IN THE SUPREME COURT OF THE STATE OF NEVADA

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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' REPLY 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 April 8, 2022

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INTRODUCTION

Most notable about the Answering Brief of Respondent Comstock Mining Incorporated ("the Mining Company") is not what it says but what it fails to say. The Mining Company does not address dispositive legal arguments made in the Opening Brief of Comstock Residents Association and Joe McCarthy (collectively, "Citizens") that point out the District Court's Order granting Motion for Attorneys' Fees (the "Fees Order") is defective as a matter of law. It also does not dispute key facts that demonstrate the Fees Order constitutes an abuse of discretion that cannot be salvaged by remand.

The plain language of NRS 278.0237 clearly indicates that the statute does not apply to this case and is not a valid authority upon which the District Court could impose fees. NRS 18.010(2) likewise does not apply to a petition for judicial review case such as this. Even if it did, the record is clear that Citizens brought and pursued this suit in good faith based on a reasonable interpretation of the law as it applies to the facts here.

Contrary to the Mining Company's contention, NRS 18.010(2)(b) is not triggered simply when a plaintiff does not meet its burden of proof. If that position were accepted, fees could be imposed on the losing party in every case, which contravenes the American Rule regarding attorneys' fees as well as the Legislature's intent to limit fee shifting to unique and egregious circumstances that do not exist in

this case. Citizens proffered copious evidence of two commissioners' bias and financial dependence on the Mining Company, which coincided with the Lyon County Commissions vote to jettison forty years of master planning that protected residential areas from mining activities. The fact that the District Court determined that this evidence fell short of showing a due process violation does not constitute a basis for imposing fees under NRS 18.010(2)(b).

Rather than bolster the faulty Fees Order, the Answering Brief underscores its defects. As a result, Citizens respectfully request that the Court vacate the Fees Order and rule, as a matter of law, that neither NRS 278.0237 nor NRS 18.010 authorize the imposition of fees in this case.

ARGUMENT

A. The Answering Brief Confirms There Was No Legal Basis Upon Which The District Court Could Award Fees

Contrary to the Mining Company's erroneous assertion (RAB 7), 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). In their Opening Brief (at 23-30), Citizens established that neither statutory basis relied upon by the District Court – NRS 278.0237 nor NRS 18.010 – applies in this case as a matter of law. The Mining Company's Answering Brief makes only passing efforts to rehabilitate this shortcoming, all of which must fail as a matter of statutory interpretation.

1. The Mining Company Cannot Shoehorn This Case Into NRS 278.0237 Where The Statute's Plain Language Makes Clear It Does Not Apply Here

Nowhere in its Answering Brief does the Mining Company address the plain language of NRS 278.0237, which on its face does not apply to this case. To seek fees under NRS 278.0237, the prevailing party's underlying action must have been brought pursuant to NRS 278.0233. This case was not and, indeed, could not have been, brought under the authority of NRS 278.0233 because NRS 278.0233(1)(a) authorizes only 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. It does not provide a basis for a citizens' group who opposed the approval of an application to seek judicial review, as occurred here. *See id.*

Notably, the Answering Brief does not dispute key facts that bring this case outside the purview of NRS 278.0233 and NRS 278.0237: (1) the Mining Company did not bring any claim, much less one against Lyon County; (2) the Mining Company did not seek a "permit" but rather applied for amendments to zoning land and use classification; (3) the Mining Company did not plead any actual damages suffered as a result of agency action; (4) Lyon County granted, rather than denied or conditioned, the Mining Company's application for the land use change; and (5) no action by Lyon County was found to be arbitrary, capricious, or contrary to law. By

failing to oppose these points, the Mining Company concedes that they render impermissible the District Court's imposition of fees under NRS 278.0237. *See Ozawa v. Vision Airlines, Inc.*, 125 Nev. 556, 563, 216 P.3d 788, 793 (2009) (treating party's failure to respond to an argument as a concession that the argument is meritorious); *Bates v. Chronister*, 100 Nev. 675, 682, 691 P.2d 865, 870 (1984) (treating failure to respond to an argument as a confession of error).

Rather than address the insurmountable plain language, the Mining Company simply asserts in conclusory fashion that the statute "provides a basis for judicial review of an agency decision on the grounds the decision was arbitrary and capricious." RAB at 8 (citing *Redrock Valley Ranch, LLC v. Washoe County*, 127 Nev. 451, 254 P.3d 641 (2011)). That NRS 278.0233 provides an avenue for judicial review to those parties who meet the statutory requirements does not alter the fact that the statute simply does not apply here. The *Redrock Valley* case supports Citizens' position, not the untenable statutory construction urged by the Mining Company. *See id.* at 455-56, 254 P.3d at 644.

The Mining Company also fails to address the directly applicable Supreme Court precedent in *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 an award of fees was inappropriate under NRS 278.0237 because NRS 278.0233 is applicable "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." *Enterprise Citizens*, 112 Nev. at 661, 918 P.2d at 313. The Mining Company does not even attempt to distinguish *Enterprise Citizens*, much less explain how NRS 278.0233 applies in this case where the District Court held, and the Supreme Court affirmed, that the agency (Lyon County) acted rationally and within its power.

The Mining Company's citation to NRS 278.3195(4) further confirms that the District Court had no authority to award fees because the Legislature chose only to authorize fees in judicial review cases brought under NRS 278.0233, not those brought under NRS 278.3195(4). These are separate judicial review provisions aimed at different factual scenarios. To the extent Mining Company seeks to conflate the two in order to shore up the District Court's unlawful award of fees, the Supreme Court rejected that very scheme in *Enterprise Citizens*. *Id*. at 661, 918 P.2d at 313.

Put simply, because the Mining Company provides no justification for how the plainly inapposite NRS 278.0233 applies here, it acknowledges that the District Court erred as a matter of law in awarding fees pursuant to NRS 278.0237.

2. The Mining Company Concedes NRS 18.010 Does Not Apply To Petitions For Judicial Review

The Answering Brief is likewise silent in the face of Citizens' argument that NRS 18.010 does not apply to judicial review actions such as this one. *State, Dep't of Human Res. v. Fowler*, 109 Nev. 782, 858 P.2d 375 (1993), and *Zenor v. State,*

Dept. of Transp., 134 Nev. 109, 412 P.3d 28 (2018), establish that where, as here, the Legislature has created a robust statutory framework for judicial review, fees should only be awarded in the limited circumstances delineated by the Legislature. In is Answering Brief, the Mining Company fails completely to address this argument or cite, much less distinguish, these applicable Supreme Court precedents. On that basis alone, the Fee Order cannot stand.

Rather than address the pertinent law, the Mining Company tries to deconstruct the Citizens' Petition into its individual claims for relief. *See* RAB 9 ("NRS 18.010(2) applies to [the Citizens' [] claims for open meeting law violations [First Claim for Relief], violations of due process [Second Claim for Relief], and violations of NRS Chapter 278 [Fourth Claim for Relief]."). However, this Court has already characterized the Citizens' action as a single petition for judicial review. *See CRA I*, Dkt. 16-37327 at 2 ("[Citizens'] petitioned for judicial review in the district court on the grounds [listed in Citizens' four causes of action]." Therefore, NRS 18.010 does not apply to this judicial review petition *in toto*. By contending otherwise, the Mining Company seeks to circumvent the Legislature's comprehensive statutory framework for judicial review of land use decisions in NRS Chapter 278 that excludes an award of fees under NRS 18.010.

B. Citizens Brought And Maintained This Action In Good Faith, And Nothing Supports The Label "Vexatious" Asserted By The Mining Company

Even assuming *arguendo* that NRS 18.010(2) could apply to this case, the Answering Brief fails to identify any aspect of Citizens' suit that could justify a fee award under that provision.[1] As shown in the Opening Brief (at 33-41), Citizens brought and maintained the action in good faith. In its Answering Brief, the Mining Company ignores the evidence and law presented by Citizens, instead labeling their lawsuit as "vexatious" simply because Respondents prevailed. RAB 9-10. The test for fees under NRS 18.010(2)(b) is whether the action lacked "credible evidence to support it." *Rodriguez v. Primadonna Co., LLC*, 125 Nev. 578, 588, 216 P.3d 793, 800 (2009). The mere fact that Mining Company prevailed does not justify a fee award. *See* NRS 18.010(2)(b).

In denying Citizens' due process claim and entering judgment for the defendants, the District Court simply concluded that their evidence of the Commissioners' pecuniary interests did not meet the preponderance threshold or the "exceptional level" of campaign contributions that existed in *Caperton v. Massey*. 556 U.S. 868, 872 (2009). JA 7:1685-1686. "Preponderance of the evidence" means "greater weight of the evidence." Black's Law Dictionary (11th ed. 2019). It does

[1] Although the Mining Company cites to NRS 18.010(2), it only argues that fees are appropriate under NRS 18.010(2)(b). NRS 18.010(2)(a) is inapplicable as Citizens sought no award of damages, only declaratory and injunctive relief. *See* JA 1:33-34.

not mean, as Mining Company falsely contends, that the "District Court … emphatically found [Citizens] had failed to present evidence to support a due process violation." RAB 14.

Indeed, elsewhere in its Answering Brief, the Mining Company contradicted itself, acknowledging that "[t]he District Court found [the Citizens] had 'not shown by a **preponderance** of the evidence that [the Citizens] were denied due process.'" RAB 11, citing JA 7:1685-1686 (emphasis added). That Citizens did not succeed in showing a due process violation by a preponderance of evidence does not mean their claims were "brought without reasonable ground," as required for NRS 18.010(b)(2). As two justices of the Court indicated when dissenting from the denial of en banc reconsideration, Citizens' claims were sufficiently reasonable for the Court to take a second look at them. *Comstock Residents Association, et al. v. Lyon County, et al*., Appeal No. 79445 Dkt. 21-10276. The Mining Company fails to identify any conduct within the ambit of NRS 18.010(b)(2) that could justify the Fees Order.

Moreover, the Mining Company's contention regarding delay is factually untrue and, in any event, is not a basis for a fee award. The Mining Company was never prevented from proceeding with any development plans it may have had. To proceed with mining, the Mining Company needed to apply for a special use permit, which it never did. JA 3:0591 ("[A]ny mining [] conducted on the property would

require a special use permit."). Citizens never sought a preliminary injunction, and the Mining Company was never enjoined from moving forward. It simply chose not to. The Mining Company cannot falsely attribute that decision to Citizens. There is no evidence that Citizens brought their claims for the purpose of delay or in any manner that would implicate NRS 18.010(2)(b).

To shore up the fee award for the PJR claim, the Mining Company argues that Citizens failed to show the County's action "was not based on substantial evidence." RAB 12. A petition for judicial review can also succeed, however, if the action being challenged is contrary to law. *See Kay v. Nunez*, 122 Nev. 1100, 146 P.3d 801 (2006). As set forth in its Opening Brief (at 33-35), Citizens argued that Lyon County's approval of the Mining Company's application was both arbitrary and contrary to law because: (1) it failed to explain what conditions changed to so drastically reverse course after 40 years of separating incompatible uses in both planning documents and prior actions; (2) it ignored controlling Master Plan policies and precedent that separated incompatible uses; and (3) it refused to consider the impacts of the full range of uses (particularly mining) it was adding to lands within and adjacent to Silver City. *Id*.

In is Answering Brief, the Mining Company never addresses how these arguments lack evidentiary or legal support. Instead, the Mining Company focuses exclusively on the substantial evidence test and effectively argues that any citizen

who unsuccessfully contests a local government decision is subject to an NRS 18.010(2)(b) award of fees because *ipso jure* they failed to overcome the substantial evidence standard. By specifying the limited circumstances in which fees could be imposed, the Legislature indicated it did not intend for a citizen to be so punished for testing the legality of their government's actions. *See id.* Since these Citizens brought fact and law-based claims, even if NRS 18.010 were applicable, it provides no basis for an award.[2]

C. The Mining Company Does Not Dispute That The Fees Order Lacks Any Findings To Support The *Brunzell* Factors

In its Answering Brief, the Mining Company makes no effort to defend the absence of findings in the Fees Order. Rather, the Mining Company points to the "affidavits of counsel." RAB 9, 14. However, "where the court has failed to consider these factors and has made no findings based on evidence that the attorney's fees sought are reasonable and justified, it is an abuse of discretion for the court to award the full amount of fees requested." *Beattie v. Thomas*, 99 Nev. 579, 589, 688 P.2d 268, 274 (1983). Particularly given the fact that the Respondents' counsel drafted

[2] Citizen's Opening Brief (at 37-41) sets forth both the factual and legal basis for their claims under NRS 278.220 and the Open Meeting Law. In response, the Mining Company simply reiterates the fact that these claims were unsuccessful but fails to show that the facts and law presented were neither relevant nor extant. Since Citizens presented factual support, no fees are appropriate under NRS 18.010(2)(b).

the defective Fees Order, an abuse of discretion due to lack of findings must be found here. *See id.*

D. The Mining Company Fails to Rehabilitate The Unreasonable Fees Award

In their Opening Brief (at 41-42), Citizens established the unreasonableness of the fee award given the unreliable block billing practiced by counsel for the Mining Company and at least one error identified in its supporting affidavits. In response, the Mining Company simply doubles down on its defective affidavits and summarily concludes the reasonableness of the fee award without defending its block-billing practice or addressing the error. RAB 15. Because the Mining Company fails to demonstrate that over $200,000 in fees was reasonable, the award should be vacated.

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 vacated and the Court enter an order denying Respondents' fees request as a matter of law.[3]

DATED April 8, 2022

JOHN L. MARSHALL

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[3] In a separate filing, Lyon County and the Citizens stipulate to dismiss the appeal and vacate the portion of the Fees Award related to Lyon County.

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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 2,646 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 April 8, 2022

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 8, 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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