BEFORE THE COMMISSION OF APPRAISERS OF REAL ESTATE

STATE OF NEVADA

SHARATH CHANDRA, Administrator, REAL ESTATE DIVISION, DEPARTMENT OF BUSINESS AND INDUSTRY, STATE OF NEVADA, Petitioner, vs. THOMAS L. WITHERBY (License No. A.0001528-CR - CLOSED), Respondent.	Case No. 2020-492, AP21.045.S FILED JUN 20 2024 NEVADA COMMISSION OF APPRAISERS

PETITIONER'S MOTION TO DISMISS
RESPONDENT'S MOTION TO MODIFY REVOCATION ORDER

The REAL ESTATE DIVISION OF THE DEPARTMENT OF BUSINESS AND INDUSTRY OF THE STATE OF NEVADA ("Division"), by and through its attorneys of record, Aaron D. Ford, Attorney General, and Christal P. Keegan, Deputy Attorney General, brings this Motion to Dismiss Respondent's Motion to Modify Revocation Order as it lacks subject matter jurisdiction pursuant to NRS 233B.131(3).

DATED this 17th day of June 2024.

AARON D. FORD
Attorney General

By: epkeegan
CHRISTAL P. KEEGAN, ESQ.
Deputy Attorney General
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Attorney for Real Estate Division

I. BACKGROUND

To recall, the Nevada Commission of Appraisers of Real Estate ("Commission") have heard this matter three times now: at its October 3, 2023 Commission Meeting where it proceeded with a default when Witherby chose not to attend his hearing[1], at its January 16, 2024 Meeting when it denied his Petition for Rehearing[2], and at its April 23, 2024 Meeting when it rejected his Motion to Reconsider Revocation Order for lack of jurisdiction[3]. During which, the Respondent, Thomas L. Witherby ("Witherby"), took this case to the District Court and lost.[4] With the dismissal of his Petition for Judicial Review, the door to apply to the District Court to seek leave to present additional evidence to the Commission has effectively closed. Therefore, the Commission does not have jurisdiction to modify its Order pursuant to NRS 233B.131(3).

II. LEGAL ARGUMENT

The Nevada Administrative Procedures Act ("APA"), specifically NRS 233B.131 with regards to additional information, plainly requires an open judicial review case. Further, the Commission's consideration of additional evidence is subject to the reviewing court ordering such:

> **NRS 233B.131 Transmittal of record of proceedings to reviewing court by party and agency; shortening of or corrections or additions to record; additional evidence; modification of findings and decision by agency based on additional evidence.**
>
> 2. If, before submission to the court, an application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence and any rebuttal evidence be taken before the agency upon such conditions as the court determines.
>
> 3. After receipt of any additional evidence, the agency:
>
> (a) May modify its findings and decision; and
>
> (b) Shall file the evidence and any modifications, new findings or decisions with the reviewing court.

In *Garcia v. Scolari's Food & Drug,* 125 Nev. 48, 200 P.3d 514 (2009), the Supreme Court held for purposes of the APA section allowing the district court to order that additional evidence be taken before an agency if good reasons exist for failing to present it during administrative proceeding, "good

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[1] Exhibit A, Findings of Fact, Conclusions of Law, and Order, Filed October 10, 2023.
[2] Exhibit B, Order Denying Motion for Rehearing, Filed January 26, 2024.
[3] Exhibit C, Order Rejecting Respondent's Motion to Reconsider Revocation of Order, Filed April 30, 2024.
[4] Exhibit D, Order Denying Petition for Judicial Review, Filed April 11, 2024.

reasons" do not exist when a party's attorney deliberately decides not to present available evidence during the course of an administrative proceeding and that party then seeks remand.

In *Nevada Indus. Comm'n v. Horn,* 98 Nev. 469, 471, 653 P.2d 155, 156 (1982), it is contemplated that if the district court determines that additional evidence should be received, the district court should order that such evidence be presented to the appropriate administrative agency.

A. The Commission Lacks Subject Matter Jurisdiction to Modify its Order and Witherby's Motion Must be REJECTED.

Nothing in NRS 233B permits the filing or granting of a Motion for Modification after a district court has already denied the petition initially. The District Court has not ordered this allegedly additional evidence be taken before the Commission.[5]

Further, the alleged additional evidence is a publicly available deed in existence since April 28, 2020.[6] The deed is not material, and since, with reasonable diligence, it was readily available and discoverable during the course of the Commission proceedings, Witherby has failed to demonstrate any "good reasons" for his failure to present it prior to now.[7]

B. Witherby's Claimed "Harm" is Not Additional Evidence.

Witherby cannot claim his alleged harm as additional evidence because he was on effective notice of the resulting disciplinary actions: "**This is a formal proceeding that may result in fines and/or revocation, suspension, denial of renewal of or conditions being imposed upon you.**"[8] Further, Witherby continues to use his alleged harm to argue for modification of the Commission's Order, but not even the District Court could find that Witherby had demonstrated such harm to justify the Court to grant a Stay when it DENIED his Motion to Stay Enforcement of the Commission's Order.[9] The Commission's Order as affirmed by the District Court should not be disturbed in furtherance of protecting the appraisal industry and the public.

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[5] *Garcia v. Scolari's Food & Drug,* 125 Nev. 48, 200 P.3d 514 (2009) *and Nevada Indus. Comm'n v. Horn,* 98 Nev. 469, 471, 653 P.2d 155, 156 (1982).

[6] Motion to Modify Revocation Order, Filed June 11, 2024, Exhibit 6. Deed.

[7] *Garcia v. Scolari's Food & Drug,* 125 Nev. 48, 200 P.3d 514 (2009).

[8] Exhibit E, Notice of Complaint and Obligation to Respond, Filed May 19, 2023. *See also,* Complaint and Notice of Hearing, Filed May 19, 2023, P. 7, Discipline Authorized.

[9] Exhibit F, Order Denying Motion to Stay Enforcement of the Order, Filed March 25, 2024, p.2, lines 3-10.

C. Witherby's Motion is Frivolous.

Witherby's gamesmanship of the administrative procedures are clearly for improper purposes, to continue to cause unnecessary delay to the Commission's Order, and has needlessly increased the cost of litigation upon the Division and the State. It is unreasonable for Witherby, by and through his legal counsel, to commit such continued frivolity and baseless requests upon this Commission, when relief or appeal to the higher courts from the District Court's Final Order was available.[10]

III. CONCLUSION

Because NRS Chapter 233B provides no avenue or mechanism for the request sought, the Commission does not have the discretion to modify its Order under NRS 233B.131(3). For the reasons stated herein, the Commission should REJECT his request for modification. Thank you.

DATED this 20th day of June 2024.

STATE OF NEVADA
Department of Business and Industry
Real Estate Division

By: _____
CHARVEZ FOGER
Deputy Administrator
3300 West Sahara Avenue, Suite 350
Las Vegas, Nevada 89102

DATED this 17th day of June 2024.

AARON D. FORD
Attorney General

By: epkeegan
CHRISTAL P. KEEGAN, ESQ.
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Attorney for Real Estate Division

[10] **Nevada Rules of Appellate Procedure, Rule 4(a)(1)** stating in relevant part "…a notice of appeal must be filed after entry of a written judgment or order, and no later than 30 days after the date that written notice of entry of the judgment or order appealed from is served." *See also* **Nevada Rules of Civil Procedure Rule 11 (b) Representations to the Court.** Stating in relevant part: By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;"

EXHIBIT A

EXHIBIT A

BEFORE THE COMMISSION OF APPRAISERS OF REAL ESTATE

STATE OF NEVADA

SHARATH CHANDRA, Administrator,
REAL ESTATE DIVISION,
DEPARTMENT OF BUSINESS & INDUSTRY,
STATE OF NEVADA,

Petitioner,

vs.

THOMAS L. WITHERBY
(License No. A.0001528-CR),

Respondent.

Case No. 2020-492, AP20.045.S

FILED

OCT 10 2023

NEVADA COMMISSION OF APPRAISERS

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter came on for hearing before the Nevada Commission of Appraisers of Real Estate (the "Commission"), on Tuesday, October 3, 2023 (the "Hearing"). Thomas L. Witherby ("Respondent") did not appear in person, through counsel, or otherwise. Christal Park Keegan, Esq., Deputy Attorney General with the Nevada Attorney General's Office, appeared on behalf of Petitioner Sharath Chandra, Administrator of the Real Estate Division, Department of Business and Industry, State of Nevada (the "Division").

Mrs. Keegan advised the Commission that RESPONDENT was aware of his attendance at the hearing, and that his hearing was scheduled for the July 18-20, 2023 hearings, but the RESPONDENT requested a continuance, which the Commission granted. The Division sent the RESPONDENT Meeting Re-Notices no later than 30 days prior to the October 3-5, 2023 hearings. The RESPONDENT never filed an Answer as part of the record in the proceedings and did not ask for a second continuance.

Therefore, the Division proceeded with a default pursuant to NAC 645C.500(13). The Division's Commission Coordinator, Maria Gallo, testified regarding proper notice to the RESPONDENT. The Commission found appropriate service of the notice of the hearing, the complaint and notice thereof, the Notice of Documents with documents numbered 0001 – 0364 was made, and all other efforts taken to inform the RESPONDENT of the matter before the Commission.

. . .

Therefore, the Commission, having considered the evidence introduced by the Division and being fully advised, enters the following Findings of Fact, Conclusions of Law, and Order:

I. JURISDICTION

At all times relevant to this Complaint, the Respondent was a Certified Residential Appraiser licensed by the Division, and therefore, is subject to the Jurisdiction of the Division and the provisions of NRS and NAC Chapter 645C. By availing himself of the benefits and protections of the laws of the State of Nevada, the Respondent has submitted to the jurisdiction of the Division.

II. FINDINGS OF FACT

The matter having been submitted for decision based upon the allegations of the Complaint, the Commission now, based upon the evidence presented during the hearing, finds that there is substantial evidence in the record to establish each of the following:

1. The Respondent's Nevada Certified Residential Appraiser, License No. A.0001528-CR, has been in closed, expired status for over a year as of March 31, 2022.

2. The Respondent prepared an Appraisal Report for 3183 Mura Del Prato, Henderson, Nevada 89044 ("Property"). *0057 – 0103.*

3. The Respondent's Appraisal Report represented use of linear regression modules to support the adjustments made in the sales grid but admitted lack of understanding of how to properly complete a linear regression. *0067.*

4. Further, the Respondent's Appraisal Report and workfile do not contain statistical analysis to support the adjustments made in the sales grid. *0057 – 0329.*

5. The Complainant alleged the Respondent failed to support adjustments made for upgraded features. *0002.*

6. The Respondent's Appraisal Report and workfile failed to support the $25,000 adjustment made to Comparable Sale #2's upgraded features. *0059.*

7. The Complainant alleged homes built by Toll Brothers are premium but the Respondent failed to note such benefit for Comparables #s 1-3 built by Toll Brothers. *0002.*

. . .

. . .

8. The Respondent's Appraisal Report did not make adjustments for differing builders when data indicates a resale townhome built by Toll Brothers commands a higher premium. *0059, 0064, and 0343.*

9. The Complainant alleged the RESPONDENT misrepresented Comparables #s 1, 3, 4, 5, and 6 as end-units and made no adjustments or comments about the impact of this feature. *0002.*

10. The Property is an end-unit townhome but the Respondent's Appraisal Report contained only one end-unit comparable, Comparable #2, with no adjustments made to the other non-end-unit comparables. *0059 and 0064.*

11. The Respondent's Appraisal Report and workfile provided no evidence to support the opinion that seller concessions do not affect pricing, even if under 3% of the sales price. *0067, and 0057 – 0329.*

12. The Respondent's Appraisal Report failed to report and analyze a prior sale of the Property that occurred within the prior three years despite such information publicly recorded. *0350.*

13. The Respondent's Appraisal Report appraised for $300,000 which was less than what the Property sold for two years prior at $310,000. *0350, and 0063.*

III. CONCLUSIONS OF LAW

The Commission, based upon the preponderance of the evidence, makes the following legal conclusions:

The Respondent failed to prepare the appraisal report for the Property in Compliance with the Standards of the Appraisal Foundation and the law. The Standards are published in the Uniform Standards of Professional Appraisal Practice ("USPAP") adopted by the Appraisal Standards Board of the Appraisal Foundation, as authorized by Congress, and adopted in Nevada by NAC 645C.400(1)[1].

First Violation

The USPAP RECORD KEEPING RULE requires an appraiser must prepare a workfile for each appraisal or appraisal review assignment. A workfile must be in existence prior to the issuance of any report or other communication of assignment results. A written summary of an oral report must be added

[1] The 2020-2021 edition of USPAP, effective January 1, 2020 through December 31, 2021, is applicable to and utilized for this Complaint.

to the workfile within a reasonable time after the issuance of the oral report. The workfile must include all other data, information, and documentation necessary to support the appraiser's opinions and conclusions and to show compliance with USPAP, or references to the location(s) of such other data, information, and documentation.

The Respondent violated USPAP RECORD KEEPING RULE by failing to include statistical analysis to support the adjustments made in the sales grid within the Appraisal Report or workfile.

The Respondent's actions constitute unprofessional conduct pursuant to NRS 645C.470(2), as determined by NAC 645C.405(1) and grounds for disciplinary action pursuant to NRS 645C.460(1)(a) and/or (b).

Second Violation

USPAP Standards Rule 1-1(c) requires that an appraiser in developing a real property appraisal must (c) not render appraisal services in a careless or negligent manner, such as by making a series of errors that, although individually might not significantly affect the results of an appraisal, in the aggregate affects the credibility of those results.

Respondent violated Standards Rule 1-1(c) by failing to contain documentation to support the $25,000 adjustment for Comparable #2's upgraded features.

Respondent further violated Standards Rule 1-1(c) by failing to adjust for differing builders in the Appraisal Report when Comparables #s 1, 2, and 3 are Toll Brother built units, and Comparables #s 4, 5, and 6 are KB Homes built units.

Respondent also violated Standards Rule 1-1(c) by failing to use more than just one end-unit comparable, Comparable #2, and failing to make adjustments to the other non-end-unit comparables, Comparables #s 1, 3, 4, 5, and 6.

The Respondent's actions constitute unprofessional conduct pursuant to NRS 645C.470(2), as determined by NAC 645C.405(1) and (2) and grounds for disciplinary action pursuant to NRS 645C.460(1)(a) and/or (b).

Third Violation

USPAP Standards Rule 1-2(c) required an appraiser, in developing a real property appraisal, must (c) not render appraisal services in a careless or negligent manner, such as by making a series of errors

that, although individually might not significantly affect the results of an appraisal, in the aggregate affects the credibility of those results.

The Respondent violated Standards Rule 1-2(c) by failing to provide support for the opinion that seller concessions of 3% or less do not affect pricing and failing to update the boiler plate Definition of Value language stating "the seller pays these costs in virtually all sales transactions" which contradicted his opinion that there were seller concessions.

The Respondent's actions constitute unprofessional conduct pursuant to NRS 645C.470(2), as determined by NAC 645C.405(1) and (2) and grounds for disciplinary action pursuant to NRS 645C.460(1)(a) and/or (b).

Fourth Violation

USPAP Standards Rule 1-5(b) provides that when the value opinion to be developed is market value, an appraiser must, if such information is available to the appraiser in the normal course of business: (b) analyze all sales of the subject property that occurred within the three (3) years prior to the effective date of the appraisal.

Respondent violated Standards Rule 1-5(b) by failing to report or analyze the publicly recorded prior sale of the Property which occurred June 21, 2018, for $310,000, less than two (2) years prior to the effective date of the Appraisal Report.

The Respondent's actions constitute unprofessional conduct pursuant to NRS 645C.470(2), as determined by NAC 645C.405(1) and grounds for disciplinary action pursuant to NRS 645C.460(1)(a) and/or (b).

Fifth Violation

USPAP Standards Rule 2-1(a) requires each written or oral real property appraisal report must: (a) clearly and accurately set forth the appraisal in a manner that will not be misleading.

In violation of Standards Rule 2-1(a), Respondent failed to change his Definition of Value to match his opinion that there were seller concessions, even if under 3% of the sale price.

Respondent also violated Standards Rule 2-1(a) when he made a series of errors which in their aggregate can mislead the intended user, specifically, when Respondent failed to support the $25,000 adjustment for Comparable #2's upgraded features; failed to adjust for differing

builders; used only one end-unit comparable, Comparable #2, and failed to make adjustments to the other non-end-unit comparables.

The Respondent's actions constitute unprofessional conduct pursuant to NRS 645C.470(2), as determined by NAC 645C.405(1) and (2) and grounds for disciplinary action pursuant to NRS 645C.460(1)(a) and/or (b).

Sixth Violation

USPAP Standards Rule 2-2(a)(x) requires each written real property appraisal report must be prepared under one of the following options and prominently state which option is used: Appraisal Report or Restricted Appraisal Report. (a) The content of an Appraisal Report must be appropriate for the intended use of the appraisal and, at a minimum (x) provide sufficient information to indicate that the appraiser complied with the requirements of STANDARD 1 by: (1) summarizing the appraisal methods and techniques employed; (2) stating the reasons for excluding the sales comparison, cost, or income approach(es) if any have not been developed; (3) summarizing the results of analyzing the subject sales, agreements of sale, options, and listings in accordance with Standards Rule 1-5; [Comment: If such information is unobtainable, a statement on the efforts undertaken by the appraiser to obtain the information is required. If such information is irrelevant, a statement acknowledging the existence of the information and citing its lack of relevance is required.]; (4) stating the value opinion(s) and conclusion(s); and (5) summarizing the information analyzed and the reasoning that supports the analyses, opinions, and conclusions, including reconciliation of the data and approaches.

Respondent violated Standards Rule 2-2(a)(x) by failing to analyze the previous sale in the Appraisal Report.

The Respondent's actions constitute unprofessional conduct pursuant to NRS 645C.470(2), as determined by NAC 645C.405(1) and grounds for disciplinary action pursuant to NRS 645C.460(1)(a) and/or (b).

ORDER

The Commission, being fully apprised in the premises and good cause appearing, hereby ORDERS:

1. Respondent's license (License No. A.0001528-CR) is revoked;

2. Respondent shall pay to the Division a fine of $10,000 per violation for committing the above-stated six (6) violations of law for a total administrative fine of $60,000;

3. Respondent shall pay the costs of the investigation and the hearing in the amount of $3,897.22 which is actual, reasonable, and necessary;

4. The total amount the Respondent shall pay is $63,897.22 and shall be paid in full within 180 days of this Order;

5. If the payment is not actually received by the Division on or before its due date, it shall be construed as an event of default by Respondent. In the event of default, the unpaid balance of the costs and fees, together with any attorney's fees and costs that may have been assessed, shall be due in full to the Division within ten (10) calendar days of the date of default. The Division may institute debt collection proceedings for failure to timely pay the total fine; and

6. The Commission retains jurisdiction for correcting any errors that may have occurred in the drafting and issuance of this document.

DATED this 10th day of October, 2023.

NEVADA REAL ESTATE COMMISSION

By: _____
President, John Wright
Nevada Real Estate Commission

DATED this 4th day of October, 2023.

AARON D. FORD
Attorney General

By: cpkeegan
CHRISTAL P. KEEGAN (Bar No. 12725)
Deputy Attorney General
5420 Kietzke Lane, Suite 202
Reno, Nevada 89511
(775) 687-2141
Attorney for Real Estate Division

EXHIBIT B

EXHIBIT B

BEFORE THE COMMISSION OF APPRAISERS OF REAL ESTATE

STATE OF NEVADA

SHARATH CHANDRA, Administrator, REAL ESTATE DIVISION, DEPARTMENT OF BUSINESS AND INDUSTRY, STATE OF NEVADA,

Petitioner,

vs.

THOMAS L. WITHERBY (License No. A.0001528-CR),

Respondent.

Case No. 2020-492, AP21.045.S

FILED

JAN 26 2024

NEVADA COMMISSION OF APPRAISERS

ORDER DENYING MOTION FOR REHEARING

On December 21, 2023, Respondent Thomas L. Witherby filed his Petition for Rehearing. On December 29, 2023, the Petitioner Sharath Chandra, Administrator of the Real Estate Division, Department of Business and Industry of the State of Nevada ("Division") filed its Motion to Dismiss Respondent's Petition for Rehearing. On January 10, 2024, Respondent filed his Opposition to Petitioner's Motion to Dismiss Respondent's Petition for Rehearing.

The matter came before the Nevada Commission of Appraisers of Real Estate ("Commission") for hearing on Tuesday, January 16, 2024. Respondent appeared and was represented by counsel Leslie Miller (Bar No. 7897). Deputy Attorney General, Christal P. Keegan, appeared on behalf of the Division.

The matter having been submitted for decision based on the Commission's consideration of the oral arguments presented during the hearing and the filed documents, the Commission now enters its Order.

ORDER

IT IS HEREBY ORDERED that Respondent's Petition Request for Rehearing is DENIED pursuant to NAC 645C.505 because the Respondent's Petition failed to demonstrate any causes or grounds for a rehearing.

IT IS FURTHER ORDERED that the Commission's Findings of Fact, Conclusions of Law, and Orders filed on October 10, 2023 in Case No. 2020-492, AP21.045.S is AFFIRMED.

DATED this 26th day of January 2024.

NEVADA COMMISSION OF
APPRAISERS OF REAL ESTATE

By: _____
President, John Wright
Nevada Commission of Appraisers of Real Estate

EXHIBIT C

EXHIBIT C

BEFORE THE COMMISSION OF APPRAISERS OF REAL ESTATE

STATE OF NEVADA

SHARATH CHANDRA, Administrator, REAL ESTATE DIVISION, DEPARTMENT OF BUSINESS AND INDUSTRY, STATE OF NEVADA,

Petitioner,

vs.

THOMAS L. WITHERBY (License No. A.0001528-CR),

Respondent.

Case No. 2020-492, AP20.045.S

FILED

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NEVADA COMMISSION OF APPRAISERS

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ORDER REJECTING RESPONDENT'S MOTION TO RECONSIDER REVOCATION ORDER

This matter came on for hearing before the Nevada Commission of Appraisers of Real Estate (the "Commission"), on Tuesday, April 23, 2024 (the "Hearing"). Thomas L. Witherby ("Respondent") appeared and was represented by counsel Ellsie Lucero. Christal Park Keegan, Esq., Deputy Attorney General with the Nevada Attorney General's Office, appeared on behalf of Petitioner Sharath Chandra, Administrator of the Real Estate Division, Department of Business and Industry, State of Nevada (the "Division").

The matter having been submitted for decision based on the Commission's consideration of the oral arguments presented during the hearing, consultation from Commission Counsel, and the filed documents, the Commission now enters its Order.

ORDER

IT IS HEREBY ORDERED that Respondent's Motion for Reconsideration of Revocation Order is REJECTED as it lacks jurisdiction at this time.

DATED this 30th day of April 2024.

NEVADA COMMISSION OF APPRAISERS OF REAL ESTATE

By: _____

President, John Wright
Nevada Commission of Appraisers of Real Estate

EXHIBIT D

EXHIBIT D

ELECTRONICALLY SERVED
4/11/2024 10:28 AM

CLERK OF THE COURT

ORDR

AARON D. FORD
Attorney General
CHRISTAL P. KEEGAN (Bar No. 12725)
Deputy Attorney General
State of Nevada Office of the Attorney General
5420 Kietzke Lane, #202
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(775) 687-2141 (phone)
(775) 688-1822 (fax)
ckeegan@ag.nv.gov

Attorneys for Respondents

DISTRICT COURT

CLARK COUNTY, NEVADA

THOMAS L. WITHERBY,

Petitioner,

vs.

REAL ESTATE DIVISION, DEPARTMENT OF BUSINESS AND INDUSTRY, STATE OF NEVADA and SHARATH CHANDRA in his capacity as Administrator of the REAL ESTATE DIVISION; NEVADA COMMISSION OF APPRAISERS OF REAL ESTATE and JOHN WRIGHT in his capacity as President of the COMMISSION OF APPRAISERS OF REAL ESTATE,

Respondents.

Case No.: A-24-887290-J

Dept. No.: 2

ORDER DENYING PETITION FOR JUDICIAL REVIEW

Respondents Real Estate Division, Department of Business and Industry and Sharath Chandra's, as Administrator of the Division, (collectively "Division") motion to dismiss petitioner Thomas L. Witherby's petition for judicial review, and petitioner's ex parte motion to reconsider this Court's order denying motion to stay came for hearing on April 3, 2024. At the same time, the Court advanced its decision on the merits of petitioner's petition for judicial review. Ellsie Lucero, of the law firm Kaempfer Crowell,

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Case Number: A-24-887290-J

appeared on behalf of petitioner, and Christal P. Keegan, Deputy Attorney General, appeared on behalf of the Division.

Upon review and consideration of the arguments, pleadings, and papers on file, and for good cause appearing:

I.

FINDINGS

1. Pursuant to NRS 233B.135(1)(b), this Court's review is confined to the record, with great deference given to the agency.

2. Witherby had proper notice of the disciplinary proceeding against him before the Nevada Commission of Appraisers of Real Estate ("Commission") but failed to appear such that the Commission entered an order against him by default.

3. The Commission then heard Petitioner's Petition Request for Rehearing at its January 16, 2024 Meeting, and having reviewed the matter twice, Witherby's rights were not substantially prejudiced.

4. Pursuant to NRS 233B.135(3), the record demonstrates substantial evidence to support the Commission's Order such that this Court will not disturb it.

5. The Court denies Petitioner's Petition for Judicial Review, and as such, his Motion to Reconsider Order Denying Petitioner's Motion to Stay Enforcement of Order is moot.

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II.

ORDER

IT IS THEREFORE ORDERED that the Petitioner's application for Judicial Review is hereby denied, and the Commission's Order dated October 10, 2023, shall remain in full force and effect.

Dated this 11th day of April, 2024

DISTRICT COURT JUDGE

210 88C D4DA B04F
Carli Kierny
District Court Judge

Submitted by:

AARON D. FORD
Attorney General

By: ckeegan
CHRISTAL P. KEEGAN
Deputy Attorney General
Nevada Bar No. 12725
Office of the Attorney General
5420 Kietzke Lane, #202
Reno, Nevada 89511
ckeegan@ag.nv.gov
Attorneys for Respondents

Approved by:

KAEMPFER CROWELL

By: */s/ Ellsie Lucero*
Ellsie Lucero, Esq.
Nevada Bar No. 15272
1980 Festival Plaza, Suite 650
Las Vegas, Nevada 89135
elucero@kcnvlaw.com
Attorneys for Petitioner

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Thomas Witherby, Petitioner(s) vs. Real Estate Division, Department of Business and Industry, State of Nevada, Respondent(s)	CASE NO: A-24-887290-J DEPT. NO. Department 2

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order Denying was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 4/11/2024

Lesley Miller	lmiller@kcnvlaw.com
Tera Carlstrom	tcarlstrom@kcnvlaw.com
Ellsie Lucero	elucero@kcnvlaw.com
Desiree Endres	dendres@kcnvlaw.com
Kimberly Rupe	krupe@kcnvlaw.com
Christal Keegan	ckeegan@ag.nv.gov

EXHIBIT E

EXHIBIT E

BEFORE THE COMMISSION OF APPRAISERS OF REAL ESTATE

STATE OF NEVADA

SHARATH CHANDRA, Administrator, REAL ESTATE DIVISION, DEPARTMENT OF BUSINESS AND INDUSTRY, STATE OF NEVADA,

Petitioner,

vs.

THOMAS L. WITHERBY (License No. A.0001528-CR),

Respondent.

Case No. 2020-492, AP21.045.S

FILED

MAY 19 2023

NEVADA COMMISSION OF APPRAISERS

COMPLAINT AND NOTICE OF HEARING

State of Nevada, Department of Business and Industry, Real Estate Division ("the Division"), by and through counsel, Attorney General AARON D. FORD and Deputy Attorney General Christal Park Keegan, hereby notifies THOMAS L. WITHERBY ("Respondent") of an administrative complaint and hearing which is to be held pursuant to Chapter 233B and Chapter 645C of the Nevada Revised Statutes ("NRS") and Chapter 645C of the Nevada Administrative Code ("NAC"). The purpose of the hearing is to consider the allegations stated below and to determine if the Respondent should be subject to a disciplinary penalty as set forth in NRS 645C and or NAC 645C, if the stated allegations are proven at the hearing by the evidence presented.

JURISDICTION

At all times relevant to this Complaint, the Respondent was a Certified Residential Appraiser licensed by the Division, and therefore, is subject to the Jurisdiction of the Division and the provisions of NRS and NAC Chapter 645C. By availing himself of the benefits and protections of the laws of the State of Nevada, the Respondent has submitted to the jurisdiction of the Division.

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PROCEDURAL HISTORY

1. The Division received a complaint alleging that the Respondent's Appraisal Report contained inaccuracies and omissions that negatively impacted the value of the Property. *0002 - 0056.*

2. The Division commissioned a Standard 3 Review of the underlying appraisal performed by the Respondent. *0335 - 0354.*

3. The Respondent requested his case to be heard by the Appraisal Advisory Review Committee ("AARC"). *0363.*

4. The Respondent did not appear at the May 24, 2022, AARC meeting, therefore, the Division determined that this matter should be heard by the Nevada Commission of Appraisers of Real Estate ("Commission"), now comes herewith. *0363.*

FACTUAL ALLEGATIONS

1. The Respondent's Nevada Certified Residential Appraiser, License No. A.0001528-CR, has been in closed, expired status for over a year as of March 31, 2022.

2. The Respondent prepared an Appraisal Report for 3183 Mura Del Prato, Henderson, Nevada 89044 ("Property"). *0057 – 0103.*

3. The Respondent's Appraisal Report represented use of linear regression modules to support the adjustments made in the sales grid but admitted lack of understanding of how to properly complete a linear regression. *0067.*

4. Further, the Respondent's Appraisal Report and workfile do not contain statistical analysis to support the adjustments made in the sales grid. *0057 – 0329.*

5. The Complainant alleged the Respondent failed to support adjustments made for upgraded features. *0002.*

6. The Respondent's Appraisal Report and workfile failed to support the $25,000 adjustment made to Comparable Sale #2's upgraded features. *0059.*

7. The Complainant alleged homes built by Toll Brothers are premium but the Respondent failed to note such benefit for Comparables #s 1-3 built by Toll Brothers. *0002.*

8. The Respondent's Appraisal Report did not make adjustments for differing builders when data indicates a resale townhome built by Toll Brothers commands a higher premium. *0059, 0064, and 0343.*

9. The Complainant alleged the RESPONDENT misrepresented Comparables #s 1, 3, 4, 5, and 6 as end-units and made no adjustments or comments about the impact of this feature. *0002.*

10. The Property is an end-unit townhome but the Respondent's Appraisal Report contained only one end-unit comparable, Comparable #2, with no adjustments made to the other non-end-unit comparables. *0059 and 0064.*

11. The Respondent's Appraisal Report and workfile provided no evidence to support the opinion that seller concessions do not affect pricing, even if under 3% of the sales price. *0067, and 0057 – 0329.*

12. The Respondent's Appraisal Report failed to report and analyze a prior sale of the Property that occurred within the prior three years despite such information publicly recorded. *0350.*

13. The Respondent's Appraisal Report appraised for $300,000 which was less than what the Property sold for two years prior at $310,000. *0350, and 0063.*

VIOLATIONS OF LAW

The Respondent failed to prepare the appraisal report for the Property in Compliance with the Standards of the Appraisal Foundation and the law. The Standards are published in the Uniform Standards of Professional Appraisal Practice ("USPAP") adopted by the Appraisal Standards Board of the Appraisal Foundation, as authorized by Congress, and adopted in Nevada by NAC 645C.400(1).

First Violation

The USPAP RECORD KEEPING RULE requires an appraiser must prepare a workfile for each appraisal or appraisal review assignment. A workfile must be in existence prior to the issuance of any report or other communication of assignment results. A written summary of an oral report must be added to the workfile within a

reasonable time after the issuance of the oral report. The workfile must include all other data, information, and documentation necessary to support the appraiser's opinions and conclusions and to show compliance with USPAP, or references to the location(s) of such other data, information, and documentation.

The Respondent violated USPAP RECORD KEEPING RULE by failing to include statistical analysis to support the adjustments made in the sales grid within the Appraisal Report or workfile.

The Respondent's actions constitute unprofessional conduct pursuant to NRS 645C.470(2), as determined by NAC 645C.405(1) and grounds for disciplinary action pursuant to NRS 645C.460(1)(a) and/or (b).

Second Violation

USPAP Standards Rule 1-1(c) requires that an appraiser in developing a real property appraisal must (c) not render appraisal services in a careless or negligent manner, such as by making a series of errors that, although individually might not significantly affect the results of an appraisal, in the aggregate affects the credibility of those results.

Respondent violated Standards Rule 1-1(c) by failing to contain documentation to support the $25,000 adjustment for Comparable #2's upgraded features.

Respondent further violated Standards Rule 1-1(c) by failing to adjust for differing builders in the Appraisal Report when Comparables #s 1, 2, and 3 are Toll Brother built units, and Comparables #s 4, 5, and 6 are KB Homes built units.

Respondent also violated Standards Rule 1-1(c) by failing to use more than just one end-unit comparable, Comparable #2, and failing to make adjustments to the other non-end-unit comparables, Comparables #s 1, 3, 4, 5, and 6.

The Respondent's actions constitute unprofessional conduct pursuant to NRS 645C.470(2), as determined by NAC 645C.405(1) and (2) and grounds for disciplinary action pursuant to NRS 645C.460(1)(a) and/or (b).

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Third Violation

USPAP Standards Rule 1-2(c) required an appraiser, in developing a real property appraisal, must (c) not render appraisal services in a careless or negligent manner, such as by making a series of errors that, although individually might not significantly affect the results of an appraisal, in the aggregate affects the credibility of those results.

The Respondent violated Standards Rule 1-2(c) by failing to provide support for the opinion that seller concessions of 3% or less do not affect pricing and failing to update the boiler plate Definition of Value language stating "the seller pays these costs in virtually all sales transactions" which contradicted his opinion that there were seller concessions.

The Respondent's actions constitute unprofessional conduct pursuant to NRS 645C.470(2), as determined by NAC 645C.405(1) and (2) and grounds for disciplinary action pursuant to NRS 645C.460(1)(a) and/or (b).

Fourth Violation

USPAP Standards Rule 1-5(b) provides that when the value opinion to be developed is market value, an appraiser must, if such information is available to the appraiser in the normal course of business: (b) analyze all sales of the subject property that occurred within the three (3) years prior to the effective date of the appraisal.

Respondent violated Standards Rule 1-5(b) by failing to report or analyze the publicly recorded prior sale of the Property which occurred June 21, 2018, for $310,000, less than two (2) years prior to the effective date of the Appraisal Report.

The Respondent's actions constitute unprofessional conduct pursuant to NRS 645C.470(2), as determined by NAC 645C.405(1) and grounds for disciplinary action pursuant to NRS 645C.460(1)(a) and/or (b).

Fifth Violation

USPAP Standards Rule 2-1(a) requires each written or oral real property appraisal report must: (a) clearly and accurately set forth the appraisal in a manner that will not be misleading.

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In violation of Standards Rule 2-1(a), Respondent failed to change his Definition of Value to match his opinion that there were seller concessions, even if under 3% of the sale price.

Respondent also violated Standards Rule 2-1(a) when he made a series of errors which in their aggregate can mislead the intended user, specifically, when Respondent failed to support the $25,000 adjustment for Comparable #2's upgraded features; failed to adjust for differing builders; used only one end-unit comparable, Comparable #2, and failed to make adjustments to the other non-end-unit comparables.

The Respondent's actions constitute unprofessional conduct pursuant to NRS 645C.470(2), as determined by NAC 645C.405(1) and (2) and grounds for disciplinary action pursuant to NRS 645C.460(1)(a) and/or (b).

Sixth Violation

USPAP Standards Rule 2-2(a)(x) requires each written real property appraisal report must be prepared under one of the following options and prominently state which option is used: Appraisal Report or Restricted Appraisal Report. (a) The content of an Appraisal Report must be appropriate for the intended use of the appraisal and, at a minimum (x) provide sufficient information to indicate that the appraiser complied with the requirements of STANDARD 1 by: (1) summarizing the appraisal methods and techniques employed; (2) stating the reasons for excluding the sales comparison, cost, or income approach(es) if any have not been developed; (3) summarizing the results of analyzing the subject sales, agreements of sale, options, and listings in accordance with Standards Rule 1-5; [Comment: If such information is unobtainable, a statement on the efforts undertaken by the appraiser to obtain the information is required. If such information is irrelevant, a statement acknowledging the existence of the information and citing its lack of relevance is required.]; (4) stating the value opinion(s) and conclusion(s); and (5) summarizing the information analyzed and the reasoning that supports the analyses, opinions, and conclusions, including reconciliation of the data and approaches.

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Respondent violated Standards Rule 2-2(a)(x) by failing to analyze the previous sale in the Appraisal Report.

The Respondent's actions constitute unprofessional conduct pursuant to NRS 645C.470(2), as determined by NAC 645C.405(1) and grounds for disciplinary action pursuant to NRS 645C.460(1)(a) and/or (b).

DISCIPLINE AUTHORIZED

1. Pursuant to NRS 645C.460(2), if grounds for disciplinary action against an appraiser are found to exist for unprofessional conduct, the Commission may revoke or suspend the certificate, place conditions upon the certificate, deny the renewal of his or her certificate, and/or impose a fine up to $10,000.00 per violation.

2. Additionally, under NRS 622.400, the Commission is authorized to impose the costs of the proceeding upon the Respondent, including investigative costs and attorney's fees, if the Commission otherwise imposes discipline on the Respondent.

3. Therefore, the Division requests the Commission to impose such discipline as it determines is appropriate under the circumstances and to award the Division its costs and attorney's fees for this proceeding.

PLEASE TAKE NOTICE that a disciplinary hearing has been set to consider this Administrative Complaint against the above-named Respondent in accordance with Chapter 233B and Chapter 645C of the Nevada Revised Statutes and Chapter 645C of the Nevada Administrative Code.

THE HEARING WILL TAKE PLACE at the Commission meeting scheduled for July 18- 20, 2023, beginning at approximately 9:00 a.m. each day, or until such time as the Commission concludes its business. The Commission meeting will be held at the Nevada State Business Center, 3300 W. Sahara Avenue, Nevada Room 4th Floor, Las Vegas, Nevada 89102, with video conference to: Department of Business & Industry 1818 E. College Parkway Suite 103, Carson City, Nevada 89076.

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STACKED CALENDAR: Your hearing is one of several hearings that may be scheduled at the same time as part of a regular meeting of the Commission that is expected to take place on July 18-20, 2023. Thus, your hearing may be continued until later in the day or from day to day. It is your responsibility to be present when your case is called. If you are not present when your case is called, a default may be entered against you, and the Commission may decide the case as if all allegations in the complaint were true. If you need to negotiate a more specific time for your hearing in advance, because of coordination with out-of-state witnesses or the like, please call Maria Gallo, Commission Coordinator, at (702) 486-4074.

YOUR RIGHTS AT THE HEARING: Except as mentioned below, the hearing is an open meeting under Nevada's open meeting Law (OML) and may be attended by the public. After the evidence and arguments, the Commission may conduct a closed meeting to discuss your alleged misconduct or professional competence. You are entitled to a copy of the transcript of the open and closed portions of the meeting, although you must pay for the transcription.

As the Respondent, you are specifically informed that you have the right to appear and be heard in your defense, either personally or through your counsel of choice. At the hearing, the Division has the burden of proving the allegations in the complaint and will call witnesses and present evidence against you. You have the right to respond and to present relevant evidence and argument on all issues involved. You have the right to call and examine witnesses, introduce exhibits, and cross-examine opposing witnesses on any matter relevant to the issues involved.

You have the right to request that the Commission issue subpoenas to compel witnesses to testify and/or evidence to be offered on your behalf. In making this request, you may be required to demonstrate the relevance of the witnesses' testimony and/or

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evidence. Other important rights you have are listed in NRS Chapter 645C, NRS Chapter 233B, and NAC Chapter 645C.

DATED the 18 day of May, 2023.

NEVADA REAL ESTATE DIVISION

By: _____
SHARATH CHANDRA, Administrator
3300 W. Sahara Avenue, Suite 350
Las Vegas, Nevada 89102
Telephone: (702) 486-4033

DATED the 18th day of May, 2023.

AARON D. FORD
Attorney General

By: _____
CHRISTAL PARK KEEGAN, ESQ.
Deputy Attorney General
Bar No. 12725
5420 Kietzke Lane #202
Reno, Nevada 89511
Telephone: (775) 687-2141
Email: ckeegan@ag.nv.gov
Attorney for Real Estate Division

BEFORE THE COMMISSION OF APPRAISERS OF REAL ESTATE

STATE OF NEVADA

SHARATH CHANDRA, Administrator, REAL ESTATE DIVISION, DEPARTMENT OF BUSINESS AND INDUSTRY, STATE OF NEVADA,

Petitioner,

vs.

THOMAS L. WITHERBY (License No. A.0001528-CR),

Respondent.

Case No. 2020-492, AP21.045.S

FILED

MAY 19 2023

NEVADA COMMISSION OF APPRAISERS

mgallo

NOTICE OF COMPLAINT AND OBLIGATION TO RESPOND

TO: THOMAS L. WITHERBY
5921 N. LAMP POST DR.
BEVERLY HILLS, FL 34465

VIA CERTIFIED MAIL.

PLEASE TAKE NOTICE THAT A COMPLAINT HAS BEEN FILED AGAINST YOU before the Real Estate Commission ("Commission") by the Real Estate Division of the Department of Business and Industry, State of Nevada ("the Division"). **This is a formal proceeding that may result in fines and/or revocation, suspension, denial of renewal of or conditions being imposed upon you.** Served with this Notice is a copy of the Complaint and Notice of Hearing and a Notice of Documents providing copies of all non-privileged communications, reports, affidavits or depositions in the possession of the Division which may be relevant to the complaint and which may be used as evidence against you.

YOU MUST ANSWER THE COMPLAINT within thirty (30) days after it was served on you (**if sent to you by mail, the time period starts from the date of mailing**). Your Answer must contain an admission or denial of each allegation in the

Complaint and any defenses upon which you will rely, **and must be filed with the Real Estate Division as follows**:

MARIA GALLO
Commission Coordinator
Nevada Real Estate Division
3300 W. Sahara Avenue, Suite 350
Las Vegas, Nevada 89102

A copy also must be sent to:
CHRISTAL PARK KEEGAN, ESQ.
Deputy Attorney General
5420 Kietzke Lane, Suite 202
Reno, Nevada 89511
Email: ckeegan@ag.nv.gov

If you do not answer on time, the Division may ask the Commission to enter its decision against you and decide the case based solely on the Complaint.

Other important rights you have are listed in Nevada Revised Statutes Chapters 645 and 233B and the Nevada Administrative Code Chapter 645.

DATED this 18th day of May, 2023.

AARON D. FORD
Attorney General

By: epkeegan
CHRISTAL PARK KEEGAN, ESQ.
Deputy Attorney General
Bar No. 12725
5420 Kietzke Lane, Suite 202
Reno, Nevada 89511
Telephone: (775) 687-2141
Email: ckeegan@ag.nv.gov
Attorney for Real Estate Division

EXHIBIT F

EXHIBIT F

ELECTRONICALLY SERVED
3/25/2024 9:24 AM

CLERK OF THE COURT

ORDR
AARON D. FORD
Attorney General
CHRISTAL P. KEEGAN (Bar No. 12725)
Deputy Attorney General
State of Nevada Office of the Attorney General
5420 Kietzke Lane, #202
Reno, Nevada 89511
(775) 687-2141 (phone)
(775) 688-1822 (fax)
ckeegan@ag.nv.gov

Attorneys for Respondents

DISTRICT COURT

CLARK COUNTY, NEVADA

THOMAS L. WITHERBY,

Petitioner,

vs.

REAL ESTATE DIVISION, DEPARTMENT OF BUSINESS AND INDUSTRY, STATE OF NEVADA and SHARATH CHANDRA in his capacity as Administrator of the REAL ESTATE DIVISION; NEVADA COMMISSION OF APPRAISERS OF REAL ESTATE and JOHN WRIGHT in his capacity as President of the COMMISSION OF APPARAISERS OF REAL ESTATE,

Respondents.

Case No.: A-24-887290-J

Dept. No.: 2

ORDER DENYING MOTION TO STAY ENFORCEMENT OF THE ORDER

Petitioner's Motion to Stay Enforcement of the Order having been heard by this Court on March 20, 2024, at its 9:00 a.m. civil calendar stack, with Lesley B. Miller, of the law firm Kaempfer Crowell, appearing on behalf of Petitioner Thomas L. Witherby ("Witherby"), and Christal P. Keegan, Deputy Attorney General, appearing on behalf of Respondents Sharath Chandra, Administrator, of the Nevada Real Estate Division of the Department of Business (collectively, the "Division").

. . .

Electronically Filed
03/25/2024 9:23 AM

Case Number: A-24-887290-J

Upon review and consideration of the arguments, pleadings, and papers on file, and for good cause appearing:

I.

PRELIMINARY FINDINGS

1. Pursuant to NRS 233B.140, this Court is specifically authorized, upon application of the Petitioner, to issue a stay on the Respondents, as governed by Rule 65 of the Nevada Rules of Civil Procedure.

2. Pursuant to NRS 645C.500(5), the Division has met its legal requirement of service to Witherby.

3. Witherby has not demonstrated reasonable likelihood of success on the merits.

II.

ORDER

IT IS THEREFORE ORDERED that the Petitioner's application for Stay Enforcement of the Order is hereby denied, and the Commission's Order dated October 10, 2023, shall remain in full force and effect until further order of this Court.

Dated this 25th day of March, 2024

DISTRICT COURT JUDGE

010 46D E347 AB45
Carli Kierny
District Court Judge

Submitted by:

AARON D. FORD
Attorney General

By: _____
CHRISTAL P. KEEGAN
Deputy Attorney General
Nevada Bar No. 12725
Office of the Attorney General
5420 Kietzke Lane, #202
Reno, Nevada 89511
ckeegan@ag.nv.gov
Attorneys for Respondents

Approved by:

KAEMPFER CROWELL

By: /s/ Lesley B. Miller
Lesley Miller, Esq.
Nevada Bar No. 7987
1980 Festival Plaza, Suite 650
Las Vegas, Nevada 89135
lmiller@kcnvlaw.com
Attorneys for Petitioner

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Thomas Witherby, Petitioner(s) vs. Real Estate Division, Department of Business and Industry, State of Nevada, Respondent(s)	CASE NO: A-24-887290-J DEPT. NO. Department 2

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order Denying was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 3/25/2024

Lesley Miller	lmiller@kcnvlaw.com
Tera Carlstrom	tcarlstrom@kcnvlaw.com
Ellsie Lucero	elucero@kcnvlaw.com
Desiree Endres	dendres@kcnvlaw.com
Kimberly Rupe	krupe@kcnvlaw.com
Christal Keegan	ckeegan@ag.nv.gov