SATICOY BAY LLC SERIES 9641 CHRISTINE VIEW, Appellant, *v.* FEDERAL NATIONAL MORTGAGE ASSOCIATION, Respondent.

No. 69419

May 17, 2018 417 P.3d 363

Appeal from a district court order granting a motion for summary judgment in a quiet title action. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

**Affirmed.**

*Kim Gilbert Ebron* and *Karen L. Hanks* and *Jacqueline A. Gilbert*, Las Vegas; *Law Offices of Michael F. Bohn, Ltd.*, and *Michael F. Bohn*, Las Vegas, for Appellant.

*Lemons, Grundy & Eisenberg* and *Robert L. Eisenberg*, Reno; *Aldridge Pite, LLP*, and *Jory C. Garabedian, Laurel I. Handley*, and *Anthony R. Sassi*, Las Vegas, for Respondent.

*Arnold & Porter LLP* and *Michael A.F. Johnson* and *Howard N. Cayne*, Washington, D.C.; *Fennemore Craig P.C.* and *Leslie L. Bryan-Hart* and *John D. Tennert*, Reno, for Amicus Curiae Federal Housing Finance Agency.

Before the Supreme Court, En Banc.

## OPINION

By the Court, Douglas, C.J.:

In 2008, the Federal Housing Finance Agency (FHFA) placed respondent Federal National Mortgage Association (Fannie Mae) into conservatorship pursuant to the Housing and Economic Recovery Act (HERA). As conservator, the FHFA is authorized to take over and preserve Fannie Mae's assets and property. When the FHFA is acting as a conservator, 12 U.S.C. § 4617(j)(3) (the Federal Foreclosure Bar) protects its property from nonconsensual foreclosure. In this case, we must decide whether a regulated entity like Fannie Mae has standing to assert the Federal Foreclosure Bar in a quiet title action and, if so, whether the Federal Foreclosure Bar preempts NRS 116.3116, which allows a homeowners' association foreclosure on a superpriority lien to extinguish a first deed of trust. We answer both questions in the affirmative and further hold that the Federal Foreclosure Bar invalidates any purported extinguishment of a regulated entity's property interest while under the FHFA's con-

servatorship unless the FHFA affirmatively consents. We therefore affirm.[1]

*FACTS AND PROCEDURAL HISTORY*

Don and Rieta Moreno (the Morenos) obtained a home loan in the amount of $174,950 from Countrywide Home Loans, Inc., that was secured by a deed of trust on a property located in Las Vegas. The deed of trust was recorded and named Mortgage Electronic Registration Systems, Inc., as the beneficiary. Respondent Fannie Mae was subsequently assigned the deed of trust.

Appellant Saticoy Bay LLC Series 9641 Christine View (Saticoy Bay) purchased the property at an HOA foreclosure sale for $26,800 after the Morenos failed to pay their HOA dues. Thereafter, Saticoy Bay brought suit against Fannie Mae, among others, to quiet title. Both parties filed motions for summary judgment. The district court granted Fannie Mae's countermotion for summary judgment, concluding that 12 U.S.C. § 4617(j)(3) preempts NRS 116.3116, and thus, the foreclosure sale did not extinguish Fannie Mae's deed of trust without the FHFA's consent. Because the district court found that the FHFA did not consent to the foreclosure sale, Saticoy Bay's interest in the property was subject to the deed of trust. Saticoy Bay now appeals the district court's order.

*DISCUSSION*

*Standard of review*

Issues of standing and whether a federal statute preempts state law are questions of law subject to de novo review. *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 368, 252 P.3d 206, 208 (2011); *Nanopierce Techs., Inc. v. Depository Tr. & Clearing Corp.*, 123 Nev. 362, 370, 168 P.3d 73, 79 (2007). In addition, a district court's grant of summary judgment is reviewed de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id.*; *see also* NRCP 56(c). When deciding a summary judgment motion, all evidence "must be viewed in a light most favorable to the nonmoving party." *Wood*, 121 Nev. at 729, 121 P.3d at 1029. General allegations and conclusory statements do not create genuine issues of fact. *See id.* at 731, 121 P.3d at 1030-31.

[1]We previously issued our decision in this matter in an unpublished order. Cause appearing, we grant Fannie Mae and its amicus curiae FHFA's motion to reissue the order as an opinion, *see* NRAP 36(f), and issue this opinion in place of our prior order.

*Fannie Mae has standing to invoke the Federal Foreclosure Bar*

Saticoy Bay argues that Fannie Mae lacks standing to assert that the Federal Foreclosure Bar preempts NRS 116.3116 because (1) HERA only protects the property of the FHFA, and (2) the FHFA is not a party to this case. Fannie Mae argues that it has standing to assert the Federal Foreclosure Bar because private parties routinely invoke federal statutory protections in purely private litigation. We conclude that Fannie Mae has standing to invoke the Federal Foreclosure Bar.

"To have standing, the party seeking relief [must have] a sufficient interest in the litigation, so as to ensure the litigant will vigorously and effectively present his or her case against an adverse party." *Nationstar Mortg., LLC v. SFR Invs. Pool 1, LLC*, 133 Nev. 247, 250, 396 P.3d 754, 756 (2017) (internal quotation marks omitted). This court has already addressed Saticoy Bay's arguments by necessary implication in *Nationstar Mortgage.* This court held that the servicer of a loan owned by a regulated entity may argue that the Federal Foreclosure Bar preempts NRS 116.3116, even though the FHFA was not a party to the case. *Id.* at 249, 251, 396 P.3d at 756, 758. Certainly, a regulated entity whose property interest *is* at stake is entitled to assert that the Federal Foreclosure Bar preempts NRS 116.3116 on its own behalf.

Moreover, we must afford a statute its plain meaning if its language is clear and unambiguous. *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 123 Nev. 468, 476, 168 P.3d 731, 737 (2007). HERA's statutory language is clear. The statute's plain language provides that when the FHFA is acting as a conservator, it shall "immediately succeed to . . . the assets of the regulated entity." 12 U.S.C. § 4617(b)(2)(A)(i). Another provision of HERA states that the Federal Foreclosure Bar applies "with respect to the [FHFA] in any case in which the [FHFA] is acting as a conservator or a receiver." 12 U.S.C. § 4617(j)(1). According to the plain language of the statute, Fannie Mae's property interest effectively becomes the FHFA's while the conservatorship exists. Thus, the Federal Foreclosure Bar protects Fannie Mae's deed of trust while Fannie Mae is under the conservatorship.

Based on the foregoing, the district court properly concluded that Fannie Mae had standing to assert that the Federal Foreclosure Bar preempts NRS 116.3116.

*The Federal Foreclosure Bar preempts NRS 116.3116*

Saticoy Bay argues that the Federal Foreclosure Bar does not preempt NRS 116.3116.[2] Fannie Mae argues that NRS 116.3116 con-

[2]Saticoy Bay also contends that the Federal Foreclosure Bar protects the FHFA's assets from state taxation and not foreclosure sales. We reject Saticoy Bay's argument according to the plain language of the Federal Foreclosure

flicts with Congress's clear purpose of the Federal Foreclosure Bar to protect the operations of Fannie Mae while under conservatorship.[3] We agree with Fannie Mae.

"The preemption doctrine, which provides that federal law supersedes conflicting state law, arises from the Supremacy Clause of the United States Constitution." *Nanopierce Techs., Inc. v. Depository Tr. & Clearing Corp.*, 123 Nev. 362, 370, 168 P.3d 73, 79 (2007). Federal law may preempt state law even when federal statutory language does not expressly say so. *Id.* at 371, 168 P.3d at 79. That is, preemption may be implied when the federal law actually conflicts with the state law. *Id.* at 371, 168 P.3d at 80. "Even when implied, Congress's intent to preempt state law, . . . must be clear and manifest." *Id.* at 371-72, 168 P.3d at 79 (internal quotation marks omitted). "Conflict preemption analysis examines the federal statute as a whole to determine whether a party's compliance with both federal and state requirements is impossible or whether, in light of the federal statute's purpose and intended effects, state law poses an obstacle to the accomplishment of Congress's objectives." *Id.* at 371-72, 168 P.3d at 80.

We first must assess whether the Federal Foreclosure Bar expressly preempts NRS 116.3116 through clear and explicit preemption language, and we conclude that it does not. *See Davidson v. Velsicol Chem. Corp.*, 108 Nev. 591, 596, 834 P.2d 931, 934 (1992) ("Congress' silence cannot be ignored—it is inimical to a finding of express pre-emption.").

Therefore, the question is whether the Federal Foreclosure Bar implicitly preempts NRS 116.3116. The Federal Foreclosure Bar states that "[n]o property of the [FHFA] shall be subject to . . . foreclosure, . . . without the consent of the [FHFA]." 12 U.S.C. § 4617(j)(3). As a conservator, the FHFA is tasked with taking action "necessary to put the regulated entity in a sound and solvent condition" and "appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of

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Bar, which states that "[n]o property of the [FHFA] shall be subject to . . . foreclosure." 12 U.S.C. § 4617(j)(3); *see Berezovsky v. Moniz*, 869 F.3d 923, 929 (9th Cir. 2017) (holding that the Federal Foreclosure Bar applies to foreclosure sales).

[3]Fannie Mae also argues that NRS 116.3116 violates the Due Process Clause of the United States and Nevada Constitutions. This court's decision in *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortg.*, 133 Nev. 28, 28, 388 P.3d 970, 971 (2017), forecloses that argument.

In addition, Fannie Mae asserts that the foreclosure sale was commercially unreasonable. This court has long held that inadequacy of price alone is not sufficient to set aside a foreclosure sale. *Shadow Wood HOA v. N.Y. Cmty. Bancorp.*, 132 Nev. 49, 60, 366 P.3d 1105, 1112 (2016). Instead, the party seeking to set aside a foreclosure sale must demonstrate some element of fraud, unfairness, or oppression. *Id.* Here, we conclude that equitable grounds do not exist to warrant setting aside the foreclosure sale.

the regulated entity." 12 U.S.C. § 4617(b)(2)(D). In contrast, NRS 116.3116 allows homeowners' association foreclosures to automatically extinguish Fannie Mae's property interest without the FHFA's consent by granting the association a superpriority lien. *See* NRS 116.3116(2). NRS 116.3116 is in direct conflict with Congress's clear and manifest goal to protect Fannie Mae's property interest while under the FHFA's conservatorship from threats arising from state foreclosure law. As the two statutes conflict, the Federal Foreclosure Bar implicitly preempts NRS 116.3116 to the extent that a foreclosure sale extinguishes the deed of trust. Thus, the district court did not err in concluding so.

*The FHFA did not consent to the extinguishment of Fannie Mae's property interest*

Saticoy Bay argues that the FHFA implicitly consented to the extinguishment of Fannie Mae's deed of trust during the foreclosure sale by failing to act. We disagree.

The Federal Foreclosure Bar cloaks the FHFA's "property with Congressional protection unless or until [the FHFA] affirmatively relinquishes it." *Berezovsky v. Moniz*, 869 F.3d 923, 929 (9th Cir. 2017). In other words, "the Federal Foreclosure Bar does not require [the FHFA] to actively resist foreclosure." *Id.* Here, the FHFA did not consent to the extinguishment of the deed of trust.

## *CONCLUSION*

Because Fannie Mae was under the FHFA's conservatorship at the time of the homeowners' association foreclosure sale, the Federal Foreclosure Bar protected the deed of trust from extinguishment. Absent the FHFA's affirmative relinquishment, Saticoy Bay's interest in the property is subject to Fannie Mae's deed of trust. Therefore, we conclude the district court properly granted summary judgment in favor of Fannie Mae.

Cherry, Gibbons, Pickering, Hardesty, Parraguirre, and Stiglich, JJ., concur.

EUREKA COUNTY; DIAMOND NATURAL RESOURCES PROTECTION & CONSERVATION ASSOCIATION; JASON KING, P.E., Nevada State Engineer, Division of Water Resources, Department of Conservation and Natural Resources; BAUMANN FAMILY TRUST; BURNHAM FARMS, LLC; GALEN BYLER; MARIAN BYLER; CONLEY LAND & LIVESTOCK, LLC; DAMELE FARMS, INC.; DIAMOND VALLEY HAY COMPANY, INC.; FRED L. ETCHEGARAY; JOHN J. ETCHEGARAY; MARY JEAN ETCHEGARAY; LW & MJ ETCHEGARAY FAMILY TRUST; EUREKA MANAGEMENT CO., INC.; GALLAGHER FARMS LLC; JAYME L. HALPIN; SANDI HALPIN; TIM HALPIN; HIGH DESERT HAY, LLC; J&T FARMS, LLC; J.W.L. PROPERTIES, LLC; MARK MOYLE FARMS LLC; J.R. MARTIN TRUST; CHERYL MORRISON; MATT MORRISON; DEBRA L. NEWTON; WILLIAM H. NORTON; PATRICIA NORTON; D.F. & E.M. PALMORE FAMILY TRUST; STEWARDSHIP FARMING, LLC; SCOTT BELL; KRISTINA BELL; DON BERGNER; LINDA BERGNER; JAMES ETCHEVERRY; MICHEL AND MARGARET ANN ETCHEVERRY FAMILY LIMITED PARTNERSHIP; MARK T. AND JENNIFER R. ETCHEVERRY FAMILY TRUST; MARTIN P. AND KATHLEEN A. ETCHEVERRY FAMILY TRUST; LAVON MILLER; KRISTI MILLER; LYNFORD MILLER; SUSAN MILLER; ALBERTA MORRISON; and DONALD MORRISON, Petitioners, *v.* THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF EUREKA; and THE HONORABLE GARY FAIRMAN, District Judge, Respondents, and SADLER RANCH, LLC; ROGER ALLEN; and JUDITH ALLEN, Real Parties in Interest.

No. 72317

May 17, 2018 417 P.3d 1121

Original petition for a writ of prohibition, or in the alternative, certiorari or mandamus, in a water law action.

**Petition granted.**

*Theodore Beutel*, District Attorney, Eureka County; *Allison MacKenzie, Ltd.*, and *Karen A. Peterson* and *Willis M. Wagner*, Carson City, for Petitioner Eureka County.

*Adam Paul Laxalt*, Attorney General, and *Justina A. Caviglia*, Deputy Attorney General, Carson City, for Petitioner Jason King, P.E.

*McDonald Carano LLP* and *Debbie A. Leonard* and *Michael A. T. Pagni*, Reno, for Petitioners.

*Parsons Behle & Latimer* and *Robert W. Marshall* and *Gregory H. Morrison*, Reno, for Real Parties in Interest Roger Allen and Judith Allen.

*Taggart & Taggart, Ltd.*, and *David H. Rigdon, Paul G. Taggart*, and *Rachel L. Wise*, Carson City, for Real Party in Interest Sadler Ranch, LLC.

Before the Supreme Court, Hardesty, Parraguirre and Stiglich, JJ.

## OPINION

By the Court, Hardesty, J.:

Water in Diamond Valley, Nevada, is over-appropriated and has been pumped at a rate exceeding its perennial yield for over four decades. In 2014, the Office of the State Engineer found that groundwater levels in southern Diamond Valley had fallen over 100 feet. A vested, senior water rights holder has asked the district court to order the State Engineer to curtail junior water rights in the Diamond Valley Hydrographic Basin No. 153 (Diamond Valley). In this writ proceeding, we must determine whether junior water rights holders are entitled to notice of and an opportunity to participate in the district court's consideration of this curtailment request. Because the district court's consideration of the matter at the upcoming show cause hearing could potentially result in the initiation of curtailment proceedings, we conclude that due process requires junior water rights holders in Diamond Valley be given notice and an opportunity to be heard.

### *FACTS AND PROCEDURAL HISTORY*

Real party in interest Sadler Ranch purchased its real property and water rights in Diamond Valley in September 2011. The acquired ranch was established in the mid-19th century, and thus, Sadler Ranch claims to be a pre-statutory, vested, senior water rights holder in Diamond Valley. Of the two major springs on Sadler Ranch's property, one has noticeably diminished in flow and the other has stopped flowing completely.

In 2014, Sadler Ranch petitioned the State Engineer for replacement water to offset the loss from its springs but was ultimately awarded a fraction of the volume of water it requested. Dissatisfied with the State Engineer's replacement water award, Sadler Ranch petitioned the district court in April 2015 to order the State Engineer

to initiate curtailment proceedings regarding junior water rights in Diamond Valley and to reimburse Sadler Ranch for damage to its senior water rights. The district court subsequently allowed dozens of parties to intervene in the litigation, including petitioners Eureka County and Diamond Natural Resources Protections & Conservation (collectively, Eureka County) and all of the other petitioners listed in the instant petition. The State Engineer then proposed to designate Diamond Valley as a critical management area (CMA).[1] Sadler Ranch moved to stay the proceedings pending the outcome of the State Engineer's action, which the district court granted. In August 2015, the State Engineer officially designated Diamond Valley as a CMA pursuant to his authority under NRS 534.110(7)(a).

After determining that the State Engineer's CMA designation was not going to help its water dispute, Sadler Ranch filed an amended petition for curtailment. In its amended petition, Sadler Ranch requested the district court to either (1) direct the State Engineer to begin curtailment proceedings, or (2) issue an order curtailing pumping based on the State Engineer's knowing and intentional refusal to follow Nevada law. The district court entered an order granting in part and denying in part the State Engineer's motion to dismiss, finding that Sadler Ranch's amended petition pleaded sufficient facts to conclude that the State Engineer's failure to order curtailment was an abuse of his discretion. The same day, the district court entered an alternative writ of mandamus directing the State Engineer to begin curtailment proceedings or show cause why the State Engineer has not done so.

In August 2016, the State Engineer filed a motion arguing that Sadler Ranch must provide notice to all Diamond Valley appropriators who may be affected by the district court's decision at the upcoming show cause hearing. Eureka County joined in the motion. Sadler Ranch opposed the motion, arguing that the upcoming hearing to show cause would not result in a final order of curtailment that requires notice and that the State Engineer was the proper party to give notice to Diamond Valley appropriators because he maintains the records of water rights holders.

In October 2016, the district court denied the State Engineer's motion. The district court reasoned that even if it ordered curtailment at the upcoming show cause hearing, "the 'how' and 'who' of curtailment could not be decided until a future proceeding." The district court concluded that due process was not required until that future proceeding. The district court also reasoned that any potential unnotified parties were already adequately represented by the

[1]A CMA is a "basin in which withdrawals of groundwater consistently exceed the perennial yield of the basin." NRS 534.110(7)(a). A basin must be designated a CMA for at least 10 consecutive years before the State Engineer is required to curtail withdrawals in that basin. NRS 534.110(7).

diverse interests of the dozens of interveners and, because NRCP 24 prevents parties from intervening in an action when their interests are already adequately represented, it would be illogical to notify parties of a proceeding they cannot then join.

Eureka County subsequently filed a motion for reconsideration and was joined by the State Engineer. The district court denied Eureka County's motion to reconsider, again finding that unnotified appropriators were already adequately represented and that due process had not attached because the upcoming show cause hearing would not curtail any specific parties' rights. In February 2017, Eureka County filed the instant writ petition.

## *DISCUSSION*

### *The writ petition should be entertained*

"This court has original jurisdiction to issue writs of mandamus and prohibition." *MountainView Hosp., Inc. v. Eighth Judicial Dist. Court*, 128 Nev. 180, 184, 273 P.3d 861, 864 (2012); *see* Nev. Const. art. 6, § 4. "A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust or station, or to control a manifest abuse or an arbitrary or capricious exercise of discretion." *Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 39, 175 P.3d 906, 907-08 (2008) (internal quotation marks and alterations omitted). Because a writ petition seeks an extraordinary remedy, this court has discretion whether to consider such a petition. *Cheung v. Eighth Judicial Dist. Court*, 121 Nev. 867, 869, 124 P.3d 550, 552 (2005).

Generally, extraordinary writ relief is only available where there is no "plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170; *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). However, we have previously stated that "[w]hile an appeal generally constitutes an adequate and speedy remedy precluding writ relief, we have, nonetheless, exercised our discretion to intervene under circumstances of urgency or strong necessity, or when an important issue of law needs clarification and sound judicial economy and administration favor the granting of the petition." *Nev. Yellow Cab Corp. v. Eighth Judicial Dist. Court*, 132 Nev. 784, 788, 383 P.3d 246, 248 (2016) (*quoting Cote H.*, 124 Nev. at 39, 175 P.3d at 907-08).

We choose to entertain the instant writ petition as one for mandamus since it appears the district court arbitrarily and capriciously exercised its discretion by denying the State Engineer's motion.[2] *See Cote H.*, 124 Nev. at 39, 175 P.3d at 908. The parties do not dispute the district court's contention that at some point in the pro-

[2]Because we entertain this writ petition as one for mandamus, we deny petitioners' alternative requests for a writ of prohibition and a writ of certiorari.

ceedings due process will attach but dispute when due process must be provided for junior water rights holders. Judicial economy favors answering the due process question now rather than on appeal after the hearings are held. Additionally, even though there is only one basin in Nevada currently designated as a CMA, there are a number of other basins that are currently over-appropriated and may require curtailment proceedings in the future. Thus, addressing the due process concerns now will clarify the notice requirements in water rights curtailment actions.

*Due process requires notice be given to all junior water rights holders*

We review constitutional challenges de novo, including a violation of due process rights challenge. *Callie v. Bowling*, 123 Nev. 181, 183, 160 P.3d 878, 879 (2007). The Nevada Constitution protects against the deprivation of property without due process of law. Nev. Const. art. 1, § 8(5). Procedural due process requires that parties receive "notice and an opportunity to be heard." *Callie*, 123 Nev. at 183, 160 P.3d at 879 (internal quotation marks omitted). In Nevada, water rights are "regarded and protected as real property." *Application of Filippini*, 66 Nev. 17, 21-22, 202 P.2d 535, 537 (1949).

In the lower court proceedings, Eureka County, the State Engineer, Sadler Ranch, and the district court all agreed that water rights are property rights protected by due process. The dispute concerns *when* due process rights attach and at what stage in the proceedings notice must be given. Eureka County characterizes the upcoming show cause hearing as the decision on whether curtailment should begin. The State Engineer argues that because Nevada has a strict priority system for water rights, the "who" is already determined by the priority date once the court determines whether to curtail. Eureka County agrees that not every Diamond Valley appropriator will be affected by the possible curtailment, but it maintains that junior appropriators below the cutoff date will certainly be affected, and some will have been notified after their only meaningful opportunity to protect their rights has passed.

Sadler Ranch argues that notice is not required because, even if Sadler Ranch is successful at the upcoming show cause hearing, the result would merely be the initiation of more detailed proceedings, at which point due process will be required. The district court agreed with Sadler Ranch's characterization, stating that due process will only attach when the court is faced with the later decisions regarding the specific " 'how' and 'who' of curtailment."

We hold that in order to comply with constitutional due process, notice to junior water rights holders is required before the upcoming show cause hearing. The district court characterizes the show cause

hearing as merely determining whether future proceedings are required. However, in its show cause order, the district court directed that:

> immediately upon receipt of this writ, the State Engineer begin the required proceedings to order curtailment of pumping in Diamond Valley on the basis of priority of right, or, that you show cause why you have not done so and why this Court should not order you to begin the required proceedings to order curtailment and why this Court should not order curtailment of pumping in Diamond Valley.

Based on the language of the order, it appears that one possible outcome of the show cause hearing is a judicial determination forcing curtailment to begin.

In the district court's subsequent order denying Eureka County's motion for reconsideration, it clarified the scope of the show cause hearing, stating that it would be

> limited to the issue of whether the State Engineer's alleged failure to take the discretionary action of initiating curtailment in Diamond Valley is a manifest abuse of discretion or an arbitrary and capricious exercise of discretion supporting this Court's alternate writ of mandamus . . . .

Under Sadler Ranch's argument, junior water rights holders do not need to be involved in this limited hearing. We disagree. Junior water rights holders should be permitted to challenge whether the State Engineer's failure to initiate curtailment was an abuse of discretion and thus, whether curtailment is required. Any junior water rights holders notified after that decision will only be able to argue that the curtailment cutoff date should be below their priority level, rather than arguing for a solution other than curtailment at all. We conclude that such limitation is inappropriate.

The district court appears to be taking a "wait and see" approach to the notice issue because there is a possibility curtailment may not be ordered at the upcoming hearing, and thus, the expense and delay of providing notice would have been unnecessary. However, because the language in the show cause order indicates that the district court may enter an order forcing curtailment to begin, junior water rights holders must be given an opportunity to make their case for or against the option of curtailment. Notice must be given at an appropriate stage in the proceedings to give parties meaningful input in the adjudication of their rights. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) ("It is equally fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner." (*quoting Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (other quotation marks and citations omitted))). Thus, junior water rights holders must be notified before the curtailment decision

is made, even if the specific "how" and "who" of curtailment is decided in a future proceeding. As to the district court's determination that the junior water rights holders' interests were already adequately represented, we conclude that real property rights, including water rights, are unique forms of property and those with an ownership interest cannot be adequately represented by others. *See Dixon v. Thatcher*, 103 Nev. 414, 416, 742 P.2d 1029, 1030 (1987) (holding that "real property and its attributes are considered unique").

The district court expressly relied on *Desert Valley Water Co. v. State*, 104 Nev. 718, 766 P.2d 886 (1988), in drawing its conclusion that notice need not be given at this stage in the proceedings. *Desert Valley* dealt with the State Engineer's denial of a company's numerous applications to pump underground water. *Id.* at 719, 766 P.2d at 886. The company appealed the State Engineer's decision to the district court and noticed the State Engineer pursuant to NRS 533.450. *Id*. The district court dismissed the appeal because the company failed to provide notice to other persons or entities affected by the State Engineer's denial of the applications as required by the statute. *Id*. We reversed the district court, stating that "a decision concerning the allocation of water affects every citizen of Nevada" and that notice only needed to be served "at a minimum, upon those parties who have participated in the proceedings." *Id*. at 720, 766 P.2d at 887.

The district court's reliance on *Desert Valley* is misplaced because that case dealt with providing notice of an appeal, as required by statute, rather than notice required by due process prior to the deprivation of a property right. The appeal concerned the denial of one company's applications to pump water, which is not a vested right, and thus, this court's comments on the required notice for such an appeal are inapplicable to the instant petition, which involves the possibility that parties may have their existing water rights curtailed. Thus, here, the district court's exercise of its discretion to deny the junior water rights holders their due process rights to notice and the opportunity to be heard at the upcoming show cause hearing was arbitrary and capricious. *See Cote H.*, 124 Nev. at 39, 175 P.3d at 908; *Hamdi*, 542 U.S. at 533.

Additionally, real parties in interest Roger and Judith Allen argue that the upcoming show cause hearing will only determine a "pure question of law . . . regarding how and when the State Engineer must address overpumping, if at all," and involving every junior water rights holder in the litigation is unnecessary as it will not help resolve that question. The Allens argue that petitioners have failed to identify any question of fact at issue that would impact the question of whether curtailment is required, and allowing hundreds of potential litigants to participate in the proceedings will not help the district court decide how to apply Nevada water law to the underly-

ing facts of the case. However, we conclude that all Diamond Valley water rights holders should be given notice of the upcoming show cause hearing regardless of whether the district court is deciding only a "pure question of law." Further, the district court's order setting the hearing suggests some factual questions may be considered. As described above, the language of the show cause order leaves open the possibility that the district court will order curtailment proceedings, thus affecting unnotified parties' property rights. Despite determining questions of law, the district court is still allowing evidentiary hearings, and for that reason, we conclude that unnotified water rights holders must be allowed to present their arguments and evidence as well.

Finally, Sadler Ranch argues that Eureka County's writ petition is just a tactic to delay curtailment. Sadler Ranch contends that because of the State Engineer's past delays and continued failure to correct the water situation, Sadler Ranch's wells are drying up, which impairs Sadler Ranch's water rights without due process. However, Sadler Ranch acknowledges that at some point in future proceedings, the district court will require all Diamond Valley water rights holders to be given notice. It does not appear unduly burdensome to give notice now rather than at a less meaningful time in future proceedings. Notice will still have to be given before water rights are curtailed, whether now or before a future proceeding.[3]

## *CONCLUSION*

Because the upcoming show cause hearing may result in a court order to begin curtailment proceedings, resulting in possible deprivation of property rights, due process requires junior water rights holders in Diamond Valley to be given notice and an opportunity to be heard before the district court conducts the hearing. Therefore, we grant the petition and direct the clerk of this court to issue a writ of mandamus vacating the district court's order denying the State Engineer's motion for Sadler Ranch to provide notice to all affected appropriators in Diamond Valley and direct the district court to enter an order requiring that notice be provided to all junior water rights holders in Diamond Valley prior to any show cause hearing being conducted in the district court.

Parraguirre and Stiglich, JJ., concur.

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[3]Based on our disposition, we decline to address petitioners' arguments concerning the interpretation of NRS 534.110 and real parties in interest's unclean hands arguments. Both are more appropriately vetted in the district court during the upcoming hearings.

SAYEDBASHE SAYEDZADA, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 71731-COA

May 24, 2018 419 P.3d 184

Appeal from a judgment of conviction, pursuant to a jury verdict, of 13 counts of possession of credit or debit card without cardholder's consent. Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

**Affirmed.**

*Philip J. Kohn*, Public Defender, and *Tyler C. Gaston* and *Deborah L. Westbrook*, Deputy Public Defenders, Clark County, for Appellant.

*Adam Paul Laxalt*, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *John Thomas Jones*, Chief Deputy District Attorney, and *Charles W. Thoman*, Deputy District Attorney, Clark County, for Respondent.

Before the Court of Appeals, Silver, C.J., Tao and Gibbons, JJ.

## OPINION

By the Court, Silver, C.J.:

Sayedbashe Sayedzada was arrested after a security guard discovered Sayedzada hiding a woman's purse under his shirt; police later determined the purse had been stolen. The State charged Sayedzada with possession of a credit or debit card without the cardholder's consent. The case went to trial, and during voir dire, Sayedzada challenged several prospective jurors for cause. The district court allowed a traverse of those jurors before making its ruling. Sayedzada thereafter renewed his for-cause challenge as to two of the prospective jurors. The district court denied Sayedzada's challenges for cause, and Sayedzada used two peremptory challenges to exclude those two jurors from the jury panel. Sayedzada did not renew his challenge as to the other two jurors, and they were empaneled.

In this opinion, we first address whether Sayedzada waived his appellate argument of juror bias as to the two jurors he passed for cause below. We thereafter address juror bias and whether the district court abused its discretion by failing to strike the two challenged jurors for cause.

We first hold that a party waives the right to challenge a juror's presence on the jury on appeal where the party's appellate argument is based on facts known to the party during voir dire; the party con-

sciously elected not to pursue, or abandoned, a challenge for cause on that basis; and the party accepted the juror's presence on the jury. We conclude that in this case, Sayedzada waived his arguments regarding the empaneled jurors. We thereafter turn to the issue of juror bias and distinguish between actual, implied, and inferable bias. We conclude the district court erred by denying one of Sayedzada's challenges for cause, but this error is harmless and does not warrant reversal.

## *FACTS*

Sayedzada attacked a condominium-complex security guard who confronted him after the guard noticed he was hiding something under his shirt and acting suspiciously. The guard subdued Sayedzada and called the police. The guard discovered Sayedzada had a purse hanging around his neck, which Sayedzada claimed to have found. The purse contained several credit cards belonging to a woman and her family. Additional credit cards were found scattered on the ground where Sayedzada had been sitting after the guard subdued him. Officers recovered a total of 13 credit cards. When police contacted the purse's owner, she told them she was unaware her purse, which she had left in her unlocked car the night before, had been stolen. The State charged Sayedzada with 13 counts of possession of a credit or debit card without the cardholder's consent, and he pleaded not guilty.

At the preliminary hearing, Sayedzada indicated that at trial he would seek to exclude evidence of the purse theft. The State stated it would not introduce that evidence, but acknowledged the jury would be able to draw that inference from the facts.

As relevant to this appeal, during voir dire, Sayedzada initially challenged prospective jurors 7, 29, 37, and 38 for cause. The district court allowed a traverse of the challenged jurors before making its ruling. After each side finished questioning the prospective jurors, Sayedzada renewed his challenges to prospective jurors 29 and 38, but expressly declined the court's invitation to make further challenges and did not renew his challenges as to prospective jurors 7 and 37. The district court denied Sayedzada's two challenges for cause without explanation, and Sayedzada used his peremptory challenges to exclude prospective jurors 29 and 38 from the jury panel. Prospective jurors 7 and 37 were empaneled, and Sayedzada accepted the jury panel without further objection. The jury convicted Sayedzada on all charges following a two-day trial. Sayedzada appeals.

## *ANALYSIS*

Sayedzada contends the district court's denial of his challenges for cause requires reversal because prospective jurors 7 and 37 were

empaneled, which in turn prejudiced his case. Sayedzada also contends the district court abused its discretion by denying his challenges for cause to prospective jurors 29 and 38.[1] We address these points in turn.

*Waiver of right to challenge jurors 7 and 37 on appeal*

Sayedzada argues the empaneled jury was not fair and impartial because it included jurors 7 and 37, whom he had initially objected to for cause below. Sayedzada claims these jurors gave answers during voir dire that indicated they were biased. When questioned at oral argument as to whether his failure to maintain an objection below waived the claim, Sayedzada conceded that he failed to renew his challenge for cause with respect to these jurors after they were traversed as to bias. But Sayedzada argued his counsel's actions below are irrelevant under *Blake v. State*,[2] which he contends requires this court to reverse the verdict if any biased juror is empaneled, regardless of whether the party challenged that juror for cause below.

As an initial matter, *Blake* does not stand for the broad proposition Sayedzada argues. The Nevada Supreme Court concluded in *Blake* that, even had the district court abused its discretion by denying a for-cause challenge to a juror, the error was not reversible where the defendant failed to show, or even argue, "that any juror actually empaneled was unfair or biased." 121 Nev. at 796, 121 P.3d at 578. Notably, the appellant in *Blake* preserved his argument for appeal by challenging the juror below. *Id*. at 795-96, 121 P.3d at 578. Thus, *Blake* simply comports with the general rule echoed in other Nevada cases that erroneously failing to strike a juror for cause is not reversible error where the jury actually empaneled is impartial. *See, e.g.*, *Preciado v. State*, 130 Nev. 40, 44, 318 P.3d 176, 178 (2014) ("A district court's erroneous denial of a challenge for cause is reversible error only if it results in an unfair empaneled jury."); *Weber v. State*, 121 Nev. 554, 581, 119 P.3d 107, 125 (2005) ("Any claim of constitutional significance must focus on the jurors

[1]Sayedzada additionally argues the district court violated his constitutional rights by denying his fair-cross-section challenge without an evidentiary hearing. Sayedzada did not make a prima facie showing that the venire process systematically excluded a distinctive group in the community or that the district court selected the jury panel in an unfair manner, and accordingly, we conclude Sayedzada was not deprived of his right to a jury selected from a fair cross section of the community. *See Williams v. State*, 121 Nev. 934, 939, 125 P.3d 627, 631 (2005) ("The Sixth Amendment does not guarantee a jury or even a venire that is a perfect cross section of the community."). Sayedzada further argues the evidence was insufficient, the prosecutor engaged in misconduct, the district court abused its discretion when making various evidentiary findings, and cumulative error warrants reversal. We have carefully considered the parties' arguments on these additional points and conclude these claims lack merit.

[2]121 Nev. 779, 796, 121 P.3d 567, 578 (2005).

who were actually seated, not on excused jurors."), *rejected on other grounds by Farmer v. State*, 133 Nev. 693, 405 P.3d 114 (2017); *see also Ross v. Oklahoma*, 487 U.S. 81, 88 (1988) (noting peremptory challenges "are a means to achieve the end of an impartial jury").

The issue before this court is whether a defendant may waive subsequent challenges to the seating of a juror where the record demonstrates the defendant was aware of the particular facts below; the defendant consciously elected not to pursue, or abandoned, a challenge for cause based on these facts; and the defendant accepted the juror's presence on the jury. The Nevada Supreme Court has held, albeit not recently, that a defendant does waive the right to challenge the seating of a juror under such circumstances. *See McCall v. State*, 97 Nev. 514, 516, 634 P.2d 1210, 1211 (1981); *State v. Hartley*, 22 Nev. 342, 357, 40 P. 372, 374 (1895); *State v. Anderson*, 4 Nev. 265, 279 (1868).

The Nevada Supreme Court first addressed this issue in 1868 in *Anderson*. 4 Nev. at 279. There, during voir dire, a juror stated "he had formed and expressed an unqualified opinion as to the guilt or innocence of the prisoner, but subsequently had modified that opinion." *Id*. Defense counsel "failed to challenge the juror for either implied or actual bias, but accepted him without objection." *Id*. Anderson attempted to challenge the juror on appeal, and the Nevada Supreme Court concluded he could not raise this objection on appeal. Specifically, the court held:

> If the prisoner accepts a juror without objection, whom he knows to have formed and expressed an unqualified opinion, he cannot, after verdict, raise this objection. If he willfully takes his chance with such a juror, he must abide the result. Otherwise a prisoner could always get a new trial by simply refusing to exercise his unquestioned right to challenge such jurors for implied bias.

*Id*.

The Nevada Supreme Court again addressed the issue of waiver in *Hartley*. 22 Nev. at 354-57, 40 P. at 373-74. In this case, during voir dire several jurors each "answered that he had formed an unqualified opinion as to the guilt or innocence of [Hartley]." *Id*. at 354, 40 P. at 373. Hartley accepted the jurors without objection and subsequently argued on appeal that because these jurors should have been disqualified, he was denied his right to a fair and impartial trial. *Id*. at 354-55, 40 P. at 373. Looking to the common law and Nev. Gen. Stat. § 4214 (1861),[3] the court found that, under both, "a defendant could waive an objection to a juror, and that he did waive it unless the challenge was taken prior to the jury being completed;

[3]This statute was eventually codified in NRS 175.075 and repealed in 1967. 1967 Nev. Stat., ch. 523, § 447, at 1472.

and especially was this the case when the ground of challenge was then known." *Id*. at 355-56, 40 P. at 373-74 (noting this view is further supported by caselaw, including *Anderson*). The court further held that "in such case, after verdict, [the defendant does not have a] constitutional ground for the objection that he has not been tried by a 'constitutional jury.'" *Id*. at 357, 40 P. at 374.

The Nevada Supreme Court has cited *Anderson* and *Hartley* on several occasions, recognizing their holdings that a defendant can waive the right to raise a challenge to juror bias on appeal. *See Maxey v. State*, 94 Nev. 255, 256, 578 P.2d 751, 752 (1978) (citing *Hartley* and holding where a defendant has knowledge of misconduct during voir dire, he must immediately assert his right to a mistrial or he will be deemed to have waived any alleged error); *Hanley v. State*, 83 Nev. 461, 464, 434 P.2d 440, 442 (1967) (citing *Anderson* and *Hartley* in context of determining whether a change of venue is warranted due to the inability to obtain an impartial jury); *State v. McMahon*, 17 Nev. 365, 370, 30 P. 1000, 1001 (1883) (citing *Anderson* in context of finding that a provision, which required a jury sworn to try an indictment for a felony be kept together until finally discharged by the court, may be waived); *State v. Borowsky*, 11 Nev. 119, 127 (1876) (citing *Anderson* in context of determining whether a defendant can consent to proceed with a misdemeanor prosecution with less than the full number of jurors required).

Finally, it appears the Nevada Supreme Court most recently addressed the issue of waiver in 1981 in *McCall*. 97 Nev. at 515-16, 634 P.2d at 1211. In that case, defense counsel received, before voir dire, a juror's questionnaire that indicated she was a citizen of British Columbia. *Id*. at 516, 634 P.2d at 1211. There was no objection at the time of voir dire, but McCall moved for a mistrial after trial and sentencing, when he discovered the juror was a non-citizen. *Id*. at 516, 634 P.2d at 1211. On appeal, McCall alleged "he was denied his right to a jury trial before twelve citizens because one juror was an alien." *Id*. at 515-16, 634 P.2d at 1211. The court found McCall's failure to object to the seating of the non-citizen juror at the time of voir dire constituted a waiver of that claim. *Id*. at 516, 634 P.2d at 1211.

Although a significant amount of time has lapsed since *Anderson*, *Hartley*, and *McCall* were decided, the policy underlying the waiver rule remains sound. Parties should not be able to strategically place questionable jurors on the jury as a means of cultivating grounds for reversal should the verdict be unfavorable. As more recently observed by the Supreme Court of Appeals of West Virginia, the waiver rule "serves to minimize the incentive to sandbag in the hope of acquittal and, if unsuccessful, mount a post-conviction attack on the jury selection process." *State v. Tommy Y., Jr.*, 637 S.E.2d 628, 637 (W. Va. 2006) (quoting *State v. Marlow*, 888 S.W.2d 417, 420 (Mo.

Ct. App. 1994)); *see also United States v. Brazelton*, 557 F.3d 750, 755 (7th Cir. 2009) (cautioning that allowing a defendant to intentionally forgo challenging a juror for cause and yet obtain a reversal based on that juror's presence on the jury would effectively allow defendants to "plant an error and grow a risk-free trial" (quoting *United States v. Boyd*, 86 F.3d 719, 722-23 (7th Cir. 1996))).

We therefore take this opportunity to reiterate that a party waives any challenge to the seating of a juror on appeal where the party was aware of the basis for the challenge at the time of voir dire, had the opportunity to challenge the prospective juror on those facts but ultimately declined to do so, and approved the juror's presence on the jury panel. We emphasize that for the waiver rule to apply, the record must clearly demonstrate the party was aware of the salient facts and consciously chose to approve the juror for jury service rather than advance a challenge for cause. Where the record does not so demonstrate, a challenge to the seating of a juror may be reviewed for plain error. *See* NRS 178.602 (plain error); *Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018) (explaining NRS 178.602 provides a mechanism for review of a forfeited error); *Nelson v. State*, 123 Nev. 534, 543-44, 170 P.3d 517, 523-24 (2007) (reviewing an unpreserved challenge to an empaneled juror for plain error); *see also United States v. Olano*, 507 U.S. 725, 733 (1993) (distinguishing waiver, which occurs where a defendant intentionally relinquishes a known right, from forfeiture, the failure to timely assert a right).

Turning to the present case, Sayedzada was aware of the facts elicited during voir dire that he claims demonstrates jurors 7 and 37 were biased. And, in fact, Sayedzada initially attempted to challenge those jurors for cause. But Sayedzada elected to not renew his challenge after the traverse of the jurors. More to the point, Sayedzada intentionally bypassed two opportunities to challenge the jurors on the same facts he now raises on appeal: immediately following the traverse when he reasserted his for-cause challenge to prospective jurors 29 and 38, and again when the district court expressly asked whether either party had any further challenges and Sayedzada asserted he did not. Sayedzada thereafter accepted the jury panel. These facts demonstrate Sayedzada's intent below to relinquish his objection to these jurors and accept their presence on the jury panel. Accordingly, we conclude Sayedzada waived his right to make an appellate argument as to the bias of these jurors, along with any objection that the presence of these jurors on the jury deprived him of his right to be tried by a fair and impartial jury.

*For-cause challenges to prospective jurors 29 and 38*

Sayedzada contends the district court abused its discretion by denying his challenges for cause to jurors 29 and 38 because both

demonstrated bias in their voir dire answers and each had experiences similar to the victim's.

Under NRS 175.036(1), a party may challenge a prospective juror "for any cause . . . which would prevent the juror from adjudicating the facts fairly." The juror's qualification is a question of fact for the trial judge. *See* NRS 16.060; *Hall v. State*, 89 Nev. 366, 370-71, 513 P.2d 1244, 1247 (1973) (applying NRS 16.060, which pertains to civil cases, to a criminal trial). Thus, we generally will defer to the trial court's decision so long as the trial court sufficiently questioned the juror and determined the juror was unbiased and could be impartial. *See Preciado v. State*, 130 Nev. 40, 44, 318 P.3d 176, 178-79 (2014) (discussing the standard of review in challenges for cause); *see also United States v. Maloney*, 699 F.3d 1130, 1137-38 (9th Cir. 2012) (discussing cases where the jurors in question had experiences similar to the facts of the cases and the district courts' questioning of those jurors was sufficient to show their impartiality), *overruled on other grounds by United States v. Maloney*, 755 F.3d 1044 (9th Cir. 2014). When reviewing whether a juror demonstrated bias, the juror's statements must be considered as a whole. *See Weber v. State*, 121 Nev. 554, 581, 119 P.3d 107, 125 (2005).

The Nevada Supreme Court has repeatedly held district courts must strike for cause any juror whose voir dire answers demonstrate the juror's views would prevent or substantially impair the juror's ability to be impartial and apply the law. *See, e.g.*, *Khoury v. Seastrand*, 132 Nev. 520, 530-32, 377 P.3d 81, 88-89 (2016) (clarifying that prospective jurors whose voir dire answers demonstrate actual bias must be dismissed for cause); *Preciado*, 130 Nev. at 44, 318 P.3d at 178-79 (concluding the district court should have removed for cause a prospective juror whose answers cast doubt on her ability to be impartial); *Jitnan v. Oliver*, 127 Nev. 424, 431-32, 254 P.3d 623, 628-29 (2011) (holding that prospective jurors whose views would prevent them from performing their duties as jurors should be removed for cause). However, bias may also arise based on the juror's background or experiences and may exist even where the juror promises impartiality. *See Sanders v. Sears-Page*, 131 Nev. 500, 508-09, 354 P.3d 201, 206-07 (Ct. App. 2015); *see also United States v. Torres*, 128 F.3d 38, 45-48 (2d Cir. 1997) (addressing implied and inferable bias).

In *Torres*, the United States Court of Appeals for the Second Circuit defined three types of bias that provide grounds for removing a juror for cause: actual, implied, and inferable bias. 128 F.3d at 43-48. Actual bias, or bias in fact, arises where the juror demonstrates a state of mind that prevents the juror from being impartial. *Id*. at 43-44; *see also Sanders*, 131 Nev. at 507, 354 P.3d at 206 (addressing actual bias). Thus, the court will find actual bias where the juror admits to partiality or the juror's voir dire answers demonstrate bias.

*Torres*, 128 F.3d at 43-44*; see also Preciado*, 130 Nev. at 44-45, 318 P.3d at 179 (reviewing voir dire answers for actual bias); *Jitnan*, 127 Nev. at 432, 254 P.3d at 629 (considering whether a juror who gave inconsistent answers demonstrated bias). A determination of actual bias is grounded in the court's adequate questioning of the juror regarding the juror's ability to apply the law impartially. *Torres*, 128 F.3d at 44. A district court has broad discretion to determine whether a juror's answers evince actual bias, "as it is better able to view a prospective juror's demeanor than a subsequent reviewing court." *Khoury*, 132 Nev. at 530, 377 P.3d at 88 (quoting *Jitnan*, 127 Nev. at 431, 254 P.3d at 628).

In contrast, implied bias, or bias as a matter of law, depends solely on the juror's background and/or relationship to the parties or case, and exists independently of actual bias. *Torres*, 128 F.3d at 45. Thus, the juror's voir dire answers regarding the juror's ability to be impartial have no bearing on implied bias. *Id.* Under common law, implied bias exists in a narrow set of specific situations, most of which deal with the juror's relationship to the case, such as where the juror is related to or has worked with a party, or has some interest in the outcome of the case. *See id.*; *cf.* Nev. Gen. Stat. § 4220 (1861) (limiting implied bias to nine specific situations). The Nevada Legislature has codified elements of the common law's implied bias in the civil context, *see* NRS 16.050 (addressing challenges for cause), and this court has previously considered whether other situations may establish implied bias and require a court to remove a juror for cause. *See Sanders*, 131 Nev. at 508-09, 354 P.3d at 206-07. However, the Legislature has not codified a definition or prohibition on implied bias in the criminal context. As we conclude the facts in this case ultimately do not rise to the level of implied bias, we need not attempt to define its parameters here. *See Torres*, 128 F.3d at 46 ("[T]he doctrine of implied bias is reserved for 'exceptional situations' in which objective circumstances cast concrete doubt on the impartiality of a juror." (citing *Smith v. Phillips*, 455 U.S. 209, 222 (1982) (O'Connor, J., concurring))); *Tinsley v. Borg*, 895 F.2d 520, 527 (9th Cir. 1990) (urging prudence in formulating categories that bar jurors).

A third type of bias, inferable bias, arises where the juror discloses some fact that "bespeaks a risk of partiality sufficiently significant to warrant granting the trial judge discretion to excuse the juror for cause, but not so great as to make mandatory a presumption of bias." *Torres*, 128 F.3d at 47. Inferable bias is related to actual bias in that it derives from facts elicited during voir dire, but it is also distinct in that it does not rely upon the juror's admission of bias or the judge's evaluation of the juror's credibility. *Id.* Inferable bias is related to implied bias in that it exists independently of the juror's assertion of impartiality, but it is also distinct in that "the disclosed fact does not establish the kind of relationship between the juror and

the parties or issues in the case that mandates the juror's excusal for cause." *Id.* Unlike the situation where mandatory disqualification arises because a juror is actually or impliedly biased, a judge may exercise his or her discretion to infer bias from the facts elicited during voir dire where those facts show an average person in the juror's situation would be unable to decide the matter objectively. *Id.* This discretion to infer bias enables courts to strike for cause jurors who either may have an interest in concealing their bias or may be unaware of it, but whose answers demonstrate that the juror cannot reasonably be expected to separate his or her own experiences from the facts at the core of the case and judge impartially. *Id.* at 47-48; *see Dennis v. United States*, 339 U.S. 162, 172-73 (1950) (Reed, J., concurring) (noting the court's decision that it would not imply bias to jurors based on their employer did not mean the court could not do so "when circumstances are properly brought to the court's attention which convince the court that Government employees would not be suitable jurors *in a particular case*" (emphasis added)).

Inferable bias is not the same as potential bias, which does not justify removing a juror for cause. *Compare Torres*, 128 F.3d at 46-48, *with Khoury*, 132 Nev. at 531, 377 P.3d at 89. Bias may be inferred where facts disclosed by the prospective juror during voir dire show an average person in the juror's situation would not be able to be unbiased. *Torres*, 128 F.3d at 46-48. For example, bias may be inferred where "a juror has engaged in activities that closely approximate those of the defendant on trial." *Id.* at 47. "[O]nce facts are elicited that permit a finding of inferable bias, then, just as in the situation of implied bias, the juror's statements as to his or her ability to be impartial become irrelevant." *Id*. On the other hand, potential bias is the suggestion of bias based on the juror's expressed doubts as to his or her impartiality and ability to follow the law. *See Khoury*, 132 Nev. at 531, 377 P.3d at 89. Unlike inferable bias, if a juror manifests potential bias, further questioning may either rehabilitate the juror or demonstrate impermissible bias if the juror's answers, taken as a whole, demonstrate the juror's state of mind "substantially impairs the juror's ability to apply the law and the instructions of the court in deciding the verdict." *Id.*

With this in mind, we turn now to Sayedzada's claim that the district court abused its discretion by denying his challenges for cause to prospective jurors 29 and 38.

*Prospective juror 29*

We are troubled by prospective juror 29's answers during voir dire. First, prospective juror 29 disclosed that she had past experiences similar to those of the victim in this case. Specifically, prospective juror 29 was the victim of credit card theft on several occasions and was also a victim of a vehicle burglary where her purse

and other valuable items were stolen. And, critically, prospective juror 29 expressly and repeatedly doubted her ability to be impartial as a result of her own victimization, stating, "It makes me very angry. . . . It makes me mad. I don't know if I could be impartial." Although after further questioning, prospective juror 29 asserted the experiences did not affect her view of the criminal justice system and claimed she could be fair and impartial, she immediately backtracked, reiterating that "[p]ersonally, it makes you angry, but who wouldn't be," and admitting that, despite her assertion of impartiality, she still "could be biased" by her experiences. Of even further concern, prospective juror 29 gratuitously opined that the role of a criminal defense attorney is to "get your client off the [ ] hook" and she firmly believed that as "a matter of integrity," a truly innocent defendant would necessarily want to "state [their] case personally." Unlike other prospective jurors, she did not retreat from these opinions upon further questioning.

We conclude the district court abused its discretion by denying Sayedzada's challenge for cause as to prospective juror 29.[4] The facts here show prospective juror 29 demonstrated actual bias. She expressly and repeatedly doubted her ability to be impartial, disparaged Sayedzada's constitutional right not to testify and the defense attorney's role in the case, and offered only a lukewarm claim of impartiality to counter those damaging statements. Prospective juror 29's statements as a whole demonstrated that her bias would have prevented or substantially impaired her ability to apply the law and the court's instructions. *See Khoury*, 132 Nev. at 531, 377 P.3d at 89.

We also determine that even if there was no actual bias, these facts would have supported striking prospective juror 29 for inferable bias. The district court was aware from the pretrial proceedings and voir dire that prospective juror 29 was the victim of the same key crimes underlying the charges: car burglary, purse theft, and credit card theft. And, critically, prospective juror 29's statements that these experiences made her "angry" and admissions that those experiences could bias her against the defendant show that she would be unable to separate her own experiences from those in this particular case. An objective evaluation of these facts supports a conclusion that an average person in prospective juror 29's position would not be able to decide the case objectively. Because the record supports an inference that prospective juror 29's similar experiences

[4]We note the district court's decision is particularly troubling here, where the district court failed to provide *any* reason for its decision and the bias is apparent from the record. *See Jitnan*, 127 Nev. at 433, 254 P.3d at 629 (noting district courts are encouraged to make particularized findings on the record when deciding a challenge for cause and the failure to do so hampers appellate review).

would have prevented her from deciding the matter objectively, the district court would have been within its discretion to infer bias and strike prospective juror 29 accordingly.[5] *See Torres*, 128 F.3d at 48 (affirming the decision to strike for cause a juror who had engaged in conduct similar to the conduct alleged against the defendant); *cf. Brioady v. State*, 133 Nev. 285, 286-89, 396 P.3d 822, 823-25 (2017) (noting that a juror's history of being molested as a child could have "very likely" supported a challenge for cause where the defendant was on trial for sexual assault of a child and lewdness with a child).

Although the district court should have granted the challenge for cause as to prospective juror 29, a district court's error in denying a challenge for cause is not grounds for reversal unless the defendant demonstrates both that he exhausted all of his peremptory challenges and that an empaneled juror was unfair or biased. *Preciado v. State*, 130 Nev. 40, 44, 318 P.3d 176, 178 (2014); *Blake v. State*, 121 Nev. 779, 796, 121 P.3d 567, 578 (2005). We conclude the error was harmless here. Sayedzada removed both prospective jurors 29 and 38 by peremptory challenge. Further, as we held above, he waived his arguments that jurors 7 and 37 were biased, along with any objection that the presence of these jurors on the jury deprived him of his right to be tried by a fair and impartial jury. And Sayedzada does not argue any other empaneled juror was biased. Accordingly, we conclude no relief is warranted. *See Preciado*, 130 Nev. at 44, 318 P.3d at 178.

*Prospective juror 38*

We conclude the district court did not abuse its discretion by denying the challenge for cause to prospective juror 38. Unlike prospective juror 29, prospective juror 38 did not express more than a possibility of bias arising from her experiences. Prospective juror 38 asserted she could be fair and impartial and that she did not believe her experiences would affect her ability to fairly judge the case. And although prospective juror 38 had been the victim of having her bank account and credit card information stolen, she did not have experiences closely similar to those of the victim here. Accordingly, the record does not show that prospective juror 38 harbored bias that would prevent her from applying the law or following the court's instructions. *See Khoury*, 132 Nev. at 531, 377 P.3d at 89; *Hall v. State*, 89 Nev. 366, 370-71, 513 P.2d 1244, 1247 (1973) (finding defendant was not entitled to a new trial because the fact that a juror

[5]We note, however, that credit card theft or compromise is especially commonplace in today's society and a juror's experience with such a crime is unlikely to support an inference of bias absent more particularized similarities to the victim's experience.

was the victim of a burglary committed on the first day of a burglary trial was not grounds to dismiss the juror as a matter of law, and there was no proof of actual bias on the part of the juror or facts from which to infer the juror was biased).

*CONCLUSION*

A defendant is entitled to a fair and impartial jury, and the district court must remove biased jurors for cause. However, a party waives the right to challenge a juror's presence on the jury on appeal where the party's appellate argument is based on facts known to the party during voir dire; the party consciously elected not to pursue, or abandoned, a challenge for cause on that basis; and the party accepted the juror's presence on the jury panel. In this case, we conclude Sayedzada waived his challenges as to jurors 7 and 37.

In assessing juror bias, a district court must excuse a juror for cause for actual and implied bias, and may excuse a juror for inferable bias. The failure to excuse a biased prospective juror is reversible error only where the erroneous denial of the for-cause challenge results in an unfair empaneled jury. Here, although the district court abused its discretion by failing to strike for cause a prospective juror who demonstrated actual and inferable bias, the error does not warrant reversal. Accordingly, we affirm Sayedzada's conviction.

Tao and Gibbons, JJ., concur.

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MONTAGE MARKETING, LLC, fka MONTAGE MARKETING CORPORATION, a Delaware Limited Liability Company, Appellant, *v.* WASHOE COUNTY ex rel. WASHOE COUNTY BOARD OF EQUALIZATION; and WASHOE COUNTY ASSESSOR JOHN WILSON, Respondents.

No. 59063

May 31, 2018 419 P.3d 129

Appeal from a district court order denying a petition for judicial review in a property tax matter. First Judicial District Court, Carson City; James Todd Russell, Judge.

**Affirmed.**

*Maupin, Cox & LeGoy* and *Rick R. Hsu* and *Debra O. Waggoner*, Reno, for Appellant.

*Christopher J. Hicks*, District Attorney, and *Herbert B. Kaplan*, Deputy District Attorney, Washoe County, for Respondents.

Before the Supreme Court, CHERRY, HARDESTY and PARRAGUIRRE, JJ.

## OPINION

By the Court, HARDESTY, J.:

In this appeal, we consider the appropriate method for assessing the taxable value of fully developed but unsold condominium units held by the developer. This case arises from a decision by the State Board of Equalization finding that the county assessor properly assessed each unsold condominium unit based on its retail price. Appellant Montage Marketing, LLC, contends that, because the condominium building qualifies as a subdivision, the unsold condominium units instead should have been valued together as a single unit and discounted to determine the net sellout or wholesale value to a single buyer, which would result in a significantly lower assessment value.

This appeal requires us to interpret two statutory provisions: NRS 361.227(2)(b), which pertains to valuation of parcels in a qualified subdivision, and NRS 361.227(5)(c), which permits the "discounted cash flow" method to be used for assessing the full cash value of real property. We conclude that neither of these statutory provisions required the county assessor to value the condominium units as a single unit or to apply the discounted cash flow method to determine their full cash value. We thus affirm the district court's order denying judicial review of the State Board of Equalization's decision.

### *FACTS AND PROCEDURAL HISTORY*

This appeal involves tax assessment valuations for the tax years 2009-2010 and 2010-2011 for the Montage, a 21-story luxury condominium development located in downtown Reno in Washoe County. The condominium building was converted from a hotel and subdivided into 376 residential units with 11 different floor plans. The individual residential units were fully developed by February 2009, and the first units were sold to individual purchasers in March 2009. As of May 2009, 30 out of the 376 units were sold, and only 3 more units were sold as of February 2010. The unsold units remained under the common ownership of appellant Montage Marketing, LLC (Montage) and continued to be marketed as individual residential units for sale.

The Washoe County Assessor (Assessor) determined the taxable value of the unsold condominiums owned by Montage to be $86,804,500 for the 2009-2010 tax year and $71,120,370 for the 2010-2011 tax year. In assessing the condominiums, the Assessor followed the process prescribed under NRS 361.227. First, the As-

sessor calculated the full cash value of the land of each condominium. Because the condominium building qualified as a subdivision under NRS 361.227(2)(b), the Assessor applied a discount to the value of the land based on its expected absorption period—the number of years it would take for all of the units to be sold or otherwise absorbed into the market. Next, the Assessor calculated the taxable value of the improvements of each condominium. Then, to ensure that the taxable value of each condominium did not exceed its full cash value, the Assessor utilized the sales comparison method permitted by NRS 361.227(5) and reduced the taxable value of each condominium to 90 percent of its list price.

Montage sought review with the Washoe County Board of Equalization, arguing that the assessed taxable value of the unsold condominiums exceeded their full cash value. The County Board upheld the Assessor's valuations, and Montage appealed that decision to the State Board of Equalization (the State Board).

At the hearing before the State Board, Montage contended that the Assessor should have valued the condominium units collectively as one unit to derive a wholesale or net sellout value, which is what the unsold condominiums would be worth if sold in bulk to a single investor. Montage presented a report from its own appraiser, which calculated the full cash value of the unsold condominiums at $40,350,000 for the 2009-2010 tax year and $24,000,000 for the 2010-2011 tax year based on the net sellout values. The appraiser's report explained that these values were reached by first assessing the aggregate retail prices of all the condominium units and then, because the units would likely not be sold for a period of years, applying a discounted cash flow analysis to determine the present value of the condominium units to a single buyer. Montage argued that, because the condominium building qualified as a subdivision under NRS 361.227(2)(b), the Assessor was required to view the condominiums as a single unit and to discount the value of the entire property—both land *and* improvements—to determine the full cash value.

The Assessor argued that Montage's method of appraisal was improper because Montage was marketing each condominium to individual buyers and not to a single investor and thus the proper valuation method was what each condominium was worth if sold individually. The Assessor agreed that the condominiums qualified as a subdivision under NRS 361.227(2)(b), but asserted that the subdivision discount only applied to land and not to the valuation of any improvements on the land.

The State Board upheld the Assessor's valuations. The State Board acknowledged that under NRS 361.227(2)(b), a subdivision discount methodology must be used to assess the taxable value of parcels that comprise a qualified subdivision. The State Board found

that the Assessor had appropriately applied a subdivision discount of 50 percent to the land and that both the land and improvements had been appraised at the proper taxable value for both tax years.

Montage filed a petition for judicial review in the district court. The district court upheld the State Board's decision, and this appeal followed.

## *DISCUSSION*

"In reviewing orders resolving petitions for judicial review that challenge State Board decisions," this court presumes that the State Board's determinations are valid. *State Bd. of Equalization v. Bakst*, 122 Nev. 1403, 1408, 148 P.3d 717, 721 (2006). The taxpayer has the burden of proof and can overcome this presumption of validity only by presenting clear and satisfactory evidence that the tax valuation is "unjust and inequitable." *Id.* at 1408-09, 148 P.3d at 721. To satisfy this requirement, the taxpayer must demonstrate that the State Board applied "a fundamentally wrong principle," the Board refused to exercise its best judgment, or the assessment was so excessive as to necessarily imply fraud and bad faith. *Canyon Villas Apartments Corp. v. State*, 124 Nev. 832, 838, 192 P.3d 746, 750 (2008).

On appeal, Montage argues that the State Board applied a fundamentally wrong principle by upholding the Assessor's valuations of the unsold condominiums based on the retail list price of each condominium. Montage contends that the unsold condominiums should have been valued collectively as one unit and discounted to derive a wholesale value. Montage contends that this approach is expressly contemplated by the subdivision exception in NRS 361.227(2)(b), in conjunction with the discounted cash flow method permitted under NRS 361.227(5)(c). To resolve Montage's arguments, we first consider Nevada's real property tax assessment scheme and how the Assessor appraised the real property in this case. We then address whether Nevada's tax assessment scheme required the unsold condominiums held by Montage to be valued collectively as a single unit and discounted to wholesale value.

### *Nevada's tax assessment scheme and the Assessor's appraisal*

NRS Chapter 361 and the corresponding regulations set forth a scheme by which real property must be assessed. In assessing the taxable value of real property, county assessors must separately appraise two components of the property: (1) the land, and (2) any improvements on the land. NRS 361.227(1). Generally, each parcel of land must be considered a single unit for tax purposes and be separately valued and assessed. *See* NRS 361.227(2). However, NRS 361.227 provides several exceptions to this rule:

> 2. The unit of appraisal must be a single parcel unless:
>
> (a) The location of the improvements causes two or more parcels to function as a single parcel;
>
> (b) The parcel is one of a group of contiguous parcels which qualifies for valuation as a subdivision pursuant to the regulations of the Nevada Tax Commission; or
>
> (c) In the professional judgment of the person determining the taxable value, the parcel is one of a group of parcels which should be valued as a collective unit.

It is undisputed by the parties that the condominium building is a qualified subdivision for purposes of NRS 361.227(2)(b). Subsection 6(d) directs the Nevada Tax Commission to establish regulations for the valuation of parcels in a subdivision, and pursuant to that directive, the Tax Commission adopted NAC 361.1295, which sets forth the valuation methods that an assessor may use when valuing the land within a qualified subdivision. In relevant part, NAC 361.1295 directs the county assessor to calculate "the estimated retail selling price of all parcels in the subdivision which are not sold, rented or occupied, reduced by the percentage specified for the expected absorption of the parcel[,]" and then allocate that taxable value to each of the parcels. NAC 361.1295(1)(c), (2). The regulation further provides that the "taxable value of any improvements made within a qualified subdivision" should be calculated pursuant to NRS 361.227.

After determining the taxable value of the property, the assessor must then ensure that the taxable value does not exceed the full cash value of the property. NRS 361.227(5). "Full cash value" is defined as "the most probable price which property would bring in a competitive and open market under all conditions requisite to a fair sale." NRS 361.025. In determining whether a property's taxable value exceeds its full cash value, the assessor may utilize three alternative methods: (1) a comparable sales analysis; (2) a summation of the land and any improvements; or (3) "[c]apitalization of the fair economic income expectancy of fair economic rent, or an analysis of the discounted cash flow." NRS 361.227(5). If, after utilizing one of these methods, the assessor determines the taxable value exceeds the full cash value, the assessor must reduce the taxable value of the property accordingly. NAC 361.131.

With respect to Montage's unsold condominiums, the Assessor separately appraised the land and the improvements for each of the tax years pursuant to NRS 361.227 and the regulations. First, because the condominium building was a qualified subdivision, the Assessor applied a 50-percent discount to the value of the land based on an expected absorption period of ten or more years for the unsold units, and then allocated that amount to each of the condominium units, pursuant to NAC 361.1295. The Assessor next calculated the

improvements for each condominium pursuant to NRS 361.227(1). The Assessor then utilized the comparable sales approach, also known as the market approach, to determine the full cash value of each condominium, pursuant to NRS 361.227(5). To ensure the taxable value did not exceed the full cash value, the Assessor applied obsolescence to reduce the taxable value of each unsold condominium to 90 percent of its list price.

*The subdivision exception in NRS 361.227(2)(b)*

Montage contends that the plain language of NRS 361.227(2)(b) requires the unsold condominium units to be appraised as a single unit because they are part of a qualified subdivision. Montage maintains that the legislative history of the statute supports this position and demonstrates that the State Board misconstrued NRS 361.227(2)(b).

Appeals involving interpretation of a statute or regulation present questions of law that we review de novo. *See State v. Bakst*, 122 Nev. 1403, 1409, 148 P.3d 717, 721 (2006). When reviewing a statute, we look first to the language of the statute and, if the language is plain and unambiguous, we give effect to that language and do not look beyond it. *Silver State Elec. Supply Co. v. State, Dep't of Taxation*, 123 Nev. 80, 84, 157 P.3d 710, 713 (2007). Otherwise, we will look to legislative history and rules of construction to determine the meaning of the statute. *Id*. at 84-85, 148 P.3d at 713. We will "afford great deference to an administrative body's interpretation of a statute that is within the language of the statute." *Imperial Palace, Inc. v. State*, 108 Nev. 1060, 1067, 843 P.2d 813, 818 (1992).

NRS 361.227(2)(b) provides that "[t]he unit of appraisal must be a single parcel unless: . . . [t]he parcel is one of a group of contiguous parcels which qualifies for valuation as a subdivision pursuant to the regulations of the Nevada Tax Commission." Montage reads NRS 361.227(2)(b) as mandating that the unsold condominiums be appraised collectively as one unit to determine a wholesale value. Thus, under Montage's interpretation of the statute, the Assessor should have applied a discount to the entire subdivision—i.e., both the land and the improvements of the unsold condominiums—which would have yielded the value of the condominiums collectively as a single unit.

We disagree with Montage's interpretation of NRS 361.227(2)(b). A careful reading of the statute reveals that it does not expressly require that an entire subdivision be appraised as a single unit. Unlike the two other exceptions to the single parcel rule in NRS 361.227(2), which specify when two or more parcels "function as a single parcel" or "should be valued as a collective unit," the subdivision exception in 2(b) contains no such language. Nor does the statute state how parcels in a subdivision should be valued. Instead,

when subsection 2(b) is read in conjunction with subsection 6(d), it is clear that the Legislature granted the Tax Commission authority to determine how parcels in a qualified subdivision should be valued. And the Tax Commission adopted NAC 361.1295, which allows a discount to the value of the land, but not the improvements, of each individual parcel that makes up a subdivision.

Montage does not specifically argue that NAC 361.1295 is invalid or conflicts with NRS 361.227(2)(b). *See* NRS 233B.040(1) (providing that regulations "adopted and filed in accordance with the provisions of [NRS Chapter 233B] have the force of law"); NRS 233B.090 (stating that there is a rebuttable presumption that a regulation by an administrative agency is valid). And, in any event, the Tax Commission's subdivision regulation is consistent with the statute's requirement that the Commission establish criteria for valuing subdivisions. *See Imperial Palace*, 108 Nev. at 1067, 843 P.2d at 818 (affording great deference to the Tax Commission's interpretation when it is within the statutory language). Furthermore, NAC 361.1295 was adopted in 1988, and since then, the Legislature has not modified NRS 361.227(2)(b). *See Silver State Elec. Supply Co.*, 123 Nev. at 85, 157 P.3d at 713 (noting that "the Legislature's acquiescence to the Tax Commission's reasonable statutory interpretation by not modifying the statute indicates that the interpretation accords with legislative intent").

Even if we were to resort to the statute's legislative history, as Montage urges us to do, we find no clear legislative intent for parcels in a fully developed subdivision to be appraised collectively as a single unit or to be discounted in their entirety. The legislative history shows that the Legislature passed subsection 2(b) to benefit subdivision developers who hold many unsold parcels for an indefinite time due to economic downturn. Hearing on A.B. 291 Before the Assembly Comm. on Taxation, 64th Leg. (Nev., April 7, 1987). The intent in creating an exception for parcels in subdivisions was to allow assessors to take into account the carrying costs incurred by developers over the property's absorption period—the amount of time it would take for all the parcels to sell—and to apply a discount to arrive at the present value of the property. *Id.* This method of valuation is commonly known as the developer's discount method or the subdivision development approach to value. It is not clear, however, that the Legislature intended this subdivision discount to apply to both the land and improvements of parcels in a subdivision. In fact, the legislative history indicates that this discount was intended to apply only to undeveloped subdivisions.[1] *See* Hearing on

[1]Montage also relies heavily on an opinion issued by the Nevada Attorney General's Office in April 1987 to argue that unsold subdivision parcels must be appraised collectively as one unit. *See* 87-8 Op. Att'y Gen. (1987). Montage's reliance on that opinion is misplaced for several reasons. First,

A.B. 291 Before the Assembly Comm. on Taxation, 64th Leg. (Nev., April 23, 1987) (statement by Dick Franklin, Assessors Association, that "for the most part, land only was involved and depreciation would not be a factor. . . . They are dealing primarily with vacant land. Once property is used by the developer, it would drop out of this situation.").

Indeed, applying the subdivision discount only to undeveloped land would comport with how other jurisdictions generally understand or utilize the subdivision or development approach to valuation.[2] *See, e.g.*, *Hixon v. Lario Enters., Inc.*, 892 P.2d 507, 512 (Kan. 1995) (concluding that the developer's discount method does not apply to "subdivided property, where streets and curbs have been laid, utilities have been installed, and homes have been built on the property"); *Edward Rose Bldg. Co. v. Indep. Tp.*, 462 N.W.2d 325, 334 (Mich. 1990) (holding that a developer's discount did not apply to land that had been subdivided and improved and marketed on an individual lot basis); *First Interstate Bank of Or. v. Dep't of Revenue*, 760 P.2d 880, 883 (Or. 1988) (holding that the developer's discount method was not a permissible method of valuation for an established subdivision); *see also* Appraisal Institute, *The Appraisal of Real Estate* 342-43 (12th ed. 2001) (explaining that subdivision development analysis is a technique for valuing vacant land and determining the bulk sale value of a proposed subdivision).

Because the plain language of NRS 361.227(2)(b) does not require parcels in a subdivision to be appraised collectively as a single unit, we conclude the statute did not preclude the Assessor from appraising each condominium unit on an individual basis. Furthermore, in appraising the taxable value of each unit, the Assessor was permitted by NAC 361.1295 to apply a subdivision discount to the land but not to the improvements. Thus, Montage fails to demonstrate that the State Board misconstrued NRS 361.227(2)(b) or otherwise applied a fundamentally wrong principle.

*The discounted cash flow analysis under NRS 361.227(5)(c)*

Montage argues that the State Board's refusal to consider the discounted cash flow method in determining the full cash value of the unsold condominium units resulted in an unjust and inequitable tax-

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because the language of NRS 361.227(2)(b) is plain and unambiguous, we may not go beyond that language to determine its meaning. Second, nothing in the opinion suggests that parcels must be appraised collectively once they are fully developed as residential units and marketed to individual buyers, and thus the opinion does not provide clear support for Montage's position. Third, regardless of the import of the Attorney General's opinion, it is not binding on this court. *Miller v. Burk*, 124 Nev. 579, 594 n.54, 188 P.3d 1112, 1122 n.54 (2008).

[2]The parties do not challenge the application of the subdivision discount to the land of the unsold condominiums; thus, we make no decision as to whether such a discount is appropriate here.

able value in contravention of NRS 361.227(5). Montage contends that it is clear from the legislative history of NRS 361.227(5)(c) that the discounted cash flow method "is used in subdivision valuation to ascertain the true value based on holding costs and absorption—a wholesale value."

This argument raises the question of whether the discounted cash flow method for valuing property is an appropriate method for assessing the taxable value of condominium units marketed to individual buyers. We have never addressed the discounted cash flow analysis in NRS 361.227(5)(c) before, nor have we considered the proper methodology for assessing unsold condominium units held by a developer of a condominium building. NRS 361.227(5) sets forth three alternative methods that an assessor may use in determining whether the full cash value exceeds the taxable value: (a) comparable sales analysis; (b) a summation of the values of the land and any improvements; or (c) "[c]apitalization of the fair economic income expectancy or fair economic rent, or *an analysis of the discounted cash flow.*" The discounted cash flow analysis is an income capitalization technique that involves deducting costs and expenses from the anticipated gross sales price of the property and then applying a discount based on the expected absorption period to arrive at the property's present value. Appraisal Institute, *supra*, at 343.

The "discounted cash flow" language was added to NRS 361.227(5)(c) in 1999 through Assembly Bill (A.B.) 601. Hearing on A.B. 601 Before the Assembly Comm. on Taxation, 70th Leg. (Nev., April 8, 1999). In addition to amending subsection 5(c) to include that language, A.B. 601 amended subsection 2 to include the third exception to the rule that a unit of appraisal is a single parcel—when "the parcel is one of a group of parcels which should be valued as a collective unit" in the appraiser's professional judgment. *Id.* The legislative history shows that the Legislature enacted these provisions together to provide the same benefit to owners of certain contiguous parcels, such as a developer with vacant land in a planned community, that was currently being provided to developers of subdivisions. *Id.* At a hearing on A.B. 601, Mark Schofield, the Clark County Assessor, explained: "We currently use a developer's subdivision discount, where we discount the value of the property, determined by the number of years it will take to build that property up . . . . This essentially would employ that same theory in valuing vacant parcels. You are giving them that benefit even though they are not subdivided." *Id.*

Montage relies on this language to contend that it is clear that the State Board has historically used the discounted cash flow method in subdivision valuation, was expressly vested with that authority by A.B. 601, and should have applied that method here to determine that the taxable value exceeded the full cash value. We disagree. The legislative history indicates that the discounted cash flow analysis is

similar to the subdivision discount, in that it provides for a discount due to the number of years that it will take for property to be developed and sold. However, nothing in the legislative history supports Montage's contention that the discounted cash flow analysis is the appropriate method for assessing the full cash value of fully developed subdivisions such as the condominiums at issue here. In fact, the legislative history suggests that the discounted cash flow method is intended to apply only in the valuation of non-subdivided vacant parcels. Furthermore, the discounted cash flow method was added to NRS 361.227(5)(c) more than ten years after the subdivision rule was enacted. Thus, to the extent that Montage suggests that the Legislature had always allowed the discounted cash flow method to be used to assess the full cash value of developed subdivisions, this position is not supported by the statutory language or the legislative history.

Montage alternatively urges this court to find that the discounted cash flow method was appropriate because Montage purchased the condominium project as an investor with the intent to make money from the project, and thus the condominiums should be treated as income-producing property rather than as individual residential units. Montage relies on *Canyon Villas Apartments Corp. v. State*, 124 Nev. 832, 843, 192 P.3d 746, 754 (2008), to argue that the income capitalization approach is appropriate here due to the property's "income-generating potential and the time-value of money." The property at issue in *Canyon Villas*, an apartment complex, is clearly distinguishable from the property here, individual residential condominium units. Thus, Montage's reliance on *Canyon Villas* is misplaced. Moreover, county assessors must use the valuation approach that most accurately measures the full cash value of property, *see* NRS 361.227(5)(c), without any consideration of the owner's identity or intent behind purchasing that property. The Assessor in this case utilized the sales comparison approach, which is the approach generally used by appraisers in valuing individual condominium units, *see* Appraisal Institute, *supra*, at 77, and Montage's status as an investor does not warrant valuing its condominiums differently than those of other owners. To hold otherwise would result in a determination of the condominiums' value as an investment or their value to the current owner, not the full cash value, which is the price that each condominium unit would receive on the open market.

## *CONCLUSION*

We conclude that Montage failed to demonstrate that the State Board's decision upholding the Assessor's valuation was unjust and inequitable. The State Board did not apply a fundamentally wrong principle when it found that the subdivision discount applied only to the land. Nor did the State Board apply a fundamentally wrong

principle in assessing the condominiums as individual units and utilizing the sales comparison method to ensure that the taxable value did not exceed the full cash value. Accordingly, we affirm the district court's order denying judicial review of the State Board of Equalization's decision.[3]

Cherry and Parraguirre, JJ., concur.

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THE COMMISSION ON ETHICS OF THE STATE OF NEVADA, Appellant, *v.* IRA HANSEN, in His Official Capacity as Nevada State Assemblyman for Assembly District No. 32; and JIM WHEELER, in His Official Capacity as Nevada State Assemblyman for Assembly District No. 39, Respondents.

No. 69100

May 31, 2018 419 P.3d 140

Motion to dismiss this appeal from a district court order granting a petition for judicial review. First Judicial District Court, Carson City; James E. Wilson, Judge.

**Appeal dismissed.**

Pickering, J., with whom Douglas, C.J., and Stiglich, J., agreed, dissented.

*State of Nevada Commission on Ethics* and *Tracy L. Chase*, Carson City, for Appellant.

*Legislative Counsel Bureau Legal Division* and *Brenda J. Erdoes*, Legislative Counsel, *Kevin C. Powers*, Chief Litigation Counsel, and *Eileen G. O'Grady*, Chief Deputy Legislative Counsel, Carson City, for Respondents.

Before the Supreme Court, En Banc.

## OPINION

By the Court, Hardesty, J.:

Assemblymen Ira Hansen and Jim Wheeler seek dismissal of this appeal, arguing that the notice of appeal is void because it was not authorized by the client, the Nevada Commission on Ethics, a public

[3]Montage's motion for oral argument is denied. NRAP 34(f)(1).

body. Because we determine that an attorney for a public body must have authorization from the client in a public meeting prior to filing a notice of appeal, the notice of appeal is defective and we lack jurisdiction to further consider this appeal.

*FACTS AND PROCEDURAL HISTORY*

In November 2013, respondent Assemblyman Ira Hansen received four citations from a Nevada Department of Wildlife employee for allegedly violating NRS 503.580, which prohibits certain animal traps from being set within 200 feet of public roads or highways. While the dispute was pending, respondent Assemblyman Jim Wheeler requested, and the Legislative Counsel Bureau (LCB) provided, a written legal opinion analyzing whether box traps and snare traps constitute traps prohibited under NRS 503.580.

On March 5, 2014, Fred Voltz filed an ethics complaint, termed a Request for Opinion (RFO), against each assemblyman with appellant the State of Nevada Commission on Ethics (the Commission). The RFO alleged that the assemblymen used their official positions to benefit personal interests. Voltz claimed that Hansen sought to use the LCB opinion to assist him in the defense of his criminal case.

After the Commission's general counsel reviewed the RFOs, the assemblymen sought dismissal by the Commission. The Commission denied the motion to dismiss on March 3, 2015. On April 2, 2015, the assemblymen filed a petition for judicial review in the district court.

Finding that the Nevada Assembly had sole jurisdiction to consider ethical questions concerning the assemblymen's acts, the district court granted the assemblymen's petition for judicial review on October 1, 2015, ordering the Commission to dismiss the RFOs. The assemblymen served the Commission with written notice of entry of the district court's order on October 26, 2015.

On the advice of the Commission's legal counsel, the chair and the executive director, *without consulting the Commission*, authorized the filing of a notice of appeal of the district court order directing the Commission to dismiss the RFOs. Three days later, on October 29, 2015, a notice of appeal was filed with this court on behalf of the Commission. The Commission did not hold a meeting prior to filing the notice of appeal.

On December 1, 2015, the assemblymen filed an open meeting law complaint against the Commission in the district court. The complaint alleged that the Commission violated the open meeting law when the Commission filed a notice of appeal without first making its decision, or taking action, to appeal the district court's order in a public meeting. The complaint sought to have the Commission's action of filing an appeal declared void because it was taken in violation of Nevada's open meeting law.

The Commission then held an open meeting on December 16, 2015, seeking to ratify and approve the action taken by the Commission's counsel in filing the appeal. The Commission voted unanimously in favor of appealing the district court's order granting the petition for judicial review and ordering the Commission to dismiss the RFOs. Alleging the notice of appeal is defective, the assemblymen now move to dismiss this appeal.

## *DISCUSSION*

The assemblymen fundamentally argue that the Commission's notice of appeal is defective because it was filed without proper authorization from the client. The Commission argues that the notice of appeal is valid because its chair and executive director provided counsel the authority to file the notice of appeal. The Commission further argues that it cured any initial failure to provide authority to its counsel when it later authorized an appeal in an open meeting. We conclude that the Commission's contentions lack merit and grant the motion to dismiss this appeal.

### *The right to appeal rests with the client*

"The right to appeal is a substantial legal right," and "[i]t is the client, not the attorney, who determines whether an appeal shall be taken." 7A C.J.S. *Attorney & Client* § 301 (2015); *see also* Restatement (Third) of the Law Governing Lawyers § 22(1) (Am. Law Inst. 2000) (stating that the client decides "whether to appeal in a civil proceeding"). Further, the attorney must have such authority *prior* to filing a notice of appeal, because "there is no implied authority in the event of a judgment adverse to the client, to prosecute review proceedings by appeal and to bind the client for costs and expenses incidental thereto." *In re Judicial Settlement of the Account of Proceedings of McGinty*, 492 N.Y.S.2d 349, 352 (N.Y. Sur. Ct. 1985). "A client may not validly authorize a lawyer to make the decision[ ] [whether to appeal] when other law . . . requires the client's personal participation or approval." Restatement (Third) of the Law Governing Lawyers § 22(2) (Am. Law Inst. 2000).

### *Like decisions to settle a case, public bodies must comply with Nevada's open meeting law when authorizing legal counsel to file a notice of appeal*

The Commission argues that the decision to file a notice of appeal does not require an "action" by the public body. *See* NRS 241.015(3)(a)(1). In support of its argument, the Commission suggests that the decision to appeal is similar to the decision to file a motion by counsel. We view these litigation decisions differently on two grounds.

First, "action," as applicable to public bodies, is defined as a decision, commitment, or vote "made by a majority of the members present . . . during a meeting of a public body." NRS 241.015(1). In order for a public body to make a decision, there must be a meeting. NRS 241.015(1). Although "the public body may gather to confer with legal counsel at times other than the time noticed for a normal meeting," Adam Paul Laxalt, *Nevada Open Meeting Law Manual* § 4.11 (12th ed. 2016), http://ag.nv.gov/uploadedFiles/agnvgov/Content/About/Governmental_Affairs/OML_Portal/2016-01-25_OML_12TH_AGOMANUAL.pdf, when the public body confers with its counsel, its "deliberations may not result in any action . . . . A decision to settle a case or make or accept an offer of judgment would be an action, which is prohibited in any type of closed meeting." 2005-04 Att'y Gen. Open Meeting Law Op. 4 (2005).

While NRS 241.015(3)(b)(2) allows public bodies to hold attorney-client conferences behind closed doors, we agree with our sister state that any "legal advice" exception to the open meeting law cannot be extended "to include a final decision to appeal" because such a decision "transcends 'discussion or consultation' and entails a 'commitment' of public funds." *Johnson v. Tempe Elementary Sch. Dist. No. 3 Governing Bd.*, 20 P.3d 1148, 1151 (Ariz. Ct. App. 2000). Since filing an appeal involves the commitment of public funds, we hold that the decision to file a notice of appeal requires an "action" by the public body. Just as a public body would need to meet in an open meeting to determine other material steps in the litigation process, such as initiating a lawsuit or agreeing to a settlement, it must also authorize an appeal of an adverse determination in an open meeting.[1]

Second, "[w]hether to appeal is an issue much like whether to settle." Restatement (Third) of the Law Governing Lawyers § 22 cmt. d (Am. Law Inst. 2000). This distinction comes into focus when considering the expenditure of public funds in both the decision to settle and the decision to file an appeal. *See Johnson*, 20 P.3d at 1151. We note that other jurisdictions have similarly invalidated notices of appeal where a public body did not properly authorize their filing. *See State ex rel. Hjelle v. Bakke*, 117 N.W.2d 689, 696 (N.D. 1962) (determining that a notice of appeal was invalid where

[1]The Commission argues that it is unreasonable for its counsel to be expected to gain approval of a quorum, in an open meeting, in order to defend the Commission, especially considering the time constraints involved in filing an appeal. However, public bodies need only give three working days' notice prior to holding a meeting. NRS 241.020(2). Acknowledging that such a requirement could create frustration for public bodies in receiving legal advice, this court previously explained that "[a]ny detriment suffered by the public body in this regard must be assumed to have been weighed by the [L]egislature in adopting this legislation." *McKay v. Bd. of Cty. Comm'rs of Douglas Cty.*, 103 Nev. 490, 496, 746 P.2d 124, 127 (1987).

the board of arbitrators did not authorize its filing); *see also Shaw v. Common Council of City of Watertown*, 63 N.W.2d 252, 255 (S.D. 1954) (invalidating notices of appeal that were filed without authorization by the City Council).

Here, the notice of appeal was filed without any authorization from the Commission. It is the Commission as a whole that is the client—not the executive director, nor the Commission chair. We therefore conclude that the Commission's notice of appeal is defective, and we lack jurisdiction to consider it. *See Guerin v. Guerin*, 116 Nev. 210, 214, 993 P.2d 1256, 1258 (2000).[2]

The American Bar Association Model Rules of Professional Conduct indicate that "[u]nder various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority . . . to decide upon settlement or whether to appeal from an adverse judgment." Model Rules of Prof'l Conduct pmbl. and scope 18 (2015). The dissent's analysis presupposes that the authority to file a notice of appeal is (1) delegable and (2) was delegated in this case. The dissent also cites *City of San Antonio v. Aguilar*, 670 S.W.2d 681 (Tex. App. 1984), rejecting a Texas Open Meeting Act appeal filed by a city attorney based on the city attorney's separate authority under the city's ordinances. Here, whether the authority to file a notice of appeal is delegable is not germane to our analysis because the record does not show and nothing in the statutes or regulations concerning the Ethics Commission provides for a grant or delegation of decision-making authority to the Commission's chair, director, or legal counsel to file a notice of appeal without action by the Commission as a whole. *See* NRS Chapter 281A; NAC Chapter 281A.

Although the Commission, as the client, subsequently authorized its attorney to file a notice of appeal, that authorization was not in effect at the time the notice of appeal was filed. When the Commission subsequently authorized the notice of appeal in an open meeting on December 16, 2015, more than 30 days had passed since the Commission was served with written notice of the district court's order. To the extent the Commission argues that the subsequent authorization cures any open meeting law violation, we note that NRS 241.0365(5) provides that any action taken to correct an open meeting law violation is only effective prospectively. Therefore, even if the Commission's legal counsel had filed a new notice of appeal

[2]The underlying premise for the dissent is that the open meeting law does not apply because there was no meeting. But that argument ignores the fact that actions by a public body must be taken by the body in an open meeting conducted in accordance with the open meeting law. When the action taken by the public body requires an open meeting, failure to hold an open meeting itself is a violation. NRS 241.015. There is no question in this case that there was no meeting.

after receiving authorization from the client, the appeal would have been dismissed as untimely. *See* NRAP 4(a)(1).[3]

Because the notice of appeal was filed without Commission authorization, we conclude the notice of appeal is defective and, thus, this court lacks jurisdiction to consider the Commission's appeal. Accordingly, we grant the motion to dismiss the appeal.[4]

Cherry, Gibbons, and Parraguirre, JJ., concur.

Pickering, J., with whom Douglas, C.J., and Stiglich, J., agree, dissenting:

The Commission's executive director and its chair specifically authorized Commission counsel to file a notice of appeal, and the Commission thereafter met and ratified it. This was sufficient authorization for the appeal. I would deny the motion to dismiss, order the parties to complete their briefs, and resolve this appeal on the merits.

I.

Some background provides helpful context for understanding this procedural dispute. The Commission received two ethics complaints, deemed "requests for opinions" or RFOs, against the respondents, Assemblymen Hansen and Wheeler. The complaints grew out of misdemeanor charges the Nevada Department of Wildlife initiated against Hansen under NRS 503.580, for placing snare traps near a roadway. As a member of the Nevada Legislature, Hansen can request legal opinions from the Legislative Counsel Bureau (LCB), a prerogative the public does not share. *See* NRS 218F.710(2). He did so, asking the LCB for its opinion on whether NRS 503.580, which prohibits placing steel traps within 200 feet of a public roadway, applies to box traps and snare traps. Legislative Counsel cautioned that it might look like a conflict of interest for

[3]The dissent bases its conclusion, in part, on ordinary rules of ratification. However, it concedes that under the open meeting law, any attempted ratification by a public body is only effective prospectively.

[4]The Commission also argues that the LCB lacks the ability to represent a legislator's private interests. Because the RFOs were submitted against the assemblymen in their official capacity, the LCB is representing the assemblymen in their official capacity, something it is authorized to do, including being able to "prosecute, defend, or intervene in any action or proceeding before any court." NRS 218F.720(1); NRS 218F.720(6)(c)(2) (defining "Legislature" as including "any current or former . . . member . . . of the Legislature"). The Commission further argues that assemblymen are not authorized to file an open meeting law case pursuant to NRS 241.037. Because the motion to dismiss concerns the validity of the notice of appeal filed without an open meeting, we do not address the assemblymen's authority to file an open meeting law complaint under NRS 241.037.

Hansen to request the opinion and suggested he ask a colleague to make the request. Hansen turned to his fellow legislator, Wheeler. At Wheeler's request, Legislative Counsel issued a written opinion that NRS 503.580 doesn't apply to snare traps.

The ethics complaints, or RFOs, allege that the Assemblymen used their official positions, and government resources, to benefit Hansen's personal interests in defeating the misdemeanor charges against him, when Hansen should have hired his own private lawyer. *See* NRS 281A.020; NRS 281A.400; NRS 281A.420; NRS 281A.440 (2015). As required by NAC 281A.405, Commission counsel and its executive director reviewed the RFOs and advised the Commission they believed it had jurisdiction to proceed. Citing legislative immunity, the Assemblymen filed a pre-hearing motion to dismiss with the Commission. Although the Commission denied the Assemblymen's motion, it ordered its executive director to investigate the Assemblymen's legislative immunity claim.

Dissatisfied, the Assemblymen filed a petition for judicial review or, in the alternative, writ relief in district court, seeking an order terminating the Commission proceedings against them. Appearing through its in-house counsel, the Commission objected that judicial review was premature because the Commission had yet to resolve the RFOs. The Commission and the Assemblymen submitted a written stipulation and order to the district court in which (1) the Assemblymen agreed to waive confidentiality, *see* NRS 281A.440(8) (2015); and (2) both sides agreed to stay the Commission proceedings until the judicial proceedings—expressly including any appeals—ran their course. After briefing and argument, the district court entered a written order in which it rejected the Commission's prematurity objection, sustained the Assemblymen's legislative immunity claim, and directed that "the Commission terminate its proceedings."

Under NRAP 4(a)(1), the Commission, like any other party who loses in district court, had 30 days to file a notice of appeal. At the direction of the Commission's executive director and its chair, Commission counsel timely did so. The Assemblymen did not challenge the validity of the notice of appeal until the 30-day deadline for perfecting an appeal ran out. They then filed a second suit in district court, in which they challenged the validity of the notice of appeal under the Nevada Open Meeting Act, or NOMA, NRS Chapter 241, because the Commission did not conduct a public meeting to authorize this appeal before filing it. In response, the Commission noticed and convened an open public meeting and ratified the notice of appeal.

The Assemblymen then filed the motion to dismiss now before this court. They argue that, because NOMA invalidates the Commission's original notice of appeal, NRS 241.036, and limits the ratification vote to prospective effect only, NRS 241.0365(5), and

because the time for filing a proper notice of appeal has expired, this court lacks jurisdiction and must dismiss, giving them a win on the merits by procedural default. In the alternative, the Assemblymen ask for a stay of this appeal while they pursue their NOMA suit in district court.

II.

A.

The difficulty with the Assemblymen's argument—and the majority's analysis—is that Nevada's open meeting law, or NOMA, does not apply to the decision the Commission's counsel, its executive director, and its chair made to file the notice of appeal. The eight-member Commission is, to be sure, a "public body" for purposes of NOMA. NRS 241.015(4); *see* NRS 281A.200(1) ("The Commission on Ethics, consisting of eight members, is hereby created."). So, if enough members of the Commission to constitute a quorum had met privately and taken action as a group, NRS 241.036 and NRS 241.0365(5) would apply, and the Assemblymen would prevail because, under NRS 241.036 "[t]he action of any public body taken in violation of any provision of [NOMA] is void," and, under NRS 241.0365(5) "[a]ny action taken by a public body to correct an alleged violation of [NOMA] by the public body is [only] effective prospectively."

But "action," for purposes of NOMA, is a strictly defined term of art. Insofar as relevant here, NOMA defines "action" to mean a "decision," "commitment or promise made," or "an affirmative vote" taken, by "a majority of the members present, whether in person or by means of electronic communication, *during a meeting of a public body*." NRS 241.015(1)(a), (b), (c) (emphasis added). For purposes of NOMA, "meeting" also carries its own definition: "The gathering of members of a public body *at which a quorum is present*, whether in person or by means of electronic communication, to deliberate toward a decision or to take action on any matter over which the public body has supervision, control, jurisdiction or advisory power." NRS 241.015(3)(a)(1) (emphasis added). Neither the Commission's counsel nor its executive director is a member of the Commission, and its chair met only with them. The decision to appeal thus did not implicate NOMA, because there was no quorum of the Commission's members and, with no quorum, there was no meeting at which an action was taken.

The decision in *Dewey v. Redevelopment Agency of Reno*, 119 Nev. 87, 64 P.3d 1070 (2003) (en banc), is on point. *Dewey* held that NOMA did not apply to a meeting between less than a quorum of a public body and staff. *Id.* at 88-89, 64 P.3d at 1071. As *Dewey* recognizes, by limiting NOMA to "meetings," and defining "meeting" to require a "quorum," the Nevada Legislature joined "a majority

of states in adopting a quorum standard as the test for applying the Open Meeting Law to gatherings of the members of public bodies." *Id.* at 95, 64 P.3d at 1075. Under the quorum standard, "a quorum is necessary to apply the Open Meeting Law to a given situation." *Id.*; *see* Patricia E. Salkin, 1 *American Law of Zoning* § 3A:6 (5th ed. 2016) (noting that "most states require a quorum to be present for Open Meetings Laws to apply to a meeting") (citing *Dewey* and collecting cases). Absent a showing that less than a quorum of members has met serially with the "specific intent" of evading NOMA by avoiding a quorum, *see* NRS 241.015(3)(a)(2)[1]—nothing suggests that here—NOMA "only prohibits collective [private] deliberations or actions where a quorum is present." *Dewey*, 119 Nev. at 95, 64 P.3d at 1075.

A quorum of the Commission did not meet and decide to file the notice of appeal; the decision was made by the Commission's counsel and the executives to whom she answers. The Commission's chair, who participated in the decision, was the only Commission member involved, and a single member of an eight-member body does not constitute a quorum. Under *Dewey*, without a quorum, NOMA and its invalidating statutes, NRS 241.036 and NRS 241.0365(5), do not apply.[2] *See City of San Antonio v. Aguilar*, 670 S.W.2d 681, 686 (Tex. App. 1984) (rejecting open meeting law challenge to notice of appeal filed by city attorney after consultation with city manager: "The Open Meetings Act does not apply where definitionally there was no 'meeting'"); *State Bank of Burleigh Cty. Tr. Co. v. City of Bismarck*, 316 N.W.2d 85, 88-89 (N.D. 1982) (rejecting open meeting law challenge to notice of appeal because a public meeting was not required to authorize its filing) (distinguishing *State ex rel. Hjelle v. Bakke*, 117 N.W.2d 689, 696 (N.D. 1962), a case cited by the majority, as limited to its unique facts); *see also Mohr v. Murphy Elementary Sch. Dist. 21 of Maricopa Cty.*, 2010 WL 1842262 *2 (D. Ariz. 2010) (the "complaint fails to state a violation of the open meeting law . . . because it contains no allegation that legal action was taken outside of a public meeting by a *quorum* of Board members") (citing *Dewey*, 119 Nev. 87, 64 P.3d 1070), *aff'd mem.*, 449 Fed. App'x 650 (9th Cir. 2011).

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[1]NRS 241.015(3)(a)(2) was not considered in *Dewey* because it did not become a part of NOMA until 2001. 2001 Nev. Stat., ch. 378, at 1836.

[2]Even if NOMA applied, the Assemblymen's remedy would lie in the district court action they filed after the Commission filed its notice of appeal, not in a motion to this court to dismiss the Commission's appeal. *See* NRS 241.037(2) ("Any person denied a right conferred by this chapter may sue in the district court of the district in which the public body ordinarily holds its meetings . . . to have an action taken by the public body declared void."). It is not clear to me the second suit is timely, given the stipulated stay of Commission proceedings in district court, which specifically contemplates an appeal and was filed more than 60 days before the Assemblymen filed their second suit. *See* NRS 241.037(3)(b).

The majority relies on *Johnson v. Tempe Elementary School District No. 3 Governing Board*, 20 P.3d 1148, 1151 (Ariz. Ct. App. 2000), but their reliance is misplaced. In *Johnson*, a majority of the members of the public body met privately to authorize an appeal when, by the terms of Arizona's open meeting law, the meeting needed to be open, which invalidated the vote to authorize the appeal. Had there not been a "meeting" at all—the situation here—the open meeting statute would not have applied. *See Boyd v. Mary E. Dill Sch. Dist. No. 51*, 631 P.2d 577, 579-80 (Ariz. Ct. App. 1981) (affirming dismissal of open meeting law claim where the alleged legal action was taken by less than a quorum of the board), *cited in Mohr*, 2010 WL 1842262 at *2.

B.

This leaves the argument, raised by the Assemblymen for the first time in reply, *but see Phillips v. Mercer*, 94 Nev. 279, 283, 579 P.2d 174, 176 (1978) (court will not consider an issue first raised in reply), that only the governing board of a public body can authorize an appeal, not the entity's chair, its executive director, or its in-house lawyer.

The decision to appeal is important enough that, if the client and lawyer cannot agree, the client's decision controls. *See* Restatement (Third) of the Law Governing Lawyers § 22 (Am. Law Inst. 2000), *cited in* majority op., *supra*, p. 306. But that does not translate into a rule that only a client entity's governing board can authorize an appeal, as the majority suggests the Restatement supports. *See id.* § 96 cmt. d ("Who within an organization or among related organizations is authorized to direct the activities of a lawyer representing an organization is a question of organizational law beyond the scope of this Restatement."). Surely a lawyer who has represented an entity client in district court can accept the client representative's instruction to file a notice of appeal without demanding advance approval from the entity's board of directors. *See Cty. Council v. Dutcher*, 780 A.2d 1137, 1145 (Md. 2001) (reversing order dismissing appeal as unauthorized and noting that "[i]n a governmental attorney-client relationship . . . it is not uncommon to find an established policy giving the government attorney standing instructions and authority to take all actions necessary to protect the government client's appellate interests until such time as the client may adequately consider the matter").

A lawyer representing a client before a tribunal is presumed to have actual authority to do so. *See* Restatement (Third) of the Law Governing Lawyers § 25 (Am. Law Inst. 2000). The corollaries to this rule are that an "appellate court, upon its own motion or even that of opposing counsel, will not inquire ordinarily into the authority of the attorney to file the appeal," *Dutcher*, 780 A.2d at 1143, and that, to prevail in such an intrusive challenge, the protester "bears

the burden of persuading the tribunal that a lawyer's appearance was without actual authority." Restatement (Third) of the Law Governing Lawyers § 25 cmt. c. Here, the Assemblymen's NOMA-based motion to dismiss fails to meet that burden. The record, such as it is, reveals that the Commission's dedicated counsel, with the approval of its executive director, stipulated to stay the Commission proceedings until the Assemblymen's petition for judicial review, including any appeals therefrom, ran its course. *See* note 2, *supra*. From this and the other evidence of record nothing suggests the Commission's counsel lacked actual authority to file the notice of appeal, proof of which would be required for the Assemblymen's challenge to carry. *See City of Bismarck*, 316 N.W.2d at 88 ("In the absence of a showing that the governing body intends otherwise, we see no reason to limit the authority of the city attorney to the conduct of law business at the trial level only."); *Hopkins Cty. Bd. of Educ. v. Hopkins Cty.*, 242 S.W.2d 742, 743 (Ky. App. 1951) (because "[t]he authority given appellants' attorneys to prosecute this lawsuit would ordinarily include carrying it through to a final determination [on appeal], it was not necessary that special authority, by resolution or otherwise, need have been given appellants' attorneys to prosecute this appeal"); *City of San Antonio*, 670 S.W.2d at 685 ("Since the appellees do not present any evidence to rebut the presumption of authority in this case, we find that the city attorney had authority to pursue this appeal.").

C.

But even accepting, arguendo, that the Commission's chair, executive director, and in-house counsel did not have authority to appeal on their own, without approval of the Commission itself, the motion to dismiss still should be denied, because the Commission properly ratified the appeal in an open meeting convened for that purpose.

"A lawyer's act is considered to be that of a client in proceedings before a tribunal . . . when . . . the client ratifies the act." Restatement (Third) of the Law Governing Lawyers § 26. Here, the Commission unanimously ratified the decision to take this appeal, albeit after the 30-day time for appeal expired. If NOMA applied, the notice of appeal would be ineffective because such ratification would only have prospective effect. *See* NRS 241.0365(5). But, as has been shown, NOMA did not apply to the decision to file the notice of appeal because there was no quorum and no meeting. *See supra* § II.A. Normal ratification principles therefore control, under which a client can ratify an appeal after the time for appeal has passed, so long as the lawyer timely filed the imperfectly authorized notice of appeal. *Linn Cty. v. Kindred*, 373 N.W.2d 147, 149 (Iowa Ct. App. 1985), *noted in* Restatement (Third) of the Law Governing Lawyers, *supra*, § 26 cmt. e; *see Dutcher*, 780 A.2d at 1145 ("The

District Council's subsequent ratification of this appeal . . . , four days after the expiration of the statutory 30 day appeal period, does not defeat the timeliness of the filed appeal."); *City of Tulsa v. Okla. State Pension & Ret. Bd.*, 674 P.2d 10, 13 (Okla. 1983) (reversing court of appeals order dismissing an appeal as unauthorized and untimely because the public entity did not ratify the notice of appeal the city attorney filed until the time for appeal had passed; even "[i]rregular and void acts may be ratified or confirmed at a subsequent meeting, provided it is a valid or legal meeting"). The Commission properly ratified the appeal; it should be allowed to proceed.

For these reasons, I respectfully dissent.