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.

Supreme Court No.: 79134

APPEAL FROM JUDICIAL REVIEW OF ADMINISTRATIVE ORDER
SECOND JUDICIAL DISTRICT COURT
IN AND FOR WASHOE COUNTY, NEVADA
HONORABLE ELLIOT SATTLER, DISTRICT JUDGE

APPELLANTS' REPLY BRIEF

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Argument

I. Introduction

The NSCB concedes, as it must, that there is no definition of the phrase "single construction site or subdivision site" to be found anywhere in NRS Chapter 624 or the associated regulations (NAC 624). NSCB Brief; p. 21. The evidence in the record before this Court confirms that the NSCB's own investigator could not find applicable definitions anywhere, and that there are absolutely no published or internal written guidelines, manuals, or guide books that the investigator could use to determine whether something is a single construction site or subdivision site. 4 A.App. 904-907.

There is no evidence in the record that any court, the Legislature, the Legislative Counsel Bureau, or even the NSCB, has ever published an opinion or legislative history of any kind that supports the application of NRS 624.220(2) in the manner in which it was applied to Silverwing in this case. There is no evidence in the record before this Court that the NSCB has ever previously used NRS 278.320 to define NRS 624.220(2), much less in the manner in which the NSCB has done in this case. When presented with the reality that the NSCB's own website[1] omits any reference to NRS 278.320 in its provision of Rules,

[1] www.nvcontractorsboard.com/rules.html.

Regulations, and Statutes to licensees and the general public, the NSCB had no response.

II. For purposes of the severability analysis, NRS 624.220(2) is a single statutory provision, not a series of provisions operating independently.

Severability requires a determination that legal effect can be given to a statute standing alone and that the legislature intended the provision to stand alone if other provisions failed. The NSCB argues that this Court "should not obliterate license limits if it determines there is a constitutional problem with 'subdivision site' in NRS 624.220(2)," and instead suggests that this Court could simply remove "subdivision site" from the statute with a "swipe of a blue pencil." NSCB Brief; p. 16, 19. The NSCB further argues that "single construction site" and "subdivision site" are exclusive, constituent statements such that either could be removed from the statute while keeping the remainder of the statute in tact. NSCB Brief; p. 19. The NSCB fails to recognize the practical result of its own request.

If "single construction site" and "subdivision site" were separate constituent statements, then the removal of one would mean that there are only license limits with respect to the other. Using the NSCB's own analysis, the removal of "subdivision site" from NRS 624.220(2) would mean there would no longer be any license limits related to work performed on any site within subdivision. Conversely, if "single construction site" were excised from NRS 624.220(2), there would no longer be license limits on commercial construction projects (or on any

residential project not located within a "subdivision"). It is hard to imagine that the NSCB intended to argue such a result.

The only rational way to interpret the phrase "single construction site or subdivision site" is to recognize that it provides two sides of the same licensing coin: one side ("subdivision site") applies to residential construction sites, and the other side ("single construction site") applies to commercial construction sites. If one side of the coin disappears, then license limits for that side likewise disappear. Certainly, legal effect is not given to the Legislature's intent in creating licensing limits if those limits apply only to limited sectors of the industry (i.e. either commercial construction or residential, but not both).

III. The NSCB's Answering Brief Confesses Error.

NRAP 31(d) permits this Court to treat the NSCB's failure to address all of the arguments raised on appeal (i.e. all of the constitutional deficiencies in NRS 624.220(2)) as confessed error. "A party confessed error when that party's answering brief effectively failed to address a significant issue raised in the appeal." *Polk v. State*, 126 Nev. 180, 185, 233 P.3d 357, 360 (2010). Here, the NSCB did not just inadvertently omit an analysis of NRS 624.220(2)'s use of "single construction site", the NSCB scoffed at the thought of having to justify the basis of its position: "the Board will not further contaminate this appeal by

responding to Silverwing's 'single construction site' arguments." NSCB Brief; p. 21.

Silverwing challenged both the facial and as-applied constitutionality of NRS 624.220(2) in its entirety. The challenge was not limited to just a particular string of words ("subdivision site" or "single construction site") because NRS 624.220(2) operates as one complete sentence, not a series of separate statutory provisions. Similarly, the NSCB did not limit its allegations against Silverwing to the determination of whether the each project at issue was a single construction site or subdivision site. In advance of the hearing, the NSCB specifically asked the ALJ to afford deference to the Board's "Tesla Opinion" (creating factors for the application of "single construction site") because, according to the NSCB, it had "the full force and authority of a Board decision." 3 A.App. 649. Now, in its Answering Brief, the NSCB claims the Board's own "Tesla Opinion" was nothing more than an "informal" opinion. NSCB Brief; p. 20.

At the hearing, the NSCB requested that the administrative proceeding be reconvened so the NSCB could perform additional research and present evidence on the application of the facts to the phrase "single construction site." 4 A.App. 845-846. Both parties introduced evidence and testimony related to the facts as applied to the vague phrase, "single construction site." On the one hand, the NSCB contends that all of that evidence and testimony is irrelevant and "did not

prejudice Silverwing's substantial rights at the administrative proceeding" (NSCB Brief; p. 20) while at the same time arguing that any Constitutional defect in the phrase "subdivision site" should be cured with the severability doctrine, thereby leaving only the term "single construction site" in the statute. The NSCB's position is disingenuous. More importantly, the NSCB's Answering Brief fails to analyze how that severed statute would apply. In doing so, the NSCB has confessed error.

IV. NRS 624.220(2) is vague on its face.

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 by the NSCB and its staff. There is no guidance in NRS Chapter 624, NAC Chapter 624, or in any Legislative history that defines a single construction site or subdivision site. There are no internal NSCB manuals, guidelines, memoranda, or checklists that define a single construction site or subdivision site. The NSCB'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, the NSCB evades having to define a "subdivision site" by improperly concluding that a subdivision site is <u>everything</u> in the <u>entire subdivision</u>. As outlined below and presented extensively in Silverwing's Opening brief, that cannot be the law.

A. A subdivision site must be a smaller part of a subdivision.

The ALJ's 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 Opening Brief (pages 17-18, 26) 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 the district court, NRS 278.320(1) already contemplates the geographic location of a statutory "subdivision", so the Legislature **must** have intended a "subdivision site" under NRS 624.220(2) to have a different meaning or the word "site" is rendered superfluous. 6 A.App. 1252. 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, each "site" is a legally separate, identifiable part of the whole subdivision.

A contrary interpretation of NRS 624.220(2) is not only grammatically incorrect and circular, it ignores that an entirely different statute (NRS 624.264(2)(b)) provides for the limited circumstances where aggregation across multiple sites is supposed to occur. NRS 624.264 permits the NSCB to place additional restrictions upon a licensee who intends to engage in residential

construction and has not held a contractor's license within the 2 years immediately preceding the date of the application. Those restrictions may include the aggregation of monetary limits "regardless of the number of contracts, construction sites, subdivision sites or clients." NRS 624.264(2)(b)(emphasis added). Silverwing's license is **NOT** restricted pursuant to NRS 624.264.

There is no indication or logic suggesting that the Legislature intended license limits to aggregate in perpetuity, or across separately permitted sites. To the contrary, the use of the word "site" is what provides the temporal and physical limitations 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.

V. The only reasonable interpretation of NRS 624.220(2) is one in which "site" is defined by the municipal permitting and inspection process.

This Court need not invalidate the concept of licensing limits to invalidate the NSCB's (and ALJ's) interpretation of NRS 624.220(2). The NSCB's Brief posits that its interpretation of the statute is, by way of example, necessary to prevent a subcontractor from working under ten separate contracts for the construction of each floor of a ten-story building, and to prevent a contractor from building forty houses in a single subdivision for one developer. NSCB Brief; p. 36. The NSCB's argument is misguided.

The original construction of a ten-story building is not permitted and performed through ten separate building permits, one for each floor. To the contrary, there is one permit for the construction of the building and the permit defines the "site" (regardless of whether it is a "construction site" or a "subdivision site").[2] The building, in its entirety, has its own separate permit submittal with separate and unique municipal building department fees for the permit, plan checks, impact fees, inspections (city and private), fire safety, energy requirements, and certificate of occupancy. *Id.* Because the municipal building department issues the permit defining the site, there is no opportunity for a subcontractor to parse out its work on a floor-by-floor basis.

As the building ages, and tenants come and go and tenant improvements are performed in different spaces within the building and on different floors in different months or years, separate permits would be issued by the building department for the separate, distinct improvements. *Id.* Separate fees would be paid and separate design plan checks and inspections would occur. *Id.* Each tenant improvement of separate space would, in the eyes of the local building department, be treated as a separate site and the work that particular space would be paid for separately than work on a distinct, independent, space. *Id.*

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[2] *See*, for example, the City of Reno Building Permit Application for commercial construction which delineates whether the permit is for new construction, site improvements, remodel/addition, demolition, HVAC-rooftop, change of use, or new tenant. https://www.reno.gov/home/showdocument?id=81588.

Apparently, however, the NSCB contends that all work performed for the building owner is to be aggregated in perpetuity, including work performed years after the building was completed…except in the case of Tesla where the NSCB found that the continuous, largely uninterrupted expansion of one building would be classified as more than one construction site. Juxtaposed against the NSCB's blessing of the perpetual expansion of the Tesla Gigafactory, there is no basis for the NSCB to conclude that Silverwing's consecutive construction of separately permitted apartment buildings should be aggregated for license limit determination. The NSCB's analysis makes no sense, and it certainly is not rationally related to any stated Legislative goal or indicative of equal treatment of similarly situated contractors under the law. (Tesla and Silverwing both have the financials to obtain "Unlimited" monetary license limits yet, apparently, only Tesla is allowed to use the same subcontractors on subsequent phases of construction).

In a subdivision of multiple distinct houses, there are separate submittals with separate and unique municipal building department and impact fees, separate plan checks, separate permits, separate inspections (city and private), and separate certificates of occupancy.[3] The exact same scenario is true when multiple, separate

[3] *See*, for example, the City of Reno Building Permit Application for residential construction which delineates whether the permit is for a single family, duplex, townhouse or mobile home, defines project valuation based on the cost of labor and materials for the specific building, and requires the square footage of the specific building. https://www.reno.gov/home/showdocument?id=81590.

apartment buildings are constructed. 4 A.App. 894:16-24. There simply is no basis for the NSCB to conclude, inapposite to the building department, that all of the buildings for which separate building permits are issued (especially when they are built months or even years apart) constitute one individual subdivision site for license limit aggregation of all contracts for those separate buildings.

VI. The uncontroverted evidence in the record establishes that the building departments treated each Silverwing building as a separate site.

Here, the four projects at issue in this case were comprised of multiple, separate buildings on separate sites. Each building required its own separate submittal with separate and unique municipal building department and impact fees, separate plan checks, separate permits, separate inspections (city and private), and separate certificates of occupancy. 4 A.App. 894:16-24; 942-945. Mechanically, Silverwing set up its contracts with a schedule of values that delineated how much work a particular subcontractor would perform on each permitted building (site) within a particular project, and no subcontractor was guaranteed a right to perform work on every building (site). 4 A.App. 921:11-25. In doing so, Silverwing believed and understood that each site, permitted and inspected separately, was a separate and distinct site. 4 A.App. 943-944. There is no evidence in the record that any subcontractor was concurrently performing work on multiple buildings at the same time, much less doing so in excess of that subcontractor's license limits.

The NSCB compliance officer, Mr. Gore, by his own admission, treated each Silverwing project in its entirety as one "single construction site" or one "subdivision site" because he wanted to. His analysis was entirely subjective and was not based on an application of laws, guidelines, manuals, codes, or anything else. The ALJ allowed Mr. Gore to define the law because no statute, code, or case law exists from which the ALJ could himself apply law to the actual facts. However, compliance officers, like police officers, are supposed to be fact gatherers. They cannot make laws (like legislators) or make the ultimate determination as to what a law means and whether it has been violated (like judges). Otherwise, the risk of *ad hoc* rulemaking and inconsistency between compliance officers become profound. The trier of fact must ultimately determine whether a violation has occurred, and the trier of fact's determination that there is a violation must be based on something more than just blind acceptance of a compliance officer's recommendation.

VII. There is no legislative history explaining the operative intent of NRS 624.220(2).

"Prior legislative history is a hazardous basis for inferring the intent of a subsequent Legislature." *Great Basin Water Network v. State Eng'r*, 126 Nev. 187, 197, 234 P.3d 912, 918 (2010)(FN 8)(internal citations omitted). As conceded by the NSCB, and also recognized by the Legislative Counsel Bureau, there is no legislative history explaining either the intent of the addition of the phrase "single

construction site or subdivision site for a single client" to NRS 624.220(2) or how that phrase is to be applied. The NSCB's Brief provides no reference anywhere in any legislative history of the Legislature's intent to use NRS 278.320(1) as a surrogate for the term "subdivision site" in NRS 624.220(2).

The NSCB posits that the case of *Gur-Kovic v. State Contractors Board* (95 Nev. 489, 596 P.2d 850 (1979)) stands for the proposition that bids cannot be split and that statutory changes to NRS 624.220(2) reflect Legislative intend to close a perceived loophole. First, the *Gur-Kovic* case bears no factual similarity to the case before this Court. More importantly, however, the NSCB misreads the entire premise of the *Gur-Kovic* case.

In *Gur-Kovic*, the pool contractor admitted to submitting a bid in excess of its license and that error provided the basis for the violation of statute. The licensee <u>was not</u> reprimanded for later submitting two bids, one for labor to be performed by the licensee and one for equipment to be supplied by a separate material/equipment supply company (a company not subject to the provisions of NRS Chapter 624.) The point of the case was that the licensee could not cure its original, admitted violation by changing the nature of the contracts after bid submission. However, had the licensee originally submitted a bid for the labor only, and had the separate material supply company originally submitted a separate bid for the provisions of materials/equipment, there would have been <u>no</u> violation.

The *Gur-Kovic* case is not premised on in improper attempt to "split a contract"; to the contrary, it is based on the fact that an original bid was not properly split between the licensee entity who would perform the labor and the non-licensee entity who would supply the materials/equipment. Those facts in no way relate to the issues before this Court, or explain the Legislature's intended use of the phrase "single construction site or subdivision site."

VIII. The Amicus Briefs filed in support of the NSCB are contradictory.

The fundamental conclusion posited to the Court by the Construction Trade Association (CTA) amicus Brief is that NRS 624.220(2)'s limitation on 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" is rationally related to a legitimate public purpose. The legitimate public purpose, as articulated by CTA's Brief, is "to guard the public from the adverse consequences of a contractor's financial insolvency, as well as a contractor's lack of experience." CTA Brief; p. 6. CTA's position might make sense if concurrent work was aggregated for all licensees regardless of where the work was performed or for whom, if the word "site" as used in NRS 624.220(2) was analogous to a specific permit, or if it was clear that consecutively performed and completed work could not be aggregated. In the absence of any such qualifications, there is no

rational relationship between the actual language of NRS 624.220(2) and the CTA's claimed public purpose of the statute.

As discussed at length in Silverwing's Opening Brief, the Legislature delineated specific financial metrics to be considered in determining license limits. Those solvency/liquidity metrics are based on the ratio of current assets to current liabilities. The metrics are not, however, based on whether a licensee performs work for just one client or for multiple clients. The metrics also do not punish a licensee for the previous, proper performance of work for a client by contemplating that the successful relationship cannot be replicated again in the future. Moreover, it cannot be rationally argued that one subcontractor performing work for a general contractor on multiple, consecutive and separately permitted sites provides a greater risk to the public than the same subcontractor performing concurrent work on innumerable sites for different clients.

Paradoxically, the Labor-Management Cooperation Committee (LMCC) amicus Brief supports Silverwing's position. Silverwing and LMCC are in agreement that the definition of the word "subdivision" in NRS 278.320(1) is not an appropriate surrogate for the phrase "subdivision site" in NRS 624.220(2), and that there is no indication that the Legislature intended such cross reference. Oddly though, LMCC argues that the Legislature actually intended "single construction site or subdivision site" to mean "work of improvement", a phrase

defined by NRS 624.029 and NRS 108.22188. LMCC Brief; p. 3-6. LMCC argues that the Legislature really intended "single construction site" and "subdivision site" to be synonymous with "work of improvement" as defined by NRS 624.029. LMCC Brief; p. 7. In essence, it appears that LMCC considers the words "site" and "project" to be interchangeable despite the absence of any indication that the Legislature intended such use. While LMCC's use of NRS 108.22188 makes some practical sense, it is not supported by any generally accepted method of statutory construction and is completely contrary to the interpretation proffered by the NSCB and adopted by the ALJ.

The Legislature chose to use the limiting phrase "single construction site or subdivision site" instead of the phrase "work of improvement", "project", or "subdivision." Had the Legislature intended for license limits to aggregate as broadly as the NSCB, CTA or LMCC now argue, the Legislature had multiple ways in which it could have done so, which did not occur.

Conclusion and Relief Requested

No amount of creative lawyering can change the fact that NRS 624.220(2) is so vague that nobody, not the NSCB, not its investigator, not contractors, and not the public at large, can articulate with any reasonable certainty when the statute will apply. The ALJ and the district court allowed that determination to be made entirely within the subjective and arbitrary scope of the NSCB's enforcement

officer's personal opinion, without any objective guidance. That is classic violation of due process. Moreover, there is no rational basis for the statute's disparate treatment of licensees with the same monetary limit through the aggregation of work performed for the same client on a single construction site or subdivision site while allowing concurrent work to be performed for an unlimited number of separate clients. Similarly, the aggregation of work previously performed for the same client on a "single construction site or subdivision site" is not rationally related to the solvency of a licensee, or to the Legislature's stated goal to protect the health, safety and general welfare of the public. The NSCB attempt to cure the deficiencies in NRS 624.220(2) by inserting a different statutory definition (NRS 278.320(1)) was improper, as was its attempt to usurp the Legislature's role by creating clarifying criteria.

Based on the foregoing, Silverwing respectfully requests the Court reverse the decision of the district court and set aside the decision of the Administrative Law Judge.

Dated: March 4, 2020

/s/ *Michael S. Kimmel*
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CERTIFICATE OF COMPLIANCE (BASED UPON NRAP FORM 9)

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman type style.

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, using the computation guidelines in NRAP 32(a)(7)(C), it contains 3,667 words.

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

Dated: March 5, 2020

/s/ *Michael S. Kimmel*____
Michael S. Kimmel

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Hoy Chrissinger Kimmel Vallas and that on this date the foregoing ***Appellants' Reply Brief (Appeal from Judicial Review of Administrative Order, Second Judicial District Court In and For Washoe County, Nevada, Honorable Elliot Sattler, District Judge***) was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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DATED this 5th Day of March, 2020.

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An employee of Hoy Chrissinger Kimmel Vallas