IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

Case No. 83463

COMSTOCK RESIDENTS ASSOCIATION; AND JOE MCCARTHY,

Appellants,

vs.

LYON COUNTY BOARD OF COMMISSIONERS; AND COMSTOCK MINING INCORPORATED,

Respondents.

Appeal From Order Granting Defendants' Motion for Attorneys' Fees

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APPELLANTS' OPENING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Comstock Residents Association is a not-for-profit entity with no parent corporations, and there is no publicly held company that owns 10% or more of its stock. Joe McCarthy is an individual.

The following law firms have lawyers who appeared on behalf of the Appellants or are expected to appear on his behalf in this Court:

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DATED February 7, 2022

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JURISDICTIONAL STATEMENT

Plaintiffs/Appellants Comstock Residents Association and Joe McCarthy (collectively "Citizens") appeal from the District Court's July 30, 2021 Order Granting Defendants' Motion for Attorneys' Fees ("Fees Order").[1] Joint Appendix ("JA"), 7:1685.[2] The Fees Order awarded Defendants/Respondents Lyon County Board of County Commissioners ("Lyon County") and Comstock Mining Incorporated (the "Mining Company") a total of $253,151.47 in attorneys' fees. The Fees Order is appealable order under NRAP 3A(b)(8) as a special order entered after final judgment. Notice of Entry of the Fees Order was filed on August 4, 2021. JA 7:1687. Citizens' Notice of Appeal was timely filed on September 1, 2021. JA 7:1691. Appellate jurisdiction therefore exists. *See* NRAP 4(a)(1).

ROUTING STATEMENT

Although this case is presumptively assigned to the Court of Appeals under NRAP 17(b)(7), Citizens submit that the Supreme Court should retain this appeal for the following reasons:

(1) Pursuant to NRAP 17(a)(12), the principal issues raised by this appeal are of statewide public importance. The Fees Order imposed significant fees without statutory authority, findings, or substantial evidence of frivolousness, and in a

[1] Prior to this appeal, all parties stipulated to dismiss Plaintiff Gayle Sherman. The District Court has not acted upon that stipulation.
[2] Citation to the Joint Appendix shall be to "JA volume:page."

manner that would effectively suppress adversely affected public citizens from bringing reasonable petitions for judicial review of local government actions.

(2) Pursuant to NRAP 17(a)(11), this appeal raises issues of first impression under NRS 18.010 and NRS 278.0237 regarding the award of attorneys' fees in land use cases, particularly the exposure of citizens groups seeking judicial review of their government's decisions.

(3) The Supreme Court retained jurisdiction in the previous two appeals in this matter (as well as the related Public Records Act case in which Citizens prevailed), and continuity in review would be helpful to the resolution of the issues. *See* December 2, 2016 Order Affirming in Part, Reversing in Part, and Remanding, *Comstock Residents Association et al. v. Lyon County, et al.*, Supreme Court Case No. 68433 ("*CRA I* Order") (Document No. 16-37327); January 11, 2021 Order of Affirmance, *Comstock Residents Association, et al. v. Lyon County*, *et al.*, Supreme Court Case No. 79445 ("*CRA II* Order") (Document No. 21-00718); *Comstock Residents Association, et al. v. Lyon County*, 134 Nev. 142, 414 P.3d 318 (2018) ("Public Records Act case").

Citizens submit that the foregoing reasons warrant Supreme Court review of this appeal as well.

ISSUES PRESENTED

The entire analytical portion of District Court's two-page Fees Order reads: "The Affidavits on file demonstrate that the fees requested are reasonable under standards set forth in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, P.2d 31, 33 (1969). The Court, therefore, finds that all fees requested must be awarded under NS [*sic*] 18.010 and NRS 278.0237." JA 7:1685.

The issues on appeal are:

(1) Whether the District Court erred as a matter of law when it awarded fees to the Defendants pursuant to NRS 278.0237 when the plain language of that statute limits a fee award to plaintiffs in cases brought under NRS 278.0233, which this case is not;

(2) Whether the District Court erred as a matter of law and abused its discretion when it concluded, without engaging in any analysis or making any findings, that Defendants were entitled to fees under NRS 18.010(2)(b); and

(3) Whether the District Court abused its discretion when it awarded the total amount of fees requested by Defendants without making **any** *Brunzell* findings and without the necessary evidence to review the reasonableness of Defendants' request.

STATEMENT OF THE CASE

Local citizens brought this action to challenge the approval by Lyon County of the Mining Company's application to change long-standing land use designations of property the Mining Company controlled, in and adjacent to Silver City. The Mining Company sought to conduct its mining activities adjacent to residential neighborhoods. Although the County had rejected such a proposal several times before and, for forty years, maintained a Master Plan that prohibited mining in the locations requested by the Mining Company, after improper communications and relationships between the Mining Company and various County Commissioners, the County approved a change in land use designations to allow for the Mining Company's proposed operation.

Citizens sued Lyon County and the Mining Company alleging the approval was arbitrary, capricious, or otherwise contrary to law. Citizens' petition for judicial review ("PJR") consisted of an abuse of discretion claim and claims that Lyon County's violated the Nevada Open Meeting Law (NRS Chapter 241) ("OML claim") and Citizens' due process rights ("Due Process claim"). *See* JA 1:1-35.

In this case's first trip to the Supreme Court following the district court's dismissal of Citizens' claims and denial of the abuse of discretion and NRS 278.220 claims, Citizens prevailed, in part, and the Court remanded for further proceedings on the Due Process Claim. *CRA I*. After the district court entered judgment against

Citizens on the merits on the Due Process claim, Citizens appealed again, with two justices dissenting from the en banc Court's affirmance. *CRA II*.

Following remittitur, the District Court entered the Fees Order awarding Lyon County and the Mining Company $253,151.47 in attorneys' fees. This is an appeal from the Fees Order. Citizens set forth in some detail the factual background of the underlying case to demonstrate the reasonableness of their claims such that the Fees Order was an abuse of discretion under NRS 18.010(b)(2).

STATEMENT OF FACTS

A. For Forty Years, The County's Master Plan And Zoning Designations Prohibited Mining Operations Such As the Mining Company's Near Residential Areas Of Silver City

The Mining Company controls mining patents in the historic Comstock lode, which was discovered in 1859. JA 1:0197. Starting in 1971 and extending until 2014, the Lyon County Board of County Commissioners repeatedly exercised its discretion to affirm master plan and zoning designations for property in and adjacent to Silver City to preclude mining near residential areas and avoid the possibility of adjacent incompatible uses. JA 1:0198-0209; JA 4:0855. In 1971, Lyon County adopted its initial Master Plan that contained policies separating the existing Silver City neighborhood from extractive industrial uses such as mining. JA 1:0198-0199.

In 1986, Nevex Corporation, a mining company, sought to change the 1971 master plan and zoning designations. JA 1:200. Lyon County rejected Nevex's

applications, finding that the proposed changes (which were the same changes the Mining Company sought in 2014) were expressly contrary to the master plan that was then in effect. Notably, that master plan had substantially weaker protections for Silver City against possible mining activities than the 2010 Comprehensive Master Plan in affect in 2013 when the Mining Company filed its application. *See generally* JA 1:0200; 2:0306-0368.

In 1990, Lyon County adopted a new Master Plan that maintained the same master plan and zoning designations separating Silver City residential areas from mining uses that had been the basis for its rejection of the Nevex application. JA 1:0200-0201. In 2002, Lyon County developed and adopted a West Central Land Use Plan that covered Silver City. JA 1:0203-0203. This plan again maintained the land use designations and zoning to prohibit mining and added specific restrictions to protect Silver City residents from earth disturbing activities and visual scarring caused by above-ground mining. *Id*.

In 2010, Lyon County undertook a comprehensive effort to update its countywide master plan. JA 1:0203-0209. During the adoption process for the 2010 Comprehensive Master Plan, the Mining Company asked the County to change the master plan and zoning designations. JA 4:0764-0767. The County refused and adopted the 2010 Comprehensive Master Plan without the Mining Company's requested changes. JA 4:0769-0770. The adopted 2010 Master Plan maintained the

same land use designations and zoning for Silver City and heightened protections for residents against adjacent mining activities that had existed for the previous 40 years. JA 1:0203-0209.

B. After Unsuccessfully Seeking Changes During Lyon County's Master Planning Process, the Mining Company Set Out To Gain Supporters On The County Commission By Giving Financial Incentives To Commissioners

Given these prior actions of the County Commissioners adverse to its interests, to conduct mining activities in and adjacent to Silver City, the Mining Company would need a change in the County Commission's orientation. It set out to accomplish that.

1. Commissioner Keller Became Financially Dependent On Multiple No-Bid Contracts Between The Mining Company And Her Family Businesses

In January 2011, Vida Keller replaced Commissioner Larry McPherson on the County Commission. Early that year, the Mining Company invited Vida and her husband Scott Keller, as well as other local elected officials, to tour the Mining Company's mining operations. JA 5:1028-1029. According to Scott Keller, the tour included the historic Dayton mine buildings. JA 5:1135. During that tour, Scott Keller made a comment that a building looked unsafe and work should be done to stabilize it. JA 5:1029-1030. Thereafter, the Mining Company reached out to Scott to hire him to work on the stabilization of the Dayton mine structures. JA 5:1031; JA 5:1137.

To facilitate payment for the work, Scott negotiated a contract between the Mining Company and his brother Rick Keller's (i.e., Vida's brother-in-law) construction company, Priceless Construction. *Id*.; 5:1250-6:1251. The contract did not undergo a competitive bidding process. JA 5:1031. Scott Keller then was hired by his brother to perform work under this contract with the Mining Company. JA 5:1137. Scott Keller's work under the Mining Company-Priceless Construction contract was completed in 2011.

At the conclusion of the one-year contract, to continue its financial ties with the Kellers, the Mining Company again affirmatively reached out to Scott to perform additional work on the Mining Company's property. JA 5:1138-1140. At that time, Vida and Scott owned several businesses, including Priceless Realty, a real estate agency under which Vida worked as a licensed real estate agent, and Keller Construction/ Consulting, a mobile home repair business. *See* JA 5:1009-1012.

The couple jointly contributed to performing the work for the family businesses: Scott performed the physical labor and Vida kept the books and did the invoicing, taxes, etc. JA 5:1138-1139. The Kellers used the same contact information and billing addresses for their personal use and all their businesses. *Id*.

On January 1, 2012, the Mining Company entered a no-bid retainer contract with Priceless Realty. JA 3:0824-826. Under this contract, the Mining Company paid the Kellers' company $5,000 per month to be available for consultant services and a

bonus equal to 5% of any construction contracts managed by Priceless Realty. *Id*. No minimum hours of work were required or were actually billed, nor were specific tasks identified in the contract. JA 5:1140-1141. The Mining Company paid the Kellers' company $60,000 over the course of the year-long Priceless Realty contract. JA 6:1277.

With its master plan and zone change application on the near horizon (formally filed with the County several months later), the Mining Company entered into another no-bid contract, this time with another of the Keller's businesses, "Keller Consulting" company. JA 5:1100-1101. Under this May 1, 2013 contract, the Mining Company paid the Kellers' business $7,083 per month to be available for consultant services – which was $2,083 more per month than the prior contract. *Id*. When asked why the Mining Company agreed to a 40 percent increase for the same services, Scott Keller testified that he simply "wanted more money" and the Mining Company complied. JA 5:1148. The Mining Company paid the Kellers over $212,000 under this contract. JA 5:1171.

In October of 2013, after having awarded Commissioner Keller's company this lucrative contract, the Mining Company applied to Lyon County to change the master plan and zoning designations to allow mining use on the property in and adjacent to Silver City. *See* JA 4:0900, *et seq*. By the time Commissioner Keller considered, deliberated, and acted upon the Mining Company's land use

applications, the Mining Company had paid Commissioner Keller's companies hundreds of thousands of dollars. JA 5:1171; 6:1277.

Moreover, the Kellers had become dependent upon the Mining Company's payments to meet the family's financial needs. JA 5:1007-1008; 1017-1018. During that period, Commissioner Keller was caring for her sick mother and had taken over care and responsibility for her mother and grandchildren. *Id*. Because of these family obligations, Commissioner Keller testified, she ceased all activity as a real estate agent. JA 5:1017. As a result, the Kellers received income from only two sources while the Mining Company was seeking permission from the County Commission to allow mining uses on its property: (1) Lyon County – Commissioner Keller's part-time salary of approximately $26,000, and (2) the Mining Company – via the Priceless Realty and Keller Consulting contracts worth $80,000 annually. JA 5:1017-1018.

Even with the income from the Mining Company, the Kellers could not pay their bills at the time the Mining Company's application came before the Commission. JA 5:1021-1022, 1024. Commissioner Keller decided not to pay her property tax bills to the very County that she had been elected to serve and fell into arrears. *Id*.

2. The Mining Company Gave Record-Level Contributions To Commissioner Hastings' Campaign

With Commissioner Keller's businesses under contract, the Mining Company pivoted to replacing the commissioner who represented the district that encompassed Silver City and had opposed the Mining Company's proposed land use changes. In 2012, Bob Hastings ran against incumbent Commissioner Chuck Roberts for the district representing, *inter alia*, Silver City. During the race, the Mining Company and its related companies contributed $17,500 in cash to Hastings to aid his election. JA 4:0782-0783. The Mining Company's contributions constituted more than 60 percent of the cash given to Commissioner Hastings that year and dwarfed any other single contributor. *Id*.

The average Lyon County Commission candidate from 2008 to 2012 raised a little more than $7,000. The Mining Company's contributions to Commissioner Hastings alone exceeded the totals for seven out of ten candidates from 2008-2014 and were twice the total raised by any candidate in 2016, even when including in-kind contributions. *Id*. Commissioner Hastings was dependent on the Mining Company's contributions to match and exceed his opponent's fundraising in the November 2012 race. *Id*. Hastings defeated Roberts in the election for District I Commissioner and was seated shortly thereafter. *Id*.

3. Commissioners Hastings And Keller Interjected Themselves Into Planning Staff's Review Of The Mining Company's Applications To Benefit The Mining Company

During Lyon County's consideration of the Mining Company's land use application, Commissioners Hastings and Keller actively promoted the Mining Company's interests and sought to influence planning staff's review of the Mining Company's applications. Commissioner Hastings, for example, contacted Rob Loveberg, head of the Lyon County Planning Department, regarding the Mining Company's application and the staff report and recommendation that Mr. Loveberg was drafting. JA 4:0935. Commissioner Hastings reported to Mr. Loveberg that the Mining Company was "intense" and concerned that the staff report might be negative. *Id*. According to Commissioner Hastings, even a staff report based on facts would "not calm [the Mining Company] nerves."

Commissioner Hastings specifically asked Mr. Loveberg whether the report would be negative or recommend a denial. *Id*. Mr. Loveberg responded that he had not finished the report but intended to submit a balanced one. *Id*. Commissioner Hastings then forwarded Mr. Loveberg's response to Commissioner Keller and asked for her thoughts. *Id*. Commissioner Hastings subsequently discussed Mr. Loveberg's approach with Commissioner Keller. *Id*.

Commissioner Hastings also forwarded the internal email from Mr. Loveberg to the Mining Company's Chief Executive Officer Corrado DeGasperis. JA 4:0938.

Noting the pressure he was going to bring to bear on Mr. Loveberg, Commissioner Hastings stated that he "will be discussing this matter further with Jeff Page," who was the County Manager and Mr. Loveberg's supervisor. JA 4:0938. In this email to the Mining Company's CEO, Commissioner Hastings assured the company he would take care of its interests: "I want to make sure that Rob [Loveberg] understands that concerns **we** have and Jeff amy [*sic*] be the conduit **we** need." *Id*. (emphases added.) Commissioner Hastings' use of the word "we" in this email establishes that he viewed his interests as aligned and coextensive with those of the Mining Company's and therefore biased.

Commissioner Hastings also coordinated with the Mining Company on gathering information on Citizens, strategizing for hearings before the Planning Commission and even recruiting witnesses to testify on the company's behalf. JA 4:0940 (Commissioner Hastings email to the Mining Company regarding potential witness to testify on the Mining Company's behalf); JA 4:0968 (Commissioner Hastings email to the Mining Company ("Do **we** know or is there a way to get a list of CRA members?")(emphasis added); JA 4:0945 (Mining Company email to Commissioner Hastings setting up strategy call for Planning Commission meeting: "Let's talk tomorrow about the upcoming LC Planning meeting. I will fill you in.").

Notwithstanding this interference, the Lyon County professional planning staff exhaustively reviewed the Mining Company's application, issued in-depth

reports, and recommended that the Mining Company's application be denied. 4:0849-0883, 4:0864 ("Staff recommends denial of the requested master plan amendments based on the guidance provided by the Comprehensive Master Plan, County-wide Component, including the adopted Land Use Plan, the majority of applicable goals, policies and strategies, Silver City's unique and historic character, and the County's lengthy, consistent master plan record of land use planning for Silver City."). On December 10, 2013, the Lyon County Planning Commission voted 5-to-1 to recommend that the County Commissioners deny the Mining Company's application. JA 4:0789-0790.

On December 20, 2013, Citizens objected to Commissioners Keller and Hastings' participation in the consideration, deliberation, and decision on the Mining Company's application because of their financial ties to and demonstrable bias in favor of the Mining Company. JA 4:0958-0960. Notwithstanding Citizens' objection, Commissioners Keller and Hastings not only failed to recuse but, to the contrary, intensified their involvement with the Mining Company's application by actively promoting a behind-the-scenes last-minute "compromise" to guarantee a vote to overturn the Planning Commission's action.

Commissioner Keller herself in the month leading up to the hearing had multiple telephone contacts with the Mining Company's CEO or the company's consultants, most of which she initiated. JA 7:1564-1570. During this same time,

Commissioner Keller was contacting and meeting with the Mining Company to obtain reimbursement for the Kellers' expenses under their personal contract with the Mining Company. JA 5:1246-1248.

The day before the hearing on the Mining Company's application (January 1, 2014, a holiday), Commissioner Keller was particularly active, having 16 calls with the Mining Company representatives. JA 7:1568-1570. Commissioner Keller herself initiated all but three of these contacts. *Id*. During the days before the hearing, Commissioner Keller also had significant telephone contact with Commission Chairman Mortenson and Commissioner Hastings (nine contacts in two days). *Id*. While Commissioner Keller worked the phones, the Mining Company representatives met with Commissioners Fierro, Mortenson, Keller and Hastings, to, in the words of the Mining Company's representative, "propose options" to resolve concerns regarding the Mining Company's application. *CRA I*, Dkt. 16-02096 (Recording CMI #1) at 23:09, (CMI #1) at 15:53 (Commissioner Fierro disclosing December 30, 2013 meeting with the Mining Company's representative to discuss application); (CMI #1) at 16:52 (Commissioner Mortenson disclosing he also met with the Mining Company as did Commissioner Fierro); (CMI #1) at 17:00 (Commissioner Hastings disclosing contacts with the Mining Company). Citizens were not included in these conversations. As candidly admitted by the Mining Company, the compromise worked out in these private calls and meetings the days

before the public meeting "was the result of some Commissioners talking about is there an opportunity for some sort of [reduction in the scope of the Mining Company's Application]." *CRA I*, Dkt 16-02096 (CMI #1) 47:38. That is, the Commissioners deliberated on an agendized item before the public hearing.

More specifically, the compromise worked out was a map that was circulated to and discussed serially by a majority of commissioners outside a public meeting. On December 30, 2013, the Mining Company met with Commissioner Fierro to discuss his concerns with the Mining Company's application. *CRA I*, Dkt 16-02096 (Commissioner Fierro disclosure). Then, on December 31, 2013, the Mining Company sent Commissioner Fierro a map of the parcels of concern. JA 4:0956. Commissioner Keller thereafter received the map (JA 5:1114) and provided it, on January 1, 2014, to Commissioner Mortenson in person (JA 5:1063-1066). *See also* JA 4:0951. Later that day, the Mining Company sent to the County Manager the "compromise" proposal worked out in these serial meetings. JA 6:1259.

The next day, on Commissioner Keller's motion, the Commissioners voted to approve the Mining Company's revised land use application, allowing mining uses in areas that, through its master planning process, the County had prohibited for over 40 years. JA 4:0954. During the discussion of the Mining Company's application, the County Commissioners refused to consider the impacts of the proposed mining use on Silver City despite the findings by their own staff that such impacts existed.

Compare CRA I, Dkt. 16-02096 (CMI#1) at 46:17, 52:23, 49:58 (Commissioners asserting that legally they could only consider residential "allowable" uses not the new mining "special" uses) *with* JA 4:0860 (Lyon County staff report stating, "[t]he future potential for mineral exploration and attraction operations should be considered for the requested master plan amendment and concurrent zone change requests.").

Citizens thereafter sued. JA 1:1.

C. Prior Judicial Proceedings

As characterized by the Supreme Court, Citizens, "petitioned for judicial review on the grounds that: (1) [Lyon County] violated CRA's due process rights, (2) [Lyon County] violated open meeting laws, (3) [Lyon County] abused its discretion, and (4) [Lyon County] violated NRS 278.220(4)'s requirement to wait and review the Planning Commission report before taking final action." *CRA I*, Dkt. 16-37327 at 2; JA 1:0030-0033.

Defendants moved to dismiss the OML, Due Process, and NRS 278.220 claims. JA 1:0071. After briefing, the District Court granted that motion in part and denied in part. JA 1:0107. The District Court then denied Citizens' abuse of discretion and NRS 278.220 claims after briefing on its merits. JA 4:0617. Citizens thereafter appealed both orders. See *CRA I*, Dkt. 16-37327 at 2.

On appeal, the Supreme Court reversed the District Court and concluded Citizens had pleaded sufficient facts that, if proven, established that "the probability of perceived or actual bias was unconstitutionally high because of the[] commissioners' dealings with [the Mining Company]." *Id.* at 4. As noted by the Supreme Court, Citizens alleged Commissioners Keller and Hastings failed to recuse themselves despite impermissible conflicts of interest and bias. *Id*. The Supreme Court further held that Citizens' Complaint "included numerous factual allegations regarding the Mining Company's allegedly unprecedented support of Commissioner Hastings' campaign. It also included detailed factual allegations regarding [the Kellers' companies'] contractual situation with [the Mining Company]." *Id*. at 3.

Although it reversed the District Court's dismissal of Citizens' Due Process claim, the Supreme Court affirmed the District Court's denial of Citizens' abuse of discretion claim, finding that the County's actions were based on substantial evidence in the record and otherwise consistent with applicable law (e.g., NRS 278.220). *CRA I* at 6-8. Additionally, the Supreme Court affirmed the dismissal of Citizens' OML claim with prejudice, concluding Citizens had not pled sufficient facts to allege a knowing OML violation and that the last-minute change in the proposed action needed to be agendized. *CRA 1* at 4-6.

On remand of the Due Process claim, Citizens obtained requested public records that they obtained following their successful suit in *Comstock Residents*

Association v. Lyon County, 134 Nev. 142, 414 P.3d 318 (2018) and conducted discovery, including requests for production and depositions. The parties then submitted briefs and evidentiary exhibits for the District Court to consider and decide the Due Process claim on the merits. *See* JA 3:0708, 3:0740, 4:0758, 6:1322, 7:1548, 7:1576, 7:1619. Citizens cited testimony by Commissioner Keller and her husband of their direct contractual relationship with, and financial dependency on, the Mining Company. *Supra*, at 7-11. Citizens also cited documentary evidence developed during their public records and discovery requests to, *inter alia*, establish: (1) the contracts between the Kellers and the Mining Company; (2) the receipt by the Kellers of over $200,000 in direct payments from the Mining Company (contradicting Commissioner Keller's January 2, 2014 financial disclosure); and (3) Commissioner Hastings' communications and efforts on behalf the Mining Company during the County's consideration of the Mining Company's application. *JA* 7:1553-1570.

Notwithstanding this evidence, the District Court decided in Defendants' favor on the Due Process claim. JA 7:1641. Citizens appealed, and a panel of the Supreme Court affirmed. *Comstock Residents Association, et al. v. Lyon County, et al.*, Appeal No. 79445 (*CRA II*) Dkt. 21-00718. Citizens petitioned for rehearing (Dkt. 21-02750) and, after denial (Dkt. 21-05537), sought en banc reconsideration (Dkt. 21-06745). The en banc Court denied Citizens' petition; however, Justices

Stiglich and Silver dissented, indicating that they "would grant the petition for en banc reconsideration." *CRA II*, Dkt. 21-10276.

D. The District Court Granted A Sizeable Fee Award To Defendants Without Legal Authority And The Required Findings

Shortly after the District Court's order on the merits of the Due Process claim, Defendants filed a Motion for Attorneys' Fees. JA 7:1645. To support the Motion, Defendants provided only spare declarations and failed to include any actual time records. JA 7:1653, 1656, 1659. Defendants also submitted a two-page proposed order to the District Court. JA 7:1680. After the Supreme Court issued its remittitur in the Due Process appeal, the District Court entered Defendants' proposed order without making any findings or reviewing the reasonableness of the claimed fees and awarded all the fees sought, stating only:

> The Affidavits on file demonstrate that the fees requested are reasonable under standards set forth in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, P.2d 31, 33 (1969).
>
> The Court, therefore, finds that all fees requested must be awarded under NS [*sic*] 18.010 and NRS 278.0237.

JA7:1685. Based on that language alone, the District Court awarded $50,000 to the County and $203,151.47 to the Mining Company for a total judgment against Citizens of $253,151.47. JA 7:1698. This appeal followed. JA 7:1691.

SUMMARY OF ARGUMENT

The District Court erred as a matter of law when, in a two-sentence order, it concluded that Defendants were eligible for fees under NRS 278.0237 and NRS 18.010. On its face, NRS 278.0237 applies only to actions brought under NRS 278.0233 by an unsuccessful applicant for a land use entitlement where the local government denial was arbitrary, capricious, or otherwise an abuse of discretion. In this case, Citizens' action was not brought pursuant to NRS 278.0233 and cannot be deemed to have been brought under that statute because Citizens were not the applicant. Rather, Citizens challenged the County's approval of the Mining Company's land use application pursuant to NRS 278.3195. Because the plain language of NRS 278.0237 is clear that it does not apply to this case, the District Court erred as a matter of law when it invoked that statute to award fees to Defendants.

The District Court also committed legal error by awarding fees pursuant to NRS 18.010 because that statute does not apply to petitions for judicial review. Although the Court's precedent addressed judicial review of state agencies' actions brought under NRS Chapter 233B, because NRS Chapter 278 presents a similarly comprehensive statutory framework in which the Legislature deemed fees to be warranted in very limited circumstances not applicable here, the District Court could not circumvent that will of the Legislature by awarding fees under NRS 18.010.

Even if authority for fees could be deemed to exist, the District Court nevertheless abused its discretion by: (1) failing to make any finding that this action was frivolous; (2) ignoring that Citizens' claims were supported by evidence and applicable law; (3) awarding over $250,000 in fees against a citizen group without analyzing any of the *Brunzell* factors; and (4) impliedly determining that the amount of fees was reasonable, notwithstanding the lack of supporting evidence.

STANDARD OF REVIEW

Eligibility for attorney fees is a matter of statutory interpretation that is reviewed de novo. *In re Estate of Miller*, 125 Nev. 550, 553, 216 P.3d 239, 241 (2009).

> [An appellate court] normally reviews an award or denial of attorney fees under NRS 18.010(2)(b) for an abuse of discretion. *Mack–Manley v. Manley*, 122 Nev. 849, 860, 138 P.3d 525, 532-33 (2006). However, the district court "may not award attorney's fees unless authorized by statute, rule or contract." *Fowler,* 109 Nev. at 784, 858 P.2d at 376 (citing *Nev. Bd. of Osteopathic Med. v. Graham,* 98 Nev. 174, 175, 643 P.2d 1222, 1223 (1982). Further, issues of statutory interpretation are questions of law reviewed de novo. *Albios v. Horizon Cmtys., Inc.,* 122 Nev. 409, 417, 132 P.3d 1022, 1028 (2006).

Zenor v. State, Dep't of Transp., 134 Nev. 109, 111, 412 P.3d 28, 30 (2018).

ARGUMENT

A. As A Matter Of Law, Respondents Were Not Entitled To Fees Under Either Statute Invoked By The District Court

In its Fees Order, the District Court awarded fees under NRS 278.0237 and NRS 18.010 when neither of these statutory provisions authorizes a fee award in this case.

1. NRS 278.0237 Only Authorizes A Fee Award In An Action Brought Under NRS 278.0233, Which This Case Is Not

In NRS Chapter 278, the Nevada Legislature created two opportunities for judicial review of local land use decisions, depending on who is the petitioner. In only one of these instances, NRS 278.0237, did the Legislature allow a prevailing party to recover fees so long as the suit is brought under NRS 278.0233. This case was not brought under the authority of NRS 278.0233 and does not come within the ambit of that statute.

NRS 278.0233(1)(a) authorizes land use applicants (i.e., those with an interest in the real property) to seek judicial review of, *inter alia*, a public agency's denial or improper conditioning of an application that caused the applicant actual damages.[3]

[3] NRS 278.0233(1)(a) creates a highly qualified cause of action for (1) a person with an interest in real property, (2) who has filed an "application for a permit," (3) to file suit "against the agency," (4) "to recover actual damages caused by," (5) a final action which imposes conditions on the use of the property, (6) in excess of the agency's authority, which conditions are arbitrary or capricious, or unlawful. NRS 278.0233(1)(b) authorizes a suit for actual damages against an agency's improper

See e.g., *Redrock Valley Ranch, LLC v. Washoe County*, 127 Nev. 451, 455-56, 254 P.3d 641, 644 (2011) (an unsuccessful applicant for water use permit sued under NRS 278.0233 to seek judicial review of the government's decision and damages). All others who wish to challenge a local government's land use decision (e.g., opponents of a land use application or an unsuccessful applicant who did not incur actual damages) must file petitions for judicial review under NRS 278.3195(4). *See*, *e.g.*, *Kay v. Nunez*, 122 Nev. 1100, 1103-1104, 146 P.3d 801, 804-805 (2006) (citizen who opposed land use designation change sought judicial review); *Citizens for Cold Springs v. City of Reno*, 126 Nev. 263, 270-271, 236 P.3d 10, 14-15 (2010) (same).

The Legislature only authorized a fee award for a Chapter 278 action in limited circumstances not applicable here. Specifically, only an unsuccessful applicant who suffered actual damages as a result of the local government's arbitrary and capricious action to deny an application may recover fees: "The court may award reasonable attorney's fees, court costs and interest to the prevailing party in an action brought under NRS 278.0233." NRS 278.0237(2).

NRS 278.0233 is entirely inapplicable here because: (1) Defendants did not bring any claim; (2) the Mining Company did not seek a "permit" but rather applied

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assessment of a tax, fee, or other monetary charge; a cause of action not relevant here.

for amendments to zoning land and use classification; (3) the Mining Company did not bring a claim against Lyon County; (4) the Mining Company did not plead any actual damages suffered as a result of agency action; (5) Lyon County granted, rather than denied or conditioned, the Mining Company's application for the land use change; and (6) no action by Lyon County was found to be arbitrary, capricious, or contrary to law. The Plaintiff/Petitioner here was the opponent of an approved application, and the action was brought under NRS 278.3195, not NRS 278.0233. JA 1:1. Because Respondents brought no claim, much less one under NRS 278.0233, they cannot recover attorneys' fees under NRS 278.0237.

The District Court provided no analysis to support its conclusion that Respondents were entitled to fees under a clearly inapplicable statute. JA 7:1685. In their briefing below, Respondents contended that since the "primary crux of this action was the land use decision," the PJR "arises out of NRS 278.0233 . . . ." JA 7:1651. The only case cited for this baseless proposition clearly involved a suit by an unsuccessful applicant, which is the sole circumstance in which fees can be awarded under NRS 278.0237. *See* JA 7:1679 (Reply to Opposition to Motion for Attorneys' Fees, at 5), citing *Redrock Valley Ranch*, 127 Nev. at 455-56, 254 P.3d at 644. There is simply no legal authority for a fee award in this case under NRS 278.0237.

Moreover, the Supreme Court has repeatedly held that judicial review of local agency action in the land use context brought by petitioners like Citizens arise exclusively under NRS 278.3195. Starting in *Kay v. Nunez*, supra, and most recently in *City of Henderson v. Eighth Jud. Dist. Ct.*, 137 Nev. Adv. Op. 26, 489 P.3d 908 (2021), the Court has built jurisprudence that recognizes general land use cases as arising under NRS 278.3195, without even mentioning NRS 278.0233.

Respondents' reliance on *Redrock Valley Ranch* is misplaced and in fact illustrates why NRS 278.0233 is inapplicable here. The petitioner in *Redrock Valley Ranch* sought a permit from Washoe County to import water from one basin to another. 127 Nev. at 455-56, 254 P.3d at 644. Washoe County denied the permit. *Id*. Redrock Valley Ranch – i.e., the applicant – then sued Washoe County under NRS 278.0233 as an unsuccessful applicant for a land use permit who had allegedly suffered actual damages because of a public agency's allegedly arbitrary, capricious, or otherwise unlawful action denying the permit. *Redrock Valley Ranch*, 127 Nev. at 455-56, 254 P.3d at 644. In the background section of the opinion relied upon by Defendants below, the Supreme Court merely set out these facts and then affirmed the application denial by Washoe County. *Id.* Neither the facts nor holding of that case supports the notion adopted by the District Court that *any* case reviewing a land use decision automatically falls under NRS 278.0233, notwithstanding the absence of the required statutory criteria.

Indeed, the Supreme Court has specifically held that an action such as this one cannot serve as a basis for a claim under NRS 278.0233 and fees under NRS 278.0237. *See Enterprise Citizens Action Comm. v. Clark County Bd. of Comm's*, 112 Nev. 649, 661, 918 P.2d 305, 313 (1996). In *Enterprise*, the Supreme Court concluded that:

> [NRS 278.0233] indicates that relief in the form of actual damages is available only to the party which submitted the application requesting an improvement or change of use on its property and only after the responsible agency acts arbitrarily in imposing some type of restriction on the use of the property in excess of the agency's statutorily derived powers.

Id. As a result, the Court denied a fee request sought by a party that did not meet the statutory criteria. *See id.*

Here, the Mining Company did not bring this action against Lyon County for arbitrarily imposing restrictions on the use of property. JA 1:1. Indeed, Lyon County granted the Mining Company's application, prompting Citizens to bring this action to challenge the approval. JA 4:0954, 1:1. Because NRS 278.0233 has no relation to Citizens' lawsuit, as a matter of law, attorneys' fees could not be awarded to Defendants under NRS 278.0237. *See id.*

2. NRS 18.010 Does Not Apply To Petitions For Judicial Review

The District Court also incorrectly premised liability for attorneys' fees on NRS 18.010. JA 7:1685. NRS 18.010 authorizes fees in two circumstances: when the prevailing party has not recovered more than $20,000 (NRS 18.010(2)(a)) or

when a claim or defense is found to have been asserted "without reasonable ground or to harass the prevailing party." NRS 18.010(2)(b). The District Court did not state under which section of NRS 18.010 it imposed fees.

This Court has previously rejected the application of both NRS 18.010(2)(a) and (b) in petitions for judicial review of an agency action. First, in *State, Dep't of Human Res. v. Fowler*, 109 Nev. 782, 786, 858 P.2d 375, 377 (1993), the Court "held that attorney fees were not available under NRS 18.010(2)(a) in a petition for judicial review of an agency determination that did not include monetary recovery." *Zenor*, 134 Nev. at 109, 412 P.3d at 30.

The Court next held that NRS 18.010(2)(b) is likewise inapplicable to PJR actions because the Legislature chose to omit a fee provision within the statutory framework of NRS Chapter 233B. *Zenor,* 134 Nev. at 111, 412 P.3d at 30. "That the Legislature intentionally omitted attorney fees from NRS Chapter 233B is supported by the fact that the Legislature expressly authorized fees and costs in similar statutes—specifically for frivolous petitions of hearing officer decisions involving industrial injuries." *Id.* Even though the allegation was that the petitioner brought the petition to harass the respondent, the Supreme Court held that no attorneys' fees were available without a statute authorizing them in the same section creating the right of review. *Id.*

The same rationale is applicable to petitions for judicial review under NRS Chapter 278 because it likewise involves a comprehensive statutory scheme regarding land use decisions. As noted above, the Supreme Court held that NRS 278.3195 is the exclusive method of seeking review of a land use decision arising under NRS Chapter 278. *Supra* at 25. And as described above, the Legislature provided for a fee award in only limited circumstances in a specific type of Chapter 278 suit that is not at issue here. NRS 278.0237. The Legislature's omission of a fee-shifting provision from NRS 278.3195 should be deemed intentional, particularly where the Legislature chose to allow for a fee award elsewhere in the Chapter. *See Zenor*, 134 Nev. at 111, 412 P.3d at 30; *Dep't of Tax. v. DaimlerChrysler Servs. N. Am., LLC*, 121 Nev. 541, 548, 119 P.3d 135, 139 (2005) ("Nevada law also provides that omissions of subject matters from statutory provisions are presumed to have been intentional."). Because the Legislature created a comprehensive statutory framework in NRS Chapter 278 that does not allow for a fee award here, NRS 18.010 should not be used as an end run around the Legislature's policy decision.

Finally, the application of NRS 18.010(2)(b) is complicated by the very deferential burden of proof in PJR actions. To prevail in a PJR action, a petitioner has a tall order: it must show that the public agency's decision was arbitrary, capricious, or otherwise contrary to law and not supported by substantial evidence in the administrative record. *Kay*, 122 Nev. at 1103-1104, 146 P.3d at 804-805.

Although this is a difficult burden to satisfy, citizens who believe a government agency has made an unlawful decision should not be discouraged from seeking judicial review. The District Court's Fees Order exposes any unsuccessful PJR petitioner to a crippling fee award. If the Legislature had intended this result, it would have expressly so provided.

B. The District Court Abused Its Discretion By Failing To Make A Finding That The Action Was Frivolous, As Was Necessary To Award Fees Under NRS 18.010(2)(b)

Even assuming arguendo that the District Court had discretion to award fees under NRS 18.010(2)(b), it clearly abused that discretion because Citizens had reasonable bases for bringing and maintaining this action. The relevant question for a fee award under NRS 18.010(2)(b) is whether the plaintiff "brought or maintained a claim without reasonable grounds." *Rodriguez v. Primadonna Co., LLC*, 125 Nev. 578, 588, 216 P.3d 793, 800 (2009). "[I]f an action is not frivolous when it is initiated, then the fact that it later becomes frivolous will not support an award of [attorney's] fees." *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1354, 971 P.2d 383, 387 (1998) (internal quotation omitted). "For purposes of NRS 18.010(2)(b), a claim is frivolous or groundless if there is no credible evidence to support it." *Rodriguez*, 125 Nev. at 588, 216 P.3d at 800.

Furthermore, "[a]ttorney fees are not appropriate where the underlying claim rested on novel and arguable issues, even if those issues were not resolved in the claimant's favor." *Patush v. Las Vegas Bistro*, 135 Nev. 353, 356, 449 P.3d 467, 470 (2019); *see also Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 968, 194 P.3d 96, 107 (2008) (approving the denial of attorneys' fees because "appellants raised reasonably supportable, if not ultimately successful, arguments" in a complex and previously unsettled area of law); *Key Bank v. Donnels*, 106 Nev. 49, 53, 787 P.2d 382, 385 (1990) (concluding that it was an abuse of discretion to award attorney fees under NRS 18.010(2)(b), when the relevant law "was not free from doubt" and the complaint "presented complex legal questions concerning statutory interpretation and legislative intent, raised on reasonable grounds").

The Supreme Court has repeatedly determined judicial findings are necessary to award attorneys' fees, and the absence of findings constitutes an abuse of discretion. *See, e.g.*, *Capriati Constr. Corp. v. Yahyavi*, 137 Nev. Adv. Op. 69, 498 P.3d 226, 231 (2021) (noting that "[i]n exercising [its] discretion [to award fees], the district court must make findings under the … *Brunzell* factors").

Under *Brunzell*, the district court must consider:

> (1) the qualities of the advocate: his ability, his training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation; (3) the work actually performed

> by the lawyer: the skill, time and attention given to the work; (4) the result: whether the attorney was successful and what benefits were derived.

85 Nev. at 349, 455 P.2d at 33.

In this case, the District Court made no findings. JA 7:1685. Rather, the Fees Order states only: "The Affidavits on file demonstrate that the fees requested are reasonable under standards set forth in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, P.2d 31, 33 (1969). The Court, therefore, finds that all fees requested must be awarded under NS [*sic*] 18.010 and NRS 278.0237." JA 7:1685.

The District Court made no findings regarding what facts entitled Defendants to fees under either NRS 18.010 or NRS 278.0237. The District Court did not specify whether it awarded fees under the distinct provisions of NRS 18.010(2)(a) or (2)(b). It made no findings whether the action contained claims for money damages; it made no findings under 18.010(2)(b) which, if any, claims were brought and maintained frivolously. Similarly, the District Court made none of the necessary findings required by *Brunzell* and *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 81, 132 P.3d 606, 615-616 (2014), as to the reasonableness of the fees requested. This was a clear abuse of discretion that requires that the Fees Award be vacated.

C. No Remand Is Warranted Because The Record Is Clear That The Standard For Awarding Fees Under NRS 18.010(2)(b) Cannot Be Satisfied Here

As is readily evident from the factual and procedural history of this case, Citizens brought and maintained the action in good faith.

1. The Abuse of Discretion Claim

Citizens' abuse of discretion claim focused on three challenges to Lyon County's decision to change the land use designations to allow mining in and adjacent to Silver City. First, Citizens recited the long factual history of Lyon County's past efforts to separate incompatible uses, such as residential and mining. Lyon County had consistently zoned the Silver City area to preclude mining in or adjacent to the town site. JA1:0142-0152. In fact, over the years Lyon County strengthened the land use designations and protective policies to preclude exactly the type of use contemplated in the Mining Company's application. JA 4:0855-0856. Citizens argued that because the County's decision to grant the Mining Company's application was so inconsistent with the County's 40-year history of master planning, the County was required by law to explain what conditions had changed to justify taking an opposite position. *CRA I*, Dkt. 16-06746, at 5-9. Case law provides multiple examples of courts reversing governmental decisions where the affected public has long relied on the consistent application of stated policy. *Id*. at 8.

Second, Citizens argued that the decision to allow the siting of industrial open pit mining adjacent to existing residential uses was inconsistent with multiple policies of the Lyon County's current master plan. JA 1:0168-0180. In support of this argument, Citizens cited the numerous policies in the master plan directing separation of mining/industrial uses and existing residential zoning. *See id*. Indeed, Lyon County's own professional staff had called out these same inconsistencies when it found that the Mining Company's proposal was contrary to the master plan and therefore recommended it be denied. *See* JA 4:0849-0883, 0864. While the Commissioners need not follow staff's advice, they cannot abuse their discretion by acting inconsistently with the controlling master plan regarding separation of incompatible uses. *CRA I*, Dkt. 16-06746, at 9-11. Thus, this second prong of Citizens' abuse of discretion claim was supported by facts (the number of directly applicable master plan policies and the inconsistency of mining and residential housing as adjacent uses) and law *Id*.

Third, Citizens argued that the Commissioners abused their discretion by refusing to consider the effects of the full range of uses proposed in the Mining Company's application. *CRA I*, Dkt. 16-06746, at 11-13. Prior to Lyon County's action granting the Mining Company's application, mining was prohibited on the property in question. JA 4:0796. The Mining Company, wanting to mine its lands sought a different designation that allowed industrial mining. *See* JA 5:1111 ("The

applicant seeks the amendments for the purpose of pursuing continued mineral exploration, development and the economic mining potential of the subject property.")

However, when it came time for the Commissioners to hear the Mining Company's application, they stated that they could not consider the effects of mining uses allowed by the proposed designation *CRA I*, Dkt. 16-01655, at 25-26 ("The Board [of County Commissioners] was not required to consider uses [i.e., mining] that were not at issue in [the Mining Company's] Application.). Citizens argued the Commissioners' refusal to consider mining uses, allowed by the Mining Company's proposal, for consistency with the existing master plan was an abuse of discretion as a matter of law. JA 1:0173-0174. Thus, this third argument of Citizens' abuse of discretion claim was supported by facts (e.g., the refusal of the Commissioners to consider only some but not all uses allowed by the proposed land use designation change) and law.

Since all three of the arguments presented by Citizens were based on facts and applicable law, the abuse of discretion claim was not frivolous and cannot be subject to a fee award under NRS 18.010(2)(b).

2. The Due Process Claim

Citizens sued Lyon County for violating its due process rights because at the time Commissioner Keller acted upon the Mining Company's land use application,

she was financially dependent on the Mining Company (a fact she did not disclose). Similarly, Citizens argued that Commissioner Hastings was unduly biased because the Mining Company had directly funded to an unprecedented level his recent election campaign, and Commissioner Hastings thereafter through numerous contemporaneous emails and actions illustrated his commitment to pursue the Mining Company's objectives as his own. *Supra* at 5-11.

Under *Caperton v. Massey Coal Company*, 556 U.S. 868, 872 (2009), due process protects citizens "when 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" *Id*., quoting *Withrow v. Larkin*, 421 U. S. 35, 47 (1975); *see also Gilman v. Nevada State Board of Veterinary Med. Exam'rs*, 120 Nev. 263, 269 (2004) (clarified on other grounds in *Nassiri v. Chiropractic Physicians' Bd.*, 130 Nev. Adv. Op. 27 (April 3, 2014)); *Ivey v. Eighth Jud. Dist. Ct.*, 129 Nev. 154, 159 , 299 P.3d 354, 357 (2013).[4] With these legal authorities as guideposts, Citizens legitimately sought court review of whether Commissioner Keller and Hastings' financial ties to the Mining Company were of such magnitude so as to be deemed unconstitutional.

[4] As established by the United States Supreme Court, the Due Process Clause applies to a mining company's overwhelming funding of a judicial candidate, notwithstanding the fact that the contributions did not violate state election law or ethics laws. *Caperton*, 556 U.S. at 884. Similarly, in *Ivey*, the Court examined whether campaign contributions in accordance with state limits, nevertheless amounted to a due process violation. *Ivey*, 129 Nev. at 159-161, 299 P.3d at 357-358.

In the first appeal, this Court reversed the District Court's dismissal and held that Citizens had alleged sufficient facts to state a due process cause of action. *CRA I*, Dkt. 16-37327 at 3-4. On remand, Citizens provided evidence to support their allegations from facts both disclosed by Lyon County in its record below and through discovery (both depositions and multiple document requests). *See supra* at JA 7:1553-1570. Ultimately, a panel of this Court determined these facts did not constitute a violation of NRS Chapter 237, which it held to be coextensive with due process considerations in this case. *CRA II*, Dkt. 21-00718, *et seq*.

Citizens thereafter sought en banc reconsideration of the panel's decision. CRA II, Dkt. 21-06745. While the Court denied the request, Justices Stiglich and Silver dissented, indicating they would grant the petition. *CRA II*, Dkt. 21-10276. Although Citizens was unable to garner majority support for their petition, the fact that two justices deemed the due process claim to have merit demonstrates it was not frivolously brought or maintained. There was no basis for the District Court to impose fees on Citizens for having brought and pursued this claim.

3. The NRS 278.220 Claim

Citizens presented a good-faith claim supported by evidence under NRS 278.220(4). NRS 278.220(4) prescribes a process if the Lyon County Commission seeks to deviate from the action of its Planning Commission:

> No change in or addition to the master plan or any part thereof, as adopted by the planning commission, may be made by the governing

> body in adopting the same until the proposed change or addition has been referred to the planning commission for a report thereon . . . .

Id. Prior to Citizens' lawsuit, no reported case had interpreted this provision.

Citizens' claim was straightforward. The Lyon County Commission made a change in the specific acreage covered by the Mining Company's master plan application. Lyon County approved the revised map and only then referred the change back to its Planning Commission for a report – hence conceding NRS 278.220 applied because no other reason existed to send the matter back to the Planning Commission. JA 1:0128, 0131, 0139. These facts support a reasonable argument that Lyon County violated NRS 278.220(4) when it adopted its last-minute change to the Mining Company's application for a master plan amendment. Indeed, the District Court refused to dismiss the Citizen's NRS 278.200 claim finding, "[t]he Comstock Residents argue the county put the cart before the horse. The Court agrees. The violation of NRS 278.220 is not dismissed." JA 1:0111-0112.

That the Supreme Court ultimately held that a reduction in acreage change is not a "change" within the meaning of NRS 278.220(4) in *CRA I* does not render Citizens' claim frivolous and without legal and evidentiary support. *See Key Bank*, 106 Nev. at 53, 787 P.2d at 385 (a novel claim is not frivolous because it ultimately fails).

4. The OML Claim

As set forth above, Citizens alleged that Lyon County violated the OML when (1) multiple Commissioners deliberated outside of a public meeting by creating a last-minute revision to the Mining Company's application, and (2) the notice of the meeting did not include the last-minute revision to the application. JA 1:30. Defendants moved to dismiss, and the District Court granted the Defendants' motion without leave to amend. JA 1:0109-0110. Citizens appealed the dismissal arguing that they had evidence of a quorum of commissioners deliberating outside of a noticed meeting, they did not need to specifically plead improper motive for each commissioner, and in any event, they should be given leave to amend to the proper legal pleading standard. *See CRA I*, Dkt 16-06746 at 19-22. As to the OML notice, Citizens argued that the notice given in this case was insufficient because of the nature of the revision to the Mining Company's application and the lack of any notice provided to the public. *Id*.

As noted above, a panel of the Supreme Court affirmed the dismissal with prejudice finding Citizens did not plead ill-motive of the commissioners and that a reduction in acreage of a land use application did not require notice to the affected public. *CRA I*, Dkt. 37327 at 4-5. Justice Cherry dissented, arguing that as to the deliberation claim, Citizens should have been given the opportunity to amend to meet the Court's articulated standards of an OML claim. *Id*. at 9.

Citizens' OML claim was supported by fact and law. As to the deliberation outside of a meeting argument, Citizens pled multiple commissioners deliberated in private to find a "fix" for the Mining Company's application and had evidence that the number exceeded a quorum. JA 1:25 (¶ 95). As Justice Cherry noted, Citizens should have been given leave to amend to plead the only element the panel found missing, the improper motive requirement, particularly where existing facts showed a purposeful effort to meet serially. *See* supra at 15-16. And the facts revealed during subsequent discovery on the Due Process claim supported the OML claim, even though it had already been dismissed with prejudice. JA 7:1559-1571.

As for the adequacy of notice, it is undisputed that Citizens and the public received no notice that changes were made to the Mining Company's application and were only disclosed at the beginning of the public meeting. JA 4:0951-0952. Citizens made a reasonable argument that the changes were substantial enough so that the public was not properly notified of the actual application before the commission. *See e.g.*, *Sierra Watch v. Placer County*, 69 Cal.App.5th 1, 9-11, 284 Cal.Rptr. 195, 200-202 (2021) (distribution of key document to elected officials but not made available to the public prior to the hearing is a violation of California's open meeting law). That the Court ultimately disagreed does not render Citizens' claim to be anything other than a good-faith effort supported by facts to hold

government officials accountable to the public they serve, particularly where no controlling case law existed.

D. The Amount Of Fees Awarded Was Not Reasonable Under *Brunzell*

Based only on its one-sentence ruling, the District Court imposed a quarter-million-dollar fee award against a citizens group that reasonably sought to keep its government representatives accountable and free from improper influence. JA _. Although the District Court's complete lack of any *Brunzell* findings mandates reversal, even if one where to examine the *Brunzell* factors, the District Court's reliance on Defendants' affidavits was an abuse of discretion as to the reasonableness of the amount of fees.

For example, the affidavits attach no billing records. Instead, the Lyon County District Attorney simply stated that the County "does not track billable hours in any of its cases," and, "[i]n this case, over the course of four years, a reasonable estimate of hours spent on this case would exceed several hundred hours." JA 7: 1654. He provided no rationale or analysis of how he reached that number. *Id*. The District Attorney did not break down the tasks he undertook or use the actual cost of that time to the county. *Id*. Rather, the District Attorney only estimated a reasonable private hourly rate ($250). *Id*. Thus, without any information on the actual work undertaken and premised only on an hourly rate unconnected to actual costs, the District Court awarded Lyon County $50,000 in fees.

The Mining Company's affidavits fare no better. The Affidavits of James R. Cavilia (JA 7:1656) and Justin M. Townsend (JA 7:1659) likewise provided no billing records to assess whether time spent on any particular task was reasonable. Instead, in an example of extreme block billing, each attorney simply stated the total number of hours billed and the identical general categories of work undertaken. *See* JA 7:1657, 1660. Thus, the only information provided to the District Court was that the two attorneys spent a total of 712 hours on "drafting pleadings, attending hearings, preparing exhibits for presentation to the Court, conducting discovery, attending depositions, and all related and required litigation efforts." JA 7:1657, 1660.[5] Without some effort to detail billings, it is impossible for a court, or a party opposing the fee motion, to determine whether the claimed time was reasonably spent. *Natural Gas Co. v. Apache Corp.,* 355 F.Supp.2d 1246, 1264 (N.D.Okla.2004) (finding that it was difficult, if not impossible, to review the reasonableness of block-billed time entries, one of which was a time entry for 7.3 hours containing eight tasks).

[5] In addition to being unsubstantiated, the Mining Company's affidavits were also unreliable. For example, Mr. Cavilia asserted in his affidavit that he spent time, "attending depositions, and all related and required litigation efforts." 7:1657. However, de did not attend either of the two depositions in this case; rather, the Mining Company was represented in both depositions by Mr. Townsend. JA 74:0971, 5:1123. In other words, Mr. Cavilia claimed time for work he did not perform. *See id.*

As a result, the District Court's award should be overturned as an abuse of discretion.

CONCLUSION

The District Court lacked legal authority for the Fees Order and abused its discretion in awarding over $250,000 in fees without any findings or adequate supporting evidence. Citizens respectfully request that the Fees Award be reversed and vacated and the Court enter an order denying Respondents' fees request, as a matter of law.

AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED February 7, 2022

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NRAP 28.2 ATTORNEY'S CERTIFICATE

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 2007 in 14-point font, Times New Roman style. I further certify that this brief complies with the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 9,686 words.

Pursuant to NRAP 28.2, 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), which requires every assertion regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that this brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED February 7, 2022

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 7, 2022, a copy of the foregoing document was electronically filed with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system (E-Flex). The following participants who are registered as E-Flex users will be served by the E-Flex system upon filing. All others will be served by first-class mail.

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