

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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Supreme Court No.: 79134

**APPELLANTS' APPENDIX
VOLUME 6**

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

SILVERWING DEVELOPMENT,
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Petitioners,

Case No.: CV18-00128

vs.

Dept. No.: 10

NEVADA STATE CONTRACTORS
BOARD,

Respondent.

ORDER REGARDING PETITION FOR JUDICIAL REVIEW

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

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

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

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

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

NRS 233B.135 provides:

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

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

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

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

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

- (a) In violation of constitutional or statutory provisions;
- (b) In excess of the statutory authority of the agency;
- (c) Made upon unlawful procedure;
- (d) Affected by other error of law;
- (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (f) Arbitrary or capricious or characterized by abuse of discretion.

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

NRS 624.220(2) provides in relevant part:

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

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

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

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

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

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

22
23 NRS 624.220(2) is not unconstitutionally vague on its face because it is a civil statute which
24 is not impermissibly vague in all applications. For example, the statute provides sufficient notice
25 that a single contract for single client which exceeds the contractor’s license violates the statute. It
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1 also provides adequate notice that multiple contracts for a single client for separate projects which
2 exceed the contractor's license do not violate the statute. Although the standards for multiple
3 contracts on a single project are less clear, this scenario is merely one of several covered by the
4 statute. Because it provides sufficient guidance to at least some prohibited conduct and the
5 applicable standards of enforcement, NRS 624.220(2) is not unconstitutionally vague on its face
6 and does not infringe upon substantive due process.
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8 An individual may challenge the constitutionality of a statute as-applied and argue that the
9 application in a particular case resulted in a substantive due process violation. *State v. Eighth Jud.*
10 *Dist. Ct. (Logan D.)*, 129 Nev. 492, 501, 306 P.3d 369, 375 (2013). "When undertaking a
11 substantive due process analysis, a statute that does not infringe upon a fundamental right will be
12 upheld if it is rationally related to a legitimate government purpose." *Logan D.*, 129 Nev. at 501,
13 306 P.3d at 375-76 (explaining Legislature is not required to articulate its purpose behind statutory
14 enactment).
15

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

8 Both the United States Constitution and the Nevada Constitution guarantee individuals
9 equal protection under the law. U.S. CONST. amend XIV; Art. 4, §21 NEV. CONST. The threshold
10 inquiry in an equal protection challenge is whether the statute is discriminatory on its face. *Rico v.*
11 *Rodriguez*, 121 Nev. 695, 703, 120 P.3d 812, 817 (2005). A statute which treats similarly situated
12 individuals differently implicates equal protection. *Id.* The level of scrutiny used varies depending
13 on the class implicated in the statute. *Id.* The rational basis test is used where the statute does not
14 implicate a suspect class, a fundamental right or a quasi-suspect class. *Id.* The statute will be
15 upheld if it is rationally related to a legitimate government interest. *Id.*
16
17

18 On its face, NRS 624.220(2) is facially neutral and does not treat similarly situated licensed
19 contractors differently. Each licensed contractor is bound by his or her respective license limits in
20 regards to the contract work performed for a single client. Even if the statute had created a
21 classification, the statute would survive rational basis review because it is rationally related to
22 promoting responsible construction and contractor solvency. NRS 624.260. *See also* The
23 Respondent’s Brief Ex. I Sen. Judiciary Comm. Minutes 3, 6, 7. For these reasons, NRS
24 624.220(2) does not violate the Petitioner’s right to equal protection.
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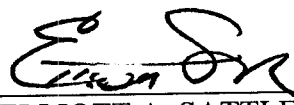
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1 While a district court cannot substitute its opinion for the agency's opinion on a question of
2 fact, questions of law are reviewed for clear error. NRS 233B.135(3). Statutory interpretation is a
3 question of law. *Taylor v. Dep't of Health and Human Servs.*, 129 Nev. 928, 930, 314 P.3d 949,
4 951 (2013). The district court defers to the agency's interpretation of its governing statutes, as long
5 as the interpretation is "within the language of the statute." *Taylor*, 129 Nev. at 930, 314 P.3d at
6 951 (citing *Dutchess Bus. Servs., Inc. v. Nev. State Bd. of Pharmacy*, 124 Nev. 701, 709, 191 P.3d
7 1159, 1165 (2008)). Statutory interpretation must be conducted reasonably "in light of the policy
8 and spirit of the law" and to "avoid absurd results." *Flamingo Paradise*, 125 Nev. at 509, 217 P.3d
9 at 551 (citing *Desert Valley Water Co. v. State, Eng'r*, 104 Nev. 718, 720, 766 P.2d 886, 886-87
10 (1988)). Statutes should not be interpreted to "render words or phrases superfluous." *Flamingo*
11 *Paradise*, 125 Nev. at 509, 217 P.3d at 551 (citing *Mangarella v. State*, 117 Nev. 130, 133, 17 P.3d
12 989, 991 (2001)).

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

3 DATED this 8 day of November, 2018.

4
5 
6 ELLIOTT A. SATTLER
7 District Judge

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this ____ day of November, 2018, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe; that on the 8 day of November, 2018, I electronically filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

MICHAEL S. KIMMEL, ESQ.


THEODORE CHRISSINGER, ESQ.

NOAH G. ALLISON, ESQ.

PHILLIP MANNELLY, ESQ.

PAUL GEORGESON, ESQ.

EVAN JAMES, ESQ.


Sheila Mansfield
Judicial Assistant

1 **NEOJ**

2 THE ALLISON LAW FIRM CHTD.

3 Noah G. Allison (Bar #6202)

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9 *Attorneys for Nevada State Contractors Board*

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

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18 BOARD,

19 Respondent.

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Dept.: 10

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

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

AFFIRMATION

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

24 DATED this 14th day of November, 2018.

THE ALLISON LAW FIRM CHTD.

By: 

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

CERTIFICATE OF SERVICE

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

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

MICHAEL KIMMEL, ESQ. for SILVERWING DEVELOPMENT et al

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

THEODORE CHRISSINGER, ESQ. for SILVERWING DEVELOPMENT et al

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

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


An employee of THE ALLISON LAW FIRM CHTD.

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

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

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

7 NRS 233B.135 provides:

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

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

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

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

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

- (a) In violation of constitutional or statutory provisions;
- (b) In excess of the statutory authority of the agency;
- (c) Made upon unlawful procedure;
- (d) Affected by other error of law;
- (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (f) Arbitrary or capricious or characterized by abuse of discretion.

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

NRS 624.220(2) provides in relevant part:

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

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

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

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

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

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

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

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

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

8 Both the United States Constitution and the Nevada Constitution guarantee individuals
9 equal protection under the law. U.S. CONST. amend XIV; Art. 4, §21 NEV. CONST. The threshold
10 inquiry in an equal protection challenge is whether the statute is discriminatory on its face. *Rico v.*
11 *Rodriguez*, 121 Nev. 695, 703, 120 P.3d 812, 817 (2005). A statute which treats similarly situated
12 individuals differently implicates equal protection. *Id.* The level of scrutiny used varies depending
13 on the class implicated in the statute. *Id.* The rational basis test is used where the statute does not
14 implicate a suspect class, a fundamental right or a quasi-suspect class. *Id.* The statute will be
15 upheld if it is rationally related to a legitimate government interest. *Id.*
16
17

18 On its face, NRS 624.220(2) is facially neutral and does not treat similarly situated licensed
19 contractors differently. Each licensed contractor is bound by his or her respective license limits in
20 regards to the contract work performed for a single client. Even if the statute had created a
21 classification, the statute would survive rational basis review because it is rationally related to
22 promoting responsible construction and contractor solvency. NRS 624.260. *See also* The
23 Respondent’s Brief Ex. I Sen. Judiciary Comm. Minutes 3, 6, 7. For these reasons, NRS
24 624.220(2) does not violate the Petitioner’s right to equal protection.
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1 While a district court cannot substitute its opinion for the agency's opinion on a question of
2 fact, questions of law are reviewed for clear error. NRS 233B.135(3). Statutory interpretation is a
3 question of law. *Taylor v. Dep't of Health and Human Servs.*, 129 Nev. 928, 930, 314 P.3d 949,
4 951 (2013). The district court defers to the agency's interpretation of its governing statutes, as long
5 as the interpretation is "within the language of the statute." *Taylor*, 129 Nev. at 930, 314 P.3d at
6 951 (citing *Dutchess Bus. Servs., Inc. v. Nev. State Bd. of Pharmacy*, 124 Nev. 701, 709, 191 P.3d
7 1159, 1165 (2008)). Statutory interpretation must be conducted reasonably "in light of the policy
8 and spirit of the law" and to "avoid absurd results." *Flamingo Paradise*, 125 Nev. at 509, 217 P.3d
9 at 551 (citing *Desert Valley Water Co. v. State, Eng'r*, 104 Nev. 718, 720, 766 P.2d 886, 886-87
10 (1988)). Statutes should not be interpreted to "render words or phrases superfluous." *Flamingo*
11 *Paradise*, 125 Nev. at 509, 217 P.3d at 551 (citing *Mangarella v. State*, 117 Nev. 130, 133, 17 P.3d
12 989, 991 (2001)).

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

DATED this 8 day of November, 2018.


ELLIOTT A. SATTLER
District Judge

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this ____ day of November, 2018, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe; that on the 8 day of November, 2018, I electronically filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

MICHAEL S. KIMMEL, ESQ.

THEODORE CHRISSINGER, ESQ.

NOAH G. ALLISON, ESQ.

PHILLIP MANNELLY, ESQ.

PAUL GEORGESON, ESQ.

EVAN JAMES, ESQ.


Sheila Mansfield
Judicial Assistant

NEVADA STATE CONTRACTORS BOARD

5390 KIETZKE LANE

RENO, NEVADA 89511

IN THE MATTER OF:

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

RESPONDENT.

Investigative Case No. 30042873

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

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

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

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

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

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

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

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

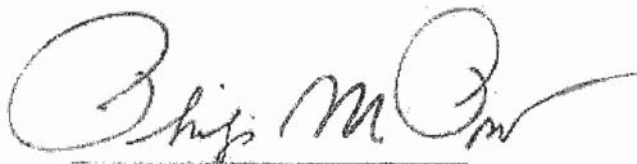
Specifically, I relied upon the testimony of the Board's Compliance Officer, Jeff Gore, which I recounted at pages 3 through 5 of the Decision entered December 21, 2017.

NRS 624.220(2) provides:

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

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

January 18, 2019

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

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

PROOF OF SERVICE BY EMAIL & U.S. MAIL

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

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

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

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

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

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



Mara Satterthwaite, Esq.
msatterthwaite@jamsadr.com

1 **NEO**

2 THE ALLISON LAW FIRM CHTD.

3 Noah G. Allison (Bar #6202)

4 3191 East Warm Springs Road

5 Las Vegas, Nevada 89120-3147

6 Tel (702) 933-4444

7 Fax (702) 933-4445

8 noah@allisonnevada.com

9 *Attorneys for Nevada State Contractors Board*

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

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

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

15 Petitioners,

16 vs.

17 NEVADA STATE CONTRACTORS
18 BOARD,

19 Respondent.

Case No.: CV18-00128

Dept.: 10

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

20 PLEASE TAKE NOTICE that a Clarification on Remand of Decision Entered on December 17,
21 2017 was served on the parties in the above captioned case on the 22nd day of January, 2019 a copy of
22 which is attached hereto.

23 **AFFIRMATION**

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

26 DATED this 24th day of January, 2019.

27 THE ALLISON LAW FIRM CHTD.

28 By: 

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



CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of January, 2019, I electronically filed the foregoing with the Clerk of the Court by using the electronic filing system which will send a notice of electronic filing to the following:

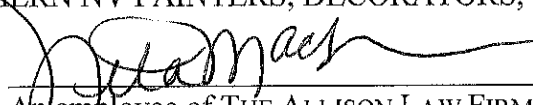
EVAN JAMES, ESQ. for SOUTHERN NV PAINTERS, DECORATORS, & GLAZIERS LMCC

MICHAEL KIMMEL, ESQ. for J. CARTER WITT III et al

THEODORE CHRISSINGER, ESQ. for J. CARTER WITT III et al

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

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


An employee of THE ALLISON LAW FIRM CHTD.



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

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

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

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

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

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

NRS 624.220(2) provides:

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

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

January 18, 2019

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

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

PROOF OF SERVICE BY EMAIL & U.S. MAIL

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

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

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

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

Mr. Michael S. Kimmel
Hoy Chrissinger Kimmel, PC
3753 Howard Hughes Pkwy
Suite 200
Las Vegas, NV 89169
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I declare under penalty of perjury the foregoing to be true and correct. Executed at Las Vegas, NEVADA on January 22, 2019.



Mara Satterthwaite, Esq.
msatterthwaite@jamsadr.com

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

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

Petitioners,

Case No.: CV18-00128

vs.

Dept. No.: 10

NEVADA STATE CONTRACTORS
BOARD,

Respondent.

ORDER PERMITTING SUPPLEMENTAL BRIEFING

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

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

1 The Petitioners seek judicial review of a decision on December 21, 2017, rendered by
 2 Administrative Law Judge, the Honorable Phillip M. Pro (Ret.) (“Judge Pro”). Judge Pro ruled that
 3 the Petitioners violated NRS 624.3013(5) and imposed a \$33,000 fine. The Petition Ex. 1 9. The
 4 Court entered the ORDER REGARDING PETITION FOR JUDICIAL REVIEW on November 8,
 5 2018 (“the November Order”). The November Order denied the first two grounds in the Petition,
 6 finding NRS 624.220(2) violated neither due process nor equal protection.² The November Order
 7 5-7. In regards to the fourth argument, the Court entered a limited remand, requesting Judge Pro
 8 clarify the manner by which he determined the Petitioners’ individual projects were “subdivision
 9 sites.” Judge Pro entered the CLARIFICATION ON REMAND OF DECISION ENTERED
 10 DECEMBER 17, 2017, (“the Clarification”) on January 18, 2019. In the Clarification, Judge Pro
 11 explained that he reconciled the word “site” in NRS 278.320(1) and NRS 624.220(2) by using
 12 evidence presented during the hearing on September 28, 2017, and by gauging the Respondent’s
 13 understanding of such language. The Clarification 2: ¶ 5. Judge Pro specifically relied on the
 14 testimony of Compliance Officer Jeff Gore (“Mr. Gore”) and resolved any ambiguity in favor of
 15 the Respondent’s understanding, as adduced through Mr. Gore’s testimony. The Clarification 3: ¶
 16 3.

20 After reviewing the Clarification, the Court will permit the Petitioners and the Respondent
 21 to file limited supplemental briefing regarding the Clarification *only*. Participating amici will not
 22 be permitted to file supplemental briefing. Such briefing must be limited to ten (10) pages. The
 23

26 Association, Mechanical Contractor’s Association of Las Vegas, Nevada Subcontractor’s Association, Sheet Metal and
 27 Air Conditioning Contractors’ National Association of Southern Nevada and Associated Builders and Contractors, Inc.
 were permitted to participate as amicus curiae.

28 ² The third argument was not considered because the Petitioner was not disciplined under the “single construction site”
 language.

1 Petitioners and the Respondent may omit a recitation of the facts and procedural history because of
2 the Court's familiarity with this matter. The supplemental briefing must be filed within ten (10)
3 judicial days of this Order to be considered by the Court before its final ruling on the Petition. The
4 Petitioners are directed to submit the matter for consideration after the ten (10) judicial days have
5 elapsed. No additional argument will be necessary. *See* WDCR 12(5) ("Decision shall be rendered
6 without oral argument unless oral argument is ordered by the court....").
7

8 **DATED** this 9 day of April, 2019.
9

10 
11 ELLIOTT A. SATTLER
12 District Judge
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CERTIFICATE OF MAILING

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

CERTIFICATE OF ELECTRONIC SERVICE

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

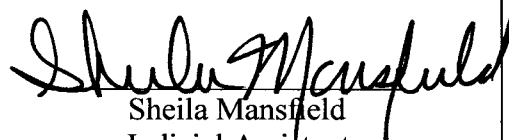
MICHAEL S. KIMMEL, ESQ.

THEODORE CHRISSINGER, ESQ.

NOAH G. ALLISON, ESQ.

PHILLIP MANNELLY, ESQ.

EVAN JAMES, ESQ.


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1 **SB**

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6 *Attorneys for Nevada State Contractors Board*

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

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

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

Case No.: CV18-00128

Dept.: 10

12 Petitioners,

13 vs.

RESPONDENT'S SUPPLEMENTAL BRIEF

14 NEVADA STATE CONTRACTORS
15 BOARD,

16 Respondent.

17 Respondent Nevada State Contractors Board ("Board") submits this Supplemental Brief in
18 response to the Court's April 9, 2019 Order Permitting Supplemental Briefing regarding Administrative
19 Law Judge Pro's ("ALJ Pro") Clarification on Remand of Decision Entered December 17, 2017
20 ("Clarification") filed on January 24, 2019.

21 **I.**

22 **INTRODUCTION**

23 It is a tad presumptuous and distinctly uncomfortable for a party's counsel to lecture a judge about
24 what another judge has said in response to the current judge's question. In its November 11, 2018 Order
25 Regarding Petition for Judicial Review, this Court used plain English to request clarification from ALJ
26 Pro on a single issue. In his Clarification on Remand of Decision filed on January 24, 2019, ALJ Pro
27 used plain English to provide clarification to this Court on that single issue. The undersigned counsel for
28 the Board herein provides his thoughts on this Court's question and ALJ's Pro's clarification, but stresses
that the *Court* is best situated to understand its question and interpret ALJ Pro's response. The Board

also takes this opportunity to reaffirm and reinforce this Court’s acknowledged obligation “to give proper deference” to ALJ Pro’s determination. Order Regarding Petition for Judicial Review, 8:27-28.

II.

THIS COURT ASKED ALJ PRO HOW HE DEFINED “SUBDIVISION SITE” IN NRS 624.220(2) TO MEAN THE GEOGRAPHIC LOCATION OF THE SUBDIVISION.

This Court agreed that ALJ Pro’s use of the definition of “subdivision” from NRS 278.320(1) to clarify “subdivision site” in NRS 624.220(2) was “entirely reasonable.” Order Regarding Petition for Judicial Review, 8:16-17. The Court also did not dispute ALJ Pro’s factual finding that each of Silverwing’s four construction projects occurred within the boundaries of a subdivision. Decision, p. 3. For example, the aggregated subcontracts for the construction work at Fountainhouse at Victorian Square occurred within the boundaries of Fountainhouse’s duly recorded and fully-defined subdivision plat.

The Court required clarification from ALJ Pro as to why he decided “subdivision site” under NRS 624.220(2) meant the *entire* subdivision plat as opposed to a single “site” within the plat. Order Regarding Petition for Judicial Review, 8:22-28. This case turns on the Court’s question. If “subdivision site” in NRS 624.220(2) meant one “site” within the subdivision, there would be no violation for aggregating subcontracts. If “subdivision site” in NRS 624.220(2) means the entire subdivision, the violations are obvious.

RECORDED SUBDIVISION PLAT

| | | | | | | | |
|------|------|------|------|------|------|------|------|
| Site | Site | Site | Site | Site | Site | Site | Site |
| Site | Site | Site | Site | Site | Site | Site | Site |
| Site | Site | Site | Site | Site | Site | Site | Site |
| Site | Site | Site | Site | Site | Site | Site | Site |
| Site | Site | Site | Site | Site | Site | Site | Site |
| Site | Site | Site | Site | Site | Site | Site | Site |
| Site | Site | Site | Site | Site | Site | Site | Site |
| Site | Site | Site | Site | Site | Site | Site | Site |

Subcontract 1

Subcontract 2

Subcontract 3

Subcontract 4

“Subdivision site”
VIOLATION
under 624.220(2)

Subdivision “site”
NO VIOLATION
under 624.220(2)



1 **III.**

2 **ALJ PRO RESOLVED THE “SITE” QUESTION BASED ON THE ASSESSMENTS AND**
 3 **CONDUCT OF THE BOARD’S COMPLIANCE OFFICER.**

4 ALJ Pro explained that he interpreted “subdivision site” in NRS 624.220(2) to mean the *entire*
 5 subdivision plat based on Compliance Investigator Jeff Gore’s (“Gore”) assessment and his conduct of
 6 the investigation as ALJ Pro stated in his Decision. Clarification on Remand of Decision, p. 3. In his
 7 Decision, ALJ Pro recounted that Gore “testified that the four Silverwing Projects were each comprised
 8 of multiple separate buildings, each of which required a separate building permit from the City of Reno
 9 bearing progressive issuance dates as the build out of the Projects progressed.” Decision, p. 4. ALJ Pro
 10 also recounted Gore’s explanation that “his determination of whether subcontracts were for a single or
 11 multiple construction sites was based on his 21 years of experience in commercial construction before
 12 joining the Board as an Investigator.” Decision, p. 5.

13 It is evident from ALJ Pro’s Decision that Gore, after considering several factors, treated each of
 14 Silverwing’s four construction projects as more than a “site” within a subdivision plat. Even though Gore
 15 was unaware of any definition of “single construction site” or “subdivision site” in NRS 624.220(2),
 16 Gore’s conduct and assessment was consistent with “subdivision site” meaning the *entire* subdivision.
 17 Decision, p. 5. As such, ALJ Pro defined “subdivision site” in NRS 624.220(2) to accord with Gore’s
 18 “contemporaneous assessment and conduct” of the matter. Clarification on Remand of Decision, p. 3.

19 **IV.**

20 **THIS COURT SHOULD GIVE “PROPER DEFERENCE” TO ALJ PRO’S DECISION AND**
 21 **CLARIFICATION ON REMAND.**

22 There are three compelling reasons why this Court should defer to ALJ Pro’s ruling on the last
 23 narrow – but important -- question of whether “subdivision site” in NRS 624.220(2) means the entire
 24 subdivision plat. The first reason is found in the statute. The second reason is found in case law. The
 25 third reason is found in this Court’s own words.

26 First, as he explained in his Clarification, ALJ Pro’s construction of the statute tied strongly to his
 27 factual findings. A reviewing court may not substitute its judgment for that of the agency as to the weight
 28 of evidence on a question of fact. NRS 233B.135(3). ALJ Pro give paramount weight to Gore’s

assessment that the construction projects in this matter were far larger than dozens and dozens of small projects on discrete subdivision “sites.” Gore’s testimony determined how ALJ Pro construed “subdivision site” in NRS 624.220(2). Clarification on Remand, p. 3.

Second, ALJ Pro’s interpretation of “subdivision site” triggers the *Chevron Doctrine*. ALJ Pro accepted the Board’s (Gore’s) reasonable assessment based on Gore’s years of experience and his assessment of the projects. Now, this Court should defer to ALJ Pro’s interpretation of the Board’s governing statutes and regulations because ALJ Pro’s interpretation is within the language of NRS 624.220(2). See, *Dutchess Business Services v. Nevada Board of Pharmacy*, 124 Nev. 701, 709, 191 P.3d 1159, 1165 (2008).

Third and finally, this Court itself expressed its desire “to give proper deference to Judge Pro’s determination.” Order Regarding Petition for Judicial Review, 8:27-28. The need to give proper deference is the entire reason why this Court requested clarification and clarification was provided.

V.

CONCLUSION

ALJ Pro’s clarification answered this Court’s question. The Court now can give proper deference to ALJ Pro’s Decision.

AFFIRMATION

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

DATED this 30th day of April, 2019.

THE ALLISON LAW FIRM CHTD.

By: 

Noah G. Allison (Bar #6202)
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*Attorney for Nevada State
Contractors Board*

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of April, 2019, I electronically filed the foregoing Respondent's Supplemental Brief with the Clerk of the Court by using the electronic filing system which will send a notice of electronic filing to the following:

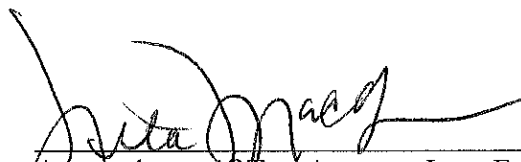
THEODORE CHRISSINGER, ESQ. for J. CARTER WITT III et al

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

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

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

MICHAEL KIMMEL, ESQ. for J. CARTER WITT III et al



An employee of THE ALLISON LAW FIRM CHTD.

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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,

CASE NO.: CV18-00128

DEPT. NO.: 10

Petitioners,

vs.

NEVADA STATE CONTRACTORS BOARD

Respondents.

Supplemental Brief

Petitioners Silverwing Development and J Carter Witt III (collectively, "Silverwing") respectfully submit the following Supplemental Brief as requested by the Court's April 9, 2019 Order. As directed, the scope of this brief is limited to responding to the Clarification on Remand of Decision Entered December 17, 2017 issued by the Honorable Phillip M. Pro (Ret.) ("Judge Pro") on January 18, 2019 (the "Clarification").

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ARGUMENT

I. INTRODUCTION

A subdivision site is _____. So far, nobody has been able to fill in the "blank" in any meaningful and understandable way. There is no realistic opportunity for a contractor who wants to abide by the law to understand how the law operates and will be applied. There is no guidance in NRS Chapter 624, NAC Chapter 624, or in any Legislative history that defines a subdivision site. There are no internal NSCB manuals, guidelines, memoranda, or checklists that define a subdivision site. Respondent's briefing does not clarify the issue, other than to say that a "subdivision site" is the same thing as an NRS 278.320(1) "subdivision". In other words, Respondent evades having to define a "subdivision site" by improperly concluding that a subdivision site is everything in the entire subdivision.

The Administrative Law Judge's (Judge Pro) December 22, 2017 Decision found that the word "site" simply defines "the physical location where a specified subdivision exists" by "identifying a geographic location." December 22, 2017 Decision; p. 7. This Court disagreed, and requested clarification from Judge Pro as to how His Honor determined that Silverwing's individual projects were "subdivision sites" in light of the fact that "subdivision" and "subdivision site" cannot be synonymous.

The essence of Judge Pro's subsequent Clarification is simple. After conceding the circular and ambiguous nature of the Board's interpretation of the statutes, the Clarification ignored any distinction between terms and accepted that a subdivision site is whatever the Board's Compliance Officer, Jeff Gore, says it is.

That cannot be the law.

II. A SUBDIVISION SITE MUST BE A SMALLER PART OF A SUBDIVISION.

The December 22, 2017 Decision, and subsequent Clarification, suffer from the false premise that a statutory "subdivision" and a "subdivision site" are one and the same. Silverwing's prior briefing thoroughly analyzed the definition of "subdivision" in NRS 278.320(1), and clearly established why a "subdivision site" must be a smaller part of the larger "subdivision."

As noted by this Court, NRS 278.320(1) already contemplates the geographic location of a statutory "subdivision", so a "subdivision site" must have a different meaning or the word "site" is rendered superfluous. November 7, 2018 Order. Moreover, there must be some difference between a "subdivision" and a "subdivision site" in light of the fact that a statutory "subdivision" is comprised of five or more "sites". *Id.* In other words, "sites" are legally separate, identifiable parts of the whole (subdivision). Any other interpretation leads to the absurd results this Court recognized during the September 4, 2018 Hearing (the "Coyote Springs" and "Red Hawk" examples described the Court in which license limit aggregation would apply in perpetuity). The word "site" is what provides the temporal limitation to NRS 624.220(2) so that licensees are not forever precluded from performing work in a subdivision if they reach their license limit on an individual subdivision site.

Importantly, NRS 624.220(2) does not permit aggregation of license limits across subdivision sites or construction sites. Therefore, if there is not substantial evidence in the record that each project in its entirety was one subdivision site (singular) or construction site (singular), the December 22, 2017 Decision cannot stand. Stated another way, if there

1 is substantial evidence that each project was comprised of multiple subdivision sites or
2 construction sites, the December 22, 2017 Decision cannot stand.

3 **III. THE UNDISPUTED FACTS SUPPORT THE CONCLUSION THAT EACH PROJECT WAS**
4 **COMPRISED OF MULTIPLE SITES.**

5 The following facts are critical to this Court's analysis of the validity of Judge Pro's
6 December 22, 2017 Decision and subsequent Clarification. The four projects at issue in this
7 case were comprised of multiple, separate buildings on separate sites. Exhibit 2,
8 SWD000036 - SWD000039.¹ Each building required its own separate submittal with
9 separate and unique municipal building department fees, separate plan checks, separate
10 permits, separate inspections (city and private), and separate certificates of occupancy.
11 Transcript; p. 161-164; Exhibit 6:1-5. Mechanically, Silverwing set up its contracts with a
12 schedule of values that delineated how much work a particular subcontractor would
13 perform on each permitted building (site) within a particular project, and no subcontractor
14 was guaranteed a right to perform work on every building (site). Transcript; p. 140:11-25,
15 p. 141:1-12; Exhibit 2. In doing so, Silverwing believed and understood that each site,
16 permitted and inspected separately, was a separate site. Transcript; p. 162:23-25, p. 163:1-
17 25, p. 164:1-9.

18 There is NO contrary evidence in the record before this Court.

19 Mr. Gore, by his own admission, treated each project in its entirety as a "single
20 construction site" or "subdivision site" solely based on his own personal predilections. His
21 analysis was not based on an application of laws, guidelines, manuals, codes, or anything
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27 ¹ All references to exhibits are the exhibits admitted into evidence as part of the
28 September 28, 2017 Hearing (the "Hearing").

1 else. Judge Pro allowed Mr. Gore to define the law because no statute, code, or case law
 2 exists from which Judge Pro could himself apply law to the actual facts.² However,
 3 compliance officers, like police officers, are supposed to be fact gatherers. They cannot
 4 make laws (like legislators) or make the ultimate determination as to what a law means
 5 and whether it has been violated (like judges). Otherwise, the risk of *ad hoc* rulemaking
 6 and inconsistency between investigators become profound.
 7

8 CONCLUSION

9 This Court recognized the impossibility of the position that a "subdivision site" and
 10 a statutory "subdivision" were one and the same. As a result, this Court remanded the
 11 matter to Judge Pro for clarification. The Clarification does not explain how each individual
 12 project at issue in this case could be deemed a subdivision site (as opposed to multiple
 13 subdivision sites within a subdivision). To the contrary, the Clarification illustrates the
 14 unconstitutional application of the law to Silverwing in this case. NRS 624.220(2) is so
 15 vague that nobody, not the NSCB, not its investigator, not professionals like Mr. Witt (with
 16 decades of experience developing in good standing), and not the public at large, can
 17 articulate with any certainty when the statute will apply.
 18
 19

20 Based on the foregoing, Silverwing respectfully requests the Court reverse the
 21 decision of the Administrative Law Judge.

22 ///

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26 _____
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28 ² This is, in part, why NRS 624.220(2) is unconstitutionally vague.

Affirmation

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

Dated April 30, 2019.

/s/ Michael S. Kimmel

Michael S. Kimmel

HOY | CHRISSINGER | KIMMEL | VALLAS

Attorneys for Petitioners

Certificate of Service

I hereby certify that on April 30, 2019, I electronically filed the foregoing with the Clerk of the Court by using the electronic filing system which will send a notice of electronic filing to the following:

NOAH ALLISON, ESQ. for NEVADA STATE CONTRACTORS BOARD

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

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

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

/s/ Shondel Seth

An employee of Hoy | Chrissinger | Kimmel | Vallas PC

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

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

Petitioners,

Case No.: CV18-00128

vs.

Dept. No.: 10

NEVADA STATE CONTRACTORS
BOARD,

Respondent.

ORDER DENYING PETITION FOR JUDICIAL REVIEW

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

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

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

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

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

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

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

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

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

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

4
5 In the Clarification, Judge Pro explained that he reconciled the word “site” in NRS
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2 1. Judicial review of a final decision of an agency must be:

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

4 (b) Confined to the record.

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

8 2. The final decision of the agency shall be deemed reasonable and lawful until
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12 3. The court shall not substitute its judgment for that of the agency as to the weight
13 of evidence on a question of fact. The court may remand or affirm the final
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21 evidence on the whole record; or

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23 4. As used in this section, "substantial evidence" means evidence which a reasonable
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 11 attempting to ascertain the definition of “subdivision site,” the Respondent properly referred to
 12 other legislative pronouncements, instead of generating its own definition. In this vein, the
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 14 contemporaneously recognized the different role of the word “site” in NRS 278.320(1) and NRS
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 16 “site” more properly denoted location, rather than size, in NRS 624.220(1). Mr. Gore’s testimony
 17 emphasized the important role geographic location plays in determining whether a project is a
 18 single subdivision site. For all of these reasons, the Respondent supplied a reasonable definition of
 19 “subdivision site” to which Judge Pro appropriately deferred.

20 Second, the Respondent’s definition of “subdivision site” does not conflict with other
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 27 ⁶ From the Court’s review, the only other definition of “subdivision” is found NRS 119.110. “Subdivision” is defined as
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 divided or proposed to be divided over any period in 35 or more lots, parcels, units or interests” NRS 119.110
 governs the sale of subdivided land.

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3 statute where clearly contradicted by statutory language and applicable regulation). Additionally,
4 NRS 624.160 vests the Respondent "with all of the functions and duties relating to the
5 administration of this chapter," including contractor discipline. As such, the Respondent is
6 empowered to interpret and enforce NRS 624.220. For these reasons, the Respondent's definition
7 of "subdivision site" does not conflict with other statutory provisions and does not exceed the
8 Respondent's statutory authority.
9

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

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

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

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

CERTIFICATE OF ELECTRONIC SERVICE

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

MICHAEL S. KIMMEL, ESQ.

THEODORE CHRISSINGER, ESQ.

NOAH G. ALLISON, ESQ.

PHILLIP MANNELLY, ESQ.

EVAN JAMES, ESQ.


Sheila Mansfield
Judicial Assistant

CODE: \$2515

HOY | CHRISSINGER | KIMMEL | VALLAS

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

Electronically Filed
Jul 10 2019 01:26 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Attorneys for: Silverwing Development, J. Carter Witt III

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

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

CASE NO.: CV18-00128

DEPT. NO.: 10

Petitioners,

vs.

NEVADA STATE CONTRACTORS BOARD

Respondents.

Notice of Appeal

Notice is hereby given that Petitioners Silverwing Development and J Carter Witt III
(collectively, "Silverwing") appeals to the Nevada Supreme Court from the following:

1. The District Court's June 21, 2019 Order Denying Petition for Judicial Review
(Attached as Exhibit 1).
2. And from all other orders and judgments made final and appealable by the
foregoing.

///

///

Affirmation

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

Dated July 3, 2019.

/s/ Michael S. Kimmel

Michael S. Kimmel

HOY | CHRISSINGER | KIMMEL | VALLAS

Attorneys for Petitioners

Certificate of Service

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

Respondent

NOAH ALLISON, ESQ. for NEVADA STATE CONTRACTORS BOARD

Amicus

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

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

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

/s/ Shondel Seth

An employee of Hoy | Chrissinger | Kimmel | Vallas PC

INDEX OF EXHIBITS

| <u>Exhibit #</u> | <u>Description</u> | <u># of Pages</u> |
|------------------|---------------------|-------------------|
| Exhibit 1 | June 21, 2019 Order | 8 |

FILED
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Jacqueline Bryant
Clerk of the Court
Transaction # 7354594 : yvilorla

Exhibit 1

Exhibit 1

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
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Dept. No.: 10

NEVADA STATE CONTRACTORS
BOARD,

Respondent.

ORDER DENYING PETITION FOR JUDICIAL REVIEW

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

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

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

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

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

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

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

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

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

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

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

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

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5 In the Clarification, Judge Pro explained that he reconciled the word “site” in NRS
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12 **DATED** this 21 day of June, 2019.

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15 ELLIOTT A. SATTLER
16 District Judge
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