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

---

APPELLANTS' PETITION FOR REHEARING

JOHN L. MARSHALL (#6733)
570 Marsh Avenue
Reno, NV 89509
775-303-4882
johnladuemarshall@gmail.com

LEONARD LAW, PC
Debbie Leonard (#8260)
955 S. Virginia St., Suite #220, Reno, NV 89502
775-964-4656
debbie@leonardlawpc.com

Attorneys for Appellants

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 ("CRA") 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 a member of CRA.

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

John L. Marshall

Debbie Leonard, Leonard Law, PC

DATED October 10, 2022

JOHN L. MARSHALL

By: /s/ John L. Marshall

John L. Marshall (NV Bar No. 6733)
570 Marsh Avenue
Reno, NV 89509
775-303-4882
johnladuemarshall@gmail.com

LEONARD LAW, PC
Debbie Leonard (NV Bar No. 8260)
955 S. Virginia Street, Suite 220
Reno, Nevada 89502
Phone: (775) 964-4656
debbie@leonardlawpc.com

Attorneys for Appellants

I. INTRODUCTION

The Court's Order Affirming in Part, Reversing in Part, and Remanding ("Order") held Appellants Comstock Residents Association and Joe McCarthy (collectively, "CRA") liable for attorney's fees on a theory not briefed below or presented to this Court: that CRA brought unreasonable claims against Comstock Mining Inc. ("CMI"). CRA petitions the Court to rehear this appeal pursuant to NRAP 40(c) on the following grounds:

1. **CRA Asserted No Claim Against CMI**.
   The Court overlooked a material fact when it concluded under NRS 18.010(2)(b) that CRA brought unsupported claims against respondent CMI because no cause of action or request for relief was pled against CMI.

2. **CMI Was Named Because It Is A Necessary Party**.
   The Court misapprehended a material fact when it concluded CRA named CMI as a liable party. CRA only named CMI as the real party in interest, and its Petition for Judicial Review would be subject to dismissal if it had not.

3. **Precedent Precludes An Award of Fees**.
   This Court's precedents preclude an award of attorney fees in judicial review actions. Although CMA's pleading also includes associated claims, the Court already identified this action as a Petition for Judicial Review of Lyon County's approval of a land use application. The Court overlooked, misapplied, or failed to consider this authority when it awarded fees in this petition for judicial review case.

4. **CRA Had No Opportunity To Be Heard On This New Basis For An Award of Substantial Fees**.
   The Court awarded fees under a theory no party briefed and that CMI never argued. The Court failed to consider its own controlling authority that militates against a decision that rests on grounds not raised by any party or fully vetted.

II. STANDARD OF REVIEW

Rehearing is warranted when the Court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or when the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case. NRAP 40(c)(2).

III. ARGUMENT

A. CRA Brought No Claims Against CMI

In the Order, the Court based its holding that CMI is entitled to attorney fees on a misapprehension that CRA's Petition for Judicial Review stated claims against CMI. *See* Order at 3 ("[A]ll causes of action in CRA's complaint were only properly pursued as to the Board, not CMI as none of the causes of action are even legally cognizable against CMI."). CRA, however, brought no claims against CMI.

As described by the Court, CRA's Petition "challenged the [Lyon County] Board [of Commissioners'] decision to grant CMI's application to amend the master plan for Lyon County." Order at 1. CRA stated four causes of action, all framed against Lyon County:

- Claim 1 states that "Lyon County BOC violated both Nevada Open Meeting requirements . . . ." JA 1:0030 (Petition at ¶ 114). No mention of CMI occurs in Claim 1. JA 1:0031-0032.

- Claim 2 states CRA's "due process rights were therefore violated by the participation of Commissioners Keller and Hastings during consideration of CMI's 2013 Application." JA 1:0031 (Petition at ¶ 122). While CMI is mentioned in Claim 2 in fact allegations, CRA alleges no violation of law by CMI.
- Claim 3 concludes "Lyon County BOC's action approving CMI's amended 2013 Application was therefore contrary to law." JA 1:0032-0033 (Petition at ¶ 131). Claim 3 contains no allegations against CMI, only referencing the company when identifying whose application's is at issue. *Id*. (Petition at ¶¶ 123-131).
- Claim 4 concludes "Lyon County therefore violated NRS 278.220(4)." JA 1:0033 (Petition at ¶ 136). CMI is not mentioned at all in Claim 4.

No other allegation in the Petition claims that CMI violated any law or was legally responsible for Lyon County's actions. JA 1:0001-0034.

Moreover, CRA's Request for Relief similarly seeks no relief against CMI; Lyon County is the only party so identified. CRA requested that the Court, "declare that Lyon County BOC violated the Nevada Open Meeting Law; [. . .] declare that Lyon County BOC denied [CRA] their due process rights; [. . .] declare that Lyon County BOC abused its discretion and/or acted contrary to law; [. . .] declare that

Lyon County BOC violated NRS 278.220 [. . .;] mandate that the adoption by Lyon County of [CMI's] Application is null and void." JA 1:0033-0034 (Petition's Request for Relief).

Notably, CMI has never treated this lawsuit as stating a cause of action against it (as opposed to Lyon County). *See*. *e.g.*, JA 1:0068 (CMI's Answer) ("The claims of Plaintiff/Petitioners in the Complaint pertain to the exercise or performance, or failure to exercise or perform discretionary duties on the part of Respondent, Lyon County, its agents or employees . . . ."). CMI has never sought to dismiss this action as against it. *See*, *e.g.*, JA 1:0071-0072 (CMI merely joined in Lyon County's Motion to Dismiss). Most significantly, CMI never argued for attorney fees under NRS 18.010 on the basis that CRA allegedly asserted claims against it. *See* JA 7:1645 (CMI's Motion for Fees); 7:1674-1679 (CMI's Reply); CMI's Answering Brief at 9-14. In short, CMI participated in this case not out of fear of liability, but rather to protect its interest in the challenged Lyon County action that approved CMI's proposed master plan amendments.

To state a claim for relief, a petitioner must make "a short and plain statement of the claim showing that the pleader is entitled to relief." NRCP 8(a). In other words, it must allege an injury in violation of law and a demand for relief as to the responsible party. *Crucil v. Carson City*, 95 Nev. 583, 585, 600 P.2d 216, 217

(1979). Since CRA alleged no claim against CMI and sought no relief from CMI, CRA did not assert a cause of action against CMI. The Court misapprehended the facts and misapplied the law when it concluded otherwise.

B. CRA Was Required To Name CMI As A Party

CMA named CMI only because it was the real party in interest who must be joined either under NRCP 19 or pursuant to the requirements for a petition for judicial review. Yet the Court's Order punishes CRA for ensuring that the real party in interest was adequately joined in the proceeding and afforded the opportunity to defend the land use approval it secured from Lyon County. *See* Order at 4 ("CRA did not have reasonable grounds to bring or maintain its claims **against CMI**") (emphasis added).

CRA named CMI because it was obligated to do so. Under NRCP 19(a)(1)(B)(i), a party "must be joined" if its absence would impair or impede its ability to protect its interests. CMI had a direct interest in the subject matter of the Petition: i.e., the validity of Lyon County's action on CMI's application to amend the master plan designation to allow it to purse its mining interests.

A successful land use applicant satisfies the criteria for joinder. In *Sierra Club, Inc. v. California Coastal Comm'n*, 95 Cal.App.3d 495, 157 Cal. Rptr. 190 (1979), held that in an action challenging a permit to a land use developer, the

developer was found to be a necessary and indispensable party, and failure to join the developer timely justified dismissal. *See also Save Our Bay, Inc. v. San Diego Unified Port Dist.*, 42 Cal.App.4th 686, 696, 49 Cal.Rptr.2d 847 (1996) (failure to timely join private landowner in litigation over development plan was fatal).

The mandatory joinder of real parties in interest is also required by the Nevada Administrative Procedures Act. Under NRS 233B.130(2)(a), petitions for judicial review must "[n]ame as respondents the agency and all parties of record to the administrative proceedings." *Id.* (emphasis added). Although this case involves a Petition for Judicial Review of a land use decision, in the absence of specific procedural requirements in NRS Chapter 278, NRS 233B.130(2)(a) serves as guidance. Given this well-established procedure in administrative review cases, a petitioner under NRS 278.3195(4) would risk dismissal if it failed to name the real party in interest.

This Court's precedents offer numerous examples of cases in which petitioners in land use cases have named the successful land use applicant as a party where the local government's action is challenged, indicating that is the proper procedure to follow. *See*, *e.g.*, *Kay v. Nunez*, 122 Nev. 1100, 1102-03, 146 P.3d 801, 803-04 (2006) (identifying Nunez as the recipient of the challenged land use permit); *Enterprise Citizens Action League v. Clark County*, 112 Nev. 649, 918 P.2d 305

(1996) (indicating the recipient of the challenged variance was named as a party); *Scenic Nevada, Inc. v. City of Reno*, No. 80644, 2021 WL 1978360. *1 (Nev. May 17, 2021) (Unpublished Order of Affirmance) (indicating that petitioner named Lamar Advertising Company as a party in a challenge to City's approval of Lamar's application for a billboard) (cited in this Court's Order at 4). The Court overlooked that the real party in interest was named as a party in each of these authorities.

The Court's Order presents a Catch-22 for petitioners in land use cases: they must either (1) name the successful land use applicant as the real party in interest yet face sanctions under NRS 18.010 for doing so; or (2) fail to name the real party in interest, thereby running the risk that the petition will be dismissed for failing to join a necessary party.

The Court thus misapprehended fact and law when it failed to distinguish between a defendant facing liability from claims for relief and a party named simply because it has a protectable interest in the claims levied against another party. In this case, CRA asserted no claim against CMI and named it solely because of its status as a necessary party. CRA therefore did not file claims (unreasonable or otherwise) against CRA within the meaning of NRS 18.010(2)(b).

C. The Court's Order Conflicts With Precedent

The Court's Order authorizes a real party in interest who was named simply to ensure they had the opportunity to protect their interest to recover attorney fees under NRS 18.010(2)(b) any time the public entity's decision is affirmed. That determination overlooks the law that NRS 18.010 does not apply to petitions for judicial review.

In *State, Dep't of Human Res. v. Fowler*, 109 Nev. 782, 858 P.2d 375 (1993) and *Zenor v. State, Dep't of Transp.*, 134 Nev. 109, 412 P.3d 28 (2018), the Court held that NRS 18.010 does not apply to judicial review actions. CRA presented this law to the Court, but CMI failed to address it in its Answering Brief. *See* CRA's Opening Brief at 27-30; Reply Brief at 5-7; CMI's Answering Brief. This Court recognized CRA's pleading as a Petition for Judicial Review. *See* Order Affirming in Part, Reversing on Part, and Remanding, at 1 ("This in an appeal from a district court order denying a petition for judicial review in a land use matter."), at 2 ("CRA petitioned for judicial review in the district court on the grounds [set forth in the Petition's four causes of action]").

Under the Court's Order, a successful applicant may now seek a fee award under NRS 18.010 simply because it is named as a respondent – as it must be under NRCP 19(a) and NRS 233B.010(2)(a). No prior case has awarded fees in these

circumstances, and this result is contrary to *Fowler* and *Zenor*. Rehearing should be granted to correct this conflict.

D. Rehearing Provides CRA An Opportunity To Be Heard On The Actual Basis Of An Award Against It

The Court's ground for awarding fees under NRS 18.010(2)(b) – that CRA brought claims against CMI that only lie against Lyon County – was not argued by CMI below or on appeal. The Court did not seek supplemental briefing and submitted the matter without oral argument. As a result, CRA never had the opportunity to brief the issue or point out that this newly crafted basis for awarding fees conflicts with existing law. Particularly given that this unbriefed grounds for a fee award results in a sanction – amounting to hundreds of thousands of dollars – against a citizens group that simply wished to hold its government accountable, the opportunity to be properly heard on this new theory is warranted.

This Court has consistently declined to develop or rely on arguments not raised by the parties or that the parties have not had an opportunity to address. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (rejecting contentions not cogently argued or supported by relevant authority). This is sound practice ubiquitously adopted by appellate courts: "The art of advocacy is not one of mystery. Our adversarial system relies on the advocates to inform the discussion and raise the issues to the court. Particularly on appeal, we

have held firm against considering arguments that are not briefed." *Indep. Towers of Washington v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003); *see also Townsend v. Monster Beverage Corp.*, 303 F.Supp.3d 1010, 1036 (C.D. Cal. 2018) ("The Court's role is not to make or develop arguments on behalf of the parties . . . .").

Because the Court has interpreted NRS 278.3195 to bar a petitioner from naming the real party in interest in a judicial review action (or be sanctioned), CRA submits that complete briefing from the parties on due process grounds and sound consideration by the Court to avoid conflicts with its existing jurisprudence is warranted. CRA therefore requests that the Court grant this Petition for Rehearing to provide it with an opportunity to be heard.

II. CONCLUSION

The Court's fee award to CMI misapprehended and overlooked controlling authorities and facts as described above. CRA respectfully request the Court grant this petition and rehear the appeal after providing CRA an opportunity to be heard on the Court's basis for the award.

Submitted October 10, 2022.

JOHN L. MARSHALL

By: /s/ John L. Marshall
John L. Marshall (#8541)
570 Marsh Avenue
Reno, NV 89509

775-303-4882
johnladuemarshall@gmail.com

LEONARD LAW, PC
Debbie Leonard (NV Bar No. 8260)
955 S. Virginia Street, Suite 220
Reno, Nevada 89502
Phone: (775) 964-4656
debbie@leonardlawpc.com

Attorneys for Appellants

NRAP 28.2 ATTORNEY'S CERTIFICATE

I, John L. Marshall, counsel to CRA and Joe McCarthy, do hereby certify that:

(1) I have read the foregoing document;

(2) To the best of my knowledge, information and belief, the foregoing document is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(3) To the best of my knowledge, information and belief, the foregoing document complies with all applicable Nevada Rules of Appellate Procedure, including the requirement of Rule 28(e) that every assertion regarding matters in the record be supported by a reference to the page and volume number, if any and if available, of the appendix where the matter relied on is to be found as applicable;

(4) The foregoing document complies with the formatting requirements of Rule 32(a)(4)-(6), and either the page- or type-volume limitations stated in Rule 32(a)(7) as applicable as the document contains 2,301 words and 201 lines of text in Times New Roman font.

Respectfully submitted October 10, 2022,

By: _____/s/John L. Marshall_____
JOHN L. MARSHALL
SBN 6733
570 Marsh Avenue
Reno, Nevada 89509

Telephone: (775) 303-4882
johnladuemarshall@gmail.com

Attorney for the Appellants

CERTIFICATE OF SERVICE

Pursuant to NRCP 25(c), I certify that on the date indicated below, I caused service to be completed by:

_____ personally delivering;

_____ delivery via Reno/Carson Messenger Service;

_____ sending via Federal Express (or other overnight delivery service);

_____ depositing for mailing in the U.S. mail, with sufficient postage affixed thereto; or,

___X___ delivery via electronic means (fax, eflex, NEF, etc.)

a true and correct copy of the foregoing pleading addressed to:

Stephen Rye, Lyon County District Attorney

James Cavilia
Justin Townsend
Attorneys for Respondent CMI

By: _____/s/John L. Marshall_____ Dated: October 10, 2022
John L. Marshall