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' PETITION FOR EN BANC RECONSIDERATION

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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 ("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 November 21, 2022

JOHN L. MARSHALL

By: /s/ John L. Marshall

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I. INTRODUCTION

The Panel's Order Affirming in Part, Reversing in Part, and Remanding ("Order") held a non-profit citizen group liable for potentially hundreds of thousands of dollars in attorney's fees on a theory not briefed below nor presented to the Panel: that Appellants Comstock Residents Association and Joe McCarthy (collectively, "CRA") "unreasonably" named the land use applicant (Respondent Comstock Mining Company ("CMI")) as a party in what was ultimately an unsuccessful judicial challenge to Lyon County's rezoning of CMI's property to allow mining. En banc reconsideration is necessary to secure and maintain uniformity of the Court's decisions and to prevent serious precedential and statewide public policy consequences for citizens seeking to hold their government accountable.

II. BACKGROUND

CRA brought this action seeking judicial review of Lyon County's decision to grant CMI's land use application to rezone CMI's land to allow mining near CRA members' homes. JA 1:0001-0035. CRA also named CMI as a defendant because of CMI's interest in Lyon County's decision to rezone CMI's land to CMI's benefit. *Id*. Although successful in fending off a motion to dismiss on several claims, CRA lost on the merits of its claims against Lyon County. 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 (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 (Document No. 21-00718).

CMI then sought the attorney fees it paid to defend Lyon County's action and to protect the rezoning of its land. As became clear from CMI's motion, the County's District Attorney had allowed CMI's counsel to take on the lion's share of the defense, such as by drafting joint briefs on the County's behalf. CMI argued it was entitled to over $200,000 in fees based on NRS 278.0237 and NRS 18.010(2)(b). Under the latter fee-shifting statute, CMI argued that CRA's claims against Lyon County were frivolous, but not that CRA had asserted any claims against CMI, much less ones that were frivolous. JA 7:1645; 7:1674-1679.

The District Court granted CMI's fee motion without making any findings (JA 7:1685) and CRA appealed, arguing: (1) NRS 278.0237 was inapplicable in that CMI was a successful applicant and (2) CRA's claims against Lyon County were not frivolous because they were supported by evidence that, among other things, Lyon County denied CRA's due process rights when a Commissioner actively participated in the consideration of, and voted for, CMI's application when at the same time she was financially dependent on income from CMI. *See* CRA's Opening Brief. In its brief on appeal, CMI again argued it was entitled to fees under NRS

278.0237 and under NRS 18.010(b)(2) on the basis that CRA's claims against Lyon County were not supported by any facts. CMI's Answering Brief at 9-14.

After submitting the matter without oral argument, the Panel rejected all of CMI's arguments yet nevertheless affirmed a fee award in favor of CMI on a ground not briefed by the parties. Order Affirming in Part, Reversing in Part, and Remanding ("Order") (September 19, 2022) (Document No. 02-29078). The Panel agreed with CRA that NRS 278.0237 is inapplicable to this case because this was not an action brought under NRS 278.0233. *Id.* at 2-3. The Panel also reversed the award of fees because the district court failed to make appropriate findings under *Brunzell v. Golden Gate National Bank,* 85 Nev. 345, P.2d 31 (1969). As to entitlement to fees under NRS 18.010(2)(b), however, the Panel *sua sponte* arrived at a new basis for an award, shifting the analysis away from whether CRA's claims against Lyon County were supported by adequate facts to, instead, whether CRA should be sanctioned for hundreds of thousands of dollars simply because it named the real party in interest – CMI – as a defendant. As part of this pivot, the Panel attributed CRA's claims against Lyon County to also constitute claims against CMI. Then, the Panel declared the alleged claims against CMI frivolous because CRA could not get from CMI any of the relief it sought in the complaint. Having so construed CRA's complaint, the Panel then determined that CMI is entitled to attorney fees under NRS 18.010(2)(b) and remanded for the district court to make

Brunzell findings. Order at 4. The Panel denied CRA's Petition for Rehearing. Document No. 22-34058.

III. ARGUMENT

A. Legal Standard for En Banc Reconsideration

A petition for en banc reconsideration is appropriate when: (1) reconsideration by the full court is necessary to secure or maintain uniformity of decisions of the Supreme Court or Court of Appeals, or (2) the proceeding involves a substantial precedential, constitutional, or public policy issue. NRAP 40A(a). Both of these bases for en banc reconsideration apply here.

B. The Panel Created an Inconsistency Among the Court's Decisions Regarding the Joinder Requirements for Petitions for Judicial Review Under NRS Chapter 278

The Panel's Order holds, in contravention of this Court's precedents, that harsh financial sanctions should be imposed on the plaintiff/petitioner in a Chapter 278 judicial review case simply for joining a necessary party. 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 because this case challenged the validity of the County's approval of CMI's application to amend the master plan so that CMI could pursue its mining project. JA 1:0001-0035. Had CRA been successful, the zoning amendment obtained by

CMI would have been invalidated. This clearly meets the Rule 19 standard, thereby requiring that CRA name CMI as a necessary party. *See*, *e.g.*, *Home Savers, Inc. v. United Sec. Co.*, 103 Nev. 357, 359, 741 P.2d 1355, 1357 (1987) (requiring that when a suit seeks to set aside a conveyance of property, the person to whom the property was conveyed must be joined as a party); *Schwob v. Hemsath*, 98 Nev. 293, 294, 646 P.2d 1212, 1212 (1982) (holding that property owner of record must be joined in quiet title action).

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 government's action is challenged, indicating that CRA naming CMI as a defendant was precisely 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); *Enter. 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 Disposition) (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 the Panel's Order at 4). If applied to each of these cases, the Panel's Order would have

authorized monetary sanctions against each petitioner simply because the real party in interest was named as a party.

Because the Court's jurisprudence assumes without discussion that joinder of the successful land use applicant is required, it has not needed to issue a decision that directly addresses this point. Elsewhere, however, courts have held that in an action challenging a permit to a land use applicant, the permittee was a necessary and indispensable party, and failure to join the permittee timely justified dismissal. *Sierra Club, Inc. v. Calif. Coastal Comm'n*, 157 Cal. Rptr. 190, 194-95 (Cal. Ct. App. 1979); *see also Seiller Waterman, LLC v. Bardstown Cap. Corp.*, 643 S.W.3d 68, 81 (Ky. 2022) (holding that the successful applicant in zoning proceedings was a necessary party to neighboring homeowners' appeal); *Matter of Manupella v. Troy City Zoning Bd. of Appeals*, 272 A.D.2d 761, 763 (N.Y. App. 2000) ("The owner of real property subject to a variance challenge generally is a necessary party because the owner will be inequitably and adversely impacted if the zoning board decision were annulled"); *Save Our Bay, Inc. v. San Diego Unified Port Dist.*, 49 Cal.Rptr.2d 847, 853 (Cal. Ct. App. 1996) (failure to timely join private landowner in litigation over development plan was fatal); *Bd. of Cnty. Comm'rs of Mesa Cnty. v. Carter*, 564 P.2d 421, 422 (Colo. 1977) ("The person whose rezoning application is challenged is an indispensable party to that proceeding."). Although these cases

make clear that a successful land use applicant satisfies the criteria for mandatory joinder in a lawsuit challenging the public agency's action, the Panel's Order would subject every challenger to a land use decision to monetary sanctions for doing exactly that.

The mandatory joinder of real parties in interest is specifically called out 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 under NRS 278.3195(4), there is no reason for the procedure to differ, and in the absence of specific procedural requirements in Chapter 278, NRS 233B.130(2)(a) serves as useful guidance. Given this well-established – indeed, mandatory – procedure in administrative review cases, a petitioner's case under NRS 278.3195(4) would likely be dismissed if it failed to name the real party in interest. *See* NRAP 19(a). Yet the Panel's Order holds that a petitioner should be sanctioned simply for following the joinder rules.

The Panel'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 pursuant to NRCP 19(a), thereby running the risk that they will 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. Because the quagmire created by the Panel's Order is contrary to precedent, reconsideration by the full court is necessary to maintain uniformity of the Court's decisions. *See* NRAP 40A(a).

C. The Panel's Order is Inconsistent With the Court's Precedent That Precludes an Award of Fees Under NRS 18.010 for Judicial Review Claims

The Panel's Order also conflicts with controlling precedent that holds NRS 18.010 does not apply to petitions for judicial review. In *State, Dep't of Human Res. v. Fowler*, 109 Nev. 782, 785-86, 858 P.2d 375, 377 (1993) and *Zenor v. State, Dep't of Transp.*, 134 Nev. 109, 109-10, 412 P.3d 28, 29-30 (2018), the Court held that NRS 18.010 does not apply to judicial review actions.[1] The Court's rationale for this conclusion is clear: "NRS 233B.130 does not contain any specific language authorizing the award of attorney's fees in actions involving petitions for judicial review of agency action." *Zenor*, 134 Nev. at 110, 412 P.3d at 30, quoting *Fowler*, 109 Nev. at 785, 858 P.2d at 377.

[1] Although CRA presented this law to the Panel, CMI failed to address it in its Answering Brief, and the Panel's Order reaches a contrary conclusion. *See* CRA's Opening Brief at 27-30; Reply Brief at 5-7; *see generally* CMI's Answering Brief.

Similarly, NRS Chapter 278 only allows for a fee award in limited circumstances not at issue here. *See* NRS 278.0237(2) ("The court may award reasonable attorney's fees, court costs and interest to the prevailing party in an action brought under NRS 278.0233.") (emphasis added). This case was brought by a citizens group under NRS 278.3195, not by an unsuccessful applicant under NRS 278.0233. As the Panel noted, the applicant – CMI – successfully obtained the master plan amendment it sought so NRS 278.0237 does not apply. By allowing CMI to recover fees in a manner not specified in NRS Chapter 278, the Panel "impl[ied] provisions not expressly included in the legislative scheme." *Zenor*, 134 Nev. at 110, 412 P.3d at 30, *quoting State Indus. Ins. Sys. v. Wrenn*, 104 Nev. 536, 539, 762 P.2d 884, 886 (1988). This inconsistency with precedent should be reconciled by the full court.

This Court has 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]"). Yet the Panel nevertheless awarded fees to CMI pursuant to NRS 18.010. Under the Panel's Order, a successful land use applicant may now seek a fee award under NRS 18.010 simply because it is named as a respondent. This result is contrary to *Fowler* and *Zenor*,

implies a provision in NRS 278.3195 that does not exist, and expands the scope of NRS 18.010 beyond what the statute allows.[2] En banc reconsideration should be granted to correct this irreconcilable conflict.

D. This Case Involves Substantial Precedential and Public Policy Issues That Deserve Full-Court Review

1. The Panel's Decision Will Deter Citizens From Challenging Arbitrary Government Action

Reasonable citizen lawsuits to force government compliance with applicable law should not be discouraged, as the Panel's Order does. Citizens understand that challenging their governments' actions means facing unfavorable odds because governments' decisions are afforded significant deference and can only be overturned for an abuse of discretion, i.e., the challenged decision is arbitrary or contrary to law. The Panel's decision now adds the potential for severe adverse

[2] Even had the Panel not contravened the Court's precedents, it incorrectly concluded that CRA's "claims" were alleged against CMI and therefore were subject to NRS 18.010(2)(b). CRA challenged Lyon County's rezoning of CMI's property in four causes of action against Lyon County for violations of the Nevada Open Meeting Law and due process, an abuse of discretion, and action contrary to NRS 278.220(4). JA 1:0030-0033. Similarly, CRA sought relief solely from Lyon County. JA 1:0033-0034. CRA's Complaint/Petition did not allege that CMI violated any duty, obligation, or other legal requirement or was liable for Lyon County's actions because CMI was named solely as the real party in interest. At no point did CMI seek to be dismissed from the action on the basis that CRA had alleged a "claim" against it that was "without reasonable ground or [brought] to harass" CMI. NRS 18.010(2)(b). Rather, CMI acted all along like it was a necessary party to the proceeding and therefore a properly named defendant.

financial consequences for bringing such actions, which will inhibit citizens from seeking to reverse arbitrary and unlawful governments actions.

As demonstrated in CRA's appellate briefing, its claims against Lyon County were based on reasonable grounds and were supported by facts. Indeed, the Panel did not hold that CRA's claims against Lyon County were frivolous under NRS 18.010(2)(b). Instead, the Panel held that a petitioner is liable for an award of attorney fees when it names as a party the underlying successful applicant (which it is required to do by NRCP 19) and then loses the underlying claims against the government agency (as usually is the case in judicial review proceedings due to the deferential standard of review). As a result, in addition to overcoming the deferential standard of review afforded land use decision makers that makes success on the merits difficult, citizens now also face liability for substantial attorney fees merely because they lost. This possibility of significant fiscal penalty will deter citizens' suits even when they are reasonably based on facts. En banc reconsideration should be granted to avoid this result.

2. A Party Held Liable For Attorney Fees Should Be Given An Opportunity To Be Heard On The Grounds Relied Upon When The Consequences Are Profound

The Panel'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 Panel did not seek supplemental briefing and submitted the matter without oral argument. As a result, CRA never had the opportunity to brief this newly created basis for awarding fees. Particularly given that this fee award is a sanction — amounting to hundreds of thousands of dollars — against a citizens group that simply wished to hold its government accountable, the full court should give CRA the opportunity to be properly heard on whether this new theory is justified.

Moreover, the 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 Panel 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 requests that the full Court grant this Petition for En Banc Reconsideration to provide it with an opportunity to be heard.

IV. CONCLUSION

The Panel's decision creates a new avenue for attorney's fees in judicial review cases that undermines the uniformity of the Court's decisions and creates serious precedential and statewide public policy consequences for citizens seeking to hold their government accountable. As a result, en banc reconsideration is warranted.

Submitted November 21, 2022.

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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 2988 words in Times New Roman font.

Respectfully submitted November 21, 2022,

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CERTIFICATE OF SERVICE

Pursuant to NRAP 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: November 21, 2022
John L. Marshall