

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants,

vs.

NEVADA STATE CONTRACTORS BOARD
Respondents.

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**APPELLANTS' APPENDIX
VOLUME 4**

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IN THE MATTER OF:

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

RESPONDENT.

Investigative Case No.: 30042873

Respondent's Closing Brief

Continued Hearing Date: 09/28/2017
Continued Hearing Time: 8:30 a.m.

Respondent's Closing Brief

Silverwing Development and J Carter Witt III (collectively, "Respondent") hereby file
their Closing Brief.

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1 **I. Introduction**

2 The NSCB asks the ALJ to penalize Respondent (a licensee with a spotless record of
3 building hundreds of millions of dollars of projects in Nevada for twenty years) to the tune
4 of nearly \$62,000. As the sole basis for the imposition of such an extreme penalty, the
5 NSCB relies upon NRS 624.220(2). The problem, however, is that NRS 624.220(2) is
6 unconstitutionally vague (violation of due process) and creates disparate treatment of
7 licensees of the same monetary limit, and their clients, with no rational relationship to a
8 legitimate government interest (violation of equal protection). Although these
9 constitutional infirmities exist on the face of the statute, they become even more evident
10 when the statute is applied to the uncontested material facts of this case.

11 As discussed below, there is no lawful basis upon which it can be concluded that
12 Respondents violated NRS 624.3015(3) (knowingly entering into a contract with a
13 contractor for work in excess of its limit), violated NRS 624.3013(5) (failing to ascertain
14 that each person whose bid on a construction project the licensee considers is
15 appropriately licensed as required by NAC 624.640(6)), or even had a reason to believe
16 that Respondent's interpretation of NRS 624.220(2) would not be consistent with how the
17 NSCB would interpret and apply NRS 624.220(2).

18 **II. Due Process - NRS 624.220(2) is unconstitutionally vague both facially**
19 **and as applied to Respondents in this contested matter.**

20 In its attempt to justify its case and validate NRS 624.220, the NSCB engages in a
21 game of legal hopscotch that is not supported by established principles of statutory
22 construction. In doing so, the NSCB has "jumped over", avoided, and ignored the testimony
23 of NSCB Compliance Investigator Jeff Gore related to NRS 624.220(2). Mr. Gore could not,
24 and did not, articulate any well settled and ordinarily understood meanings of either the
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1 phrase "subdivision site" or "single construction site".¹ Unequivocally and without any
2 hesitation, Mr. Gore admitted that (1) the phrase "single construction site" is not defined
3 anywhere in Nevada Revised Statutes or Nevada Administrative Code; (2) the phrase
4 "subdivision site" is not defined anywhere in Nevada Revised Statutes or Nevada
5 Administrative Code; and, (3) that there are absolutely no internal written guidelines,
6 manuals, or guide books that he uses to determine whether something is a single
7 construction site or subdivision site.²

8
9 Although the NSCB attempts to save the statute by artificially forcing these projects
10 into the statutory definition of subdivision, the reality is that it does not matter. If any part
11 of NRS 624.220(2) is unconstitutional on its face or as applied to Respondent, then the
12 entire subsection of the statute fails. The ALJ, and in fact even a state court, may not simply
13 "blue pencil" out or ignore the relevant context of the statute in an attempt to render the
14 statute constitutional. *See Kenaitze Indian Tribe v. State of Alaska*, 860 F.2d 312, 316 (9th
15 Cir. 1988)(articulating that creative interpretation of a statute is the same as an
16 impermissible judicial change to statutory language, and that courts must "look to policy in
17 interpreting statutes...not rewrite language to conform to the policy").
18

19
20 By his own admission, Mr. Gore was (and is in all cases involving NRS 624.220(2))
21 left with nothing more than his own personal subjective experience or predilections as the
22 guiding factor to determine whether the work at issue involved a single construction site, a
23 subdivision site, or neither. Legally, a statute may not be so devoid of adequate guidelines
24 as to permit the enforcers of the statute to "pursue their personal predilections." *See Silvar*
25

26 ¹ See September 28, 2017 Hearing Transcript; p. 117-122.

27 ² See September 28, 2017 Hearing Transcript; p. 123-126.
28

1 v. *Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 122 Nev. 289, 293, 129 P.3d 682, 685
 2 (2006)(the second prong of the vagueness test). Moreover, when a statute is without
 3 ordinarily understood meanings, there is no way for a court to define the limits of the
 4 statute. *Id.* (the first prong of the vagueness test).

5
 6 Mr. Gore's testimony was fatal to the First and Second Causes of Action in the NSCB
 7 Complaint, and it establishes both facial and as applied unconstitutional vagueness. The
 8 NSCB cannot cure that unconstitutional vagueness by attempting to shoehorn NRS
 9 624.220(2) into other Nevada statutes.

10
 11 **A. There is no legal basis upon which to conclude that the phrase**
 12 **"subdivision site" as used in NRS 624.220(2) is synonymous with**
 13 **"subdivision" as used in NRS 278.320(1).**

14 NRS 624.220(2) reads in relevant part, as follows:

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

20 Because there is no statutory or judicially created definition of the phrase
 21 "subdivision site" in NRS Chapter 624 or NAC Chapter 624, the NSCB asks the ALJ to rely on
 22 the definition of "subdivision" found in NRS 278.320(1). But, NRS Chapter 278 is a
 23 planning and zoning chapter, not a contractor licensing law chapter. Specifically, NRS
 24 278.320(1) is a general provision addressing the subdivision of land, and it defines a
 25 statutory "subdivision" as "any land, vacant or improved, which is divided or proposed to
 26 be divided into five or more lots, parcels, sites, units or plots, for the purpose of any
 27 transfer or development, unless exempted by law." Because a statutory "subdivision" is
 28 composed of land divided into "five or more lots, parcels, sites, units or plots", a
 "subdivision site" must be something less than an actual "subdivision"; a "subdivision site"

1 must be a smaller piece of the entire subdivision. Yet, there is no statutory definition for
2 what constitutes that piece.

3 Moreover, by concluding that "subdivision site" and "subdivision" are synonymous,
4 the NSCB necessarily renders superfluous the word "site" as it is used both in NRS
5 624.220(2) and NRS 278.320(1). Rules of statutory construction mandate that "every
6 word, phrase and provision in the enactment has meaning." *See Law Offices of Barry*
7 *Levinson, P.C. v. Milko*, 124 Nev. 355, 366-67, 184 P.3d 378, 386-87 (2008)[Internal
8 citations and quotations omitted]. Had the Legislature intended aggregation of license
9 limits across an entire statutory subdivision, it would have omitted the word "site" from
10 "subdivision site" in NRS 624.220(2). Had the Legislature not intended a "site" to be a
11 smaller piece of an NRS 278.320(1) statutory subdivision, it would have omitted the word
12 "site" from the definition of types of pieces of land, five or more of which are required to
13 create a statutory subdivision. The plain language of NRS 624.220(2) clearly does not
14 contemplate the aggregation of work across an entire statutory subdivision, or across
15 multiple "sites" within the same statutory subdivision; aggregation is only contemplated on
16 a subdivision site (singular).³

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20 **B. There is no legal basis upon which to conclude that the projects**
21 **at issue in this contested case are statutory "subdivisions".**

22 Even if rules of statutory construction were ignored and the ALJ interpreted
23 "subdivision site" and "subdivision" synonymously, the projects in this contested case do
24 not meet the definition of a NRS 278.320(1) subdivision. By Legislative mandate, there

25
26 ³ The NSCB's position creates an interesting paradox. On the one hand, the NSCB
27 contends that the ALJ is without the jurisdictional authority to conclude that a statute is
28 unconstitutional on its face. In the same breath, the NSCB then asks the ALJ to legislate
from the bench and solve, judicially, admitted ambiguities in statutes.

1 cannot be a statutory subdivision without the actual or proposed division of land into five
2 or more pieces. Here, the uncontested facts are that the recorded maps prove the land in
3 each project was not divided (or proposed to be divided) into five or more pieces. See
4 September 28, 2017 Hearing Transcript; p. 59-62.

5 The NSCB would like the fact that the recorded maps contain the words
6 "condominium" and "subdivision" to be dispositive of the issue. That, however, is not the
7 law. There is simply no circumstance contemplated by the recorded maps in which an
8 individual piece of land that can be aggregated with four other individual pieces of land,
9 which then in their sum, can become a statutory subdivision pursuant to NRS 278.320(1).
10 In the absence of such a division of land, there can be no statutory subdivision. Here, the
11 maps divide airspace and nothing more.

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14 **C. In the context of this contested case and NRS 624.220(2), there is**
15 **no practical or legal difference between vagueness and**
16 **ambiguity.**

17 The NSCB's Closing Brief devotes considerable attention to its perceived distinction
18 between unconstitutional vagueness and statutory ambiguity. With respect to the
19 definitions of "single construction site" and "subdivision site", it is a distinction without a
20 difference. Here, the statute in question is being used by the NSCB to exact substantial
21 punitive fines from Respondent. Much smaller fines have already been exacted from
22 Respondent's subcontractors.⁴ The same statute can also be used to revoke a licensee's
23

24
25 ⁴ The NSCB's inference that the subcontractors who paid these fines consented to the
26 NSCB's statutory interpretations, or that the subcontractors agreed they had in fact
27 violated the law is, quite frankly, offensive. Absolutely no admissible evidence was
28 presented to the ALJ even tending to support such inferences. It is far more reasonable to
conclude that the subcontractors involved paid their minimal fines because it was far less
expensive, and far less risky to their businesses, to simply cut a check.



1 license in its entirety, thereby terminating the licensee's ability to continue working.
2 Procedurally, the NSCB acts as the police, the judge, the jury and, in some cases, the
3 proverbial executioner. While the quasi-criminal nature of this contested case certainly
4 favors construction of statutory ambiguities against the NSCB, a "tie goes to the
5 defendant/respondent" (the rule of lenity) approach is not even necessary.
6

7 The NSCB admitted in its Tesla Opinion, and also on the record during the hearing,
8 that the phrase "single construction site" is ambiguous and subject to more than one
9 reasonable meaning. Similarly, the Legislative Counsel opined that NRS 624.220(2) is
10 vague and that the Legislature did not intend the statute to be read and applied literally.
11 Rather, the word "site" as used in the context of "single construction site" or "subdivision
12 site" was subject to "some temporal and geographic limitations" which were implied but
13 not specifically articulated by the Legislature. The problem, however, is that no place in the
14 law defines those limitations.
15

16 Under either a "facial" or "as-applied" challenge, "[A] statute is unconstitutionally
17 vague if it does not give a person of ordinary intelligence a reasonable opportunity to know
18 what is prohibited." *See* 73 Am. Jur. 2d Statutes § 234. Here, the vagueness exists because
19 the statute is subject to so many different, reasonable interpretations. Counsel for both the
20 NSCB and Legislative Counsel (at the request of an Assemblyman) have tried to make sense
21 of NRS 624.220(2) through formal, written opinions. The absence of clarity in the statute
22 led both governmental entities down the path of crafting qualifications, factors, and tests
23 that simply are not present in the plain language of the statute. Ironically, the fact that
24 attorneys for multiple governmental bodies cannot agree on the statute's meaning or
25 application to a given set of facts evidences the very vagueness asserted by Respondent.
26
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1 It is impossible for the NSCB to resolve NRS 624.220(2)'s vagueness through
2 legislative history or common rules of statutory construction. As a result, the NSCB relies
3 on statutes from other states whose Legislatures have provided greater clarity of terms in
4 their own laws. However, none of those borrowed statutes are contractor licensing
5 statutes, and none of those statutes are relevant or applicable in this contested case. Again,
6 there is inherent irony in the fact that the NSCB is forced to look to the laws of other states
7 in an attempt to prove that a particular Nevada statute is not vague.
8

9 There are no specific standards in NRS 624.220(2) delineating when a particular
10 project will be considered a single construction site or subdivision site. The absence of
11 those standards not only fails to prevent arbitrary and discriminatory enforcement by the
12 NSCB, it makes it entirely impossible for a person of ordinary intelligence to understand,
13 with any level of certainty, what conduct is prohibited. There was no reasonable way for
14 Respondent to understand what criteria Investigator Gore would use to determine if he
15 thought a given project was a single construction site or multiple construction sites. As
16 evidenced by his testimony, Investigator Gore could not even articulate the delineating
17 factors in his analysis, or from where he obtained those factors. What is clear from the
18 uncontroverted testimony, however, is that all municipal building departments treat each
19 building as separate and unique by requiring separate and unique fees, plan checks (for
20 structure, fire, architecture, ADA compliance, and energy), permits (which require a
21 separate civil engineering plan by building), inspections, and certificates of occupancy for
22 each building. The most rational conclusion is that separate permits evidence separate
23 construction sites.
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1 **III. Equal Protection⁵ - NRS 624.220(2) unconstitutionally treats similarly**
 2 **situated licensees, and their clients, differently.**

3 The NSCB contends that Respondent has knowingly violated the law because, either
 4 on "one construction site" or on a "subdivision site", it has hired certain subcontractors to
 5 perform work the value of which, when aggregated across all buildings, exceeds the
 6 subcontractor's license limit.

7 A licensee with a set monetary limit is entitled to the same rights as any other
 8 licensee with the same set monetary limit. Licensees of the same monetary limit must be
 9 treated the same, regardless of whether their work is performed for one "client" or for
 10 multiple clients. Simply stated, fundamentals of equal protection mandate that it is
 11 improper to aggregate work for "one client" to determine whether a license limit has been
 12 exceeded while at the same time permitted a similarly situated licensee to enter into a
 13 infinite amount of agreements for separate clients.
 14

15 The Fourteenth Amendment of the United States Constitution forbids an
 16 enactment that "den[ies] ... any person ... equal protection of the laws." U.S.
 17 Const. amend. XIV, § 1. Article 4, Section 21 of the Nevada Constitution
 18 requires that all laws be "general and of uniform operation throughout the
 19 State." "The standard for testing the validity of legislation under the equal
 20 protection clause of the state constitution is the same as the federal
 21 standard." *Barrett v. Baird*, 111 Nev. 1496, 1509, 908 P.2d 689, 698 (1995),
 22 *overruled on other grounds by Lioce v. Cohen*, 124 Nev. 1, 174 P.3d 970
 23 (2008).

24 A statute that treats similarly situated people differently implicates equal
 25 protection. *Rico v. Rodriguez*, 121 Nev. 695, 703, 120 P.3d 812, 817 (2005).
 26 When a suspect class or fundamental right is not involved, different
 27 classifications are permissible, so long as they are reasonable. *Flamingo*
 28

25 ⁵ The NSCB has never addressed Respondent's constitutional attack based on equal
 26 protection (either facially or as applied to the facts of this contested case). The ALJ
 27 certainly has the authority to treat that failure as an admission that Respondent's position
 28 is meritorious. Should the NSCB address equal protection for the first time in its Reply
 Brief, Respondent respectfully requests an opportunity to file a response limited to those
 newly raised arguments.

1 *Paradise Gaming v. Att'y General*, 125 Nev. 39, ----, 217 P.3d 546, 558-59
2 (2009).

3 In re Candelaria, 126 Nev. 408, 416-17, 245 P.3d 518, 523 (2010).

4 Admittedly, Respondents are not a "suspect class" and NRS 624.220(2) does not
5 implicate fundamental rights. Accordingly, the lesser standard of rational relationship to a
6 legitimate governmental interest must be applied to determine if NRS 624.220(2) violates
7 due process. *Gaines v. State*, 116 Nev. 359, 371, 998 P.2d 166, 173 (2000). Even under this
8 lesser standard, it is clear that NRS 624.220(2) is an unconstitutional violation of due
9 process.
10

11 NRS 624.005 sets forth the Legislature's declaration with respect to the provisions
12 of the chapter relating to discipline of licensees.

13 The Legislature declares that the provisions of this chapter relating to the
14 discipline of licensees are intended to promote public confidence and trust in
15 the competence and integrity of licensees and to protect the health, safety
and welfare of the public.

16 Preventing a "client" from re-employing a licensee who has successfully performed
17 previous projects does not meet the Legislature's stated goal. Preventing a licensee from
18 performing the same work on multiple buildings for the same client does not meet the
19 Legislature's stated goal.
20

21 To the contrary, the "public" is at far greater risk of licensee default where a licensee
22 performs multiple projects for multiple different clients, none of whom may know whether
23 the licensee is properly performing on the other client's project. There is no rational basis
24 upon which it can be articulated that NRS 624.220(2) serves a legitimate government
25 interest when similarly situated licensees may overextend themselves by entering into an
26 infinite number of contracts, either concurrently or sequentially, with different "owners".
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As applied to this specific contested case, NRS 624.220(2) substantially narrows the pool of subcontractors who Respondent can hire to perform work. By way of example, a subcontractor with a \$100,000 limit could concurrently perform \$200,000 worth of work for two separate clients, or for one client on two different ends of Reno (provided neither project individually exceeded \$100,000), but cannot concurrently perform \$200,000 worth of work in two separately permitted buildings on the same subdivision site or single construction site. It bears note that Respondent holds an unlimited class "B" license and is also the owner of the projects. There is no public interest to be protected in this contested case; if one of the subcontractors fails, Respondent, and only the Respondent, suffers the consequences of addressing such failure. There is no legitimate government interest in a scheme which prevents Respondent from using well-performing subcontractors over and over again.

IV. Nondelegation Doctrine - the NSCB's attempts to cure the deficiencies in NRS 624.220(2) through the creation of non-statutory factors or tests is an unconstitutional delegation of legislative authority.

There is a profound difference between an agency interpreting NRS 624.220(2), and an agency crafting a test, not present in the statute, that will be applied after the fact using admittedly undefined factors that will vary in weight at the discretion of the agency. In its Closing Brief, much like its previously filed Memorandum, the NSCB essentially argues that the *Tesla Opinion* is not a regulation and is not an attempt to legislate. According to the NSCB, the *Tesla Opinion* is nothing more than a declaratory order disposing of a petition, and elaborating how NSCB staff interprets and applies the statute for the benefit of the public. The public, however, is entitled to protection against discriminatory and arbitrary actions of public officials. 16A Am. Jur. 2d Constitutional Law § 312. That public protection is at the heart of the nondelegation doctrine and it is exactly why the NSCB may not create

1 interpretive orders crafting factors to be used in the application of a statute. If the statute,
2 either on its face or as applied to Respondent, lacks the specificity to determine if/when it
3 should be applied, then it fails as a matter of law. The NSCB cannot "cure" the statute's
4 failure by crafting an internal test.

5 The purpose of the doctrine that legislative power cannot be delegated is to
6 assure that truly fundamental issues will be resolved by the legislature and
7 that a grant of authority is accompanied by safeguards adequate to prevent
8 its abuse. The nondelegation doctrine insures the protection of citizens
9 against discriminatory and arbitrary actions of public officials, and it
provides the assurance that duly authorized, politically accountable officials
make fundamental policy decisions.

10 16A Am. Jur. 2d Constitutional Law § 312. The Legislature may only vest an agency with
11 "mere fact finding authority and not the authority to legislate." *McNeill v. State*, 132 Nev.
12 Adv. Op. 54, 375 P.3d 1022, 1025-26 (2016)(internal citations and quotations omitted).

13 In the *McNeill* case, the Nevada Supreme Court recognized as follows:

14 Because the Board has no authority to impose conditions not enumerated in
15 NRS 213.1243, the nonenumerated conditions the Board imposed on McNeill
16 were unlawful, and McNeill did not violate the law when he failed to comply.

17 *Id.* Here, the NSCB has not only created nonenumerated conditions or criteria for analyzing
18 an admittedly ambiguous statute for potential violation long after private citizens have
19 entered into a contract, the Tesla Opinion concedes that the weight and importance of the
20 nonenumerated conditions will vary from situation to situation.

21 The NSCB's Closing Brief compounds this problem by, for the first time, attempting
22 to use Occupational Safety and Health statutes and Motor Carrier statutes to clarify
23 contractor-licensing statutes. Now, according to the NSCB, persons in the industry must
24 use "several tools...to guide them in defining the geography and duration of a 'single
25 construction site.'" These tools include, at least in part, several statutes not present in NRS
26 Chapter 624 and the NSCB's own Tesla Opinion; they possibly even include unrelated
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1 statutes from other states. The NSCB lacks the constitutional authority to impose any
2 conditions upon a licensee that are not present in the statute, including conditions
3 presented anywhere outside of NRS Chapter 624.

4 **V. It is impossible to knowingly violate a law that everyone agrees is**
5 **subject to multiple reasonable meanings.**

6 The NSCB's Closing Brief claims Respondent knowingly contracted with its
7 subcontractors for work in excess of their limits on 30 separate occasions. Nothing could
8 be further from the truth. As admitted by Mr. Gore during his testimony, the dollar amount
9 of a subcontract, on its face, is not determinative of whether the subcontract is for work in
10 excess of a licensee's monetary limit. See September 28, 2017 Hearing Transcript; p. 111-
11 113. A factual determination must be made as to whether the work encompassed by the
12 subcontract is to be performed on one or multiple construction sites, or one or multiple
13 subdivision sites. While NRS 624.024's definition of "knowingly" may obviate a parties'
14 knowledge of the specific law, it does not obviate factual inquiry or how those facts apply in
15 the context of the law.
16

17
18 Here, there is absolutely no basis to conclude that an ordinarily prudent person
19 (much less Respondent with decades of development and construction experience) would
20 foresee that the NSCB would create a definition of "single construction site" so drastically
21 different than what is used by municipal building departments in the permitting,
22 inspection, and certificate of occupancy process. There is no basis to conclude that an
23 ordinarily prudent person would foresee that the NSCB would borrow statutes from other
24 areas of law, and in fact other states, to create a working definition of "subdivision site" so
25 drastically different than what rules of statutory construction mandate. There is no basis
26 to conclude that an ordinarily prudent person would foresee that the NSCB would ignore
27
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1 the statutory requirement that a statutory subdivision contain five or more divisions of
2 land.

3 As a practical matter, this is a case in which the NSCB, through its counsel, is trying
4 to use creative lawyering to fix statutory deficiencies after a contested case has already
5 been filed. Mr. Gore did not consider the definition of "subdivision site" in other states
6 when conducting his investigation; Mr. Gore did not use NRS 618.953, or 706.463, or the
7 Chapter 108 lien statutes, or even NRS 278.320(1), to make a determination as to whether
8 Respondent had violated the law. Mr. Gore looked at the face dollar amount of each
9 subcontract and, where that dollar amount appeared to exceed the subcontractor's license
10 limit, he subjectively concluded there was a violation of law without any further analysis.
11 There could be no further analysis because, as repeatedly admitted by Mr. Gore, there are
12 no statutes, regulations, internal written guidelines, manuals, or guide books that he uses
13 to determine whether something is a single construction site or subdivision site.
14

15
16 **VI. Conclusion.**

17 Based on the foregoing, Respondent respectfully requests that the ALJ enter a
18 decision as follows:

19
20 (1) Finding NRS 624.220(2) unconstitutional on its face and as applied to
21 the Respondent in this contested case based on violations of due process, equal
22 protection, and the nondelegation of duty doctrine;

23 (2) Finding, factually, that the projects at issue in this contested case do
24 not meet the statutory definition of "subdivision" as set forth in NRS 278.320(1);

25 (3) Finding, factually, that the projects at issue in this case were not
26 "single construction sites" because each building was subject to a separate unique
27 fees, plan checks, permit, inspection process, and certificate of occupancy;
28



1 (4) Finding that the NSCB has failed to meet its burden of proving that
2 Respondent knowingly violated NRS 624.3015(5) by knowingly bidding to contract
3 or entering into a contract with a contractor for work in excess of his limit or
4 beyond the scope of his license (First Cause of Action);

5 (5) Finding that the NSCB has failed to meet its burden of proving that
6 Respondent violated NRS 624.3013(5) by failing to ascertain that each person
7 whose bid on a construction project the licensee considers is appropriately licensed
8 as required by NAC 624.640(6) (Second Cause of Action);

9 (6) Finding that the NSCB has failed to meet its burden of proving that
10 Respondent violated NRS 624.3015(3) by knowingly bidding to contract or entering
11 into a contract with a contractor for work in excess of his limit or beyond the scope
12 of his license (Third Cause of Action); and,

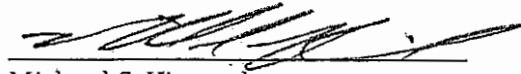
13 (7) Finding that the NSCB has failed to meet its burden of proving that
14 Respondent violated NRS 624.3013(5) by failing to ascertain that each person
15 whose bid on a construction project the licensee considers is appropriately licensed
16 as required by NAC 624.640(6) (Fourth Cause of Action).

17 **VII. Mitigation based on prior clear record.**

18 To the extent the ALJ finds there has been a violation of any kind, Respondent
19 respectfully requests the ALJ consider Respondent's exemplary record when
20 deciding the appropriate disposition of this matter. Additionally, the ALJ should
21 thoughtfully consider that multiple government agencies all agree NRS 624.220(2)
22 is subject to multiple reasonable interpretations, and the investigatory staff of the
23 NSCB admits that there are no clear guidelines for applying the statute. To punish
24 Respondent under such circumstances simply doesn't make sense.
25
26
27
28

Dated this 9th day of November 2017

HOY | CHRISSINGER | KIMMEL | VALLAS



Michael S. Kimmel

Attorneys for Respondents

HOY | CHRISSINGER
KIMMEL | VALLAS
ATTORNEYS AND COUNSELORS AT LAW



CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2017, I personally filed the foregoing with the Nevada State Contractors Board as follows:

Margi Grein, Executive Officer
Nevada State Contractors Board
5390 Kietzke Lane, Suite 102
Reno, Nevada 89511

Courtesy copy via email to:

Noah Allison, Esq.
Attorney for NSCB
noah@allisonnevada.com

Judge Pro
c/o Michelle Samaniego
MSamaniego@jamsadr.com



An employee of Hoy | Chrissinger | Kimmel | Vallas PC

HOY | CHRISSINGER
KIMMEL | VALLAS
ATTORNEYS AND COUNSELORS AT LAW



EXHIBIT “13”

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

**NEVADA STATE CONTRACTORS BOARD'S
REPLY TO RESPONDENT'S CLOSING BRIEF**

COMES NOW the Nevada State Contractors Board ("NSCB" or "Board"), by and through its counsel of record, and submits its Reply to Respondent Silverwing Development's ("Silverwing") Closing Brief.

I.

INTRODUCTION

Silverwing raised several points in its closing Brief. The Board has determined the following points merit a reply:

1. Silverwing's "subdivision" versus "subdivision site" argument.
2. Silverwing's invocation of the "rule of lenity" in an administrative matter.
3. The ALJ's role in deciding a "facial" equal protection clause challenge versus its role in an "as applied" equal protection challenge.
4. Independent or deferential review of the Board's interpretation of NRS 624.220(2) under the facts and circumstances of this case.

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II.

ARGUMENT

A. "Subdivision" and "Subdivision Site" Do Not Mean the Same Thing.

In the context of NRS 278.320(1), a "subdivision" is a noun. It is a legal fiction with a defined beginning and ending, consisting of land divided or proposed to be divided into five or more lots, parcels, units or plots, for the purpose of any transfer or development, or for any proposed transfer or development. NRS 278.320(1). In the context of NRS 624.220(2), a "subdivision site" consists of an adjective, "subdivision," describing a noun, "site," to define the physical place where a subdivision exists. The word "site" in NRS 624.220(2) is not a superfluous word as suggested by Silverwing. It provides real-world context to a legal construct by defining its geographic location, like "subdivision map" defines a map of a subdivision; like "subdivision plat" defines the legally enabling document of a subdivision; or like "subdivision development" defines the construction associated with a subdivision. The Board's interpretation of "subdivision site" in NRS 624.220(2) to mean the place where a subdivision exists is the best resolution of the ambiguity¹.

B. The "Rule of Lenity" Does Not Apply to Civil Administrative Law.

Silverwing urges the ALJ to construe any ambiguity in NRS 624.220(2) in Silverwing's favor based on the "rule of lenity." The lenity doctrine, also called "the rule of strict construction," posits that courts should resolve ambiguity in the meaning of criminal statutes in favor of defendants. *Crandon v. United States*, 494 U.S. 152, 158 (1990). The most commonly cited rationale for the lenity doctrine is the idea that individuals should have advance notice of what conduct will subject them to criminal penalties. *Id.* at 160. The common threads running through all rationales for the lenity doctrine are *criminal* statutes and *criminal* penalties. Regulatory statutes and administrative fines are completely different in scope and purpose.

In *Handyman Connection of Sacramento, Inc. v. Sands*, the California Contractors Board cited and fined a contractor for alleged violations of the Contractors' State License Law.

¹ See also Section D *infra* for discussion on deference given to Board's reasonable interpretation of an ambiguous law under its administration.

1 *Handyman Connection of Sacramento, Inc. v. Sands*, 123 Cal. App. 4th 867, 867 (Cal. App. 2004).
 2 The contractor contested the citation on factual and constitutional grounds. *Id.* at 873-74. An
 3 ALJ heard the matter and upheld the citation and the Board adopted the ALJ's decision². *Id.*
 4 at 874. The contractor appealed the Board's decision to the superior court on a peremptory
 5 writ of administrative mandamus and the trial court affirmed the decision. *Id.*

6 On appeal, the Court addressed several of the contractor's arguments, including its
 7 argument that any ambiguities in the regulatory statutes must be construed in the contractor's
 8 favor. *Id.* at 895. The Court rejected the contractor's assertion ruling:

9 In effect, Handyman urges us either to import the so-called "rule of lenity" from
 10 criminal law into civil administrative law, or to treat occupational regulatory
 11 statutes as contracts of adhesion to which licensees are involuntary parties. To
 12 do either would be unwarranted. Because regulatory statutes like the License
 Law are intended to protect the public, it is the public, not the licensee, that
 deserves the benefit of any doubt.

13 *Id.* at 896, citing and explaining *Hughes v. Board of Architectural Examiners*, 17 Cal. 4th 763,
 14 777-793, 795 (1998) (case involving an agency disciplinary action based on facially ambiguous
 15 statutes where the California Supreme Court resolved the ambiguity *against* the licensee and
 16 in favor of the agency's power to impose discipline for the public's protection).

17 In Nevada, regulatory bodies like the Contractors Board are charged by statute to carry
 18 out the provisions of their respective chapters for the protection and benefit of the *public*. NRS
 19 622.080 (emphasis added). The *Handyman* case from California that rejected the rule of lenity
 20 in administrative discipline matters is applicable here in Nevada. Silverwing thus cannot seek
 21 refuge under the "rule of lenity."

22 **C. The Board Properly Declined to Respond to Silverwing's Equal Protection**
 23 **Challenge to NRS 624.220 at the ALJ Level Because It Was a Purely Facial Challenge.**

24 There are two types of constitutional challenges a party can make under the Equal
 25 Protection Clause: an "as-applied" challenge and a "facial" challenge. An "as-applied" challenge
 26 is a claim that the operation of a statute is unconstitutional in a particular case. *Wal-Mart*

27 _____
 28 ² Notably, in its legal conclusions, the ALJ deferred the contractor's constitutional arguments
 regarding the interpretation of the licensing statutes to the consideration of the appellate court.
Id. at 878.

1 *Stores, Inc. v. City of Turlock*, 483 F. Supp. 2d 987, 996 (E.D. Cal. 2006). A “facial” challenge
2 alleges the statute may rarely or never be constitutionally applied. *Id.* Put another way:

3 [A]n as-applied challenge claims [] the government’s conduct as permitted by a
4 statute violated the defendant’s rights. *The violation is specific to the facts of the*
5 *defendant’s case*, and the statute is flawed only to the extent it permitted the
6 government to act in that case. In contrast, a facial challenge claims [] the
7 defendant was acted upon pursuant to a statute that itself was constitutionally
improper. The harm claimed is not a direct violation of the defendant’s
constitutional rights, but rather a more abstract claim that the defendant was
acted upon pursuant to a statute that has some kind of constitutional defect.

8 *Id.* at 996-97 quoting Orrin S. Kerr, *Congress, the Courts, and New Technologies: A Response to*
9 *Professor Solove*, 74 Fordham L. Rev. 779, 787 n. 50 (2005) (emphasis added).

10 Silverwing’s “constitutional attack based on equal protection” (as phrased in footnote 5
11 of its Closing Brief) is purely a facial attack on NRS 624.220(2). It deploys the textbook “rational
12 basis” / “legitimate government interest” analysis against the statute itself, not the way the
13 Board seeks to enforce the statute under the facts of this particular case. In other words,
14 Silverwing attacks the statute itself; not the way the statute is used against it in this case. We
15 have not heard a whisper of an argument that the Board has singled Silverwing out for unique
16 or disparate treatment under NRS 624.220(2).

17 As explained in Board’s Opening Brief, pure facial constitutional challenges to statutes
18 are reserved for the judicial branch of government to resolve. It is true that a facial due process
19 vagueness challenge imposes a duty on an administrative tribunal in a contested matter. An
20 ALJ should do its utmost to make legal conclusions that accord with constitutional principles.
21 On the other hand, a facial equal protection challenge imposes no duty on the ALJ. A facial
22 equal protection challenge does nothing more than question the Legislature’s wisdom in
23 enacting a law. An administrative tribunal is duty-bound to accept the Legislature’s wisdom
24 without question. The Board therefore has refrained from rebutting Silverwing’s “rational basis”
25 / “legitimate government interest” arguments at this stage.

26 //

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1 **D. The "Chevron Doctrine" Empowers the Board's Interpretation of NRS 624.220(2)**
2 **in this Case.**

3 In 1984, in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837
4 (1984), the Supreme Court handed down a landmark decision in administrative law
5 jurisprudence. The *Chevron* Court held that when a court reviews an agency's construction of
6 a statute it is charged to administer, it is confronted with two questions. *Chevron* at 842. First
7 and always, is the question whether the legislature has directly spoken to the precise question
8 at issue. *Id.* If yes, that is the end of the inquiry for the court and the agency, and the court
9 must give effect to the unambiguously expressed intent of the legislature. *Id.* at 842-43.
10 Second, if the court determines the legislature has not directly addressed the precise question
11 at issue, the court may not impose its own construction of the statute, as would be necessary
12 in the absence of an administrative interpretation. *Id.* at 843. Rather, the court must inquire
13 if the agency's position is based on a permissible construction of the statute. *Id.* In other words,
14 a court may not substitute its own construction of an ambiguous statutory provision for a
15 reasonable interpretation made by the agency. *Id.* at 844.

16 The Nevada Supreme Court recognized the *Chevron Doctrine* in a case similar to this one
17 with respect to deference to administrative interpretations. In *Thomas v. City of N. Las Vegas*,
18 two police officers who were discharged arbitrated their grievances with the City. *Thomas v.*
19 *City of N. Las Vegas*, 127 P.3d 1057, 1060 (Nev. 2006). The collective bargaining agreement
20 between the parties required the arbitration to be governed by the Federal Mediation and
21 Conciliation Services ("FMCS") rules. *Id.* at 1062. The arbitrator ruled that the City's discharge
22 of the officers was justified. *Id.* The arbitrator, however, failed to disclose his membership on
23 arbitration panels for Metro, its unions and other organizations. *Id.* On that basis, the officers
24 moved to vacate the arbitration awards. *Id.*

25 On appeal, the parties debated whether the arbitrator had a duty to disclose his panel
26 membership and whether his failure to do so demonstrated evident partiality. *Id.* at 1069. The
27 Court analyzed the arbitrator's duty under FMCS guidelines, which utilized the "Code of
28 Professional Responsibility for Arbitrators of Labor-Management Disputes" (the "Code") for its

1 arbitrators. *Id.* By design, the Code does not have any bright line rules for disclosure. *Id.*
2 Instead, the facts and circumstances of each case must be weighted when determining whether
3 the standards have been violated. *Id.*

4 The Code requires arbitrators to disclose "any close personal relationship or other
5 circumstance. . . which might reasonably raise a question as to the arbitrator's impartiality."
6 *Id.* at 1070. The City cited "Opinion No. 22" from the National Academy of Arbitrators that had
7 interpreted the disputed Code provision in its favor. *Id.* The Court, citing *Chevron*, deferred to
8 Opinion No. 22 as the equivalent of an agency interpretation of the FMCS guidelines, and on
9 that basis ruled in favor of the City. *Id.*

10 Like the Code described in the *Thomas* case, it is entirely possible and in fact implicit³,
11 that the Legislature chose the phrase "single construction site" in NRS 624.220(2) to give the
12 Board the flexibility to interpret the phrase based on the facts and circumstances of each case.
13 The *Tesla Opinion* does not provide any "rules" or formulae for deciding whether construction
14 activity is on a "single construction site" or multiple construction sites. All the *Tesla Opinion*
15 does is explain how the Board looks at the issue for the benefit of the public. The facts and
16 circumstances vary with each case.

17 The *Chevron* Doctrine requires all tribunals to defer to the Board's interpretation of any
18 and all ambiguous words and phrases in NRS 624.220(2) so long as the Board's interpretation
19 is reasonable. Respectfully, the Board's assertion that multi-building construction projects in
20 the same area, under a common name, under the same owner, under the same general
21 contractor, with construction of buildings occurring progressively and simultaneously, and with
22 subcontracts covering the entire development or multiple buildings constitutes a "single
23 construction site" under NRS 624.220(2) is a reasonable interpretation under the second prong
24 of *Chevron*.

25 //

26 //

27
28 ³ *Chevron* at 843 ("Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.")

III.

CONCLUSION

In summary, the ALJ should construct the phrase "subdivision site" NRS 624.220(2) to mean the place where a subdivision exists. The ALJ should not apply the criminal "rule of lenity" in this matter. The ALJ should not interpret the Board's decision to not respond to Silverwing's facial challenge to NRS 624.220 under the equal protection clause as a waiver of the arguments it will make at the appellate level. Finally, the *Chevron* Doctrine requires the ALJ to defer to the Board's reasonable interpretation and application of NRS 624.220(2) in this case.

DATED this 16th day of November, 2017.



NOAH G. ALLISON, PROSECUTING ATTORNEY
NEVADA STATE CONTRACTORS BOARD

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of The Allison Law Firm Chtd., counsel for the Nevada State Contractors Board, and that on November 16, 2017, I served the attached **NEVADA STATE CONTRACTORS BOARD'S REPLY TO RESPONDENT'S CLOSING BRIEF** 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:

JUDGE PHILIP PRO

3800 Howard Hughes PARKWAY

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LAS VEGAS, NV 89169

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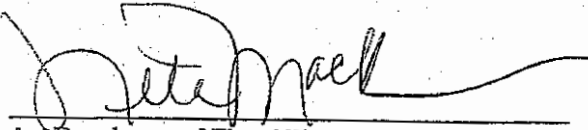
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Counsel for Respondent SILVERWING



An Employee of The Allison Law Firm Chtd.,
Counsel for the Nevada State Contractors Board

EXHIBIT “14”

NEVADA STATE CONTRACTORS BOARD

5390 KIETZKE LANE

RENO, NEVADA 89511

IN THE MATTER OF:

Investigative Case No. 30042873

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

RESPONDENT.

DECISION

Respondent Silverwing Development ("Silverwing") is a licensed contractor in the State of Nevada, holding license number 44017, a Class B (General Building) license with an unlimited monetary license limit, issued December 5, 1997. License number 44017, is held as a corporation with Respondent J. Carter Witt, III as President and Qualified Individual.

On July 14, 2017, the Nevada State Contractors Board ("the Board") filed a Complaint alleging four Causes of Action. The First Cause of Action charges Silverwing, with 30 violations NRS 624.3015(3), for knowingly entering into a contract with a contractor for work in excess of its monetary limit. The Second Cause of Action charges Silverwing with 30 violations of NRS 624.3013(5), for 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 Third Cause of Action charges Silverwing with 3 violations of NRS 624.3015(3), for knowingly entering into a contract with a contractor for work beyond the scope of its license. The Fourth Cause of Action

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.

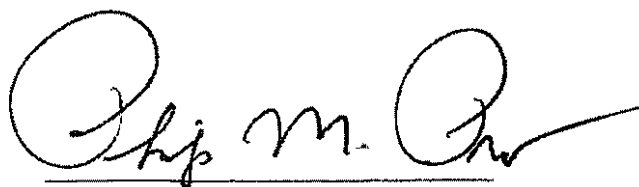
The record adduced at the hearing conducted September 28, 2017, establishes that Silverwing has an unblemished record as the holder of Class B General Contractors license since 1997. Additionally, the record is clear that although the violations found were knowingly committed under the standard enunciated 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 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, 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:

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Silverwing Construction

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Nevada State Contractors Board
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Henderson, NV 89074
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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

CODE: 4185

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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,

Petitioners,

vs.

NEVADA STATE CONTRACTORS BOARD
Respondents.

CASE NO.: CV18-00128

DEPT. NO.: 10

**Transcript of September 28, 2017
Administrative Hearing**

Transcript of September 28, 2017 Administrative Hearing



1 PLEASE TAKE NOTICE that pursuant to NRS 233B.131(1), a certified copy of the
2 September 28, 2017 Administrative Hearing is hereby filed simultaneously with this Notice as
3 Exhibit 15.

4 **AFFIRMATION**

5 The undersigned hereby affirms that the preceding does not contain the social security
6 number of any person.
7

8 Dated April 2, 2018.

9 /s/ Michael Kimmel

10 Michael S. Kimmel

11 HOY | CHRISSINGER | KIMMEL | VALLAS

12 Mark A. Hutchison

13 Daniel H. Stewart

14 HUTCHISON & STEFFEN, PLLC

15 Attorneys for Petitioners
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Certificate of Service

I hereby certify that on April 2, 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:

NOAH ALLISON, ESQ. for NEVADA STATE CONTRACTORS BOARD

PAUL GEORGESON, 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

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

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

/s/ Michael S. Kimmel -
An employee of Hoy | Chrissinger | Kimmel | Vallas PC



Exhibit List

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BEFORE THE NEVADA STATE CONTRACTORS BOARD

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IN RE:
SILVERWING DEVELOPMENT
License No. 44017

Thursday, September 28th, 2017

State Contractors Board
5390 Kietzke Lane, Suite 102
Reno, Nevada 89511

Reported by: KATE MURRAY, CCR #599
Job Number : 410230

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APPEARANCES:

ADJUDICATING LAW JUDGE
PHILIP PRO, Hearing Officer

Board Counsel:
NOAH ALLISON, ESQ.

For the Licensee:
HOY CHRISSINGER KIMMEL VALLAS
Attorneys at Law
MICHAEL KIMMEL, ESQ.
50 West Liberty Street, Suite 840
Reno, Nevada 89501

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1 RENO, NEVADA; THURSDAY, SEPTEMBER 28TH, 2017; 8:30 A.M.

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5 HEARING OFFICER PRO: This is the time
6 set for hearing in the matter of Silverwing
7 Development and J. Carter Witt, III, President, and
8 Qualified Individual on License No. 44017.

9 We are convened in Reno, Nevada at the
10 offices of the Nevada State Contractors Board. We
11 have a video link and audio link to the Board's
12 offices in Las Vegas, Nevada.

13 Let me ask the Executive Director,
14 Ms. Grein, are the doors opened and unlocked in Las
15 Vegas so that those who wish to can attend?

16 MS. GREIN: Yes. The doors are open.

17 HEARING OFFICER PRO: Marvelous. Thank
18 you. Has the notice of today's hearing been
19 properly posted?

20 MS. GREIN: Yes, Your Honor. The notice
21 was posted at the Paseo Verde library, Sawyer State
22 Building, Clark County library, Reno City Hall,
23 Washoe County Courthouse, South Valleys library,
24 both offices of the State Contractors Board, on the
25 Board's website, and on the Nevada Public Notice

1 website.

2 HEARING OFFICER PRO: Thank you,
3 Ms. Grein.

4 I don't see anyone in Las Vegas, but of
5 course, people may come and go, and we have folks
6 here in the audience, and certainly, they're most
7 welcome.

8 Let me begin by asking Counsel to state
9 their appearances for the record and the other
10 participants. I'll start with Mr. Allison.

11 MR. ALLISON: Yes. Thank you. Noah
12 Allison, Prosecutor, Nevada State Contractors Board.

13 HEARING OFFICER PRO: With you on behalf
14 of the Board?

15 MR. ALLISON: I have here sitting with
16 me, Jeff Gore, Investigator, Nevada State
17 Contractors Board.

18 HEARING OFFICER PRO: Thank you, very
19 much. Mr. Kimmel?

20 MR. KIMMEL: Thank you, Your Honor.
21 Sorry. It took me a minute to figure out the mic.

22 HEARING OFFICER PRO: I'm not sure mine
23 is on. Do I need to push a button? Okay. It's on
24 now. Goodness, I hope they can hear me in Las
25 Vegas. If they open the windows, they might.

1 Mr. Kimmel?

2 MR. KIMMEL: Thank you, Your Honor.

3 Michael Kimmel on behalf of the respondents. With
4 me I have J. Carter Witt, who is one of the
5 respondents, and then also Doug Hunter.

6 HEARING OFFICER PRO: Thank you. Thank
7 you very much.

8 All right. Are the parties ready to
9 proceed at this time, Mr. Allison, Mr. Kimmel?

10 MR. ALLISON: We are, Your Honor.

11 MR. KIMMEL: Yes, Your Honor, we are.

12 HEARING OFFICER PRO: Great. Well, a
13 recording and stenographic report of the proceeding
14 is being made, so again, try to avoid talking too
15 fast or our court reporter will have to alert you
16 that you're not getting a good record, and you want
17 to get a good record, I'm sure.

18 Let me begin with just a few preliminary
19 comments because I did have the opportunity to
20 confer with Counsel last week regarding today's
21 proceeding, but by way of recap, let me just kick
22 things off before I turn to Mr. Allison and
23 Mr. Kimmel for them to state their positions.

24 The notice of hearing and complaint was
25 filed by the Nevada State Contractors Board on July

1 14, 2017 for disciplinary action based on four
2 causes of action set forth in the complaint against
3 Silverwing Development and its president and
4 qualified individual, Mr. Witt, on License Number
5 44017 that had been issued on December 5, 1997.

6 Now, the first cause of action, as I read
7 it, alleges basically from December 23rd, 2015
8 through October of 2016, Silverwing began entering
9 approximately 14 contracts with six subcontractors
10 for work on a project identified as the
11 Fountainhouse project.

12 In 2013, entered specified contracts with
13 subcontractors for the Bungalows project.

14 In 2014, entered specified contracts on
15 the Edgewater condos or condominium project, and in
16 2014, entered specified contracts on the Edgewater
17 apartments project.

18 Based upon those factual allegations, the
19 Board alleges that Silverwing violated Nevada
20 Revised Statute 624.3015(3), by entering contracts
21 with subcontractors for work in excess of the limit
22 or beyond the scope of Silverwing's license.

23 The second cause of action is based on
24 the same factual allegations, alleging Silverwing 30
25 times violated NRS 624.3013(5) by failing to

1 ascertain that each person who has been on the
2 construction project considered was appropriately
3 licensed as required by Nevada Administrative Code
4 Section 624.640.

5 The third cause of action alleges that on
6 October 23rd, 2015 and November 11, 2014, Silverwing
7 entered subcontracts with RDR Production Builders to
8 supply and install framing for the Fountainhouse,
9 Edgewater Condo, and Edgewater Apartment projects in
10 violation of Nevada Revised Statute by knowingly
11 bidding to a contract or entering into a contract
12 with a contractor for work in excess or beyond the
13 scope of its license.

14 And the fourth cause of action is based
15 upon those same factual allegations alleged in Count
16 III, that Silverwing has three times violated NRS
17 624.3013 by failing to ascertain that each person
18 who has bid was appropriately licensed as required
19 under Nevada Administrative Code.

20 Now, Silverwing filed a response and
21 answer on August 24, 2017, and I should add
22 parenthetically that the original date for the
23 hearing had been earlier in the month but was
24 continued. I don't recall the specific
25 circumstances, but one of the parties had a conflict

1 so it was continued to today's date, so this is the
2 properly scheduled date.

3 In its answer, respondent argues that the
4 first two causes of action, that is one and two, are
5 based on a premise that all work by one
6 subcontractor for one client, whether under one or
7 multiple contracts shall be aggregated for the
8 purpose of determining whether a license limit has
9 been exceeded on a single construction site or
10 subdivision site under NRS 624.220(2).

11 Respondent contends that that provision
12 of the Nevada Revised Statute is unconstitutionally
13 vague and that it does not give a person of ordinary
14 intelligence a reasonable opportunity to know what
15 is prohibited, thus respondent argues that NRS
16 624.220(2) is unenforceable and cannot provide a
17 basis for an alleged violation of Nevada Revised
18 Statute 624.3015(3), as alleged in Counts I and II.

19 Respondent argues next that it is a
20 violation of equal protection to aggregate work for
21 one client to determine whether a license limit has
22 been exceeded while at the same time permitting a
23 similarly situated licensee to enter into an
24 infinite amount of agreements with separate clients.

25 Respondent argues this warrants dismissal

1 of the first two causes of action.

2 Silverwing also makes responses to the
3 specific factual allegations alleged in the various
4 claims set forth in the original complaint, and
5 further argues in mitigation that respondents have
6 never knowingly or intentionally violated the
7 statutes and have held the same Class B license for
8 over two decades with no defaults or failures to pay
9 subcontractors or other violations.

10 As I mentioned, we convened a
11 teleconference last week. That was the state of the
12 record at the time.

13 The parties raised a very good issue
14 concerning the authority, jurisdiction, if you will
15 of an administrative tribunal to consider challenges
16 to the statutes of a constitutional nature which
17 attack the statute on its face as opposed to
18 as-applied and the attendant factual circumstances
19 that are presented in that regard.

20 Shortly thereafter, counsel for the State
21 Contractors Board, filed a responsive memorandum to
22 the answer setting forth its argument concerning the
23 authority of the administrative law judge and for
24 that matter just the Nevada State Contractors Board
25 through any administrative proceeding to address

1 facially a challenge of constitutionality to a
2 statute, and also with respect to the as-applied,
3 the argument was presented.

4 That was filed on -- I'll find the exact
5 date of that -- September 22nd.

6 On September 26th, on behalf of
7 respondent, Mr. Kimmel did submit an answer, a reply
8 memorandum, if you will, to the Contractors Board
9 memorandum.

10 I didn't get that until this morning.
11 There was some confusion at JAMS in terms of the
12 staff getting that to me. I have had a chance to
13 read that. I haven't had a chance to obviously
14 research any of the matters that were cited therein.

15 When we broke in our teleconference last
16 week, my recollection was two things were going to
17 happen.

18 One, the parties were going to discuss
19 whether there were factual stipulations that they
20 might reach that would obviate the need for calling
21 certain witnesses, and I say that because as to many
22 of the facts alleged, at least as I read the
23 pleadings, there is no debate as to what happened
24 with whom and so forth and when.

25 I may be wrong about that, and it is

1 certainly the right of the parties to present their
2 full evidence upon that, but it seemed to be it
3 might expedite the proceedings somewhat.

4 So the thought was in that call, again as
5 I recall and I'm going to turn to Counsel in a
6 moment to correct my misimpression, if there is one,
7 that the parties did want to perhaps commence with
8 their arguments on the constitutionality
9 prerogatives, reviewing prerogatives of the
10 administrative tribunal with respect to the
11 challenges that are made to the statute.

12 We can proceed in either way. Obviously,
13 this is the kind of matter, it seems to me, given
14 the arguments in advance that will require
15 preparation of a written ruling, and something which
16 obviously would be subject to review in the District
17 Court at the appropriate time.

18 I want to make sure we make a clear
19 record and give Counsel an opportunity to vet their
20 arguments fully and certainly to develop the factual
21 record to the degree that we need to do that, to
22 have a basis to not only inform my decision, but to
23 assist any reviewing court.

24 With that kind of brief summary and
25 introduction, I can turn to both Mr. Allison and to

1 Mr. Kimmel for any opening remarks they wish to
2 make, and please feel free to fill-in the blanks or
3 correct anything that maybe I have misstated about
4 what we have covered.

5 MR. ALLISON: Thank you, Your Honor.
6 Noah Allison, Nevada State Contractors Board.

7 I have spent a significant amount of time
8 on the phone with Mr. Kimmel over the past weeks,
9 couple weeks. We have gotten to know each other.

10 HEARING OFFICER PRO: I commend you both.
11 You were really very cooperative on the phone and
12 obviously have spent some time discussing this case
13 that raises some interesting issues.

14 MR. ALLISON: It does. Leading -- I want
15 to lead off with, and I would like to have some time
16 to do -- you might want to consider it an opening,
17 and I have spoken to Mr. Kimmel, if it's okay with
18 Your Honor, it does have legal elements to it.

19 HEARING OFFICER PRO: Sure.

20 MR. ALLISON: Openings typically preview
21 facts, but I would like to discuss some of the legal
22 elements.

23 HEARING OFFICER PRO: Absolutely.

24 MR. ALLISON: Because I think it will
25 lead toward, at least our interpretation, it leads

1 toward a much more simplistic approach to the
2 factual presentation today.

3 As far as the constitutional issues are
4 concerned, it's my -- it's our contention as stated
5 in our brief, and I certainly respect the
6 respondent's right to raise these issues and to any
7 extent they feel that they need to do that in this
8 forum to preserve their rights to move forward with
9 a facial challenge, I will stipulate today and at
10 this moment that I am not going to get up at the
11 District Court and say that they didn't raise these
12 at the administrative level, and therefore, should
13 be dismissed. I'm not going to make a waiver
14 argument.

15 I agree that you have raised the
16 vagueness challenge. I agree you have raised the
17 equal protection challenge. However, I don't think
18 that those issues are appropriate for an
19 administrative law judge to determine.

20 I think that the administrative law judge
21 has an obligation to try to enforce the statutes
22 that are presented to him as applied with
23 constitutional principles in mind, but I don't think
24 that the facial attacks are on the table for today.

25 If you would like, Your Honor, instead of

1 me giving a long opening on multiple issues, I would
2 be happy to stop here and let Mr. Kimmel respond to
3 that because, to me, that is our position on the
4 facial challenges, the vagueness, and the equal
5 protection.

6 HEARING OFFICER PRO: Mr. Kimmel, do you
7 wish to respond to that aspect of the opening?

8 MR. KIMMEL: Absolutely. Thank you, Your
9 Honor. Like Counsel represented, we have spent
10 quite a bit of time together on the phone trying to
11 simplify some of these issues, and also, quite
12 frankly, discussing the law and discussing our
13 differing points of view on both the
14 constitutionality and then just statutory
15 interpretation in general, and I appreciate
16 Counsel's willingness to do that on behalf of the
17 Board.

18 Your Honor is correct. We did speak
19 about trying to bifurcate, if you will, some of our
20 discussion today, and I agree with Mr. Allison that
21 I think it would be beneficial for the Court for
22 both Mr. Allison on behalf of the Board and then
23 myself on behalf of the respondents to frame the
24 issues legally as we see that they should be framed.

25 That has a component of statutory

1 construction to it. We would argue it also has a
2 component of constitutionality to it. We disagree
3 that the facial -- a facial challenge cannot be
4 examined at all. Of course, if something is
5 facially unconstitutional, then it is
6 unconstitutional under of any set of fact patterns,
7 including our fact pattern, so there is some
8 crossover there from our perspective.

9 The big no-no, if you will, in terms of
10 raising a facial challenge in an administrative law
11 context is if there is no contested case and you're
12 going to the Court, you're going to the
13 administrative law judge and saying, We want you to
14 rule that this statute is unconstitutional. We
15 can't do that in the absence of a contested case,
16 clearly.

17 Once there is a contested case and once
18 the allegations have been made, then those two
19 tests, whether it's as-applied or facial, are really
20 intertwined.

21 The facts are the facts, and we'll go
22 through those at the latter part of this proceeding,
23 but I do believe that Your Honor must entertain and
24 consider both facial and as-applied since we are in
25 a contested case.

1 Now, with that said, I appreciate Counsel
2 for the Board's recognition and stipulation that
3 there would be no waiver of those claims. We
4 believe we have articulated those to a large degree
5 in the papers that have been filed with the State
6 Contractors Board, and we both recognize that
7 everything that has been filed is part of the record
8 on review.

9 HEARING OFFICER PRO: Yeah, and I am glad
10 you both raised this. In many ways, I think you're
11 saying the same thing.

12 You have a challenge, which is both
13 facial and as-applied, and as I think you both
14 observed, an administrative law judge, an
15 administrative tribunal does not have fiat to flatly
16 declare a statute unconstitutional.

17 At the same time, it's undeniable that in
18 considering even an argument as applied, you have to
19 consider the facial -- what the statute says, the
20 facial implications of that, and while I certainly
21 could not make a ruling as I maybe was accustomed to
22 for many years, in dealing with, I cannot ignore
23 those arguments either and would have to work those
24 into my analysis and would appropriately do that.

25 In either case, I think at least after --

1 well, there have been several cases that you all had
2 briefed and referenced, but even just the more
3 recent one, the Showgirls case, the as-applied
4 analysis is something that is appropriate to proceed
5 on and render a finding on and decision on.

6 All of this is without prejudice to
7 either side to seek relief in the state courts where
8 ultimate determinations can be made as to the facial
9 constitutionality of the statute in question.

10 MR. KIMMEL: Then Your Honor, if I might,
11 with respect to Your Honor's question about
12 stipulated facts?

13 HEARING OFFICER PRO: Yeah.

14 MR. KIMMEL: I would tend to agree; I
15 think Mr. Allison agrees as well that the facts are
16 pretty much the facts.

17 What they mean and how they apply is
18 where the meat of this is. Because the record is
19 complete based on even just submitting the documents
20 and all of the individual contracts, we certainly
21 aren't going to endeavor to go through every single
22 one of the 117 exhibits that we made part of the
23 record, and I have no expectation that the Board is
24 going to go through every single page of the 100
25 pages that the Board has included as exhibits.

1 Our intention is to basically pick out
2 two that we think are kind of from two different
3 buckets, if you will, walk the Court through those,
4 and then show the Court that those are
5 representative of the whole.

6 If there becomes any question or issue
7 about whether those are representative of the whole,
8 then we can certainly go through more if it would be
9 helpful to Your Honor.

10 HEARING OFFICER PRO: All right.

11 MR. ALLISON: I'll be doing something
12 very similar to that, and I wanted to -- we were
13 going to use additional buckets, but because of the
14 way some information that has come to light since we
15 last spoke with you, Your Honor, the Board's legal
16 analysis is different than it was coming in a week
17 ago, and it's based on the single construction site
18 part of the statute.

19 HEARING OFFICER PRO: The subdivision
20 site, which is addressed in your memorandum that was
21 also filed two days ago.

22 MR. KIMMEL: That's correct.

23 MR. ALLISON: We have learned that this
24 particular set of facts, and our position is now we
25 have a different legal interpretation of that, is

1 that all of the operative acts for this complaint
2 occurred within the bounds of a subdivision, which
3 we would then say -- that then sort of in our view
4 takes the Tesla opinion off the table, the single
5 construction site component off the table, and that
6 is what this opening analysis that I was going to
7 present discusses.

8 HEARING OFFICER PRO: Though, I think, in
9 Mr. Kimmel's reply memorandum just filed, the
10 argument is that the vagueness argument applies
11 whether we're talking about construction or
12 subdivision site.

13 MR. KIMMEL: That is correct, Your Honor.
14 I would add to that that we absolutely disagree that
15 any of these were subdivisions, statutory
16 subdivisions as that is defined in NRS 278, and that
17 is part of the legal framework that we will set up
18 when it becomes our turn to discuss the legal aspect
19 of this.

20 HEARING OFFICER PRO: Okay.

21 MR. KIMMEL: I would like to also add
22 that prior to the start of those proceedings,
23 earlier this morning, I provided Mr. Allison with
24 several copies of pages of the recorded maps from
25 each of these projects.

1 I think Mr. Allison actually has some of
2 these included in his slides that he will be
3 presenting, but I would like to have those be part
4 of the record on appeal.

5 MR. ALLISON: I have no objection to
6 marking these. Would this be a good time to move to
7 put things in the record?

8 HEARING OFFICER PRO: Yeah. Let's go
9 ahead and do that, so at least we have a clear
10 factual record, and our court reporter can note it.

11 MR. ALLISON: May I approach?

12 MR. KIMMEL: I have one, so you can keep
13 that. I printed enough for the Board.

14 HEARING OFFICER PRO: Now, what is
15 provided to me, it appears a marking of 5095. Is
16 that intended to be the identifier?

17 MR. ALLISON: No, Your Honor. I believe
18 that is the map number on record with the recorder's
19 office.

20 HEARING OFFICER PRO: Okay.

21 MR. KIMMEL: But, Your Honor, it will
22 work as an identifier because each page has that
23 individual map number on it that is provided by the
24 recorder's office.

25 HEARING OFFICER PRO: 5054 as the case

1 may be and so forth.

2 MR. KIMMEL: That's correct, Your Honor.

3 HEARING OFFICER PRO: With regard to the
4 other exhibits, you had submitted binders of
5 exhibits, and I take it, there is no objection to
6 any of those being received into this record?

7 MR. ALLISON: I have one -- I have --
8 obviously, I asked to move in the Board's exhibits,
9 which are numbered through page 457 plus, and I have
10 no objection to admitting their exhibits, 1 through
11 106, and the condominium maps as well.

12 HEARING OFFICER PRO: Okay.

13 MR. ALLISON: There is an exhibit that
14 they're offering, which I think is better -- which I
15 do object to in terms of it being an exhibit.

16 I don't object to it being part of the
17 record on appeal, and that is the LCB opinion that
18 was attached to the reply brief.

19 HEARING OFFICER PRO: That is marked as
20 107 on mine.

21 MR. ALLISON: I don't regard that as
22 evidence.

23 HEARING OFFICER PRO: The Wheeler matter?

24 MR. ALLISON: Right. I don't regard that
25 as evidence. I think it is, frankly, an amicus

1 brief in an administrative setting during a
2 disciplinary proceeding.

3 The Board has all kinds of problems with
4 this outside of this proceeding, but we don't think
5 that it's evidence in the sense of --

6 HEARING OFFICER PRO: So you're saying
7 it's better confined to legal argument?

8 MR. ALLISON: Correct.

9 HEARING OFFICER PRO: Briefing and so
10 forth.

11 MR. ALLISON: Correct.

12 HEARING OFFICER PRO: What about that the
13 September 19th, 2017 letter to Assemblyman Jim
14 Wheeler?

15 MR. ALLISON: Yes. That is what I'm --
16 that is the LCB opinion I'm referring to.

17 HEARING OFFICER PRO: Right, okay.

18 MR. ALLISON: Yeah.

19 HEARING OFFICER PRO: What about that,
20 Mr. Kimmel?

21 MR. KIMMEL: Well, I want to make sure
22 I'm understanding what the objection is. It sounds
23 like Mr. Allison is saying he has no problem with it
24 being part of the record.

25 HEARING OFFICER PRO: Correct, just not

1 an evidentiary exhibit.

2 MR. KIMMEL: If it's not an evidentiary
3 exhibit, that's fine.

4 HEARING OFFICER PRO: Okay. It is part
5 of the record. It is an exhibit to the reply
6 memorandum of September 26th, submitted by
7 Mr. Kimmel, on behalf of respondent.

8 Any objections to any of the State's
9 records that were included?

10 MR. KIMMEL: No, Your Honor, except I
11 would just like to qualify that the contracts that
12 were included are not complete, and that is
13 something that we will address when we go through
14 them factually.

15 They don't include the exhibits to the
16 contracts themselves.

17 HEARING OFFICER PRO: That probably would
18 be pretty voluminous, but are they essential to
19 the --

20 MR. ALLISON: I need to hear the
21 testimony why they would --

22 HEARING OFFICER PRO: Why it matters?

23 MR. ALLISON: Why it matters.

24 HEARING OFFICER PRO: All right. Well,
25 we can always make supplements to them to make them

1 complete, if necessary.

2 MR. ALLISON: Right.

3 HEARING OFFICER PRO: All right. With
4 that understanding, go ahead, Mr. Allison, with your
5 presentation.

6 MR. ALLISON: Thank you. Your Honor did
7 an excellent job of framing the issues and the
8 statutes that are on -- our disciplinary statutes
9 that are applicable today, that are being pled.

10 The underlying statute, though, that
11 gives rise to this discipline is NRS 624.220, and
12 I'm going to be showing a presentation on
13 PowerPoint. The slides have been provided to
14 everybody.

15 This is something similar to what the
16 Board gave at a presentation at the Southern Nevada
17 Home Builders on this issue, and it is on point in
18 our view with the facts of this case, and I have
19 tied that into this PowerPoint.

20 Going to the second slide, this is
21 something that Your Honor knows very well, and these
22 are the rules of statutory construction. Your Honor
23 knows this very well, and the rules are very simple.

24 When a statute is clear and unambiguous,
25 there is no room for interpretation. You have to

1 apply it as it is written and give it its plain
2 meaning.

3 When a part of the statute is ambiguous,
4 the Board must ascertain, or the ALJ in this
5 situation must ascertain the will of the legislature
6 when it enacted the statute. There are lots of ways
7 to do that, starting with statutes, legislative
8 history, statutory definition, regulatory
9 definitions, other items.

10 The Board also may examine the objects
11 sought to be obtained by the statute, meaning the
12 purpose, and laws on the same or similar subjects
13 and the consequences of a particular construction,
14 which these are all basic rules of statutory
15 construction as Your Honor, I'm sure, is very
16 familiar with them.

17 Focusing on the statute that really is
18 the heart and soul of this matter, it's 624.220(2).
19 I would like to take a minute and really dissect
20 this statute with Your Honor and for the people in
21 the gallery as well because it is the Board's intent
22 to educate on this issue as often as possible.

23 The Board shall limit the field and scope
24 of the operations of a licensed contractor by
25 establishing a monetary limit on a contractor's

1 license.

2 That's the first phrase that section. It
3 is a "shall," meaning the Board is obligated to do
4 that. This has been in place since prior to --
5 since the 1940s, I believe.

6 It's never been challenged, and it's been
7 recognized that the Board has this obligation to set
8 financial limits.

9 The second phrase in the section then
10 defines the way the Board does that, and it's broken
11 into various phrases, and that goes to the next
12 slide.

13 The first phrase that we have is, The
14 limit must be the maximum contract a licensed
15 contractor may undertake on one or more construction
16 contracts.

17 When we do our -- the very first primary
18 rule of statutory construction, we must look to see
19 if there is an ambiguity. Is there anything
20 ambiguous about that phrase, and we, the Board, does
21 not believe -- it's the Board's contention there is
22 nothing unambiguous about that. It must be given
23 its plain meaning. The limit must be the maximum
24 contract a licensed contractor may undertake on one
25 or more construction contracts.

1 The next phrase is a single construction
2 site, on a single construction site.

3 Because of what I'm about to show the
4 Court regarding the subdivision issues, I don't
5 think that this particular phrase, and this is the
6 phrase that the Tesla opinion was based on, "on a
7 single construction site," phrase.

8 It relates to commercial property mostly.
9 It was used on the Gigafactory. That was why Tesla
10 wanted this. It was a very large single parcel that
11 they were going to be building in multiple phases.

12 That phrase doesn't have applicability
13 here, and that is the phrase that I will agree that
14 the Board thought there was some ambiguity and
15 thought that there was a need for the Tesla opinion,
16 at least not to make rules, but to explain to the
17 public how the Board interpreted that phrase.

18 The next phrase in the sentence is
19 "subdivision site," and this is another phrase that
20 the Board believes does not have any ambiguity about
21 it. There is a plain meaning and well understood
22 meaning in the law and in the public as to what a
23 subdivision is, and I'll spend a minute talking
24 about that.

25 The final phrase is for a single client.

1 Again, this is something that we don't think this is
2 an ambiguous phrase for the public and has a plain
3 and simple meaning.

4 So summing up, phrases 1 and 4, when you
5 put them together, which we think are unambiguous,
6 the limit, and I'll use the Silverwing relationship
7 as my point, the limit is the most a subcontractor
8 may contract for under one or more multiple
9 subcontracts with a single general contractor.

10 That is the Silverwing situation. That
11 is the situation we have here. We have Silverwing
12 as a contractor; multiple subcontractors are working
13 with them.

14 A client is simply a customer. There is
15 really no misunderstanding as to the meaning of
16 that.

17 Now, we get to subdivision. What is a
18 subdivision? When you couple it with the word
19 "site," what is a subdivision site?

20 A site -- I go to Black's Law Dictionary
21 for "site." A site is a place. It's a plot of
22 ground suitable or set apart for some specific use,
23 so when you take the word "site," and you put the
24 word "subdivision" in front of it, simply I think
25 it's unambiguous that just that means that it is a

1 place where the subdivision is. That is what a
2 subdivision site would be.

3 A subdivision is defined by Nevada law in
4 NRS 278.320, and Your Honor, if you would like to
5 have a copy of this statute, I can have it made and
6 provided if you want to look at that at some point.

7 HEARING OFFICER PRO: Well, certainly, I
8 don't have it in front of me, but I can obtain that
9 separately. Go ahead.

10 MR. ALLISON: A subdivision means any
11 land, vacant or improved, which is divided or
12 proposed to be divided into five or more lots,
13 parcels, sites, units or plots for the purpose of
14 any transfer or development or for any proposed
15 transfer or development unless exempted by one of
16 the following provisions, and then they give some
17 exemptions, none of which, and if I hear that an
18 exemption applies, I'll address it in response, but
19 I don't think any of these exemptions are applicable
20 that are given in the statute, so that is what a
21 subdivision is.

22 We know what a subdivision is. The
23 Nevada Revised Statute tells us how a subdivision is
24 created. There are multiple procedures that go into
25 creating a subdivision.

1 You need signatures from all different
2 kinds of bodies. You have to record a map, a plat.
3 There are all kind of things that have to happen in
4 order to create one, and then the question becomes
5 when is a subdivision created because a
6 subdivision -- there is a point in time when land is
7 not a subdivision and then there is an exact point
8 in time when it changes from being raw land to a
9 subdivision. When is that?

10 There is some case authority. I can
11 provide the cites on that, if Your Honor wants them.
12 If I hear dispute on it, I'll provide those cites,
13 but the authority is that a subdivision is created
14 upon the recording of a properly approved plat. At
15 that moment, the subdivision comes into existence.
16 That subdivision continues its existence until
17 sometime in the future when it is reverted. It
18 could be in perpetuity, but what signals the death
19 of a subdivision is a reversion, a recording of a
20 reversion back to the land.

21 Those are the beginning and end posts of
22 a subdivision.

23 HEARING OFFICER PRO: Under that
24 interpretation, would a subdivision be comprised or
25 essentially be comprised of five or more

1 construction sites, individual construction sites?

2 MR. ALLISON: There could be any number
3 of construction sites going inside of a subdivision.

4 HEARING OFFICER PRO: Well, it could be
5 more.

6 MR. ALLISON: You could have 20 different
7 projects happening within a subdivision for the same
8 client.

9 Now, you could have 20 different
10 construction projects going on in a subdivision for
11 different clients, and then you don't even get into
12 the 220(2), but when they're all for the same client
13 and when they're all within the same subdivision,
14 the Board's position is -- the Board's position is
15 that you aggregate those license limits because it's
16 within a subdivision site.

17 It's unfortunate, and I'm going to say
18 right now, I did not write this law. The Board did
19 not write this law. This law was written in 1967.
20 Perhaps there was a different understanding at the
21 time or a different -- subdivisions were being used
22 differently then, and I am not going to dispute
23 that, but that is the law that is in effect today.
24 It's been in effect for 50 some years.

25 HEARING OFFICER PRO: Yeah. Originally,

1 promulgated in 1941.

2 MR. ALLISON: Right. The language, the
3 "single construction site" or "subdivision site"
4 language was added in the 1967 session. There are
5 absolutely no minutes or anything that tells us why
6 they did that.

7 Again, we don't look at those things when
8 it's unambiguous, and I think "subdivision site" is
9 unambiguous. I think the law unambiguously says
10 that the limit must be the maximum contract a
11 licensed contractor may undertake on one or more
12 construction contracts on a subdivision site for a
13 single client. That's it. Very simple.

14 What we have here in this case, I'm going
15 to present and we are going to hear argument to the
16 contrary, I'm going to present that this is all
17 occurring within a single subdivision, and I will
18 take the evidence on that as necessary, but I think
19 a lot of this is judicial notice and I think a lot
20 of this is going to be uncontested.

21 I'll start with the three subdivision
22 areas, and that's the Fountainhouse at Victorian
23 Square, and we have our subcontractors that are over
24 their license limits within that subdivision and out
25 of scope.

1 We have the Bungalows at Sky Vista. We
2 have them on that subdivision, and then we have
3 Edgewater at Virginia Lake. Now, that was
4 originally split into two, and because we had one
5 called the Edgewater at Virginia Lake Apartments and
6 we had Edgewater at Virginia Lake Condominiums, but
7 these are all within the same bounds of the
8 subdivision.

9 The reason why, and I want to do a bit of
10 a mea culpa -- the reason why this only became an
11 issue a week ago for us, or the other day for us,
12 was because, typically, in construction, apartments
13 are conceived and understood to be commercial
14 property.

15 Normally, they will sit on a single
16 parcel, and they're apartments. You rent them out
17 and it's one parcel for an apartment complex.

18 I got some information from Mr. Kimmel
19 the other day where he made reference to Mr. Witt,
20 his business practice is to create a subdivision at
21 the inception of this so that at a later date, he
22 could do a condo conversion. He could take these,
23 and I think it's easier to do it upfront than to do
24 it on the back end, to do that subdivision exercise.

25 At that point, I said, Oh, my gosh, all

1 of these things that I thought were apartments all
2 along because they say "apartments," are actually
3 within subdivisions, and I went and checked and that
4 is exactly what they are. They are within
5 subdivisions.

6 I have my excellent help here. I do have
7 278.320 printed out for you.

8 HEARING OFFICER PRO: Thank you.

9 MR. KIMMEL: I have it. Thank you,
10 though.

11 MR. ALLISON: Yeah.

12 What we have, again, is we have these
13 three projects, and now, if we go to each of these,
14 I want to kind of take a minute and we're going to
15 learn a little bit about these projects. They look
16 like they're actually very nice projects, by the
17 way.

18 This is the Fountainhouse at Victorian
19 Square project, and what we're looking at here on
20 the screen, Judge, this is a map that is provided on
21 the website for Washoe County where you can actually
22 overlay the subdivision boundaries, so if you look
23 at this, and you can see and now, it's hard to see,
24 but you can see -- may I go back here where
25 Mr. Leggett is, and I can maybe point at some things

1 on the screen for you?

2 All right. I'm going to go back here.

3 Fountainhouse at Victorian Square, there is
4 Victorian Avenue at the bottom, and you have Avenue
5 of the Oaks across the middle, and you have this
6 parabola, like a dome section running from Victorian
7 Avenue on the bottom across Avenue of the Oaks to
8 Victorian Plaza Circle at the top, that area is
9 called the Fountainhouse -- that is a subdivision,
10 that area there. That is, as I understand it, the
11 Fountainhouse project.

12 If we go to these documents, these are
13 the actual creations of the documents. You see all
14 the signatures and items that have to go into
15 getting a subdivision map recorded, a plat recorded
16 and all the things that go into that. You see the
17 city engineer has to sign it, water resources, the
18 utility companies, Reno City Planning, health
19 certificate. I mean, it's a very in-depth process
20 to get this created, this subdivision created.

21 At the very top on the left-hand side,
22 this is important, we have what is called the
23 owner's certificate.

24 What you have over here is you have the
25 owner entity, which is called SWD-NVL, LLC. That's

1 the owner of the property. That is J. Carter Witt.
2 It's an entity owned by Mr. Witt. Mr. Witt is also
3 the owner of Silverwing, so what Mr. Witt does, and
4 I don't think there will be disagreement is he
5 develops his own properties.

6 He has his own general contracting
7 company, and he contracts with his own general
8 contracting company to develop his own property, who
9 then goes ahead and hires subcontractors.

10 What we have here is we have Mr. Witt
11 knowingly creating this subdivision and the date,
12 the birth date of this subdivision, if you look in
13 the lower right is November 16, 2015. That is the
14 date that this legal concept came into being,
15 November 16th, 2015.

16 When you go through these items, I know
17 you can't see much on the screen, but if you look at
18 the second page on the left-hand side, this is
19 5095A, you will see in the lower left-hand quadrant,
20 total area, 10.64 plus or minus acres; total number
21 of common element parcels, three; area, 10.32 acres;
22 total number of dedication parcels, one, and then
23 below that, total number of lots, condo units, 336.

24 Again, we go back to the definition of a
25 subdivision in our statute, and we have it as

1 divided or proposed to be divided into five or more
2 lots, parcels, sites, units or plots, so we have 336
3 on the face of this particular item.

4 Again, these are more parts. Now, we
5 move on to the Bungalows at Sky Vista. If I may, I
6 will go over and define the metes and bounds of this
7 project, so we can understand where that is.

8 HEARING OFFICER PRO: In terms of
9 understanding where the other one was, the
10 Fountainhouse, is that -- I'm trying to picture
11 geographically.

12 Would it be east basically of the
13 university, more towards Sparks?

14 MR. WITT: Your Honor, it's directly
15 across from the Nugget Casino.

16 HEARING OFFICER PRO: Okay. So it is in
17 Sparks.

18 MR. WITT: On 80.

19 HEARING OFFICER PRO: Yes, okay.

20 MR. ALLISON: We have the Bungalows at
21 Sky Vista project and this has Silver Sky Parkway on
22 the right-hand side, running through the center of
23 the map moving toward the right, and in the center,
24 you see in yellow, a large area. That area there,
25 running along Silver Sky Parkway, is my

1 understanding of the Bungalows at Sky Vista.

2 Now, it's not only the yellow area.

3 You'll notice it also runs to the left. You see the
4 boundary running to the left and then straight up
5 heading toward Lear Boulevard, and then it kind of
6 jumps back down and reconnects with the yellow
7 section and goes back to Silver Sky Parkway.

8 That entire area, as I understand it, is
9 the Bungalows at Sky Vista subdivision.

10 Again, we have the same idea. We have
11 the map for that. This entity is called SWD-Quarry
12 Bungalows, LLC, Mr. Witt signing on behalf of that
13 entity, another owner-builder concept where he used
14 his Silverwing entity to do the development of this
15 project, all the signatures of all the folks.

16 We have a birth date on this of November
17 26th, 2013. That's the date that the map was, the
18 plat was recorded.

19 I put the word "knowingly" into the
20 slides because that is a critical element as far as
21 the scienter with respect to the violation of the
22 statutes, and we can get into that later, but there
23 is a statutory definition of "knowingly" in our
24 chapter.

25 All the different parts there, all the

1 different units. I do think it's in the -- let's
2 see, second page of the document of the Bungalows.
3 Lower center, subdivision summary, total area, 32.52
4 acres; total lots, 188.

5 So again, we have the five or more units,
6 lots, et cetera, divided or proposed to be divided.

7 Edgewater at Virginia Lake is the third.
8 This is along the shore of Virginia Lake, and we
9 have -- I can't make out the street there, but it
10 looks like --

11 HEARING OFFICER PRO: It's right behind
12 the Peppermill basically, isn't it? Between that
13 and Virginia Lake?

14 MR. ALLISON: Okay. It's the entire area
15 where you see the red except for the part on the
16 other side of the street on the right. That is a
17 different subdivision, but everything on the
18 left-hand side, except for Virginia in the lower
19 right there, that appears to be a separate
20 subdivision. That is the Edgewater at Virginia Lake
21 subdivision.

22 It was neat. I've got to give Washoe
23 County props. They really have a nice website where
24 you can layer the subdivisions right over the areas.

25 Does Your Honor have any questions so far

1 about where everything is?

2 HEARING OFFICER PRO: No, no. I am okay
3 on that.

4 MR. ALLISON: Again, we have a the
5 ownership entity here for Virginia Lake. I have an
6 entity here called SWD-NVL, LLC, J. Carter Witt, and
7 the birth date, September 5th, 2014, 2:54 p.m. for
8 this subdivision.

9 Second page, we see 10.64 plus or minus
10 acres; total common element, parcels three, and
11 skipping down, total number of lots, condo units,
12 336.

13 Then a second section that says, Total
14 number of limited common element parcel, and I don't
15 know what that means, 360.

16 So with that information, which only came
17 to light the other day, the Board's position is what
18 we will do because these are within subdivision
19 sites and these contracts postdate the subdivision,
20 the birth date of the subdivision and the
21 subdivisions are still in existence at this time,
22 what the statute requires us to do is if you are
23 working within a subdivision, for a single client,
24 what you would do is you would simply take that, you
25 would have a license limit, and then as you do

1 different contracts, you continue to add them up,
2 and again, I apologize for the way this was written.
3 I did not write it.

4 This is a legislative concern. I have no
5 problem if somebody wants to go back to the
6 legislature next session and maybe make some changes
7 there, but unfortunately, what that means, Your
8 Honor, is if you are in a subdivision and you're
9 working for a single client in 2001, and you go back
10 into that same subdivision 10 years later for the
11 same client, it is going to aggregate your license
12 limit.

13 That is our position. That is what we
14 think the law says, and we think that is
15 unambiguous, and we think that is what the evidence
16 is going to show today.

17 HEARING OFFICER PRO: Let me just ask out
18 of curiosity, is that the manner in which it has
19 been consistently applied by the Board, if you know?

20 MR. ALLISON: I believe it has.

21 HEARING OFFICER PRO: All right.

22 Mr. Kimmel?

23 MR. KIMMEL: Thank you, Your Honor. I
24 think I'm going to take my argument a little bit out
25 of turn from what I originally intended because of

1 some of the things that have been said.

2 There's two premises, though, that I
3 would like Your Honor to consider that frame
4 everything that I am about to say.

5 The first is that the Board is
6 incorrectly taking the position that "subdivision
7 site" is synonymous with "subdivision," and I will
8 get to that.

9 The second, and this, to some degree, is
10 an application of law to fact, the Board is
11 incorrectly taking the position that just because
12 these maps say "condominium subdivision" on them,
13 that that means they are a statutory subdivision
14 under the definition of the statute.

15 It's very important in our analysis that
16 we actually go through these statutes to see how
17 they apply.

18 From a more general perspective, I think
19 that Counsel for the Board has framed the area in
20 which the dispute lies in this case. It is really
21 one phrase or one part of a sentence within
22 624.220(2), and it's the one or more construction
23 contracts on a single construction site or
24 subdivision site for a single client.

25 I don't believe there is any dispute here

1 that we're talking about a single client. I don't
2 think there is any dispute here that aggregation
3 under the statute can occur across one or more
4 multiple contracts.

5 The dispute here is bound up in what does
6 the phrase "single construction site" mean, and what
7 does the phrase "subdivision site" mean and then,
8 under which of those two phrases do the facts of
9 this particular case apply.

10 So for a minute, let's start with "single
11 construction site." Through the Tesla letter and I
12 believe here on the record, the Board has conceded
13 that "single construction site" is ambiguous.

14 It is a phrase that is subject to any
15 number of reasonable meanings, and because of that,
16 we clearly believe that that is unconstitutional,
17 both in application and on its face.

18 What is clear, though, is that "single
19 construction site" is stated in the singular. It is
20 a thing. It is not multiple things, so let's move
21 on to "subdivision site."

22 There is no statutory definition or
23 judicially created definition of the phrase
24 "subdivision site." It's clear that the phrase is
25 stated in the singular. Site is singular.

1 Now, NRS 278.320 defines a subdivision
2 as, and I quote, "Any land, vacant or improved,
3 which is divided or proposed to be divided into five
4 or more lots, parcels, sites, units or plots for the
5 purpose of any transfer or development unless
6 exempted by law," end quote.

7 If we break that down, the definition of
8 a subdivision requires the division of land, land,
9 into five or more parts.

10 For a second, we won't talk about what
11 the parts can be, but the clear requirement is the
12 actual land has to be divided into five or more
13 parts. In the absence of that division, there can
14 be no statutory subdivision. That is what the law
15 provides. We can't ignore that.

16 When we get to the testimonial part, and
17 I can give a little bit of a preview now, but when
18 we go back through these maps, what we really need
19 to be looking for is whether the land has been split
20 apart in some way into various pieces, and it has to
21 be more than five pieces, five pieces or more, the
22 land.

23 It doesn't matter if there is a thousand
24 buildings on one parcel of land, and each one of
25 those buildings has some kind of unique identifier.

1 If the land has not been divided out in some
2 fashion, then it cannot be a subdivision.

3 HEARING OFFICER PRO: Let me ask you.
4 You note that there is no statutory definition of
5 "subdivision site."

6 MR. KIMMEL: Correct.

7 HEARING OFFICER PRO: There is a
8 definition, as you just read from NRS 278.320 of the
9 term "subdivision," and within that, it refers to
10 five or more lots, parcels, sites, units or plots.

11 It incorporates the word "sites" into the
12 definition of "subdivision." Are you saying that,
13 in essence, a subdivision site, therefore, would be
14 one of the five sites within a subdivision?

15 MR. KIMMEL: It's possible. The point,
16 and I think Your Honor's point is a good one, the
17 key here is that clearly a subdivision site has to
18 be a portion of a subdivision. They cannot be
19 synonymous.

20 HEARING OFFICER PRO: Like a parcel, like
21 a plot or a lot, it would be, by your construction,
22 something that is incorporated or included within a
23 subdivision.

24 MR. KIMMEL: Yes, the idea Your, Honor,
25 is that the subdivision is the pie. For the pie to

1 be created there has to be an aggregation of various
2 parts. The statute defines what some of those parts
3 might be, and Your Honor, with respect to some of
4 those words, the parts actually have their own legal
5 definition like lots, parcels.

6 HEARING OFFICER PRO: Right.

7 MR. KIMMEL: Site doesn't, and I'll get
8 to that in a minute, but the point is, clearly,
9 "subdivision" and "subdivision site," singular,
10 cannot be synonymous because the statute says that
11 you would need multiple sites to make up a
12 subdivision.

13 Now, there is a second and very, very
14 important component of that. Remember, this is all
15 predicated on a division of land. It's not multiple
16 buildings. It's a division of land. Five or more
17 divisions of land in some form, whether it's lots,
18 parcels, sites, units or plots, five or more
19 divisions of land before it can be considered a
20 subdivision.

21 Now, as a preview, I will tell you, when
22 we go through these actual maps, what we will see,
23 both in the notes and that is why I have provided
24 the Court and Board's Counsel with printouts because
25 it is very important that we read what is actually

1 going on on these maps and not just presume that
2 because they say "condominium subdivision," they
3 equate to an NRS 278.320 statutory subdivision.
4 Those are different things.

5 What we will see when we go through these
6 actual maps and the notes is that the land itself
7 was not divided up into more than five pieces, five
8 or more pieces on any one of these projects;
9 therefore, by definition, they cannot be considered
10 statutory subdivisions.

11 Let me step away from that for a second,
12 Your Honor, and let's just talk about statutory
13 construction for a second.

14 Counsel did a good job of presenting some
15 of the tenets of statutory construction. Well,
16 there are other tenets as well.

17 The Court can't simply ignore words,
18 pretend they're not there. "Subdivision site"
19 stated in the singular contains a word that is not
20 present in the title or definition of 278.320,
21 subdivision. One is a subdivision site. One is a
22 subdivision.

23 Again, the distinction there is that the
24 subdivision is -- if you even have a statutory
25 subdivision, it is the pie. The subdivision site,

1 if there were to be a statutory subdivision, is a
2 piece of that pie.

3 So the contractor's law with respect to
4 license limits aggregates within the piece of the
5 pie, not across all of the pieces of the pie.

6 Had the legislature intended that type of
7 aggregation, it could have said, subdivision without
8 using the word, the singular modifier "site."

9 HEARING OFFICER PRO: If the statute
10 simply said, if NRS 624.220(2) simply struck the
11 word "site" and said, subdivision for a single
12 client, that would be --

13 MR. KIMMEL: Yes, Your Honor. My
14 apologies. I didn't mean to speak over you.

15 Exactly, or another option would be to
16 make the word "site" plural, "subdivision sites."
17 Either way would have the same effect, but what is
18 clear is the legislature chose to state it in the
19 singular in the same way that it chose to state
20 "single construction site" in the singular.

21 There is no basis, either in the plain
22 language of the statute or in legislative history or
23 anywhere else, to conclude that the legislature
24 intended aggregation across the entire subdivision.

25 As Your Honor just pointed out, it would

1 have been so incredibly simple just to say
2 "subdivision." It is already a defined word
3 somewhere else in another statute.

4 So Your Honor, where does that ultimately
5 get us? It gets us to the place that runs us right
6 into the problem, the constitutional problems with
7 these statutes.

8 It doesn't matter whether we're talking
9 about a single construction site or a subdivision
10 site. The word that is not defined anywhere is
11 "site."

12 That is where the problem arises because
13 there is no legitimate way for my client to make a
14 determination on the front end whether they are
15 violating the law.

16 There is no legitimate way on the back
17 end for the enforcement arm of this law, the
18 Contractors Board, to make the determination of
19 whether it applies, a particular law applies. That
20 is why the Tesla letter created some factors.

21 It's why the LCB wrote the letter that it
22 did because, unfortunately, and it's not the Board's
23 fault, it's not my client's fault, we're dealing
24 with a statute that is ill defined.

25 Now, we will get to what the reasonable

1 application from our perspective is, that the city,
2 the building departments, the county, the
3 permitting, the inspections, all of those things are
4 done by building. That is the reasonable
5 interpretation of what the site is.

6 HEARING OFFICER PRO: So you don't
7 quarrel with the concept that each of the locations
8 we're talking about, the Bungalows, Edgewater, is a
9 subdivision?

10 MR. KIMMEL: No, we do. We disagree with
11 the contention that they are a statutory
12 subdivision.

13 HEARING OFFICER PRO: Because it's not
14 divided into five or more parcels or lots.

15 MR. KIMMEL: Exactly, Your Honor. A
16 condominium project is not a subdivision. A
17 subdivision has certain implications, right?

18 I mean, in reality, when you look at the
19 notes, what is going on here is the division is air.
20 It's air within a wall space, but it's not the
21 ground below, and it expressly states that, that the
22 ground below is common element that is owned as one
23 entirety. It's not divided. It's the space within
24 the unit, within the walls, the air, if you will,
25 that is divided, so it does not meet the definition,

1 the statutory definition of a subdivision.

2 Condominiums are actually governed by 117
3 and to some extent, 116, which is the common
4 interest community statute, but "condominium" itself
5 is defined within NRS Chapter 117.

6 What we are doing here, we have to step
7 back for a minute. What we're doing here is we're
8 taking a phrase, either "subdivision site" or
9 "single construction site" that is in 624, and we
10 all recognize neither of those are defined within
11 624, so now, we're going out somewhere else and
12 trying to figure out something else that might fit
13 it, and the something that the Board says might fit
14 it is "subdivision" as defined in 278, but it
15 doesn't meet the test for a statutory subdivision,
16 so we're still back in the same place, where we have
17 two phrases that are undefined.

18 It is undisputed that the term "site," as
19 it is used in 624.220(2) is not statutorily defined.
20 It's undisputed. It's undisputed that the phrase
21 "single construction site" and the phrase
22 "subdivision site," as they are used in 624.220(2)
23 are not statutorily defined.

24 It is undisputed that the Nevada State
25 Contractors Board recognized in its Tesla opinion

1 and on the record today, Your Honor, that the phrase
2 "single construction site" is, and I quote,
3 "Ambiguous because the phrase is subject to more
4 than one reasonable meaning," end quote.

5 It is also undisputed -- there is lots of
6 lawyer wrangling going on here, and I appreciate
7 that.

8 Mr. Allison is a very skilled and
9 qualified lawyer, and we have had some wonderful
10 conversations about this stuff that are very
11 academic, but let's talk about the practical world,
12 and let's talk about the application of a statute
13 that is based on saying that a contractor knowingly
14 violated it when everyone seems to agree that
15 624.220 must, in some form, have some temporal and
16 geographic limitation to it.

17 The problem is that the legislature
18 didn't write those limitations, so we're left trying
19 to interpret a statute that is vague and ambiguous.

20 The Board and its staff are left trying
21 to enforce a statute that is vague and ambiguous.

22 That addresses the vagueness part of it,
23 Your Honor.

24 I won't go back through and recite the
25 constitutional argument about delegation of

1 legislative authority. I think that I have covered
2 that sufficiently in the filing papers.

3 The equal protection argument applies
4 whether we're talking about a subdivision,
5 aggregation across an entire subdivision or
6 aggregation across some sort of expanded definition
7 of what a single construction site might be.

8 The equal protection argument, both
9 as-applied and on its face, is that licensees who
10 have the same license limit should be permitted to
11 perform up to that license limit. That is not what
12 is happening.

13 That is the heart of the equal protection
14 argument.

15 Counsel didn't address at all the third
16 and fourth causes of action. I will very, very
17 briefly address those legally.

18 There is certainly an argument to be made
19 that the regs are as between NAC 624.160 and 170,
20 there is some confusion as to whether the
21 preclusions provided by NRS 624 apply, and what I
22 mean by that, Your Honor, is it's very clear that
23 for a Class B licensee, there is a cross-reference
24 back to the definition of contractor, and it has
25 within it certain limitations, if you will.

1 It is not clear in the reg for the Class
2 B2 subcontractor that that same cross-reference and
3 limitation applies.

4 With that said, we recognize that there
5 is an apparent violation there, and it was in error.
6 It was an absence of understanding of how that all
7 works and not an intentional act to try and evade
8 the law, and I would just leave it at that.

9 HEARING OFFICER PRO: All right. Thank
10 you.

11 MR. ALLISON: May I respond briefly?

12 HEARING OFFICER PRO: Certainly.

13 MR. ALLISON: We are at the heart of the
14 dispute in this discussion. The facts are simply
15 almost to be plugged into whatever you legally
16 decide is going on here, and I want to -- something
17 occurred to me because now I have heard Mr. Kimmel's
18 argument in its entirety, I think I understand
19 better what we're talking about with "subdivision
20 site" because he is correct, words mean things in
21 statutes. Every word means something.

22 I'm going to start with one, and now,
23 we're going to take 220(2), and we're going to kind
24 of overlay it with 278.320 because what 278.320
25 says, and this was kind of overlooked in

1 Mr. Kimmel's presentation, subdivision means any
2 land, vacant or improved, which is divided or
3 proposed to be divided in five or more lots.

4 What that tells me is you can have a
5 subdivision before the division occurs because it
6 says, Subdivision means any land which is divided or
7 proposed to be divided into five or more lots,
8 parcels, sites, units or plots, and then I thought
9 about that and I said, you know what that means to
10 me -- and this is very common. This is the way
11 homes get built because I always think of
12 subdivisions in terms of homes.

13 You have a master developer. He creates
14 a subdivision. He then builds all these homes in
15 the subdivision and then sells them to individual
16 people, and each one of those people then become
17 owners of their little subdivided plot of land.

18 If I'm thinking in terms of -- those, I
19 would think, might be sites, and the way Mr. Witt
20 has set this up, his idea is, I'm going to build all
21 of this and then I'm going to divide it.

22 That is what this document -- if it's not
23 a division, it is a proposal to divide. That is
24 what this document, these maps seem to be doing if
25 that is the case, and it even talks about into how

1 many.

2 They talk about lots, 188 lots. There
3 you're talking about your five or more, so what I
4 think -- when you read that and now you read 220(2),
5 and you look at the word "subdivision site," what I
6 am thinking about is you aggregate when you're
7 building your subdivision out and you're the master
8 builder and you haven't divided your property out
9 yet, that is an aggregation across the whole
10 subdivision.

11 If you are an owner of the discrete site,
12 that is a different arrangement. That is a
13 different animal. That is the subdivision site.

14 That is kind of the way my mind started
15 thinking, and I'm probably not articulating it very
16 well, but that is what my mind started thinking when
17 I started putting it against real world development.
18 This is the way these things go. This is the
19 condominium development schema.

20 You create your subdivision in the form
21 of a proposal to be divided. You build, then you
22 divide thereby -- and upon division, you create
23 sites.

24 At the time of the proposal, it's a
25 subdivision, but it is just one site, and if that is

1 the case, then we have to think about aggregation on
2 the subdivision site.

3 MR. KIMMEL: Your Honor, if I could, I
4 would like to respond to that?

5 HEARING OFFICER PRO: Yes.

6 MR. KIMMEL: Again, the notes become so
7 key here because you have to understand the way
8 these are actually formulated.

9 Before I get to the notes, let me step
10 aside for a second and say under counsel's
11 interpretation of the statute, if you had a 50-story
12 high-rise condominium project, that would be a
13 subdivision because they each buy a unit of air
14 above the ground.

15 That is not a subdivision, Your Honor.
16 That is not a 278 statutory subdivision, so we have
17 to look and we have to see, are these actual
18 projects more like that vertical condominium tower,
19 or are they more like Double Diamond with single
20 family homes on single family plots, lots, parcels,
21 APNs that get sold?

22 Where we find that information is in the
23 recorded documents themselves, and for example, Your
24 Honor, when we admitted these exhibits, we talked
25 about an identifying map number that we could use to

1 identify each page.

2 HEARING OFFICER PRO: Right.

3 MR. KIMMEL: So I'll start with Edgewater
4 at Virginia Lake condominium subdivision. That is
5 5095.

6 HEARING OFFICER PRO: Got it.

7 MR. KIMMEL: The second page of that
8 exhibit is, or I'm sorry, the third page of that
9 exhibit has the notes, and that's 5095C is the
10 designation for the page.

11 HEARING OFFICER PRO: Yes.

12 MR. KIMMEL: You'll have to forgive me,
13 Your Honor, these are still hard to read, but
14 looking at the first note, the last sentence of the
15 first note reads, The building structures themselves
16 and the ground beneath said buildings are to be
17 owned and maintained by the homeowners association
18 being a part of the common element.

19 So now, we look at the actual map and we
20 see how many common elements are there? There are
21 three. To the extent there is any division of land
22 here on any level because this is one APN, it's one
23 legal parcel, to the extent that there can even be
24 an argument that there is some kind of division of
25 land, it's three, and the interest in it is an

1 undivided interest by definition because all of the
2 owners own it, and that is if this was ever actually
3 sold as condominiums.

4 There is no circumstances in which an
5 individual owner owns an individual parcel of land
6 which can be aggregated with four other individual
7 owners owning individual parts of land, which then
8 in its sum, can become a statutory subdivision under
9 278.

10 So the belief that, well, it could be
11 done that way at a later date, no, that is not what
12 the map says, Your Honor.

13 If we look at the Bungalows, which starts
14 with 5054, and we turn to the second page of that
15 exhibit, which is 5054A, and again, my apologies for
16 the type.

17 If you look at note 3, the last sentence
18 of note 3, The balance of the building structures
19 and the ground beneath the buildings are to be owned
20 and maintained by the owners of the common elements.

21 These are undivided interests in the
22 whole, and if we look at this map, there is just one
23 common element. It's the entire thing, and the
24 buildings sit on that thing, and what the notes
25 clarify is if at some point in time, these were

1 turned into condos, what the condo owner would be
2 buying would, in essence, be airspace between some
3 walls and an undivided interest in the entirety,
4 which is exactly what happens in a high-rise.

5 Now, if we look at the third set,
6 Fountainhouse, that begins with the map designation
7 5139, and we turn to the second page 5139A and look
8 at the notes for this one, we see note 3, the
9 balance of the -- again, this is the last sentence.
10 The balance of the building structures and the
11 ground beneath said buildings are to be owned and
12 maintained by the owners of the common element, so
13 again, Your Honor, even this perception that
14 somewhere down the road these condominiums could be
15 sold as separate pieces of land that can be
16 aggregated to meet the statutory definition of
17 278.320 is simply legally incorrect.

18 The maps themselves define, the notes
19 themselves define what has been given or what could
20 be given and what has been divided and what has not
21 been divided. The land has not been divided. The
22 map does not propose that the land be divided.

23 Counsel said something really, really
24 interesting at one point during his initial
25 argument. He used the phrase "metes and bounds."

1 Metes and bounds are terms that are used to define
2 land.

3 What Your Honor will not find in any of
4 these notes are metes and bounds related to the
5 interior space of one of these apartments or
6 condominiums.

7 I say "apartments," and let me go back to
8 another point that I unfortunately skipped over. On
9 the Bungalows at Sky Vista, which was 5054, and the
10 page we were looking at with the notes was 5054A.
11 If you look at note 15, it even says, For the
12 purpose of the Sky Vista Homeowners Association
13 Covenants, Conditions & Restrictions, CC&Rs, this
14 project should be considered an apartment project.

15 If it's necessary, and we get there, Your
16 Honor, what you will hear from Mr. Witt is these are
17 all apartments. They're all rented as apartments.
18 They're marketed as apartments. They were financed
19 as apartments.

20 This mapping process is simply to provide
21 the opportunity to sell as a condo or to sell the
22 entire project as a condo conversion already, but
23 that doesn't make it a statutory subdivision. We
24 have to look at the actual language of the document
25 and see what was created.

1 MR. ALLISON: Your Honor, if I may, one
2 more response?

3 HEARING OFFICER PRO: Go ahead.

4 MR. ALLISON: Two things. One, I would
5 think that a document -- I mean, you record a
6 document that says "subdivision" on it, I would
7 think that it's a subdivision. That is what you are
8 recording; that is what you're telling the world is
9 that this is a subdivision.

10 It says, Edgewater at Virginia Lake, a
11 condominium subdivision, and then we have Bungalows
12 at Sky Vista, a subdivision. Subdivision down here.

13 When you go to the website, it's
14 registered as -- it's portrayed as a subdivision.
15 To say something to the world it's a subdivision and
16 say it's not really a subdivision, that certainly is
17 confusing to me.

18 What I would like to do, Your Honor, at
19 this point because this is becoming a hinge issue
20 for just the way this case comes down because if it
21 is a subdivision site, and it's the way I have --
22 and it's the way Mr. Kimmel has described it, then
23 we've got to take that off the table and now we have
24 to come back to single construction site.

25 If it is a subdivision site the way I

1 have -- the way the Board has interpreted it,
2 meaning giving recognition to Your Honor's
3 observation that the word "site" is actually within
4 the definition of "subdivision," but you also have
5 to give thought to the concept of divided or
6 proposed to be divided. There has been some
7 understanding of what that means.

8 What does it mean to say, "proposed to be
9 divided," because if you take out the words --
10 again, doing the phrasing exercise, which if you
11 take out "which is divided," subdivision means any
12 land, vacant or improved, which is proposed to be
13 divided into five or more lots, which means, you can
14 -- the way I read that, you can have a subdivision
15 prior to the division of the property, which means,
16 at that point, it's one site.

17 When you have one site, the subdivision
18 site fits with what I have been saying today and how
19 it would be aggregated.

20 What I would ask Your Honor to do and I
21 don't know if we need to take some time, reconvene.
22 I think it would be very important, and I'll invite
23 Mr. Kimmel's response, to get a ruling, whether
24 we're talking about a legal subdivision site which
25 will then have a certain factual application to the

1 contracts or if it's not a subdivision site, now, I
2 have to talk about whether we're dealing with a
3 single construction site, which is a completely
4 different -- now we're getting into the Tesla
5 opinion, and we're getting into whether the
6 buildings are being built at the same time and all
7 those other things.

8 I would like to know the answer to that
9 before we go forward, if possible.

10 HEARING OFFICER PRO: Well, let me ask
11 you in that regard because you're right, the legal
12 arguments and the issues that are framed are kind of
13 evolving during the course of the hearing a bit, and
14 undeniably, that is going to have to be sorted out,
15 but to make productive use, first of all, of today,
16 do those issues nullify the ability for the parties
17 to establish the factual record of what happened?
18 Can we proceed with that?

19 I'm, again, thinking out loud, but it may
20 be in light of the arguments that have been made,
21 and certainly the benefit that you all would have
22 and I would have in looking at the transcript of
23 that, post-hearing briefing on these issues would
24 perhaps be sensible to make sure it's clear exactly
25 what the positions and the arguments of the parties

1 are, and allow me to make that kind of a ruling that
2 might necessitate further hearing, but rather than
3 jumping to that conclusion, is there any reason why
4 we couldn't proceed -- because I don't want to make
5 a ruling off the top of my head based on what has
6 been presented.

7 I think that you have raised some really
8 interesting and important legal issues, but if we
9 can get in the record -- the facts aren't going to
10 change it seems to me, are they?

11 What happened happened; the contracts are
12 the contracts, and can't that all be presented and
13 then we can have post-hearing briefing on not only
14 the legal arguments but how that applies to the
15 facts.

16 MR. ALLISON: They can. It was just that
17 if we were dealing with one, I would simply have to
18 just say, Here are the contracts, here are the
19 numbers, add them up, we're done.

20 If it's the other I need to be talking
21 about, and I can do that today, I'm prepared to do
22 that, talk about whether we have -- what the
23 temporal separation between the work is, what the
24 permitting separation is, what the contractual
25 separation is or lack thereof for these projects.

1 HEARING OFFICER PRO: I realize that is
2 more laborious and involves more, but how much more?

3 MR. ALLISON: I think we could work
4 through that.

5 HEARING OFFICER PRO: Yeah.

6 MR. KIMMEL: Your Honor, if I might, I
7 think my concern is, and we're happy to go through
8 all that, but my concern is, does it matter?

9 If the Board has conceded, which it has,
10 that "single construction site" is ambiguous, then
11 do the facts to determine whether it's a single
12 construction site or not, do they really matter?

13 MR. ALLISON: Well, I'm prepared to
14 respond to that. I think there is a vast difference
15 between what would be vague, constitutionally vague,
16 and something that is ambiguous.

17 A statute that has a vague term, in other
18 words, we only will allow contractors who are nice
19 to be given a license, that would be a vague
20 statute. Those are subject to constitutional
21 attack.

22 When you have an ambiguity, meaning there
23 could be more than one meaning to a phrase, that is
24 not subject to constitutional attack, and I have
25 been speaking in terms of ambiguity.

1 I want the record to be very clear on
2 that with regard to "single construction site."

3 HEARING OFFICER PRO: Well, in the end,
4 it may not matter, but I think today, it would make
5 sense to get the record complete.

6 MR. KIMMEL: That's fine.

7 HEARING OFFICER PRO: While we're able to
8 produce that, and you can argue the nuanced
9 difference between ambiguity versus vagueness and
10 what was meant, and the fact that one is being
11 opined by counsel in response to a request as
12 opposed to something being adjudicated
13 administratively after a contested argument which
14 may refine things a little bit more fully.

15 Let's go ahead -- unless you have
16 additional preliminary legal arguments you wish to
17 make, I think we should get our evidentiary record
18 completed, and then it seems sensible to have -- I
19 think it would be helpful to you and to me to have
20 post-hearing briefing at a reasonable schedule to
21 really button this down, so when a ruling is made,
22 it may entail further, but not necessarily.

23 It might be something we can get an
24 answer to and put you in an position of knowing
25 where you stand here and make your decisions from

1 there as to what further review might be needed down
2 the road.

3 MR. ALLISON: Okay.

4 HEARING OFFICER PRO: Do you want to take
5 five minutes to get yourselves organized for your
6 presentation of any evidence, or a 10-minute break
7 for everybody before we start with that?

8 I don't know how long it will take.

9 MR. ALLISON: I would appreciate that
10 just to get my notes together.

11 MR. KIMMEL: That would be fine. Thank
12 you, Your Honor.

13 HEARING OFFICER PRO: Let's take 10
14 minutes. We'll reconvene at 10:15 just to make it
15 easier for everyone.

16 (Break taken at 10:02 a.m.)

17 HEARING OFFICER PRO: We can go ahead and
18 go on the record.

19 Mr. Allison, who will your witness be or
20 your witnesses be?

21 MR. ALLISON: I only have two. It will
22 be Mr. Gore and Mr. Witt.

23 HEARING OFFICER PRO: Okay. Who do you
24 want to call first?

25 MR. ALLISON: Mr. Gore.

1 HEARING OFFICER PRO: Mr. Gore, you can
2 remain there to offer your testimony, but would you
3 please stand and raise your right hand?

4 (Whereupon Mr. Gore was sworn)

5 HEARING OFFICER PRO: Please have a seat,
6 and if you would, please state your full name for
7 the record and spell your last name for the court
8 reporter.

9 MR. GORE: Jeff Gore, G-o-r-e, and I'm
10 compliance investigator for the State Contractors
11 Board.

12 HEARING OFFICER PRO: Thank you very
13 much. Go ahead Mr. Allison.

14 JEFF GORE

15 after having been duly sworn, testified as follows:

16 DIRECT EXAMINATION

17 BY MR. ALLISON:

18 Q. Mr. Gore, you just testified you're a
19 compliance investigator with the Contractors Board.
20 How long have you been with the Board?

21 A. Three years this month.

22 Q. As a compliance investigator, very
23 briefly, what are your jobs and duties? What do you
24 do?

25 A. Most of my work revolves around

1 workmanship issues, but there are times when items
2 like this come up which are industrial regulation
3 violations.

4 Q. And you investigate those?

5 A. Yes, I do.

6 Q. Did you have an opportunity to
7 investigate this particular matter, the Silverwing
8 matter?

9 A. Yes, I did.

10 Q. How did this matter initially come to
11 your attention?

12 A. It was initially brought on upon an
13 anonymous complaint that was turned in that I
14 received on Zephyr Plumbing.

15 Q. Is that page 18 of the documents? You
16 have the documents there in front of you.

17 A. Yes.

18 Q. Okay. We don't know who filed this
19 complaint with respect to Zephyr Plumbing, but it
20 appears to relate to the Bungalows and Edgewater
21 there. Are those the Silverwing projects?

22 A. Yes.

23 Q. What was the nature of the complaint
24 against Zephyr Plumbing?

25 A. That they bid or contracted on these

1 projects over their limit.

2 Q. Okay. It's anonymous. Does that matter
3 to you whether you investigate the complaint?

4 A. No, it does not.

5 Q. What is the Board's policy with respect
6 to complaints?

7 A. To open any written complaint.

8 Q. Okay. You don't have any discretion?
9 You investigate any written complaint you receive?

10 A. Yes, sir. Any one that is assigned to
11 me.

12 Q. Okay. You investigated -- I see the next
13 exhibit, page 20. I see a citation issued to
14 Zephyr. What was the citation that you issued to
15 Zephyr?

16 A. This was a citation for bidding over
17 their limit.

18 Q. Okay. Was this in relation to one of the
19 Silverwing, where Silverwing was the general
20 contractor?

21 A. Yes.

22 Q. Did Zephyr accept the citation?

23 A. Yes, they did.

24 Q. They paid it?

25 A. Yes, they did.

1 **Q. Did you have an opportunity as a result**
2 **of the Zephyr investigation to investigate other**
3 **subcontractors that were working for Silverwing?**

4 A. Well, based on this investigation, and
5 one that was assigned to Mr. Nolan, I received both
6 of those citations as part of the opening complaint
7 against Silverwing.

8 **Q. Okay. Because we do have quite a few**
9 **subcontractors that are involved here, let's just**
10 **run down a few of them and you can tell me what kind**
11 **of contractor they are. That way, we're not going**
12 **to hit every one of these in detail, okay?**

13 A. Okay.

14 **Q. So we have Preferred Window Products.**
15 **Who are they?**

16 A. They are a C8 contractor.

17 **Q. Did they get cited as a result of this**
18 **investigation?**

19 A. Yes, they did.

20 **Q. Did they pay it?**

21 A. Yes, they did.

22 **Q. How about ABC Builders? What kind of**
23 **contractor are they?**

24 A. ABC is a C3 carpentry builder.

25 **Q. Carpenters?**

1 A. Yes.

2 Q. Did they get cited?

3 A. Yes, they did.

4 Q. Did they pay their citation?

5 A. They did.

6 Q. These are all citations for what, for
7 going over their limit?

8 A. Yes.

9 Q. Are these all on Silverwing projects?

10 A. Yes.

11 Q. RJR Builders, who are they?

12 A. RJR is another C3 carpentry contractor.

13 Q. Did they get cited?

14 A. Yes, they did.

15 Q. Did they pay?

16 A. Yes, they did.

17 Q. How about systems of Nevada?

18 A. Yes, they did.

19 Q. Did they get cited?

20 A. Yes.

21 Q. Did they pay?

22 A. Yes.

23 Q. RDR Builders, what are they?

24 A. They are a B contractor.

25 Q. So this is a B contractor that was hired

1 **by who?**

2 A. By Silverwing.

3 **Q. Were they cited for -- were they cited?**

4 A. Yes. They were cited for their license
5 limit and contracting outside the scope of their
6 license.

7 **Q. So they got cited for two things as**
8 **opposed to the others?**

9 A. Yes.

10 **Q. One was what now?**

11 A. One was bidding over their monetary
12 limit, and the other one was bidding outside the
13 scope of their license.

14 **Q. Why is it outside the scope of a license**
15 **for a B contractor to work for another B contractor?**

16 A. For a B contractor working there, part of
17 a B contractor's job is to include more than two
18 unrelated trades. They were a framing contractor,
19 and therefore, they're not included in that, and
20 also, it would allow a B contractor to perform a
21 specialty trade if it's on his project.

22 **Q. I see. So what was RDR Production doing**
23 **as a B contractor on the project?**

24 A. Framing.

25 **Q. They were doing that under Silverwing,**

1 **who was the general contractor?**

2 A. Yes.

3 MR. ALLISON: I apologize, Counsel, for
4 what might look like a little bit of leading, but
5 I'm just trying to get through the facts on this.

6 BY MR. ALLISON:

7 **Q. HTA Plumbing & Mechanical, who are they?**

8 A. Plumbing contractor.

9 **Q. Did they get cited?**

10 A. Yes, they did.

11 **Q. Did they pay it?**

12 A. Yes, they did.

13 **Q. How about Zephyr? What are they? Zephyr**
14 **Plumbing.**

15 A. Zephyr is another plumbing contractor,
16 and they were cited and paid.

17 **Q. High Voltage Electric?**

18 A. Electrical contractor. They were cited
19 and paid.

20 **Q. Okay. Buttacavoli Development Company,**
21 **what kind of work do they do?**

22 A. That is C8 glass company.

23 **Q. Glaziers?**

24 A. Yes.

25 **Q. Were they cited?**

1 A. Yes, they were.

2 Q. Have they paid?

3 A. They have not.

4 Q. Okay. So we have one protest so far?

5 A. Well, I'm not sure it's a protest. The
6 only response to the citation was that he filed
7 bankruptcy.

8 Q. Okay.

9 HEARING OFFICER PRO: That's a pretty
10 good response, generally.

11 BY MR. ALLISON:

12 Q. Yeah. Jim's Cabinets & Installation,
13 what do they do?

14 A. Carpentry.

15 Q. Were they cited?

16 A. Yes, they were.

17 Q. Paid?

18 A. Yes.

19 Q. US Granite?

20 A. They are a granite fabrication company.

21 Q. Cited?

22 A. Yes, they were cited.

23 Q. Paid?

24 A. Yes, they paid.

25 Q. Infinity Paint, did I get them? What did

1 **they do?**

2 A. Painting contractor. They were cited and
3 paid.

4 **Q. Burke Roofing?**

5 A. Roofing contractor, who was cited and
6 also paid.

7 **Q. All right. Okay. Going through these**
8 **projects, we have basically four projects that we're**
9 **looking at. I know we characterized it as three**
10 **during the opening, but let's speak in terms of**
11 **four.**

12 **Tell me about the Fountainhouse project.**
13 **How many buildings were involved in that; do you**
14 **know?**

15 A. I don't know the exact number on it.
16 There was definitely several buildings as part of
17 that contract.

18 **Q. Why don't we look at the exhibits in**
19 **respondent's binder, Exhibit 36 or 32, I'm sorry.**

20 A. Thirty-two looks like Edgewater in my
21 book.

22 **Q. All right. Let's skip ahead. We'll**
23 **start with Fountainhouse. Go to 33.**

24 A. Okay.

25 **Q. This is a -- do you know what this**

1 document is that you're looking at, Exhibit 33 in
2 the respondent's binder?

3 A. This is a breakdown of the buildings at
4 the Fountainhouse project and their permit numbers
5 as issued by the jurisdiction.

6 Q. How many buildings do you see there?

7 A. There's a total of 11 including a
8 clubhouse.

9 Q. Okay. Did you have an opportunity to
10 look, to go beyond what we're seeing here in 33 and
11 see when these permits were issued and when these
12 permits were finalized?

13 A. I did.

14 Q. Did you create a worksheet for that?

15 A. I did.

16 MR. ALLISON: Okay. I'd like to provide
17 this.

18 MR. KIMMEL: So this is something new?

19 MR. ALLISON: It's a worksheet. It's
20 demonstrative, if you want it to be.

21 MR. KIMMEL: I'm just asking, it's not
22 contained in the prior book?

23 MR. ALLISON: Right, correct.

24 I'd like to mark this, Your Honor, as
25 Board Exhibit 2, I guess.

1 HEARING OFFICER PRO: Exhibit 2?

2 MR. ALLISON: Yes.

3 HEARING OFFICER PRO: We can receive that
4 as Exhibit 2. The second page addresses the
5 Fountainhouse 11 buildings.

6 MR. ALLISON: Right.

7 BY MR. ALLISON:

8 Q. Mr. Gore, what I see here is -- why don't
9 you tell me what you did with respect to these
10 permits which were drawn from Exhibit 33. What
11 exercise did you undertake?

12 A. I listed all the permits in here. I went
13 to the jurisdictional website and found the issue
14 dates and the C of O dates. I put them in the
15 spreadsheet and ordered them in Excel to filter by C
16 of O date.

17 Q. In the contracting construction world,
18 what does the issuance of a permit signify to you?

19 A. That a project is ready to start.

20 Q. That work can commence?

21 A. Yes.

22 Q. What does a final slash C of O, what does
23 that mean?

24 A. C of O is certificate of occupancy which
25 would mean that the building is ready for occupancy.

1 Q. So the completion?

2 A. Yes.

3 Q. So it would be fair to say that an
4 issuance of permit signals the start, and C of O
5 signals the completion, at least as far as the
6 building department is concerned?

7 A. Correct.

8 Q. If we look at Fountainhouse, we have a
9 list of issuance dates. They appear to be arranged
10 chronologically. Did you do that?

11 A. Yes. Well, I filtered them
12 chronologically by their C of O date, and then the
13 issuance date happens to pretty much coincide in
14 that chronological order also.

15 Q. In other words, if you look at Exhibit
16 33, they don't line up the way -- these aren't
17 listed buildings 1 through 10.

18 These are buildings issued in
19 chronological order, like I see Building 10 being
20 the second permit issued. Is that the way you see
21 it?

22 A. Yes.

23 Q. Okay. So if I am looking at this and I
24 see these permits and I see the issuance going --
25 when was the first permit issued at Fountainhouse?

1 A. October 15th, 2015.

2 **Q. When was the last permit issued at**
3 **Fountainhouse?**

4 A. There were three issued on January 25th,
5 2016.

6 **Q. Okay. When was the first final -- the**
7 **first permit finaled on Fountainhouse?**

8 A. August 3rd, 2016.

9 **Q. And the last permit finaled on**
10 **Fountainhouse?**

11 A. May 15th, 2017.

12 **Q. So based on that, would it be fair to**
13 **say, Mr. Gore, that at least from January 25th,**
14 **2016, through August 3rd of 2016, there were open**
15 **permits on all the buildings?**

16 A. That is correct.

17 **Q. Okay. Let's go to Exhibit 34. Let's do**
18 **the Bungalows next.**

19 **If we look at Exhibit 34 in the**
20 **respondent's, we see a group of permits that goes on**
21 **to two pages. How many buildings do you see here at**
22 **the Bungalows?**

23 A. I see 48 buildings including the
24 clubhouse and maintenance building.

25 **Q. Okay. Did you do the same exercise with**

1 **respect to permitting on these buildings?**

2 A. Yes, I did.

3 **Q. Is this, what we have marked as Exhibit**
4 **2, your findings on that?**

5 A. Yes.

6 **Q. How did you determine these dates? What**
7 **did you do? How did you figure this out?**

8 A. I went on the website, I believe this was
9 the City of Reno's website. It shows if you go
10 through all the trees and get to everything, it will
11 show you an issue date, and then it will also show
12 you a final or C of O date on that permit.

13 MR. ALLISON: I'd like to add this as an
14 exhibit. I'd move to add that.

15 HEARING OFFICER PRO: We had it marked as
16 Exhibit 2, so I think it's part of Exhibit 2. It's
17 four pages, but it covers the Edgewater as well as
18 the Bungalows and the Fountainhouse.

19 MR. ALLISON: Okay.

20 BY MR. ALLISON:

21 **Q. Doing the same thing, it looks like --**
22 **did you do some kind of a chronological view of**
23 **this?**

24 A. Yes. Again, these were filtered the same
25 way. I told it to sort by final C of O in my Excel

1 spreadsheet.

2 Q. Okay. Did you filter the issuance dates?

3 A. I did not. I just let them fall in order
4 by the final C of O.

5 Q. Okay. So would it be possible -- it's
6 possible, though, if we go through this, we can
7 determine how many buildings were going
8 simultaneously, how many permits were open
9 simultaneously? Is that possible to do by looking
10 at this?

11 A. Yes.

12 Q. So for instance, the building at the top,
13 1/30/14, I see a final C of O, 5/27/14. Do you see
14 that?

15 A. Yes.

16 Q. If we take any of the permits that are
17 issued between those dates, what does that signify
18 to you, that they're open permits at the same time?

19 A. Open permits at the same time with
20 ongoing concurrent work.

21 Q. Let's finally go to the first page. This
22 is the Edgewater at Virginia Lake page, and it's
23 divided into apartments and condos. Do you see
24 that?

25 A. I do.

1 Q. What is the -- did you do -- what did you
2 do with respect to this one, the same approach?

3 A. Yes. I filtered them by the C of O dates
4 again.

5 Q. Okay. Looking at the Edgewater at
6 Virginia Lake apartments, you can look and see when
7 there was -- when the permits were opened -- when
8 there were open permits at the same time; is that
9 correct?

10 A. That's correct.

11 Q. And also with the condominiums?

12 A. That is correct.

13 Q. Okay. What about the contracts? Let's
14 look at some of those. Let's look at a few.

15 Let's go to exhibit number -- in your
16 book, let's just start at the first one. Let's look
17 at the exhibit on page 49. Let's start at 48,
18 actually.

19 What am I looking at on page 48?

20 A. Forty-eight is a license printout for
21 Preferred Window Products.

22 Q. Okay. And I see various items listed
23 here. I see C8 classification. What does that
24 mean?

25 A. That means a glass and glazing license.

1 **Q. Over on the right, I see a license**
2 **monetary limit of \$225,000. What does that mean?**

3 **A. That is the maximum allowed that**
4 **contractor can bid.**

5 **Q. Okay. If we look at the -- go to the**
6 **next page. We have a contract document. How did**
7 **you come into possession of this contract document,**
8 **Mr. Gore?**

9 **A. It was provided by the respondent.**

10 **Q. Okay. If we look at the date of the**
11 **contract, what is its date?**

12 **A. December 23rd, 2015.**

13 **Q. Who are the parties to the contract?**

14 **A. Silverwing Development and Preferred**
15 **Window Products.**

16 **Q. What kind of contractor is Silverwing**
17 **Development?**

18 **A. B general contractor.**

19 **Q. Does it have a license limit?**

20 **A. No.**

21 **Q. The next paragraph, I see this SWD-Quarry**
22 **FVS, LLC. Do you know who that was on the project?**

23 **A. That is -- well, the respondent or the**
24 **contractor.**

25 **Q. It says "owner." Do you know anything**

1 about that entity? SWD-Quarry, does that mean
2 anything to you?

3 A. It's a development entity that was set up
4 to develop the project.

5 Q. It talks about, it says here, Has hired
6 contractor to oversee the construction of all
7 structures on the attached sequence list, Exhibit 1,
8 in the residential development known at
9 Fountainhouse at Victorian Square, Sparks, Nevada,
10 hereafter referred to as Fountainhouse.

11 Do you have -- if you go through the
12 contract and get to the end, it ends at page 55 is
13 where the record ends of it.

14 Have you been provided with Exhibit 1,
15 the sequence list? Did you ever receive that?

16 A. I do not recall ever seeing a sequence
17 list in my documents.

18 Q. Okay. The source of this document was
19 the respondent; is that correct?

20 A. That's correct.

21 Q. All right. Let's keep going down here.
22 Description of work, it says here --

23 HEARING OFFICER PRO: Just so I'm clear,
24 the contracts obviously are between the general
25 contractor and the subcontractor. They presumably

1 would each have copies of them.

2 The copies are not submitted to the
3 Nevada State Contractors Board for their records,
4 are they, automatically?

5 MR. GORE: No.

6 HEARING OFFICER PRO: So it's between the
7 parties, and they have copies of their contracts.

8 MR. GORE: That's correct.

9 BY MR. ALLISON:

10 **Q. How does the Board obtain information**
11 **like that when they want it?**

12 A. We request it from the licensee.

13 HEARING OFFICER PRO: So you would have
14 potentially two sources, right? You can go to the
15 general and you can go to the sub.

16 MR. GORE: Yes.

17 HEARING OFFICER PRO: Presumptively, and
18 as licensees, they would be obligated to give you
19 access to them?

20 MR. GORE: That's correct.

21 HEARING OFFICER PRO: Let me ask one
22 other question while I'm on the subject.

23 The limits of the license, those are
24 established either at the time the license is
25 issued, or if there is some proceeding to request a

1 raising or change of the limit, that can be
2 accomplished; am I correct?

3 MR. GORE: That is correct, and they can
4 get a one-time monetary increase, or they can get a
5 permanent monetary increase during the course of
6 their license.

7 HEARING OFFICER PRO: And they would
8 secure that through the Nevada State Contractors
9 Board?

10 MR. GORE: That is correct.

11 HEARING OFFICER PRO: And the initial
12 limit is predicated on what? When it's established,
13 what is the rationale in the setting of the limit on
14 a particular, a glazier or roofer or anybody else?

15 MR. GORE: It's based on their proof of
16 financial feasibility, you know, based on financials
17 and their net worth. I don't know all the
18 calculations. Licensing does that.

19 HEARING OFFICER PRO: Some process to
20 make sure they're reliable in terms of up to that
21 limit then?

22 MR. GORE: That is correct.

23 HEARING OFFICER PRO: Okay. Go ahead.
24 Sorry.

25 MR. ALLISON: That's okay.

1 BY MR. ALLISON:

2 Q. While we're on that, what is the
3 process -- what is a one-time raise? What does that
4 entail?

5 A. That would entail submitting a set of
6 financials to the licensing department with a
7 request for a one-time raise in limit. It's
8 reviewed and processed and approved or disapproved.

9 Q. When are you supposed to submit that
10 one-time raise request?

11 A. Five days prior to bidding a project.

12 Q. So we have here under the description of
13 work, I'm not going to go through the whole contract
14 with you by any stretch, but we have a reference
15 here to an Attachment A, scope of work. Were those
16 provided to you?

17 A. If they're not in the thing, I did not
18 receive them.

19 Q. Okay. What is normally in a scope of
20 work document? What does a scope of work say in the
21 attachment?

22 A. It's going to say, We agree to provide
23 materials, labor. It may have some specifications,
24 window specifications in there, model numbers,
25 things of that nature, but basically, it will say,

1 I'm going to provide you and install all the windows
2 on this building, for example.

3 Q. Okay. We move on down here to Section
4 1A, Payment, and it says, For the performance of all
5 work and the furnishing of all materials, equipment
6 and tools, which subcontractor is obligated to
7 perform and supply under this contract,
8 subcontractor shall be paid by owner the sum of
9 \$299,700.00. Do you see that?

10 A. Yes.

11 Q. Was it your understanding that the owner
12 was going to pay the subcontractor on this project?

13 A. Yes.

14 Q. The contract, who is this contract
15 between?

16 A. Well, the owner, or my interpretation is
17 the general contractor, Silverwing Development,
18 would be paying his subcontractor.

19 Q. Okay. Even though it says "owner" here?

20 A. Yes.

21 Q. It says \$299,700. If you flip back one
22 page to Exhibit 48 and look at the monetary limit,
23 how does that relate to the monetary limit?

24 A. That is over the monetary limit of
25 \$225,000.

1 Q. Okay. Is there anything in this contract
2 when you reviewed it -- did you have an opportunity
3 to review the contract, by the way?

4 A. Yes.

5 Q. Did you see anything in this contract
6 that says anything along the lines of, Preferred
7 Windows shall not proceed to the next project, the
8 next building, until the prior building is completed
9 and fully paid?

10 A. No, I did not.

11 Q. Did you see anything in this contract
12 that breaks out the work that Preferred Window is
13 supposed to do by building?

14 A. I do not.

15 Q. Did you have an opportunity to talk to
16 Preferred Window about this project, about its role
17 in this affair?

18 A. I talked to them in regards -- not
19 specifically to the case with Silverwing, but in
20 regards to the citation I gave them on their case
21 file.

22 Q. What was their position with respect to
23 that?

24 MR. KIMMEL: Objection. That's hearsay.

25 HEARING OFFICER PRO: How do you respond

1 to that?

2 MR. ALLISON: Hearsay is often acceptable
3 in administrative proceedings.

4 HEARING OFFICER PRO: Yeah. I'll go
5 ahead and allow it. I'll let the witness respond to
6 it.

7 The rules are certainly not ignored, but
8 they're relaxed a bit in an administrative
9 proceeding.

10 BY MR. ALLISON:

11 Q. If you even remember?

12 A. Well, they basically said that they
13 understood what they did was wrong. They missed it
14 because in California, they don't have a monetary
15 limit.

16 HEARING OFFICER PRO: Who are you
17 speaking to at the time?

18 MR. GORE: Preferred.

19 HEARING OFFICER PRO: Do you remember
20 which person?

21 MR. GORE: I do not remember her name.

22 BY MR. ALLISON:

23 Q. There's an Angela Randev on the first
24 page who is listed as the CFO, and there's a Sara
25 Pierce as the president. Do either of those names

1 **sound familiar to you?**

2 A. I do not recall who I talked to. I
3 believe she was the controller, identified herself
4 as the controller for the company. I do not believe
5 I talked to any of the principals.

6 MR. ALLISON: Your Honor, this is what I
7 have spoken with Mr. Kimmel about as far as
8 truncating the hearing, in that I'll make a
9 representation that there are a lot of contracts
10 very similar across all these projects.

11 HEARING OFFICER PRO: Right.

12 MR. ALLISON: Where on the face of the
13 contract, the amount is in excess of the
14 subcontractor's license limit, and they all sort of
15 say the same thing.

16 If there are variances, I would be happy
17 to listen to those if Mr. Kimmel wants to bring them
18 up, but I'm going to submit that as a group that we
19 have one bucket of contracts where the subcontractor
20 is just, on its face, in excess of the limit.

21 HEARING OFFICER PRO: Accepting that as a
22 proffer, did you want to cross-examine or reserve
23 your questions to the witness on any of the
24 particular contracts we're talking about?

25 MR. KIMMEL: I accept counsel's summation

1 of what he believes the contracts say and his
2 position that they are, on their face, over the
3 limit, although I will cross and have my own
4 testimony related to whether, in fact, that is true,
5 that they are over the limit.

6 HEARING OFFICER PRO: Okay. The
7 contracts say what they say.

8 MR. KIMMEL: The contracts say what they
9 say. We do not dispute that.

10 HEARING OFFICER PRO: The question is
11 whether they exceed the license limit.

12 MR. KIMMEL: Correct.

13 MR. ALLISON: The purpose of what I'm
14 saying isn't to try to prevent any
15 cross-examination. I'm just offering up the
16 extrapolation of this contract to the others that is
17 similarly situated.

18 HEARING OFFICER PRO: Right. That's
19 fine.

20 MR. ALLISON: Thank you.

21 BY MR. ALLISON:

22 Q. Let's go to the next contract. The next
23 contract kind of represents the second bucket.
24 Let's go to page 58.

25 Again, what are we looking at here on

1 **page 58?**

2 A. This is a license report for ABC
3 Builders.

4 **Q. Their license type classification is?**

5 A. C3-B, finished carpentry.

6 **Q. Okay. What is their monetary limit?**

7 A. \$150,000.

8 **Q. Let's go to the next page. We have a**
9 **contract with similarities. Do you see the**
10 **similarities in the contract between the Preferred**
11 **Windows?**

12 A. Yes.

13 **Q. All right. Putting aside the scope, the**
14 **type of contractor it is, let's just focus on the**
15 **payment section.**

16 What does Section 1A say the payment is
17 going to be for this by ABC Builders?

18 A. \$79,357.

19 **Q. If we go back one page and see the**
20 **license monetary limit of \$150,000, does that give**
21 **you any heartburn?**

22 A. No, it does not.

23 **Q. Why?**

24 A. Because it is under their monetary limit
25 pretty significantly.

1 **Q. Okay. Now, let's go to page 66, we see**
2 **another contract for the Fountainhouse at Victorian**
3 **Square?**

4 A. That's correct.

5 **Q. Who are the parties?**

6 A. Yes.

7 **Q. Who are the parties?**

8 A. Silverwing Development and ABC Builders.

9 **Q. So same contractor, same owner; do I have**
10 **that right?**

11 A. Yes.

12 **Q. What is the contract amount for this one?**

13 A. \$147,840.

14 **Q. Okay. By itself, standing alone, does**
15 **this contract give you any heartburn?**

16 A. No, sir.

17 **Q. Why?**

18 A. Because it is, again, under their
19 monetary limit.

20 **Q. When you put it next to the prior**
21 **contract for Fountainhouse at Victorian Square,**
22 **which is \$79,000 and \$147,840, now does it give you**
23 **heartburn?**

24 A. Yes, it does.

25 **Q. Why?**

1 A. Because it is over the monetary limit of
2 the contractor.

3 Q. Why is it over the monetary limit?

4 A. Because he is building on a construction
5 site concurrently with the project going, and it is
6 over his limit.

7 Q. Okay. Let's keep going. Let's go to
8 page 73. Let's go back -- I'm sorry. I want to go
9 back really quick here.

10 Let's go back again to page 59, the first
11 ABC contract. I want you to tell the Hearing
12 Officer what the date of that contract is?

13 A. January 11th, 2016.

14 Q. Page 66, what is the date of that
15 contract?

16 A. March 1st of 2016.

17 Q. All right. Now, let's go to 73.

18 A. April 29th, 2016.

19 Q. What is this third contract? What is the
20 amount for?

21 A. It is, again, for \$147,840.

22 Q. Standing alone, do you have a problem
23 with it?

24 A. No, sir.

25 Q. Adding the two prior, do you have a

1 **problem with it?**

2 A. Yes, I do.

3 **Q. We're now pretty far over the limit?**

4 A. Yes, we are.

5 **Q. Let's go to the next -- let's go to page**

6 **80. What is the date on this contract?**

7 A. July 1st, 2016.

8 **Q. Who are the parties?**

9 A. Silverwing Development and ABC Builders.

10 **Q. What project?**

11 A. Fountainhouse.

12 **Q. And what is the amount on this project?**

13 A. \$147,840.

14 **Q. That is pretty close to the license**

15 **limit, isn't it?**

16 A. Yes, it is.

17 **Q. The two prior ones, similarly close,**

18 **right?**

19 A. Yes.

20 **Q. Again, standing alone, does this give you**

21 **a problem, heartburn?**

22 A. In the absence of any change orders, no.

23 **Q. When you take the prior contracts, do you**

24 **have a problem?**

25 A. Yes.

1 Q. Let's go to page 88. You know what?

2 Before we go to page 88, I want to stop at -- hold
3 on. I want to stop at page 87. We have something
4 different here from the other ones.

5 Do you see this document here, building
6 schedule of values, standard contract work? Do you
7 see that?

8 A. I do.

9 Q. What is a schedule of values?

10 A. I think it's pretty self-explanatory, but
11 those are the values based on each building they're
12 performing work on.

13 Q. If you take Building 4 and 5, what is the
14 combined schedule of values for those, according to
15 this document, for those two buildings?

16 A. It matches the contract amount of
17 \$147,840.

18 Q. Okay. Can you tell me, as you sit here,
19 what you think the difference is, if any, between a
20 schedule of values and a scope of work? I'm sorry
21 to put you on the spot.

22 A. Well, a schedule of values outlines more
23 how you would receive your payment. A scope of work
24 would be more encompassing saying specific --
25 generally, there's exclusions, obviously some of the

1 window contractors might exclude any electrical
2 work, but it is to describe the installation of
3 their windows, the materials they're going to
4 provide, and generally, there's a note in there to
5 scheduling and staying on course.

6 **Q. In the contract starting on page 80 and**
7 **going through 86 and possibly 87, did you see**
8 **anything in this contract that says, Don't build**
9 **Buildings 4 and 5 until you are done with the other**
10 **buildings you have been working on?**

11 **A. No, I did not.**

12 HEARING OFFICER PRO: If that had been
13 the situation, would that affect your judgment or
14 concerns about the process, the contracting process,
15 construction process?

16 MR. GORE: It may have swayed it a little
17 bit. I would still be investigating was it a
18 work-around for maintaining under the monetary
19 limit, and I would review it with my supervisors at
20 the point and give it to counsel.

21 HEARING OFFICER PRO: Well, I guess what
22 I'm driving at is if the subcontract were to parse
23 the work to be done so that on a \$150,000 limit,
24 \$147,000 performance would be completed before you
25 started another \$147,000 performance, would that

1 satisfy the limit that you would apply?

2 MR. GORE: Again, I would be skeptical of
3 the way the orders, the dates and stuff going
4 together on that, but it would be something that I
5 would provide to my supervisor and send off to
6 counsel and get a final determination, but it was
7 definitely -- it would change the thought process at
8 that point for sure, but to me, as an investigator,
9 it would look to me, contracts two months apart,
10 they're trying to avoid -- you know, usurp the
11 process of staying under their monetary limit by
12 dividing the contracts.

13 It would be something that I would ask
14 for counsel's advice on before I processed it as a
15 violation.

16 HEARING OFFICER PRO: Okay. I didn't
17 mean to go off into the hypothetical.

18 MR. ALLISON: That's okay. It was a good
19 question.

20 BY MR. ALLISON:

21 Q. Going to page 88 of the contract, we see
22 August 1st, 2016. Again, who are the parties?

23 A. Silverwing Development and ABC Builders.

24 Q. Can you tell me the date, please?

25 A. August 1st, 2016.

1 Q. And the amount?

2 A. \$147,840.

3 Q. When you take it alone, is it okay?

4 A. Yes.

5 Q. When you add it with the others, do you
6 have a problem?

7 A. Yes.

8 Q. So with respect to ABC Builders, would it
9 be fair to say that on the Fountainhouse project,
10 based on what we just said, with a \$150,000 limit,
11 ABC Builders entered into four subcontracts for
12 \$147,840 with Silverwing and a fifth contract for
13 \$79,537?

14 A. Yes.

15 MR. ALLISON: That, Your Honor, and I'll
16 submit, is kind of bucket two.

17 HEARING OFFICER PRO: Right. Same
18 process on the others.

19 MR. ALLISON: Where they're all -- where
20 you don't have a contract on its face in excess of
21 the limit, but when you take them all --

22 HEARING OFFICER PRO: The aggregation of
23 them.

24 MR. ALLISON: -- they aggregate to
25 something over the limit.

1 HEARING OFFICER PRO: All right.

2 MR. ALLISON: I would take note, and
3 you're going to review the record in your decision
4 anyway, but I would take note with respect to the
5 scienter issue on how close we get on these
6 subcontracts.

7 HEARING OFFICER PRO: Yeah. Your
8 argument, the temporal proximity --

9 MR. ALLISON: Well, it's slightly
10 different. \$150,000 limit. The subcontract
11 conveniently or coincidentally --

12 HEARING OFFICER PRO: Just stays under.

13 MR. ALLISON: It's just under that.

14 HEARING OFFICER PRO: All right.

15 MR. ALLISON: So that is something that
16 is in there as well. That is bucket two.

17 BY MR. ALLISON:

18 Q. Let's talk for a minute about RDR

19 Production Builders. Who are they?

20 A. They are a general contractor that was
21 hired to perform framing work.

22 Q. Let's go to 296. Who is -- what are we
23 looking at here at 296?

24 A. We're looking at license printout for RDR
25 Production Builders. It indicates they're a B2

1 residential and small commercial builder.

2 **Q. Okay. What does a B2 contractor do?**

3 A. He is the prime contractor on a
4 construction project.

5 **Q. Okay. Is there a limitation because B2**
6 **is a subclassification of a B?**

7 A. Well, it limits him providing project
8 management for the project as a whole, and if he is
9 in charge of the project, then he is allowed to
10 perform specialty trades.

11 **Q. Maybe I didn't -- that was a bad question**
12 **by me. You have a B -- the B classification of**
13 **contractor, which you just described as people who**
14 **manage and can self-perform and can hire**
15 **subcontractors and things, right?**

16 A. That is correct.

17 **Q. And then you have subclassifications of**
18 **the B, one of them being a B2?**

19 A. Yes.

20 **Q. What is a B2 -- what is the point of that**
21 **subclassification? What are they restricted to?**

22 A. They are restricted to residential
23 structures, I believe, under three stories, three
24 stories and under for commercial projects.

25 **Q. Okay. What is the license limit for RDR?**

1 A. \$1,200,000.

2 Q. Let's go to the contract here. What is
3 the date on this contract?

4 A. November 11th, 2014.

5 Q. And the parties to the contract, who are
6 they?

7 A. Silverwing Development and RDR Production
8 Builders, Inc.

9 Q. If we go down to the description of the
10 work, the last sentence there under -- after the
11 first paragraph, what does it say? Would you read
12 that?

13 A. The work is generally described as supply
14 and install materials and labor for framing.

15 Q. Okay. If we go to Section 1A, payment,
16 what is the amount that is being paid for this work?

17 A. \$1,178,296.

18 Q. Okay. Two questions. Start with the
19 first one. Does the amount of the contract, as
20 you're looking at it, give you any heartburn?

21 A. No, sir.

22 Q. Does the work that is being described to
23 be performed in the contract give you heartburn?

24 A. Yes, it does.

25 Q. Why?

1 A. Because by not being the prime
2 contractor, he is not allowed to perform as a
3 specialty contractor.

4 Q. What would be the violation we're talking
5 about here?

6 A. Contracting outside of the scope of his
7 license.

8 Q. Okay. If I look at 296, and we see these
9 limits in the designations, are these available to
10 the public, this information?

11 A. Yes.

12 Q. How do you get this information? How
13 would I get this as a member of the public?

14 A. It's listed on our public website.

15 Q. So anybody who is looking at RDR, they
16 could go here and find out their limit and their
17 license type?

18 A. License type, limit, bond information.

19 Q. Okay. Let's go on here to exhibit --
20 let's move on to 303. That's the end of the
21 contract that we have at least, right?

22 A. Uh-huh.

23 Q. Is that a yes?

24 A. Yes.

25 Q. If we go to 304, what is this document

1 **that I'm looking at? What is the date on it?**

2 A. It is November 11th, 2014.

3 **Q. What is this document?**

4 A. It is a contract extension.

5 **Q. Which project does it relate to?**

6 A. Edgewater at Virginia Lake Condos.

7 **Q. Is that the same as the contract, the**
8 **underlying contract, same project?**

9 A. Yes.

10 **Q. What is this extension doing?**

11 A. It's extending the value of the contract.

12 **Q. Okay. How is it extending them, how**
13 **much?**

14 A. \$589,148.

15 **Q. Okay. Now do you have heartburn over the**
16 **license limit for RDR?**

17 A. Yes.

18 **Q. Why?**

19 A. Because it's clearly over their monetary
20 limit of \$1.2 million.

21 **Q. Okay. Again, who are the parties here?**

22 A. Silverwing Development and RDR Production
23 Builders, Incorporated.

24 **Q. Okay. Did RDR pay -- you said RDR got**
25 **cited for this?**

1 A. Yes, they did.

2 **Q. Did they pay their fines?**

3 A. Yes, they did.

4 **Q. Did you cite them -- what did you cite**
5 **them for?**

6 A. They were cited for contracting over
7 their limit and contracting outside the scope of
8 their license.

9 **Q. Did they pay for both of those?**

10 A. Yes, they did.

11 **Q. Again, I'm going to ask the hearsay**
12 **question. Did they have any problem with that, or**
13 **what did they say, or could you tell us what the**
14 **communications were on that?**

15 A. There was no pushback or anything from
16 them. They were a little bit late paying it, and I
17 was just told it was lost in the shuffle. I didn't
18 get any particulars. I didn't have an argument or
19 any dispute from the contractor.

20 HEARING OFFICER PRO: Do you recall who
21 you talked to?

22 MR. GORE: I talked to -- his last name
23 was Dos Rios, and I believe his name was Ron, but he
24 may have gone by Anthony or Tony.

25 HEARING OFFICER PRO: Okay.

1 MR. ALLISON: Your Honor, that is the
2 third bucket. That is the out of scope by virtue of
3 it being a B hiring a B.

4 I have kind of covered my three buckets
5 by only giving one from each. I am going to
6 represent, and I'll turn it over -- I'm inclined to
7 turn it over to cross-examination, but there are
8 different ways in which the contracts were -- how it
9 aggregated.

10 You have some where they were multiple
11 subcontracts. There are some where there were
12 extensions to the contracts, some where there are
13 change orders to the contract, same idea, though.

14 HEARING OFFICER PRO: I understand, and
15 they're in evidence and in the post-hearing briefing
16 if you want to cite to a particular difference, you
17 can do that just based on what is in the --

18 MR. ALLISON: With that, I really don't
19 have any more questions of Mr. Gore.

20 HEARING OFFICER PRO: We'll turn it over
21 to Mr. Kimmel.

22 Mr. Kimmel, do you want to use the
23 lectern or do you want to stay where you are?

24 MR. KIMMEL: If Your Honor is fine with
25 it, I am fine with where I am. I have my documents

1 spread out.

2 HEARING OFFICER PRO: That's fine.

3 MR. KIMMEL: Thank you, and I will
4 remember to push the button this time.

5 CROSS-EXAMINATION

6 BY MR. KIMMEL:

7 Q. Good morning, Mr. Gore. We have met
8 before.

9 If you could, I would like to have you
10 start by turning to page 58 of the Contractors
11 Board's exhibits. Do you have that in front of you?

12 A. Yes.

13 Q. This is the printout for ABC Builders,
14 correct?

15 A. That is correct.

16 Q. And it shows a monetary limit of
17 \$150,000, correct?

18 A. That is correct.

19 Q. Okay. So I would like to ask you a
20 hypothetical using ABC Builders as the subcontractor
21 and the respondent, Silverwing, is the contractor,
22 okay?

23 As the investigator, do you believe that
24 Silverwing, in one written contract, could hire ABC
25 Builders to build a \$100,000 building in Las Vegas

1 and a \$100,000 building in Reno?

2 A. I believe they could.

3 Q. Okay. And the reason is because we can't
4 just look at the dollar amount of the contract,
5 right? We have to look at the actual work being
6 performed, correct?

7 A. That is correct.

8 Q. So in the example that I gave you and the
9 hypothetical that I gave you, is it your belief that
10 the building that is being built in Las Vegas is a
11 different construction site than the building that
12 is being built in Reno?

13 A. Yes.

14 Q. Okay. So let me tweak that hypothetical
15 a little bit. Same parties, same contract, the
16 location of one of the buildings was out in Stead.
17 Are you familiar with where Stead is?

18 A. Yes.

19 Q. And the location of the other building
20 was in South Reno. Are you familiar with where that
21 is?

22 A. Yes.

23 Q. Would you consider that to be okay under
24 one contract?

25 A. Yes.

1 Q. Again, it's because we have to look
2 beyond the dollar amount of the contract, the face
3 dollar amount of the contract, and determine what
4 work is being performed, correct?

5 A. That's correct.

6 Q. And where it's being performed, correct?

7 A. Yes.

8 Q. Are you generally familiar with the
9 building process in terms of the city building
10 department?

11 A. Yes. I am generally familiar.

12 Q. You're familiar enough that you knew to
13 go look for permits, correct? We looked at that
14 exhibit that you had prepared?

15 A. That is correct.

16 Q. You would agree, wouldn't you, that for
17 every project that is at issue in this
18 administrative hearing, for every one of these
19 projects, there was multiple buildings, correct?

20 A. That is correct.

21 Q. And for every one of those multiple
22 buildings, each building had to have its own unique
23 permit, correct?

24 A. That is correct.

25 Q. Okay. So now looking at this, and I

1 believe Your Honor marked it as number 2, which was
2 the spreadsheet?

3 HEARING OFFICER PRO: Correct.

4 BY MR. KIMMEL:

5 Q. Looking at the spreadsheet compilation
6 that you made, Mr. Gore, of the permit numbers, the
7 issue dates and final C of O's; do you have that? I
8 think it's outside of your book.

9 A. Yes.

10 Q. So let's just, for example, take a look
11 at the first page, the Edgewater Virginia Lake
12 permit number, and you indicated that you had put
13 all of these into your Excel spreadsheet and then
14 you used the sort function to make it sort by issue
15 date, correct?

16 A. No. I sorted them by final certificate
17 of occupancy.

18 Q. I'm sorry. Thank you for correcting me.
19 You sorted them by the final C of O, not by the
20 issue date?

21 A. That is correct.

22 Q. Okay. With respect to the issue date,
23 that is just the date upon which the permit was
24 issued, correct?

25 A. Yes.

1 Q. So that is the earliest date that
2 construction could lawfully start, correct?

3 A. That is correct.

4 Q. But it doesn't mean that that is the date
5 that construction actually started, correct?

6 A. No, not necessarily.

7 Q. So we can't look at these dates and
8 presume that just because two permits have the same
9 issue date that the construction started at the
10 exact same time, correct?

11 A. I could presume that they were worked on
12 during the same period of time.

13 Q. That wasn't my question, sir.

14 With respect to when construction
15 actually started, the issue date doesn't confirm
16 when construction actually started, correct?

17 A. Correct.

18 Q. It only confirms the earliest date upon
19 which construction could start, correct?

20 A. That is correct.

21 Q. With respect to any individual
22 subcontractor, the issue date doesn't confirm when
23 that individual subcontractor started its work on a
24 particular permitted building, correct?

25 A. Correct.

1 Q. All you know is that that subcontractor
2 would have had to have finished its work prior to
3 the final C of O, correct?

4 A. That is correct.

5 Q. But with respect to the overlapping
6 periods of buildings and permits that you
7 referenced, from what you have prepared here in
8 Exhibit 2, there is no way for you to represent to
9 this Court that an individual contractor was
10 performing work at the same time on multiple
11 buildings, correct?

12 A. Not from the information provided in this
13 document, no.

14 Q. Okay. Now, even if they were, even if an
15 individual contractor -- strike that.

16 Let me back up. Remember my hypothetical
17 about ABC Builders entering into one contract for a
18 dollar amount that included work performed in Las
19 Vegas and in Reno at the same time. Do you remember
20 that?

21 A. Yes.

22 Q. You would agree that that subcontractor
23 could concurrently perform the work in Reno and Las
24 Vegas, and that's okay, right?

25 A. Yes.

1 Q. Because they're different construction
2 sites?

3 A. Yes.

4 Q. And they're different construction sites
5 based on how you are interpreting that phrase,
6 correct?

7 A. That is correct.

8 Q. Okay. I gave you the easy example of Las
9 Vegas and Reno being where the two buildings were
10 and then I gave you the example of Stead and South
11 Reno as being within the same contract, and you
12 agreed that those could be two different
13 construction sites, correct?

14 A. That is correct.

15 Q. Can you point me to the statute or
16 regulation that you rely upon to decide when
17 something is a single construction site versus when
18 it is not a single construction site? In other
19 words, where is the demarcation?

20 A. I'm not sure I understand the question,
21 the demarcation?

22 Q. Forgive me. Maybe the best way to do
23 this is through a series of hypotheticals.

24 We have done the hypothetical with Reno
25 and Las Vegas. Remember that?

1 A. Yes.

2 Q. Okay. Then we did the hypothetical with
3 Stead and South Reno. Do you remember that?

4 A. Yes.

5 Q. Okay. Let me make the hypothetical a
6 little smaller. Let's say that -- Kietzke Lane is
7 out here; you're familiar with that, correct?

8 A. Yes.

9 Q. So let's say the contract was to build
10 one building on this side of Kietzke Lane, which
11 would be the east side of Kietzke Lane, and one
12 building on the west side of Kietzke Lane. Does
13 that make sense?

14 A. Yes.

15 Q. Would you consider that to be the same
16 construction site?

17 A. There would be other factors to look into
18 based on when the work was going on, single contract
19 client. These all -- the course of buildings down
20 this row, and if I am building one over there for
21 the same contractor, I would believe it was a single
22 construction site.

23 Q. Okay. So my question was -- strike that.
24 From the Stead-Reno example to the
25 Kietzke Lane example, something changed in your

1 opinion, right? For the first time, you came to the
2 conclusion that it might be one single construction
3 site; is that fair?

4 A. Yes.

5 Q. So what I am asking when I use the words,
6 where do you look to find that demarcation, I'm
7 curious as the investigator investigating these
8 cases, what statute or regulation are you relying on
9 to figure out where that change should occur?

10 Where do -- on what do you get to make
11 the decision that we have gone from the Stead
12 example to the Kietzke Lane example?

13 MR. ALLISON: I'm going to make an
14 objection just so I have it on the record, Your
15 Honor.

16 I do think that the question is actually
17 intruding on the legal, on the ALJ's obligation to
18 reach the conclusion of law and interpret the
19 statute, and he is actually asking for legal
20 opinions from an investigator.

21 HEARING OFFICER PRO: No. I don't think
22 that that is an impermissible legal conclusion. He
23 is asking him as an investigator.

24 He is charged with investigating these
25 issues, and if we were talking about a project in

1 Reno and one in Las Vegas, based on his testimony as
2 I understand it, it wouldn't prompt an
3 investigation. Maybe in Stead and South Reno, same
4 thing, but across the street on Kietzke, a different
5 response.

6 He is charged not with making an ultimate
7 legal conclusion, but he certainly has experience
8 and is informed and makes a decision what he
9 investigates and what he doesn't, so I think it's an
10 appropriate question. I'll allow it.

11 MR. ALLISON: Yes. I agree with that.

12 Thank you.

13 BY MR. KIMMEL:

14 Q. And I point out on direct examination,
15 this witness offered an opinion about whether these
16 contracts exceeded the license limits, so the point
17 is, the only way we can determine if an individual
18 contract or if a series of contracts exceed a
19 particular subcontractor's license limit is we have
20 to first define what is a single construction site,
21 correct?

22 A. That is correct.

23 Q. Okay. What I have asked you as the
24 investigator who is handling -- strike that. Let me
25 back up.

1 When a complaint comes to you and you
2 review it, what decision-making authority do you
3 have, if any, as to whether the complaint is going
4 to be ignored or as to whether you're going to start
5 investigating it?

6 A. Every complaint that is assigned to me, I
7 begin an investigation until the point I decide to
8 provide to my supervisor whether an allegation is
9 valid or invalid.

10 Q. So there becomes a point in time after an
11 investigation is filed and you have actually, or I'm
12 sorry, after a complaint has been filed, that you
13 conduct an investigation, and then you, yourself,
14 make a determination as to whether there is
15 validity; is that correct so far?

16 A. That's correct.

17 Q. And then you take your determination to
18 your supervisor and advise them whether you think
19 there is validity or invalidity to the complaint; is
20 that correct?

21 A. That is correct.

22 Q. As part of your investigation process,
23 are you making a determination as to whether a
24 particular contract or group of contracts applies to
25 a single construction site or multiple construction

1 **sites? Do you actually make that determination?**

2 A. I form my own opinion and provide it to
3 my supervisor and we review it from there.

4 **Q. Okay.**

5 A. Through factual documents.

6 **Q. Again, my question is, what statute or**
7 **regulation are you relying on to form that opinion**
8 **as to whether a given situation involves a single**
9 **construction site or multiple construction sites?**

10 A. Well, my opinion on that would be formed
11 based on history of construction, if I was a
12 developer on the project here and across the street,
13 how I would mobilize my equipment, when I would have
14 my surveys done, utilities, and typically, I'm going
15 to mobilize all my heavy equipment to start on this
16 project, I'm not going to send them out of town.
17 I'm going to have them drive across the street and
18 continue the project in that manner.

19 **Q. It's interesting you mentioned utilities.**
20 **Do you have an understanding as to**
21 **whether every single individual building on each one**
22 **of these projects is -- each building is served by**
23 **one set of utilities, or do you have an**
24 **understanding as to whether each individual**
25 **apartment is served directly by one utility?**

1 A. Most generally, each individual apartment
2 would have its own power utilities, and sewer would
3 probably be tied in together in conjunction based on
4 the number of units you were using.

5 Q. Utilities, would it surprise you to know
6 that the utilities are tied to the permit, so if a
7 building has -- if a particular building has an
8 individual permit, then that particular building has
9 utilities that are separate than the utilities and
10 sewer that go to a different building that has a
11 completely different permit?

12 A. And what was the question again?

13 Q. I'm sorry. That was a bad question, so
14 I'll just forget it.

15 You would agree to me that -- strike
16 that.

17 NAC 624 provides, in general, provides
18 the regulation related to construction, correct?

19 A. That is correct.

20 Q. Okay. Are you aware of a definition of
21 "single construction site," that phrase, anywhere in
22 NAC 624?

23 A. No.

24 Q. Are you aware of a definition of the
25 phrase "single construction site," anywhere in NRS

1 624?

2 A. No.

3 Q. Are you aware of a definition of the
4 phrase, quote, "subdivision site," end quote,
5 anywhere in Nevada Administrative Code Chapter 624?

6 A. No.

7 Q. Are you aware of a definition of, quote,
8 "subdivision site," end quote, anywhere in NRS
9 Chapter 624?

10 A. No.

11 Q. Are you aware of a definition anywhere in
12 the Nevada Revised Statutes, any chapter, of the
13 phrase, quote, "single construction site," end
14 quote?

15 A. No.

16 Q. Are you aware of any regulation anywhere
17 in the administrative code under any chapter that
18 defines the phrase, quote, "single construction
19 site," end quote?

20 A. No.

21 Q. And not to belabor the point, but would I
22 be correct if I said that nowhere in NRS at all have
23 you found a definition of the phrase, quote, "single
24 construction site," end quote?

25 A. No.

1 Q. Nowhere in any chapter of the NRS have
2 you found the definition of, quote, "subdivision
3 site," end quote?

4 A. No.

5 Q. When you go out and make your
6 determination based on your investigation as to
7 whether it is a single construction site or multiple
8 construction sites, you are making that
9 determination just based on your own experience,
10 correct?

11 A. That is correct.

12 Q. There is no defined list of factors that
13 you have to use to make that determination, correct?

14 A. No.

15 HEARING OFFICER PRO: Let me follow-up on
16 that last question just to make sure I do
17 understand.

18 You mentioned your experience and the
19 factors that you would look at given the
20 circumstances, across the street versus across the
21 state or across the county, something like that.

22 You have your experience to rely on.
23 You're an experienced investigator, and you have had
24 experience in the field prior to that, I'm assuming.

25 Are there any other written guidelines

1 you have, manuals, guide books, things that you have
2 that you employ to make those determinations as to
3 construction sites, subdivision site?

4 MR. GORE: No.

5 HEARING OFFICER PRO: Okay. All right.
6 Thank you.

7 BY MR. KIMMEL:

8 **Q. You have a general understanding that for**
9 **each one of these permits that you have found in**
10 **Exhibit 2, that I now seem to have misplaced. There**
11 **it is.**

12 **In Exhibit 2, for each permit on each**
13 **building there will be separate inspections by the**
14 **appropriate building department, correct?**

15 A. That is correct.

16 **Q. Those inspections are per building. Per**
17 **building, per permit, correct?**

18 A. Correct.

19 **Q. And the certificate of occupancy is per**
20 **building, per permit, correct?**

21 A. That is correct.

22 MR. KIMMEL: Mr. Gore, I think that is
23 all that I have at this time. Thank you for your
24 time.

25 HEARING OFFICER PRO: All right.

1 Mr. Allison, any redirect?

2 MR. ALLISON: Yes. Thank you.

3 REDIRECT EXAMINATION

4 BY MR. ALLISON:

5 Q. Mr. Gore, you are ready to receive your
6 law degree?

7 A. Sure.

8 Q. Are you familiar with what has been
9 thrown around in this case and in others, have you
10 heard of the Tesla opinion?

11 A. Yes, I have.

12 Q. What is your understanding of that, now
13 that we have given you a law degree?

14 HEARING OFFICER PRO: He doesn't have a
15 law degree. It reminds me of a case I had years
16 ago. It was a Lacey Act case. Probably no one in
17 the room knows what the Lacey Act is. It is illegal
18 taking of endangered species: Bighorn sheep, bear.

19 We had an expert witness who qualified,
20 and he didn't have a degree that would qualify him.
21 He was a professional tracker, and the attorney
22 cross-examining him says, Mr. So and So, you don't
23 have a master's of science degree in tracking, do
24 you, and he said no, I don't.

25 You don't have a bachelor of science in

1 tracking, do you?

2 No, I don't. I don't have an MS or a BS,
3 but I do have a J-O-B. He had some life experiences
4 that qualified him to be a tracker.

5 So I didn't understand the witness to be
6 testifying to legal interpretations, but he has
7 pretty clearly demonstrated that he has, as he must
8 to be the investigator, the experience that allows
9 him to make the determinations that inform what he
10 inspects and what he doesn't.

11 That, I think, is the way we can look at
12 it, so if Tesla would be a factor he would consider
13 in making that, sure, go ahead.

14 BY MR. ALLISON:

15 Q. Well, I just wanted to know if you were
16 aware of it, and if it was something that is known
17 to the investigators in your department?

18 A. Yes, it is. It was provided to all of
19 us.

20 Q. Okay. I'm going off of the Tesla letter.
21 Would you agree with me when you have somebody
22 saying -- when an issue turns on are these two
23 places, are these two places one construction site,
24 or are these two things or multiple things, multiple
25 construction sites, you look at -- we have talked

1 **about it, geography, right?**

2 A. Yes.

3 **Q. What does geography mean to you?**

4 A. Location or proximity of projects.

5 **Q. Across the street or across the state?**

6 A. Correct.

7 **Q. Right next to each other?**

8 A. That's correct.

9 **Q. One hundred feet away, 300 feet away, and**
10 **you, as an investigator, use your skill to kind of**
11 **coalesce that and reach those conclusions?**

12 A. That is correct.

13 **Q. I mean, we all know that one in Las Vegas**
14 **and one in Reno, you don't need to be an**
15 **investigator to know that one, right?**

16 A. Correct.

17 **Q. But maybe being an investigator when**
18 **you're across the street, your expertise comes into**
19 **play?**

20 A. That's correct.

21 **Q. Your expertise comes from what? What**
22 **made you so -- I'm not trying to be -- what made you**
23 **so special to be an investigator? Where is your**
24 **background?**

25 A. My background is in commercial

1 construction. I was born and raised into it. I
2 spent 21 years working in the field for my father
3 and other union companies.

4 Q. So you took what you know as a commercial
5 construction contractor, and that now is the basis
6 of what you do as an investigator?

7 A. That is correct.

8 Q. Okay. Meaning, if you know it as an
9 investigator, you would have known it as a
10 contractor?

11 A. That's correct.

12 Q. All right. Next one, you have two
13 buildings, putting aside geography, what about a
14 building that you build it -- let's do this one.

15 You build something in 1970, it falls
16 apart. You demolish it, and then in 2010, you build
17 it on the exact same spot. Same construction spot,
18 single construction site or not single construction
19 site?

20 A. Same construction site, single site.

21 Q. How is it separated now? Take away the
22 geography. What is now --

23 A. Time.

24 Q. Time. Temporal separation?

25 A. Correct.

1 Q. Is that something you look at?

2 A. Yes.

3 Q. Let's look at exhibit -- let's look at
4 that Preferred Windows one, page 49.

5 What is this contract -- what is the
6 reference in this contract? What project is this
7 referring to?

8 A. Fountainhouse at Victorian Square.

9 Q. Do you see a single contract for every
10 single building with respect to Preferred Window
11 Products?

12 A. I do not.

13 Q. Can the idea of a single construction
14 site turn on the contract separation? Can that be
15 something you think about, that goes into that?
16 Meaning if there had been -- I'm not saying it's the
17 controlling factor necessarily, but if there had
18 been separate contracts for every building
19 referenced that way, Building 1 at Fountainhouse at
20 Victorian Square instead of just Fountainhouse at
21 Victorian Square, would that mean something to you?

22 A. Yes. It would change the thought process
23 a little bit, but definitely if it was a project
24 worked concurrently, it would --

25 Q. But it all goes into the -- it all goes

1 into -- your brain is opened like this,
2 (indicating), and we're putting in geography, time,
3 contracts, and we're kind of turning on the Jeff
4 Gore machine, and he is going to spit out whether
5 it's a single construction site.

6 Am I accurately explaining that?

7 A. Yes.

8 Q. All right. So let's take the
9 Fountainhouse at Victorian Square.

10 Do you know how the design of this
11 project came about? Is there a master design with
12 one giant, big thick piece of -- thick giant thing
13 that you go through it and it's all bound and there
14 are different buildings in it, or is it 10 separate
15 designs with -- do you know anything about that?

16 A. It should have been submitted to counsel
17 and reviewed as a whole package as the entire
18 project.

19 Q. Does that make a difference as to whether
20 it's a single construction site or multiple
21 construction sites?

22 A. Yes.

23 Q. The way the design is submitted?

24 A. Yes.

25 Q. So another item to throw into the brain.

1 How about permitting? Are they separate
2 permits, or is it just one giant permit?

3 A. They're separate permits.

4 Q. So that's another one that goes in there,
5 right?

6 A. Yes.

7 Q. And then, it's like we're making a mixed
8 drink here. You shake it up and out comes your
9 answer.

10 What was your answer on this as an
11 investigator? Are we talking multiple construction
12 sites, or are we talking a single construction site?

13 A. From my experience, I would call it a
14 single construction site.

15 Q. Okay. That is based on your experience
16 coming up through what industry?

17 A. The construction industry.

18 MR. ALLISON: Okay. Thank you. That's
19 all I've got.

20 HEARING OFFICER PRO: Thank you.
21 Anything further, Mr. Kimmel?

22 MR. KIMMEL: No. Thank you, Your Honor.

23 HEARING OFFICER PRO: Thank you,
24 Mr. Gore. I appreciate it.

25 HEARING OFFICER PRO: All right. You had

1 one additional witness. Mr. Witt?

2 MR. ALLISON: Yes.

3 HEARING OFFICER PRO: Mr. Witt, you can
4 remain where you are as well. If you would please
5 stand and raise your right hand?

6 (Whereupon Mr. Witt was sworn)

7 HEARING OFFICER PRO: Have a seat, and
8 again, if you can state for the record your full
9 name. I believe it is the initial J is in front of
10 your name?

11 MR. WITT: The initial is my name, so
12 it's a southern tradition. We hand out initials in
13 the south. J. Carter Witt, III, President,
14 Silverwing Development.

15 HEARING OFFICER PRO: Thank you.

16 J. CARTER WITT, III

17 after having been duly sworn, testified as follows:

18 DIRECT EXAMINATION

19 BY MR. ALLISON:

20 Q. Good morning, Mr. Witt.

21 A. Good morning.

22 Q. Thank you for coming down today. Can you
23 explain to the Hearing Officer very briefly -- I
24 represented your business model as basically being
25 you are the owner, you develop properties, and

1 you're the owner, and you have your own general
2 contracting company, and you develop them through
3 that model. Is that basically a correct statement?

4 A. That's correct.

5 Q. Okay. Is that what you have been doing
6 for a long time here? Has that always been your
7 model?

8 A. Well, first off, it's not just here.

9 Q. Okay.

10 A. We have been active in my development
11 capacities -- I'm sorry, I have a cold -- in three
12 states as a general contractor and developer, and
13 before that, I have done projects in 16 other states
14 that I oversaw the construction and development of.

15 Q. So why are you -- why do you like to be
16 your own general contractor?

17 A. It helps us control costs and understand
18 the dynamics of the construction that if we were
19 removed, a third-party contractor in the field could
20 easily not fill-in the blanks and cause us more
21 costs.

22 Q. Okay. Tell me about -- why don't you
23 give me the background of how Fountainhouse came to
24 be about.

25 Let me ask it in a certain way. Can you

1 tell us where Fountainhouse is located?

2 A. Victorian Square, Sparks, Nevada.

3 Q. How many buildings?

4 A. Eleven.

5 Q. Ten residential buildings and one
6 clubhouse?

7 A. Correct.

8 Q. Do you have a common architect for that?

9 A. Correct.

10 Q. Did he design all the buildings at the
11 same time?

12 A. No. I believe the clubhouse was
13 fast-forwarded.

14 Q. What does that mean, fast-forwarded?

15 A. It was expedited.

16 Q. So you had 10 buildings designed and then
17 at the end, you added in a clubhouse?

18 A. No. Exact opposite.

19 Q. You had a clubhouse and you added in 10
20 buildings?

21 A. That's correct.

22 Q. Would you agree with me that the design
23 is in a common single package for the 10 buildings?

24 A. I don't know what that means.

25 Q. Okay. If I were to ask for the plan set

1 for Fountainhouse, would I be given 10 separate plan
2 sets, or would I be given one plan sets?

3 A. There would be a number of plan sets.

4 Q. I'm not talking mechanical, electrical.
5 I'm talking architectural?

6 A. I am as well.

7 Q. Okay. Are they dated differently, or are
8 they all the same?

9 A. I don't know.

10 Q. Okay. How about -- who wrote your
11 contracts? Do you write your own?

12 A. Yes.

13 Q. So you have written -- when I look at
14 page 49 in the binder, and I see the contract
15 between Silverwing and Preferred Windows, that is
16 your product? You created that?

17 A. Correct, although there is always
18 negotiation between the parties so that there can be
19 changes from contract to contract.

20 Q. It's a dynamic document, but you're
21 the -- you have created it, you initiated it?

22 A. We initiated it, yes.

23 Q. Okay. From what I gather from your
24 attorney and what I have gathered from your answers
25 is you view the Fountainhouse at Victorian Square as

1 **actually 11 separate sites of construction?**

2 A. Correct.

3 **Q. Okay. Can you tell me how this contract**
4 **supports that belief of yours?**

5 A. Yes, because the contract that you were
6 alluding to earlier was not complete. I'm not sure
7 why that was the case.

8 But there -- mentioned in the contract is
9 -- specifically mentioned in the text of the
10 contract that you do have, it refers to a schedule
11 of values. That schedule of values is attached as
12 an addendum to the contract or part of the contract
13 at the time the contract was done, unless there has
14 been some adjustments, and that reflects a dollar
15 amount per building site.

16 **Q. Why does attaching a schedule of -- why**
17 **does a schedule of values change the -- how does**
18 **that control the way the contract is set up?**

19 A. Well, first off, the contract under
20 Section 5 allows us to terminate without cause at
21 any time, so there is no expectations by the
22 subcontractor at the onset that they will complete
23 the contract.

24 We proceed with the contract. If his
25 performance is good, we will work from building site

1 to building site. That particular schedule
2 basically delineates what the specific cost is per
3 building site, which has always been our
4 interpretation of the law.

5 **Q. Where is that in the contract?**

6 A. Well, I know it's in the documents we
7 provided you. I was asked for the documentation
8 from Mr. Gore, and I think Fred.

9 I had our staff do the contracts. There
10 was a second or even maybe a third request. I was
11 not really directly a part of that copy, but if
12 something was missing, I would have easily provided
13 to you, but certainly, the information we provided
14 to you for this hearing includes that.

15 **Q. What I have -- because you had an**
16 **opportunity to provide documents for this**
17 **proceeding, correct, in response to it?**

18 A. That's correct.

19 **Q. What I have with respect to that**
20 **Preferred Windows contract that I got from you is**
21 **Exhibit 31. Let's take a look at that.**

22 **What am I looking at here in Exhibit 31?**

23 A. Schedule of values, the SOV.

24 **Q. Are you telling me that this was an**
25 **attachment to the contract?**

1 A. It's incorporated as part of the contract
2 and described in the contract.

3 Q. Where? Let's go back and look. I just
4 want to understand. Bear with me. I can be a
5 little slow. Show me where that is?

6 A. Under Section 1A.

7 Q. 1A, all right. You mean the scope of
8 work?

9 A. No. I mean the schedule of values
10 mentioned in Section 1A.

11 Q. Okay. Let's read it. The contract price
12 stated herein is for the base bid only. I'm reading
13 -- I'll just read the whole section.

14 For the performance of all work and the
15 furnishing of all materials, equipment and tools,
16 which subcontractor is obligated to perform and
17 supply under this contract, subcontractor shall be
18 paid by owner the sum of \$299,700.00, as reflected
19 in the billing schedule of values attached as
20 Attachment D, which is attached to this contract,
21 hereinafter the standard SOV.

22 Is that what you're talking about? This
23 is Exhibit D to your contract?

24 A. Yes, and it's entitled, "Schedule of
25 values."

1 **Q. It's your position that Exhibit D to this**
2 **contract breaks this contract up into 10 separate**
3 **contracts?**

4 A. It's not only my position, it's been my
5 experience in the past that that is exactly how
6 operations have gone.

7 **Q. Okay. So if someone is looking at this**
8 **contract, they're going to have to go to Attachment**
9 **D to understand it's 10 separate contracts?**

10 A. If someone is looking at this contract,
11 they simply can look at the schedule of values and
12 see per building site what the amount is.

13 **Q. It then goes on to say, The contract**
14 **price stated herein is for the base bid only and**
15 **does not include any optional and/or upgrade**
16 **materials. Options and upgrades are priced**
17 **separately on a unit price basis as delineated in**
18 **Attachment B and E of this contract and hereby made**
19 **a part of by reference, hereinafter called the**
20 **optional SOV.**

21 **What is that?**

22 A. Well, that is general language,
23 particularly when we get into home building, but for
24 the issues at hand here, that would be N/A, not
25 applicable.

1 **Q. Are those separate contracts too?**

2 A. No. There is -- they don't exist in this
3 contract.

4 **Q. But if they did, would they be considered**
5 **to be separate and independent contracts like you're**
6 **saying -- are they considered to be separate and**
7 **independent contracts like you're saying these are?**

8 A. Right. They would gross up the
9 respective buildings, if in fact, we did options and
10 upgrades on apartments, which we don't do.

11 **Q. How about a change order? Is that a**
12 **separate and independent contract?**

13 A. That would be in addition to the
14 respective building that it was associated with.

15 **Q. Okay. How about a contract extension?**
16 **Is that a separate and independent contract?**

17 A. Yes, it is.

18 **Q. Let's look at this schedule of values for**
19 **windows. I see here \$7,100 for the clubhouse.**
20 **\$10,100 for the storefronts, and then I see all**
21 **these other numbers per building. \$28,493, but I**
22 **see different prices. Is that because the buildings**
23 **are slightly different?**

24 A. That's correct.

25 **Q. They all add up to \$305,430.20.**

1 A. Yes, except the storefronts never
2 occurred.

3 Q. Okay. The storefronts never occurred,
4 and if we subtract out change order 2, you actually
5 come back to the 299 that is in the contract. Did I
6 get that right?

7 A. If that is what you say. I don't have my
8 calculator with me.

9 Q. Okay. If this was attached to the
10 contract as you say as Exhibit D, why is there --
11 why is change order 2 already known and listed
12 there?

13 A. Because it was probably replaced knowing
14 that there was a change and what we had asked for in
15 that particular building.

16 Q. Don't contracts usually have, at the end,
17 some kind of listing of exhibits? I see Attachment
18 D here in Section 1A. What is Attachment C? Where
19 is that in the contract?

20 A. Without looking through that, I have no
21 idea, but I believe C -- where are you seeing the
22 reference to C?

23 Q. Well, I see an A, and I see a D. I don't
24 see a B or a C.

25 A. Well, SOV, payments on standard and

1 optional would be C. As I told you before, there
2 were no optionals, so there was no C.

3 Q. Okay. Options and upgrades B, there you
4 go, and E of this contract, I'm looking in Section
5 1A, and you say C is what?

6 A. C is optional SOV, if applicable,
7 payments on the standard and optional SOVs shall be
8 processed in C. There were no optional SOVs, so
9 there is no C.

10 Q. Okay. I got it. So I go back to my
11 question. If there is an Attachment D and it's this
12 document that you're representing as 31, and this
13 was part of the contract, how do we already know
14 what the change order amount is?

15 A. I believe I already answered that
16 question.

17 Q. Answer it again. I didn't catch it.

18 A. The change order could have come up --
19 without knowing the actual circumstances of this
20 particular contract, but generally, that would
21 indicate that it came up right about the time that
22 we were doing the contract, and there was some
23 change on that building, and it may have been ADA or
24 something, that type of thing, so we basically
25 adjusted the SOV to include it in the final

1 document.

2 **Q. What is the date of this contract?**

3 A. It is dated December 23rd.

4 **Q. Let's go to page 57.**

5 A. Correct.

6 **Q. What is the amount of this change order?**

7 A. The \$4,025 that is represented in the

8 SOV.

9 **Q. What is the date of this change order?**

10 A. This was in August.

11 **Q. Of what year?**

12 A. 2016.

13 **Q. So help me understand how Attachment D**
14 **was on the original contract when we have a change**
15 **order that is after the fact?**

16 A. Because it was amended to exactly what
17 you've seen. What you're seeing is the final
18 contract in context, and it allows for a lot less
19 uncertainty from our accounting department when
20 they're looking at it, comparing billing against the
21 contract.

22 **Q. So what you have in here as Exhibit 31 is**
23 **not what was attached as Attachment D to the**
24 **contract?**

25 A. The only difference is the change order

1 of \$4,000.

2 Q. Why didn't you produce the entire
3 contract?

4 A. You're asking -- I think I answered that
5 before, but I'll do it for you again.

6 Q. Please do.

7 A. I instructed our staff to basically --
8 there was a list that came from the license board.
9 I instructed them to basically provide them with all
10 those contracts.

11 They hand-delivered them to the license
12 board. There were one or two subsequent requests.
13 I handed those requests off to one of our staff to
14 do, but this was, of course, provided to you before
15 the hearing.

16 Actually, I had the question reversed.
17 When I saw your initial citation, I said, Where are
18 the SOVs? That is really -- I think I was the first
19 person who basically actually found that to be
20 missing.

21 Q. Okay. So we have got -- let's talk about
22 the permitting a little bit and the timing and the
23 issuance of these.

24 You heard the testimony of Mr. Gore and
25 his representation that the issuance of a permit and

1 the finaling of a permit represents the window of
2 construction for that structure. Do you agree with
3 that concept?

4 A. At the point of a permit, it allows us to
5 commence construction.

6 Q. And from what I gathered from the
7 questioning of your counsel to Mr. Gore, what you're
8 going to be saying, what you're saying is, yeah, the
9 permit was issued on this date, but I didn't
10 actually start it until way down the road so you
11 can't really fault me for that. Is that where
12 you're coming from on that?

13 A. Well, first off, you're putting words in
14 my mouth, which I don't appreciate.

15 Secondly, in the actual real world of
16 construction, permits are taken out in advance for a
17 variety of reasons.

18 By example, sewer fees go up, so
19 therefore, you want to basically get under the wire
20 on purchasing permits before to not pay the
21 additional impact fees, so there's a number of
22 reasons why permits are purchased early but not
23 initially acted upon.

24 Q. Can you tell me whether or not buildings
25 were being built -- let's take Fountainhouse. Were

1 these buildings being built at the same time, or
2 were they being built one after the other? One
3 would be completed, and then you would move on to
4 the next; One would be completed and you move on to
5 the next?

6 A. It's basically a hybrid of what you just
7 said. One would be -- a task in a building, by
8 example, a foundation would be completed, and then
9 the foundation in the next one would be started
10 while the framing on Building 1 would have
11 commenced. It's a sequence.

12 Q. Okay. So you had activity on multiple
13 buildings at the same time. Different scopes,
14 you're saying, but activity?

15 A. That's correct.

16 Q. Okay. You're saying that because, for
17 instance -- let's take Preferred Window. Are you
18 saying that Preferred Window would be on Building 1,
19 they would do all of its window work, be completely
20 done and paid, and then move on to Building 2?

21 A. Yes. In that particular case, that would
22 be a good example of it.

23 Q. What can you show us -- what could a
24 contractors board who is investigating this issue
25 look to to learn that kind of thing?

1 A. Well, if you want to see what is
2 completed and paid for, you would just ask for the
3 checks paid to each sub on monthly basis. That will
4 show you work that has been done and completed, paid
5 for before moving on.

6 Q. So are you saying it's overly simplistic
7 to just say there is an open permit and there is
8 overlap?

9 A. Exactly.

10 Q. Where I'm going with this is, there was a
11 point made in one of these documents that you're
12 going to see, which is well taken, it was actually
13 made by the LCB, is that making the Board have to go
14 and try and parse all this information and try to
15 say, Well, we have multiple permits, they're open at
16 the same time, but we -- this guy was actually still
17 working, was only working on this one and hadn't
18 moved on to the next one at the time is an
19 unreasonable thing to ask a licensing agency to do.
20 Do you agree with that?

21 A. The limits are based upon solvency, and
22 that is how it is stated in the NRS.

23 You have, obviously, the same condition
24 on the examples that Mr. Gore was discussing where
25 concurrent buildings were being done across town,

1 across state by different contractors, so yeah, I
2 would think it's unreasonable to select one owner
3 and say that they are in violation and everybody
4 else is not.

5 I disagree with you.

6 Q. Okay. Can you tell me why again? It
7 sounds like you just thought we were singling out
8 Silverwing? Is that your answer? Is that your
9 answer?

10 A. Go ahead and repeat the question.

11 Q. My question is do you think it's
12 appropriate when you have multiple open permits,
13 okay, and you have subcontractors working on
14 multiple buildings and what you're trying to say is,
15 No, really, they were only on this building during
16 this time and only on the next building during the
17 next time, and they were fully paid here before they
18 went there. You got to believe me on that, and I
19 can prove it to you.

20 Is it overly burdensome on the Board to
21 try to have to parse that?

22 A. I would say looking at the amount of
23 documentation that the Board requested, if they also
24 wanted to see the checks that were issued on a
25 monthly basis on completed work, and now you have

1 brought up the LCB opinion, where they said it
2 should be basically reset. Then that would be your
3 reset point, and it should be on a
4 building-by-building basis.

5 **Q. Do you agree with me that it was improper**
6 **to hire RDR Builders to perform framing work?**

7 A. I would like to give you a little
8 background, but your conclusion is correct.

9 The background on them, they were
10 previously a framer in the market. As you know, we
11 had a catastrophic downturn here in the area. They
12 left to California.

13 They wanted to come back into the market.
14 They hired a foreman from a previous job that we had
15 a lot of confidence in. They were framing in
16 California. They came here.

17 They bid the job, and we blew it on that
18 determination and missing that regulation.

19 There is obviously a lot of regulations
20 we're supposed to be on top of, and we blew it on
21 that, so I agree with you, we made a mistake on
22 that.

23 **Q. Okay. Did you check their license -- do**
24 **you check your subcontractors' licenses before you**
25 **enter into contracts with them?**

1 A. Yes, and insurance.

2 Q. Okay. So at least with RDR, you did look
3 and see that it was a B?

4 A. Apparently, our contract administrator
5 did do that, yes.

6 Q. Okay.

7 A. Actually, until the citation, I really
8 wasn't aware of the regulation that we cannot hire a
9 B to do framing.

10 Q. Would you agree with me, with respect to
11 Edgewater -- we'll do each one at a time.

12 With respect to Fountainhouse, you saw my
13 opening presentation where I pointed out the
14 subdivision plat. I know we have the legal dispute
15 over what that means, but the date on that was
16 November 16 was the date that this was recorded.

17 Would you agree with me that the
18 contracting activity for Fountainhouse occurred
19 after that?

20 A. Yes.

21 Q. Same question for the Bungalows. Did the
22 contracting activity occur after the plat was
23 recorded?

24 A. Yes.

25 Q. Same thing for Edgewater. Did the

1 **contracting activity occur after the plat was**
2 **recorded?**

3 A. Yes. I believe so. I mean, we may have
4 had some mobilization, we may have had some offsite
5 work, but as far as the work on the job site, I
6 think that is correct.

7 Q. Okay. Do any of the buildings on any of
8 your work sites have common systems that they use
9 between them?

10 If you want me to try, I can dissect that
11 for you, if you would like?

12 A. Please, yeah, just so I understand.

13 Q. Do they share a common sewer line?

14 A. Each building has a sewer line.

15 Q. Does it feed into a common sewer line?

16 A. Depending upon where it's located, yes
17 and no. It could feed into wherever the capacity as
18 to which line needs to be directed.

19 Q. Does each building have its own fire
20 command, fire safety command center?

21 A. Yes.

22 Q. So there is not one for the whole
23 property. It's building by building?

24 A. It's building by building.

25 Q. Okay. The paving -- let me ask this.

1 Was the paving and parking lots for all of these
2 buildings, were they done as subcontracts to your B,
3 or did you hire them as owner, as an A? Do you
4 remember?

5 A. I don't recall that. I'm sorry.

6 Q. Because what I'm wondering is how do you
7 delineate your parking lots around the project by
8 building? How do you do that?

9 A. We usually work on the parking necessary
10 for that building, and then behind it is usually a
11 lay-down area, and you know, an area that is not --
12 doesn't allow any sort of pedestrian traffic from
13 any of the public.

14 Q. Did your pavement contractors have
15 schedules of value based on buildings?

16 A. Probably by areas depending upon the
17 timing of when the buildings were going to be
18 occupied, and again, I would have to go back on a
19 case-by-case basis and look at that for you.

20 Q. Would it be fair to say then that your
21 schedule of values between subcontractors wasn't
22 consistently just building by building. There could
23 be other ways that you created your schedule of
24 values?

25 A. No. Everything was building by building.

1 As far as the site goes, we made sure that any
2 building needed to be occupied, obviously, we had
3 access.

4 Q. Why would you do contract extensions? We
5 looked at one of those contract extensions where it
6 came to 147, and it was for two buildings.

7 Why did you feel the need to do a
8 contract extension for two buildings for an amount
9 just below the license limit, when as you say, you
10 could have just had it all be one thing and it's
11 separate and that? Why did you go through that
12 exercise?

13 A. I don't recall that, except for they
14 weren't -- they were certainly not working on more
15 than two buildings at a time, so that is probably
16 why we did it that way.

17 Q. How about your landscaping? Did you have
18 common landscaping across the project?

19 A. Which project?

20 Q. Fountainhouse?

21 A. Fountainhouse has only a nominal amount
22 of landscaping. It is primarily around the
23 perimeter of the property.

24 Q. So that was divided by building or how
25 did you contract that?

1 A. That was done at the end of the entire
2 project.

3 **Q. But it was for the whole area?**

4 A. It had nothing to do with the occupancy
5 or construction of an individual site, no.

6 **Q. How about Virginia Lake? Did that have**
7 **extensive landscaping?**

8 A. No. Well, we made an attempt to actually
9 reduce our landscaping for drought tolerance issues,
10 so any grass you see is turf, and the perimeter
11 landscaping is all drip, and it was done at the end
12 of the project because if it is done earlier, then
13 it gets damaged.

14 **Q. If it's done earlier, what?**

15 A. It gets damaged.

16 **Q. Was that done by building, your**
17 **landscaping contracts?**

18 A. There were not -- there isn't landscaping
19 per building. It's around the perimeter of the
20 property.

21 **Q. On all of them?**

22 A. Pretty much. I mean the clubhouse has a
23 little bit of landscaping, a couple plants, if you
24 want to include that, but that is pretty much the
25 case.

1 **Q. Do you have the little parking covers**
2 **around?**

3 A. Carports?

4 **Q. Yeah.**

5 A. Yes.

6 **Q. Do you do those by building?**

7 A. We did those by area, which might include
8 one or two buildings because the construction on the
9 subsequent buildings would have prevented any
10 additional effort.

11 **Q. Okay.**

12 A. Before they're in place, there is still
13 parking that those tenants could still use.

14 **Q. I'm sorry?**

15 A. Before the carports were in place, the
16 parking function was still viable.

17 **Q. Okay.**

18 A. By building.

19 MR. ALLISON: All right. Sir, I think
20 that is all I have for the moment. Thank you.

21 HEARING OFFICER PRO: All right. Thank
22 you. Any questions for Mr. Witt?

23 MR. KIMMEL: Yes. I'm sorry. I was
24 trying to decide if I wanted to request a break or
25 just push through it.

1 HEARING OFFICER PRO: Well, let me ask
2 about that because I'm happy to sit here. I don't
3 know how much longer we have.

4 This is your final witness?

5 MR. ALLISON: Yes.

6 HEARING OFFICER PRO: Do you have other
7 witnesses that you would be calling?

8 MR. KIMMEL: Your Honor, I think we have
9 actually covered most of the points that I was going
10 to discuss with Mr. Hunter, so I don't think I am
11 going to need to call Mr. Hunter, and I think we
12 have discussed also most of the points I wanted to
13 discuss with Mr. Witt, but there are just a few that
14 I would like to finish up with.

15 HEARING OFFICER PRO: Fine. What I meant
16 was, and I don't want to abuse our court reporter or
17 other staff if they needed a lunch break or
18 something.

19 It's a little after noon, but we can go
20 straight through if you can wrap it up. We can
21 break shortly now or we can break in half an hour.

22 MR. KIMMEL: Your Honor, my expectation
23 is I'm not going to be anywhere close to a half an
24 hour. I'll be quick.

25 HEARING OFFICER PRO: Let's go ahead and

1 wrap it up.

2 DIRECT EXAMINATION

3 BY MR. KIMMEL:

4 Q. Mr. Witt, you provided some of your
5 background. Approximately, how many projects have
6 you built?

7 A. Maybe 100 to 150.

8 Q. Approximately, how much living space, if
9 you have any idea?

10 A. Approximately, two to 3,000 homes, two to
11 3,000 thousand apartments, and about a billion to
12 two billion of commercial properties.

13 Q. To the best of your knowledge as the
14 developer, are any of the projects that are at issue
15 in this case projects in which you subdivided land
16 into five or more pieces for sale or development?

17 A. Absolutely not.

18 Q. Explain how you set up these projects?

19 A. We went to the various municipalities,
20 and we asked for a certain concept to be approved.
21 That included the thought of doing a condominium
22 subdivision as a part of the approval, simply as a
23 secondary exit option well into the future if we
24 ever wanted to take it.

25 We have never taken it to date, and this

1 dates back on this approach to 2001, 2002.

2 **Q. As you understand it, is a condominium**
3 **subdivision different than an NRS 278 subdivision?**

4 A. Dramatically.

5 **Q. Has any individual unit or living space**
6 **on any of these projects been sold?**

7 A. The Villas at Edgewater.

8 **Q. Besides the Villas at Edgewater?**

9 A. No, and they were intended to be sold.

10 **Q. Besides those, could any individual unit**
11 **presently be sold as a condominium?**

12 A. No.

13 **Q. Are all of these projects, besides what**
14 **you just referenced, currently rented as apartments?**

15 A. Yes.

16 **Q. You were present when I was going through**
17 **my legal presentation about the maps and some of the**
18 **notes on the maps. Do you recall that?**

19 A. Yes.

20 **Q. Based on your recollection of the maps,**
21 **do the maps assign land to any specific unit?**

22 A. No.

23 **Q. Has any land been sold?**

24 A. No.

25 **Q. Has any land been subdivided for sale?**

1 A. No.

2 **Q. What is actually assigned to each**
3 **apartment or unit?**

4 A. An undivided interest in the total
5 parcel.

6 **Q. Did you believe when you did these maps**
7 **that you were creating a statutory subdivision?**

8 A. Absolutely not. That is why it's called
9 a condominium subdivision.

10 **Q. We have talked a little bit about the**
11 **permit process. We haven't talked about the**
12 **inspection process.**

13 **Can you explain just briefly how an**
14 **inspection takes place?**

15 A. There is significant independence from
16 one building site to the next. We started with a
17 discussion of the application for the permit.

18 The application for the permit includes a
19 formal application, civil engineering, and fees.
20 The city has to review it for setbacks and various
21 compliance issues. If it's acceptable, they grant
22 us the approval to go forward at that point.

23 From that point forward, that building
24 site is independently inspected from any other
25 building site, and in any of these developments that

1 are being discussed here today, a log is kept for
2 that by both the city inspector and the engineer of
3 record.

4 Also, from a financing standpoint, the
5 bank inspector independently inspects every building
6 site separately and determines an amount of
7 completion that is funded into an account for
8 distribution to the subcontractors.

9 **Q. What is certificates of occupancy?**

10 A. Certificates of occupancy are done at the
11 very, very end. They're also independent from each
12 other.

13 At that point, we have to get approval
14 for fire and safety, and then the utilities look at
15 them as all independent because utilities are only
16 allowed to basically connect gas once fire and
17 safety has been signed off, so utilities are -- if
18 they get the approval, by example, in Building 1, to
19 hang meters for gas, that does not give them the
20 right or the ability to hook up gas to any of the
21 other buildings, any of the other construction
22 sites.

23 **Q. Did you believe that each building was a**
24 **separate construction site?**

25 A. Absolutely, and I wanted to add one other

1 factor. After we're done, we file a notice of
2 completion independently on each building to time
3 bar liens, which ties back into the mechanic's liens
4 laws, so they're also done independently of each
5 other.

6 Q. Okay. I appreciate that explanation.
7 Thank you.

8 When you set all of this up, did you
9 believe that each building was a separate
10 construction site?

11 A. Absolutely.

12 Q. As you sit here today, do you still
13 believe that each building is a separate
14 construction site?

15 A. Absolutely.

16 Q. Is that belief premised on this
17 permitting and construction process idea that you
18 just described?

19 A. Yes, and they're all independent of each
20 other. If the economy went down like we saw in '07
21 and '08, we could stop this project and have two
22 buildings out there, which unfortunately, you saw
23 throughout Nevada after the downturn.

24 They are each independent. The balance
25 of the construction sites, again, require

1 independent applications to start. There is no
2 macro approval for us to start construction.

3 As Mr. Gore indicated by his findings,
4 they're all done independently, and it's always been
5 our focus that each site is an independent
6 construction site, subdivision site, if you want to
7 fall into that category, which I would very much
8 disagree with, but they're all independent building
9 sites.

10 **Q. Did you intentionally try and violate any**
11 **laws?**

12 **A. Absolutely not. I think my history tells**
13 **that. I have been doing this for 30 years. This is**
14 **the first time in 30 years that I have ever been**
15 **cited by any state for anything, and during the**
16 **downturn, we were one of the few people that paid**
17 **every subcontractor and every bank off and didn't**
18 **have a lien to our name.**

19 **Q. Did you, in your opinion, knowingly**
20 **violate any laws?**

21 **A. Absolutely not.**

22 **Q. We talked about or you talked with**
23 **counsel about the one issue with RDR.**

24 **Even though you didn't intend it to**
25 **happen and didn't know that it was happening, you**

1 **accept responsibility for that?**

2 A. We do. I learned something from it.

3 MR. KIMMEL: No further questions. Thank
4 you.

5 HEARING OFFICER PRO: All right. Thank
6 you. Mr. Allison, any further?

7 MR. ALLISON: Very quickly.

8 FURTHER DIRECT EXAMINATION
9 BY MR. ALLISON:

10 Q. One final question, Mr. Witt.

11 Are you aware that the Board offers
12 contractors an opinion service where you can ask if
13 you feel like you're in a situation where you might
14 be close to going over the line, you can ask and the
15 Board can give an informal opinion?

16 A. No.

17 Q. You were not aware of that service that
18 was available?

19 A. No.

20 Q. Okay.

21 A. However, it was mentioned to me at the
22 informal hearing we had after this all began.

23 Q. Okay. If you had known that there was
24 one, would you have used it in this situation?

25 A. I may have used it. I may not have

1 agreed with it because I'm still looking for the
2 basis of the opinion.

3 MR. ALLISON: All right. Thank you.

4 HEARING OFFICER PRO: Thank you.
5 Anything else on that, Mr. Kimmel?

6 MR. KIMMEL: No, Your Honor. Thank you.

7 HEARING OFFICER PRO: All right. So
8 Mr. Allison, that completes your witnesses and your
9 case in chief, and Mr. Kimmel, since you have
10 covered with your client what you intended to cover,
11 was there any other evidence you -- any other
12 witnesses you wish to call in your case in chief?

13 MR. KIMMEL: No, Your Honor. Thank you.

14 HEARING OFFICER PRO: All right. Let's
15 talk about how to proceed then.

16 From here, we have, again, the arguments
17 that have been framed with regard to the
18 constitutional challenges to the statutes and
19 statute issue. We now have the evidentiary record
20 from which to address the as-applied arguments as
21 well as just the fundamental merits arguments.

22 My thought earlier today, as I expressed
23 it, was, one, we need to get the transcript
24 prepared. I don't know how long that will take,
25 roughly.

1 THE REPORTER: I can get it to you by
2 Monday.

3 HEARING OFFICER PRO: It's going to be
4 soon, obviously. You all would have access to that.

5 I think it would be -- this is an
6 interesting issue and I think it is an important set
7 of issues. What kind of briefing would you propose
8 and how long would you propose to accomplish that?

9 Tell me what is realistic from your
10 respective perspectives. Assuming we do just as we
11 would in argument, we would have an opening brief by
12 the Board, responding brief, and a rebuttal brief.

13 MR. ALLISON: Well, just so everybody is
14 aware, I am going to be incapacitated starting next
15 Friday for a few days. I'm having a surgery.

16 HEARING OFFICER PRO: Well, good luck
17 with that, and that is fine.

18 Everybody is busy. I'm not trying to put
19 anybody through a meat grinder. Give yourself what
20 you need. We're not talking about consumers at risk
21 or something here.

22 MR. ALLISON: If I could have -- if we
23 could agree on the scopes of the briefs, I would
24 agree on maybe -- if you give me time after I go
25 through that, like maybe a week or so.

1 HEARING OFFICER PRO: Do you want 30
2 days?

3 MR. ALLISON: Thirty days would be
4 perfect for me.

5 HEARING OFFICER PRO: Okay. Thirty days,
6 and then how long -- what kind of the timeframe
7 would you wish?

8 MR. KIMMEL: That's 30 days to file a
9 closing argument, and then we would have some amount
10 of time to file a responsive argument to which he
11 would have a reply.

12 HEARING OFFICER PRO: Yes, right.

13 MR. KIMMEL: If we can agree to try to
14 keep this under 10 pages or set some sort of
15 limitation on what we're talking about, Your Honor,
16 then I see no reason why I can't turn around an
17 opposition within 10 court days basically.

18 HEARING OFFICER PRO: All right. So two
19 weeks so we don't screw up our calendar, but say two
20 weeks --

21 MR. KIMMEL: Two weeks is fine.

22 HEARING OFFICER PRO: -- to accommodate
23 weekends, and then reply?

24 MR. ALLISON: Five days.

25 HEARING OFFICER PRO: Say one week.

1 Again, I want to do it so we fall during a weekday
2 and not get messed up on weekends.

3 MR. ALLISON: Sure.

4 HEARING OFFICER PRO: Let's talk about --
5 that sounds reasonable. Let's talk about scope and
6 page limit.

7 It's difficult to anticipate because you
8 have to filter what you get in the transcript and
9 what else you read and think about, but what is
10 realistic?

11 MR. ALLISON: Well, I think the issues
12 really come down to -- the things that I would be
13 interested in briefing, I'm not interested in
14 briefing factual issues.

15 HEARING OFFICER PRO: The facts are
16 there.

17 MR. ALLISON: I'm interested in briefing
18 the subdivision legal issue on that. I would like
19 to think about that a little bit more, and really,
20 it's more of a -- I kind of want to drill into the
21 as-applied issues with the understanding that I
22 don't have any intention of writing anything to you,
23 Your Honor, about whether the statute needs to be
24 stricken because it's vague on its face or any of
25 the facial challenges.

1 HEARING OFFICER PRO: I can tell you all
2 now that I don't have authority to strike a statute
3 on constitutional grounds. I can opine on and rule
4 on the as-applied.

5 Certainly, in the context of that, I
6 wouldn't be limited in expressing my view on the
7 facial constitutionality of something, but take that
8 and a nickel, and you can buy some coffee.

9 MR. ALLISON: It's worth just about as
10 much as an LCB opinion.

11 HEARING OFFICER PRO: There you go. That
12 is exactly what you would have.

13 MR. KIMMEL: Ouch. I can't believe you
14 said that on the record.

15 HEARING OFFICER PRO: I'm not going to
16 tell you how to write your briefs. You both know
17 what you want to cover, what you think you need to
18 cover to inform me.

19 I don't want to put arbitrary page
20 limits. Fifteen pages for your opening?

21 MR. ALLISON: That's fine. Fifteen will
22 be fine.

23 HEARING OFFICER PRO: Same for your
24 response?

25 MR. KIMMEL: Your Honor, I am fine with

1 that. Mr. Allison and I, I think, have a very
2 professional cordial relationship.

3 If he calls me up and expresses that he
4 has comes up with something that now he needs 20
5 pages on, I'm not going to put him through the
6 wringer of having to contact Your Honor.

7 HEARING OFFICER PRO: And what you have
8 briefed has been concise.

9 MR. KIMMEL: Correct.

10 HEARING OFFICER PRO: You both have
11 demonstrated you're not bloviating across the map on
12 things that you're focused on, what the issues are,
13 and I don't anticipate some tedious briefing from
14 either of you. I would be shocked.

15 Let's go with that. I don't have a
16 calendar in front of me, but we're today at the
17 28th, so 30 days hence would be the 28th of October,
18 which I am assuming is a -- does anyone have a
19 calendar?

20 MR. KIMMEL: I do, Your Honor. I'm
21 pulling it up.

22 MR. ROZARIO: The 28th is a Saturday.

23 MR. KIMMEL: That is correct.

24 HEARING OFFICER PRO: The 28th is a
25 Saturday, so you either want to make it the 27th.

1 MR. ALLISON: That's fine.

2 HEARING OFFICER PRO: October 27th, and
3 then two weeks thereafter would be November --

4 MR. ROZARIO: Excuse me, Your Honor. I
5 believe the 27th is a state holiday.

6 MR. ALLISON: Nevada Day.

7 HEARING OFFICER PRO: No. That is
8 October 31st.

9 I know, I know. I never understood why
10 they changed that, you know? Nevada Day is October
11 31, right?

12 MR. KIMMEL: Yeah. It's supposed to be.

13 MR. ALLISON: Children think they dress
14 up and get treats because it's Nevada Day.

15 MR. ALLISON: That's what I tell my son.

16 HEARING OFFICER PRO: So the 27th would
17 not be good.

18 MR. ALLISON: The 26th is fine.

19 HEARING OFFICER PRO: Okay, the 26th.

20 MR. KIMMEL: The 9th.

21 HEARING OFFICER PRO: November 9 for the
22 responsive memorandum, and the reply would be a week
23 later, so that would be November 16. I'm hoping
24 that is not a holiday. That is well in advance of
25 Thanksgiving.

1 Let's go with that as a schedule, and
2 then the matter will stand submitted to me, and I am
3 required to have a ruling within 30 days, but I'll
4 have one as quick as I can after that, accounting
5 for being overstuffed with turkey for a couple of
6 those days.

7 Is there anything else on behalf of the
8 Board at this time, Mr. Allison?

9 MR. ALLISON: No. Thank you.

10 HEARING OFFICER PRO: Mr. Kimmel, on
11 behalf of your client?

12 MR. KIMMEL: No, Your Honor. Thank you
13 very much, though. We appreciate your participation
14 in this.

15 HEARING OFFICER PRO: Oh, you bet. I'm
16 glad I was involved in this.

17 Ms. Grein, I should ask you. Is there
18 anything else we need to tend to from your
19 perspective before we recess today's proceedings?

20 MS. GREIN: Not to my knowledge.

21 HEARING OFFICER PRO: Okay, great. We'll
22 go ahead and declare the hearing closed and be in
23 recess, and thank you again for your able briefing
24 and presentations to everyone, the testimony which
25 was helpful to me.

1 I look forward to seeing the briefs, and
2 we'll go from there.

3 MR. ALLISON: Thank you.

4 HEARING OFFICER PRO: Thank you, all.

5 MR. KIMMEL: Thank you, Judge.

6 (Hearing concluded at 12:25 p.m.)
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1 STATE OF NEVADA)
) ss.
2 COUNTY OF WASHOE)

3

4 I, KATE MURRAY, Certified Court Reporter
5 for the County of Washoe, State of Nevada, do hereby
6 certify:

7 That I was present at the Nevada State
8 Contractors Board on Thursday, September 28th, 2017,
9 and took stenotype notes of the above-entitled
10 proceedings and thereafter transcribed them into
11 typewriting as herein appears;

12 That the foregoing transcript is a full,
13 true and correct transcription of my stenotype notes
14 of said hearing.

15

16 DATED: At Reno, Nevada, this 2nd day of
17 October, 2017.

18

19


KATE MURRAY, CCR 1599

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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,

vs.

NEVADA STATE CONTRACTORS BOARD

Respondents.

CASE NO.: CV18-00128

DEPT. NO.: 10

PETITIONERS' OPENING BRIEF

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TABLE OF AUTHORITIES

Cases Cited:

<i>Barrett v. Baird</i> , 111 Nev. 1496, 1509, 908 P.2d 689, 698 (1995)	14
<i>City of Las Vegas v. Eighth Judicial Dist. Court</i> , 118 Nev. 859, 864, 59 P.3d 477, 481 (2002)	9
<i>Cornella v. Justice Court</i> , 132 Nev.Adv.Op. 58, 377 P.3d 97, 100 (2016)	8, 9
<i>Currier v. SIIS</i> , 114 Nev. 328, 333, 956 P.2d 810, 813 (1998)	7
<i>Deja Vu Showgirls v. State, Dept. of Tax.</i> , 130 Nev.Adv.Op. 73, 334 P.3d 392, 398 (2014)	8
<i>Elizondo v. Hood Mach., Inc.</i> , 129 Nev. 780, 785, 312 P.3d 479, 482 (2013)	7
<i>Flamingo Paradise Gaming v. Att'y General</i> , 125 Nev. 39, ----, 217 P.3d 546, 558–59 (2009)	14
<i>Flamingo Paradise Gaming, LLC v. Chanos</i> , 125 Nev. 502 (2009) (footnote 14)	8
<i>Gaines v. State</i> , 116 Nev. 359, 371, 998 P.2d 166, 173 (2000)	15
<i>Gandy v. State ex rel. Div. Investigation</i> , 96 Nev. 281, 282, 607 P.2d 581, 582 (1980)	7
<i>Hoffman Estates v. Flipside, Hoffman Estates</i> , 455 U. S. 489, 497 (1982)	9
<i>In re Candelaria</i> , 126 Nev. 408, 416–17, 245 P.3d 518, 523 (2010)	14
<i>Kenaitze Indian Tribe v. State of Alaska</i> , 860 F.2d 312, 316 (9th Cir. 1988)	6
<i>Kolender v. Lawson</i> , 461 U.S. 352, 358, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983)	9
<i>Law Offices of Barry Levinson, P.C. v. Milko</i> , 124 Nev. 355, 366–67, 184 P.3d 378, 386–87 (2008)	13
<i>Lioce v. Cohen</i> , 124 Nev. 1, 174 P.3d 970 (2008)	14

1	<i>Matter of T.R.</i> , 119 Nev. 646, 652 (2003)	9
2	<i>McNeill v. State</i> , 132 Nev. Adv. Op. 54, 375 P.3d 1022, 1025–26 (2016)	18, 19
3	<i>Nelson v. State</i> , 123 Nev. 534, 540–41, 170 P.3d 517, 522 (2007)	8, 10
4	<i>Rico v. Rodriguez</i> , 121 Nev. 695, 703, 120 P.3d 812, 817 (2005)	14
5	<i>SIIS v. Christensen</i> , 106 Nev. 85, 787 P.2d 408 (1990)	7
6	<i>Silvar v. District Court</i> , 122 Nev. 289, 292 (2006)	8, 9, 11
7	<i>Smith v. Goguen</i> , 415 U.S. 566, 574, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974)	9
8	<i>S. Nevada Homebuilders Ass'n v. Clark Cty.</i> , 121 Nev. 446, 449, 117 P.3d 171, 173 (2005)	13
9	<i>Tighe v. Las Vegas Metropolitan Police Dept.</i> , 110 Nev. 632, 877 P.2d 1032 (1994)	7
10	<i>Williams v. State</i> , 118 Nev. 536, 546, 50 P.3d 1116, 1122 (2002)	8
11	Statutes Cited:	
12	NRS 213.1243	19
13	NRS 233B.135(3)	7
14	NRS 278.320(1)	4, 7, 12, 13, 19, 20, 21
15	NRS 624.005	15
16	NRS 624.220(1)	12
17	NRS 624.220(2)	3, 4, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 21
18	NRS 624.260	6, 15
19	NRS 624.265	6, 15
20	NRS 624.3015(3)	10
21	Regulations Cited:	
22	NAC 278.190	12
23		
24		
25		

Secondary Sources Cited:

16A Am. Jur. 2d Constitutional Law § 312	18
73 Am. Jur. 2d Statutes § 234	8

ISSUES PRESENTED FOR REVIEW

I. Nevada and federal law preclude the enforcement of an unconstitutionally vague statute as a violation of due process. Here, the Nevada State Contractors Board's ("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.

II. 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.

1 III. Nevada and federal law preclude the legislative branch from delegating its power to
2 legislate. Here, the NSCB has used its advisory opinion process to unilaterally create
3 conditions or criteria for analyzing an admittedly ambiguous statute (NRS
4 624.220(2)) for potential violation. The third issue presented for review is whether,
5 as a matter of law, the NSCB's December 14, 2015 Advisory Opinion violates Article
6 3, Section 1 of the Constitution of the State of Nevada and/or Article I, Section I of
7 the United States Constitution.
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10 IV. Nevada law precludes the aggregation of projects for determining whether a license
11 limit has been exceeded where the work to be aggregated is not performed on a
12 "single construction site" or "subdivision site". NRS 624.220(2). Here, the
13 Administrative Law Judge ("ALJ") ruled the projects were statutory subdivisions
14 under NRS 278.320(1) and could therefore be treated as a "subdivision site" under
15 NRS 624.220(2). The final issue presented for review is whether that decision is
16 supported by substantial evidence when none of the projects divided land, or
17 contemplated the division of land, into five or more parts as required by NRS
18 278.320(1) to constitute a statutory subdivision.
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STATEMENT OF THE CASE

In this case, the NSCB aggregated the work performed by subcontractors on separately permitted buildings within each of four projects, which in some circumstances created a total dollar amount of work in excess of some subcontractors' license limits. After doing so, the NSCB then found Petitioners Silverwing J Carter Witt, III and Silverwing Development (collectively, "Silverwing") to have "knowingly" violated the law by bidding to contract or entering into a contract with a contractor for work in excess of the subcontractor's limit, and by failing to ascertain that a subcontractor is appropriately licensed. These violations are premised on the interpretation and application of NRS 624.220(2) (the statutory definition of a license limit).

The NSCB has previously deemed one aspect of NRS 624.220(2) ambiguous, and the Legislative Counsel Bureau ("LCB") opined that "there is a need for clarification of the law".¹ Exhibit 5, SWD000147. By all accounts, the NRS 624.220(2) lacks the specificity and clarity necessary to facilitate compliance with the law by licensees at the point of contract, and to facilitate the NSCB's reasonable application of the law after contract.

On July 14, 2017, more than one year after the NSCB initiated its investigation, the NSCB filed its Complaint alleging four causes of action against Silverwing. The first and second causes of action alleged 30 violations each, premised on the application of NRS

¹ All references to exhibits are the exhibits admitted into evidence as part of the September 28, 2017 Hearing (the "Hearing"). They are contained in the record on appeal as Exhibit 1, pages 1-457; Exhibit 2, pages 1-21 and SWD000001 - SWD000141; Exhibit 3, pages 1-7; Exhibit 4, pages 1-2; Exhibit 5, pages 1-8 and SWD000142 - SWD000152; Exhibit 6, pages 1-4; Exhibit 7, pages 1-7; Exhibit 8, pages 1-26; Exhibit 9, pages 1-2; Exhibit 10, pages 1-16; Exhibit 11, pages 1-2; Exhibit 12, pages 1-15; Exhibit 13, pages 1-8; Exhibit 14, pages 1-11; and Exhibit 15, the September 28, 2017 Hearing Transcript, pages 1-175. Because the record as transmitted by the NSCB has not been bates-labeled in its entirety, Silverwing will also reference individual page labeling where possible.

1 624.220(2). The third and forth causes of action alleged 3 violations each, premised on the
2 use of a B-2 residential and small commercial contractor as a framing subcontractor.

3 Silverwing answered the Complaint on August 24, 2017, challenging the
4 constitutionality of NRS 624.220(2). The contested administrative hearing was held on
5 September 28, 2017. Through Decision dated December 21, 2017 (the "ALJ Decision"), the
6 ALJ found that Silverwing, although it did not act with the intent to evade the law, had
7 "knowingly" violated the law with respect to the allegations in the first and third causes of
8 action. Silverwing was ordered to pay the minimum fine of \$1,000, per violation, or a total
9 of \$33,000, plus \$28,739 for the NSCB's attorney fees and costs. The ALJ also dismissed the
10 second and fourth causes of action.
11

12 Silverwing now seeks judicial review of the ALJ Decision. The statute providing the
13 basis for the ALJ Decision is unconstitutional. Additionally, there is not substantial
14 evidence in the record to support the ALJ's determination that the projects at issue are
15 statutory subdivisions pursuant to NRS 278.320(1).
16

17 **STATEMENT OF FACTS**

18 The facts in this matter are largely undisputed. Petitioner J Carter Witt, III is the
19 President and Qualifying Officer of Petitioner Silverwing Development (collectively,
20 "Silverwing"). (Ex. 1 at 16). Silverwing maintains a Class-B, unlimited monetary license
21 and has developed thousands of homes, thousands of apartments, and over one billion
22 dollars worth of commercial properties. Transcript; p. 159:10-12. Silverwing acted as the
23 general contractor on the four projects at issue in this case, projects which are owned and
24 were developed by Witt. Transcript; p. 134:22-25, 135:1-4.
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1 Silverwing has held the same Class B license in Nevada for nearly two decades.
2 During that time, Silverwing has not received a single violation from the NSCB prior to this
3 case. Transcript; p. 164:12-18. There have been no claims of default on debts, failure to
4 pay subcontractors, or failure to comply with any city and/or county obligations and bonds,
5 despite the severity of the recent recessions. *Id.* Over the course of nearly two decades in
6 Nevada alone, Silverwing has developed approximately 2000 lots and homes, constructed
7 approximately 1400 multi-family units, and brought numerous commercial projects to
8 completion...all of which have provided a direct benefit to the public and the communities
9 in which the developments were built. Transcript; p. 159:4-12.
10

11 Silverwing developed four projects at issue in this case: Edgewater at Virginia Lake
12 Apartments; Edgewater at Virginia Lake Condos (collectively, "Edgewater"); Fountainhouse
13 at Victorian Square ("Fountainhouse"); and, The Bungalows at Sky Vista ("Bungalows").
14 Exhibit 7, p. 1-7. J Carter Witt III was also an owner and managing member of the projects.
15 Each project is comprised of multiple, separate buildings. Exhibit 2, SWD000036 -
16 SWD000039. Each building required its own separate submittal with unique municipal
17 building department fees, plan checks, permits, inspections (city and private), and
18 certificates of occupancy. Transcript; p. 161-164; Exhibit 6:1-5.
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21 Silverwing did as is customary in the industry...it engaged subcontractors to
22 perform work at the projects and some of these subcontractors performed work on
23 multiple buildings or sites within one project over an extended period of time.
24 Mechanically, Silverwing set up its contracts with a schedule of values that delineated how
25 much work a particular subcontractor would perform on each permitted building within a
26 particular project, and no subcontractor was guaranteed a right to perform work on every
27 building. Transcript; p. 140:11-25, p. 141:1-12; Exhibit 2. In doing so, Silverwing believed
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and understood that each site permitted and inspected separately was to be treated as a separate construction site. Transcript; p. 162:23-25, p. 163:1-25, p. 164:1-9. The NSCB has not alleged, and the record does not reflect, that any of the subcontractors exceeded their license limit on a single permitted and inspected building. The alleged violations are premised on the aggregation of work across permitted buildings within the larger project as a whole.

ARGUMENT

I. INTRODUCTION

The first cause of action in the NSCB Complaint is based on the premise that all work by one subcontractor for one client, whether under one or multiple contracts, shall be aggregated for the purpose of determining whether a license limit has been exceeded "on a single construction site or subdivision site." NRS 624.220(2). That statute reads as follows:

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 NRS 624.265, inclusive.

Id. As articulated below, NRS 624.220(2) is unconstitutional and may not provide the basis upon which disciplinary and/or criminal penalties may be imposed upon a licensed contractor, or a "client" who hires a licensed contractor.

If any part of NRS 624.220(2) is unconstitutional on its face or as applied to Silverwing, then the entire subsection of the statute fails. The NSCB, and in fact even a state



1 court, may not simply "blue pencil" out or ignore the relevant context of the statute in an
2 attempt to render the statute constitutional. *See Kenaitze Indian Tribe v. State of Alaska*,
3 860 F.2d 312, 316 (9th Cir. 1988)(articulating that creative interpretation of a statute is the
4 same as an impermissible judicial change to statutory language, and that courts must "look
5 to policy in interpreting statutes...not rewrite language to conform to the policy").
6

7 **II. STANDARD OF REVIEW**

8 In the contested administrative case below, Silverwing challenged both the facial
9 and as-applied constitutionality of NRS 624.220(2). Constitutionality is a legal question,
10 and this Court must decide pure legal questions without deference to an agency
11 determination. *See Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 785, 312 P.3d 479, 482
12 (2013). Silverwing also challenges the construction of NRS 624.220(2), and whether it was
13 proper for the ALJ (and the NSCB) to use NRS 278.320(1)'s definition of "Subdivision" as a
14 surrogate for NRS 624.220(2)'s undefined use of the phrase "subdivision site". A reviewing
15 court may undertake independent review of the administrative construction of a statute.
16 *See Currier v. SIIS*, 114 Nev. 328, 333, 956 P.2d 810, 813 (1998) (Internal citations omitted).
17

18 When the decision of an administrative body is contested, the function of the court
19 is to review the evidence presented to the administrative body and to ascertain whether
20 that body acted arbitrarily or capriciously, thus abusing its discretion. *See Gandy v. State ex*
21 *rel. Div. Investigation*, 96 Nev. 281, 282, 607 P.2d 581, 582 (1980). The court may not
22 substitute its judgment for that of the agency on questions of fact. *Id.*, *see also*, NRS
23 233B.135(3). With respect to facts, Nevada precedents mandate that where the
24 administrative decision is not supported by substantial evidence, it must be reversed. *See*
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1 *SIIS v. Christensen*, 106 Nev. 85, 787 P.2d 408 (1990); *see also Tighe vs. Las Vegas*
 2 *Metropolitan Police Dept.*, 110 Nev. 632, 877 P.2d 1032 (1994).

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 6 **III. NRS 624.220(2) VIOLATES SILVERWING'S RIGHT TO DUE PROCESS BECAUSE IT**
 7 **IS UNCONSTITUTIONALLY VAGUE BOTH FACIALY AND AS APPLIED TO SILVERWING IN**
 8 **THIS CONTESTED MATTER**

9 It is black letter law that "[A] statute is unconstitutionally vague if it does not give a
 10 person of ordinary intelligence a reasonable opportunity to know what is prohibited." *See*
 11 73 Am. Jur. 2d Statutes § 234. A facial challenge to the statute only requires the potential
 12 for enforcement; an as-applied challenge arises where the government enforces the
 13 provisions of a statute against a party. Even if a facial challenge fails, the law may be
 14 challenged as applied once the government attempts to enforce the law. *See, e.g., Flamingo*
 15 *Paradise Gaming, LLC v. Chanos*, 125 Nev. 502 (2009) (footnote 14).

16 The Nevada Supreme Court presumes that all statutes are valid, and "the burden is
 17 on the challenging party to demonstrate that a statute is unconstitutional." *See, Cornella v.*
 18 *Justice Court*, 132 Nev.Adv.Op. 58, 377 P.3d 97, 100 (2016); *Flamingo Paradise Gaming*, 125
 19 Nev. at 509 (both citing *Silvar v. District Court*, 122 Nev. 289, 292 (2006)). While the
 20 challenging party "generally bears the burden of demonstrating that there is no set of
 21 circumstances under which the statue would be valid," if a heightened level of scrutiny
 22 applies, "the general presumption regarding a statute's constitutionality is reversed, and
 23 the State bears the burden of demonstrating the statute's constitutionality." *Deja Vu*
 24 *Showgirls v. State, Dept. of Tax.*, 130 Nev.Adv.Op. 73, 334 P.3d 392, 398 (2014).
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1 In challenging a statute as constitutionally vague on its face, and in violation of the
2 Due Process clause, the Nevada Supreme Court has adopted a two-prong test:

3 Under the first prong of the vagueness test, “a statute will be deemed to have
4 given sufficient warning as to proscribed conduct when the words utilized
5 have a well settled and ordinarily understood meaning when viewed in the
6 context of the entire statute.” *Nelson v. State*, 123 Nev. 534, 540–41, 170 P.3d
7 517, 522 (2007) (quoting *Williams v. State*, 118 Nev. 536, 546, 50 P.3d 1116,
8 1122 (2002)). But a statute is not unconstitutionally vague simply because
9 there are some marginal cases where it is difficult to ascertain whether the
10 facts violate the statute. *Id.* at 541, 170 P.3d at 522. Moreover,
11 “[m]athematical precision is not [required] in drafting statutory language.”
12 *Castaneda*, 126 Nev. at 482, 245 P.3d at 553 (quoting *City of Las Vegas v.*
13 *Eighth Judicial Dist. Court*, 118 Nev. 859, 864, 59 P.3d 477, 481 (2002)).
14 Thus, when statutory language has ordinarily understood meanings, this
15 court applies those meanings to define the limits of the statute.

16 Under the second prong of the vagueness test, in order to avoid
17 discriminatory enforcement of a criminal statute, the Legislature must
18 “establish minimal guidelines to govern law enforcement.” *Kolender v.*
19 *Lawson*, 461 U.S. 352, 358, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983) (quoting
20 *Smith v. Goguen*, 415 U.S. 566, 574, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974)).
21 This prong is more important than the first prong because otherwise “a
22 criminal statute may permit a standardless sweep, which would allow the
23 police, ‘prosecutors, and juries to pursue their personal predilections.’”
24 *Silvar*, 122 Nev. at 293, 129 P.3d at 685 (quoting *Kolender*, 461 U.S. at 358,
25 103 S.Ct. 1855).

26 In analyzing a statute under this two-prong test, the standard of review for a civil
27 statute is lower, while the standard of review for a criminal standard is heightened.
28 *Flamingo Paradise Gaming*, 125 Nev. at 512-513. To challenge a civil statute, a party “must
show that the statute is impermissibly vague in all of its applications. [*Citations omitted.*] In
making this showing, ‘[a] complainant who engages in some conduct that is clearly
proscribed cannot complain of the vagueness of the law as applied to the conduct of
others.’” *Id.*, citing *Matter of T.R.*, 119 Nev. 646, 652 (2003); *Hoffman Estates v. Flipside*,
Hoffman Estates, 455 U. S. 489, 497 (1982). If the statute involves criminal penalties or
constitutionally-protected rights, the Court will apply a heightened level of review that

1 “will look to whether vagueness permeates the text, which means a statute will be invalid
2 if the conduct prohibited by the statute is void in most circumstances.” *Cornella*, 132
3 Nev.Adv.Op. 58, 377 P.3d at 101, citing *Flamingo Paradise Gaming*, 125 Nev. at 512.

4 The NSCB's December 14, 2015 Advisory Opinion (issued by the Board's counsel,
5 Noah Allison)(the "Tesla Opinion") analyzed, in part, NRS 624.220(2). Exhibit 2;
6 SWD000148 - SWD000152. Importantly, the Tesla Opinion found: **"The Board deems the
7 language of phrase 2, 'single construction site,' as ambiguous because the phrase is
8 subject to more than one reasonable meaning."** *Id.*, SWD000150. In other words, there
9 is no "well settled and ordinarily understood meaning" of the phrase "single construction
10 site" when viewed in the context of the entire statute. *See Nelson v. State*, 123 Nev. 534,
11 540–41, 170 P.3d 517, 522 (2007). In doing so, the Tesla Opinion admitted that the statute
12 fails for vagueness.

13 Moreover, if a statute is admittedly vague and "subject to more than one reasonable
14 meaning", there is no basis upon which to determine that someone "knowingly" violated
15 the statute. Silverwing was charged with multiple purported violations of NRS
16 624.3015(3)² based on the license limits of numerous subcontractors, and the effect of
17 aggregating the work of those subcontractors on separate permitted projects because all
18 work was performed for one client, Silverwing. Simply, the purported violations turn on
19 whether the work was performed on "one construction site", a phrase which the Tesla
20 Opinion agrees is vague and subject to different reasonable meanings. It was both rational
21 and reasonable for Silverwing to conclude, at the point of bid and contract, that
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27 ² "Knowingly bidding to contract or entering into a contract with a contractor for
28 work in excess of his or her limit or beyond the scope of his or her license."

1 construction sites requiring separate submittals, permits and/or buildings constitute
2 different construction sites, regardless of whether one or multiple written contracts exist.

3 After the NSCB issued its Complaint, but before the hearing, the NSCB changed its
4 position and alleged, for the first time, that all of Silverwing's condominium projects were
5 statutory "subdivision sites" instead of "single construction sites". Transcript; p. 19-23:25,
6 p. 20:1-7. The NSCB did so because it recognized the implications of the Tesla Opinion and
7 its prior admission that the phrase "single construction site" was ambiguous. *Id.* In reality,
8 the phrase "subdivision sites" is no less ambiguous than the phrase "single construction
9 site".
10

11 NSCB Compliance Investigator Jeff Gore testified about NRS 624.220(2) at the NSCB
12 hearing. Exhibit 15. Mr. Gore could not, and did not, articulate any well settled and
13 ordinarily understood meanings of either the phrase "subdivision site" or "single
14 construction site". *Id.*, p. 123:20-25, p. 124:1-25, p. 125:1-25, 126:1-3. Unequivocally and
15 without any hesitation, Mr. Gore testified that (1) the phrase "single construction site" is
16 not defined anywhere in Nevada Revised Statutes or Nevada Administrative Code; (2) the
17 phrase "subdivision site" is not defined anywhere in Nevada Revised Statutes or Nevada
18 Administrative Code; and, (3) that there are absolutely no internal written guidelines,
19 manuals, or guide books that he uses to determine whether something is a single
20 construction site or subdivision site. *Id.* The record is devoid of any indication that Mr.
21 Gore's investigation included an analysis, on any level, of whether the projects at issue
22 were single construction sites, subdivision sites, or even statutory subdivisions.
23
24

25 By his own admission, Mr. Gore was (and is in all cases involving NRS 624.220(2))
26 left with nothing more than his own personal subjective experience or predilections as the
27 guiding factor to determine whether the work at issue involved a single construction site, a
28

1 subdivision site, or neither. Legally, a statute may not be so devoid of adequate guidelines
 2 as to permit the enforcers of the statute to "pursue their personal predilections." *See Silvar*
 3 *v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 122 Nev. 289, 293, 129 P.3d 682, 685
 4 (2006)(the second prong of the vagueness test). Moreover, when a statute is without
 5 ordinarily understood meanings, there is no way for a court to define the limits of the
 6 statute. *Id.* (the first prong of the vagueness test).
 7

8 **A. THE ALJ ERRED AS A MATTER OF LAW BY CONCLUDING THAT THE**
 9 **PHRASE "SUBDIVISION SITE" AS USED IN NRS 624.220(2) IS**
 10 **SYNONYMOUS WITH "SUBDIVISION" AS USED IN NRS**
 11 **278.320(1).**

12 Because there is no statutory or judicially created definition of the phrase
 13 "subdivision site" in NRS Chapter 624 or NAC Chapter 624, the NSCB asked the ALJ to rely
 14 on the definition of "subdivision" found in NRS 278.320(1). But, NRS Chapter 278 is a
 15 planning and zoning chapter, not a contractor licensing law chapter.³ Specifically, NRS
 16 278.320(1) is a general provision addressing the subdivision of land, and it defines a
 17 statutory "subdivision" as "any land, vacant or improved, which is divided or proposed to
 18 be divided into five or more lots, parcels, sites, units or plots, for the purpose of any
 19 transfer or development, unless exempted by law."⁴ Because a statutory "subdivision" is
 20 composed of land divided into "five or more lots, parcels, sites, units or plots", a
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 23 ³ The Court may take judicial notice of the fact that the Nevada State Contractors
 24 Board's own website omits any reference to NRS 278.320 in its provision of Rules,
 25 Regulations, and Statutes to licensees and the general public.
 26 www.nvcontractorsboard.com/rules/html.

27 ⁴ NAC 278.190, which was not promulgated by the NSCB and cannot properly be used
 28 to supplement NRS Chapter 624 (*see* NRS 624.220(1)), defines a subdivision as including "a
condominium project or a planned unit development." (Emphasis added). However,
 neither the statute nor the regulation define the site that makes up the smaller piece of the
 entire project.

1 "subdivision site" must be something less than an actual "subdivision"; therefore, a
2 "subdivision site" must be a smaller piece of the entire subdivision. Yet, there is no
3 statutory definition for what constitutes that piece.
4

5 Moreover, by concluding that "subdivision site" and "subdivision" are synonymous,
6 the ALJ necessarily rendered superfluous the word "site" as it is used both in NRS
7 624.220(2) and NRS 278.320(1). Rules of statutory construction mandate that "every
8 word, phrase and provision in the enactment has meaning." *See Law Offices of Barry*
9 *Levinson, P.C. v. Milko*, 124 Nev. 355, 366–67, 184 P.3d 378, 386–87 (2008)(Internal
10 citations and quotations omitted). Notably, had the Legislature intended aggregation of
11 license limits across an entire statutory subdivision, it would have omitted the word "site"
12 from "subdivision site" in NRS 624.220(2). Had the Legislature not intended a "site" to be a
13 smaller piece of an NRS 278.320(1) statutory subdivision, it would have omitted the word
14 "site" from the definition of types of pieces of land, five or more of which are required to
15 create a statutory subdivision. The plain language of NRS 624.220(2) clearly does not
16 contemplate the aggregation of work across an entire statutory subdivision, or across
17 multiple "sites" within the same statutory subdivision; aggregation is only contemplated on
18 a subdivision site (singular).
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21 A contrary conclusion leads to the absurd and problematic result that a licensee
22 could be precluded, in perpetuity, from performing work for the same client in a
23 subdivision once a license limit had been reached, regardless of whether the new work was
24 performed decades later under a completely separate permit on a completely separate
25 building. The law does not favor such absurd statutory interpretation. *See S. Nevada*
26 *Homebuilders Ass'n v. Clark Cty.*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005). A statutory
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subdivision under NRS 278.320(1) cannot be synonymous with an NRS 624.220(2) "subdivision site".

///

IV. NRS 624.220(2) VIOLATES SILVERWING'S RIGHT TO EQUAL PROTECTION UNDER THE LAW BECAUSE IT UNCONSTITUTIONALLY AGGREGATES WORK FOR SOME, BUT NOT ALL, LICENSEES OF THE SAME MONETARY CLASS

A licensee with a set monetary limit is entitled to the same rights as any other licensee with the same set monetary limit. Licensees of the same monetary limit must be treated the same, regardless of whether their work is performed for one "client" or for multiple clients. Simply stated, fundamentals of equal protection mandate that it is improper to aggregate work for "one client" to determine whether a license limit has been exceeded while at the same time permitting a similarly situated licensee to enter into a infinite amount of agreements for separate clients.

Similarly, it is improper to aggregate work performed within an entire subdivision (which can include thousands of homes) for one client while at the same time permitting a similarly situated licensee to enter into an infinite amount of agreements for one client provided the work is not performed in the same subdivision.

The Fourteenth Amendment of the United States Constitution forbids an enactment that "den[ies] ... any person ... equal protection of the laws." U.S. Const. amend. XIV, § 1. Article 4, Section 21 of the Nevada Constitution requires that all laws be "general and of uniform operation throughout the State." "The standard for testing the validity of legislation under the equal protection clause of the state constitution is the same as the federal standard." *Barrett v. Baird*, 111 Nev. 1496, 1509, 908 P.2d 689, 698 (1995), *overruled on other grounds by Lioce v. Cohen*, 124 Nev. 1, 174 P.3d 970 (2008).

A statute that treats similarly situated people differently implicates equal protection. *Rico v. Rodriguez*, 121 Nev. 695, 703, 120 P.3d 812, 817 (2005). When a suspect class or fundamental right is not involved, different classifications are permissible, so long as they are reasonable. *Flamingo*

1 *Paradise Gaming v. Att'y General*, 125 Nev. 39, ----, 217 P.3d 546, 558–59
2 (2009).

3 *In re Candelaria*, 126 Nev. 408, 416–17, 245 P.3d 518, 523 (2010).

4 Admittedly, Silverwing not a "suspect class" and NRS 624.220(2) does not implicate
5 fundamental rights. Accordingly, the lesser standard of rational relationship to a legitimate
6 governmental interest must be applied to determine if NRS 624.220(2) violates due
7 process. *Gaines v. State*, 116 Nev. 359, 371, 998 P.2d 166, 173 (2000). Even under this
8 lesser standard, it is clear that NRS 624.220(2) is an unconstitutional violation of due
9 process.
10

11 NRS 624.005 sets forth the Legislature's declaration with respect to the provisions
12 of the chapter relating to discipline of licensees.

13 The Legislature declares that the provisions of this chapter relating to the
14 discipline of licensees are intended to promote public confidence and trust in
15 the competence and integrity of licensees and to protect the health, safety
and welfare of the public.

16 Moreover, NRS 624.220(2) makes specific reference to NRS 624.260 to NRS 624.265, which
17 are the statutes addressing the financial responsibility and solvency of a licensee. If
18 solvency were truly considered, aggregation would occur across all open projects for a
19 licensee. Preventing a "client" from re-employing a licensee who has successfully
20 performed previous projects does not meet the Legislature's declaration, and it certainly
21 does not consider solvency of the licensee. Preventing a licensee from performing the same
22 work on multiple buildings for the same client does not meet the Legislature's declaration,
23 and it certainly does not consider the solvency of the licensee. Preventing a licensee from
24 performing work in a subdivision for the same client...forever...once the licensee has
25 reached its aggregated license limit does not meet the Legislature's stated goal.
26
27
28



To the contrary, the "public" is at far greater risk of licensee default where a licensee concurrently performs multiple projects for multiple different clients, none of whom may know whether the licensee is properly performing on the other client's project. The public health, safety and welfare are at far greater risk if a revolving door of subcontractors are used to complete multi-building projects. There is no rational basis upon which it can be articulated that NRS 624.220(2) serves a legitimate government interest when similarly situated licensees may overextend themselves by entering into an infinite number of contracts, either concurrently or sequentially, with different "clients" or in different subdivisions. The record in this case shows that neither the NSCB, nor the ALJ Decision, even attempt to explain the rational basis for the statute...likely due to the fact that aggregation under the terms of NRS 624.220(2) is irrational.

The following example is illustrative:

<u>Contract Date</u>	<u>Plumber "A" w/ \$50,000 Limit</u>	<u>Plumber "B" w/ \$50,000 Limit</u>
January 2018	\$50k contract for client "1"	\$50k contract for client "1"
January 2018	\$50k contract for client "2"	
January 2018	\$50k contract for client "3"	
January 2018	\$50k contract for client "4"	
January 2025		\$50k contract for client "1"

Based on the plain language of NRS 624.220(2), Plumber "A" has acted within its license limit because, even though it has concurrently contracted to perform \$200,000 in work at the same time, it has done so for four separate clients. Plumber "B", however, has violated the law if the work it contracts to perform for the same client, under contracts entered into seven years apart for work to be performed years apart, will be performed at a

1 "single construction site" or "subdivision site." As articulated by the NSCB's own counsel at
2 the administrative hearing:

3 This is a legislative concern. I have no problem if somebody wants to go back
4 to the legislature next session and maybe make some changes there, but
5 unfortunately, what that means, Your Honor, is if you are in a subdivision and
6 you're working for a single client in 2001, and you go back into that same
7 subdivision 10 years later for the same client, it is going to aggregate your
8 license limit.

9 Transcript; p. 42:4-12.

10 The implications to the housing industry in Nevada are profound. On its face, NRS
11 624.220(2) prevents Silverwing (and any other general contractor) from reusing a
12 subcontractor in a subdivision, in perpetuity, once the subcontractor has performed work
13 in the aggregate to the level of its license limit. That is not equal treatment under the law.

14 **V. THE NSCB'S ATTEMPT TO ISSUE AN ADVISORY OPINION TO CURE THE**
15 **DEFICIENCIES IN NRS 624.220(2), AND USE IT IN THIS CONTESTED CASE,**
16 **IS AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE AUTHORITY**

17 In an attempt to save NRS 624.220(2) from its obvious vagueness, the Tesla Opinion
18 established internal criteria through which license limit issues would be examined.

19 When a license limit issue turns on the meaning of "single construction site" -
20 - for example when a licensee facing potential discipline for bidding or
21 performing work under multiple contracts for a single client in excess of its
22 limit, asserts that its bids or work for a single client relate to separate
23 construction sites -- the Board considers various criteria in deciding the
24 question in harmony with the Legislature's intent for creating license limits.

25 Tesla Opinion, p. 3. Oddly, the NSCB's own investigator testified that he was not aware of
26 any internal criteria or test. Exhibit 15, p. 125:25, p. 126:1-4. It appears, therefore, that
27 the analysis is not even uniform within the NSCB.

28 Nonetheless, there is a profound difference between an agency interpreting NRS
624.220(2), and an agency creating a test, not present in the statute, that will be applied



1 after the fact using admittedly undefined factors that will vary in weight at the discretion of
2 the agency. In its Memorandum of Points and Authorities in Response to Respondent's
3 Constitutional Challenge to NRS 624.220(2), the NSCB essentially argued that the Tesla
4 Opinion is not a regulation and is not an attempt to legislate. Exhibit 3. According to the
5 NSCB, the Tesla Opinion is nothing more than a declaratory order disposing of a petition
6 and elaborating how NSCB staff interprets and applies the statute for the benefit of the
7 public. Exhibit 3, p. 4-5. The Legislative Counsel Bureau disagreed:

9 Accordingly, we regard the Tesla opinion as an example of "ad hoc
10 rulemaking," or an ineffectual attempt to adopt a regulation without
11 complying with the notice, hearing and approval process set forth in chapter
12 233B of NRS. While we mention the opinion at various points in this letter
13 where we think it is instructive, we do not believe that it has any legal force
14 or effect.

15 Exhibit 5, SWD000143.

16 The public is entitled to protection against discriminatory and arbitrary actions of
17 public officials. 16A Am. Jur. 2d Constitutional Law § 312. That public protection is at the
18 heart of the nondelegation doctrine and it is exactly why the NSCB may not create
19 interpretive orders enumerating factors to be used in the application of a statute. If the
20 statute, either on its face or as applied to Silverwing, lacks the specificity to determine
21 if/when it should be applied, then it fails as a matter of law. The NSCB cannot "cure" the
22 statute's failure through the use of an internal test.

23 The purpose of the doctrine that legislative power cannot be delegated is to
24 assure that truly fundamental issues will be resolved by the legislature and
25 that a grant of authority is accompanied by safeguards adequate to prevent
26 its abuse. The nondelegation doctrine insures the protection of citizens
27 against discriminatory and arbitrary actions of public officials, and it
28 provides the assurance that duly authorized, politically accountable officials
make fundamental policy decisions.



1 16A Am. Jur. 2d Constitutional Law § 312. The Legislature may only vest an agency with
2 "mere fact finding authority and not the authority to legislate." *McNeill v. State*, 132 Nev.
3 Adv. Op. 54, 375 P.3d 1022, 1025–26 (2016)(internal citations and quotations omitted).
4

5 In the *McNeill* case, the Nevada Supreme Court recognized as follows:

6 Because the Board has no authority to impose conditions not enumerated in
7 NRS 213.1243, the nonenumerated conditions the Board imposed on McNeill
were unlawful, and McNeill did not violate the law when he failed to comply.

8 *Id.* Here, the NSCB has not only created nonenumerated conditions or criteria for analyzing
9 an admittedly ambiguous statute for potential violation long after private citizens have
10 entered into a contract, the Tesla Opinion concedes that the weight and importance of the
11 nonenumerated conditions will vary from situation to situation. The NSCB lacks the
12 constitutional authority to impose any conditions upon a licensee that are not present in
13 the statute, including conditions presented anywhere outside of NRS Chapter 624.
14

15 **VI. SUFFICIENT FACTS DO NOT EXIST TO SUPPORT THE LEGAL CONCLUSION THAT THE**
16 **PROJECTS AT ISSUE IN THIS CONTESTED CASE ARE STATUTORY "SUBDIVISIONS"**

17 Even if rules of statutory construction were ignored and the ALJ interpreted
18 "subdivision site" and "subdivision" synonymously, the projects in this contested case do
19 not meet the definition of a NRS 278.320(1) subdivision. Therefore, NRS 278.320(1)
20 should not be applied to this case. By Legislative mandate, there cannot be a statutory
21 subdivision without the actual or proposed division of land into five or more pieces. Here,
22 the uncontested facts are that the recorded maps prove the land in each project was not
23 divided (or proposed to be divided) into five or more pieces. Exhibit 15, p. 59-62; Exhibit
24 7:1-7.
25

26 The NSCB would like the fact that the recorded maps contain the words
27 "condominium" and "subdivision" to be dispositive of the issue. That, however, is not the
28



1 law. There is simply no circumstance contemplated by the recorded maps in which an
 2 individual piece of land can be aggregated with four other individual pieces of land, which
 3 then in their sum, can become a statutory subdivision pursuant to NRS 278.320(1). In the
 4 absence of such a division of land, there can be no statutory subdivision. Here, the maps
 5 divide airspace and nothing more.
 6

7 The first Note on the Edgewater project map provides that: "The building structures
 8 themselves and the ground beneath said buildings are to be owned and maintained by the
 9 homeowners association being a part of the common element." Exhibit 7; Tract Map
 10 5095C. There are only three common elements on the actual map. *Id.* There is only one
 11 legal parcel, and there is no division of land into five or more pieces.
 12

13 The last sentence of the third Note on the Bungalows project map provides that:
 14 "The balance of the building structures and the ground beneath the buildings are to be
 15 owned and maintained by the owners of the common elements." Exhibit 7; Tract Map
 16 5054A. There is only one common element on the actual map. *Id.* There are only two legal
 17 parcels, and there is no division of land into five or more pieces. *Id.*
 18

19 The last sentence of the third Note on the Fountainhouse project map provides that:
 20 "The balance of the building structures and the ground beneath the buildings are to be
 21 owned and maintained by the owners of the common elements." Exhibit 7; Tract Map
 22 5139A. There are only two common elements on the actual map. *Id.* There is only one
 23 legal parcel, and there is no division of land into five or more pieces. *Id.*
 24

25 Since there is no evidence of the division of land into five or more pieces on any of
 26 the projects at issue, the ALJ erred in concluding that these projects were NRS 278.320
 27 statutory subdivisions.
 28

CONCLUSION

1 As a practical matter, this is a case in which the NSCB, through its counsel, is trying
2 to use creative lawyering to fix statutory deficiencies after a contested case has already
3 been filed. Mr. Gore never considered the definition of "subdivision site" when conducting
4 his investigation; Mr. Gore did not use NRS 618.953, or 706.463, or the Chapter 108 lien
5 statutes, or even NRS 278.320(1), to make a determination as to whether Respondent had
6 violated the law. Mr. Gore looked at the face dollar amount of each subcontract and, where
7 that dollar amount appeared to exceed the subcontractor's license limit, he subjectively
8 concluded there was a violation of law without any further analysis. There could be no
9 further analysis because, as repeatedly admitted by Mr. Gore, there are no statutes,
10 regulations, internal written guidelines, manuals, or guide books that he uses to determine
11 whether something is a single construction site or subdivision site.
12

13
14 NRS 624.220(2) is so vague that nobody, not the NSCB, not its investigator, and not
15 the public at large, can articulate with any certainty when the statute will apply. That is a
16 violation of due process. Moreover, there is no rational basis for the statute's disparate
17 treatment of licensees with the same monetary limit through the aggregation of work
18 performed for the same client on a single construction site or subdivision site. The NSCB
19 lacks the authority to rewrite the statute, or to create rules that may only lawfully be
20 promulgated by the Legislature.
21

22 Based on the foregoing, Silverwing respectfully requests the Court reverse the
23 decision of the Administrative Law Judge.

24 ///

25 ///

26 ///

27 ///

28 ///

1 ///

2 ///

Affirmation

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

Dated April 3, 2018.

/s/ Michael S. Kimmel
 Michael S. Kimmel
 HOY | CHRISSINGER | KIMMEL | VALLAS

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CERTIFICATE OF COMPLIANCE

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

Dated April 3, 2018.

/s/ Michael S. Kimmel _____

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Certificate of Service

I hereby certify that on April 3, 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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PAUL GEORGESON, 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

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