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**IN THE SUPREME COURT OF THE STATE OF NEVADA**

\*\*\*\*\*

ANSE, INC. d/b/a NEVADA STATE )	CASE NO. :
PLASTERING )	
	) District Court Case No.: A470159
Petitioner, )	Dept. No. : XIX
	)
vs. )	
	) <b>PETITION FOR WRIT OF MANDAMUS</b>
JUDGE ALLAN R. EARL, EIGHTH )	<b>AGAINST THE EIGHTH JUDICIAL</b>
JUDICIAL DISTRICT COURT OF CLARK )	<b>DISTRICT COURT OF CLARK COUNTY,</b>
COUNTY, NEVADA )	<b>NEVADA</b>
	)
Respondent, )	
	)
GLENN HAYWARD; FRED W. )	
SCHAEFER; DONALD T. BARSKY; )	
JAMES F. SEARCY; SHELDON )	
FACTOR; JOHN P. FRIAR; NORMAN )	
YORK; BERNARD BRONSTEIN; D.J. )	
ADDONIZIO, individually, and on behalf of )	
all others similarly situated, and ROES 1- )	
20, 000, inclusive, )	
	)
Real Parties In Interest. )	
	)

**WRIT OF MANDAMUS**

**KEVIN E. HELM, ESQ.**  
 Nevada Bar No. 003432  
**HELM & ASSOCIATES**  
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 d/b/a Nevada State Plastering

THE HONORABLE ALLAN R. EARL  
 DEPARTMENT XIX  
 EIGHTH JUDICIAL DISTRICT COURT  
 OF CLARK COUNTY, NEVADA  
 Complex Litigation Center  
 333 South Sixth Street  
 Las Vegas, NV 89101  
 (702) 671-4450  
 Respondent

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AFFIDAVIT OF KEVIN E. HELM, ESQ ..... 12

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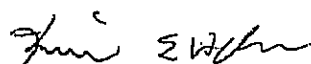
**PETITION FOR WRIT OF MANDAMUS**

**COMES NOW** Third-Party Defendant ANSE, INC. d/b/a NEVADA STATE PLASTERING, by and through its attorneys, HELM & ASSOCIATES, and hereby Petitions the Supreme Court of Nevada to issue a Writ of Mandamus to overturn Respondent Court's January 8, 2008 Order on Third-Party Defendant ANSE, Inc.'s Motion for Partial Summary Judgment Regarding Chapter 40 Application. This extraordinary relief is necessary to cure the Eighth Judicial District Court's abuse of discretion and misapplication of the law in improperly denying ANSE, Inc.'s Motion for Partial Summary Judgment, which violates the clear authority outlined by this Court in prior decisions.

This Petition is made and based upon the following Memorandum of Points and Authorities, the pleadings and papers on file herein, and such other oral arguments or documentary evidence as may be presented to this Honorable Court.

DATED this 17<sup>th</sup> day of February, 2008.

**HELM & ASSOCIATES**

  
**KEVIN E. HELM, ESQ.**  
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2810 W. Charleston Blvd., Suite G-67  
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(702) 258-0022

Attorneys for Petitioner  
ANSE, INC. d/b/a  
Nevada State Plastering

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**ISSUE**

1. Did Respondent Court abuse its discretion and misapply the law by denying Petitioner's Motion for Partial Summary Judgment Regarding Chapter 40 Application, which:
  - a. will thereby allow counsel for Real Parties In Interest to present evidence on and argue claims for seven hundred and twenty-nine (729) residences in violation of N.R.S. Chapter 40 and previous rulings of this Court?

**INTRODUCTION**

This Petition for Writ of Mandamus requests this Honorable Court to examine the Order handed down by Respondent Court on Petitioner ANSE, Inc.'s Motion for Partial Summary Judgment Regarding Chapter 40 Application. Petitioner respectfully submits that the Order denying Partial Summary Judgment is contrary to Nevada Law and the rights of Petitioner and all other Defendants involved in the underlying case.

The Respondent Court's Order denying Partial Summary Judgment improperly applies N.R.S. Chapter 40 and confounds the extent of its reach. The Order allows Real Parties In Interest's counsel to present evidence on and argue claims for seven hundred and twenty-nine (729) residences that have been occupied for a period of time and then resold. Such homes are clearly not "new" residences for the purpose of Chapter 40 application as required by the statute and previously held by this Court. The Order thereby ignores the plain language of N.R.S Chapter 40 and frustrates this Court's

1 purpose in limiting the potentially boundless application of construction defect legislation  
2 to homes that have not been occupied and then resold.

3  
4 Respondent Court's Order will in effect reverse the forward progression of  
5 construction defect litigation in this State and place it back in time to a date before this  
6 Court's ruling in Westpark Owners' Ass'n v. Dist. Ct., thereby exposing original  
7 developers to litigation without limitation or reasonableness. 123 Nev. Adv. Rep. 37  
8 167 P.3d 421 (2007). In sum, Petitioner hereby requests this Honorable Court exercise  
9 its sound discretion in reviewing the aforementioned issue based upon the full briefing  
10 submitted by all parties involved, and compel Respondent Court to enter a new Order  
11 on Third-Party Defendant ANSE, Inc.'s Motion for Partial Summary Judgment Regarding  
12 Chapter 40 Application granting Petitioner's Motion and denying Real Parties In  
13 Interest's improper inclusion of seven hundred and twenty-nine (729) homes that are not  
14 "new" residences as required for Chapter 40 to apply.  
15

#### 16 **STATEMENT OF FACTS**

17  
18 This action involves a community commonly known as "Sun City Summerlin"  
19 (hereinafter referred to as "the Property") developed by Del Webb Communities, Inc.  
20 (hereinafter referred to as "Del Webb"). The Property is located in Las Vegas, Nevada,  
21 near Lake Mead Boulevard and Del Webb Boulevard. The general time line of  
22 construction was 1988 through 2000. This case involves the exterior envelopes of  
23 approximately one thousand two hundred ninety-five (1,295) single and multi-family  
24 homes. Following the sale from Del Webb, seven hundred and twenty nine (729) of the  
25 one thousand two hundred ninety-five (1,295) homes have been resold by the original  
26 homeowner. (Please see attached matrix showing original close of escrow dates,  
27  
28

1 hereinafter referred to as **Exhibit "A"**, and the recorded history of homes, that have  
2 been resold, from the Clark County Assessor's page, hereinafter referred to as **Exhibit**  
3 **"B"**).  
4

5 The original Complaint was filed on August 3, 2003, on behalf of the Sun City  
6 Summerlin Homeowners Association and nine (9) individual homeowners. Defendant  
7 Del Webb, filed an Answer to the initial complaint on August 14, 2003. On January 26,  
8 2005, Del Webb filed its Third-Party Complaint and amended the same on February 14,  
9 2005, naming among others, ANSE, Inc. Third-Party Defendant ANSE, Inc. filed its  
10 answer to the First-Amended Third-Party Complaint on March 29, 2005. Thereafter, on  
11 December 13, 2006, Plaintiffs filed their fourth Amended Complaint for damages, which  
12 substituted in the names of individual homeowners. The current operative complaint is  
13 Plaintiffs' Sixth Amended Complaint, filed on May 25, 2007. Jury selection is currently  
14 underway, with trial estimated (conservatively) to last for six months.  
15  
16

17 Third-Party Defendant and Petitioner herein ANSE, Inc. submitted a Motion for  
18 Partial Summary Judgment Regarding Chapter 40 Application concerning the seven  
19 hundred and twenty-nine (729) resold homes on November 15, 2007. (Please see  
20 attached Motion for Partial Summary Judgment dated November 15, 2007, hereinafter  
21 referred to as **Exhibit "C"**). Real Parties In Interest responded with their Opposition on  
22 December 6, 2007, to which Petitioner filed a Reply on December 12, 2007. (Please  
23 see attached Opposition dated December 6, 2007, hereinafter referred to as **Exhibit**  
24 **"D,"** and Reply dated December 12, 2007, hereinafter referred to as **Exhibit "E"**). This  
25 motion was heard by Respondent Court on December 17, 2007 (Please see attached  
26 Transcript of December 17, 2007 Hearing, hereinafter referred to as **Exhibit "F"**).  
27  
28

1 In discussing the Motion for Partial Summary Judgment Regarding Chapter 40  
2 Application, Respondent Court cited to one particular section of Chapter 40:

3 N.R.S. 40.610 reads as follows: Claimant means an owner of a residence  
4 or appurtenance. It does not say original owner. It does not say an owner  
5 of a residence purchased new, or an appurtenance made new.

6 Id at 11:12-14.

7 Petitioner presented at the December 17, 2007 hearing that the proper sections  
8 of Chapter 40 to reference are N.R.S. 40.640 and 40.615, regarding constructional  
9 defect:

10 Under N.R.S. 40.640 it talks about in a claim to recover damages  
11 resulting from a constructional defect, so you have to have a  
12 constructional defect. If you then turn to N.R.S. 40.615, it defines what a  
13 constructional defect is. In order to have a constructional defect, it must  
14 be a new residence or an alteration or an addition to existing residence.

15 Id at 12:6-10.

16 Respondent Court provided no substantive response to this point. Id at 13:3-4.  
17 Petitioner additionally referenced the decision in Westpark that detailed this Court's  
18 interpretation of the words "new residence" as that which has been unoccupied up to the  
19 point of sale. Id at 7:11. In this regard, Respondent Court stated:

20 I don't believe that our Supreme Court has said point blank that if the  
21 defect exists in the home when it's built that a subsequent purchaser, not  
22 the new one but a subsequent purchaser, **has absolutely no rights**  
23 **whatsoever against the builder.**

24 Id at 13:6-9.

25 After attempting to clarify the distinction between Chapter 40 damages and  
26 common law damages (i.e. "no rights **whatsoever**"), Petitioner requested a stay in order  
27 to appeal Respondent Court's decision. Id 10-12. Respondent Court denied the stay  
28 and stated:

1 Now you can certainly take it up on emergency motion. Believe me  
2 they're geared and ready for emergency writs. I happen to know that, so  
3 take it up.

4 Id at 14:15-17.

5 Following this denial of the stay and Respondent Court's Order denying Third-  
6 Party Defendant ANSE, Inc.'s Motion for Partial Summary Judgment from the bench, a  
7 formal Order was drafted and circulated by the Court on January 8, 2008. (Please see  
8 attached Order dated January 8, 2008, hereinafter referred to as **Exhibit "G"**). It is this  
9 Order on Third-Party Defendant ANSE, Inc.'s Motion for Partial Summary Judgment  
10 Regarding Chapter 40 Application of which Petitioner seeks immediate review.

#### 12 ARGUMENT

#### 13 **I. A WRIT OF MANDAMUS IS THE PROPER EXTRAORDINARY RELIEF TO** 14 **PREVENT EXTREME AND IRREPARABLE INJUSTICE TO THE** 15 **PETITIONER**

16 A writ of mandamus compels a government body or official to perform a legally  
17 mandated act. N.R.S. 34.160. The Supreme Court of Nevada has the authority to issue  
18 writs of mandamus to control "judicial discretion of the district court" that is "manifestly  
19 abused or is exercised arbitrarily or capriciously." State v. Eighth Judicial Dist. Ct., 118  
20 Nev. 140, 146, 42 P.3d 233, 237-238 (2002)(citations omitted). In multiple cases  
21 concerning such extraordinary relief, this Court has enunciated the proper standards as  
22 "where no disputed factual issues exist and, pursuant to clear authority under a statute  
23 or rule, the district court is obligated to dismiss an action" or where "an important issue  
24 of law needs clarification and considerations of sound judicial economy and  
25 administration militate in favor of granting the petition." Smith v. Eighth Judicial Dist. Ct.  
26 113 Nev. 1343, 1345, 950 P.2d 280, 281 (1997); State, supra at 146; *see also*  
27  
28

1 Advanced Countertop Design, Inc. v. Second Judicial Dist. Ct., 115 Nev. 268, 269, 984  
2 P.2d 756, 758 (1999).

3  
4 Here, Petitioner respectfully submits that Respondent Court manifestly abused its  
5 discretion in denying Third-Party Defendant ANSE, Inc.'s Motion for Partial Summary  
6 Judgment. This Petition posits that Respondent Court committed this abuse based  
7 upon an outright disregard of the clear authority laid out by statute and this Court, or due  
8 to an utter misunderstanding and confusion of the law as it currently stands. In either  
9 case, immediate and extraordinary relief is necessary to rectify the judicial indiscretion  
10 of the District Court.  
11

12 As previously detailed, jury selection is underway, with opening statements  
13 calendared for February 12, 2008. A conservative estimate for the length of trial is six  
14 months. Accordingly, Petitioner contends that extraordinary relief is necessary because  
15 it has no other avenue to pursue an adequate remedy to protect against the execution  
16 of the District Court's improper application of Chapter 40. Therefore, the requested  
17 relief is necessary to prevent the undue harm that will result to Petitioner and other  
18 Defendants in the underlying action if this matter were to proceed any further and an  
19 extraordinary writ is the only procedural avenue available to Petitioner to address this  
20 wrong: i.e. it has no other remedy. An appeal at law of this issue after a verdict  
21 obtained following six months in trial is ultimately no remedy at all.  
22  
23

24 **II. DENYING SUMMARY JUDGMENT AS TO THE SEVEN HUNDRED AND  
25 TWENTY-NINE (729) HOMES THAT WERE RESOLD TO SUBSEQUENT  
26 HOMEOWNERS IS AN EGREGIOUS MISAPPLICATION OF CHAPTER 40**

27 **A. THE ORDER DENYING PARTIAL SUMMARY JUDGMENT  
28 UNLAWFULLY EXTENDS CHAPTER 40 APPLICATION TO HOMES  
THAT ARE NOT "NEW"**

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**1. The Nevada Supreme Court Has Clearly Defined the Meaning of  
“New Residences” Under Chapter 40**

N.R.S. Chapter 40 applies to defects in the construction of a “new residence.” N.R.S. 40.615. In Westpark, this Court recognized that “nowhere in Chapter 40 does the Legislature define the term ‘new residence.’” *Supra* at 424. It was therefore “[its] responsibility to discern the law.” *Id* at 428. Stating a clear reliance upon “the legislative history” and “primary legislative purpose” behind Chapter 40 and its own duty to interpret the statute “in light of the policy and the spirit of the law,” this Court “interpret[ed] Chapter 40 and provide[d] a reasonable definition of [the] term [‘new’ residence].” *Id* at 428, 424.

As there is “little meaningful difference between a unit that sits vacant for a period of several weeks between the completion of construction and sale to a homebuyer and a unit that has been on the market for several months or a year before sale,” this Court recognized that the “term ‘new’ is nearly impossible to define in strict chronological terms.” *Id* at 428. Accordingly, this Court determined that “a residence is ‘new’ only if it is a product of original construction that has been unoccupied as a dwelling from the completion of its construction to the point of sale.” *Id* at 424. “This definition preserves the legislative purpose [of Chapter 40] of providing homeowners a fairly expansive remedy... [while] also avoid[ing] the absurd result that a unit occupied as a dwelling for several years could still be a ‘new residence.’” *Id* at 429. Clearly, anything beyond the original point of sale between the contractor and the purchaser does not involve a “new” residence for the purposes of Chapter 40.

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**2. The Seven Hundred and Twenty-Nine (729) Homes at Issue are Not "New Residences" Under N.R.S. Chapter 40**

In the instant case, the residences at the Property were sold by Del Webb to the original homeowners. (Please see **Exhibit A**). Thereafter, seven hundred and twenty-nine (729) of these homes were resold to subsequent purchasers. (Please see **Exhibit B**). Under this Court's explicit holding in Westpark, the fact that these seven hundred and twenty-nine (729) homes were resold following the original sale by Del Webb precludes them from being new residences under Chapter 40. Thus, for this particular subset of homes, Chapter 40 "entitlements" are completely unwarranted.

Respondent Court took pains in articulating its concerns that Petitioner's interpretation of this Court's holding in Westpark would create a second class of citizens. (Please see **Exhibit F**, 11:14-15). This is clearly not the case, as owners of residences that are not "new" for Chapter 40 purposes are not completely without recourse for alleged deficient construction. With respect to the instant matter, none of the re-sold residences will be dismissed from litigation should this Court follow the plain language of Westpark. Rather, the simple effect will be to close the door on the available recoveries set forth in N.R.S. 40.655.

As this Court is well aware, the bulk of the items set forth in N.R.S. 40.655 (i.e. attorney's fees, costs, and prejudgment interest) tend to inflate a recovery above and beyond what is necessary to repair allegedly defective construction. Particularly in an action such as this, with over one thousand five hundred Plaintiffs, Petitioner should not be required to shoulder the burden of Respondent Court's strained interpretation of Westpark.

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**CONCLUSION**

No party to this case is disputing the fact that the seven hundred and twenty-nine (729) homes at issue have been sold, occupied, and resold. N.R.S. Chapter 40 applies, in pertinent part, to defects in the construction of a "new residence." N.R.S. 40.615. It is clear from Westpark that the seven hundred twenty-nine (729) homes that have been resold to subsequent purchasers are no longer considered new residences under Chapter 40, and any claims covering them must therefore be dismissed. Respondent Court's failure to do so is a manifest abuse of discretion warranting extraordinary relief from this Honorable Court.

In the alternative, Respondent Court's failure to grant Third-Party Defendant and Petitioner herein ANSE's Motion for Partial Summary Judgment Regarding Chapter 40 Application is based upon a misunderstanding of current Nevada law. Several statements taken from the motions hearing on December 17, 2007 lend credence to this notion. For example, Respondent Court's insistent statement regarding its disbelief "that our Supreme Court has said point blank that if the defect exists in the home when it's built that a subsequent purchaser, not the new one but a subsequent purchaser, has absolutely no rights whatsoever against the builder" exemplifies its misunderstanding of the proper application of N.R.S. Chapter 40. (Please see **Exhibit F**, 13:6-9). Petitioner attempted unsuccessfully to clarify the difference between the limited Chapter 40 damages (and protections) as compared to the expansive common law damages (and protections). Respondent Court clearly failed to understand the limited application of Chapter 40, and thus improperly denied Petitioner's Motion for Partial Summary

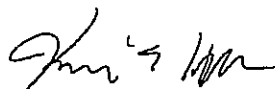
1 Judgment. Petitioner now seeks redress in this Honorable Court to clarify this important  
2 issue of law.

3  
4 Allowing these seven hundred and twenty-nine (729) homes that have been  
5 occupied and resold to be considered new for the purpose of N.R.S. Chapter 40 would  
6 contradict the logic this Court applied in Westpark and defeat the purposes of Chapter  
7 40.

8  
9 For all of the foregoing reasons, Petitioner respectfully submits that Respondent  
10 Court abused its discretion in ordering the denial of Third-Party Defendant ANSE's  
11 Motion for Partial Summary Judgment Regarding Chapter 40 Application and incorrectly  
12 applies N.R.S. Chapter 40. As such, Petitioner respectfully requests that a Writ of  
13 Mandamus issue to overturn Respondent Court's January 8, 2008 Order on Third-Party  
14 Defendant ANSE, Inc.'s Motion for Partial Summary Judgment Regarding Chapter 40  
15 Application.

16  
17 DATED this 7<sup>th</sup> day of February, 2008.

18  
19  
20 **HELM & ASSOCIATES**

21 

22 **KEVIN E. HELM, ESQ.**  
23 Nevada Bar No. 003432  
24 2810 W. Charleston Blvd., Suite G-67  
25 Las Vegas, Nevada 89102  
26 (702) 258-0022

27 Attorneys for Petitioner  
28 ANSE, INC. d/b/a  
Nevada State Plastering

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**AFFIDAVIT OF KEVIN E. HELM, ESQ.**

STATE OF NEVADA        )  
                                  ) ss:  
COUNTY OF CLARK        )

I, KEVIN E. HELM, ESQ., being first duly sworn on oath, depose and state under penalty of perjury that the following assertions are true and correct of my own personal knowledge:

1. I am an attorney duly licensed to practice law in the State of Nevada and am a partner of the law firm HELM AND ASSOCIATES, attorneys for Petitioner ANSE, INC. This Affidavit is submitted in support of the Petitioner's request for Writ of Mandamus.

2. I have discussed this Petition for Writ of Mandamus with the Petitioner and have obtained authorization to file the same.

3. This Writ is being pursued because the Eighth Judicial District Court of Clark County, Nevada has denied the Petitioner's Motion for Partial Summary Judgment Regarding Chapter 40 Application, which is an abuse of discretion and misapplication of the law that will cause irreparable injustice to Petitioner and all other Defendants in G. Hayward, et al. v. Del Webb Communities, Inc., Clark County District Court Case Number A470159.

4. A true and correct copy of Matrix of Original Close of Escrow Dates is attached hereto as Exhibit "A."

5. A true and correct copy of Clark County Assessor's Recorded History of Resold Homes for the Seven Hundred and Twenty-Nine Homes at Issue is attached hereto as Exhibit "B."





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Exhibit "B," Clark County Assessor's Recorded History of Resold Homes for the Seven Hundred and Twenty-Nine Homes at Issue..... Vol. II, 451

Exhibit "C," Third-Party Defendant ANSE, Inc.'s Motion for Partial Summary Judgment Regarding Chapter 40 Application..... Vol. V, 1191

Exhibit "D," Plaintiffs' Opposition to Third-Party Defendant ANSE, Inc.'s Motion for Partial Summary Judgment Regarding Chapter 40 Application..... Vol. VI, 1200

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