IN THE SUPREME COURT OF THE STATE OF NEVADA

COMSTOCK RESIDENTS ASSOCIATION; and JOE McCARTHY,

Appellants,

v.

LYON COUNTY BOARD OF COMMISSIONERS; and COMSTOCK MINING INCORPORATED,

Respondents.
_____/

Case No. 83463

Appeal from Third Judicial Dist.
Court Case No. 14-CV-00128

RESPONDENT COMSTOCK MINING INCORPORATED'S ANSWER TO PETITION FOR EN BANC RECONSIDERATION

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LEGAL STANDARD

A petition for en banc reconsideration, under NRAP 40A(a):

> is not favored and ordinarily will not be ordered except 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.

See also Huckaby Props. v. NC Auto Parts, 130 Nev. 196, 201, 322 P.3d 429, 432 (2014). Where the petition is "based on grounds that the proceeding involves a substantial precedential, constitutional or public policy issue, the petition shall concisely set forth the issue, shall specify the nature of the issue, and shall demonstrate the impact of the panel's decision beyond the litigants involved." NRAP 40A(c). It is not proper to reargue matters presented in the briefs. *Id*.

Further, this Court recognizes, in reviewing a petition for en banc reconsideration, it must give weight to and consider certain policy considerations, "including the public's interest in expeditious appellate resolution, which coincides with the parties' interests in bringing litigation to a final and stable judgment; prejudice to the opposing party; and judicial administration concerns, such as the court's need to manage its large and growing docket." *Huckaby*, 130 Nev. at 203, 322 P.3d at 433. (internal citations omitted).

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PROCEDURAL HISTORY

Appellants, Comstock Residents Association and Joe McCarthy (collectively "CRA"), initiated this action by filing a Complaint on January 31, 2014 in the Third Judicial District Court in and for Lyon County. The purpose of CRA's Complaint was to seek review and reversal of a January 2, 2014 decision of the Lyon County Board of Commissioners (the "Board") to approve CMI's Application for a Master Plan Amendment and Zone Change (the "Application"), first submitted to Lyon County for review in August 2013. The Board's January 2, 2014 decision was made at a regular meeting of the Board and followed a discussion of the Application at Lyon County Planning Commission meetings held on November 12, 2013 and December 10, 2013.

In its Complaint, CRA asserted four causes of action and named Respondent, Comstock Mining Incorporated ("CMI"), as a defendant to each claim. Over multiple orders and after several hearings and extensive briefing, the District Court ultimately resolved each of CRA's claims in favor of CMI and the Lyon County Board of County Commissioners (the "Board"). CRA has appealed every final order entered in this matter without success (including multiple petitions for rehearing and for en banc reconsideration) and, after almost a decade since the filing of CMI's application, CRA persists in making virtually the same arguments over and over, to

the great prejudice of CMI and without concern for the ongoing waste of judicial resources.

ARGUMENT

A. The Panel's Order affirming an award under NRS 18.010(2)(b) is consistent with Nevada precedent.

CRA contends the Court's assigned Panel erroneously affirmed an award of attorney fees under NRS 18.010(2)(b), asserting (i) CMI was a necessary party to CRA's claims against the Board and (ii) attorney fees may not be awarded in judicial review cases. Neither of these arguments has any merit and the Court should disregard them and deny CRA's petition for reconsideration.

1. CRA had no legally cognizable claim against CMI and was not required to name CMI as a party to this litigation.

The Panel properly recognized none of CRA's "causes of action are even legally cognizable against CMI." Panel's Order, p. 3. CRA cites several Nevada cases which it suggests support a contention that successful land use applicants must be named as parties "where the government's action is challenged." Petition, p. 5. None of the cited cases contain such a holding.

The first two cases cited by CRA are a rescission case and a quiet title case and it defies reason that either of these cases could have any application here. In *Home Savers, Inc. v. United Sec. Co.*, 103 Nev. 357, 741 P.2d 1355 (1987), this Court recognized a requirement to name the person who received the property in the

conveyance the plaintiff seeks to have rescinded. *Id*. at 360, 741 P.2d at 1357. Here, however, there is no conveyance at issue and CRA does not seek rescission of any conveyance. Moreover, this Court, in *Home Savers*, went on to note the aforementioned requirement had no application to the facts at issue therein, concluding NRCP 19(a) did not require joinder of the beneficiaries of the trust from which the property at issue had been conveyed and ordered a rescission where the plaintiff purchaser had unilaterally mistaken the wrong parcel of property it believed to be purchasing based, in part, on misleading information in the notice of trustee's sale. *Id*. This adds no precedential value and has no application to CRA's assertion that it was required to name CMI as a defendant to any of its claims against the Board.

In *Schwob v. Hemsath*, 98 Nev. 293, 646 P.2d 1212 (1982), this Court merely recognized the obvious truth that a party holding legal title to property in a quiet title action is in indispensable party thereto and that failure to serve process on such a party is fatal to any judgment entered against it. In that case, it was undisputed that the corporate owner of the subject property had not been served with summons and, therefore, had never appeared in the action prior to judgment being entered. That case was not about naming necessary or indispensable parties as CRA suggests but was, rather, about whether judgment could be entered against an indispensable party which had not been served with process or afforded an opportunity to appear to

defend title to the property. Here, CRA does not seek to quiet title to CMI's property nor has it asserted any claim questioning CMI's ownership of the property at issue here. *Schwob* clearly has no application here and CRA's citation to it is questionable, at best.

Next, CRA cites Nevada cases in which successful land use applicants have merely been named in actions challenging government land use decisions. None of the cases cited hold, however, that such a procedure is required. In *Kay v. Nunez*, for example, this Court affirmed the denial of a petition for writ of mandamus, recognized that a petition for judicial review is the proper mechanism by which to challenge a local government's zoning decision, and had no discussion whatsoever regarding the propriety of naming the successful land use applicant as a defendant in the action. The only holding in *Kay* pertinent here is that CRA was entitled to judicial review of the Board's decision to grant CMI's Application. That the successful land use applicant was named as a defendant, together with the local government body whose decision was subject to review, is incidental, at best, to the findings in that case. *Kay* does not support an argument that CRA was required to name CMI as a defendant to any of its claims against the Board.

The same is true for *Enter. Citizens Action Committee v. Clark Cty. Bd. of Comm'rs*, 112 Nev. 649, 918 P.2d 305 (1996) and *Scenic Nevada, Inc. v. City of Reno*, No. 80644, 2021 WL 1978360 at *1 (Nev. May 17, 2021) (unpublished

disposition), each of which was also cited by CRA. In these cases, the mere naming of the successful land use applicant as a defendant was not discussed nor was that fact integral to the holdings of these cases.

CRA asserts that the Panel's Order, if applied to *Kay*, *Enter. Citizens*, and *Scenic Nevada*, "would have authorized monetary sanctions against each petitioner simply because the real party in interest was named as a party." Petition, pp. 5-6. The truth, however, is that none of those cases even discuss such an idea. Indeed, a reading of these cases does nothing to answer whether the land use applicants, or any other party, might have sought an award of attorney fees because, again, that issue was not before the Court in those cases.

CRA is unable to cite a single Nevada case in conflict with the Panel's finding that it was proper for the District Court to enter an award of fees under NRS 18.010(2)(b). Instead, CRA cites several cases from other jurisdictions and Nevada's Administrative Procedures Act (the "APA"), which CRA acknowledges does not apply to judicial review of land use decisions. As noted herein, NRAP 40A(a) provides for reconsideration only where such action is "necessary to secure or maintain uniformity of decisions of the Supreme Court or Court of Appeals." That the Panel's decision may be inconsistent with decisions from other jurisdictions is not grounds for reconsideration.

Moreover, none of the outside cases cited by CRA discuss in any way the propriety of awarding attorney fees to a land use applicant who successfully defends against claims challenging land use decisions. More egregiously, CRA recognizes its action to challenge the Board's approval of CMI's Application is not subject to the APA (NRS Chapter 233B) but is, rather, governed by NRS 278.3195(4) and NRS 278.0235, which contain no requirement that the successful land use applicant be named as a defendant. That the APA requires in a judicial review action the naming of all parties to the administrative proceedings has no bearing or application whatsoever to this action.

Therefore, for these reasons the Panel's Order is not and cannot be inconsistent with controlling law on the issue of whether CMI was required to be named as a defendant in this action.

2. NRS 18.010(2)(b) authorizes an award of fees in this action.

CRA argues the Panel's Order affirming an award of fees is inconsistent with Nevada precedent on the alleged basis Nevada law precludes an award of fees in judicial review actions. Petition, p. 8. CRA's assertions in this regard are wrong, as a matter of law.

First, in making this argument, CRA ignores that it asserted four claims, not just a claim for judicial review. The Panel properly noted that CMI prevailed on all

four claims and that there were no reasonable grounds to bring or maintain any of the four claims against CMI. Panel's Order, pp. 3-4.

Further, one of the two cases CRA cites only applies NRS 18.010(2)(a) while the other concerns NRS 18.010(2)(b) in the limited context of a petition for judicial review brought under the APA. Here, the Panel affirmed an award of fees pursuant to NRS 18.010(2)(b) in a case that was not brought under the APA and which is not subject to any limitations on fees under the APA. Thus, the Panel's Order is not inconsistent with these precedents.

The full text of NRS 18.010(2) is:

> In addition to the cases where an allowance is authorized by specific statute, the court may make an allowance of attorney's fees to a prevailing party:
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> (a) When the prevailing party has not recovered more than $20,000; or
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> (b) Without regard to the recovery sought, when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party. The court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations. It is the intent of the Legislature that the court award attorney's fees pursuant to this paragraph and impose sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure in all appropriate situations to punish for and deter frivolous or vexations claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of

> engaging in business and providing professional services to the public.

In *State, Dep't of Human Res., Welfare Div. v. Fowler*, 109 Nev. 782, 785-86, 858 P.2d 375, 377 (1993), this Court ruled a district court, in a judicial review action, does "not have authority to award attorney's fees under NRS 18.010," but critically, the only portion of NRS 18.010 cited and analyzed is subparagraph (2)(a). *Id*. at 785-86, n. 6; 858 P.2d at 377. The reasoning of the Court in *Fowler* was the action did not include a demand for money damages. *Id*. A request for monetary damages would, of course, implicate NRS 18.010(2)(a), which is triggered in the event the prevailing party is awarded less than $20,000 in damages. The *Fowler* Court did not discuss or analyze whether the judicial review action was brought without merit, which would have implicated NRS 18.010(2)(b).

This Court, in *Zenor v. State, Dep't of Transp.*, 134 Nev. 109, 109-10, 412 P.3d 28, 29 (2018), affirmed that *Fowler* holds only that fees were not available under NRS 18.010(2)(a) in a judicial review action. In *Zenor*, though, the Court also analyzed whether a district court could award fees to a prevailing party under NRS 18.010(2)(b), however, the Court's analysis was expressly limited to petitions for judicial review brought under the APA and the provisions of NRS Chapter 233B. 134 Nev. at 109-10, 412 P.3d at 29. The Court's reasoning in *Zenor* is that NRS 233B.130(6) provides the "provisions of this chapter are the exclusive means of judicial review of, or judicial action concerning, a final decision in a contested case

involving an agency to which this chapter applies." *Id*. It is uncontested here, however, that CRA's petition for judicial review was not brought under any provision of NRS Chapter 233B but was, rather, brough under NRS 278.3195(4) and NRS 278.0235.

As CRA's petition for judicial review sought relief for an alleged abuse of discretion and the discretionary act at issue was the Board's granting of CMI's Application, CRA could obtain no relief from CMI and, therefore, there were no reasonable grounds to include CMI as a defendant to such a claim.

Further, CRA cites no cases at all to support the idea that NRS 18.010(2)(b) does not apply to CRA's claims for violation of the open meeting law, violations of due process, and violations of NRS 278.220, none of which provide any grounds for relief from CMI, as the Panel properly concluded.

Thus, an award of fees in this case under NRS 18.010(2)(b), on the basis CRA had no reasonable grounds to bring or maintain any of its claims against CMI, does not conflict with any of this Court's precedents. Thus, CRA's Petition should be denied.

B. The Panel's decision was grounded in arguments made by CMI that NRS 18.010(2)(b) authorizes an award of fees to CMI in this action as the prevailing party.

On the one hand, CRA asserts here that it argued in its appellate briefing that NRS 18.010 does not apply to petitions for judicial review and takes issue with the

Panel rejecting that argument. Petition, p. 8, n. 1. On the other hand, CRA argues it had no opportunity to address the reasoning of the Panel, which is that NRS 18.010(2)(b) authorizes an award of fees to CMI on the basis CRA had no reasonable grounds to bring or maintain any claims against CMI. Petition, pp. 11-13. This argument lacks merit and the Court should disregard it.

In its Answering Brief, CMI plainly asserted that CRA's claims, with respect to CMI, were vexatious and that, therefore, NRS 18.010(2) authorized an award of fees to CMI. Answering Brief, pp. 9-10. The term 'vexatious' is defined to mean "without reasonable or probable cause or excuse." *Black's Law Dictionary* 1596 (8th ed. 2004). The Panel agreed and affirmed the District Court's determination that CMI should be awarded fees under NRS 18.010(2)(b). CRA has had more than ample opportunity to raise contrary arguments and did so in its Opening and Reply Briefs to the Panel. That CRA disagrees with the Panel's Order is not a basis upon which this Court can or should reconsider the Panel's decision.

CONCLUSION

For the reasons set forth herein, CMI respectfully requests this Court deny CRA's Petition for En Banc Reconsideration. Further, CMI respectfully requests this Court find CRA's Petition for En Banc Reconsideration to be frivolous in that it is without legal or factual support, has needlessly multiplied these proceedings,

which have already dragged on now for nearly a decade, and that sanctions under NRAP 40A(g) are appropriate.

DATED this 23rd day of December, 2022.

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CERTIFICATE OF COMPLIANCE

I, Justin M. Townsend, counsel to CMI, offer this certification pursuant to NRAP 28.2:

1. I hereby certify that I have read the foregoing document and that it is not frivolous or interposed for any improper purpose.

2. This document complies with all Nevada Rules of Appellate Procedure, including the requirement of NRAP 28(e) that every assertion regarding matters in the record be supported by a reference to the page and volume number of the appendix where the matter relied on is to be found.

3. This document 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 answer has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14 point Times New Roman type style.

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4. I further certify that this brief complies with the page- or type-volume limitations of NRAP 40A(d), computed in compliance with NRAP 32(a)(7) because it is proportionately spaced, has a typeface of 14 points or more, and contains 2,674 words.

DATED this 23rd day of December, 2022.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that I am an employee of ALLISON MacKENZIE, LTD., Attorneys at Law, and that on this date, I caused the foregoing document to be served on all parties to this action by:

✓ Court's electronic notification system

as follows:

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DATED this 23rd day of December, 2022.

/s/ Nancy Fontenot
NANCY FONTENOT

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