

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

ELK POINT COUNTRY CLUB  
HOMEOWNERS, ASSOCIATION,  
INC., also known as ELK POINT  
COUNTRY CLUB, INC., a Nevada  
non- profit, non-stock Corporation,

Appellant,

v.

K.J. BROWN, L.L.C., a Nevada limited  
liability company; TIMOTHY D.  
GILBERT and NANCY AVANZINO  
GILBERT, as trustees of the TIMOTHY  
D. GILBERT AND NANCY  
AVANZINO GILBERT REVOCABLE  
FAMILY TRUST DATED DECEMBER  
27, 2013,

Respondent.

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Supreme Court Case No.: 82484

District Court Case Number:  
2020-CV-0124

**APPELLANT'S ANSWER TO PETITION FOR REHEARING**

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## **I.**

### **INTRODUCTION**

In support of rehearing this Court's Order of Reversal ("Order"), Respondents argue that this Court (1) should have first analyzed whether Respondents established a likelihood of success on the merits of its claim that Appellant's 26 USCS § 501(c)(7) tax-exempt status is in fact jeopardized by members' for-profit rental use of their units and then (2) this Court should have determined if the loss of the 26 USCS § 501(c)(7) tax-exempt status constituted irreparable harm for which compensatory damages is an inadequate remedy. However, Respondents are attempting to confuse and separate the critical questions at issue within this appeal by raising an entirely new argument before this Court – that the only issue before it relates to the potential for loss of Appellant's 26 USCS § 501(c)(7) tax-exempt status – in order to grasp at a new chance of implementing the improper preliminary injunction. This is wholly improper and does not support rehearing pursuant to NRAP 40(c).

This Court properly utilized the method for analyzing the elements of a preliminary injunction when it first analyzed the threshold issue of whether Respondents met their burden in demonstrating a reasonable likelihood of success on the merits of their underlying claims related to the permissibility of short-term vacation rentals/transient commercial use. *See*, Order p. 2. In finding that the use was permissible, and that Respondents had failed to meet the threshold burden, this

Court properly provided that it need not address the remaining arguments regarding irreparable harm as it related to the 26 USCS §501(c)(7) tax-exempt status. *See*, Order p. 10, n.4.

Consequently, this is not an instance where this Court has overlooked or misapprehended a material fact in the record or a material question of law in the case and Respondents' Petition for Rehearing should be denied.

## **II.** **ARGUMENT**

### **A. THE PETITION FOR REHEARING MUST BE DENIED PURSUANT TO NRAP 40(C) BECAUSE THE COURT DID NOT OVERLOOK OR MISAPPREHEND A MATERIAL QUESTION OF LAW IN THIS CASE.**

Pursuant to NRAP 40(c)(1), matters presented in the briefs and oral arguments may not be reargued in the petition for rehearing, and no point may be raised for the first time on rehearing. However, the Court may consider rehearing when the Court has overlooked or misapprehended a material fact in the record or a material question of law in the case. *See*, NRAP 40(c)(2(A)). No such misapprehension has occurred here to warrant rehearing.

Rather, Respondents argue that this Court's order failed to address or analyze a central issue on appeal, i.e. whether EPCC's I.R.C. §501(c)(7) social club tax-exempt status is in fact jeopardized by its members generating income from the transient use of their units. However, just as Respondents attempted to do in their Answering Brief, they are now circumventing the critical questions that

were introduced in Appellant’s Opening Brief and instead are providing their own take on the issues presented for review in an attempt to get another chance at implementing the unsupported preliminary injunction. This is exactly the situation that NRAP 40(c)(1) seeks to prevent. On a petition for rehearing, a petitioner may not reargue an issue already raised or raise a new issue not raised previously. *Ducksworth v. State*, 114 Nev. 951, 966 P.2d 165, 114 Nev. Adv. Rep. 106, 1998 Nev. LEXIS 114 (Nev. 1998).

The central questions of law at issue in this appeal were (1) whether Respondents demonstrated a reasonable likelihood of success on the merits as to the issue of the permissibility of short-term vacation rentals/transient commercial use and (2) whether the permissibility of short-term vacation rentals/transient commercial use potentially jeopardized Appellant’s 26 USCS § 501(c)(7) tax-exempt status constituting irreparable harm for which compensatory relief is inadequate. AOB p. 9-10. However, in Respondents’ Petition for Rehearing, they argue that this Court’s analysis should have turned on whether Respondents demonstrated a reasonable likelihood of success on the merits as to the issue of whether members’ for-profit rental use put Appellant’s 26 USCS § 501(c)(7) tax-exempt status at risk.

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**i. The underlying pleadings and motions demonstrate that the central issue was the permissibility of short-term vacation rentals/transient commercial use not Appellant's 26 USCS § 501(c)(7) tax-exempt status.**

Respondents argue in their Petition for Rehearing that this case is *not* about whether the Bylaws allow for short-term vacation rentals/transient commercial use but instead, it is about whether Appellant's tax-exempt status is at risk of being lost, an independent determination not otherwise contingent upon any review or interpretation of the Bylaws. Respondents further argue that this Court's Order misunderstands that it is *because* of Appellant's status as a 26 USCS § 501(c)(7) tax-exempt social club rather than a common-interest community governed by NRS Chapter 116 that injunctive relief was sought in the first place. However, this is wholly unsupported by the underlying pleadings and motions.

First, as this Court properly provided for in the Order, respondents waived the argument that Appellant is not a common-interest community governed by NRS Chapter 116 because they did not raise that argument below, even after Appellant argued that NRS116.340 allows Unit Owners to rent out their units in the community. *See*, Order at p. 9. Regardless, Respondents' contention that Appellant violated NRS Chapter 116 in the operative Complaint constituted a judicial admission regarding whether EPCC is a common-interest community in this case. *Id.* Therefore, this is not an issue properly set for rehearing.

Secondly, Respondents' operative Complaint contained claims against Appellant sounding in violations of NRS Chapter 116, Nuisance, Negligence, Trespass, Breach of Contract, Breach of Covenant of Good Faith and Fair Dealing, Contractual & Tortious Breach, and Declaratory Relief. 2 AA 43-63. All of Respondents' claims arose out of their position that short-term vacation rentals are not allowed in the EPCC community. *See, Id.*

Further, Respondent's claim for declaratory relief in the operative Complaint provided that there is an actual, present and justiciable controversy between Plaintiffs and Defendant concerning the interpretation and construction of the terms, conditions, and provisions of the Governing Documents, specifically as they related to the Bylaws and Unit Owners/Members' ability to engage in transient commercial use of their properties within the Association. 2 AA 60-61. It does not provide that there is an actual, present and justiciable controversy regarding whether Appellant's 26 USCS § 501(c)(7) tax-exempt status is at risk.

Lastly, the purpose of the original Motion for Preliminary Injunction, as stated by Respondents in their Answering Brief, was to "enjoin Appellant from authorizing and condoning unit owners, who advertise their units as "vacation home rentals" for profit to non-members, while offering use of EPCC's social club amenities such as its private gated community, private beach access, private beach deck and marina." RAB p. 7. The issue of Appellant's 26 USCS § 501(c)(7) tax-

exempt status was presented merely as support in demonstrating a threat of irreparable harm. This was made clear by the District Court's order which made no finding as to Respondents establishing a likelihood of success on the merits of its claim that Appellant's 26 USCS § 501(c)(7) tax-exempt status is in fact jeopardized by members' for-profit rental use of their units. 7 AA 592-604. Rather, the District Court's order made findings as to (1) the reasonable likelihood of success on the merits that under the Bylaws, any use or operation of a Unit within EPCC, or any EPCC property and facilities, by any member, to generate revenue or for a profit, is strictly prohibited; and (2) that there is a threat of permanent and irreparable harm if EPCC's IRC 501(c)(7) tax-exempt status is lost in the event EPCC is not immediately enjoined from allowing, facilitating and encouraging EPCC members in renting their Units or any other EPCC property and facilities, and deriving revenue or a profit from such use. *Id.*

Thus, it is clear from reading the Complaint and the underlying motions and briefs that Appellant's 26 USCS § 501(c)(7) tax-exempt status was merely raised by Respondent's as a factor in support of their claim for damages and as support for their argument that irreparable harm would be caused if the rentals were allowed to continue during the pendency of the litigation.

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**i. This Court properly analyzed the threshold issue of whether Respondents met their burden in demonstrating a reasonable likelihood of success on the merits related to the permissibility of short-term vacation rentals/transient commercial use.**

In Appellant's Opening Brief, Appellant set forth argument that pursuant to a plain reading and interpretation of Appellant's contractual Bylaws, short-term rentals occurring in the EPCC community would be perfectly legitimate and allowable under NRS 116.340(1). AOB p. 12-17. The analysis of which called for contractual interpretation of Appellant's Bylaws and statutory interpretation of NRS 116.340 which was subject to de novo review. AOB p. 11-12. Appellant argued that the District Court erred when finding that Respondents demonstrated a reasonable likelihood of success on the merits as to the main issue of the permissibility of short-term vacation rentals/transient commercial use. AOB p. 12-17.

Further, in arguing that no irreparable harm was present, Appellant reasoned that 26 USCS § 501(c)(7) is only concerned with business that the 26 USCS § 501(c)(7) tax-exempt club/HOA/organization *itself* engages in (i.e., transacts itself) and that the rental activity of private members is irrelevant. AOB p. 17-22. There was no dispute that, although there are homeowners in the community who engage in short and/or long-term vacation rental activities, Appellant does not operate the community's facilities in any manner that would benefit such activities, nor does it receive any share of the revenue from said rental activities. AOB p. 19. Thus,



Appellant's tax-exempt status under 26 USCS § 501(c)(7) was in no danger from the private rental activity of individual members and there was simply no imminent "irreparable harm for which compensatory relief is inadequate" to justify a preliminary injunction. AOB p. 21.

Appellant reasoned that a finding of error in **either of those central legal issues presented would essentially eliminate fulfillment of one of the factors required for granting a preliminary injunction** (reversal of the Bylaws issue would eliminate fulfillment of factor (1), while reversal of the 26 USCS §501(c)(7) tax-exempt status issue would eliminate fulfillment of factor (2) and would require the District Court's order to be vacated. AOB p. 10.

In their Answering Brief, Respondents avoided the critical questions introduced in Appellant's Opening Brief and, instead, provided their own take on the issues presented for review in an attempt to distract the Court by the factual evidence and skew the standard of review. However, it is worth pointing out that Respondents' overall position taken in opposition to the appeal was summarized in their Answering Brief as follows: "Respondents assert that the Appellant's conduct is in violation of the social club's Bylaws and Rules, and additionally places EPCC's I.R.C. § 501(c)(7) tax-exempt status at risk, which constitutes irreparable harm." RAB p. 5. Accordingly, even in Respondents' Answering Brief, it was

made clear that the issue of Appellant's 26 USCS § 501(c)(7) tax-exempt status was related only to the element of irreparable harm.

Appellant pointed this out in its Reply Brief by providing that the analysis that whether Respondents met their burden in demonstrating a reasonable likelihood of success on the merits turned on the contractual interpretation of Appellant's Bylaws and statutory interpretation of NRS 116.340 where the analysis of whether Respondents met their burden in demonstrating irreparable harm for which compensatory relief is inadequate turned on statutory interpretation of 26 USCS § 501(c)(7). ARB p. 5. The two issues were not separate claims but rather combined elements to be considered in granting or denying a preliminary injunction.

Respondents now argue that a decision on the permissibility of short-term vacation rentals/transient commercial use issue does not resolve or negate the second issue of Appellant's 26 USCS § 501(c)(7) tax-exempt status constituting irreparable harm. However, this is not the standard when determining whether a preliminary injunction should issue.

"A preliminary injunction is available when the moving party can demonstrate that the nonmoving party's conduct, if allowed to continue, will cause irreparable harm for which compensatory relief is inadequate and that the moving party has a reasonable likelihood of success on the merits." *Boulder Oaks Cmty.*

*Ass'n v. B & J Andrews*, 125 Nev. 397, 403, 215 P.3d 27, 31 (2009); NRS 33.010.

A party seeking the issuance of a preliminary injunction bears the burden of establishing (1) a likelihood of success on the merits; **and** (2) a reasonable probability that the non-moving party's conduct, if allowed to continue, will cause irreparable harm for which compensatory damage is an inadequate remedy. *S.O.C., Inc. v. Mirage Casino-Hotel*, 117 Nev. 403, 408, 23 P.3d 243, 246 (2001) (emphasis added). As provided for by the *Boulder Oaks* Court, if there is not a reasonable likelihood of success on the merits, the court need not reach the issue of whether one would suffer irreparable harm. *See*, 125 Nev. 397, 403 n.6, 215 P.3d 27, 31 (2009).

Thus, this Court properly utilized the method for analyzing the elements when it first analyzed the threshold issue of whether Respondents met their burden in demonstrating a reasonable likelihood of success on the merits related to the permissibility of short-term vacation rentals/transient commercial use. In finding that the use was permissible, and that Respondents had failed to meet the threshold burden, this Court properly provided that it need not address the remaining arguments regarding irreparable harm as it related to the 26 USCS §501(c)(7) tax-exempt status. *See*, Order at p. 10, n.4.

Consequently, this is not an instance where this Court has overlooked or misapprehended a material fact in the record or a material question of law in the

case. This Court fully considered all the materials and arguments before it and reached a determination.

**III.**  
**CONCLUSION**

Based on the foregoing, Appellant respectfully requests that the Court must deny Respondents' Petition for Rehearing pursuant to NRAP 40(c).

DATED this 3<sup>rd</sup> day of November, 2022.

RESNICK & LOUIS, P.C.

*/s/ Prescott Jones*

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**IV.**  
**CERTIFICATE OF COMPLIANCE**

I hereby certify that I have read this Answer to Petition for Rehearing, 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 answer complies with all applicable Nevada Rules of Appellate Procedure, and in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

I further 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 365 ProPlus, Times New Roman 14 point and the type-volume limitation. This brief also complies with the length requirements of NRAP 40(b)(3) because this brief does not exceed 4,667 words (the entirety of this answer contains 2,793 words).

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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.

*/s/ Prescott Jones*

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**V.**  
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that service of the foregoing **ANSWER TO PETITION FOR REHEARING** was served this 3<sup>rd</sup> day of November, 2022, by:

[X] **BY ELECTRONIC SERVICE:** by transmitting via the Court's electronic filing services the document(s) listed above to the Counsel set forth on the service list on this date as follows:

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