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6 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
7 **IN AND FOR THE COUNTY OF WASHOE**
8

9 **DOUG BERNARD,**

10 **Petitioner,**

11 **vs.**

Case No. CV09-01379

Dept. No. 1

12
13 **LEONARD I. GANG, and the**
14 **STATE OF NEVADA ex rel. THE**
15 **DEPT. OF BUSINESS AND**
16 **INDUSTRY, REAL ESTATE**
17 **DIVISION, OFFICE OF THE**
18 **OMBUDSMAN FOR OWNERS IN**
19 **COMMON INTEREST**
20 **COMMUNITIES,**

Respondents,

21 **and MICHAEL CLARK;**
22 **UNIVERSITY RIDGE**
23 **HOMEOWNER'S ASSOCIATION,**
24 **Real Parties in Interest.**

ORDER DENYING IN PART AND GRANTING IN PART

PETITION FOR WRIT OF CERTIORARI

25 **The *Petition* currently before the Court arises out of a non-binding arbitration proceeding**
26 **conducted pursuant to NRS 38.300 to NRS 38.360, inclusive. The record reflects Petitioner Doug**
27 **Bernard (Bernard) filed a complaint in the Second Judicial District Court, Department 9, in August**
28 **2007, Case No. CV07-01915, where Petitioner sought to compel University Ridge to enforce certain**
Homeowner's Association (HOA) rules and regulations concerning the height of trees within

1 Petitioner's common-interest community. Additionally, Petitioner sought a permanent injunction
2 against Clark, requiring him to trim the vegetation on his property to a height that does not or would
3 not interfere with the view from Petitioner's property. Bernard filed a claim (NRED Control No. 08-
4 75) with the Nevada Department of Business and Industry, Real Estate Division (the Division)
5 against Michael Clark and University Ridge Homeowners Association (University Ridge) in January
6 2008. The court granted a motion to dismiss on August 1, 2008, because Bernard failed to submit
7 the matter to mediation or arbitration before commencing the District Court action, as required by
8 statute.

9 The Division appointed Leonard I. Gang, Esq. to conduct an arbitration pursuant to NRS
10 38.330(2). Mr. Gang conducted a two-day arbitration on January 29, 2009, and February 10, 2009,
11 and, in a written decision dated April 3, 2009, found Petitioner had no right to an unobstructed view
12 from his property. Accordingly, Mr. Gang found in favor of Clark and University Ridge, and
13 awarded them attorney fees and costs. The award for fees and costs stated: "Pursuant to NRS
14 116.4117 and NRS 38.300 et seq., I award the HOA its costs and attorneys fees in the amount
15 \$7500.00. I award Clark costs and attorneys fees in the amount of \$7500.00."¹ Pet. Ex. 2.

17 ¹ NRS 166.4117 and NRS 38.330 were both amended in June 2009. As it read at the time the arbitration occurred, NRS
18 166.4117 provided:

19 1. If a declarant or any other person subject to this chapter fails to comply with any of its provisions or
20 any provision of the declaration or bylaws, any person or class of persons suffering actual damages
21 from the failure to comply has a claim for appropriate relief.

22 2. Subject to the requirements set forth in NRS 38.310 and except as otherwise provided in NRS
23 116.3111, a civil action for damages caused by a failure or refusal to comply with any provision of this
24 chapter or the governing documents of an association may be brought:

(a) By the association against:

(1) A declarant; or

(2) A unit's owner.

(b) By a unit's owner against:

(1) The association;

(2) A declarant; or

(footnote 1 continues on next page)

1 Petitioner contends the arbitrator exceeded his authority in awarding attorney's fees to the
2 prevailing party. Petitioner alleges Gang "requested" the parties file attorney fees demands at the
3 conclusion of the arbitration. Pet. Page 4, Line 19. Petitioner attached a motion he submitted to
4 Gang that both opposed any award of fees and costs to University Ridge, but also asked that Clark
5 pay for his fees and costs on the grounds that the contract between he and Clark was enforceable
6 independent of NRS Chapter 38 and the HOA was not a party to it. Petitioner also contended
7 Clark's defense in the arbitration was brought without reasonable grounds so his request for fees and
8 costs would be appropriate pursuant to NRS 18.010.² Pet. Ex. 1. However, he only provided his
9 own motion for attorney fees and costs as an exhibit to this *Petition*. The record before the Court
10 does not include the other parties' motions for fees and costs.

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13 *(footnote 1 continues)*

14 (3) Another unit's owner of the association.

15 3. Punitive damages may be awarded for a willful and material failure to comply with this chapter if
16 the failure is established by clear and convincing evidence.

17 4. The court may award reasonable attorney's fees to the prevailing party.

18 5. The civil remedy provided by this section is in addition to, and not exclusive of, any other available
19 remedy or penalty.

20 NRS 38.330 read, in pertinent part:

21 7. If, after the conclusion of arbitration, a party:

22 (a) Applies to have an award vacated and a rehearing granted pursuant to NRS 38.241; or

23 (b) Commences a civil action based upon any claim which was the subject of arbitration,

24 the party shall, if he fails to obtain a more favorable award or judgment than that which was obtained
25 in the initial arbitration, pay all costs and reasonable attorney's fees incurred by the opposing party
26 after the application for a rehearing was made or after the complaint in the civil action was filed.

27 ² The Supreme Court of Nevada has previously concluded NRS 18.010 may not be applied to justify an award of
28 attorney's fees and costs incurred during arbitration because arbitration is not a "trial or special proceeding" within the
statute's meaning. *Clark County v. Blanchard Const. Co.*, 98 Nev. 488, 492, 653 P.2d 1217, 1220 (1982).

1 Petitioner also contends the manner in which the Division appoints arbitrators violates
2 litigants' due-process rights, as the Division unilaterally appoints an arbitrator without input from
3 any of the parties and without limiting the fees charged by the arbitrator. Accordingly, Petitioner
4 seeks an order (1) vacating the award of attorney's fees in NRED Control No. 08-75; (2) directing all
5 arbitrators to cease and desist from awarding attorney's fees in any pending or future arbitrations
6 conducted pursuant to NRS 38.300; and (3) directing the Division to cease all NRS 38.300
7 arbitrations until the Division adopts procedural rules similar to those set forth in the Nevada
8 Arbitration Rules.

9 On August 4, 2009, the Court issued an *Order* denying a motion to dismiss the *Petition* and
10 allowed Respondents to file an answer. They filed the answer on September 18, 2009, and Clark
11 filed a *Joinder* to the *Answer* on September 24, 2009.

12 A petition for a writ of certiorari is properly granted when (1) an inferior tribunal has
13 exceeded its jurisdiction; (2) no means of appeal exists; (3) and no plain, speedy, and
14 adequate remedy at law is available. All three of these conditions must exist before a
writ may be issued.

15 *Nevada Public Land Access Coalition, Inc. v. Humboldt County Bd. of County Com'rs*, 111
16 Nev. 749, 751, 895 P.2d 640, 641 (1995) (citations omitted).

17 Petitioner carries the burden to demonstrate that extraordinary relief is warranted. *Pan v.*
18 *Eight Judicial Dist. Court ex rel. County of Clark*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004). The
19 Court's review in a writ proceeding is limited to the arguments and documents the parties provide
20 the Court. If essential information is omitted from the petition, the Court has no way to conduct a
21 proper evaluation. Indeed, the Supreme Court of Nevada "routinely" denies writ petitions for failure
22 to comply with these requirements. *Id.* at 229, 844.

23 First, Petitioner challenges the arbitrator's authority to award attorney fees and costs. An
24 award of attorney fees is reviewed for an abuse of discretion. *Brunzell v. Golden Gate Nat'l Bank*,
25 85 Nev. 345, 350, 455 P.2d 31, 33 (1969). "An arbitrator may award reasonable attorney's fees and
26 other reasonable expenses of arbitration if such an award is authorized by law in a civil action
27 involving the same claim or by the agreement of the parties to the arbitral proceeding." Nev. Rev.
28 Stat. § 38.238(1). Generally, a trial court in a civil action cannot award attorney fees or costs unless

1 "authorized to do so by a statute, rule or contract." *U.S. Design & Const. Corp. v. International*
2 *Broth. of Elec. Workers*, 118 Nev. 458, 462, 50 P.3d 170, 173 (2002).

3 The Court need not decide if Gang had authority to award attorney fees or costs because,
4 assuming *arguendo* such a statute, rule, or contract provided authority, the record reflects Gang
5 abused his discretion by not articulating sufficient findings concerning the reasonableness of the
6 amount of the award as required by *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d
7 31 (1969) and *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 124 P.3d 530 (2005).

8 In *Brunzell*, [the Supreme Court of Nevada] enumerated factors that the district court
9 should consider in awarding attorney fees, with no one factor controlling, as follows:

- 10 (1) the advocate's qualities, including ability, training, education, experience,
11 professional standing, and skill;
12 (2) the character of the work, including its difficulty, intricacy, importance, as well as
13 the time and skill required, the responsibility imposed, and the prominence and
14 character of the parties when affecting the importance of the litigation;
15 (3) the work performed, including the skill, time, and attention given to the work; and
16 (4) the result-whether the attorney was successful and what benefits were derived.

15 In *Shuette*, [the Supreme Court of Nevada] recognized the continued applicability of
16 these factors and required the district court to "provide[] sufficient reasoning and
findings in support of its ultimate determination."

17 *Barney v. Mt. Rose Heating & Air Conditioning*, 192 P.3d 730, 736 (2008) (citations
18 omitted).

19 Gang's award simply stated the basis for the award. The Court finds Gang's failure to make
20 sufficient reasoning and findings expressly in the award in support of the ultimate determination for
21 the fees and costs pursuant to the *Brunzell* factors was an abuse of discretion. *Barney*, 192 P.3d at
22 736 -737 (2008).

23 The Court finds based on the totality of the record that the granting of extraordinary relief is
24 warranted.

25 The second ground on which Petitioner files this petition is that Leonard Gang had a conflict
26 of interest while serving as an arbitrator in violation of Due Process. He contends Gang was
27 "employed by the homeowner's association in a legal capacity and he is a resident/member of that
28 same homeowner's association." Pet., Page 12.

1 The United States Supreme Court has set forth standards for evaluating a tribunal's
2 fairness under the Due Process Clause. "[A] 'fair trial in a fair tribunal is a basic
3 requirement of due process.' This applies to administrative agencies which adjudicate
4 as well as to courts." Not only must the tribunal harbor no actual bias against the
5 person facing a deprivation of his property interests, but "justice must satisfy the
6 appearance of justice." The test is:

7 whether the [adjudicator's] situation is one "which would offer a possible temptation
8 to the average man as a judge to forget the burden of proof required to convict the
9 defendant, or which might lead him not to hold the balance nice, clear and true
10 between the State and the accused."

11 A presumption of honesty and integrity cloaks those who serve as adjudicators. That
12 presumption may be overcome, however, by showing that the adjudicators have a
13 conflict of interest, such as a financial stake in the outcome of the case.

14 *Gilman v. Nevada State Bd. of Veterinary Medical Examiners*, 120 Nev. 263, 269, 89 P.3d 1000,
15 1004 (2004) (citations omitted).

16 Chapter 38 of the NRS governs arbitration of claims related to residential property within
17 common-interest communities. Section 38.310 provides no civil action may be commenced in a
18 court regarding the interpretation or enforcement of covenants, conditions, or restriction applicable
19 to such communities unless it was first submitted to arbitration pursuant to NRS 38.300-360 and
20 chapter 116. Nev. Rev. Stat. § 38.310(1). Section 38.226(2) provides, "An individual who has a
21 known, direct and material interest in the outcome of the arbitral proceeding or a known, existing
22 and substantial relationship with a party may not serve as an arbitrator required by an agreement to
23 be neutral." Section 38.227 imposes a mandatory duty on the person appointed to serve as the
24 arbitrator to disclose any known facts that a reasonable person would consider likely to affect his
25 impartiality, including a financial interest or an existing relationship with one of the parties. This
26 section presumes the arbitrator was not impartial if the arbitrator never discloses a known, direct,
27 and material interest to the parties. *Id.* at subsection (5). However, if the arbitrator does not disclose
28 the fact that may be grounds for disqualification, the court may vacate an award pursuant to Section
38.241 upon the party's "timely objection." *Id.* at subsection (4).

The record before the Court is unclear as to whether Petitioner timely objected to the
appointment of the arbitrator or timely moved to vacate the award. Section 38.227 provides if the

1 arbitrator does not disclose a known, direct and material interest in the outcome of the proceeding,
2 the Court may vacate an award upon a party's motion filed pursuant to Section 38.241(1)(b).
3 However, Section 38.241 requires a party to move to vacate an award within 90 days of notice of the
4 arbitrator's award. Petitioner attached a letter, dated April 15, 2009, addressed to the Real Estate
5 Division of the Department of Business and Industry in which he discusses his concerns about the
6 arbitration process, including that there is no process for preemptory challenges to an arbitrator.
7 Gordon Milden, Administrative Assistant with the Division, wrote a reply letter to Mr. Carucci,
8 counsel for Petitioner, on April 21, 2009, in which Milden stated the Division does not employ or
9 otherwise control the arbitrator's performance. Pet. Ex. 6.

10 The Legislature provided Petitioner a plain, speedy, and adequate remedy to address this
11 issue. Section 38.241 expressly provides a party challenging the partiality of the arbitrator an
12 opportunity to vacate the award within 90 days after receipt of notice of the award. A petition for
13 writ of certiorari does not qualify as a motion to vacate the award.

14 Moreover, the issue appears to have been waived for purposes of this petition. In the context
15 of disqualification of district court judges, Nevada law generally provides that failure to object or
16 move to disqualify the judge can be grounds for waiver of the issue. *State ex rel. Dep't Welfare v.*
17 *District Ct.*, 85 Nev. 642, 646, 462 P.2d 37, 39-40 (1969); *A Minor v. State*, 86 Nev. 691, 694, 476
18 P.2d 11, 13 (1970); *Brown v. Federal Sav. and Loan Ins. Corp.*, 105 Nev. 409, 412, 777 P.2d 361,
19 363 (1989); *see also* SCR 48.1 (preemptory challenges); Nev. Rev. Stat. §§ 1.230-1.235 (procedure
20 for disqualification of judges). Here, Petitioner does not state Leonard Gang ever disclosed that he
21 may have had some existing or prior relationship with a party to the arbitration before making his
22 ruling. Petitioner does not state when he allegedly discovered this issue, or that he ever filed an
23 objection during the arbitration, or that there is good cause why he did not do so. Accordingly, the
24 Court finds Petitioner waived the issue of disqualification. *Pan v. Eight Judicial Dist. Court ex rel.*
25 *County of Clark*, 120 Nev. at 228, 88 P.3d at 844; *see also Ex parte Parr*, 20 So.3d 1266, 1270 (Ala.
26 2009) *quoting* 46 Am.Jur.2d *Judges* § 208 ("An untimely objection or motion to disqualify a judge
27 waives the grounds for recusal. The reason for this rule is to prevent litigants from waiting to see
28 whether they win, and if they lose moving to disqualify the judge.").

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The Court has considered the record and the pleadings in their entirety. Accordingly, and good cause appearing, the Court GRANTS the *Petition for Writ of Certiorari* on the issue of attorney fees and costs and VACATES the arbitrator's award of attorney fees and costs and DENIES the *Petition for Writ of Certiorari* on all other grounds. Accordingly, this case is remanded for further proceedings consistent with this Order.

DATED: This 11th day of May, 2010.

Gaut Berry
DISTRICT JUDGE