IN THE SUPREME COURT OF THE STATE OF NEVADA

THE LAS VEGAS REVIEW JOURNAL, Appellant, vs. CITY OF HENDERSON, Respondent.	CASE NO.: 81758

APPELLANT'S PETITION FOR REHEARING

Appeal from Eighth Judicial District Court, Clark County
The Honorable Trevor L. Atkin, District Judge
District Court Case No. A-16-747289-W

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I. INTRODUCTION

This Court may consider rehearing when it has overlooked or misapprehended a material fact in the record or a material question of law in the case, or when it has overlooked, misapplied, or failed to consider law directly controlling a dispositive issue in the case. NRAP 40(c)(2).

Here, the Review-Journal respectfully requests rehearing for this Court to reconsider whether the fifth *CIR* factor favors Henderson in this Nevada Public Records Act (NPRA) matter.[1] The Court held that this factor—whether the Review-Journal "reasonably attempted to settle this matter short of litigation by notifying Henderson of its grievances and giving Henderson an opportunity to supply the records within a reasonable time"—favored Henderson because "the record reflects that [the Review-Journal] did not make a reasonable attempt to settle." *Las Vegas Review Journal v. City of Henderson*, 137 Nev. Adv. Op. 81, 500 P.3d 1271, 1276-77 (2021). However, the record reflects that, contrary to the Court's conclusion, the Review-Journal did not "rush to litigation." Rather, litigation was inevitable (and even invited by Henderson) in this matter. Therefore, this Court must re-examine and vacate its holding that the fifth *CIR* factor favors Henderson.

[1] In *Las Vegas Metropolitan Police Department v. Center for Investigative Reporting, Inc.*, 136 Nev. 122, 460, P.3d 952 (2020) (*CIR*) this Court adopted the "catalyst theory," a five-factor test to determine whether a party has prevailed in an NPRA dispute that did not reach final judgment.

II. ARGUMENT

In its Opinion, the Court stated that "the record reflects that LVRJ did not make a reasonable attempt to settle" and that "LVRJ refused to receive Henderson's calls, return Henderson's messages, or confer with Henderson to refine the search terms for the public records request." *Las Vegas Review Journal v. City of Henderson*, 500 P.3d at 1277. This misapprehends the facts on the record.

As reflected in the exhibits supporting the Review-Journal's amended petition, the Review-Journal made reasonable attempts to narrow the scope of this matter both prior to litigation and shortly after seeking relief from the District Court. (*See, e.g.*, 2 JA0324, ¶ 7 (noting that counsel for Henderson called on October 25, 2016, and refused to discuss this matter with attorney Alina Shell); 2 JA0345 (call log); 2 JA0324, ¶¶ 8-11 (noting immediate response to Henderson City Attorney Josh Reid on December 5, 2016); 2 JA0347 (response).)

Indeed, Henderson's conduct in responding to the Review-Journal's requests demonstrate that litigation was inevitable. As the undersigned noted in her response to Mr. Reid, Henderson and the Review-Journal had "very different views of the permissible scope of NPRA fees." (2 JA0347.)[2] That was an understatement—Henderson demanded an initial deposit of $2,893.94 not to ***produce*** the documents,

[2] In 2019, the Legislature repealed NRS 239.055, which purportedly authorized the "extraordinary use" fees Henderson requested.

but merely to ***begin the process of reviewing*** the documents. (1 JA0050.) As the undersigned determined in her October 12, 2016, telephone call with the Henderson City Attorney's Office, this fundamental difference in positions was irreconcilable absent court intervention, as the parties disputed not only the amount of fees, but Henderson's "ability to charge extraordinary fees to complete the Request[.]" (2 JA0223, ¶ 9.)

As the undersigned further noted, Henderson's own attorney indicated that the issue was irreconcilable, and that the Review-Journal should "file suit to address the issues regarding the permissible scope of fees." (2 JA0347.) Indeed, after filing the initial petition, the undersigned expressed willingness to narrow the issues in dispute while the parties litigated the issues pertaining to the permissible fees under the NPRA. (2 JA0324, ¶ 10 (noting that the undersigned expressed "the Review-Journal's willingness to narrow the issues in dispute and develop a process for getting the requested record" while litigating the fees issue); 2 JA0347 (Noting that while litigation had commenced, it did not change the undersigned's "willingness to continue working with [Henderson] on getting the documents").)

Henderson's own attorney further indicated that there seemed "to be a genuine dispute between the City and LVRJ with regard to the definition and application of … NRS 239.055" and that the City was "interested in having the courts provide clarity to the meaning and application of NRS 239.055[.]" (2 JA0350-51.) Under

these circumstances, the Review-Journal made a reasonable attempt to settle.

Further, counsel for the Review-Journal worked with Henderson to resolve issues concerning access during litigation by obtaining inspection of the records while continuing to assert its right to copies as well. (*See, e.g.*, 3 JA0426 (representing to the district court that even though the Review-Journal requested copies of the records, the Review-Journal accepted in-person inspection of the records as an interim solution).)

Finally, with regard to the deliberative process records Henderson eventually provided, Henderson remained steadfast in its position that it was entitled to withhold the records until this Court reversed the district court on the issue in its decision. *See Las Vegas Review-Journal v. City of Henderson*, 441 P.3d 546, 2019 Nev. Unpub. LEXIS 606, *9-10 (Nev. 2019).

Thus, this fifth *CIR* factor does not weigh against the Review-Journal's contention that it is a "prevailing party" in this matter—and therefore entitled to attorney's fees and costs—under the catalyst theory.

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III. CONCLUSION

Based on the foregoing, the Review-Journal respectfully requests this Court rehear this matter to correct its misapprehension of material facts reflecting that the Review-Journal made reasonable efforts to avoid litigation in this matter.

DATED this 14th day of February, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to NRAP 28.2:

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 the brief has been prepared in a proportionally spaced typeface (14-point Times New Roman font).

I further certify that this brief complies with the type-volume limitation of NRAP 40(b)(3) because it contains 906 words.

Finally, I hereby certify that I have read this 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 a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 14th day of February, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing APPELLANT'S PETITION FOR REHEARING was filed electronically with the Nevada Supreme Court on the 14th day of February, 2022. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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