No.: 10

NEVADA STATE CONTRACTORS
BOARD,

Respondent.

ORDER REGARDING PETITION FOR JUDICIAL REVIEW

Presently before the Court is the PETITION FOR JUDICIAL REVIEW ("the Petition").

The Petition was filed by Petitioners, SILVERWING DEVELOPMENT and J CARTER WITT III (collectively "the Petitioners") on January 17, 2018. The Petitioners filed PETITIONERS' OPENING BRIEF ("the Petitioners' Brief") on April 3, 2018. Respondent NEVADA STATE CONTRACTORS BOARD ("the Respondent") filed RESPONDENT'S ANSWERING BRIEF

1 (“the Respondent’s Brief”) on May 10, 2018.¹ The Petitioners filed the REPLY TO
2 RESPONDENT’S ANSWERING BRIEF (“the Petitioner’s Reply”) on June 15, 2018. The Court
3 held a hearing on the matter on September 4, 2018, and took the matter under advisement.

4
5 The Petitioners seek judicial review of the Respondent’s decision on December 21, 2017,
6 finding the Petitioners violated NRS 624.3013(5) and imposing a \$33,000 fine. The Petition Ex. 1
7 9. The Petitioners make four arguments: 1) NRS 624.220(2) violates the Petitioners’ due process
8 rights because it is unconstitutionally vague and unconstitutional as-applied; 2) NRS 624.220(2)
9 violates the Petitioners’ right to equal protection because similarly situated licensees were treated
10 differently; 3) the use of an advisory opinion discussing the ambiguity of “single construction site”
11 in NRS 624.220(2), (“the Tesla Opinion”), constituted an unconstitutional delegation of legislative
12 authority;² and 4) there is not sufficient evidence to support the conclusion that the projects at issue
13 are “subdivisions.” The Petitioner’s Brief 8:6-7; 14:5-7; 17:13-15; 19:15-16. The Respondent
14 argues: 1) the Administrative Law Judge, the Honorable Phillip M. Pro (Ret.) (“Judge Pro”),
15 properly invoked and applied NRS 278.320(1) to define “subdivision site;” 2) NRS 624.220(2) is
16 not unconstitutionally vague because it is clear to individuals of ordinary intelligence and provides
17 specific standards for enforcement; and 3) NRS 624.220(2) does not violate the Equal Protection
18 Clause because it is rationally related to the legitimate purpose of ensuring the financial
19 responsibility of contractors. The Respondent’s Brief 20:5-6; 22:15; 23:23-25; 25:1-2, 22-24. The
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25 ¹ The Southern Nevada Painters and Decorators and Glaziers Labor-Management Cooperation Committee, Nevada
26 Chapter Associated General Contractors, Nevada Association of Mechanical Contractors, Southern Nevada Chapter of
27 National Electronic Contractors’ Association, Southern Nevada Home Builders Association, Nevada Contractor’s
Association, Mechanical Contractor’s Association of Las Vegas, Nevada Subcontractor’s Association, Sheet Metal and
Air Conditioning Contractors’ National Association of Southern Nevada and Associated Builders and Contractors, Inc.
were permitted to participate as amicus curiae.

28 ² The Court will not consider this argument because the Petitioner was disciplined under the “subdivision site” language
in NRS 624.220(2), not the “single construction site” language addressed in the Tesla Opinion.

1 Petitioner makes four arguments in response: 1) *Chevron*³ deference cannot save an
2 unconstitutionally vague statute; 2) Judge Pro's interpretation of NRS 624.220(2) was unreasonable
3 because it impermissibly equates "subdivision" and "subdivision site;" 3) severing "subdivision
4 site" from the statute does not cure the statute's unconstitutionality; and 4) the statute is not
5 rationally related to contractor solvency. The Petitioner's Reply 3:5-14, 20-27; 6:5-8, 15.
6

7 NRS 233B.135 provides:

- 8
- 9 1. Judicial review of a final decision of an agency must be:
 - 10 (a) Conducted by the court without a jury; and
 - 11 (b) Confined to the record.

12 In cases concerning alleged irregularities in procedure before an agency that are not
13 shown in the record, the court may receive evidence concerning the irregularities.

14 2. The final decision of the agency shall be deemed reasonable and lawful until
15 reversed or set aside in whole or in part by the court. The burden of proof is on the
16 party attacking or resisting the decision to show that the final decision is invalid
17 pursuant to subsection 3.

18 3. The court shall not substitute its judgment for that of the agency as to the weight
19 of evidence on a question of fact. The court may remand or affirm the final decision
20 or set it aside in whole or in part if substantial rights of the petitioner have been
21 prejudiced because the final decision of the agency is:

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27 ³ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778 (1984) (holding agency
28 interpretation of statute it administers will be upheld where Congress has not spoken on issue and interpretation is based
on permissible construction of statute).

- (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.

4. As used in this section, "substantial evidence" means evidence which a reasonable mind might accept as adequate to support a conclusion.

NRS 624.220(2) provides in relevant part:

The [Nevada State Contractors] Board shall limit the field and scope of the operations of a licensed contractor by establishing a monetary limit on a contractor's license, and the limit must be the maximum contract a licensed contractor may undertake on one or more construction contracts on a single construction site or subdivision site for a single client.

NRS 624.3015(3) provides that "knowingly bidding to contract or entering into a contract with a contractor for work in excess of his or her limit or beyond the scope of his or her license" is a cause for disciplinary action.

Judge Pro found the Petitioner in violation of NRS 624.3015(3), for knowingly entering into a contract with a contractor for work in excess of its monetary limit, as enumerated in NRS 624.220(2).⁴ The Motion Ex. 1 8. Judge Pro determined that each of the Petitioner's four projects were "subdivision sites" and that the license limit for each individual subcontractor was the maximum contract amount for the project, not the maximum amount for an individual contract. *Id.* Judge Pro determined that, while the individual contract bids did not exceed each subcontractor's license limit, the aggregate amount of the bids did exceed the limit. *Id.* Judge Pro concluded the

⁴ The Respondent voluntarily dismissed the second cause of action, which alleged violations of NRS 624.3013(5). NRS 624.3013(5) prohibits failing to ascertain that each person whose bid on a construction project the licensee considered is appropriately licensed as required by NAC 624.640(6). The Respondent also voluntarily dismissed the fourth cause of action, which alleged violations of NAC 624.640(6).

1 projects were "subdivision sites" by borrowing the definition of "subdivision" from NRS
2 278.320(1) and defining site as "the physical location where a specified subdivision exists." *Id.* at
3 7. Judge Pro did not rule on the constitutionality of NRS 624.220(2). Judge Pro imposed a fine of
4 \$33,000. *Id.* at 9.

5
6 Both the United States Constitution and the Nevada Constitution protect the right to due
7 process under the law. "Statutes are presumed to be valid, and the challenger bears the burden of
8 showing that a statute is unconstitutional." *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev.
9 502, 509, 217 P.3d 546, 551 (2009) (citing *Silvar v. Eighth Jud. Dist. Ct.*, 122 Nev. 289, 292, 129
10 P.3d 682, 684 (2006)). Where a challenger alleges a statute is facially vague and violates the Due
11 Process Clause, courts apply a two factor test. A statute is unconstitutionally vague on its face if it:
12 "1) fails to provide notice sufficient to enable persons of ordinary intelligence to understand what
13 conduct is prohibited; and 2) lacks specific standards, thereby encouraging, authorizing or even
14 failing to prevent arbitrary and discriminatory enforcement." *Flamingo Paradise*, 125 Nev. at 510,
15 217 P.3d at 551-52 (citing *Silvar*, 122 Nev. at 23, 129 P.3d at 685). A civil statute must be
16 impermissibly vague in all of its applications in order to be unconstitutionally vague. *Flamingo*
17 *Paradise*, 125 Nev. at 512, 217 P.3d at 553 (internal citations omitted). If a civil statute provides
18 sufficient guidance to at least some prohibited conduct and the standards of enforcement for that
19 conduct, it will survive a facial challenge. *Flamingo Paradise*, 125 Nev. at 513, 217 P.3d at 554
20 (citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497, 102 S. Ct.
21 1186, 1193 (1962)).

22
23 NRS 624.220(2) is not unconstitutionally vague on its face because it is a civil statute which
24 is not impermissibly vague in all applications. For example, the statute provides sufficient notice
25 that a single contract for single client which exceeds the contractor's license violates the statute. It
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1 also provides adequate notice that multiple contracts for a single client for separate projects which
2 exceed the contractor's license do not violate the statute. Although the standards for multiple
3 contracts on a single project are less clear, this scenario is merely one of several covered by the
4 statute. Because it provides sufficient guidance to at least some prohibited conduct and the
5 applicable standards of enforcement, NRS 624.220(2) is not unconstitutionally vague on its face
6 and does not infringe upon substantive due process.
7

8 An individual may challenge the constitutionality of a statute as-applied and argue that the
9 application in a particular case resulted in a substantive due process violation. *State v. Eighth Jud.*
10 *Dist. Ct. (Logan D.)*, 129 Nev. 492, 501, 306 P.3d 369, 375 (2013). "When undertaking a
11 substantive due process analysis, a statute that does not infringe upon a fundamental right will be
12 upheld if it is rationally related to a legitimate government purpose." *Logan D.*, 129 Nev. at 501,
13 306 P.3d at 375-76 (explaining Legislature is not required to articulate its purpose behind statutory
14 enactment).
15

16 NRS 620.220(2) is not unconstitutional as applied to the Petitioner because it is rationally
17 related to the safety and health of the public as well as fiscally responsible construction. License
18 limits are determined by the Respondent after considering a number of factors relating to the
19 contractor: financial responsibility, experience and general knowledge of applicable laws. NRS
20 624.260. *See also* The Respondent's Brief Ex. I Sen. Judiciary Comm. Minutes 3, 6, 7. The
21 license limit is intended to prevent less experienced and less solvent contractors from
22 overcommitting to a single contract, thus creating the risk of non-payment to creditors. *Cf. Gur-*
23 *Kovic v. State Contractors Bd.*, 95 Nev. 489, 491, 596 P.2d 850, 851 (1979) (upholding reprimand
24 of contractor who submitted separate bids for single project and exceeded license limit). Although
25 not explicitly stated in NRS 620.220(2), the purpose of the statute is to promote risk diversification
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1 and public confidence in contractors. *See* NRS 624.005 (explaining purpose of NRS Chapter 624 is
2 to “promote public confidence and trust in the competence and integrity of licensees and to protect
3 the health, safety and welfare of the public”). By imposing strict license limits on the work that can
4 be done for a single client, the Legislature promotes financially responsible construction and
5 ensures that contractors are able to pay their creditors. For these reasons, NRS 620.220(2) does not
6 violate the Petitioner’s substantive due process rights.
7

8 Both the United States Constitution and the Nevada Constitution guarantee individuals
9 equal protection under the law. U.S. CONST. amend XIV; Art. 4, §21 NEV. CONST. The threshold
10 inquiry in an equal protection challenge is whether the statute is discriminatory on its face. *Rico v.*
11 *Rodriguez*, 121 Nev. 695, 703, 120 P.3d 812, 817 (2005). A statute which treats similarly situated
12 individuals differently implicates equal protection. *Id.* The level of scrutiny used varies depending
13 on the class implicated in the statute. *Id.* The rational basis test is used where the statute does not
14 implicate a suspect class, a fundamental right or a quasi-suspect class. *Id.* The statute will be
15 upheld if it is rationally related to a legitimate government interest. *Id.*
16

17 On its face, NRS 624.220(2) is facially neutral and does not treat similarly situated licensed
18 contractors differently. Each licensed contractor is bound by his or her respective license limits in
19 regards to the contract work performed for a single client. Even if the statute had created a
20 classification, the statute would survive rational basis review because it is rationally related to
21 promoting responsible construction and contractor solvency. NRS 624.260. *See also* The
22 Respondent’s Brief Ex. I Sen. Judiciary Comm. Minutes 3, 6, 7. For these reasons, NRS
23 624.220(2) does not violate the Petitioner’s right to equal protection.
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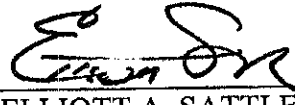
1 While a district court cannot substitute its opinion for the agency's opinion on a question of
2 fact, questions of law are reviewed for clear error. NRS 233B.135(3). Statutory interpretation is a
3 question of law. *Taylor v. Dep't of Health and Human Servs.*, 129 Nev. 928, 930, 314 P.3d 949,
4 951 (2013). The district court defers to the agency's interpretation of its governing statutes, as long
5 as the interpretation is "within the language of the statute." *Taylor*, 129 Nev. at 930, 314 P.3d at
6 951 (citing *Dutchess Bus. Servs., Inc. v. Nev. State Bd. of Pharmacy*, 124 Nev. 701, 709, 191 P.3d
7 1159, 1165 (2008)). Statutory interpretation must be conducted reasonably "in light of the policy
8 and spirit of the law" and to "avoid absurd results." *Flamingo Paradise*, 125 Nev. at 509, 217 P.3d
9 at 551 (citing *Desert Valley Water Co. v. State, Eng'r*, 104 Nev. 718, 720, 766 P.2d 886, 886-87
10 (1988)). Statutes should not be interpreted to "render words or phrases superfluous." *Flamingo*
11 *Paradise*, 125 Nev. at 509, 217 P.3d at 551 (citing *Mangarella v. State*, 117 Nev. 130, 133, 17 P.3d
12 989, 991 (2001)).

13 Judge Pro's decision to use the definition of "subdivision" from NRS 278.320(1) to clarify
14 NRS 624.220(2) was entirely reasonable; however, his method of determining that the Petitioner's
15 individual projects were "subdivision sites" is unclear from his decision. "Subdivision" is defined
16 as "any land, vacant or improved, which is divided or proposed to be divided into five or more lots,
17 parcels, sites, units or plots, for the purpose of any transfer or development, or any proposed
18 transfer or development." NRS 278.320(1) (emphasis added). Judge Pro reasoned that "site" was
19 the geographic location of the subdivision and determined that each of the Petitioner's projects
20 were "subdivision sites." The manner by which Judge Pro reached this conclusion is unclear to the
21 Court. The referenced statute already contemplates a geographic location; therefore the Court is
22 unclear how Judge Pro resolved this issue. In order to give proper deference to Judge Pro's
23 determination and to effectively consider the Petition, the matter is remanded for clarification.
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IT IS ORDERED that the matter is remanded for clarification in accordance with this
Order.

DATED this 8 day of November, 2018.


ELLIOTT A. SATTLER
District Judge

1 **NEOJ**

2 THE ALLISON LAW FIRM CHTD.

3 Noah G. Allison (Bar #6202)

4 3191 East Warm Springs Road

5 Las Vegas, Nevada 89120-3147

6 Tel (702) 933-4444

7 Fax (702) 933-4445

8 noah@allisonnevada.com

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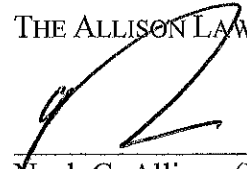
22 **AFFIRMATION**

23 The undersigned hereby affirms that the preceding does not contain the personal information of
24 any person.

25 DATED this 14th day of November, 2018.

26 THE ALLISON LAW FIRM CHTD.

27 By:

28 
Noah G. Allison (Bar #6202)
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*Attorney for Nevada State
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PHILIP MANNELLY, ESQ. for NEVADA CHAPTER ASSOCIATED GENERAL CONTRACTORS, NEVADA CONTRACTORS ASSOCIATION, MECHANICAL CONTRACTORS ASSOCIATION OF LAS VEGAS, NEVADA SUBCONTRACTORS ASSOCIATION, ASSOCIATED BUILDERS & CONTRACTORS, INC., SOUTHERN NV CHAPTER OF NATIONAL ELECTRONIC CONTRACTORS ASSOC, SOUTHERN NEVADA HOME BUILDERS ASSOCIATION, NEVADA ASSOCIATION OF MECHANICAL CONTRACTORS, SHEET METAL & AIR CONDITIONING CONTRACTORS NATL ASSOC SO. NV

EVAN JAMES, ESQ. for SOUTHERN NV PAINTERS, DECORATORS, & GLAZIERS LMCC


An employee of THE ALLISON LAW FIRM CHTD.

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

SILVERWING DEVELOPMENT,
a Nevada corporation; J CARTER
WITT III, an individual,

Petitioners,

Case No.: CV18-00128

vs.

Dept. No.: 10

NEVADA STATE CONTRACTORS
BOARD,

Respondent.

ORDER REGARDING PETITION FOR JUDICIAL REVIEW

Presently before the Court is the PETITION FOR JUDICIAL REVIEW ("the Petition").

The Petition was filed by Petitioners, SILVERWING DEVELOPMENT and J CARTER WITT III (collectively "the Petitioners") on January 17, 2018. The Petitioners filed PETITIONERS' OPENING BRIEF ("the Petitioners' Brief") on April 3, 2018. Respondent NEVADA STATE CONTRACTORS BOARD ("the Respondent") filed RESPONDENT'S ANSWERING BRIEF

1 (“the Respondent’s Brief”) on May 10, 2018.¹ The Petitioners filed the REPLY TO
2 RESPONDENT’S ANSWERING BRIEF (“the Petitioner’s Reply”) on June 15, 2018. The Court
3 held a hearing on the matter on September 4, 2018, and took the matter under advisement.

4
5 The Petitioners seek judicial review of the Respondent’s decision on December 21, 2017,
6 finding the Petitioners violated NRS 624.3013(5) and imposing a \$33,000 fine. The Petition Ex. 1
7 9. The Petitioners make four arguments: 1) NRS 624.220(2) violates the Petitioners’ due process
8 rights because it is unconstitutionally vague and unconstitutional as-applied; 2) NRS 624.220(2)
9 violates the Petitioners’ right to equal protection because similarly situated licensees were treated
10 differently; 3) the use of an advisory opinion discussing the ambiguity of “single construction site”
11 in NRS 624.220(2), (“the Tesla Opinion”), constituted an unconstitutional delegation of legislative
12 authority;² and 4) there is not sufficient evidence to support the conclusion that the projects at issue
13 are “subdivisions.” The Petitioner’s Brief 8:6-7; 14:5-7; 17:13-15; 19:15-16. The Respondent
14 argues: 1) the Administrative Law Judge, the Honorable Phillip M. Pro (Ret.) (“Judge Pro”),
15 properly invoked and applied NRS 278.320(1) to define “subdivision site;” 2) NRS 624.220(2) is
16 not unconstitutionally vague because it is clear to individuals of ordinary intelligence and provides
17 specific standards for enforcement; and 3) NRS 624.220(2) does not violate the Equal Protection
18 Clause because it is rationally related to the legitimate purpose of ensuring the financial
19 responsibility of contractors. The Respondent’s Brief 20:5-6; 22:15; 23:23-25; 25:1-2, 22-24. The
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25 ¹ The Southern Nevada Painters and Decorators and Glaziers Labor-Management Cooperation Committee, Nevada
26 Chapter Associated General Contractors, Nevada Association of Mechanical Contractors, Southern Nevada Chapter of
27 National Electronic Contractors’ Association, Southern Nevada Home Builders Association, Nevada Contractor’s
Association, Mechanical Contractor’s Association of Las Vegas, Nevada Subcontractor’s Association, Sheet Metal and
Air Conditioning Contractors’ National Association of Southern Nevada and Associated Builders and Contractors, Inc.
were permitted to participate as amicus curiae.

28 ² The Court will not consider this argument because the Petitioner was disciplined under the “subdivision site” language
in NRS 624.220(2), not the “single construction site” language addressed in the Tesla Opinion.

1 Petitioner makes four arguments in response: 1) *Chevron*³ deference cannot save an
2 unconstitutionally vague statute; 2) Judge Pro's interpretation of NRS 624.220(2) was unreasonable
3 because it impermissibly equates "subdivision" and "subdivision site;" 3) severing "subdivision
4 site" from the statute does not cure the statute's unconstitutionality; and 4) the statute is not
5 rationally related to contractor solvency. The Petitioner's Reply 3:5-14, 20-27; 6:5-8, 15.

7 NRS 233B.135 provides:

- 8
- 9 1. Judicial review of a final decision of an agency must be:
 - 10 (a) Conducted by the court without a jury; and
 - 11 (b) Confined to the record.

12 In cases concerning alleged irregularities in procedure before an agency that are not
13 shown in the record, the court may receive evidence concerning the irregularities.

14 2. The final decision of the agency shall be deemed reasonable and lawful until
15 reversed or set aside in whole or in part by the court. The burden of proof is on the
16 party attacking or resisting the decision to show that the final decision is invalid
17 pursuant to subsection 3.

18 3. The court shall not substitute its judgment for that of the agency as to the weight
19 of evidence on a question of fact. The court may remand or affirm the final decision
20 or set it aside in whole or in part if substantial rights of the petitioner have been
21 prejudiced because the final decision of the agency is:

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27 ³ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778 (1984) (holding agency
28 interpretation of statute it administers will be upheld where Congress has not spoken on issue and interpretation is based
on permissible construction of statute).

- (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.

4. As used in this section, "substantial evidence" means evidence which a reasonable mind might accept as adequate to support a conclusion.

NRS 624.220(2) provides in relevant part:

The [Nevada State Contractors] Board shall limit the field and scope of the operations of a licensed contractor by establishing a monetary limit on a contractor's license, and the limit must be the maximum contract a licensed contractor may undertake on one or more construction contracts on a single construction site or subdivision site for a single client.

NRS 624.3015(3) provides that "knowingly bidding to contract or entering into a contract with a contractor for work in excess of his or her limit or beyond the scope of his or her license" is a cause for disciplinary action.

Judge Pro found the Petitioner in violation of NRS 624.3015(3), for knowingly entering into a contract with a contractor for work in excess of its monetary limit, as enumerated in NRS 624.220(2).⁴ The Motion Ex. 1 8. Judge Pro determined that each of the Petitioner's four projects were "subdivision sites" and that the license limit for each individual subcontractor was the maximum contract amount for the project, not the maximum amount for an individual contract. *Id.* Judge Pro determined that, while the individual contract bids did not exceed each subcontractor's license limit, the aggregate amount of the bids did exceed the limit. *Id.* Judge Pro concluded the

⁴ The Respondent voluntarily dismissed the second cause of action, which alleged violations of NRS 624.3013(5). NRS 624.3013(5) prohibits failing to ascertain that each person whose bid on a construction project the licensee considered is appropriately licensed as required by NAC 624.640(6). The Respondent also voluntarily dismissed the fourth cause of action, which alleged violations of NAC 624.640(6).

1 projects were "subdivision sites" by borrowing the definition of "subdivision" from NRS
2 278.320(1) and defining site as "the physical location where a specified subdivision exists." *Id.* at
3 7. Judge Pro did not rule on the constitutionality of NRS 624.220(2). Judge Pro imposed a fine of
4 \$33,000. *Id.* at 9.

5
6 Both the United States Constitution and the Nevada Constitution protect the right to due
7 process under the law. "Statutes are presumed to be valid, and the challenger bears the burden of
8 showing that a statute is unconstitutional." *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev.
9 502, 509, 217 P.3d 546, 551 (2009) (citing *Silvar v. Eighth Jud. Dist. Ct.*, 122 Nev. 289, 292, 129
10 P.3d 682, 684 (2006)). Where a challenger alleges a statute is facially vague and violates the Due
11 Process Clause, courts apply a two factor test. A statute is unconstitutionally vague on its face if it:
12 "1) fails to provide notice sufficient to enable persons of ordinary intelligence to understand what
13 conduct is prohibited; and 2) lacks specific standards, thereby encouraging, authorizing or even
14 failing to prevent arbitrary and discriminatory enforcement." *Flamingo Paradise*, 125 Nev. at 510,
15 217 P.3d at 551-52 (citing *Silvar*, 122 Nev. at 23, 129 P.3d at 685). A civil statute must be
16 impermissibly vague in all of its applications in order to be unconstitutionally vague. *Flamingo*
17 *Paradise*, 125 Nev. at 512, 217 P.3d at 553 (internal citations omitted). If a civil statute provides
18 sufficient guidance to at least some prohibited conduct and the standards of enforcement for that
19 conduct, it will survive a facial challenge. *Flamingo Paradise*, 125 Nev. at 513, 217 P.3d at 554
20 (citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497, 102 S. Ct.
21 1186, 1193 (1962)).

22
23 NRS 624.220(2) is not unconstitutionally vague on its face because it is a civil statute which
24 is not impermissibly vague in all applications. For example, the statute provides sufficient notice
25 that a single contract for single client which exceeds the contractor's license violates the statute. It
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1 also provides adequate notice that multiple contracts for a single client for separate projects which
2 exceed the contractor's license do not violate the statute. Although the standards for multiple
3 contracts on a single project are less clear, this scenario is merely one of several covered by the
4 statute. Because it provides sufficient guidance to at least some prohibited conduct and the
5 applicable standards of enforcement, NRS 624.220(2) is not unconstitutionally vague on its face
6 and does not infringe upon substantive due process.
7

8 An individual may challenge the constitutionality of a statute as-applied and argue that the
9 application in a particular case resulted in a substantive due process violation. *State v. Eighth Jud.*
10 *Dist. Ct. (Logan D.)*, 129 Nev. 492, 501, 306 P.3d 369, 375 (2013). "When undertaking a
11 substantive due process analysis, a statute that does not infringe upon a fundamental right will be
12 upheld if it is rationally related to a legitimate government purpose." *Logan D.*, 129 Nev. at 501,
13 306 P.3d at 375-76 (explaining Legislature is not required to articulate its purpose behind statutory
14 enactment).
15

16 NRS 620.220(2) is not unconstitutional as applied to the Petitioner because it is rationally
17 related to the safety and health of the public as well as fiscally responsible construction. License
18 limits are determined by the Respondent after considering a number of factors relating to the
19 contractor: financial responsibility, experience and general knowledge of applicable laws. NRS
20 624.260. *See also* The Respondent's Brief Ex. I Sen. Judiciary Comm. Minutes 3, 6, 7. The
21 license limit is intended to prevent less experienced and less solvent contractors from
22 overcommitting to a single contract, thus creating the risk of non-payment to creditors. *Cf. Gur-*
23 *Kovic v. State Contractors Bd.*, 95 Nev. 489, 491, 596 P.2d 850, 851 (1979) (upholding reprimand
24 of contractor who submitted separate bids for single project and exceeded license limit). Although
25 not explicitly stated in NRS 620.220(2), the purpose of the statute is to promote risk diversification
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1 and public confidence in contractors. *See* NRS 624.005 (explaining purpose of NRS Chapter 624 is
2 to “promote public confidence and trust in the competence and integrity of licensees and to protect
3 the health, safety and welfare of the public”). By imposing strict license limits on the work that can
4 be done for a single client, the Legislature promotes financially responsible construction and
5 ensures that contractors are able to pay their creditors. For these reasons, NRS 620.220(2) does not
6 violate the Petitioner’s substantive due process rights.
7

8 Both the United States Constitution and the Nevada Constitution guarantee individuals
9 equal protection under the law. U.S. CONST. amend XIV; Art. 4, §21 NEV. CONST. The threshold
10 inquiry in an equal protection challenge is whether the statute is discriminatory on its face. *Rico v.*
11 *Rodriguez*, 121 Nev. 695, 703, 120 P.3d 812, 817 (2005). A statute which treats similarly situated
12 individuals differently implicates equal protection. *Id.* The level of scrutiny used varies depending
13 on the class implicated in the statute. *Id.* The rational basis test is used where the statute does not
14 implicate a suspect class, a fundamental right or a quasi-suspect class. *Id.* The statute will be
15 upheld if it is rationally related to a legitimate government interest. *Id.*
16

17 On its face, NRS 624.220(2) is facially neutral and does not treat similarly situated licensed
18 contractors differently. Each licensed contractor is bound by his or her respective license limits in
19 regards to the contract work performed for a single client. Even if the statute had created a
20 classification, the statute would survive rational basis review because it is rationally related to
21 promoting responsible construction and contractor solvency. NRS 624.260. *See also* The
22 Respondent’s Brief Ex. I Sen. Judiciary Comm. Minutes 3, 6, 7. For these reasons, NRS
23 624.220(2) does not violate the Petitioner’s right to equal protection.
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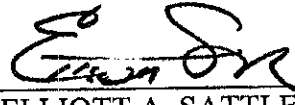
1 While a district court cannot substitute its opinion for the agency's opinion on a question of
2 fact, questions of law are reviewed for clear error. NRS 233B.135(3). Statutory interpretation is a
3 question of law. *Taylor v. Dep't of Health and Human Servs.*, 129 Nev. 928, 930, 314 P.3d 949,
4 951 (2013). The district court defers to the agency's interpretation of its governing statutes, as long
5 as the interpretation is "within the language of the statute." *Taylor*, 129 Nev. at 930, 314 P.3d at
6 951 (citing *Dutchess Bus. Servs., Inc. v. Nev. State Bd. of Pharmacy*, 124 Nev. 701, 709, 191 P.3d
7 1159, 1165 (2008)). Statutory interpretation must be conducted reasonably "in light of the policy
8 and spirit of the law" and to "avoid absurd results." *Flamingo Paradise*, 125 Nev. at 509, 217 P.3d
9 at 551 (citing *Desert Valley Water Co. v. State, Eng'r*, 104 Nev. 718, 720, 766 P.2d 886, 886-87
10 (1988)). Statutes should not be interpreted to "render words or phrases superfluous." *Flamingo*
11 *Paradise*, 125 Nev. at 509, 217 P.3d at 551 (citing *Mangarella v. State*, 117 Nev. 130, 133, 17 P.3d
12 989, 991 (2001)).

13 Judge Pro's decision to use the definition of "subdivision" from NRS 278.320(1) to clarify
14 NRS 624.220(2) was entirely reasonable; however, his method of determining that the Petitioner's
15 individual projects were "subdivision sites" is unclear from his decision. "Subdivision" is defined
16 as "any land, vacant or improved, which is divided or proposed to be divided into five or more lots,
17 parcels, sites, units or plots, for the purpose of any transfer or development, or any proposed
18 transfer or development." NRS 278.320(1) (emphasis added). Judge Pro reasoned that "site" was
19 the geographic location of the subdivision and determined that each of the Petitioner's projects
20 were "subdivision sites." The manner by which Judge Pro reached this conclusion is unclear to the
21 Court. The referenced statute already contemplates a geographic location; therefore the Court is
22 unclear how Judge Pro resolved this issue. In order to give proper deference to Judge Pro's
23 determination and to effectively consider the Petition, the matter is remanded for clarification.
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IT IS ORDERED that the matter is remanded for clarification in accordance with this
Order.

DATED this 8 day of November, 2018.


ELLIOTT A. SATTLER
District Judge

CODE: 2540

HOY | CHRISSINGER | KIMMEL | VALLAS

Michael S. Kimmel (NV Bar 9081)
Theodore E. Chrissinger (NV Bar 9528)
50 W. Liberty St., Suite 840
Reno, Nevada 89501
775.786.8000 (voice)
775.786.7426 (fax)
mkimmel@nevadalaw.com
tchrissinger@nevadalaw.com

Attorneys for: Silverwing Development, J. Carter Witt III

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

SILVERWING DEVELOPMENT, a Nevada
corporation; J CARTER WITT III, an individual,

CASE NO.: CV18-00128

DEPT. NO.: 10

Petitioners,

vs.

NEVADA STATE CONTRACTORS BOARD

Respondents.

Notice of Entry of Order

PLEASE TAKE NOTICE that on June 21, 2019, the Court entered the following Order
Denying Petition for Judicial Review, a copy of which is attached hereto as Exhibit "1".

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Affirmation

The undersigned affirm that this document does not contain any social security numbers.

Dated July 3, 2019.

/s/ Michael S. Kimmel

Michael S. Kimmel

HOY | CHRISSINGER | KIMMEL | VALLAS

Attorneys for Petitioners / Appellants

Certificate of Service

I hereby certify that on July 3, 2019, I electronically filed the foregoing with the Clerk of the Court by using the electronic filing system which will send a notice of electronic filing to the following:

Respondent

NOAH ALLISON, ESQ. for NEVADA STATE CONTRACTORS BOARD

Amicus

PHILIP MANNELLY, ESQ. for ASSOCIATED BUILDERS & CONTRACTORS, INC., NEVADA CHAPTER ASSOCIATED GENERAL CONTRACTORS, SOUTHERN NEVADA HOME BUILDERS ASSOCIATION, SOUTHERN NV CHAPTER OF NATIONAL ELECTRONIC CONTRACTORS ASSOC, SHEET METAL & AIR CONDITIONING CONTRACTORS NATL ASSOC SO. NV, NEVADA CONTRACTORS ASSOCIATION, MECHANICAL CONTRACTORS ASSOCIATION OF LAS VEGAS, NEVADA SUBCONTRACTORS ASSOCIATION, NEVADA ASSOCIATION OF MECHANICAL CONTRACTORS

EVAN JAMES, ESQ. for SOUTHERN NV PAINTERS, DECORATORS, & GLAZIERS LMCC

WESLEY SMITH, ESQ. for SOUTHERN NV PAINTERS, DECORATORS, & GLAZIERS LMCC

/s/ Shondel Seth
An employee of Hoy | Chrissinger | Kimmel | Vallas PC

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Exhibit

Exhibit 1.

June 21, 2019 Order

9 pages

Exhibit 1

Exhibit 1

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
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a Nevada corporation; J CARTER
WITT III, an individual,

Petitioners,

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vs.

Dept. No.: 10

NEVADA STATE CONTRACTORS
BOARD,

Respondent.

ORDER DENYING PETITION FOR JUDICIAL REVIEW

Presently before the Court is the PETITION FOR JUDICIAL REVIEW ("the Petition").

The Petition was filed by Petitioners, SILVERWING DEVELOPMENT and J CARTER WITT III (collectively "the Petitioners") on January 17, 2018. The Petitioners filed PETITIONERS' OPENING BRIEF ("the Petitioners' Brief") on April 3, 2018. Respondent NEVADA STATE CONTRACTORS BOARD ("the Respondent") filed RESPONDENT'S ANSWERING BRIEF ("the Respondent's Brief") on May 10, 2018.¹ The Petitioners filed the REPLY TO RESPONDENT'S ANSWERING BRIEF ("the Petitioner's Reply") on June 15, 2018. The Court held a hearing on the matter on September 4, 2018, and took the matter under advisement.

¹ The Southern Nevada Painters and Decorators and Glaziers Labor-Management Cooperation Committee, Nevada Chapter Associated General Contractors, Nevada Association of Mechanical Contractors, Southern Nevada Chapter of National Electronic Contractors' Association, Southern Nevada Home Builders Association, Nevada Contractor's

1 The Petitioners seek judicial review of the Respondent's decision finding the Petitioners in
2 violation of NRS 624.3013(5) and imposing a \$33,000.00 fine. The Petition Ex. 1, p. 9. The
3 Petitioners make four arguments: 1) NRS 624.220(2)² violates the Petitioners' due process rights
4 because it is unconstitutionally vague and unconstitutional as-applied; 2) NRS 624.220(2) violates
5 the Petitioners' right to equal protection because similarly situated licensees were treated
6 differently; 3) the use of an advisory opinion discussing the ambiguity of "single construction site"
7 in NRS 624.220(2), ("the Tesla Opinion"), constituted an unconstitutional delegation of legislative
8 authority; and 4) there is insufficient evidence to support the conclusion the projects at issue are
9 "subdivisions." The Petitioner's Brief 8:6-7; 14:5-7; 17:13-15; 19:15-16. The Respondent argues:
10 1) the Administrative Law Judge, the Honorable Phillip M. Pro (Ret.) ("Judge Pro"), properly
11 invoked and applied NRS 278.320(1) to define "subdivision site;" 2) NRS 624.220(2) is not
12 unconstitutionally vague because it is clear to individuals of ordinary intelligence and provides
13 specific standards for its enforcement; and 3) NRS 624.220(2) does not violate the Equal Protection
14 Clause because it is rationally related to the legitimate purpose of ensuring the financial
15 responsibility of contractors. The Respondent's Brief 20:5-6; 22:15; 23:23-25; 25:1-2, 22-24. The
16 Petitioner makes four arguments in response: 1) *Chevron*³ deference cannot save an
17 unconstitutionally vague statute; 2) Judge Pro's interpretation of NRS 624.220(2) was unreasonable
18 because it impermissibly equates "subdivision" and "subdivision site;" 3) severing "subdivision

19 Association, Mechanical Contractor's Association of Las Vegas, Nevada Subcontractor's Association, Sheet Metal and
20 Air Conditioning Contractors' National Association of Southern Nevada and Associated Builders and Contractors, Inc.
21 were permitted to participate as amici curiae.

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25 ² This statute requires the Respondent to establish monetary limits for contractor licenses, with the limit being "the
26 maximum contract a licensed contractor may undertake on one or more construction contracts on a single construction
27 site or subdivision site for a single client." NRS 624.220(2).

28 ³ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984) (holding agency
interpretation of statute it administers will be upheld where Congress has not spoken on issue and interpretation is based
on permissible construction of statute).

1 site” from the statute does not cure the statute’s unconstitutionality; and 4) the statute is not
2 rationally related to contractor solvency. The Petitioner’s Reply 3:5-14, 20-27; 6:5-8, 15.

3 NRS 624.3015(3) provides that “knowingly bidding to contract or entering into a contract
4 with a contractor for work in excess of his or her limit or beyond the scope of his or her license” is
5 a cause for disciplinary action. On December 17, 2017, Judge Pro filed the Decision (“the
6 Decision”) which disciplined the Petitioner. Judge Pro found the Petitioner in violation of NRS
7 624.3015(3), for knowingly entering into a contract with a contractor for work in excess of its
8 monetary limit, as enumerated in NRS 624.220(2).⁴ The Decision, p. 8. Judge Pro found the
9 Respondent’s definition of “subdivision site” to be reasonable and entitled to deference, and he
10 determined that the subcontracts were properly aggregated to determine compliance with NRS
11 624.220(2). *Id.* Judge Pro did not rule on the constitutionality of NRS 624.220(2). Judge Pro
12 imposed a fine of \$33,000. *Id.* at 9.

13 After reviewing the record, the Court entered the ORDER REGARDING PETITION FOR
14 JUDICIAL REVIEW on November 8, 2018 (“the November Order”). The November Order denied
15 the first two arguments in the Petition, finding NRS 624.220(2) violated neither due process nor
16 equal protection.⁵ The November Order 5-7. In regards to the fourth argument, the Court entered a
17 limited remand, requesting Judge Pro clarify his determination that the Respondent’s definition of
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25 ⁴ The Respondent voluntarily dismissed the second cause of action, which alleged violations of NRS 624.3013(5). NRS
26 624.3013(5) prohibits failing to ascertain that each person whose bid on a construction project the licensee considered is
27 appropriately licensed as required by NAC 624.640(6). The Respondent also voluntarily dismissed the fourth cause of
28 action, which alleged violations of NAC 624.640(6).

⁵ The third argument was not considered because the Petitioner was not disciplined under the “single construction site”
language of NRS 624.220(2).

1 “subdivision site” was a reasonable construction of the statute. Judge Pro entered the
2 CLARIFICATION ON REMAND OF DECISION ENTERED DECEMBER 17, 2017 (“the
3 Clarification”), on January 18, 2019.

4
5 In the Clarification, Judge Pro explained that he reconciled the word “site” in NRS
6 278.320(1) and NRS 624.220(2) by using evidence presented during the hearing on September 28,
7 2017, and by gauging the Respondent’s understanding the term. The Clarification 2: ¶ 5. Judge
8 Pro relied primarily on the testimony of Compliance Officer Jeff Gore (“Mr. Gore”) regarding the
9 importance of geographical location in the determination of whether a project was a “subdivision
10 site.” Judge Pro also resolved any ambiguity in favor of the Respondent’s understanding, as
11 adduced through Mr. Gore’s testimony. The Clarification 3: ¶ 3.

12
13 After reviewing the Clarification, the Court entered the ORDER PERMITTING
14 SUPPLEMENTAL BRIEFING on April 9, 2019 (“the April Order”). The April Order allowed the
15 Petitioners and the Respondent to submit limited supplemental briefing in response to the
16 Clarification. The Respondent filed RESPONDENT’S SUPPLEMENTAL BRIEF (“the RSB”) on
17 April 30, 2019. The Petitioners filed the SUPPLEMENTAL BRIEF (“the PSB”) on April 30,
18 2019, and contemporaneously submitted the additional briefing for the Court’s consideration. In
19 the RSB, the Respondent contends the Clarification reinforces that the Decision merits *Chevron*
20 deference. The RSB 3-4. The Petitioners contend the Clarification emphasizes the clear error of
21 law and the constitutional infirmity of NRS 624.220(2). The PSB 2:22-26; 4:22-24; 5:1-18.
22 Having resolved all other issues in the November Order, this Order is limited to the merits of the
23 Petition as it relates to the Respondent’s construction of NRS 624.220(2) and the corresponding
24 definition of “subdivision site.”
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1 NRS 233B.135 provides:

2 1. Judicial review of a final decision of an agency must be:

3 (a) Conducted by the court without a jury; and

4 (b) Confined to the record.

5
6 In cases concerning alleged irregularities in procedure before an agency that are not
7 shown in the record, the court may receive evidence concerning the irregularities.

8 2. The final decision of the agency shall be deemed reasonable and lawful until
9 reversed or set aside in whole or in part by the court. The burden of proof is on
10 the party attacking or resisting the decision to show that the final decision is
11 invalid pursuant to subsection 3.

12 3. The court shall not substitute its judgment for that of the agency as to the weight
13 of evidence on a question of fact. The court may remand or affirm the final
14 decision or set it aside in whole or in part if substantial rights of the petitioner
15 have been prejudiced because the final decision of the agency is:

16 (a) In violation of constitutional or statutory provisions;

17 (b) In excess of the statutory authority of the agency;

18 (c) Made upon unlawful procedure;

19 (d) Affected by other error of law;

20 (e) Clearly erroneous in view of the reliable, probative and substantial
21 evidence on the whole record; or

22 (f) Arbitrary or capricious or characterized by abuse of discretion.

23 4. As used in this section, "substantial evidence" means evidence which a reasonable
24 mind might accept as adequate to support a conclusion.

25 A district court cannot substitute its opinion for the agency's opinion on a question of fact. NRS
26 233B.135(3). Although statutory interpretation is a question of law, the district court defers to the
27 agency's interpretation of its governing statutes, as long as the interpretation is "within the
28 language of the statute." *Dep't of Corr. v. Ludwick*, 135 Nev. Adv. Op. 12, 2019 WL 1967162, at
*2 (May 2, 2019) (internal citations omitted). *See also N. Lake Tahoe Fire Prot. Dist. v. Bd. of*

1 *Admin. of Subsequent Injury Account*, 134 Nev. Adv. Op. 93, 431 P.3d 39, 42 (2018) (quoting
2 *Collins Disc. Liquors & Vending v. State*, 106 Nev. 766, 768, 802 P.2d 4, 5 (1990) (“[C]ourts
3 should not substitute their own construction of a statutory provision for a reasonable interpretation
4 made by an agency.”). Deference is not warranted if the regulation “conflicts with existing
5 statutory provisions or exceeds the statutory authority of the agency.” *Nev. Attorney for Injured*
6 *Workers v. Nev. Self-Insurers Ass’n*, 126 Nev. 74, 83, 225 P.3d 1265, 1271 (2010) (citing *State Div.*
7 *of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 293, 995 P.2d 482, 485 (2000)).

9 The Court will deny the remaining argument in the Petition because the Respondent’s
10 interpretation of NRS 624.220(2) is a reasonable construction of the language within the statute. In
11 attempting to ascertain the definition of “subdivision site,” the Respondent properly referred to
12 other legislative pronouncements, instead of generating its own definition. In this vein, the
13 Respondent referred to NRS 278.320(1), a zoning and planning statute.⁶ However, the Respondent
14 contemporaneously recognized the different role of the word “site” in NRS 278.320(1) and NRS
15 624.220(2). While “site” was a method of division in NRS 278.320(1), the Respondent determined
16 “site” more properly denoted location, rather than size, in NRS 624.220(1). Mr. Gore’s testimony
17 emphasized the important role geographic location plays in determining whether a project is a
18 single subdivision site. For all of these reasons, the Respondent supplied a reasonable definition of
19 “subdivision site” to which Judge Pro appropriately deferred.

20 Second, the Respondent’s definition of “subdivision site” does not conflict with other
21 statutory provisions and does not exceed the Respondent’s statutory authority. As adduced during
22 the hearing before Judge Pro, “subdivision site” is not defined anywhere in NRS Chapter 624 or in
23

24 ⁶ From the Court’s review, the only other definition of “subdivision” is found NRS 119.110. “Subdivision” is defined as
25 “any land or tract of land in another state, in this state or in a foreign country from which a sale is attempted, which is
26 divided or proposed to be divided over any period in 35 or more lots, parcels, units or interests” NRS 119.110
27 governs the sale of subdivided land.
28

1 an applicable regulation. *Contra Local Gov't Emp.-Mgmt. Relations Bd. v. Educ. Support Emps.*
2 *Ass'n*, 134 Nev. Adv. Op. 86, 429 P.3d 658, 662-63 (2018) (reversing agency's interpretation of
3 statute where clearly contradicted by statutory language and applicable regulation). Additionally,
4 NRS 624.160 vests the Respondent "with all of the functions and duties relating to the
5 administration of this chapter," including contractor discipline. As such, the Respondent is
6 empowered to interpret and enforce NRS 624.220. For these reasons, the Respondent's definition
7 of "subdivision site" does not conflict with other statutory provisions and does not exceed the
8 Respondent's statutory authority.
9

10
11 **IT IS ORDERED** that the PETITION FOR JUDICIAL REVIEW is hereby **DENIED**.

12 **DATED** this 21 day of June, 2019.

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14 
15 ELLIOTT A. SATTLER
16 District Judge
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1 **CERTIFICATE OF MAILING**

2 Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court
3 of the State of Nevada, County of Washoe; that on this ____ day of June, 2019, I deposited in the
4 County mailing system for postage and mailing with the United States Postal Service in Reno,
5 Nevada, a true copy of the attached document addressed to:
6
7

8 **CERTIFICATE OF ELECTRONIC SERVICE**

9 I hereby certify that I am an employee of the Second Judicial District Court of the State of
10 Nevada, in and for the County of Washoe; that on the 21 day of June, 2019, I electronically filed
11 the foregoing with the Clerk of the Court by using the ECF system which will send a notice of
12 electronic filing to the following:
13


14 MICHAEL S. KIMMEL, ESQ.

15 THEODORE CHRISSINGER, ESQ.

16 NOAH G. ALLISON, ESQ.

17 PHILLIP MANNELLY, ESQ.

18 EVAN JAMES, ESQ.
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Sheila Mansfield
Judicial Assistant